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GLOBAL ECONOMIC SLOWDOWN: IMPLICATIONS FOR TRADE AND GROWTH IN SUB-SAHARAN AFRICA

Dipo T. BUSARI, (UNIDEP,Dakar, Senegal).

I.INTRODUCTION

The global financial crisis, which started in September 2008 in the advanced capitalist economies, particularly as a result of the financial crisis that hit the mortgage market in the United States of America (USA), has rapidly spread to other parts of the world in at least three dimensions—economic slowdown (recession), financial crisis, and credit crunch.[1] These dimensions were coming at a time when the whole world admits that Africa, particularly sub-Saharan African (SSA) countries, had never had it so good since the late 1970s in terms of export performance and growth. Prior to September 2008, average annual growth rate of per capita real GDP was above 5 per cent with some countries like Botswana, Angola, and Sudan achieving annual growth rates above 6 per cent. The source of growth has been largely due to impressive export performance and favourable international prices of the major exports from the sub-continent. This is largely as a result of huge demand for raw materials by other fast-growing countries such as China and India.

This impressive growth path has raised expectations about the ability of SSA countries in meeting the Millennium Development Goals (MDGs). It is expected that SSA countries will be able to use international trade to generate the required foreign exchange to finance growth and development and thus achieve the MDGs. Also, with such sustained growth, reliance on foreign aid is expected to decline as those reasons which calls for aid will eventually be eliminated. Furthermore, the core development challenge of poverty reduction (which is the first MDG) will be addressed as SSA countries trade in goods which are produced by the vast majority of the poor people.

In sum, all hopes were high that, given good governance and sound macroeconomic reform measures, resumption of growth in SSA countries—which seems to be sustained—will lift many SSA countries out of the low-income status by providing the necessary resources for financing development. Alas, the financial crisis which started in September 2008 in the Mortgage Market in the USA is now dashing all hopes that SSA countries will be able to finance development and meet the MDGs. In fact, chances that this century will not be lost by SSA countries have become very slim. The global economic slowdown which followed the financial crisis has led to a drastic fall in demand for traditional African exports subsequently leading to a rapid fall in the international prices of these traditional commodities of export. Effectively, growth seems to have been arrested once again.

This poses new (but unexpected) growth and development challenges. First is the drastic fall in international prices of major primary commodities that are fuelling growth in Africa. This implies that many SSA countries might witness drastic swings from fiscal and external current account surpluses to prolong deficits. Second, the global credit crunch could also translate to tighter access to international (trade) credit. Already, many SSA countries are witnessing massive reduction in Foreign Direct Investment (FDI) inflows while domestic stock markets are recording outflow of foreign investments and collapse in value of stocks. These are new challenges to recent recorded growth in the sub-region and can significantly constrain the achievement of the MDGs. The sub-continent that is expected to gradually reduce aid dependency may suddenly become in dire need of aid. With the economic crisis not easing fast enough, aid commitments by advanced economies will obviously not be met, thus there will be limited capacity by SSA countries to finance development.

Thus, the great concern here is the fact that this current growth crisis may have far-reaching development implications. In other words, the growth crisis can degenerate into a development crisis (AfDB, 2009a). Why this concern is real is the fact that SSA countries are now more integrated than before with the global economy through trade, FDI, and remittances. Thus, the crisis is expected to significantly impact SSA countries through reduced demand

[1]In broad terms, the crisis could be described as a financial crisis and a recession. Morris (2008), Eichengreen et al. (2009) and Taylor (2009) provide detailed review and analysis of the crisis.

for their exports and sharp decline in commodity prices. Many SSA countries are likely to be hard hit by lower remittances and FDI while aid flows are under threat (IMF, 2009). Thus, there are serious concerns that the growth crisis has grave implications for development.

However, with appropriate counter-cyclical policy measures it may be possible for SSA countries to ameliorate the impact of the crisis and even get out of the slowdown faster than expected. Though export is necessary for sustained growth and development financing in SSA countries, the current crisis raises further questions about the nature of African production, export, and relationship with the global trading system in general. The crisis did not originate from Africa but SSA countries seem to have borne a disproportionate amount of the impact.

As things are now, it is like if there is no full recovery in the advanced economies, SSA countries will also not recover fully. The resumption of growth in SSA countries seems to be conditional on the speed of recovery in the advanced economies. Should this be so? Are SSA countries responding appropriately to the crisis and in their own best interest? How best can macroeconomic policy measures be put in place to shield the highly vulnerable members of society who are the primary victims of this crisis? What should be the post-conflict relationship and role of SSA countries with whatever new global financial and trading architectures that may emerge? These and related questions beg for urgent answers. This study sets out to examine the actual and potential implications of the various dimensions of the crisis for external trade and growth in SSA countries and considers possible emergency/short-run policy response as well as desirable regulatory proposals and long-term responses which should be designed and implemented to ameliorate the impact of the crises and possibly insulate the sub-continent from future crises.

The rest of the paper is arranged as follows. Section 2 discusses some of the major and significant expected channels through which the financial crisis and recession are expected to impact on SSA countries. Section 3 goes ahead to examine if these expected channels of transmission are already impacting on SSA countries and thus link them to trade and growth performance of SSA countries. Section 4 examines the policy responses of SSA countries so far in dealing with the crises and review the effectiveness or otherwise of such policy measures. Section 5 proposes some important long-term policy measures that can be implemented by SSA countries in order to reduce the impact of the crises, while section 6 concludes the paper.

II. EXPECTED CHANNELS OF TRANSMISSION OF THE FINANCIAL CRISIS AND RECESSION

There are several potential direct and indirect channels through which the three (or two) identified dimensions of the crisis can affect any given economy. However, the validity and severity of these channels will depend on several factors such as the level of (financial) integration of the economy with the rest of the world, extent of export diversification/primary commodity dependence, major trading partners, extent of aid dependence, nature and mode of domestic production and exchange, some initial conditions—like level of external reserves—and so on. The primary focus of this paper will be on issues of trade and growth implications of the various dimensions of the crisis, while recognising the impact on other factors.

Given the nature and characteristics of exports of SSA countries and the level of financial integration with the rest of the global financial system, the initial direct impact is not likely to be from the financial (credit and liquidity) crisis but rather the collapse in global commodity trade arising from the economic slowdown (recession) in the advanced countries. It should be noted that the financial crisis preceded (but also led to) the economic slowdown. However, the economic slowdown in the real sector of the advanced economies is what is likely to impact immediately on SSA countries through a fall in foreign demand for SSA exports and subsequent collapse of the prices of these commodities. As aggregate demand shrinks in advanced economies the prices of traditional commodity

exports of SSA countries will collapse. Schema 1 traces and describes the potential impact the financial crisis and recession will have on a typical SSA country. In broad terms, Schema 1 demonstrates that there are four major aspects of the economy that will be immediately affected—fiscal balance, external current account balance, FDI flows, and remittances.

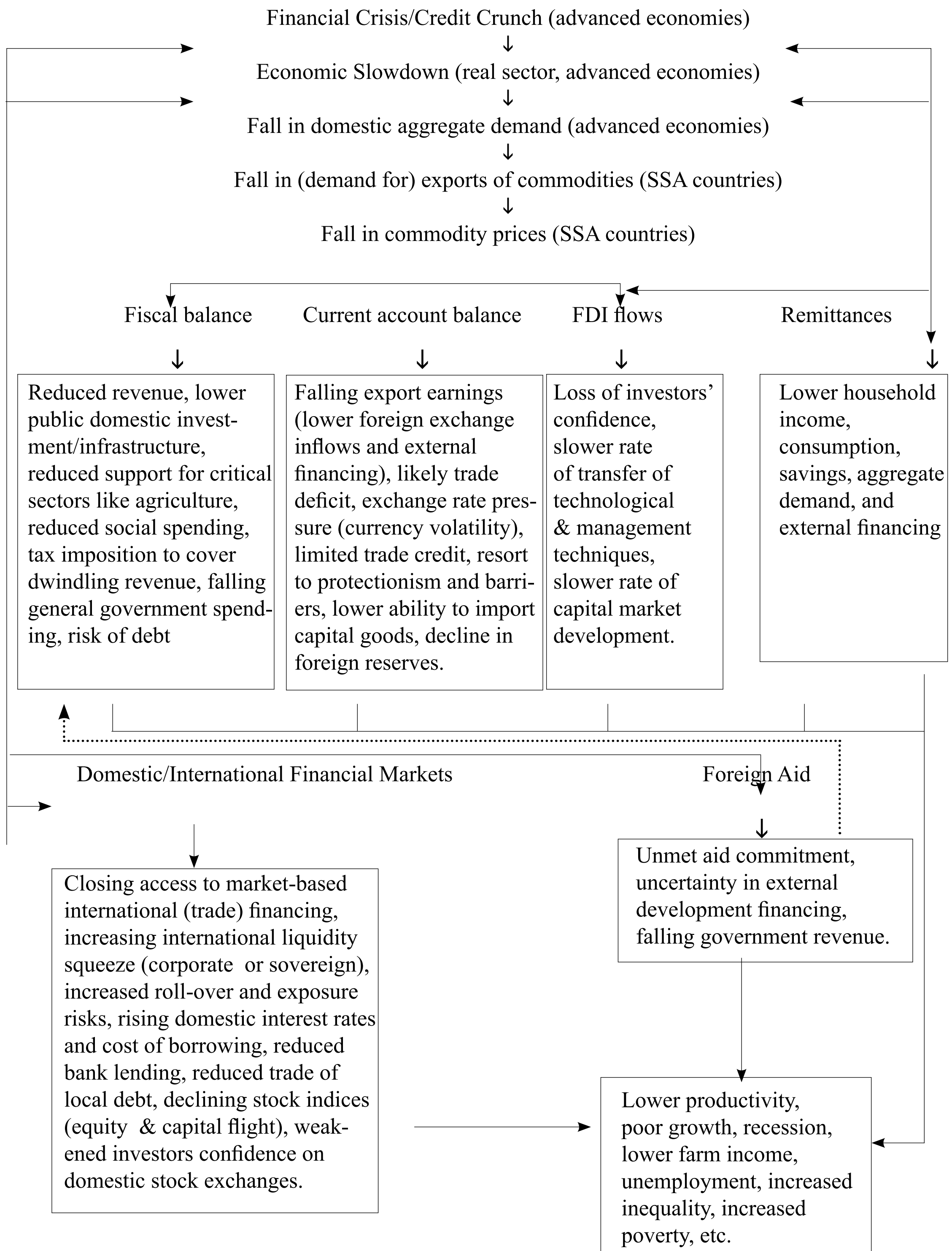
II.1 Commodity Prices-induced Effects

Theoretically, in terms of fiscal balance, it is expected that the fall in commodity prices will reduce government revenue leading to a fall in public investment in infrastructure, reduced spending support on critical sectors such as agriculture, reduced spending on social services, and so on. The fall in international prices of primary commodities will lead to reduced export earnings which imply lower foreign exchange inflows which are vital to development financing. In the extreme, countries can face trade deficit. All these are likely to put pressure on the domestic currencies of the various SSA countries. In general, countries might be tempted to impose trade restrictions in order to protect their external current account positions and the local currency. The ability to import intermediate capital goods will be constrained. Also, since most FDI inflows to Africa are in natural resources, a fall in the prices of these goods will discourage foreign investment in these sub-sectors. Some of the expected advantages of FDI such as technology transfer and the use of better management styles may be unrealised.

II.2 Non-Commodity Price-induced Effects

Apart from the fact that the crisis can lead to a fall in international prices of primary commodities which will then impact on the economies of these countries, there are some effects that are non-price-induced. They are as a result of the financial crisis and recession per se. For instance, economic slowdowns in advanced economies will slow down the flow of FDI to SSA countries even if prices of natural resources are not falling. FDI flows depend, among other things, on the health of the economies of the parent companies' countries. Another impact which is not price-induced is the issue of remittances. Due to the recession in advanced economies, employment will fall which implies that remittances by Africans living in the advanced economies will reduce. Lower remittances imply lower household income, lower income implies lower consumption and savings which will negatively impact on aggregate demand of the recipient economies. Remittances are a veritable source of external financing, thus lower remittances will imply reduced external financing. The financial crisis and the credit crunch can impact negatively on the domestic financial system depending on the level of financial integration with the global financial system. The crisis would reduce SSA countries' access to market-based international financing. Roll-over risks are also expected to increase as there are likely to be credit defaults and so on.

Schema 1: Possible Channels of the Impact of Global Crisis on SSA Countries



Source: Author's Expression.

With increasing international illiquidity, domestic interest rates are expected to rise in SSA countries which will

increase domestic cost of borrowing. For countries with developed capital markets and stock exchanges, there are likely to be a drastic decline in stock indices thereby significantly reducing the market value of many firms. This can lead to equity flight. Another non-price impact is the expected fall in the amount of aid flows to SSA countries.

Due to the financial crisis and recession, aid commitments are not likely to be fulfilled by donor countries thus leading to shortfalls in external financing. External debt is not likely to be an alternative source due to the international credit crunch. Many countries are likely to witness shortfalls in both aid-financed fiscal support and development financing thus slowing the pace of economic transformation.

In sum, the global financial crisis and recession are expected to affect SSA countries through the impact on the demand and prices of their major primary commodities of export and also through non-price effects, mainly through (net) resource flow to the continent. Both sources ultimately can translate to slower growth. In the next section, the paper attempts to examine what has been the experience of (and predicted impact on) SSA countries since the global crisis started.

III. ACTUAL AND PREDICTED TRADE AND GROWTH IMPLICATIONS FOR SSA COUNTRIES

III.1 Financial/Credit Shock

There is now a growing literature documenting the impact of the global financial crisis and recession on developing economies, particularly SSA countries. Several predictions have also been made regarding the expected impact of the crisis and recession on SSA countries. All economic and financial indicators point to the fact that grim times still lie ahead. Though the impact of the financial crisis and recession on SSA countries is expected to be less severe than in the advanced economies, the sub-continent is by no means immune. Studies such as Macias and Massa (2009), IMF (2009) and ActionAid (2009) argue that the implication of the financial crisis was not felt in SSA countries until around the third quarter of 2008. In general, two broad factors have been identified as responsible for the fall in direct and portfolio investments in SSA countries. The first being reduced capacity to invest and the second being the reduced propensity to invest (Macias and Massa, 2009). Both are attributed to the tight credit market, poor growth prospects, increased risk aversion, and reduced investors' appetite for risk.

This can be seen from the fact that the average growth rate of SSA countries fell from 6.9 per cent in 2007 to 5.5 per cent in 2008 and by January 2009, the IMF further reduced its forecast for growth for this year by 1.6 percentage points to 3.5 per cent. By April 2009, the IMF found itself further revising its forecast to a new projection of 1.7 per cent for SSA countries. It becomes easy to see that, coupled with the end of commodity boom, SSA countries' financial instruments such as bonds and even the equity markets have become unattractive to foreign investors.

Already, it is reported that, given the tight global financial market conditions, Ghana has abandoned its plan for a US$300 million debt issue, while Kenya is delaying the implementation of efforts aimed at securing a US$500 million Eurobond. Also, it is reported that Tanzania has postponed plans to issue Eurobond of about US$500 million, while Uganda has abandoned plans to issue Eurobond to fund infrastructure projects (Macias and Massa, 2009). The IMF (2008) reports that the value of SSA foreign currency denominated bond (Eurobond) in 2007 was US$6.5 billion, while in 2008, no single one came to the market. A grave concern here is the fact that, by the end of 2009, the United States of America was expected to have a budget deficit in excess of US$1000 trillion, which is expected to be financed by bond issues. This is likely to crowd-out SSA and other developing countries' private and public debt issuers (Macias and Massa, 2009). Evidence suggests that bank lending has been the hardest hit of all financial flows to developing countries. Macias and Massa (2009) point out that banks' total foreign claims on Zambia declined from $2908 million in June 2008 to $2607 million in September 2008, and Ghana experienced a similar drop over the same period. According to ActionAid (2009), bank lending to developing countries in 2008

was about 40 per cent of the 2007 level and projections for 2009 suggest that it could drop by as much as 100 per cent. This suggests that in 2009, instead of developing countries, witnessing positive net flows, there will be negative net flows. Though SSA countries are not heavily reliant on credit from foreign banks, available evidence points to the fact that "some countries had already seen the signs of a drop in foreign claims from the third quarter of 2008… The countries most exposed to a fall in international bank lending are likely to be those with a high share of foreign-owned banks (e.g. Ghana, Tanzania, Zambia, Uganda and Swaziland)" (Macias and Massa, 2009: 7).

