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I Introduction

There are three main types of European Union (EU) trade agreements: (i) Customs Unions; (ii) Association Agreements, Stabilisation Agreements, (Deep and Comprehensive) Free Trade Agreements (FTA), and Economic Partnership Agreements (EPA); and (iii) Partnership and Cooperation Agreements.¹ An EPA is a development-focused, asymmetrical trade agreement to increase trade, investment, and development support for developing countries through the gradual trade liberalisation of EPA contracting parties with the expectation that economic benefits would accrue, and *ceteris paribus*, so would the welfare of the less developed party.² The prospect of losing any currently enjoyed preferential treatment would encourage (or discourage) the preferentially treated party to transition to a new agreement depending on the new terms and conditions. Achieving a mutually acceptable EPA is the purpose of negotiations. Once ratified and entered into force, an EPA is a legally binding agreement, which can be enforced through appropriate measures in cases of non-compliance.³

The EU and the African, Caribbean and Pacific group of states (ACP) have a longstanding history of trade relations. The EU has sought to enhance these trade relations through regional EPAs. Only two regional EPAs – the South African Development Community (SADC) – EU EPA and the Caribbean Forum (CARIFORUM) – EU EPA – have come into force after long negotiations spanning over a decade. The EPAs are viewed by some ACP States as having unfair terms and potentially ill-fated impacts. As this article will show, the terms of the EPAs are more unilateral than neutral, which could lead to State-to-State disputes in the international arena, and public-private disputes in the domestic courts, from an early stage of implementation.

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¹ EU Directorate General (DG) for Trade: <<http://ec.europa.eu/trade/policy/countries-and-regions/negotiations-and-agreements/>> accessed 01 June 2019.

² European Parliament Think Tank: <[http://www.europarl.europa.eu/thinktank/en/document.html?reference=EPRS_BRI\(2018\)625102](http://www.europarl.europa.eu/thinktank/en/document.html?reference=EPRS_BRI(2018)625102)> accessed 01 June 2019.

³ For example, art. 74 of the West Africa – European Union EPA.

II Background to Africa–EU Trade Relations

Africa–EU trade policy and principles are most notably enshrined in the *ACP–EU Partnership Agreement*,⁴ (hereafter Cotonou Agreement – CA), which can be traced back to the Treaty of Rome of 1957.⁵ Even as the treaty aimed to establish a common market among the then six members⁶ of the European Community (EC), the treaty also made special provisions for the interests of the non-European colonies and so-called ‘overseas dependencies’ of four⁷ EC Members. It created an ‘association’ to promote the economic and social development of these countries and territories, and to establish close economic relations between them and the EC. These countries and territories were referred to as ‘associated states’:

This Association shall in the first place permit the furthering of the interests and prosperity of the inhabitants of these countries and territories in such a manner as to lead them to the economic, social, and cultural development to which they aspire.⁸

The above-quoted legal provision ushered in the setting for the special treatment towards these non-European states (and thus, the special relationship between both groups). This article of the Rome Treaty is arguably a cornerstone of the subsequent association conventions formed between the non-European associated states, which in effect became third country states after their respective independence. The provision was concerned with the socio-economic interests, wellbeing, and prosperity of these states. This altruistic undertone essentially lent credence to the preferential constructs that followed in the later association conventions.

The (first) Yaoundé Convention (YC I) signed on 20 July 1963,⁹ aimed to prolong this association, and hence is also known as the Association Convention. It had similar objectives as the Rome Treaty. It sought to promote the economic exchanges between the signatory parties, their economic independence and relations, and thus the development of global trade.¹⁰ The YC was renewed for the years 1969–1975.

The first Lomé Convention (LC) 1975–79, signed between the nine European Economic Community (EEC) Members and 46 ACP States, and subsequently renewed versions, were even more favourable to ACP States because they abolished the reciprocity requirement under

⁴ *Partnership Agreement Between The Members Of The African, Caribbean And Pacific Group Of States Of The One Part, And The European Community And Its Member States Of The Other Part, Signed In Cotonou On 23 June 2000*. Revised In Luxembourg On 25 June 2005. Revised in Ouagadougou on 22 June 2010, And Multiannual Financial Framework 201420, (hereafter Cotonou Agreement – CA).

⁵ *Treaty establishing the European Economic Community* (EEC Treaty, hereafter Rome Treaty) Signed in: Rome (Italy) 25 March 1957. (Entry into force: 1 January 1958).

⁶ Belgium, France, Germany, Italy, Luxembourg, the Netherlands.

⁷ France, Belgium, the Netherlands, and Italy.

⁸ Rome Treaty, art. 131.

⁹ *The First Yaoundé Convention* (1963–1969) – OJ 093, 11/06/1964 P. 1431, signed on 20 July 1963, end of validity: 31/05/1969 (hereafter YC I); Expiry in 1969 with a renewable term of five years.

¹⁰ YC I, art 1.

the YCs. The LCs allowed duty free access for ACP exports into the EEC market. Lomé I was succeeded by Lomé II, III, and IV, which entered into force in 1980, 1985, and 1990 respectively. Since 1975, no reciprocal tariff reductions were required from the ACP party, except to grant most-favoured-nation (MFN) status to the EEC party, and even then, the preferential treatment obligation towards the EEC was not substantial. As confirmed by the World Bank (WB): ‘in practice, MFN rates are the highest (most restrictive) that World Trade Organisation (WTO) members charge one another.’¹¹ Moreover, complementary support schemes for the ACP party were included, like the Stabilisation of export earnings (STABEX) from selected primary products scheme under Lomé I provided grants and loans, while the support to the mining industry (SYSMIN) scheme under Lomé II granted financial compensation to the ACP party for currency fluctuations that impacted these sectors. These preferences are captured in the footnotes.¹²

The fourth Lomé Convention expired in August 2000 and ushered in the *ACP–EU Partnership Agreement* which reversed the non-reciprocal treatment and is the legal basis for the current ACP–EU EPAs.

The EU has exclusive competence on the customs union including over the common customs tariff between EU Member States (MS) and their import/export relations with third countries.¹³ In addition, the EU has exclusive competence over common commercial policy.¹⁴ The EU can enter into international agreements with third countries that would be binding on EU MS, involving reciprocal rights and obligations, and must be concluded by the Council and consented to by the European Parliament.¹⁵

¹¹ See <https://wits.worldbank.org/wits/wits/witshelp/content/data_retrieval/p/intro/c2.types_of_tariffs.htm> accessed 10 May 2019.

¹² Article 240 Lomé II:

1. In order to avoid increases in the debt of ACP States, finance under this Convention, apart from bank loans and risk capital, is provided in the form of grants. Specifically, the following measures and actions will be taken: (a) for projects with high rates of return, and in particular for Sysmin financing, a two-stage procedure will be followed whereby ACP States will receive grants and will on-lend the funds at appropriate market terms and conditions, with suitable arrangements for deposit of interest and repayment, less an agreed service charge, in a counterpart fund account, managed according to normal procedures as agreed for this type of finance generated from Community assistance;

(b) Stabex transfers will be granted without any obligation for the beneficiary ACP States to reconstitute the resources of the system. <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A21991A0817%2801%29>> accessed 10 May 2019.

¹³ *Treaty on the Functioning of the European Union* (hereafter TFEU), art 28.

¹⁴ TFEU, art 207.

¹⁵ TFEU, art 216–218.

