

Cariforum-EU Economic Partnership Agreement

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In this presentation I would like to address the following issues, mainly from a development perspective:

- Formal aspects
- Trade issues
- Social issues
- Institutional aspects
- Relation to the WTO

1. Formal aspects

WTO notification. This agreement has not yet been notified to the WTO, despite the fact that EU preferences are being granted under the EPA Regulation. And yet the WTO Transparency Decision provides that such preferences may only be granted once an agreement is notified to the WTO. Clearly, this is not in compliance with this Decision. What is also striking, I think, is how this relaxed attitude to WTO obligations, now that there is an initialled text, compares to the frenetic pressure to initial agreements before 31 December 2007 (pressure also reflected in the EPA Regulation). It does tend to make that pressure look a little manufactured.

Entry into force. Article 243 provides that ‘Pending entry into force of the Agreement, the European Community and the Signatory CARIFORUM States shall agree to provisionally apply the Agreement, in full or in part’ and that this shall be effected ‘as soon as possible, but no later than 30 June 2008’. This may well be a useful political statement, but as the statement is contained in an agreement which has no binding force until ratification it does not amount to an enforceable obligation. This reflects a wider problem with the notion of provisional application as mandated in treaties (Art 25 VCLT).

Accession. There is an imbalance in accession to the agreement. New EU Members automatically join the agreement (Art 247), whereas Caribbean countries may join but subject to terms and conditions set by the EU (Art 248). Perhaps this may be explained by the fact that new EU Members will be granting full DGQF access and so, unlike new Cariforum members, there would never be anything to discuss. But such a justification might somehow have been incorporated into the clause itself.

2. Trade issues

Bilateral safeguards. Art 25 provides for very relaxed triggers for bilateral safeguards on both sides. One can perhaps understand this in the case of agricultural safeguards (disturbances in the markets of like or directly competitive agricultural products or in the mechanisms regulating those markets), given the unusually generous degree of market access being offered in this sector. But the trigger is the same for non-

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agricultural products (disturbances in a sector of the economy, particularly where these disturbances produce major social problems, or difficulties which could bring about serious deterioration in the economic situation of the importing Party). This may be useful for the Cariforum side, but as far as EU safeguards are concerned, this is unprecedented in the EU's bilateral treaty practice. Perhaps some degree of asymmetry might have been appropriate here.

Infant industries. There is on the other hand an apparent asymmetry in the form of an infant industry safeguards clause. Art 25(5) sets out a special safeguards clause (applicable for ten years from entry into force) when increased imports cause or threaten to cause disturbances to a competing 'infant industry'. There is no definition of infant industry, though one might point to the definition of 'infant industry' in the SACU Agreement as 'an industry which has been established in the area of a Member State for not more than eight (8) years'. The point is that this clause looks good, but does nothing that cannot be done under the normal bilateral safeguards clause. Its only possible application is if 'industry' has a narrower meaning than 'markets' or 'sector' in the normal safeguards clause. This would be the case if 'industry' applied to a subset of legal entities operative in a 'market' or 'sector'. In the absence of a definition, this cannot be said with certainty. After all, the term 'domestic industry' in the WTO agreements (SGA, SCM and ADA) is defined in of 'product', which would be more in line with the normal safeguards clause here.

Subsidies. The EPA does something to reduce export subsidies on products going to the other side. (It bans new export subsidies and imposes reductions linked to tariff reductions on the other side (Art 28) and also permits WTO countervailing measures when subsidised exports harm domestic industry). But as far as market access is concerned, it expressly permits domestic subsidies even if they nullify market access commitments (Art 27(4)). Both sides, but more likely the EU, are therefore able to subsidise local producers with complete impunity. Even in the GATT 1947, which was notoriously lax on subsidies, domestic subsidies exempted from a national treatment obligation were disciplined by a non-violation remedy.

MFN. The EPA provides for MFN treatment on the EC side with respect to all later agreements and on the Cariforum side with respect to all later agreements with developed countries and developing countries making up more than 1% of world exports (Art 19). This clause has recently been attacked by Brazil and India (two 1 per centers) at the WTO who claim that this contradicts the spirit of the Enabling Clause. The idea is that the relaxed rules in the Enabling Clause for South-South Agreements are designed to promote South-South trade to the exclusion of South-North trade. This is not a very accurate interpretation of the history of the Enabling Clause (including statements in the mid 1970s by Brazil), nor does it match the philosophy of the multilateral trading system. On the other hand, these criticisms indicate that this extension of market access to the EU might not be positive for Cariforum, in the sense that they might well hinder the negotiation of new agreements with these countries. MFN clauses in the Pacific agreements with Australia and NZ have similarly undermined the EPA process there.

Rules of origin – cumulation. The EPA provides for full regional and bilateral cumulation but not cumulation with other ACP countries. This does not comply with the Cotonou Agreement undertaking (Art 37(7)) that EPAs will provide for no less favourable market access including rules of origin.