A prominent fallout from the financial crisis is the rising cost of borrowing through bond issues by developing countries. As ActionAid (2009) points out, due to the financial crisis, international lenders are increasingly looking for less and less risky assets to invest in; the cost of borrowing through bond issues for poor countries has increased. The reason being that the interest rates charged to the US government when it borrows money through the issuance of bonds—which is regarded as the least risky of all loans—and the rate charged to developing countries when they try to borrow by issuing their own sovereign bonds—which is regarded as more risky—has increased from over 2.5 per cent in 2007 to about 7.5 per cent in 2008. In 2009, it has averaged about 7 per cent. Thus it is reported by ActionAid (2009: 5) that "the financial crisis is making borrowing more expensive to those countries that bear least responsibility for the crisis, while reducing borrowing costs in those countries that were actually responsible."

The impact of reduced net flows is also being felt in economies with equities market. Also, evidence suggests international traders are exiting in droves from stocks that appear risky (IIF, 2009). The risk rating of African financial systems has deteriorated and this has encouraged the flight of international equities traders. One major implication is that some countries have witnessed significant fall in their stock markets (see Table 1). It is reported that in 2008, investors withdrew $6.1 billion in South Africa and there are significant evidence of portfolio inflows reversal and capital flight in Kenya, Tanzania and Nigeria (IMF, 2009). According to AfDB (2009b), South Africa, Nigeria, Kenya, Mauritius and Côte d'Ivoire were among the most hit countries in 2008. It is reported that there are no indications that the situation will significantly improve in 2009, that in fact in Kenya, the Nairobi Stock Exchange (NSE) All-Share Index fell by 21.36 per cent from 30 January to 27 February and stock market capitalisation dropped by 21.35 per cent over the same period. In turn, the Nigeria Stock Exchange All-Share Index fell by 30.64 per cent in January and increased by just 7.2 percentage points in February. In Côte d'Ivoire, the BRVM Composite Index has continued to fall to date (AfDB, 2009b). Evidence suggests that portfolio equity flows have significantly slowed down in many countries and some countries are actually witnessing reverse flows.

Table 1: Stock index change in 2008 in selected SSA countries (%)

Index	% change in 2008
Nigeria All-Share Index	-45.90
Mauritius All-Share Indices	-36.20
NSE 20-Share Index	-34.10
JSE All-Share Index	-25.70
BRVM Composite Index	-10.70

Source: AfDB (2009b).

There are indications that remittances might show some resilience in the face of the financial crisis. However, the skewedness in terms of the flow of remittances makes it less effective in compensating for any negative net flows. For example, as reported by AfDB (2009a), of the top 10 ODA, FDI, and remittances recipient countries in Africa account for 46 per cent of FDI, 32 per cent of ODA and 34 per cent of remittances. The IMF (2009) points out that growth of remittances was flat in the second half of 2008, and is expected to be negative in 2009.

Furthermore, observers are of the opinion that the growth of FDI flows might reduce significantly. However, the sub-continent is not likely to witness significant outflow of non-equity foreign investment. UNCTAD (2009) predicts that FDI inflows to Africa are expected to continue to grow but at a lower rate of about 16.8 per cent compared to an average of 22 per cent before the crisis. IMF (2009) predicts that FDI to developing countries is likely to shrink significantly in 2009 and cites projections from World Economic Outlook (WEO) which indicate that FDI inflows for 2009 are expected to fall by as much as 20 per cent from their 2008 levels, compared to over 10 per cent growth that was projected in April 2008 by WEO. IMF (2009) argues that reduced profit margin of multinational corporations, difficult financing conditions, and volatile commodity prices are some of the factors that will hinder the inflow of FDI to Africa. Due to the concentration of FDI in the natural resource sectors in Africa, it is expected that FDI flows can be delayed or even cancelled due to falling commodity prices.

IMF (2009) reports FDI related to expansions of hydroelectric and mining projects has been delayed or suspended in Mozambique. Also, Macias and Massa (2009) report that the expected takeover of a South African mining conglomerate by Xstrata has been abandoned due to the economic crisis and fall in commodity prices. Furthermore, it is reported that in the Democratic Republic of Congo (DRC), most of the foreign mining companies have scaled back, postponed or completely abandoned their investment plans (AfDB, 2009b). AfDB (2009a: 5) reports that "due to the decline in global demand, copper production in the Democratic Republic of Congo (DRC) declined from 34,215 tons in June 2008 to 23,562 tons in October 2008. A similar trend is observed for cobalt and diamonds. As a result, 40 companies in the DRC extractive sector closed at the end of 2008 and over 300,000 jobs were lost."

It has been reported that ArcelorMittal, regarded as the world's leading steel company, has deferred indefinitely an Iron-ore project in Liberia. Currently, Malawi is on the verge of missing out on a gigantic uranium project. IDS (2009) reports that the Ethiopian Electric Power Corporation is concerned that its investment plans are likely to be severely affected by the crisis. Macias and Massa (2009) reports that in Tanzania, a US$3.5 billion investment in aluminum smelting had been postponed and a US$165 million nickel mining and extraction project had been rescheduled. In general it has been reported that Africa attracted US$88 billion worth of foreign investment in 2008 but FDI inflows plummeted in the first three months of 2009 by as much as 67 per cent.[2] A major reason adduced for this is the global economic crisis which has significantly reduced demand for commodities, which has been a major attraction for FDI in Africa, and particularly SSA countries. Thus, it is generally agreed that the prospects for FDI in Africa are intimately tied to the revival of global markets.

The financial crisis and economic slowdown have also been observed to have significantly lowered the flow of foreign aid to SSA countries. Thus, it is not just private capital flows that have been affected, but also official flows. Before the crisis, poverty-reducing initiatives being implemented by most SSA countries have led to significant inflow of official development assistance and other official aid to support poverty alleviation programmes. The Heavily Indebted Poor Countries (HIPC) initiative and the Multilateral Debt Relieved Initiative (MDRI) also provided avenue for significant flow of foreign official assistance to SSA countries. However, aid projections for 2009 have witnessed significant downward revision. Fosu and Naudé (2009) report that the value of aid from the UK has been reduced by as much as US$41 billion over the next seven years due to the shrinking of the UK economy and the depreciation of the pound sterling. Analysts are of the opinion that several aid commitments will not be fulfilled thus this will have negative impact on SSA countries whose fiscal budget have significant aid content.

III.2 Commodity Prices/Trade Shock

This shock comes directly from the recession in the advanced economies. It has led to lower aggregate demand and employment, reducing demand for exports of SSA countries thus crashing their prices. This shock has a more direct and faster impact on SSA countries than the financial shock. Exports of SSA countries have performed well some years prior to the crisis due to strong growth in countries such as China and India. In fact, the observed rapid growth of SSA economies prior to the crisis has been fuelled by impressive export performance. The growth has been largely export-led. However, with the collapse of aggregate demand in the advanced economies, many

[2] *http://news.yahoo.com/s/afp/20090918/wl_africa_afp/africaeconomyun.*

SSA countries have witnessed significant impact on current account balance, government revenue, and growth in general. Expectations have been significantly revised downwards. Expected external current account and fiscal surpluses are now turning into deficits.

The major oil-exporting SSA countries suffered significant drops in the international prices of their oil exports. The World Bank (2009) reports that oil prices dropped drastically from $133/barrel in July 2008 to $41/barrel in December 2008. However, by August 2009 some recovery could be observed as the price rose to above $70/barrel due to OPEC production restraint and expected demand increases occasioned by expected global recovery. In general, for most of the second half of 2009, oil prices were between $66/barrel and $72/barrel. The AfDB (2009a: 1) reports that "exports from the continent are expected to fall by more than USD 250 billion in 2009. Oil and mineral exports will suffer the largest losses. Nigeria and Angola alone could experience a combined shortfall of US$76.8 billion in exports receipts".

Also, it is reported that during the second half of 2008, non-energy commodity prices plunged 38 per cent. Oil prices fell 69 per cent between July and December 2008. Thus it is projected that there will be 42 per cent and 43 per cent decline in export in 2009 and 2010, respectively and that "African economies will likely suffer about US$578 billion in lost export earnings over the next two years, representing 18.4 per cent of GDP and five times the aid to the region over the period. Oil exporters will suffer the largest losses, with a shortfall of US$420 billion over the next two years. Mineral exporters in Zambia and the DRC together could lose about US$6 billion in 2009."[3] It is also reported that Uganda, a major coffee exporter, suffered a 34 per cent decline in coffee export in March 2009 when compared to the same period in 2008—amounting to a revenue decline from US$36.3 million to US$23.9 million (AfDB, 2009a). Thus, it could be observed that the impact of the crisis on major exports of SSA countries is through both price and quantity. Furthermore, projections suggest that Nigeria may witness a 34 per cent decline in export revenue in 2009 compared to 2007—which will come from a 5 per cent decline in production and a 31 per cent decline in oil price (AfDB, 2009a). In sum, AfDB (2009c) points out that the expected shortfall in export revenues will be in the neighbourhood of US$251 billion in 2009 and US$277 billion in 2010 for the continent as whole, with oil exporters suffering the largest losses.

An immediate fallout from this export revenue decline is the decline in trade tax revenue. (AfDB, 2009a) predicts that the continent is likely to suffer trade tax revenue shortfall to the tune of US$15 billion which will be in the neighbourhood of 1 per cent of the continent's GDP and 4.6 per cent of government revenue. It is predicted that major oil exporting countries will experience significant losses with Nigerian and Algeria suffering about US$4.6 billion trade revenue shortfall. As a group, trade revenue shortfall for major exporters is expected to be in the neighbourhood of US$8.2 billion—representing 4 per cent of government revenue—compared to US$6.8 billion for non-oil exporters—representing 5 per cent of government revenue. Thus, these trade tax revenue shortfalls will significantly impact on fiscal balance of the governments of SSA countries putting pressure on government spending on social support and other growth-inducing sectors.

Furthermore, prior to the global financial crisis and recession, many SSA countries had witnessed significant growth in trade in services, particularly tourism. The share of services in the total trade of countries like Cape Verde, Mauritius, Kenya, Uganda, Tunisia, and Morocco had witnessed significant increases over time. However, AfDB (2009a) reports that hotel operators and travel companies are already registering losses due to travel cancellations. Furthermore, the report indicates that in Mauritius and Tanzania, there have been significant reductions in the growth of tourism. For example, in Mauritius, the tourism industry contributes about 15 per cent of the GDP and tourism revenues were down by about 15 per cent in the last quarter of 2008 when compared to the same period in 2007. In Tanzania, tourism contributes about 17.2 to GDP and safari companies have reported up to 60 per cent cancellation in November 2008. There is no concrete evidence to suggest that things will improve in 2009 unless there are rapid recoveries in the advanced economies. Thus, for countries with high contribution of tourism to for-

[3] *http://www.carnegieendowment.org/publications/index.cfm?fa=view&id=22995*

eign exchange earnings, one will expect significant negative impact on government revenue (and thus spending) and the external current account balance.

Thus, the implications of the commodity prices/trade shock will largely be on the international current account, the fiscal balance of the government and FDI flows. Looking at the current account position of low-income countries (LIC), the IMF (2009: 16) posited that "On average, projected current account balances for 2009 have deteriorated by about 3 per cent of GDP since the April 2008 WEO, with a more pronounced decline in export growth than in import growth." With significant reduction in export growth compared to import growth, the current account position is expected to deteriorate further, leading to large reductions in foreign exchange reserves, thus wiping the gains of the immediate pre-crisis era.

III.3 Growth Implications of the Shocks for SSA Countries

Schema 1 shows that the final implication of both the financial and economic crises would be on economic growth with attendant implications for other variable that are directly and indirectly related with economic performance—employment, poverty, inequality, and so on.

First, the source of growth of SSA countries in the recent pre-crisis years have been largely due to favourable international prices of major primary commodities of exports (price effect) and increased demand for these goods (quantity effect). With limited capacity for diversification and value-addition in production and exports, the growth performance of SSA countries will continue to depend on the pace of recovery in other parts of the globe. Though as of September, 2009, there are signs of fragile recovery in countries like Japan, Germany, and even France, and while it is believed that the worst is over in the USA, these are not sufficient to generate immediate and strong demand for the exports of SSA countries. Thus, expectations of early growth resumption for SSA countries are still being treated with caution.

There are several forecasts that have been made about the expected growth performance of Africa in 2009 and even 2010. The, UN Economic Commission for Africa (UNECA), in May 2009, posited that Africa's growth rate would slow to a 20-year low of 2 per cent in 2009, from 5.1 per cent in 2008 and 6 per cent in 2007.[4] Also, the IMF in its May edition of African Economic Outlook (AEO) predicts that the sub-Sahara African economy will grow by about 1.5 per cent in 2009 before making a slight recovery to 4 per cent in 2010. There are also predictions that the entire continent should only look forward to achieving a growth rate of 2.8 per cent in 2009 in contrast to the pre-crisis expected growth rate of 5.1 per cent. Of this value, it is predicted that growth in oil-exporting countries in Africa will fall to 2.4 per cent compared to 3.3 per cent for the net oil importers.[5] Already there are indications that South Africa's economy will grow by about 1.5 per cent in 2009, the lowest in 17 years while Rwanda's economic growth rate will drop to about 5.3 per cent for 2009 and 2009 compared to an impressive rate of 11.2 per cent for 2008. There are expectations that small and open economies such as Botswana and Seychelles are going to be significantly impacted upon. The predictions are that gross domestic product in Botswana and Seychelles will probably fall 8 per cent and 10 per cent respectively (see footnote 4). Furthermore, due to lower oil output and weaker global energy prices, federal government revenues of Nigeria declined 32 per cent below target in the first three months of 2009. Thus, the more an SSA country is integrated into the global financial system and the more commodity-dependent it is, the more it will suffer the effects of the crises.

A worrisome feedback aspect in the whole crisis is that given decreasing export revenue, falling capacity to earn foreign exchange, declining capital inflows (such as remittances and earnings from tourism), it is easy for countries to dangerously run down external reserves. For example, AfDB (2009c) reports that the DRC has only few weeks of import cover. Thus, the capacity to import capital and intermediate goods for further production will be jeopardised—further constraining economic growth.

An encouraging issue is the fact that all projections indicate that Africa will still grow during the crisis but at a

[4]http://news.yahoo.com/s/afp/20090918/wl_africa_afp/africaeconomyun
[5]http://news.xinhuanet.com/english/2009-06/30/content_11627443.htm

much lower rate. However, staggered impacts are to be expected. For example, there are countries with weak economic fundamentals and are dependent on a single or few export commodity(ies), like Angola, Chad, DRC, and Nigeria. This group of countries will be heavily impacted upon. There are countries with strong economic fundamentals but are also dependent on a single or few export commodity(ies), such as Botswana, Algeria, and Cameroon. These countries are likely to show more resilience to the crisis. There are countries with weak economic fundamentals but less dependent on one export commodity, such as Tanzania, Ghana, and Ethiopia. This group is also expected to show some resilience to the crisis. And finally, there are countries with strong economic fundamentals and less dependent on one export commodity, such as Kenya, Tunisia, and Uganda. Barring, other circumstances, this group is expected to be least impacted upon.