The CA, is a treaty between the ACP group of states,¹⁶ and the EU and its Member States¹⁷. It was signed in Cotonou on 23 June 2000 for a duration of 20 years, with an expiry due on 29 February 2020. Negotiations for a renewed agreement have been underway since 28 September 2018 but have not yet been concluded nor ratified.¹⁸ It was established to expedite the economic, cultural and social development of the ACP States, with a view to contributing to peace and security and to promoting a stable and democratic political environment.¹⁹ This mandate is the responsibility of the Council of Ministers as the highest-level body in the CA institutional framework. The Council comprises, on the one hand, the members of the Council of the EU and members of the European Commission, and on the other hand, a member of the government of each ACP State.²⁰ It is supported by a diplomatic corps, the so-called Committee of Ambassadors, consisting on the one hand, of the permanent representative of each Member State to the EU and a representative of the Commission and, on the other, the head of mission of each ACP State to the EU.²¹ As a treaty, the CA is bound by international law,²² and so are the EPAs.

As an oversight mechanism, the Joint Parliamentary Assembly (JPA) is composed of equal numbers of EU and ACP representatives. The members of the JPA are, on the one hand, members of the European Parliament and, on the other, members of parliament or, failing this, representatives designated by the parliament of each ACP State.²³

The ACP–EC Development Finance Cooperation Committee, referred to as ‘the ACP–EC Committee’, is comprised by parity of representatives of ACP States and the EU, or their authorised representatives.²⁴ The Committee is responsible for the achievement of the objectives and principles of the development finance cooperation commitment enshrined under Articles 55–56. (Objectives and Principles), Part 4 of the CA:

¹⁶ *The Georgetown Convention* signed in July 1975 in Georgetown, Guyana, founded the ‘ACP Group’.

¹⁷ Approved on behalf of the Union by Council Decision 2003/159/EC of 19 December 2002 2003/159/EC: Council Decision of 19 December 2002 concerning the conclusion of the Partnership Agreement between the African, Caribbean, and Pacific Group of States, of the one part, and the European Community and its Member States, of the other part, signed in Cotonou on 23 June 2000.

¹⁸ According to the legislative train schedule, transitional provisions have been agreed in case the new post-Cotonou agreement is not concluded by the end of February 2020. On 28 September 2019, chief negotiators endorsed the text on the future agreement’s economic priorities, <<http://www.europarl.europa.eu/legislative-train/theme-europe-as-a-stronger-global-actor/file-towards-post-cotonou>> accessed 11 February 2020.

¹⁹ CA, art 1.

²⁰ CA, Part 2, art 15.

²¹ CA Part 2, art 16.

²² *Vienna Convention on the Law of Treaties*, signed on 23 May 1969, entered into force on 27 January 1980, art 2(1)(a).

²³ CA Part 2, art 17.

²⁴ CA TITLE IV Procedures and Management Systems, art 83 (3).

ARTICLE 55 Objectives

The objectives of development finance cooperation shall be, through the provision of *adequate financial resources* and *appropriate technical assistance*, to support and promote the efforts of ACP States to *achieve the objectives* set out in this Agreement on the basis of *mutual interest and in a spirit of interdependence*.²⁵

ARTICLE 56 Principles

1. Development finance cooperation shall be implemented on the basis of and *be consistent with* the development objectives, strategies and priorities *established by the ACP States*, at national, regional and intra-ACP levels. Their respective geographical, social, and cultural characteristics, as well as their specific potential, shall be taken into account. Guided by the internationally agreed aid effectiveness agenda, cooperation shall be based on *ownership*, alignment, donor coordination and harmonisation, *managing for development results and mutual accountability*.²⁶

The Joint ACP–EC Ministerial Trade Committee is composed of representatives of the ACP States and of the EU.²⁷ It is tasked with monitoring trade-related issues that can impact the ACP States. More specifically, the Committee is mandated to monitor the negotiations and implementation of EPAs,²⁸ and acts as the main forum for consultations on trade measures and disputes between the parties.²⁹ It can be argued that the Trade Committee is tasked with protecting the interests of the ACP party. In Declaration I of the revised CA, the Trade Committee is specifically to monitor the impact of the reciprocal market access requirements on the ACP party in the event that ‘additional support could be necessary’:

To that end, they agree to examine all necessary measures in order to maintain the competitive position of the ACP States in the EU market [...]. The objective will be to enable ACP States to exploit their existing and potential comparative advantage in the EU market.³⁰

Although these committees meet at least once annually, they have the duty to provide periodic reports and recommendations to the Council of Ministers on ways to improve the trade arrangements. At the 16th meeting (latest meeting at the time of writing this article) of the Joint ACP–EU Ministerial Trade Committee held in Brussels on 26 October 2018, the state of the EPAs was discussed.³¹ The issues raised were familiar themes about a lack of real market access by the ACP States due to the EU’s restrictive policies and practices and a lack of genuine ACP–EU dialogue on crucial issues. Both the ACP and EU sides agreed that the solutions

²⁵ Article 55 Objectives, Author’s emphasis.

²⁶ Article 56, Author’s emphasis.

²⁷ CA Title II, art 38.

²⁸ CA art 38 (2).

²⁹ CA art 38A (4).

³⁰ CA, DECLARATION I Joint declaration on support for market access in the ACP–EC partnership. Ouagadougou, 22 June 2010 (OJ L 287, 4.11.2010).

³¹ Draft minutes of the 16th meeting of the Joint ACP–EU Ministerial Trade Committee Date: 26 October 2018 <<https://data.consilium.europa.eu/doc/document/ST-2101-2019-INIT/en/pdf>> accessed 11 February 2020.

include extending the technical and financial assistance for capacity building to facilitate ACP exports' compliance with EU regulations, a flexible approach in order to create a level playing field, and the need to ensure that genuine, and adequate ACP–EU consultations are made.

III State of Play of the EPAs

On a global level, the EU has had preferential trading arrangements with developing countries in the framework of its Generalised Scheme of Preferences (GSP) since 1971. This is a legal exception to the non-discriminatory MFN provision accepted by WTO members. Given that the GSP is unilaterally offered by the EU, it is also subject to the EU's discretion in terms of approval, rejection, modification, or withdrawal.³² The GSP conforms to the WTO Agreement based on the 'enabling clause' enshrined in the General Agreement on Tariffs and Trade (GATT) 1979, which allows for differential and more favourable treatment to developing countries.³³ The GSP consists of three different tariff preferences: a general arrangement (Standard GSP); a special incentive arrangement for sustainable development and good governance (GSP+); and a special arrangement for the least-developed countries [Everything But Arms (EBA)].³⁴ The Standard GSP is automatically available to any developing country of low middle-income status unless the country is already benefitting from a special trade arrangement with the EU that grants similar rates of preferences. The Standard GSP is valid until December 2023. The EU's EBA scheme initiated in 2001 has since granted duty and quota free access to most commodity exports from Least Developed Countries (LDCs). Just over half of the (40 out of the 78) ACP States are classified as LDCs. 13 out of the 16 West African countries are LDCs. Nigeria and Ghana are non-LDCs.

By their nature, the ACP trade preferences granted by the EU are a violation of Article 1 of the WTO Agreement and Article 1 of the GATT 1994, which cover the MFN principle and non-discriminatory treatment. The ACP–EU trade preferences are based on traditional trade ties from their colonial past.³⁵ They are incompatible with the WTO Agreements because they offered non-reciprocal trade preferences, as outlined in the preceding chapter of this article. The underlying principle is that WTO members must afford each other the same treatments. To this end, a temporary derogation waiver was granted to the EU and ACP

³² Stephen R. Hurt, 'Cooperation and Coercion? The Cotonou Agreement between the European Union and ACP States and the End of the Lomé Convention' (2003) 24 (1) *Third World Quarterly* 168.