3. Social issues

Labour and environment. The agreement does include relatively strict wording – unique in the EU’s practice – ensuring high labour and environmental standards. In the investment chapter, Art 72 (Title II, Ch 2; behaviour of investors) requires the parties ‘within their own respective territories’ to take measures [to prohibit corruption]; to act in accordance with core labour standards [defined by the ILO]; and not to operate their investments in a manner that circumvents international labour or environmental obligations. The language does not however seem to include home state regulation. This seems to be excluded by the reference to ‘respective territories’.

This provision is fully subject to dispute settlement, including suspension of concessions.

More generally, the next provision Art 73 (Maintenance of standards) provides that:

[the parties must] ensure that foreign direct investment is not encouraged by lowering domestic environmental, labour or occupational health and safety legislation and standards or by relaxing core labour standards or laws aimed at protecting and promoting cultural diversity.

This provision is likewise fully subject to dispute settlement, including suspension of concessions.

Labour and environment are further regulated in Title IV (Chs 4 and 5) along the lines of the NAFTA model, which has continued in the practice of the NAFTA parties and some of those who have concluded bilaterals with them. The parties are obliged to ‘seek to ensure’ high levels of environmental and labour protection (Arts 184 and 192). They are also obliged not to lower existing standards to encourage trade or investment (Arts 188 and 193). On the other hand, at least with labour standards, the parties agree not to use these for protectionist purposes (Art 191).

Dispute settlement for these obligations is weaker. They are subject to dispute settlement but only if a special consultation procedure set out has failed (Art 204(6)), and even then, suspension of concessions is ruled out (Art 213(2)). There is an argument that those provisions which I have said are subject to full dispute settlement are subsumed in the latter provisions which are not, and therefore that the former provisions are also subject to only the limited form dispute settlement. There is certainly an overlap between Article 73 and Articles 188/193. However, there is no full overlap between Article 72 and these provisions; and for Article 73, such an argument runs up against the wording of the text.

In addition, it is relevant that the entire agreement is subject to the human rights clause set out in the Cotonou Agreement, which undoubtedly applies to serious violations of labour standards (and possibly environmental standards, if these are extreme enough: *Ogoniland*). Further, the EPA expressly permits any measures taken under Article 96 of that agreement (Art 241(2)). Those measures are defined as ‘appropriate measures’ and while this is not beyond dispute, in my opinion this can include the suspension of other agreements, including under the EPA. This was for example the interpretation of Australia in the context of the failed negotiations for a cooperation agreement with the EU in 1996.

4. Institutional issues

The political mechanisms in this agreement are fairly standard, with both sides afforded a veto power. One positive development, already mentioned, are the joint

Cariforum-EU Parliamentary and Consultative Committees, which, though consultative only, will hopefully add a more democratic element to the proceedings.

As for dispute settlement, this is quite sophisticated and there is little to be said by way of criticism. Perhaps one possible problem is the list of arbitrators, which the parties must agree on in advance (Art 221). It is not always easy to agree on such a list – after 15 years NAFTA still does not have one – and there is no default provision in case this is not agreed.

The agreement also permits the same dispute to be taken to EPA dispute settlement and WTO dispute settlement: a second bite at the cherry. The only condition is that the other proceeding must have ended. Of course, it can be quite a while before another proceeding has ‘ended’, if one includes implementation proceedings, and disputes on these.

I would also note that, in the EC, regional trade agreements (but not WTO law) can give individuals direct rights enforceable under EC law. This would probably apply under this agreement as well, as evidenced by the very broad provision given direct effect by the ECJ in *Chiquita Italia*.

5. WTO

Relationship to the WTO. This agreement is clearly negotiated in the context of WTO law, which is appropriate, especially given that this was a condition of EPA negotiations set out in the Cotonou Agreement. Many provisions are based on WTO rules or directly refer to them. This raises the question of the formal relationship of the agreement to the WTO. Here there is a clear element of deference, but it is ambiguous. So Article 242 states that

‘The Parties agree that nothing in this Agreement requires them or the Signatory CARIFORUM States to act in a manner inconsistent with their WTO obligations.’

But does it *permit* them to act inconsistently with WTO obligations? What about the suspension of concessions under the RTA? Take the example I mentioned earlier, that there could be a suspension of concessions in case one of the parties fails to make sure that investors comply with labour and environmental standards. The EPA itself recognises a potential problem here, as Article 222(3) states that

‘Nothing in the WTO Agreement shall preclude Parties from suspending benefits under this Agreement.’

This is a strange provision, as it is somewhat overreaching of the EPA to be talking about what the WTO Agreement does and does not permit. Moreover, Article 222(1) states that ‘[a]rbitration bodies set up under this Agreement shall not adjudicate disputes on each Party or Signatory CARIFORUM States’ rights and obligations under the Agreement establishing the WTO.’ These are not easy issues, but they do not seem to be very well resolved here.

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