The deceleration of growth and trade flows is, on the average, expected to increase government revenue in SSA countries by just 3 per cent in 2009 as against an average of over 20 per cent over the previous 8 years. Private investment is also expected to decrease by about 4 per cent while FDI inflow is expected to decline by between 10 per cent and 20 per cent. There is also the expectation that government expenditure will stagnate or even decline while public investment will decline by about 7 per cent.[6] The implications for poverty reduction and attaining the MDGs become obvious. Already, before the crisis, most SSA countries are lagging behind in terms of meeting the deadline for achieving the MDGs despite favourable growth. With the slow growth rates, achieving the MDGs at the stipulated time will become more difficult. It is also possible that in fragile states, there may be grave political implications of the slow growth process. In general, fiscal and external current accounts balances (as a percentage of GDP) are expected to be negative both within the range of -4 to -6 per cent.

IV. POLICY RESPONSES SO FAR

Prior to the global crisis, many SSA countries were already implementing far-reaching reform measures to usher in sound macroeconomic conditions, attract FDI, promote private investment, reduce inflation, and so on. These reform measures helped in mitigating the impact of the crisis on SSA countries. Thus, the impact could be described as less than expected. However, the situation does not suggest that all is well. Government revenues have declined significantly due to trade contraction and fall in the price of those primary commodities of export. So how have African countries coped with the global financial crisis and the recession so far?

IV.1 Revised Budgeting

This is one of the first things done by almost all SSA countries. Most governments have made significant revisions to budgeted government spending in the face of dwindling government revenue. Many development projects have also been suspended while in some cases there have been outright cancellations. This policy response, though expected, has the potential of delaying achieving the MDGs and slowing the pace of development. Social spending has also been significantly affected in many countries.

IV.2 Expansionary Monetary Policy

In many SSA countries, the relevant monetary authorities have embarked on expansionary monetary policy so as to stimulate aggregated demand. This has come largely in form of direct increase in money supply. This is aimed at boosting government revenue through seignorage and stimulating aggregate demand. The impact of this policy stance is mixed. Though many SSA countries have witnessed increases in aggregate price levels, it is yet to be analysed if they are directly as a result of the expansionary monetary policy stance of the authorities—a lot of things are happening at the same time.

IV.3 Banking and Equities Market Regulations

Many SSA countries have introduced new regulations in the banking system to protect the sector and avoid bank collapse. Countries that have large and internationally integrated banking sectors like South Africa and Nigeria have had to introduce stringent regulations to protect the system from contagion and systemic risks. However,

[6] *http://www.slideshare.net/OECD_Development_Centre/africa-and-the-global-crisis-impact-and-way-forward*

most banking systems in Africa are not highly integrated into the global financial system and as such are protected from the global financial crisis, though stress indices remain high for most systems. Many prominent stock markets witnessed significant drops in market values and as such, regulations were put in place to stabilise the markets and restore investors' confidence. However, it should be stated that many investors in the prominent stock markets have suffered significant loss in wealth due to the crash in the market values of these equities and many of these markets witnessed equity flights.

IV.4 Sector-specific Interventions and Assistance

Many countries have also undertaken direct interventions in some key sectors such as agriculture by providing assistance to farmers. Also, in many countries, the banking system has received financial support from the apex bank to prevent liquidity crisis and restore confidence. In general, key sectors in many SSA countries have received one form of support or the other so as to mitigate the impact of the global crisis and prevent compounded domestic crisis.

IV.5 Foreign Exchange Controls

A few countries have had to engage in foreign exchange controls to protect the value of their domestic currencies against major international currencies and also to prevent capital flight. Though this measure is not popularly used across the continent, some countries had to resort to its use. A major problem observers and analysts are worried about is that the introduction of exchange controls may gradually usher in the era of trade barriers and international capital restrictions. Significant decline in foreign exchange earnings have made countries like Nigeria to deliberately devalue their currency and introduce some controls in the transacting of foreign exchange.

IV.6 Countercyclical Fiscal Stimulus Packages

Many countries in Africa were able to inject some funds into their economies through a relatively modest fiscal stimulus package. However, how effective they are has not yet been fully analysed. Some of the funds have come in form of higher government deficit, support for the financial/banking system, and so on.[7] However, analysts are of the opinion that the effectiveness of the stimulus will depend on factors like the source of the funds, on what they are spent on, the size of the package, and so on. However, given the predicted export earning losses of SSA countries and the size of the stimulus injected, it is apparent that the stimulus will make little or no impact. The fact that some countries, such as Ghana, already have high deficit ratio implies that stimulus can crowd-out private investment and cause inflation if not well sourced and administered. Nigeria, South Africa, Egypt and Algeria are among the countries that have provided some sizeable stimulus packages.

IV.7 Short-term Borrowing from Breton Woods Institutions

As of May 2009, new IMF lending to Africa reached $US1.6 billion, doubling the figure for 2008.[8] The IMF has approved a total of US$545 million in emergency funding for Kenya and Tanzania, while Ghana and Mozambique are also discussing with the IMF for financial support. Other countries that have indicated that they will talk with the IMF include Ivory Coast, Ethiopia, Sao Tome and Principe and Zambia. Nigeria has also expressed interest in discussing with the World Bank for some financial support. Based on the nature of the impact of the crisis on the economies of poor countries, the IMF is exploring new lending instruments that will not require governments to tap IMF money immediately, but only when they need it. Also, the IMF has doubled the limits of its lending for its poorer borrowers, giving countries access to larger amounts of funding.

IV.8 Economic Monitoring Units

Countries have also responded by setting up crisis-specific economic intelligence and monitoring units to monitor the trend in the global economic system and evaluate how such activities are transmitting to the domestic economy and what policy responses are appropriate. The units are to provide advice to the relevant authorities on how best to design and implement policies to mitigate the impact of the global crisis on the economy and the citizens.

[7] *http://blogs.worldbank.org/africacan/a-fiscal-stimulus-for-africa*
[8] *http://www.reuters.com/article/latestCrisis/idUSN31397825*

V. BEYOND THE CRISIS: WHICH WAY FORWARD AFRICA?

V.1 Immediate pre-Crisis Conditions

The impact of the crisis on SSA countries seems to have been milder than expected. A major reason adduced for this is the fact that, prior to the crisis, many SSA countries had started putting in place sound macroeconomic environment and other reform measures that made economic fundamentals stronger than before. Many governments have succeeded in putting in place measures that help to nurture the private sector and enhance business climate indicators. Various kinds of business risks have reduced considerably in many countries and hitherto business-unfriendly countries have become very attractive to investors and also become more competitive. Here lessons are learnt about the importance of reform measures that promote private entrepreneurship, sound macroeconomic management and stability, growth and development in general.

Again, the fact that SSA countries are not too integrated into the global financial system also helped reduce the impact of the financial crisis. Also, banking systems in many SSA countries are still largely regulated which somewhat insulates them from the impact of the financial crisis. It should be pointed out that the financial crisis increased the stress index of many banks in Africa, but a general banking crisis is not envisaged. Also, thanks to the HIPC initiative and MDRI, African countries have almost totally exited external liabilities which had freed resources for development financing. It is unimaginable that the crisis had happened at the time when most SSA countries were still heavily indebted to various bilateral and multilateral foreign lending institutions. Thus, currently, the rate of capital outflow is much lower due to the lower debt burden. Much of the outflows witnessed are equity flight. Here lessons are learnt about how SSA countries want to integrate with the global financial system and the need for less reliance on foreign debt (and other foreign sources) for development financing.

It should also be mentioned that SSA countries had become more politically stable prior to the crisis. Though there are still patches of fragile political regimes, in general the political landscape of the continent has become more conducive to growth and development. This contributed to cushioning the continent against the effect of the crisis. Again, lessons are learnt on the need for good governance and a stable polity that ensures that a development-oriented state is created and entrenched.

Furthermore, the immediate pre-crisis era witnessed a more globally integrated Africa in terms of direction of trade than in previous periods. Africa has become less dependent on traditional OECD markets as trade with China, India, and Latin America increased significantly. Thus, this market diversification also contributed to mitigating the effect of the crisis on African countries. This does not discount the importance of OECD markets, but suggests the cushioning impact of market diversification. At a later stage though, when economies like China and India witnessed significant recession, SSA countries immediately felt the impact of the crisis. However, a lesson has been learnt on the importance of market creation and diversification.

V.2 Lessons and Issues for Consideration

Given the characteristics of most SSA economies and the impact of the crisis on government revenue, countercyclical fiscal response will have limited impact. At best, countercyclical policy responses will be emergency measures fit only for the short-run. Most SSA countries do not have the kind of external reserves that can sustain any meaningful stimulus package into the medium term. The crisis severely impacted on SSA countries because of the structure of their economies—aid dependency, primary commodity dependency, and so on. Also, suggesting increase in foreign aid to SSA countries at this time will be like looking for ice in the Sahara. Furthermore, in as much as the advanced economies are not fully recovered, FDI flows will not improve significantly. Thus, calling for increased FDI flows at this time will be futile. It is also disheartening that it may be increasingly difficult for SSA countries to gain trade access to the advanced countries since some of them are already introducing measures

to keep out foreign trade. Ultimately, what Africa needs is an endogenously driven rapid structural transformation of its various economies from rudimentary primary commodity-dependent economies to sustainable wealth-creating knowledge-driven economies. Short-run policy responses, though required as urgent interventions, will not achieve long-term objectives of moving the majority of the citizens out of poverty and ignorance. Thus, any long-term policy response will have to address these structural rigidities and deficiencies. Hence, the following issues would require urgent consideration by SSA countries.

V.2.I Level of Integration into the Global Financial System: China vs. South Africa Scenario

China and South Africa present two classic cases of the factors that can determine the extent of vulnerability of a country to the global financial crisis. Both are members of the G20 but have pursued different policies since the early 1990s. China has historically been less open to the global economy than many other developing countries and retains capital controls. Its financial system is also relatively closed. South Africa is at the other end of the spectrum. Since 1994, the government has adopted a strategy of extreme openness to the global economy. The South Africa equity market and banking system are largely dominated by foreign buyers. China is largely hit by the recession while South Africa—also a major exporter of goods—is being hit by both the financial and economic crises. As ActionAid (2009: 10) puts it, "While China is already being hit by the recession, its financial system looks resilient enough to survive more or less intact. However, South Africa, more integrated into precisely those global financial markets most affected by the crisis, is likely to be hit by both the recession and even more by the financial crisis, as those external sources of development finance on which it is most dependent dry up."

It is predicted that the total drop in Chinese export earnings between 2007 and the end of 2009 will be around 18 per cent which is estimated at 7 per cent of the pre-crisis GDP. Due to the relatively low international financial inflows, large domestic financial sector, high rate of domestic investment and high rate of domestic sourcing of development financing, it is predicted that losses to China's financial system between 2007 and 2009 will be just over 2 per cent of the country's pre-crisis GDP (WEO, 2008). It should be noted that the value of shares in the South African stock market held by foreigners rose from an equivalent of 2 per cent of GDP in 1995 to about 20 per cent in 2005. In 2007, foreign lending accounted for about 20 per cent of total bank credit (ActionAid, 2009). The projections are that export earnings in South Africa will be down by about 7 per cent from their 2007 levels or the equivalent of about 9 per cent of pre-crisis GDP. However, fall in flows due to the financial crisis—mainly accounted for by dramatic drops in bank lending and the value of equities—is predicted to be more than 15 per cent of pre-crisis GDP (ActionAid, 2009).This suggests that the exposure of the South African equity market and financial sector will make the impact more pronounced in South Africa than in China with a larger economy.

So what lessons can African countries draw from this and what are the appropriate policy implications?

- First, it must be confessed that the whole issue of financial globalisation has been more of risk than benefits to SSA countries. Globalisation promised massive inflow of development funds into developing countries. Much of these funds did not come as expected and now some countries risk development reversal as equities take their flight due to the crisis. Agreed, with limited capacity to mobilise domestic resources (in the short run), poor SSA countries will require external financing. The post-crisis global financial framework that will emerge should ensure that countries can get more productive and development-oriented external financing devoid of this kind of risks countries are facing now. International financial regulators must design a new system that effectively controls and manages risks and sudden shocks due to international financial flows. The current situation is a bitter lesson for a country like South Africa. SSA countries should exercise some caution in terms of the extent of integration of their financial system with the global financial system.

- Another lesson here is the issue of wholesome liberalisation. Africa might have to re-think this neoliberal policy, particularly in relation to the international capital account. The rate and speed at which equities flew out of Africa due to the global crisis is really alarming and disturbing. Should SSA countries fully liberalise the international capital account? The current experience suggests that doing that exposes SSA countries to speculative capital flows, tax evasion and increased capital flight. This has a depressing impact on domestic savings and increases dependency on external finance for development.

V.2.2 Need for Domestic Resource Mobilisation and Efficient Utilisation

Really, this is a point that needs no elaborate discussion. As it is said, experience is the best teacher. SSA countries must have realised the importance of domestic sources of development financing. International financial flows have gradually dried up and SSA countries are yet to record any meaningful success in terms of achieving the MDGs. So how best do they think they can finance development if not by exploring domestic sources? Again, the experience of China comes handy. China has succeeded to a large extent because it has relied on domestic resource mobilisation for development. There is evidence in the literature that suggest that domestic capital is the most stable source of development financing and has the highest pay-off in terms of development. External financing should be seen as complementary rather than the main source of development financing. By now, African countries must have realised the importance of domestically generated and financed development. Just within weeks of the crisis, the advanced economies mobilised over US$4 trillion to bail out various financial institutions and industries, yet aid commitments to SSA countries are unfulfilled. Africans have now realised that it has become increasingly difficult to rely on external development partners.

- Again, the basic lesson here is the importance of diversified sources of development financing and financial flows. SSA countries must now design appropriate mix of sources of development financing. Shock to the economy are inevitable and unpredictable, however, coping with shocks need not be ad-hoc. Predictable and reliable sources of development financing should be explored. Of course, how resources are deployed and used are also important. Corruption, waste, and mismanagement must be curtailed.

- Another important lesson here is that Africans must reclaim the debate on African development. Afri can development must be made endogenous in all respect—concept, strategies, tools, financing, implementation, and so on. Others should not be allowed to speak on behalf of Africans. African development must be home-grown, based on domestic investment and consumption.

V.2.3 Domestic Market Development and Market Diversification

The recession in the advanced economies affected SSA countries significantly because the advanced economies are the main markets for SSA primary exports. It is important for SSA countries to develop their internal markets and also hasten the various regional integration schemes. Currently, less than 10 per cent of African trade is regional. It is important that SSA countries explore the opportunities that regional integration can provide. This will reduce vulnerability to demand volatility coming from advanced economies. Domestic market development and regional integration are important if SSA countries are to shield themselves from global economic slowdown.

The basic lessons here are that SSA countries need to reduce their dependency, not only on primary commodity exports, but also on traditional OECD markets. Also, there is the need to diversify on the range of commodities offered for exports and to improve on value-addition. SSA countries need to pay more attention to the issue of regional integration as a veritable source of market diversification. The fact that some countries produce and export similar products is not sufficient to pay lip service to the issue of regional integration. The global crisis should be sufficient to galvanise the necessary political will to hasten regional integration and enhance South-South trade and cooperation.

V.2.4 Structural Reforms, Political Stability and Governance

It is important that SSA countries implement several structural reforms if domestic resources are to be effectively and efficiently mobilised and allocated. These reform measures are essential to overcoming infrastructure huddles and improving business environment. There is need for tax reforms that will make tax administration more efficient and increase government revenue; there is the need to put in place financial regulatory measures to control risks and reduce capital flight; there is the need to engage and partner the private sector in provision of infrastructure; there is the need to relax business regulations; there is the need to put in place measures to reduce cost of intra-African trade, and so on. Structural reforms that ensure investment in infrastructure are crucial to sustaining growth. This is one area that is generally deficient in SSA countries.

It is important that SSA countries continue to ensure that there is political stability so as not to discourage private investment. The relative stability within the continent should be sustained and consolidated. SSA countries will also have to improve on governance. All these will provide the required conducive environment to capital mobilisation for development. African countries have now realised more than ever that there is need for development to be home-grown. They have to take ownership of their development strategies and tools. Thus the necessary reforms have to be put in place to ensure that investment is profitable and with little risks. Political instability and bad governance are not conducive to home-grown development.