³³ Decision on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries (the 'Enabling Clause'), adopted under the *General Agreement on Tariffs and Trade* (GATT) in 1979, (L/4903).

³⁴ Regulation (EU) No 978/2012 of the European Parliament and of the Council of 25 October 2012 applying a scheme of generalised tariff preferences and repealing Council Regulation (EC) No 732/2008.

³⁵ Lomé Convention, Agriculture and Trade Relations between the EU and the ACP Countries in 1975–2000 Kalle Laaksonen, Petri Mäki-Fränti and Meri Virolainen (Pellervo Economic Research Institute, Finland) Working Paper 2006/20, 43.

to adapt their trade arrangements accordingly.³⁶ The EU's Market Access Regulation 1528/2007³⁷ was a bridging solution for the ACP countries that had negotiated EPAs but not yet signed and ratified them.³⁸ The WTO waiver of preferential tariff treatment for products originating in ACP States lasted until 31 December 2007.³⁹ Any interested parties and the WTO General Council are to be notified and consulted on any changes to the preferential treatment as set out in the CA.⁴⁰ The interim EPAs, restricted to trade in goods, signed and in force between 29 ACP States and the EU, have replaced the preferential arrangements, and thus negated the need for a further WTO waiver after its expiry in 2007.

The CA enshrines the broad commitments, common principles and values between the ACP and EU. It is a legally binding agreement drafted in a normative tone. As its economic and trade cooperation strategy, the CA envisages the gradual⁴¹ introduction of new trading arrangements (that is, EPAs) between ACP and EU that would pursue its objectives and principles and be in conformity with the WTO rules.⁴² These EPAs are free trade agreements (FTA) with a strong development cooperation dimension.

1 Regional EPAs

The ACP–EU EPA negotiations commenced on 27 September 2002. The ACP–EU EPA is divided into seven (7) regional-level EPAs: Central Africa, Eastern and Southern Africa (ESA), East African Community (EAC), Southern African Development Community (SADC), West Africa (WA), Caribbean (CARIFORUM), and Pacific.

The Pacific–EU EPA⁴³ is currently held between Fiji, Papua New Guinea, and the EU. Solomon Islands and Samoa are seeking accession to it, and thus an accession procedure is underway.⁴⁴

³⁶ Doha WTO Ministerial 2001: The ACP–EC Partnership Agreement, WT/MIN (01)/15, Decision of 14 November 2001. See also INTA Committee, 'Economic Partnership Agreement with the East African Community' European Parliamentary Research Service, April 2018, 3.

³⁷ Council Regulation (EC) No 1528/2007 of 20 December 2007 applying the arrangements for products originating in certain states which are part of the African, Caribbean and Pacific (ACP) Group of States provided for in agreements establishing, or leading to the establishment of, Economic Partnership Agreements, ELI: <http://data.europa.eu/eli/reg/2007/1528/2013-07-01>.

³⁸ Mid-Term Evaluation of the EU's Generalised Scheme of Preferences (GSP) Final Report, July 2018, 44.

³⁹ Understanding in Respect to Waivers of Obligations under the General Agreement on Tariffs and Trade 1994.

⁴⁰ Doha WTO Ministerial 2001: The ACP–EC Partnership Agreement, WT/MIN (01)/15, Decision of 14 November 2001.

⁴¹ CA art 36 (3).

⁴² CA art 36.

⁴³ Council Decision of 13 July 2009 on the signature and provisional application of the Interim Partnership Agreement between the European Community, of the one part, and the Pacific States, of the other part (2009/729/EC).

⁴⁴ See <http://ec.europa.eu/trade/policy/countries-and-regions/regions/pacific/> accessed 10 May 2019.

The CARIFORUM–EU EPA⁴⁵ was signed by 14 Caribbean States in October 2008, and two months later, in December 2008, the EPA entered provisional application. Haiti signed the EPA in December 2009 but has not yet ratified it.⁴⁶ The implementation of all provisions of the EPA is sluggish on both sides. The CF States are hesitant to contest any EU irregularities and the trading difficulties caused by visa issues. The EU has not fully provided the wide-ranging development cooperation as envisaged in the EPA. This springs from delay in concluding financial agreements and disbursements.⁴⁷

Since May 2012, the ESA–EU EPA⁴⁸ has been provisionally applied. There are 11 countries in the regional grouping: Comoros, Djibouti, Eritrea, Ethiopia, Madagascar, Malawi, Mauritius, Seychelles, Sudan, Zambia, and Zimbabwe. Comoros was the last to sign the EPA in 2017. They are all WTO members or observers, except Eritrea.⁴⁹

The EAC–EU EPA⁵⁰ has been ratified by Kenya (the only non-LDC country of the EAC bloc), whereas the remaining five countries Burundi, Rwanda (signed but not ratified), Tanzania, Uganda, and South Sudan⁵¹ have not, despite the negotiations concluded in October 2014. It is noteworthy that the EAC is renowned for being one of the most integrated regional economic blocs in the African Union owing to its active customs union and common market, and commitment to establishing a monetary union by 2023. Yet, it has not adopted a common position on the EPA.⁵²

The Central Africa–EU EPA⁵³ covers eight countries in the Central Africa region, but so far, only Cameroon has signed and ratified the EPA in 2009 and 2014 respectively. The interim EPA is under provisional application between the EU and Cameroon.⁵⁴

⁴⁵ *Economic Partnership Agreement between the CARIFORUM States, of the one part, and the European Community and its Member States, of the other part*, signed on 15 October 2008. (Under provisional application since December 2008). (Hereafter CARIFORUM–EU EPA)

⁴⁶ See <<http://ec.europa.eu/trade/policy/countries-and-regions/regions/caribbean/>> accessed 10 May 2019.

⁴⁷ EUROPEAID/129783/C/SER/multi Lot 1: Studies and Technical assistance in all sectors 2013/325520 Monitoring the Implementation & Results of the CARIFORUM–EU EPA, Final Report – Executive Summary, September 2014.

⁴⁸ *Interim Agreement establishing a framework for an Economic Partnership Agreement between the Eastern and Southern Africa States, on the one part, and the European Community and its Member States, on the other part* OJ L111 24.4.2012. Signed in August 2009. (Interim EPA with Madagascar, Mauritius, Seychelles and Zimbabwe since May 2012). (Hereafter ESA–EU EPA)

⁴⁹ See <<http://ec.europa.eu/trade/policy/countries-and-regions/regions/esa/>> accessed 10 May 2019.

⁵⁰ *Economic Partnership Agreement Between The East African Community Partner States, Of The One Part, And The European Union And Its Member States Of The Other Part*. Signed in September 2016. (Not yet in force). (Hereafter EAC–EU EPA).

⁵¹ South Sudan, which joined the EAC in 2016, was not part of the EPA negotiations, can accede to the EPA once it comes into force.

⁵² See <<http://ec.europa.eu/trade/policy/countries-and-regions/regions/eac/>> accessed 10 May 2019.

⁵³ *Interim Agreement with a view to an Economic Partnership Agreement between the European Community and its Member States, of the one part, and the Central Africa Party, of the other part*, OJ L 57, 28.2.2009. Signed in January 2009. (Not yet in force, only Interim EPA with Cameroon entered into force in August 2014). (Hereafter Central Africa – EU EPA).

⁵⁴ See <<http://ec.europa.eu/trade/policy/countries-and-regions/regions/central-africa/>> accessed 10 May 2019.

The WA–EU EPA⁵⁵ negotiations were closed on 6 February 2014. Four months later, the text was initialled on 30 June 2014 between 16 WA States, the Economic Community of West African States (ECOWAS) and the West African Economic and Monetary Union (UEMOA), of the one part, and the EU and its Member States, of the other part. By December 2014, all EU Member States and 13 WA States signed the EPA, except Nigeria, Mauritania and The Gambia.⁵⁶ The EU–WA regional EPA can only move to ratification stage, however, when all 16 WA countries have signed it. In the course of the occasioned impasse, bilateral agreements interim EPAs – iEPA (also called ‘stepping stone’ EPAs) were signed. Between the EU and Ivory Coast, the iEPA was signed on 26 November 2008, and ratified by the Ivorian National Assembly on 12 August 2016. With Ghana, the iEPA was signed on 28 July 2016, and ratified by the Ghanaian Parliament on 3 August 2016.

The SADC–EU EPA⁵⁷ was signed in June 2016 and became fully operational from February 2018. It is the first regional EPA in Africa to move beyond provisional application and enter into force. There are six SADC States involved in this EPA: Botswana, Lesotho, Mozambique, Namibia, Swaziland (‘BLMNS States’), and South Africa.⁵⁸ Angola is the only SADC State not yet a party to the EPA, but has the opportunity to accede.⁵⁹

The EU is SADC’s largest trading partner, with South Africa accounting for the largest part of EU imports to and EU exports from the region.⁶⁰ Consequently, the most significant state in the SADC bloc is South Africa, which already has a separate bilateral trade agreement with the EU since 2000 called the *Trade, Development and Cooperation Agreement* (TDCA) between the EU and South Africa. South Africa will gain access to new markets thanks to the EPA, but unlike the other SADC States, will not enjoy full duty-free access in the EU. The EPA extensively covers the EU Schedule of staging categories for the elimination of customs duties.

2 West Africa–European Union EPA

This article has chosen to examine the WA–EU EPA. This is due to the significance of the relations of both groupings. WA is the EU’s largest trading partner in Sub-Saharan Africa, and the EU is WA’s biggest trading partner on a global level. The WA–EU EPA negotiations

⁵⁵ *Economic partnership agreement between the West African States, the Economic Community of West African States (ECOWAS) and the West African Economic and Monetary Union (UEMOA), of the one part, and the European Union and its Member States, of the other part*. Signed in December 2014 (not yet entered into force, only interim EPA with Ivory Coast in force since September 2016, and interim EPA with Ghana in force since December 2016) (hereafter WA–EU EPA).

⁵⁶ See <<http://ec.europa.eu/trade/policy/countries-and-regions/regions/west-africa/>> accessed 10 May 2019.

⁵⁷ *Economic Partnership Agreement between the European Union and its Member States, of the one part, and the SADC EPA States, of the other part*, signed on 10 June 2016 (Entry into force February 2018) (hereafter SADC–EU EPA).

⁵⁸ See <<http://ec.europa.eu/trade/policy/countries-and-regions/regions/sadc/>> accessed 10 May 2019.

⁵⁹ SADC–EU EPA, art 119 (3).

⁶⁰ See <<http://ec.europa.eu/trade/policy/countries-and-regions/regions/sadc/>> accessed 10 May 2019.

began on 4 August 2004, and although concluded for now, they are not yet final until the WA–EU EPA reaches full and comprehensive EPA status. This would mean going beyond the trade in goods arrangement, to cover other outstanding trade matters. The current version of the WA–EU EPA text contains a *rendez-vous* clause⁶¹ to advance negotiations, and a revision clause⁶² to modify the provisions. Considering the wide scope of open issues, the challenges of negotiating are not yet over and will remain the prime concern of the Contracting States:

- (a) services; (b) intellectual property and innovation, including traditional knowledge and genetic resources; (c) current payments and capital movements; (d) protection of personal data; (e) investment; (f) competition; (g) consumer protection; (h) sustainable development; and (i) public contracts.⁶³

The EPA adoption procedure is in line with international law.⁶⁴ First, the EPA is signed by the parties, it is approved/ratified by the parliaments/national assembly of both parties, and finally, it enters into force on an agreed date. The regional WA–EU EPA is not under provisional application. There are however two bilateral interim EPAs currently under provisional application as of 3 September 2016 (Ivory Coast) and 15 December 2016 (Ghana) respectively. These stepping stone agreements ‘establish an initial framework for an EPA’⁶⁵, while ‘waiting for the conclusion of a global EPA between WA and the EU’⁶⁶. The Gambia and Mauritania signed the EU–WA EPA in 2018,⁶⁷ whereas Nigeria remains the only WA State that has still not signed the EPA. The WA–EU EPA will only enter the ratification and implementation stage once Nigeria also signs it. Currently, 29 ACP countries are implementing EPAs with the EU, which are only restricted to trade in goods. In the WA region, only two countries (Ghana and Ivory Coast) are currently implementing interim EPAs.⁶⁸

Studies have analysed and predicted the past, present, and future trade flows under each ACP–EU trade regime.⁶⁹ The LCs ended in unrealised hopes of increased diversified trade

⁶¹ WA–EU EPA, art 106.

⁶² WA–EU EPA, art 111.

⁶³ WA–EU EPA, art 106 (2).

⁶⁴ Part II Conclusion and Entry into Force of Treaties, art 6–18, *Vienna Convention on the Law of Treaties*, 1969.

⁶⁵ *Stepping Stone Economic Partnership Agreement between Ghana, of the one part, and the European Community and its Member States, of the other part*. Signed in December 2014. (Entry into force December 2016) (hereafter Ghana–EU Stepping Stone Agreement), art 1.

⁶⁶ Preamble of the Ghana–EU Stepping Stone Agreement.

⁶⁷ Overview of Economic Partnership Agreements, Updated March 2019: <http://trade.ec.europa.eu/doclib/docs/2009/september/tradoc_144912.pdf> accessed 15 May 2019.

⁶⁸ The provisions in force cover Trade Regime for Goods; Custom Duties and Non-Tariff Measures; Trade Defence Measures; Customs and Trade Facilitation; Technical Barriers to Trade and Sanitary and Phytosanitary Measures; Services, Investment and Trade Related Rules; Dispute Avoidance and Settlement; Mutual Administrative Assistance In Customs Matters.

⁶⁹ Joanna Moss, John Ravenhill, ‘Trade Developments during the First Lomé Convention’ (1982) 10 (10) *World Development*. Pergamon; Lomé Convention, Agriculture and Trade Relations between the EU and the ACP Countries in 1975–2000 Kalle Laaksonen, Petri Mäki-Fränti and Meri Virolainen (Pellervo Economic Research

and market shares between the two blocs.⁷⁰ An interesting finding is that the statistically significant increases in EEC shares of ACP total imports all occurred in relationships where, prior to the LCs, there had been no special economic ties between the ACP sub-grouping and the relevant EEC MS.⁷¹ The impact of the EPA on the economies of WA is forecasted to be small and uneven across the States. For the benefit of establishing the reason for the current impasse with the WA–EU EPA, a little digression from the hitherto legal analysis towards an economic analysis is required at this juncture of the article. Bouët et al. have undertaken an intricate economic impact analysis of the WA region. Their macroeconomic simulation models have shown that there will be marginal but positive impacts on Burkina Faso and Côte d’Ivoire and negative impacts on Benin, Ghana, Nigeria, Senegal, and Togo.⁷² The study opines that the reduction in trade barriers in the EPA is not substantial enough to create a significant growth and development impact on the WA States.⁷³ This is all the more so given the limited development support offered in the EPA. The overall increase in export in value would be limited for the WA States compared to the growth of EU imports in value terms.⁷⁴

The main difference in the forecasted impact of the EPA across WA is based on if a State is an LDC or non-LDC.⁷⁵ The WA LDCs would benefit less from the EPA liberalization scheme because their access to the EU market will not be much more improved than under the EBA regime.⁷⁶ On the other hand, the WA non-LDCs will gain greater access to the EU market than under the GSP regime.⁷⁷ For both WA LDCs and non-LDCs, the gradual opening up of their markets to the EU will result in loss of public revenue for the WA governments.⁷⁸ This is because the share of EU imports in the total imports of the WA economies is significant.⁷⁹ In addition, the customs duties on EU imports are an important portion of WA States public revenue. Therefore, the WA governments would seek alternative means to compensate the loss, most probably through increased domestic taxes that will burden the local households.⁸⁰

Institute, Finland) Working Paper 06/20; The European Union–West Africa Economic Partnership Agreement: Small Impact and New Questions. Antoine Bouët, David Laborde, Fousseini Traoré, Markets, Trade and Institutions Division, International Food Policy Research Institute (IFPRI), IFPRI Discussion Paper 01612 February 2017.