Again, an important lesson to be learnt here is the limitation of the market and the need for the state to be more involved in the development process. The state should partner all relevant stakeholders, like the private sector, civil society, and so on, in the development process. The global crisis reveals that there are still important roles to be played by the state, alongside the market, in the development process. The current global situation suggests that market failure is not significantly different from state failure, if not more costly. In fact, the current global crisis—which is due to market failure—is now being solved by the various states affected. African states must wake up to their development responsibilities; the market is not sufficient in the development process, and development should not be left to the market alone.

V.2.5 Having a Meaningful Voice in the post-Crisis Global Financial System

Unfortunately again, SSA countries seem not to be in the picture in terms of designing a post-crisis global financial system. In fact, meetings, grouping arrangements, and international governance institutions have largely excluded SSA countries (except South Africa in the G20). SSA countries were seemingly voiceless before and during the crisis, and appear to be so now after the crisis. It is highly likely that the post-crisis global financial system will not adequately take care of the interest of SSA countries. This must not be allowed to be so. The impact of the crisis on SSA countries implies that Africa deserves a better stake in the global economy. There should be increased and effective African representation and active participation in the various multilateral financial arrangements and institutions. Thus, it is important that SSA countries strongly define and articulate their interest and press for adequate representation in whatever post-crisis global arrangements that are being fashioned out, or else the airplane will take off as usual without some passengers on board.

V.2.6 Continued sector-Specific Targeting and Assistance

Because many African countries are exporters of primary agricultural goods, the agricultural sector in most countries engages about 60 to 90 per cent of the active labour force. This sector has been badly hit by the global recession and has suffered significant reduction in output and income. Farm income has reduced significantly and this will affect a large percentage of the active labour force. The consequences can be grave in terms of unemployment, poverty, and inequality, which could have significant negative political consequences. Thus governments may require intervening in this and similar vital sectors. Price/income support measures may be required despite falling government revenue. If this is not done, resources may move to other (speculative) sectors and when the global

system recovers, it may be difficult to re-allocate resource back to the vital sectors. Thus, countries which are leading exporters of such products may lose their competitiveness. Though, in many SSA countries, the banking system is not badly hit by the crisis, it is important that governments continue to support the system and ensure that prudent supervisory and regulatory measures are in place to prevent the banking system and the financial sector from unnecessary exposures.

VI. CONCLUDING REMARKS

It is rather unfortunate that a continent that did not contribute to the making of this crisis is this badly hit. However, it is a wake-up call to SSA countries. This global crisis should be seen in the context of development challenge rather than economic stabilisation. What is required now is complete shift in development strategy. Reliance on external sources of development finance, primary commodity exports, and traditional OECD markets should be re-examined. It is important that the continent empower its citizens economically so that a large domestic market can be created in the continent. The potentials are there, and all it takes is focused and visionary leadership that can install a development-oriented state. Despite the fact that most of the advanced economies are shrinking, China, India, and Brazil have growing economies. This is largely due to the fact that development is domestically cultivated and the populations are economically empowered to create adequate domestic demand. SSA countries must start looking inward if it is to minimise the impact of future external shocks on their economies. It is also rather unfortunate that, as it is, the way out for SSA countries depends on the pace of recovery by the advanced economies. There is need for rapid structural transformation of the economies of SSA countries. They are just too weak, fragile, and vulnerable. The nature, composition, and direction of exports have not changed significantly in the past four or five decades. Efforts at enhancing regional integration to create larger markets are at best rhetorical. It has become imperative that SSA countries become more sincere in this respect. The sub-continent is far from achieving the MDGs and now, with the current crisis, it is unlikely that any meaningful progress will be recorded in this respect. The current global crisis is already increasing the number of 'newly-poor' Africans and unemployment is expected to rise and government social spending is heavily threatened. The gains from the HIPC and MDRI programmes are rapidly being eroded. There is definitely a strong need for a change in development strategies.

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GLOBAL WARMING AND LIVESTOCK FARMING IN CAMEROON: IMPACTS AND IMPLICATIONS FOR POVERTY REDUCTION

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1. BACKGROUND

The potential of livestock to reduce poverty is enormous. In Cameroon, livestock are important livelihood means for the poor especially in the drought-prone areas of the Adamaoua and Northern regions. It is said that that the poorest of the poor who do not have livestock, if acquire animals, can help start a pathway out of poverty (HPI, 2001). Livestock make a significant contribution to food production through the provision of high-value protein-rich animal products; they indirectly support crop production through draught power and manure; and finally, they are the most significant source of income and store of wealth for smallholders (Swinton, 1988; Fafchamps et al. 1998).

In Cameroon, livestock contributes over 15 per cent to GDP and forms about 45 per cent of the agricultural GDP. More than 64 per cent of the land in Cameroon is arid to semi-arid lands characterised by low unreliable and poorly distributed rainfall and is mainly used for extensive livestock production and wildlife (INS, 2001). The Adamaoua and Northern regions have the highest incidence of poverty (about 65 per cent) and very low access to basic social services such as infrastructure and education facilities (Njong, 2008). In these regions the livestock sector accounts for 90 per cent of employment and more than 95 per cent of family incomes (INS, 2001).

INS (2001) reports that per capita livestock production and productivity in Cameroon have been stagnant over the last two decades. This has been attributed to a number of production and productivity constraints including, inadequate and inefficient infrastructure, lack of farm credit, inadequate funding for research and extension, etc. Outbreak of major animal diseases has also been a major factor affecting productivity. While the Ministry of Livestock, Fisheries and Animal Industries is gearing up to address the above issues, performance and sustainability of the livestock sector is quite vulnerable to climate variations. Climate can affect livestock both directly and indirectly. Direct effects from air temperature, humidity, wind speed and other climate factors influence animal performance: growth, milk production, wool production and reproduction (Houghton et al. 2001). Indirect effects include climatic influences on the quantity and quality of feedstuffs such as pasture, forage, grain and the severity and distribution of livestock diseases and parasites (Seo and Mendelsohn, 2006a). Further, climate change is likely to cause a rise in animal diseases that are spread by insects and vectors mainly due to temperature and humidity rises that favour their spread and growth. The potential importance of livestock farming for the livelihood of poor rural households has long been recognised but seldom quantified and analysed (especially in the Cameroon context).

2. The Problem

There has recently been increasing interest in the economic relationship between income sources and the welfare of households. Households may depend quite heavily on livestock farming activities to sustain their livelihood. Yet studies have neglected to explore whether income from livestock farming affects poverty. On another note, the effects of climate change on crops have been studied frequently, but there are very few analyses of its effects on livestock (see Seo and Mendelsohn 2006a; 2006b; McCarthy and Di Gregorio, 2007). A study of climate change impacts on agriculture must include an analysis of livestock impacts. This study is, first, an exploration of the extent to which livestock farming income affects our understanding of poverty. Second, the study investigates the effects of changing climatic conditions on livestock income. In a nutshell, the study seeks to answer the following questions: To what degree is livestock income poverty increasing or reducing? How does including or excluding livestock income affect our understanding of the underpinnings of household poverty? What are the determinants of livestock farming income in Cameroon? What are the impacts of climate change on livestock income and how do livestock farmers adapt? These are the core research questions that this study attempts to address.

3. Review of the Literature

A large number of agricultural studies on the effect of climate change have focused on crops (see Molua and Lambi; Sene et al. 2006). However, a large fraction of agricultural output is from livestock. Yet there is still very limited literature on the economic analyses of climatic effects on livestock. According to Adams et al. (1999) American livestock appear not to be vulnerable to climate change because they live in protected environments (sheds, barns etc.) and have supplemental feed (e.g. hay and corn). In Africa, by contrast, the bulk of livestock have no protective structures and they graze off the land. There is every reason to expect that African livestock will be sensitive to climate change. Seo and Mendelsohn (2006a; 2006b and 2008) are among the rare studies that have analysed the impact of climate change on livestock adaptation and selection of livestock species in Africa. In Kenya, some studies have investigated the response of livestock production to climate change (see Kabubo-Mariara 2008), land pressure and drought (Campbell, 1999; Kabubo-Mariara, 2005; McCarthy and Di Gregorio, 2007).

Also, quantitative studies of the relationship between livestock farming income and poverty are scarce. We could trace instead studies that show the importance of net revenue from extracting natural resources and environmental services when estimating poverty and inequality measures (see Cavendish, 1999; Mahapatra et al. 2005; Lopez-Feldman et al. 2007). To the best of our knowledge there has been no effort to estimate the impacts of livestock farm income on poverty, and also investigate the effects of climate variations on livestock income. The aim of this study is therefore to close this knowledge gap by providing new empirical evidence on these issues in Cameroon.

4. Methodology

4.1 Impact of Livestock Income on Poverty

a) Poverty Measures

To investigate the impacts of livestock income on poverty, we resort to a modified Foster-Greer-Thorbecke (FGT) class of poverty indices. Following the notation of Foster-Greer-Thorbecke (1984), let $Y_d = (Y_1, Y_2, \ldots, Y_n)$ represent household incomes arranged in increasing order of magnitude and let $z>0$ denote the poverty threshold. We may define the FGT (1984) poverty measure by:

$$P_\alpha(Y_d; z) = \frac{1}{nz^\alpha}\sum_{i=1}^{q} g_i^\alpha \qquad (1)$$

where n is the total number of households, q is the number of poor households, $g_i = z - Y_{di}$ is the income shortfall of the ith poor household and α is a weighting parameter that can be viewed as a measure of poverty aversion. The FGT index is attractive because it is not only decomposable and sub-group-consistent, but it also satisfies the axioms of transfer and monotonicity[9] (see Sen (1976). Equation (1) takes the alternative values of α = 0, 1, 2 in the analysis we are about to carry out.

When α = 0, the index becomes $P_0 = \frac{q}{n}$ ……………………………………..….. (2)

[9] That a reduction in the income of a poor household, *ceteris paribus*, increases the poverty measure (monotonicity) and that a pure transfer of income away from a poor household increases the poverty measure (Darlton-Pigou Transfer Axiom)

Equation (2) shows the proportion of the population living below the poverty threshold. That is, the incidence or the head count of poverty.

The head count index, while intuitive and easy to interpret, has some drawbacks. Among other things, it treats poverty as a discrete rather than continuous characteristic. The head count measure of poverty does not change if the incomes of very poor households increase but not enough to put them above the poverty line. Similarly, the head count measure does not increase if only those below the poverty line face a negative shock that decreases their income.

To provide a more complete picture of how poverty changes under different scenarios, the poverty gap and sensitivity (poverty gap-squared) measures will be estimated in addition to the head count measure. The poverty gap measure corresponds to α = 1 and is calculated using the formula:

$$P_1 = \frac{1}{nz}\sum_{i=1}^{q}(z - Y_{di}) \qquad (3)$$

Equation (3) reflects how far below the poverty line the average poor household's income falls (i.e., the depth of poverty). If the income of a poor household increases but not enough to take it above the poverty line, total poverty as measured by this index will decrease (even though the head count measure does not change).

When α = 2 we obtain the poverty severity index which is estimated with the help of the formula:

$$P_2 = \frac{1}{nz^{\alpha}}\sum_{i=1}^{q}(z - Y_{di})^{\alpha} \qquad (4)$$

Like the poverty gap measure, it is sensitive both to the head count and to changes in incomes of households that remain in poverty. However, it accords a greater weight to poor households who are further away from the poverty line.

Foster-Greer-Thorbecke (1984) presents a decomposition of the poverty index by population subgroup. In this study, we follow an alternative decomposition approach by Reardon and Taylor (1996) who propose a simulation method to decompose the FGT (1984) poverty measure by income source. To simulate the impacts of livestock income on poverty we decompose $P(Y_d, z)$, by substituting the sum of income across the different sources for Y_{di} in the FGT poverty index. This gives:

$$P(Y_d; z) = \frac{1}{nz^{\alpha}}\sum_{i=1}^{q}(z - \sum_{k=1}^{K} y_k)^{\alpha} \qquad (5)$$

The impact of a small percentage change in livestock income, e, on poverty, $dP(Y_d; z)/de$, is given by:

$$\frac{dP(Y_d; e; z)}{de} = \frac{1}{nz^{\alpha}}\left[\sum_{i=1}^{q_0} -\alpha g_i(e) - \sum_{q^-} g_i(e)^{\alpha} + \sum_{q^+} g_i(e)^{\alpha}\right] \qquad (6)$$

where q_o denotes the number of households in poverty both before and after the change in environmental income, and $q-$ $(q+)$ denotes the number of households that leave (enter) poverty as a result of the income change. If livestock income is poverty-reducing, the third term, $\sum_{q^+} g_i(e)^{\alpha}$ drops out, and the poverty effect is negative (i.e., poverty decreases), or at least not positive. It would be interesting to empirically determine the extent of this poverty effect.

The poverty threshold we shall consider in our analysis is that computed by the National Institute of Statistics using the food energy intake approach in 2001. The poverty indices and simulations shall be computed using DAD 4.4 Statistical Package by Duclos et al. (2005) and the Distributive Analysis Stata Package (DASP) developed by Araar (2006). Descriptive statistics and Heckman correction regression shall be analysed with STATA version 9.2.

b) Determinants of Livestock Farming Income

Use of farm data to estimate the determinants of livestock farming income may be complicated by the econometric problem of sample selection bias. Livestock income is observed only for those households who engage in livestock

farming activities (it is unobserved for those who do not carry out this activity). We may be tempted to consider only those households rearing livestock. In this case the data would be non-randomly selected or incidentally truncated and we run the risk of encountering a sample selection bias problem which will generate unreliable parameter estimates. In order to correct for the sample bias problem, the Heckman's two-step estimation procedure would be applied, as suggested by Greene (2003).

To fix ideas we can express the household data in terms of a binary variable with 1 if household is engaged or participates in livestock farming, and zero otherwise. When the binary variable is 1, another variable, expresses the household's observed livestock income. In the simplest form, the model can be expressed simultaneously using participation and valuation equations as follows: First, we define a binary variable, *Z,* for the participation/selection equation and *Y* for the valuation or income equation, conditional on two latent continuous variables Z* and *Y** such that (see Fonta and Omoke 2008):

$Z^* = x_i^{'}\alpha + \varepsilon_i$

$Z_i = 0$ if $Z_i^{'} \leq 0$ Participation Equation ………………. (7)

$Z_i = 1$ if $Z_i^{'} > 0$

$Y^* = w_i^{'}\beta + \mu_i$

$Y_i = Y^*$ if $Z_i^{'} = 1$ Valuation Equation …………………. (8)

Y_i is not observed if $Z_i = 0$

where, the latent variable *Y ** is the observed household livestock income; x and *w* are matrices of demographic and other socio-economic covariates such as; educational attainment of household head, gender, age, livestock practices, household size, etc. α and β are vectors of parameters to be estimated. ε_i and μ_i are two error terms with joint cumulative density functions, and assumed to have a bivariate normal distribution with mean zero and correlation coefficient ρ. When ρ = 0, the two equations are independent and the parameters can be estimated separately (Strazzera et al. 2003).

The conditional expected value of Y_i conditional on Z =1 and on the vector w_i is expressed as:

$E[Y_i / Z = 1, w_i] = w_i^{'}\beta + \rho\sigma_j\lambda(x_i^{'}\alpha)$ ………………………………………….. (9)

where $\lambda(x_i^{'}\alpha) = \varphi(x_i^{'}\alpha) / \Phi(x_i^{'}\alpha)$ is the inverse Mills ratio, and φ and Φ are the standard normal density and standard normal functions respectively.

Equations (7) and (8) would be estimated using the Heckman's two-step approach because of its computational simplicity. The Heckman's procedure (Heckman, 1979) is carried out in two steps. Step 1, a probit regression is computed to obtain a consistent estimator of α and then the estimated α is used to estimate the inverse Mills ratio (λ) for each household. Step 2, the estimated λ is used as an instrument or regressor in Equation (9) and allows us to estimate *w* and ρ consistently by OLS method.