⁷⁰ Moss, Ravenhill (n 69) 834.

⁷¹ *Ibid.*, p. 850.

⁷² Bouët et al. (n 69) vii.

⁷³ Bouët et al. (n 69) 40.

⁷⁴ *Ibid.*, 19.

⁷⁵ *Ibid.*

⁷⁶ *Ibid.*

⁷⁷ *Ibid.*

⁷⁸ *Ibid.*

⁷⁹ Salif Koné, Economic Partnership Agreement between West Africa and the European Union in the Context of the World Trade Organization (WTO) and the Regional Integration Process, (2010) 25 (1, March) *Journal of Economic Integration* 104–128.

⁸⁰ Bouët et al. (n 69) 93.

Even with the increase in trade effected by the EPA – also known as trade creation, the additional taxation will negate the welfare and GDP of the WA States.⁸¹ Paradoxically, even though the gradual influx of duty-free EU imports would reduce the trade balance of the WA LDCs, the competitiveness would rise due to a devaluation of their currencies and a deflation in local prices.⁸² The concomitant effect of the EPA, as with other FTAs, is the trade diversion to be expected as the WA and EU switch their supply chain from non-party States to EPA contracting party States.⁸³ Herein lies the potential source of future disputes – non-party States against EPA party States. Seeing their EU and Africa market shares gradually decline, China, India, Russia, and the US would defend their interests in courts, tribunals, and/or WTO.

Overall, the studies found that the preferential trading agreements granted to the ACP States have benefitted the EEC/EU instead. The impact on the ACP economy has been negligible – very different from the aspirations expressed in the Conventions. This puts into question the underlying rationale of the ‘aid for trade’-type agreements as a development cooperation strategy, which has not proven feasible. As succinctly put by Laaksonen et al., ‘Preferential margins cannot compensate for a lack of basic competitiveness in ACP economies’⁸⁴. This means that the existential imbalance cannot simply be attenuated by introducing greater preferential provisions for the weaker party in the EPAs. On the other hand, the issue may be rather (seen from a different legal angle) about how the legal provisions in the EPAs are interpreted and applied so that their effect is de facto (really) preferential to the weaker party. This notwithstanding, the formulation of development support provisions enshrined in the EPA could be further enhanced so that the weaker party can take real advantage of the free market envisaged in the EPA. The solution does not lie in the elimination of tariffs. The application of Non-Tariff Measures (NTMs) and other technical barriers to Trade (TBT) of both parties at the domestic level should be closely examined to understand the extent to which they contribute to the deficiencies in trade relations, and block the objectives of the EPAs.

IV Nigeria and the WA–EU EPA

There are studies that forecast the winners and losers among the WA States from the impact of the EPA.⁸⁵ More specifically, Grumiller et al. have calculated that tariff revenue losses for ECOWAS countries (including Nigeria) will be more than USD 600 million per annum

⁸¹ Ibid.

⁸² Ibid.

⁸³ Ibid.

⁸⁴ ‘Lomé Convention, Agriculture and Trade Relations between the EU and the ACP Countries in 1975–2000’ Kalle Laaksonen, Petri Mäki-Fränti and Meri Virolainen (Pellervo Economic Research Institute, Finland) Working Paper 2006/20, 10.

⁸⁵ *Etude d’Impact de l’offre d’accès aux Marchés sur les Pays de l’Afrique de l’Ouest dans le Cadre de l’Accord de Partenariat Economique, Etude Réalisé Par Le Consortium Pour La Recherche Economique Et Sociale (CRES)*

between years 5 to 10 of the implementation period of the tariff reduction schedules proposed in the WA–EU EPA, and they estimate the figure to increase to USD 1.7 billion per annum at the end of the implementation period.⁸⁶ The competition from EU imports would result in a deterioration in trade balance, and a decline in demand for locally-made products or those from the sub-region. Nigeria's GDP would shrink due to the reduction in export revenue.⁸⁷ However, some studies quantify Nigeria's potential losses as relatively marginal taking into account the royalties in oil and gas sales.⁸⁸ Moreover, the EPA is not devoid of potential benefits if seen in the wider context of national bargaining power and competitiveness trade-offs. In response to Nigeria's dumping fears on the EPA, Fasan, a Nigerian trade lawyer⁸⁹ makes a thought-provoking remark: 'China is flooding Africa with cheap exports without guaranteeing access to its market, unlike the EU'⁹⁰.

The refusal by the continent's largest economy and population to sign a trade agreement that purportedly offers a lot of benefits for the signatory nation is significant and calls for some consideration. The publicly stated reason is unequivocally protectionist: 'Presently, our industries cannot compete with the more efficient and highly technologically driven industries in Europe. We have to protect our industries and our youths'⁹¹.

Where is the flow of trade concentrated at the global level? That is, where are the most active trade relations for Nigeria at the global level? It is worth closely analysing the trade agreements of the largest trading partners of strategic significance to the EU and Nigeria if they are to enhance their trade relations.

Juillet 2011, Copyright 2011 par Friedrich-Ebert-Stiftung / Enda Tiers Monde; Mary Farrell, 'A Triumph of Realism over Idealism? Cooperation between the European Union and Africa' (2005) 27 (3) *Journal of European Integration* 263–283; Kelechi C. Nnamdi, Kingsley C. Iheakaram K., Impact of Economic Partnership Agreements (EPA) on African Economy: A legal perspective <<https://pdfs.semanticscholar.org/c82e/7f75b400c01836743c64aeb1151559a1deff.pdf>> accessed 02 June 2019.

⁸⁶ Jan Grumiller, Werner Raza, Cornelia Staritz, Bernhard Tröster, Rudi von Arnim, 'The economic and social effects of the Economic Partnership Agreements on selected African countries' Vienna, July 2018, XII: <https://www.oefse.at/fileadmin/content/Downloads/Publikationen/Studien/7_EPA_Study.pdf> accessed 02 June 2019.

⁸⁷ *Étude CRES* (n 85) 40.

⁸⁸ Farrell (n 85).

⁸⁹ Olu Fasan is a trade lawyer and political economist. Visiting Fellow at London School of Economics and Political Science (LSE). He also advises on state aid issues, working closely with the European Commission.

⁹⁰ EU–Africa trade relations: Why Africa needs the economic partnership agreements. 26 Mar 2018. <<https://www.theigc.org/blog/eu-africa-trade-relations-africa-needs-economic-partnership-agreements/>> accessed 01 June 2019. The global trade statistics of Nigeria reveals that 'fuels' is the largest export (42,701,824.93 USD – a 96.03% product share according to World Bank 2017 statistics) product group (followed by raw materials) at the global level, and the second largest product group imported into Nigeria (after consumer goods, which is the most imported product group at a value of 13,608,644.36 USD – a 41.79% product share – according to World Bank 2017 statistics). The constant ranking of these three product groups (fuels, raw materials, and consumer goods) as Nigeria's top three globally traded commodities is symbolic of the lack of a diversified economy in Nigeria.

⁹¹ Why Nigeria is Reluctant to Sign EPA with EU – President Buhari, April 2018. <<http://saharareporters.com/2018/04/05/why-nigeria-reluctant-sign-epa-eu-president-buhari>> accessed 02 June 2019.

Having regard to the top 10 countries on which Nigeria depends for its imports, there are six EU Member States – all of which belong to the ‘old’ Member States that were parties to the YCs and LCs. China, the US, and India rank as Nigeria’s first, fourth, and fifth largest import partners respectively, while Belgium, the Netherlands, Germany, the UK, France, and Italy rank as second, third, sixth, seventh, eighth, and ninth largest import partners respectively. Of these EU Member States, Nigeria enjoys the greatest trade surplus with France,⁹² followed by the Netherlands,⁹³ and Italy. However, Nigeria has a trade deficit with its largest EU trade partner (Belgium)⁹⁴ as well as with Germany, and the UK. Having a trade deficit with three (or two, if we do not count the UK) out of its six largest EU partners means that it is crucial for it to maintain its import tax revenues.

With respect to Nigeria’s exports, there are fewer EU Member States in the list of top destinations: only three (Spain, the Netherlands, and France) if the UK is excluded. The EPA would enable the free access to *all* EU Member States and could present an opportunity for new/increased trade relations with (newer) EU Member States.

If we look closely at the trade flow specifically between EU and Nigeria,⁹⁵ we note that there is a constant trade deficit on the EU’s side, as EU exports to Nigeria remain relatively low. Over the last ten years (2008–2018), the EU (mainly Spain, The Netherlands, and France) has consistently imported from Nigeria at a value of not less than 10,416 million euro (the lowest figure, which occurred in the year 2009), with the highest figure being 33,045 million euro in 2012. On the other hand, the most ‘lucrative’ trading for the EU (mainly, Belgium, The Netherlands, and Germany) with Nigeria within that same 10-year period was at a value of 12,922 million euro in 2011.⁹⁶

This asymmetrical trade is aptly summed up in the latest (year 2018) rankings whereby Nigeria holds 19th position among all EU trade partners in terms of imports to the EU, but holds 29th position as a destination for EU exports. The most traded commodity between both partners remains Mineral Products, which takes the lion’s share in imports (95.7% total share) as well as in exports (55.3% total share)⁹⁷.

⁹² 2,279,119.07 USD Thousands according to World Bank 2017 statistics.

⁹³ 889,581.10 USD Thousands according to World Bank 2017 statistics.

⁹⁴ At -3,900,962.82 USD Thousands according to World Bank 2017 statistics.

⁹⁵ See <https://webgate.ec.europa.eu/isdb_results/factsheets/country/details_nigeria_en.pdf> accessed 06 June 2019.

⁹⁶ EU trade flows and balance with Nigeria, 2008–2018 Source: European Union, Trade in goods with Nigeria. Statistical Regime 4: Total trade including inward and outward processing, DG Trade, 03–06–2019.

⁹⁷ EU trade with Nigeria in 2018 for top 5 products as harmonized system (HS) sections, Source: European Union, Trade in goods with Nigeria. Statistical Regime 4: Total trade including inward and outward processing, DG Trade, 03–06–2019.

Table 1: EU overall trade with Nigeria in 2018

Key Figures

Indicator	Unit	Period	Imports	Exports	Total trade	Balance
Last year	Mio euros	2018	22,546	11,942	34,488	-10,604
Rank as EU partner		2018	19	29	27	
Share in EU trade	%	2018	1.1	0.6	0.9	
Annual growth rate	%	2017–2018	48.7	18.4		
Annual average growth rate	%	2014–2018	-5.4	0.8		

Source: European Union, Trade in goods with Nigeria. Statistical Regime 4: total trade including inward and outward processing, DG Trade, 03. 06. 2019

Without Nigeria's signature, the WA–EU EPA cannot proceed to ratification stage, nor to provisional application. As a side note, Nigerian President was elected in July 2018 as the new chairman of ECOWAS for a 12-month tenure, in what was supposedly an unexpected appointment. Speculations arose as to the underlying motive(s) for his new ECOWAS mandate.⁹⁸ The Nigerian presidential elections took place in February 2019, and the incumbent has been re-elected. It remains to be seen if he will succumb to the pressure to ratify the WA–EU EPA, and thus bring the regional EPA into force. Nigeria would opt rather to trade under the GSP+ scheme, but the EU's rejection of Nigeria's application, some authors claim, is based on political reasons since Nigeria fulfils the GSP+ criteria.⁹⁹

It is noteworthy that the latest amendment to the CA made in 2010 has included a provision that could be used by the EU party to circumvent this WA–EU EPA standstill caused by Nigeria's refusal to sign. The amendment states that once ACP States have concluded an EPA, those ACP States, which are not Parties to the EPA, can seek accession at any time.¹⁰⁰ This potentially means that the EU and the 15 WA States signatories to the WA–EU EPA could proceed to implementing the WA–EU EPA while leaving open the possibility for Nigeria to accede to it at any time. The WA–EU EPA does not reflect this CA amendment in its own provisions. The only provision on accession relates to new EU Member States (Article 112), but does not mention the accession of ACP States to the WA–EU EPA. This could be an omission, deliberate or otherwise, but certainly not an oversight.¹⁰¹ As the expiration of the

⁹⁸ See for example <<https://www.vanguardngr.com/2018/08/now-that-buhari-is-ecowas-chairman/>> accessed 02 June 2019.

⁹⁹ Nnamdi, Iheakaram (n 85) 13.

¹⁰⁰ CA, art 37 (7).

¹⁰¹ The SADC–EU EPA allows for an interested third state or organisation, as well as Angola, to join the SADC–EU EPA upon request, art 119.

GSP draws nearer, and without an alternative preferential arrangement secured, the EU and Nigeria may feel an ever more pressing need to further (re)negotiate the terms of the WA–EU EPA, or an interim Nigeria–EU EPA, which specifically address the concerns of Nigeria. As earlier stated, the EU has been experiencing a constant trade deficit with Nigeria as EU exports to Nigeria remain relatively low, so it would be in the EU’s interests to reach a better deal. As for Nigeria, it would be looking to maintain the preferential treatment it has been enjoying with the EU so it cannot afford to transit to less favourable trading terms.

On the other hand, the EU might be contemplating a special arrangement with Nigeria as a means of overcoming the current impasse; if so, this intention has not yet been publicised. Such a scenario is only legally possible if the EPA allows for the formulation of reservations (i.e. to form special arrangements), which would most likely have to be coupled with the requirement for its consent by all Contracting States.¹⁰² A special arrangement would be reminiscent of the Lagos Treaty (signed in 1966 and expired in 1969). The Lagos Treaty aimed, in a similar vein, to grant Nigeria duty-free access to the EU market with the exception of four products, while Nigeria was to reciprocally grant free access to EU imports.¹⁰³ The Lagos Treaty never came into force due to civil war and poor relations with France. This is an example of how politics and other factors could disrupt the implementation of any trade arrangements, special or otherwise. It remains to be seen what the fate of the WA–EU EPA will be.