A by-product of the two-step approach is a relative simple test for identifying the presence of sample selection bias. Under the null hypothesis of no selection bias, (i.e ρ = 0)*,* the usual formula provides a consistent estimate of the covariance matrix of *w*. Under the alternative hypothesis ρ ≠ 0, Heckman suggests that we use the t-test of the coefficient on the λ variable as a test of sample selection bias (Melino, 1982). The Heckman's two-step approach will be implemented with the help of STATA version 9.2.

4.2 Impact of Climate Change on Livestock Income

a) Theoretical Framework

Studies of the impact of climate change on agriculture and animal husbandry employ the Ricardian analysis (Mendelsohn et al. 1994). The approach is a cross-sectional model that takes into account how variations in climate change affect net revenue. Following Seo and Mendelsohn (2006a), we start by assuming that the farmer maximises net income by choosing which livestock to purchase and which inputs to apply:

$$Max\pi = P_{qj}Q_j(L_G, F, L, K, C, W, S) - (P_F F + P_L L + P_K K) \quad (10)$$

where: π is net income; P_{qj} is the market price of animal j; Q_j is a production function for animal j; L_G is grazing land; F is feed; L is a vector of labour inputs; K is a vector of capital inputs; C is a vector of climate variables; W is available water; S is a vector of soil characteristics; P_F is a vector of prices of each type of feeds; P_L is a vector of prices for each type of labour; P_K is the rental price of capital.
The farmer chooses the species *j* and the number of animals that maximises profit. The resulting net income can be defined as:

$$\pi^* = f(P_q, C, W, S, P_F, P_L, P_K) \quad (11)$$

The Ricardian function is derived from the profit maximising level of equation (11) and explains how profits change across all the exogenous environmental factors, such as temperature and precipitations, facing a farmer. The change in welfare (ΔU) resulting from climate change from C_0 to C_1 can be measured using the Ricardian function as follows:

$$\Delta U = \pi^*(C_1) - \pi^*(C_0) \quad (12)$$

The change is beneficial if it results in an increase in net income and harmful otherwise.

b) Model Specification

In this study we estimate a reduced form of Ricardian model for net livestock income as follows:

$$\pi = \alpha_0 + \alpha_1 T + \alpha_2 T^2 + \alpha_3 R + \alpha_4 R^2 + \alpha_5 Z + \varepsilon \quad (13)$$

where T and T^2 capture levels and quadratic terms for temperature, R and R^2 capture levels and quadratic terms for precipitation. Z is a vector of socio-economic variables and ε is a random disturbance term. The quadratic terms for temperature and precipitation are expected to capture the nonlinear shape of the climate response function.
From equation (13), we can derive the expected marginal impact of temperature and rainfall changes on livestock income as in equations (14) and (15) respectively:

$$E\left[\frac{\partial \pi}{\partial T}\right] = \alpha_1 + 2\alpha_2 E(T) \quad (14)$$

$$E\left[\frac{\partial \pi}{\partial R}\right] = \alpha_3 + 2\alpha_4 E(R) \quad (15)$$

To understand what is behind the impact estimates, we analyse the farmers' choice of animal species using a multinomial logit model (Seo and Mendelsohn, 2008). Following McFadden (1981) the probability to select a species *j* can be written as follows:

$$P_{ji} = \frac{e^{Z_{ji}\gamma_j}}{\sum_{k=1}^{J} e^{Z_{ki}\gamma_k}} \quad (16)$$

The complementary analysis provided by Equation (16) measures how farmers alter their choice of animals depending on climate conditions.

5. Data and Descriptive Statistics

5.1 Data

This study is based on secondary data obtained from a project entitled *Climate Change Impacts on and Adaptations of Agro-ecological Systems in Africa* which was funded by the Global Environmental Facility (GEF), Center for Environmental Economics and Policy in Africa (CEEPA) and the World Bank. The data are in two main sections: household and climate data.

products and transactions, and relevant costs.

b) Climate Data

In addition to the household data, each farm surveyed was assigned a unique identifying code enabling it to be matched with spatially referenced satellites and ARTES (Africa Rainfall and Temperature Evaluation System) climate data. Temperature data came from satellites which measure temperatures twice daily via a Special Sensor Microwave Imager mounted on US Defense Department satellites (Basist et al. 1998). The ARTES dataset was interpolated from weather stations by the National Oceanic and Atmospheric Administration based on ground station measurements of precipitation and minimum and maximum temperature (World Bank, 2003).

5.2 Descriptive Statistics

The key household variables of interest for this paper include diversified livestock types held by farmers, costs associated with livestock inputs and incomes from livestock products. The data indicate that the major types of livestock in Cameroon are beef cattle, dairy cattle, goats, sheep and chickens. Other less frequently recorded animals include breeding bulls, pigs, oxen, camels, ducks, guinea fowl, horses, bees, and doves. The major livestock products sold were milk, beef and eggs.

Though this study is based on livestock activities, most of the farmers earned income from both crops and livestock. The income sources captured in this survey may then be booked under one of three categories: farm crop income, livestock income and non-farm income (defined as income received from all wage/salary activities, transfers; etc). To calculate the net income derived from crop farming, the quantity of each crop sold was multiplied by the local market price of the crop less input costs (such as transportation cost, cost of hiring of equipment/pesticides, cost of man hours employed, etc). Net livestock income from livestock farming was computed by multiplying the number of each animal and quantity of livestock product by its unit sales price less the associated transaction costs respectively. The survey gives information about non-farm income (wages/salaries, pension, gifts, remittances, etc). This permitted us to compute total net household income as:

Total net household income= net farm crop income + net livestock income + non-farm income

The descriptive statistics for the 801 sampled households are displayed in Table 1.

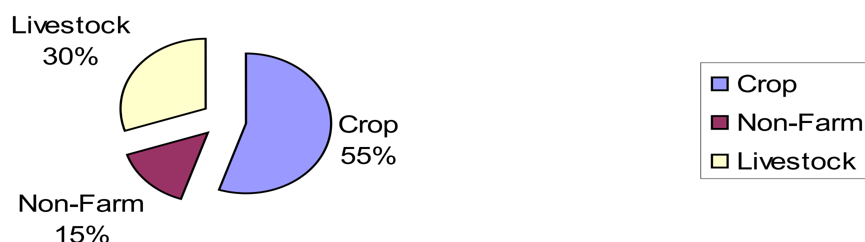
Table 1: Descriptive Statistics for the Sampled Households

Variables	Obs.	Mean	Std Dev.
Household size	765	6.27	3.72
Age	801	42.67	23.76
Distance to market (Km)	758	9.53	33.34
Electricity	795	1.23	0.42
Gender	801	1.18	0.38
Marital Status	797	1.36	0.71
Education (No. of years)	786	7.4	5.12
Farm Crop Income (Fcfa)	764	586699.48	849338.25
Non-Farm Income(Fcfa)	800	155802.28	218635.68
Livestock Income (Fcfa)	763	316682.28	959561.44
Total Household Income (Fcfa)	763	1064890.26	1525596.60

*Source: Summarised by author from data bas*e

Observe in Table 1 that the average age of household heads that participated in the survey was 42.67 years. In terms of distance from household units to the nearest market, the average distance was about 9.53 kilometres. By educational attainment, the average year of schooling for the sampled households was about 7.4 years (primary level). The average household size for the sample was about 6 members: with an average household income of about 1064890.26 Fcfa; derived from farm crops (586699.48F cfa), non-farm activities (155802.28 F cfa) and livestock farming (316682.28 F cfa). We display the distribution of total household income by income sources in figure 1.

Figure 1: Distribution of Total Household Income by Income Sources



Source: By author

Observe from Figure 1 that average livestock income accounted for about 30 per cent of average total household income. The data therefore makes it possible to test for the influence of livestock income on Cameroonian total household income.

The data show that Cameroonian households hold a diversified portfolio of animal species and derived livestock products. The major livestock types, average endowments and prices are presented in Table 1A. The table shows that the largest livestock holdings are chicken, goats, sheep, pigs and beef cattle and dairy cattle. Consequently eggs, beef and milk are the main livestock products. In Table 2A, we present the average sales of livestock products and prices.

The large standard deviations in the number of livestock and product sales across all species portray high inequalities in livestock endowments in Cameroon. Imperfect livestock markets make it difficult to obtain accurate prices of animals and products, more so where most of the products are for home consumption. For this reason, we followed Seo and Mendelsohn (2006a) to use the median prices for each animal and livestock products in each district in order to make prices robust.

6. Empirical Results

6.1 Livestock Income and Poverty

Table 2 reports the analyses of poverty with and without livestock income at the national and regional levels. The analyses are based on the 2001 poverty line established by the National Institute of Statistics (INS, 2002) at 345535 F cfa per capita.

Table 2: FGT Index with and without Livestock Income at Regional and National Level

Region	FGT(α=0)	FGT(α=1)	FGT(α=2)
Adamoua (n=30)			
With Livestock Income	0.033	0.017	0.009
Without Livestock Income	0.060	0.029	0.016
Difference (percentage points)	0.818	0.705	0.777
Centre (n=101)			
With Livestock Income	0.495	0.185	0.101
Without Livestock Income	0.802	0.316	0.168
Difference (percentage points)	0.620	0.708	0.663
East (n=100)			
With Livestock Income	0.220	0.086	0.047
Without Livestock Income	0.350	0.133	0.071
Difference (percentage points)	0.591	0.546	0.510
Extreme Nord (n=30)			
With Livestock Income	0.021	0.016	0.010
Without Livestock Income	0.033	0.028	0.016
Difference (percentage points)	0.571	0.750	0.600
Littoral (N=100)			
With Livestock Income	0.240	0.086	0.042
Without Livestock Income	0.400	0.127	0.059
Difference (percentage points)	0.666	0.476	0.404
North (n=40)			
With Livestock Income	0.175	0.140	0.118
Without Livestock Income	0.312	0.224	0.191
Difference (percentage points)	0.782	0.600	0.618
North West (n=100)			
With Livestock Income	0.550	0.309	0.219
Without Livestock Income	0.680	0.394	0.275
Difference (percentage points)	0.236	0.275	0.255
South (n=100)			
With Livestock Income	0.150	0.076	0.051
Without Livestock Income	0.210	0.093	0.062
Difference (percentage points)	0.040	0.223	0.215
South West (n=100)			
With Livestock Income	0.320	0.219	0.184
Without Livestock Income	0.380	0.260	0.222
Difference (percentage points)	0.060	0.187	0.206
West (n=100)			
With Livestock Income	0.430	0.256	0.192
Without Livestock Income	0.540	0.318	0.232
Difference (percentage points)	0.255	0.242	0.208

Region	FGT(α=0)	FGT(α=1)	FGT(α=2)
Entire Sample (N=801)			
With Livestock Income	0.302	0.153	0.105
Without Livestock Income	0.433	0.208	0.137
Difference (percentage points)	0.433	0.359	0.307

Source: Computed by author using DAD 4.4

Table 2 shows that when income from livestock activities is ignored or set to zero, poverty at the national level increases in all three cases of the FGT index measures; increasing by 0.433 percentage points (when α=0), by 0.359 (when α=1) and by 0.307 points (when α=2). This indicates that when livestock income is normalised to zero the incidence of poverty shifts from 0.302 to 0.433 indicating that about 43.3 per cent of the population is further pushed into poverty. This suggests that livestock income plays an important role in the welfare of Cameroonian households.

Observe from Table 2, that the effect on poverty is substantially lower for the entire sample than for most of the regions. For instance, when livestock income is neglected the head count measure for the nation increases by 0.433 percentage points compared to 0.818 points for Adamoua, 0.782 points for North, 0.666 points for Littoral, 0.620 for the Centre, 0.590 for East and 0.571 percentage points for the Extreme North regions respectively. The poverty gap and severity measures reveal a similar pattern of greater sensitivity of poverty at the regional levels than at the national level. These differences are explained by the fact that in the national sample a smaller proportion of household income is derived from livestock farming activities than in the regions. This is not surprising when one considers that the proportion of households in these regions (especially the northern regions of the country) involved in livestock farming is more than the proportion of households in livestock farming in the country as a whole.

The simulation results show a similar trend. To evaluate the potential poverty effects of a change in livestock income we calculate the three FGT measures for a 1 per cent change in livestock income. When livestock income decreases by 1 per cent, average poverty increases by 0.043 percentage points (when α = 0), by 0.156 (when α =1), and by 0.256 (when α =2) respectively. Our simulation results therefore suggest that ignoring livestock income when estimating poverty measures in Cameroon would substantially overestimate the impacts on household poverty. This is all the more pronounced at the regional levels, especially at the northern Saharan part of the country where most households depend on livestock activities for their livelihood. If income from these activities is set to zero, then the poverty measures from these regions would be unduly high. The impact seems to be greater on the poverty depth and severity measures than on the head count measure.

6.2 Determinants of Livestock Farming Income

Out of a total of 801 households, about 452 households (56.5 per cent) reported deriving their income from livestock farming while 348 households (representing about 43.5 per cent) reported having no livestock income. Ordinarily, in estimating the determinants of livestock farming income for the sampled households, the most convenient approach is to discard those with no livestock income and use only the selected sub-sample of households with livestock income. However, proceeding in this manner could lead to a sample selection bias.

In the methodology section we expressed two types of equations to determine the factors that influence livestock income and correct the selection bias: the participation or selection equation (eq.7) and the valuation or livestock income equation (eq. 8). The Heckman's two-step correction technique is used to estimate the equations. Starting with the participation equation to explain included versus excluded households, we estimate a reduced form probit equation to identify some demographic and socio-economic variables of the sample that would likely influence a household's decision to participate in livestock farming, but are assumed not to influence the magnitude of the resulting livestock income. The dependent variable of the selection function is binary: it takes the value of 1 when

the household participates in livestock activity and the value of 0 if it does not. Among the identified explanatory variables related to a household decision to participate in livestock farming are: education level; household size; livestock extension services; the land size of the household; and total household income per capita.[10] The results of the probit estimation are reported in Table 3.

Table 3: Probability of Participating in Livestock Farming
Dependent Variable : Participation=1 ; Non-participation=0

Variable	Coefficient
Constant	2.191***
	(13.59)
Education	-0.773**
	(-1.61)
Household size	0.010***
	(3.01)
Extension Services	0.256***
	(2.41)
Household income per capita	(0.051)***
	3.48
Land size of household	-0.269**
	(-2.02)
Pseudo R^2	0.085
% correctly predicted	83.4
Number of observations	801

Source: Computed by author using STATA 9.2

Note: The t-values are presented in parentheses.
*** indicates coefficient significant at 1% level; ** indicates coefficient significant at 5% level; * indicates coefficient significant at 10% level.

Table 3 reports the probit estimates of the probability of a household participating in livestock farming. The signs of the coefficients of the variables in the participatory equation all make intuitive sense. The educational attainment of household head plays a negative role in its livestock participation decision. This is confirmed by its coefficient, in Table 3, which is negative and highly significant. Most educated household heads have greater white-collar job opportunities, and are therefore less likely to engage in livestock activity. The larger the household size, the more the availability of labour and the higher the probability to participate in livestock farming. Households that receive livestock extension services participate more in livestock farming than non-receiving households. However, its coefficient in the model has a negative sign. This may suggest that the higher the level of subventions (transfers) received, the less likely the probability to participate. The per capita household income coefficient is positive and significant which suggests that this factor would favour livestock rearing decision. On the contrary, the lack of household land reduces the likelihood of participation in animal husbandry.

In the income equation, the dependent variable is the natural logarithm of livestock income. We introduce the following into the income equation as independent variables: age, squared age, gender, households below the poverty line (poor households), and most importantly we introduce the inverse Mills ratio which comes from the probit estimation equation so as to correct the sample selection bias. The results of the estimation are displayed in Table 4.

[10]Some household characteristics such as age; distance to market; possession of electricity; marital status etc. that were not significant are not reported.