1 Institutional Structure of the WA–EU EPA

The institutional framework is established to oversee the implementation and monitoring of the EPA. Four joint bodies make up the institutional structure of the WA–EU EPA. At the apex is the Joint Council of the WA–EU EPA, which supervises the implementation of the EPA and has the power to take decisions by consensus of both parties, which are binding and to be applied by any measure necessary in accordance with parties’ domestic legal systems.¹⁰⁴ The Joint Council shall be composed, on the one hand, of Members of the Council of the EU and Members of the European Commission and, on the other hand, of Members of the Ministerial Monitoring Committee of the WA–EU EPA and the Presidents of the ECOWAS and UEMOA Commissions. It reports to the Council of Ministers periodically.

For the EPA to operate, it requires the establishment of an implementation committee whose role encompasses a wide range of functions. The committee is essentially the executive arm of the highest body under the EPA framework – the Joint Council, whose decisions are binding on the parties.

Underneath the Joint Council is the Joint Implementation Committee of the EPA, comprising senior officials or their representatives duly appointed by the Parties,¹⁰⁵ which

¹⁰² Vienna Convention, art 20.

¹⁰³ Richard Bailey, *The European Connection: Implications of EEC Membership* (Pergamon Press 1983) 162.

¹⁰⁴ WA–EU EPA, art 94 (2).

¹⁰⁵ WA–EU EPA, art 95.

essentially conduct the functions delegated to it by the Joint Council. It even has the competence to take actions to resolve trade-related disputes about the interpretation and application of the EPA.¹⁰⁶ The Joint Implementation Committee adopts the rules of procedure for Dispute Settlement and the Code of Conduct of Arbitrators and Mediators.¹⁰⁷

The Joint West Africa – European Union Parliamentary Committee shall provide a framework for consultation and dialogue between Members of the European Parliament and Members of the Parliaments of ECOWAS and the UEMOA.¹⁰⁸

The Joint West Africa – European Union Consultative Committee is tasked with promoting dialogue and consultations between the social and economic partners of the WA and EU with a focus on economic, social, and environmental aspects of the trade relations. Its composition is determined by the Joint Council.¹⁰⁹

2 Special and Differential Treatment (SDT)

a) SDT for West Africa

The SDT principle is predicated on the development constraints of the WA States, and is reminiscent of the special provisions in the Rome Treaty. The Doha Declaration confirms that SDT is an ‘integral part of WTO Agreements’¹¹⁰. On the practical level, it commits to reviewing ‘all special and differential treatment provisions with a view to strengthening them and making them more precise, effective and operational’¹¹¹.

It should be pointed out that the SDT is nevertheless subject to the principle of proportionality – a fundamental general principle in EU law. Proportionality and necessity are a joint recurring theme in the WA–EU EPA. All instances where a measure or action can be taken to suspend a preferential treatment are qualified by the condition of doing so to the extent necessary. As examples, in temporary suspensions for lack of administrative cooperation,¹¹² trade defence measures,¹¹³ adjustments to customs,¹¹⁴ anti-dumping and countervailing measures¹¹⁵.

As the second and third largest exporters to WA (and to Nigeria), China, and the US would be the most concerned about the impacts the EPA would have on their export revenue and trade relationship. If competing products from the EU can be more cheaply purchased

¹⁰⁶ WA–EU EPA, art. 95 (3)(a)(iii).

¹⁰⁷ WA–EU EPA, art. 77.

¹⁰⁸ WA–EU EPA, art. 96.

¹⁰⁹ WA–EU EPA, art. 97.

¹¹⁰ Doha WTO Ministerial 2001: *Ministerial Declaration*, WT/MIN (01)/DEC/1, 20 November 2001, Art. 44.

¹¹¹ *Ibid.*

¹¹² WA–EU EPA, art. 17(4)(c).

¹¹³ WA–EU EPA, art. 19(2).

¹¹⁴ WA–EU EPA, art. 12(3).

¹¹⁵ WA–EU EPA, art. 20(4).

(imported) by the WA bloc, then importing the same products (especially in the product groups of fuels and consumer goods) from the US and China would be less attractive. On the other hand, this competitive advantage of the EU as exporter for Nigeria is destined to last for a temporary period until the end of the liberalization period, approximately until end of the year 2035. When substantially all trade becomes duty- and quota-free, the WTO preferential waiver expires, and the MFN obligation is fully enforced, an equal level playing field will be established. Alas, the essence of bilateral trade agreements is to define the most suitable terms for both parties to suit their strategic interests. China, the US, Russia, India, and all other trade partners with a significant role in the WA economy will review their trade agreements in their efforts to consolidate market shares in WA.

b) Balance of trade between WA and the EU

The EU is party to trade agreements with 69 countries, which account for 40% of global Gross Domestic Product (GDP).¹¹⁶ The WA–EU EPA would supersede any bilateral-level EPAs like the Stepping Stone Agreements.¹¹⁷ Moreover, countries acceding to the EU will automatically accede to these EPAs.¹¹⁸ The EU trades majorly with China, the US, Russia, and Switzerland in terms of imports and exports. There are no African countries in its top ten trading partners of the EU.¹¹⁹

Conversely, for WA, the EU consistently ranks as its largest trade partner on the global level.¹²⁰ If we zoom in to consider the EU’s trade with Africa on Member State level, the latest data shows that bilateral trading with the majority of the EU Member States remains relatively low. Spain, France, and Portugal, not least because of their close geographical proximity to Africa, purchase the largest amount of African imports.¹²¹

3 A Side Note on the Impact of BREXIT

The UK, as the former colonial power to over 15 African countries, has maintained strong and active relations with Sub-Saharan Africa. The UK’s share of bilateral trade with Africa has declined significantly compared to that of other EU Member States. The UK experienced a trade in goods deficit with Africa. Currently available statistics show that France, Germany, Spain and Italy were the largest exporters and importers of goods to Africa in 2017.¹²²

¹¹⁶ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions Commission Work Programme 2019, Delivering what we promised and preparing for the future. COM/2018/800 final.

¹¹⁷ Ghana–EU Stepping Stone Agreement, art 75, para 8.

¹¹⁸ Ghana–EU Stepping Stone Agreement, art 77 para 2, ibid

¹¹⁹ Total Goods: Top trading partners 2018. Source: Eurostat 2018 Comext Statistical regime 4.

¹²⁰ West Africa’s top 10 trading partners in goods, 2018 latest figures, Source: IMF 2018.

¹²¹ Import of goods from Africa by EU Member State, 2017. Source: Eurostat, 2018. Comext data code DS-018995.

¹²² Trade in goods balance with Africa by Member State, 2017, Africa–EU. Source: Eurostat 2018. Comext data code DS-018995.

When the UK leaves the EU, the free trade conditions under the Africa–EU EPA will not apply to the trade in goods (and in development cooperation) between Africa and the UK. Until the UK leaves the EU, it is obliged to ‘continue to ratify third country agreements with the EU’¹²³. The practical relevance of this ratification however seems to be akin to rubberstamping so as not to disrupt the EU’s trade arrangements. The UK has signed a trade continuity agreement (‘continuity deal’) with the ESA region in January 2019. It is said to replicate the effects of the existing ESA–EU EPA.¹²⁴ However, after Brexit, without special trade agreements formed between the UK and other African regions, the default MFN treatment would apply. For certain countries like Tanzania, the UK’s leaving the EU is a disincentive to ratify the EPA.¹²⁵ To take Ghana as an example from WA, the author retrieved the latest statistics about its largest trade partners in terms of their share in total imports and exports to Ghana.

There are only two EU countries in Ghana’s targeted exports – the Netherlands is fifth, while the UK is tenth. However, Ghana’s trade relationship is very different with these two countries. It exports much more than it imports from the Netherlands, that is, it enjoys a trade surplus with the Netherlands, but faces a trade deficit with the UK because it imports huge quantities similar to the level of imports from the US and China. In other words, it appears that Brexit would not be detrimental to Ghana because the latter can maintain its import duties on the large amounts of UK imports it receives. On the other hand, the iEPA would potentially gradually increase Ghana’s export levels to the Netherlands, and to other EU Member States, to fill any occurring gaps.

V Conclusions

West Africa is a strategic trade and investment region for the EU in Africa. Although Cameroon, Ivory Coast, Ghana, and Nigeria have all advanced to lower-middle-income status,¹²⁶ they face significant drawbacks foremost of which are weak institutional structures and poor infrastructure. The Standard GSP is currently still applicable for Nigeria, but no longer for Cameroon, Ivory Coast, and Ghana since the end of 2018.¹²⁷ From the economic perspective, the WA–EU EPA is to be seen through the classical lens of ‘buyer beware, and

¹²³ See <<https://www.gov.uk/government/publications/impact-assessment-for-the-eu-ghana-economic-partnership-agreement>> accessed 03 June 2019.

¹²⁴ See <<https://www.gov.uk/government/collections/esa-uk-economic-partnership-agreement-epa-2>> accessed 03 June 2019.

¹²⁵ Clara Brandi, Hulse Merran, Keijzer Niels, ‘What Next for the Economic Partnership Agreements? Thoughts on Deepening the EU–Africa Trade Partnership’ Briefing Paper 9/2017, Bonn: German Development Institute / Deutsches Institut für Entwicklungspolitik (DIE) 2.

¹²⁶ See <<https://datahelpdesk.worldbank.org/knowledgebase/articles/906519>> accessed 02 June 2019.

¹²⁷ Regulation 978/2012: as from two years after the date of application of a preferential market access arrangement, art 5(2)(b).

seller scrutinize'. Nigeria has insufficient incentives to abandon the current agreement. Indeed, common (commercial) sense dictates that WA would prioritize the country where its exports are most readily accepted and at the cheapest possible rate in return for the highest possible revenue. If it is free to export to all EU countries but due to non-tariff barriers its exports cannot penetrate the EU market, or if the amount paid for its exports is low, then there is no real benefit to WA. In other words, before entering into a trade agreement of an indefinite duration,¹²⁸ it is crucial to weigh the costs and benefits it offers to the Contracting States.

The EPA allows contracting parties to adjust the customs duties on one or more EU imported goods to accord with their sectoral policies.¹²⁹ However, the adjustment can only be *decided upon* by the WA party if the Joint Council agrees to it. Further, the same article appears to permit the enforcement of the adjustments *after* the Joint Council has taken a decision on it. This provision is seemingly too restrictive contrary to the concept of SDT. The special development needs, provided they are evidenced by empirical reports from the WA State, should be a sufficient justification to warrant the adjustment of duty levels. It should not have to be dependent on the agreement and decision of the Joint Council that may be unduly prolonged, or may never materialise, due to objections from the EU party. In fact, a converse argument could be that the proportionality should also be applied to the extent of evidence required to satisfy the need for justification. Commercially and politically sensitive information, which could be contained in the justification presented, could harm national interests of the WA party. Such information, unless they are brought in the context of the dispute settlement mechanism, are excluded under the confidentiality clause, from the otherwise due obligation on parties.

In order to enhance the capacity of the WA States to meet their obligations and enforce their rights under the EPA, the EU could make specific commitments to provide them substantial support through financial, technical, and legal resources. This would signal a real partnership that resonates with the stated development finance objectives of the CA, that is, support on the basis of mutual interest and in a spirit of interdependence.¹³⁰ All the reports reviewed for this article conclude that the major contemporary concern is the rise of anti-globalization policies. The US is becoming increasingly protectionist and disrupting of multilateral trade arrangements. The EU is keen on demonstrating its continuous support for trade liberalization through its EPAs. However, as has been discussed in this article, the developing countries want to determine the terms of their socioeconomic development and integration into the global economy. In this tripolar trading environment where the US, China, and the EU dominate, it is clear that the EU fiercely seeks to enhance its strategic economic interests in regions where it is lagging. The EU's global trade footprint mainly covers China, the US, Russia, and Switzerland in terms of imports and exports. Although, the African States are eager to transition into emerging markets status, ultimately, the most favourable trade

¹²⁸ WA–EU EPA, art 109.

¹²⁹ WA–EU EPA, art 12.

¹³⁰ CA, art 55.

deal for them will trump all other considerations. The protracted negotiations of the still unaccomplished regional EPAs between most of the African regions have affected Africa–EU trade relations. The author supports the view that further negotiations are necessary to address the existing WA–EU EPA's shortcomings outlined. The concerns of the African partners can be alleviated if the EU party allows for a greater level of flexibility in its acceptance of African exports. This can be done by adjusting its relevant trade regulations, standards, and policies.

Pressure to revise EU non-tariff barriers will continue to rise with the growing European importing trend. However, in order not to engage in a 'race to the bottom,' the EU party should consider boosting the capacities of the African party through technology transfer and enhanced capacity building programmes. As the nature of EU exports shift towards services, it is imperative that the gamut of the Africa–EUEPAs should encompass trade in services, investments, and provisions on intellectual property and technology. In a price-sensitive EU market, the very low labour costs obtainable in Africa serve as a competitive advantage for the African side compared to their international and European counterparts. However, in this modern global trade environment, their aspiration is to achieve fair trading terms and to boost their competitiveness. The global and EU markets will continuously change as new challenges arise on the global stage, as well as with the prospect of further enlargement of the EU. There is no doubt that the Africa–EU regional EPAs will benefit the EU side. Within the EU itself, there are Member States which are net 'winners' and net 'losers' of the current Africa–EU trade regime. As already highlighted, Belgium and Germany are the largest exporters holding the biggest trade surplus in terms of trade with Nigeria, for example. However, countries like France, Spain, and the Netherlands (which have trade deficits with Nigeria, for example) could stand to gain a greater market share in African markets with the duty free access that would occur if more of the African regional EPAs enter into force. As EU MSs who have longstanding bilateral trade relations and well-established operations with Africa, they have an advantage over their EU MS counterparts who do not. However, the fierce economic diplomacy and internationalisation of EU trade values that could give all EU MSs the opportunity to gain (greater) access to third countries' markets and resources cannot be effective unless it addresses the concerns of the African party.

This article aimed to analyse Africa–EU trade relations from a particular regional perspective. It focused on the West African region as a trading bloc given its high trade flux with the EU trading bloc. The article concisely established the legal background underlying the WA–EU EPA, which has emerged as arguably the most contentious amongst all other ACP–EU trade agreements.

The article began by tracing the legal history of the WA–EU EPA in order to identify its position within the overarching framework of Africa–EU trade arrangements. Then the discussion progressed into mapping the state of play of all the ACP–EU EPAs. The focus turned to the WA region to consider key EPA concerns of Ghana and its hegemon neighbour Nigeria. The article then examined the legal concept of special and differential treatment and whether it is captured in the WA–EU EPA. Flowing from that, it analysed more closely the

development objectives that gives the EPA its *raison d'être*. The final chapter recalled the main points of the study in the wider global economy context of which the EPA is a part.

This article builds on existing research and information. It is hoped that the article could contribute to a better understanding of the enduring challenges towards consolidating a real trade rapport, and thereby shape the future of Africa–EU trade.

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