Table 4: Log Livestock Income Equation adjusting for sample selectivity
Dependent Variable: Log Livestock Income

Variable	Coefficient
Constant	3.308***
	(7.532)
Age	0.035**
	(1.971)
Age^2	-0.041*
	(-1.731)
Gender (Male headed households)	0.162*
	(1.618)
Poor households	3.973***
	(6.308)
Mills lambda (λ)	-0.326**
	(-2.18)
Sigma (σ)	0.662
Adj. R^2	0.191
Log-likelihood	-210.109
Number of observations	801

Source: Computed by author using STATA 9.2

Note: The t-values are presented in parentheses.
*** indicates coefficient significant at 1% level; ** indicates coefficient significant at 5% level; * indicates coefficient significant at 10% level.

The relation between livestock income and age is of the inverted U form: at the beginning, income increases with the increase of age, when age reaches its optimal level, income reaches its maximum, then as age continues to increase, income decreases. This result supports the findings of Agesa and Agesa (1999) who conclude that the relationship between age and income is hill-shaped. We observe from Table 4 that households whose incomes are below the poverty line have a significant positive relation with livestock farming income. For such households, livestock farming activity is considered an important safety net required for overcoming poverty. The results also suggest that male-headed households have a significant positive relationship with livestock income than female-headed households. One possible explanation for this is that the males are more engaged in livestock rearing than the females. Finally, an important theoretical explanatory variable observed in Table 4, is the mills lambda (λ) variable, which explains the correlation between the participation decision equation and the livestock income equation. Since the coefficient on λ (i.e., $\lambda = -2.18$) is statistically significant, it implies that if we had excluded households with no livestock income from the estimation, the final estimates of the results would have suffered from a sample selection bias problem. Our use of the Heckman's sample selection model is then justifiable.

6.3 Climate Change Impact Analyses

a) Impact of Climate on Livestock Income

Table 5 shows the regressions of net livestock income per farm.

Table 5: Regression Estimates of Net Livestock Income Performance

Variable	Coefficient	
Constant	711.64**	(2.33)
Summer temperature	-13.84*	(-1.72)
Summer temperature sq.	359.45*	(1.69)
Winter temperature	14.36*	(1.78)
Winter temperature sq.	-356.78*	(-1.72)
Winter precipitation	168.17**	(2.02)
Winter precipitation sq.	-1.05**	(-1.99)
Spring precipitation	-391.79**	(-2.01)
Spring precipitation sq.	2.51**	(2.06)
Electricity dummy	3.93*	(1.74)
Household size	-17.03**	(-2.05)
Pop. Density	35.31*	(1.70)
Pop. Density sq.	-0.19*	(-1.72)
% Muslim	-41.03**	(-2.01)
% grassland	11.80*	(1.73)
Adj R^2	0.21	
Obs.	801	

Source: Computed by author using STATA 9.2

Note: The t-values are presented in parentheses.
*** indicates coefficient significant at 1% level; ** indicates coefficient significant at 5% level; * indicates coefficient significant at 10% level.

The net livestock income function is sensitive to the percentage of the population that is Muslim, the percentage of grassland and the population density variable. The more the grassland in a district, the higher the livestock net income per farm. This variable measures the scarcity of land for grazing in a given area. Higher population densities would translate into higher net revenue because of the increased demand for livestock products leading to higher prices for output and probably also because of lower transport costs to the market. Household size is significant and negative. This means that large households tend to have lower livestock net incomes per farm. By contrast, households with electricity have higher net revenues. Electricity may be a dummy variable for higher technology (see Seo and Mendelsohn, 2008). Soil variables and household characteristics such as age, gender and education of the head of the farm, were also tested but were dropped because they were not significant.

Table 5 also reveals that livestock net incomes are generally sensitive to climate variables. We may deduce from Table 5 that summer temperatures exhibit a U-shaped relationship with net revenue, while the response of net revenue to winter temperature is hill-shaped. High winter temperatures will encourage growth of fodder and grass, holding precipitation constant and will therefore encourage farmers to increase their livestock holdings (Kabubo-Mariara, 2008). The hill-shaped relationship suggests that excess winter temperatures are, however, harmful to animal stocking levels. Winter precipitation exhibits a hill-shaped relationship, while spring rainfall exhibits a U-shaped relationship with net revenue. The quadratic term though negative, has a relatively small impact and

suggests that excess winter precipitation will be harmful. The negative impact of the linear term implies that excess rainfall in spring would result to damage in the livestock income function. This is consistent with findings by Seo and Mendelsohn (2006a) which show that livestock production in Africa is quite sensitive to changes in precipitation. The quadratic terms show that both temperature and precipitation exhibit a nonlinear relationship with net livestock income.

b) Marginal Climate Effects and Elasticities

The marginal climate impacts on net livestock income are evaluated by calculating the change in mean net livestock income resulting from a unit change in temperature and precipitation. Table 6 displays the results of marginal impacts on livestock income.

Table 6: Marginal Impacts of Climate Change on Net Livestock Income

Marginal Impact	Coefficient
Summer temperature	14.73*
Winter temperature	11.94**
Overall temperature	17.55*
Temperature elasticity	10.39
Winter precipitation	-13.21*
Spring precipitation	-5.6*
Overall precipitation	-7.87*
Precipitation elasticity	-8.04

Source: Computed by author

Note: ** significant at 5 per cent; * significant at 10 per cent

The results on Table 6 suggest that the marginal impact of an overall change in temperature is positive, and the change is much more significant for winter than for summer temperature. A unit rise in overall temperature would result in about 10.39 percentage point increase in net livestock revenue. The reason for the large positive temperature elasticity is that farmers have the possibility to shift from crops to livestock production as temperatures increase. This finding agrees with Seo and Mendelsohn (2008) who have shown that small farmers have more substitutes than large farmers and so they are less vulnerable to climate changes. The marginal impact of an increase in precipitation is -8.04, suggesting that an increase in precipitation reduces net revenue from livestock farming. The change in net revenue resulting from a change in spring rainfall is quite modest compared to the change that results from a variation in winter precipitation. This may suggest an adaptation strategy available to the farmer: with high winter precipitation, farmers may switch to crop farming and therefore reduce their livestock holdings. The University of Georgia (2007) has explained that livestock farms have a negative elasticity with precipitation because heavy precipitation is often accompanied by an increased prevalence of animal diseases such as trypanosomiasis. Farmers can therefore adapt by shifting from livestock to crop production.

c) Farmer's Choice of Livestock Species

To understand how a farmer's choices of livestock species change with climate, we estimate a multinomial logit model. The results of the analysis are displayed in Table 7, which explain how exogenous variables affect the farmer's choice of one species from the five possible major animals captured in the survey. In making our analysis we assume that the choice of each type of animal is independent of the choice of any other animal; and that the probability of choosing each animal is a function of summer and winter temperature and summer and winter precipitation.

Table 7: Multinomial Logit Animal Selection Model

Reference animal category is chicken

Variable	Coefficient			
	Beef cattle	**Dairy cattle**	**Goats**	**Sheep**
Constant	0.422	7.744***	47.19*	27.10**
	(1.392)	(16.12)	(1.76)	(2.04)
Summer temperature	0.269**	-0.176***	-0.319**	-0.441*
	(2.02)	(-3.443)	(-2.17)	(1.869)
Summer temperature sq.	-.0.026**	-0.041*	0.051**	0.023*
	(5.149)	(-1.73)	(2.452)	(1.21)
Winter temperature	-0.123*	-0.184	-0.625***	-0.301**
	(-1.824)	(-1.09)	(-2.129)	(-2.003)
Winter temperature sq.	-0.035*	-0.026*	0.070***	0.051**
	(-1.971)	(-5.149)	(4.107)	(2.452)
Summer precipitation	0.061***	0.057***	0.013*	0.063*
	(4.096)	(3.357)	(0.953)	(1.961)
Summer precipitation sq.	-0.001	0.016	0.011	0.007
	(0.09)	(0.289)	(0.120)	(0.045)
Winter precipitation	0.035**	-0.046**	-0.079*	-0.091**
	(1.97)	(-3.192)	(-4.503)	(10.074)
Winter precipitation sq.	-0.002*	0.009	0.004*	0.001
	(-1.330)	(0.332)	(1.031)	(0.010)
Likelihood ratio test	P < 0.0001			
Lagrange multiplier test	P < 0.0001			
Wald test	P < 0.0001			

Source: Computed by author using STATA 9.2

Note: The t-values are presented in parentheses.
*** indicates coefficient significant at 1% level; ** indicates coefficient significant at 5% level; * indicates coefficient significant at 10% level.

We consider chickens to be the base outcome animal category. This may be justified on the grounds that chicken is the animal species commonly owned by the majority of Cameroonian households (see Table 1A) and whose estimates are very highly significant. Observe from table 7 that livestock farmers are more likely to choose goats and sheep, but less likely to choose beef cattle and dairy cattle with climate variation. This is indicated by the quadratic summer and winter temperature coefficients which are negative for beef cattle and dairy cattle but positive and significant for goats and sheep. This means that as temperature rises, farmers shift from beef cattle, dairy cattle and chickens to goats and sheep. As precipitation increases, farmers shift away from the other animal species to goats and chickens. This is indicated on Table 7 by the fact that the quadratic winter precipitation coefficient is negative and significant for beef cattle; it is insignificant for dairy cattle and sheep; while it is positive and significant for goats. This change in the portfolio of animals helps explain how the farmers can adapt to changing climatic conditions.

7. Conclusion and Policy Implication

The paper examines the distributional implications of income derived from livestock farming activities on poverty, and assesses the impact of climate change on livestock income in Cameroon. The analyses are based on primary data collected from a sample of 801 households in 2004. The primary data were enriched with secondary climate

data, which reflect long-term climate change in Cameroon. The impact of climate change on livestock income is analysed using the Ricardian approach. We also evaluate the marginal impacts.

It comes out of the analyses that households whose incomes are below the poverty line have a significant positive relation with livestock farming income. This implies that for such households, livestock farming activity is considered an important safety net required for overcoming poverty. This finding highlights the importance of income from livestock farming for the alleviation of poverty in the country. Livestock farming is an important source of income for many Cameroonian households. Without it, many households' ability to satisfy their basic needs would be jeopardised. The simulation results reveal that ignoring this income source when estimating poverty measures in Cameroon would substantially overestimate the impacts on household poverty, which is all the more pronounced at the regional levels, especially at the northern parts of the country where most households depend on livestock activities for their livelihood. The policy implication here is that policy makers (especially the Ministry of Livestock, Fisheries and Animal Industries), Non-Government Organisations (such as Heifer Project International–Cameroon) and agricultural research stations (such as Institute of Zoo-technical Research) should promote and intensify livestock extension services and formulate locally relevant programmes that have the greatest impact on poverty alleviation. The northern Saharan regions of the country should be especially targeted.

Another result emanating from the study is that livestock production in Cameroon is sensitive to global warming. We may deduce that the economic viability of large livestock operations is more vulnerable to warming. This is because they depend more on cattle. Global warming will force reductions in beef and dairy cattle, critical to many commercial livestock activities. On the other hand, small farmers have many substitutes. If it gets warmer, they can shift to heat-tolerant animals such as goats and sheep. In these circumstances, small farmers are actually better able to adapt to climate change than their larger more commercial counterparts. Providing subsidies or other enticements may not solve the problem. Instead, governments should encourage farmers to change the composition of animals on their farms.

The estimated marginal impacts of climate change on net income reveal that the overall impact of rising temperatures will be a significant increase in livestock income. The reason for the large positive temperature elasticity is that farmers have the possibility to shift from crops to livestock production as temperatures increase. This finding agrees with Seo and Mendelsohn (2008) who have shown that small farmers have more substitutes than large farmers and so they are less vulnerable to climate changes. The marginal impact of an increase in precipitation reveals a reduction in net revenue from livestock farming. This suggest that the adaptation strategy available to the farmer may be a switch to crop farming and thereby a reduction in livestock holdings.

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APPENDIX

Table 1A: Average Livestock Holdings and Prices

Livestock Type	No. of Households	Livestock Holdings		Price per Animal (Fcfa)	
		Mean	Std Dev.	Mean	Std Dev.
Beef Cattle	60	53.85	31.64	106444.54	18407.87
Dairy Cattle	63	59.71	21.33	117893.11	18997.32
Bulls	17	32.50	15.93	120974.06	193007.14
Goats	178	13.34	10.88	26453.95	6123.28
Sheep	113	18.29	23.59	28322.92	8092.22
Pigs	49	20.53	79.15	58018.94	29824.90
Oxen	29	61.59	52.17	114354.84	25972.48
Chicken	194	471.5	144.32	2708.04	614.80
Others	18	181.5	703.52	4190.91	3800.38

Source: Computed by author from data base

Table 2A: Average Livestock Product Sales and Prices

Livestock Product	No. of Households	Sales		Price per Product (Fcfa)	
		Mean	Std Dev.	Mean	Std Dev.
Milk (kg)	23	665	983.20	1200	400
Beef (kg)	41	761.95	659.76	1782.93	258.99
Sheep (kg)	46	221	146.14	2069.59	370.51
Goat (kg)	57	205.18	109.87	2350.88	109.87
Chicken (kg)	45	578.41	1101.06	2500	3455.36
Eggs	48	2534.90	7441.65	241.02	131.17
Wool	5	92.32	87.20	1975.53	658.09
Leather	16	409.56	198.34	806.89	531.19
Other	12	132.33	76.18	300.5	177.07

Source: Computed by author from database

CHINA’S ENERGY INTEREST IN AFRICA: DEVISING AN APPROPRIATE

INTERNATIONAL FRAMEWORK

By Edwini Kessie (WTO) & Anna-Maria Corvarglia(WTI)

1. INTRODUCTION

China has recently developed from being a net oil exporter in the early 1990s, to becoming the world's third-largest net energy importer behind the United States and Japan. Despite the global economic slowdown, China's demand for energy resources remains extremely high, compelling it to push into new energy markets, particularly in Africa. Although the Middle East remains the largest source of China's oil imports, Africa is not far behind. In 2009, China imported nearly 30 per cent of its total crude oil imports from Africa. Angola is currently the biggest African oil supplier to China, followed by the Republic of Congo, Equatorial Guinea and the Sudan.
In order to secure access to African energy resources, China has developed a two-pronged energy investment strategy, with the intention of competing with Western oil companies which have had close business ties with the leading oil producers in Africa, namely Nigeria and Angola. First, China has pursued exploration and production agreements with small countries with a relatively low visibility such as Gabon, Guinea and the Republic of Congo. Second, it has signed a number of trade deals with oil-producing countries offering generous market access and also substantial aid packages. As a result of this deliberate policy, China has secured new contracts and made huge investments in the energy sector eclipsing established Western firms in some of these oil-producing countries.

Without any uniform and coherent international rules governing trade and investment in the energy sector, the agreements concluded between energy importing countries, including China and African countries, are not always consistent and tend to reflect the interests of the former. Some of them are driven by political considerations which in the medium to long term do not serve the interests of either party. To ensure security of supplies and also adequate economic benefits for energy-producing countries, it is clear that a coherent international legal framework is needed. While the Doha Round would address some contemporary issues in international trade, it would not address some of the contentious issues in energy trade, including dual energy prices, export restrictions, and uniform multilateral disciplines on investment in the energy sector.
Notwithstanding the absence of multilateral disciplines, there are a plethora of regional trade agreements (RTAs) regulating energy trade and investment. With energy security in mind, some of these agreements contain very clear obligations for exporters and importers of energy products, and also have elaborate provisions on dispute settlement. With respect to Africa, the ECOWAS Energy Protocol provides the legal and regulatory framework for all regional energy integration initiatives among ECOWAS Member states. It is modelled on the Energy Charter Treaty (ECT), which by far is the most comprehensive and far-reaching international regulatory instrument on energy trade and investment.

However, with the real possibility of conflicting rules in energy trade at the national, regional and international level, coherence is imperative. This contribution examines the limits of current WTO rules and explores the benefits offered by regional disciplines on energy trade and investment rules with a particular focus on the legal disciplines relevant to the burgeoning trade and investment relations between China and Africa. It also suggests possible ways through which the overlaps could be bridged with a view to enacting effective multilateral disciplines which would contribute to the growth of this sector by ensuring security and predictability, while at the same time encouraging innovation and competition.

2. The Chinese Trade and Investment Involvement in the Energy Sector

China's global economic strategy is largely shaped by its national development objectives and its demand for energy and other natural resources to power its economy. Its fixation with security of oil supplies has led it in search of new suppliers in Africa and elsewhere. Energy security is an integral part of China's overall security as reflected

in a White Paper published by the Chinese Ministry of Defence in 1998[11].

The high concentration of China-Africa trade in the energy sector has recently reached new heights. Approximately 70 per cent of registered African exports to China consist of crude oil, with other raw materials accounting for nearly 15 per cent. For countries such as Angola and Sudan, their entire exports to China consist of crude oil and other oil products. China's FDI policy in Africa is driven largely by its own economic interests.[12] For the period between 2003 and 2007, the main recipient of Chinese investments was Nigeria which attracted nearly a fifth of total Chinese investments in Africa.[13] According to the Financial Times, China National Offshore Oil Company (CNOOC), a State-owned enterprise and one of the three major energy players in China, is negotiating with Nigeria to acquire one sixth of its oil reserves[14]. The bilateral relationship between Angola and China also underscores the latter's commitment to play a leading role in the energy sector in Africa. Since the end of the civil war in Angola in 2002[15], bilateral trade has increased significantly. From around US$1 billion in 2002, it reached US$25.3 billion in 2008. In 2006 Angola displaced South Africa as China's major trading partner in Africa. Chinese oil imports represented 88 per cent (US$22.3 billion) of the bilateral trade volume in 2008.

It appears from China's trade and investment patterns that priority is being given to "niche countries", where the energy sectors are characterised by limited competition, because Western multinational companies have only limited access for political reasons and because the countries are relatively new or emerging oil producers offering significant opportunities. In exchange for access to oil supplies, China has been offering diplomatic protection and also a range of economic incentives such as grants, soft loans, credit lines and infrastructural projects.[16]
With new discoveries of oil in countries such as Ghana and Uganda, it is clear that China will continue to play a major role in the development of the energy sector in Africa. To ensure a mutually beneficial relationship, it is imperative that multilateral disciplines on trade and investment in the energy sector are agreed. While there is a patch work of bilateral and regional trade agreements regulating trade and investment in this sector, they are often not comprehensive and entirely consistent. The development of multilateral disciplines would guarantee uniformity and promote the interests of exporters and importers alike.

3. The Importance of a Multilateral Regulation of the Energy Sector: an Appraisal of WTO Rules

Against this background of expanding energy trade and investments between China and the African continent, a key question is how to devise an optimal international regime which would ensure access to energy resources and also further the interests of energy-producing countries. Currently, the regulation of energy under international economic law is highly fragmented and risks being legally incoherent. Given that WTO rules are applicable to all forms of trade, they are also applicable to trade in energy goods and services, even if there are no dedicated rules. The current WTO rules were not negotiated with the specificities of the energy sector in mind, and as such cannot be expected to appropriately address all peculiarities of the energy market. Energy goods have peculiar physical characteristics that affect their means of storage, transportation and distribution preventing them from falling neatly into the WTO rules which draw a sharp distinction between goods and services. This constitutes a challenge for the energy sector, where it is not always easy to categorise transactions as "goods" or "services" trade due to

[11] *Jane's Intelligence Review, China struggles to fulfill spiraling energy demands, vol. 16, n. 7, 2004, pp. 56–7.*
[12] *Kaplinsky, R. and Morris, M. "Chinese FDI in Sub-Saharan Africa: Engaging with Large Dragons", The European Journal of Development Research, Vol.21, No. 4, 2009, pp.551- 569.*
[13] *Nigeria was followed by South Africa (19.8 per cent), Sudan (12.3 per cent), Algeria (12 per cent) and Zambia.*
[14] *Burgis T., "Chinese Seek Huge Stake in Nigeria Oil", Financial Times, 29 September 2009.*
[15] *AA.VV. "Oil, Energy and Power in Sino-Angolan Relations" in The China Monitor, Issue 54, August 2010, The Centre for Chinese Studies, Stellenbosch University, available at http://www.ccs.org.za/wp-content/uploads/2010/09/China_Monitor_AUGUST_2010.pdf*
[16] *Besada, H., Wang, Y. and Whalley, J., China's Growing Economic Activity in Africa, Working Paper n. 14024, National Bureau of Economic Research, Cambridge, 2008.*

their essential characteristics. Even if the classification is straightforward in the case of oil and solid fuels which can easily be stored and traded across borders, it is less evident in the case of natural gas and electricity. The non-storability of electricity, for example, makes it difficult to classify it as a commodity. This difficulty is reflected in the optional nature of the electrical energy entry in the HS classification. However, it has been recognised that the production of primary energy (i.e. renewable natural resources and nuclear energy production) and secondary energy (i.e. combustion of oil and other fuels) do not constitute services but result in goods, whose trade is subject to the GATT provisions.

Apart from the distinction between goods and services, energy products easily fall under the broad definition of natural resources, sharing the typical features of exhaustibility, uneven distribution across the countries, negative externalities, and price volatility (even if the broad category of natural resources is difficult to identify precisely especially in the context of international trade). Moreover, these features of natural resource markets, facilitating the creation of various forms of market power, introduce dynamics of imperfect competitions that should be taken into consideration in the analysis of WTO rules related to energy markets. First of all, the geographical concentration of natural resources, combined with the scarcity of many energy sources, makes the energy markets particularly prone to cartelisation, with few producers in few countries generally accounting for a large proportion of the world supply. Moreover, the high fixed costs of extraction, production and supply, as well as the dependence on networks for distribution can easily turn the market into monopolistic structures. For this reason, cross-border energy movement (imports, exports and transport) and supply of energy have been traditionally considered a "natural monopoly", establishing a strong connection between energy supply, monopoly and public interest. Natural monopolies require not only regulation to protect consumers from unproductive monopolist rents, but also, in order to foster competition and greater diversity of suppliers, access by outside producers/importers of energy (electricity and gas) to the energy facility (interconnector, transport, storage and distribution) owned and controlled in the form of a natural monopoly.

A wide range of policy measures impact on energy trade, including export taxes, quotas and prohibitions, applied and bound most-favoured nation (MFN) tariffs, non-tariff measures as well as national consumption taxes and subsidies. On the other hand, it has been also showed that the number of mergers and acquisitions among firms involved in the natural resource sector increased, as an alternative measure to secure access to scarce energy supplies. In this context of the perspective of progressive liberalisation of the energy sector, the mere lifting of import barriers may not be enough. Pro-active measures aimed at providing a predictable access to competitive energy networks and to limit the monopolistic structure of the energy market seem more and more necessary, together with a framework for the increasing number of investments.

4. The Existing Framework

4A Export Control Regulation in WTO

While not directly regulating trade in energy products per se, GATT/WTO nevertheless has some rules which are relevant to energy trade, particularly those regulating the right of countries to impose import and export restrictions on energy products. The most relevant substantive rules are provided under Article I guaranteeing most-favoured nation treatment, Article II mandating that import tariffs not exceed the level provided in a Member's schedule of concessions, Article XI prohibiting the imposition of quantitative restrictions, Article XIII on the non-discriminatory administration of quantitative restrictions, and Article XXVIII bis on the renegotiation of tariffs, as well as Article XVII on state trading enterprises. These rules lay down the broad parameters of measures that may be adopted by WTO Members to support or regulate an industry or sector, including the energy sector. There are certain measures, including export taxes, which are the instruments of choice to guarantee energy security in hydro-carbons-producing societies, whose status are not clearly defined under GATT/WTO rules.

The absence of any elaborate rules is seized upon by energy-producing countries to buttress their claim that it is within their rights to impose export taxes on energy products, provided they respect certain cardinal principles, including the non-discrimination principle. By contrast, energy-importing countries do not generally share this

view. They believe that in the absence of any specific rules authorising the imposition of such taxes, it should be assumed that they are prohibited. However, there is broad agreement that energy-producing countries would be within their rights if they imposed export duties on energy products. Where such duties are inscribed in a Member's Schedule of Concessions, that Member cannot impose any duty in excess of what is inscribed in the Schedule. For energy-importing countries, this binding of tariffs assures security and predictability of market access. They are also comforted by the fact that they can always renegotiate to bring down the export tariffs just as they can with import tariffs. According to Article XXVIII bis, WTO Members can engage in negotiations for the reduction of the general level of tariffs and other charges on exports, with a view to recording them in the schedules of concessions, which, in accordance with Article II:7, are an integral part of the GATT . It should be noted, however, Articles II:1(b) and (c) only refer to "importation" and to the result of "import tariffs" negotiations prompting the question whether these provisions are also applicable to export duties.

Another relevant provision is Article XI GATT, which prohibits WTO Members from imposing measures that limit or restrict exports. It relevantly provides that "no prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licenses or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party." As developed in the WTO jurisprudence, in addition to quantitative restrictions, Article XI also applies to price-based prohibitions or restrictions on both imports and exports. For example, in Japan—Trade in Semi-Conductors, the adoption of minimum prices for imported products was found to be inconsistent with Article XI:1 i. In the limited situations where a Member can impose quantitative restrictions, they are enjoined by GATT Article XIII to administer the restrictions in a non-discriminatory manner.

4.B General Exceptions

Other relevant provisions touching on Members' ability to impose export controls are Articles XX(g) and Article XXI of the GATT 1994, otherwise entitled general exceptions and security exceptions, respectively. Under the former, energy-exporting countries can adopt restrictive measures provided the objective is to conserve exhaustible natural resources. These measures must, however, be made effective "in conjunction with restrictions on domestic production or consumption". It cannot be disputed that mineral energy resources such as coal and crude oil are "exhaustible natural resources". They can neither be replenished nor manufactured, once they have run out. In the application of this Article, WTO panels and the Appellate Body have insisted that the measures must not exclusively target exports, but that similar measures to restrict domestic production or consumption must also be enacted. Furthermore, the measures must also comply with the requirements in the chapeau of the Article XX in the sense that they must neither be discriminatory nor arbitrary, or constituting a disguised restriction on trade.
Due to the relevance of national security concerns in energy law and policy, the exception set out in Article XXI is particularly relevant to trade restrictions on energy goods. Article XXI was not drafted with energy security concerns in mind, but arguably the phrase "security" could be interpreted broadly to allow countries which depend overwhelmingly on energy revenues to take restrictive measures to limit exports of energy goods. The key question would be what constitutes an "emergency in international relations". It cannot be doubted that an energy-exporting country would be justified in halting exports to a country which is deemed to be an aggressor in a conflict by the United Nations, particularly where the products concerned are aiding in the war effort.

4.C Freedom of Transit in WTO

The WTO disciplines on energy trade are not limited only to export control measures such as export tariffs and quantitative restrictions, but also the entitlement of countries to the most direct route of transit for their imports and exports. For energy-dependent countries, the security of supplies is vital, while for exporting and transit countries the right to market access and income, respectively are paramount. The main transport-related obligation in the GATT is Article V, which is based on the 1921 Barcelona Convention and Statute on Freedom of Transit. Article V provides that "there shall be freedom of transit through the territory of each contracting party, via the routes most

convenient for international transit, for traffic in transit to or from the territory of other contracting parties. No distinction shall be made which is based on the flag of vessels, the place of origin, departure, entry, exit or destination, or on any circumstances relating to the ownership of goods, or vessels or of other means of transport" (Art. V: 2). In order to achieve freedom of transit, Member States shall accord MFN treatment to goods in transit to all Members, and countries must not impose "unnecessary delays or restrictions" and unreasonable charges or transit duties, having regard to the conditions of traffic.

However, Article V GATT was not negotiated with the specific concerns of energy transit in mind. First of all, GATT Article V applies only to energy goods, such as oil, gas and coal. However, the main controversial aspect of Article V relates to its possible application to fixed infrastructure, such as electricity grids and pipelines. Furthermore, Article V:5 contains an MFN obligation with respect to charges, regulations and formalities imposed on transit goods, while it provides only for a limited national treatment obligation, prohibiting in particular the discrimination between foreign and national goods in transit. There is, in fact, no specific requirement to treat goods in transit like goods destined for or originating in the domestic market. Further, one of the strongest limitations of Article V is the fact that the provision is an inter-state obligation. It may be difficult to argue that governments can be required to oblige private energy companies, whose influence is drastically increasing in energy transport, to comply with GATT transit disciplines.

The scope of Article V has never been really determined. In the recent case of Colombia – Indicative Prices and Restrictions on Ports of Entry, the Panel provided some interpretative guidance. It should be mentioned, however, that several proposals have been tabled by WTO members within the framework of the negotiations on trade facilitation. It has been proposed, for example, by The Former Yugoslav Republic of Macedonia, Mongolia, Switzerland and Swaziland, to extend the application of Article V to fixed infrastructure, such as pipelines and electricity grids, as well as to assure a full national treatment protection to goods in transit, together with the obligation for Members states to assure that private enterprises involved in the transit should act in a manner consistent with Article V.

On the other hand, the importance of compliance with WTO obligations relating to the transit of goods has been recently raised in accession negotiations. In particular, in the case of Ukraine, the Working Party Report contains a specific reference to energy: "Ukraine would apply all its laws, regulations and other measures governing transit of goods (including energy), such as those governing charges for transportation of goods in transit, in conformity with the provisions of Article V of the GATT 1994 and other relevant provisions of the WTO Agreement".

4.D Dual Pricing, Investment and Competition Policy

Another major policy issue in the energy field, and in particular in the petroleum sector, is the "dual pricing" for natural resources. Governments of energy-producing countries keep an artificially lower domestic price and higher export prices, with the aim of ensuring sufficient and cheap supply of raw materials for their domestic manufacturing industries, in order to promote industrialisation and attract foreign investment. Notwithstanding the attempts by the US and other industrialised countries to have this issue addressed in the Uruguay Round, there are no specific disciplines in the WTO Agreement on Subsidies and Countervailing Measures and the DSB has not yet had the opportunity to shed any light on the issue.

Dual pricing, by having the same economic effect as an export tax, could probably be regarded as a prohibited "subsidy" within the meaning of the ASCM if conditional on the export of a good, or an actionable subsidy if it causes adverse effects to other Members. In the context of the Negotiating Group on Rules, in 2006 the EU tabled a submission aiming at clarifying the discipline of dual pricing with a change in the letter of Article 3 of the SCM Agreement, in order to tackle the granting of loans below costs (or another suitable benchmark) could be adequately tackled. Moreover, the issue of dual pricing practices has also recently been addressed in the context of WTO accession negotiations. The Protocol of Accession of Saudi Arabia was the first accession package to have incorporated an explicit commitment by an acceding government on energy pricing in the Report of the Working Party.

It is also understood that it is one of the thorniest issues in the accession negotiations of the Russian Federation.

The practice of dual pricing and other trade-distorting practices in the energy sector cannot be analysed within WTO legal framework without taking into consideration the importance of the existence of natural monopolies, and the role of state-owned enterprises in the energy market. The economic activities in the energy sector, in fact, have traditionally been left to state-owned companies or monopolised private enterprises, even if the process of privatisation in developed countries began in the 1990s. Article XVII of GATT, which deals with state-trading enterprises, is very relevant for international trade in energy insofar as it prohibits discriminatory behaviour in the selling and purchase of goods and also condemns inadequate and unfair opportunities for competition for foreign enterprises. However, in the specific case of energy, in many circumstances it is difficult to determine with precision whether certain energy companies fulfil the definition of a state-trading enterprise. For example, it is not clear if energy companies not entirely privatised and not fully government-owned can be subjected to this provision. It is also not clear whether Article XVII can also be extended to energy companies that control transportation and distribution networks. It is also disputable if state monopolies that maintain domestic prices for natural gas at a level below their long-term marginal costs of production are in violation of Article XVII.

However, under Article XVII GATT several important state-trading enterprises relating to energy resources have been nevertheless notified, as in the case of the Brazilian ITAIPU Binacional in the electrical energy sector or the Bolivian Republic of Venezuela on Petroleos de Venezuela S.A. and its subsidiaries in the hydrocarbons field.
The specificity and complexity of the energy sector raise particular challenges for the multilateral trading system, especially due to the fact that the WTO is lacking appropriate, comprehensive disciplines in the area of competition and investment policy, which are not being addressed under the current Doha Round negotiations. In particular, the energy sector is a capital-intensive industry that requires significant investments in infrastructure. The WTO legal framework does not deal with investment policy per se but only prohibits those investment measures identified as inconsistent with GATT Articles III (National treatment) and XI (General elimination of quantitative restrictions), such as local content and trade balancing requirements. The TRIMs Agreement does not, for example, have provisions safeguarding foreign investments or guaranteeing the rights of foreign investors. Issues such as nationalisation, compensation and the settlement of investment disputes are not addressed by the agreement.

Moreover, the fact that government procurement disciplines apply only to a fraction of the membership may also be seen as a weakness of the WTO framework, due to the considerable involvement of local and central government bodies in the purchase of energy goods and services.

4.E GATS and Energy Liberalisation

The WTO disciplines on services are par contra extremely pertinent in the energy context: the GATS Agreement applies to all measures that affect trade in energy services. Moreover, due to the fact that the energy sector is dominated by integrated state-owned monopolies, the GATS general rules on monopolies and exclusive services suppliers (Article VIII) are of particular relevance to energy services. For example, Article VIII is especially significant to gas transportation and distribution services, requiring Members to ensure that the incumbent natural monopolist in the transportation and distribution market does not act in a manner inconsistent with the MFN principle and with that Member's specific commitments.

However, the WTO "Services Sectoral Classification List" (W/120 list) does not include a separate comprehensive entry for energy services and does not fully reflect the commercial reality of the energy supply system, particularly in the oil and gas fields. Important energy services (transport, distribution, construction, consulting, engineering, etc.) are covered by the respective horizontal categories in the W/120 list, with an exception represented by 11(G)(a) "pipeline transportation of fuels", listed as a separate sub-sector of transport services. Meanwhile, some energy-related services are listed as separate subsectors. For example, 1(F) "Other business services" cover some energy-related services like technical testing and analysis services, (h) services incidental to mining, (j) services

incidental to energy distribution, (m) related scientific and technical consulting services, (n) maintenance and repair of equipment. As energy service is not registered as a separate entry in the W/120 list, each Member is free to easily modify the sectorial coverage of its specific commitments on energy services and such commitments are very limited and sparse. The large bulk of commitments in the energy sector have been undertaken by acceding countries, reflecting the dynamics of the WTO accession process and the fact that energy-related activities have started attracting more attention after 1995.

Energy services are also an essential aspect of negotiations in services of the ongoing Doha Round negotiations, and in particular, the classification of energy services has been one of the key topics of debate amongst various interest groups. The U.S and Norway proposed a dedicated Reference Paper for energy services, based on the Reference Paper on the GATS Agreement on Basic Telecommunications Services, with a view to developing a set of specific rules for cross-border energy trade.

5. The Development of Regional Disciplines to Govern the Energy Sector

Apart from disciplines imposed by the WTO, international energy trade is increasingly subject to regional norms. The RTAs' regulation of the energy sector is essentially built on the GATT/WTO fundamental principles of non-discrimination, transparency and a commitment to the progressive liberalisation of international trade. However, the regional regulatory framework for international energy regulation has the double advantage of not only providing a specific and detailed framework for trade in energy goods and services, but also for the regulation of energy-related investments. Some RTAs have comprehensive provisions covering energy goods, services and investments, with some laying down minimum standards of treatment – often formulated as "full protection and security" and "fair and equitable treatment" clauses, and other internationally accepted standards.

The most prominent and detailed regulations in the energy field have been established in the North American Free Trade Agreement (NAFTA) and in the Energy Charter Treaty (ECT). Chapter 6 of the NAFTA contains a series of legal obligations for the treatment of trade in energy and basic petrochemical goods and cross-border trade in services, incorporating all relevant GATT rights and obligations to North American trade in energy goods and services. On the European side, the ECT is a unique multilateral treaty specific to the energy sector based on the GATT/WTO pillars of non-discrimination, national treatment and access to markets on an open and transparent basis. It is therefore highly significant in the development of rules and disciplines outside the WTO context.

The ECT is not only the most comprehensive and far-reaching regulatory instrument on energy trade and investment, but it has also been particularly influential in subsequent regional agreements addressing the energy sector. The ECT constituted the basis for the regulation of the energy relations between the EC and parties to the European Charter Conference. Moreover, the ECOWAS Energy Protocol (signed in 2003 and entered into force in 2006), which provides the legal and regulatory framework for all regional energy integration initiatives among ECOWAS Member states, is basically drafted on the basis of the ECT structure and provisions. As compared to WTO regime, the ECT, NAFTA and ECOWAS regimes offer comprehensive and focused disciplines far more suited to the regulation of the energy sector. They have dedicated provisions on a broad range of export controls, freedom of energy transit, energy-related investment protection, energy efficiency and the environment.

5.A Market Access Provisions on Export Restrictions

An important feature of energy-specific regional agreements is the emphasis on access to supplies. Unlike the GATT/WTO, which puts a lot of emphasis on market access, these agreements tend to have explicit disciplines on

[17]For example, NAFTA Chapter 6 restricts the use of the GATT exemptions under Article XX, further conditioning them by three constraints. First, any restriction imposed must "not reduce the proportion of the total export shipments of the [energy] good made available to the other Party relative to the total supply of that good of the Party maintaining the restriction" (Article 605(a)). Moreover, the restriction on exports cannot be accomplished through the imposition of an export price higher than that charged for the good domestically and the restriction must "not require the disruption of normal channels of supply to other Party or normal proportions among goods" (Article 605(c)).

export controls in order to ensure energy security for countries that rely on imported energy resources.
NAFTA Chapter 6 incorporates the GATT provision on quantitative restrictions in Article 603 applying it to trade in energy and basic petrochemical goods, and interpreting these provisions narrowly. For example, in addition to the prohibition on minimum import and export prices, Article 603.2 also imposes prohibition on maximum import and export prices. Furthermore, Article 604 NAFTA introduces a specific separate provision explicitly prohibiting the use of export duties. It also extends the national treatment and the most favoured nation principles to the imposition of export taxes, requiring that, "no party may adopt or maintain any duty, tax or other charge on the export of any energy or basic petrochemical good to the territory of another party, unless such duty, tax or charge is adopted or maintained on: a) exports of any such good to the territory of all other Parties…". *With respect to other non-duty export restrictive measures, NAFTA (in Article 605) also tightens the requirements for invoking exceptions similar to those in GATT Articles XI: 2, XX and XXI*[17].

The ECT Treaty, on the other hand, adopts a symmetrical approach, in Articles 28 and 29 as regards the prohibition of both import and export restrictions. In a radical departure from the WTO system that does not prohibit the use of export duties, Article 29(4) of the ECT (mirrored in Article 29 of the ECOWAS Protocol) provides that "each Contracting Party shall endeavor not to increase any customs duty or charge of any kind imposed on or in connection with importation or exportation ... (b) in the case of the exportation of Energy Materials and Products listed..., and that of their importation if the Contracting Party is not a member of the WTO, above the level most recently notified to the Secretariat...". Paragraph (6) further provides that "no such Contracting Party shall increase any customs duty or charge of any kind imposed on or in connection with importation or exportation of Energy Materials and Products listed ... above the lowest of the levels applied on the date of the decision by the Charter Conference to list the particular item in the relevant Annex. ...".

Although couched in hortatory language, it still represents a considerable development over the GATT norm which only prohibits the imposition of import duties in excess of the bound level in a Member's schedule of concessions. It has been suggested that the language used in the ECT reflects the delicate balance struck between the economic interests of exporting countries and the energy security of importing countries. Whereas under the GATT, the primary objective is ensuring access to foreign markets and hence the emphasis on market access and the regulation of import duties, in the case of energy, the predominant concern appears to be access to supplies resulting in the strengthening of the disciplines on export restrictions.

5.B Regional Regulation of Energy Transport
Apart from the disciplines on import and export restrictions, RTAs also incorporate and elaborate on other WTO provisions of crucial importance to energy trade. The provisions on freedom of transit under ECT Article 7 (also Article 7 of the ECOWAS Treaty) appear to go further than GATT Article V. It relevantly provides that Contracting Parties should facilitate the transit of energy on a non-discriminatory basis consistent with the principle of freedom of transit, including an obligation to promote also the construction of new pipelines and transmission lines. Article 7(3) further introduces a national treatment obligation, not found in Article V GATT, namely establishing that a transit country may not treat energy materials and products in transit in a less favourable manner than such materials and products originating in or destined for its own territory.
Taking into consideration the role played by private entities in energy transit, Article 7.2, represents an important improvement compared to Article V GATT, which only regulates State-State relations.
In particular Article 7.2 ECT states that Contracting Parties "*shall encourage relevant entities to cooperate in*" transit measures, including "*measures to mitigate the effects of interruptions in the supply of Energy Materials and Products*" and "*facilitating the interconnection of Energy Transport Facilities*."
Another innovative feature of the ECT is its explicit coverage of grid-bound energy transport. The Treaty clearly specifies the concept of "*transport facilities*" through which transit takes place, including in the application of the

The NAFTA also significantly limits the use of the GATT national security exception (Article XXI) as a justification for restrictions on imports or exports of energy goods. Such restrictions can only be imposed where necessary "to supply a military establishment ... or enable fulfillment of a critical defense contract" or to "respond to a situation of armed conflict".

Article high-pressure gas transmission pipelines, high-voltage electricity transmission grids and lines; crude oil transmission pipelines; coal shipping pipelines; oil product pipelines; and other specific fixed energy facilities, notably port facilities.

In order to guarantee the effective supply and the regular flow of energy materials and products among ECT Members, Article 7.6 (also Article 7.6 ECOWAS) provides that, in the event of a dispute over any matter arising from transit, the Party whose territory is involved in the transit of energy material and products "*shall not ... interrupt or reduce, permit any entity subject to its control to interrupt or reduce, or require any entity subject to its jurisdiction to interrupt or reduce the existing flow of Energy Materials and Products prior to the conclusion of the dispute resolution procedures set out in paragraph (7)*". Furthermore, ECT Contracting Parties are obliged to take all necessary measures to facilitate transit of energy, to promote the modernisation, development and operation of inter-regional transport facilities, as well as the development of internal and cross-border interconnection facilities.

Several other concerns related to transit, such as the growing dependence on imported energy, the development of specific guidelines, criteria or rules for transit fees, the protection of international energy swaps etc. which were not addressed in Article 7, are being considered in the negotiations of the Transit Protocol, which formally started in 2000. Unfortunately the Transit Protocol, which could have been an innovative regulation of energy transit, has never been finalised and was suspended in 2006. One of the reasons behind the impasse of the negotiations of the Transit Protocol is in fact the inclusion of the energy issue especially transit in the bilateral consultations between EU and the Russian Federation in the context of the Russian WTO accession.

5.C Third-Party Access to Energy

Closely aligned to the transit of energy goods and services is the notion of "third-party access" (TPA). Third party rights consist of the right of new entrants to use the platform of existing owners to engage in a range of activities, from the generation, to the supply or the distribution, upon the payment of a reasonable fee and on practical technical terms. The access regime for third parties is defined by the degree of control of transmission operators in a given market. They usually have monopoly rights or are in a dominant position enabling them to dictate the terms for market entry. This is still the case in some countries even after the progressive liberalisation of a number service sectors following the Uruguay round. For this reason, access of third-parties is an essential pre-requisite for the creation of competitive national cross-border energy markets limiting the distortive effects linked to the operations of natural monopolies in the energy sector.

Third-party access regulation is generally disciplined in national competition laws which could either set access conditions ex-ante or imposes ex-post administrative or judicial controls to sanction alleged abusive practices by monopolistic operators. It is extremely rare to identify a norm in international law that guarantees third-party access, apart from the EU Treaty competition rules and bilateral agreement that concern cross-border transport facilities. Moreover, the main difficulty for the effective application of the third-party access indirect regulation under the ECT consists in the fact that this type of access obligations essentially addresses private entities, whereas international law is primarily concerned with states' obligations.

The only regional legal instrument in which the important issue of third-party access has been specifically addressed is the ECT. The 1991 European Energy Charter and the earlier drafts of the ECT had language that could have been clearly interpreted as obliging governments to grant TP. However, the language was modified following pressure by energy monopolists, including Gazprom, EDF and Ruhrgas. Notwithstanding the hortatory language used in the ECT Final Act, the rights of third parties are adequately protected under the Charter because of the broad reach of the non-discrimination principle. Monopolies or companies in a dominant position as far as energy transport is concerned are required to provide access to third parties on reasonable terms and conditions. In fact, the non-discrimination obligation as contained in ECT Article 10(1), when read together with ECT Articles 22 and

23 regarding the application of the ECT to state companies and special and privileged enterprises, indisputably prevents such companies from discriminating against foreign investors by either refusing access or granting access on discriminatory terms.

While GATS Article VIII, relating to monopolies and exclusive services suppliers, has a similar intent, its terms are not broad or explicit enough to guarantee a stable and fair access to energy networks. For this reason, it has been proposed to include specific provisions assuring non-discriminatory third-party access to network, grids and essential energy infrastructure. The United States and Norway have tabled a proposal aimed at creating dedicated disciplines for energy services, modelled on the Reference Paper for telecommunication services.

5. D Regional Promotion and Protection of Energy-related Investments

The most comprehensive disciplines on the promotion of trade and the protection of investments in the energy sector are to be found in regional trade agreements. The disciplines are not limited to prohibiting trade-related investment measures inconsistent with the non-discrimination principle as under the TRIMs Agreement, but also extend to other areas currently not regulated by the WTO.

A major difference between the WTO and the NAFTA system is the inclusion of a general provision on foreign investment, even if it does not specifically address the energy sector. Chapter XI of the NAFTA is based on four fundamental principles: national treatment with respect to investments by NAFTA Parties (Article 1102); MFN treatment for foreign investors from other Parties (Article 1103); minimum international standards of “fair and equitable treatment” for investments (Article 1104) and a prohibition on the use of performance requirements with respect to NAFTA investors (Article 1105). The investment chapter also includes provisions designed to facilitate investment-related transfers, including profits and other revenues flowing from investments (Article 1109), provision prohibiting expropriating or nationalising measures unless done for a public purpose, on a non-discriminatory basis, in accordance with due process of law and on payment of appropriate compensation (Article 1110)[18] .

While the ECT regime is modelled on NAFTA Chapter XI, it has the objective of creating a “level playing field” for energy sector investments. As such, a clear distinction is made between the pre-investment phase of making an investment and the post-investment phase relating to investments already made. While the provisions concerning the pre-investment phase primarily set up a “soft law” regime of good practice indications, the ECT establishes a “rigid” regime for the post-investment phase with binding obligations on the Contracting States.,

The Treaty provides for minimum standards of protection based on the non-discrimination principle. In that context, existing foreign investments made by investors (nationals and other legal entities) from other Contracting Parties in the energy sector must be treated fairly and on a non-discriminatory basis. The most-favoured-nation treatment is assured for all activities related to the investments, including management, maintenance, use, enjoyment and disposal, which should not be impaired by “unreasonable or discriminatory measures”. The contracting parties undertake to accord to the investments of investors of other Contracting Parties fair and equitable treatment, enjoying the “most constant protection and security”.

Further, the ECT provides a number of other investment protection measures that are partially reflected in the principles contained in various EU Bilateral Investment Agreements. Article 12 requires Contracting Parties to accord investors MFN and national treatment for losses suffered as a consequence of armed conflicts and civil disturbance, while Articles 13 and 14 guarantee the right of foreign investors to repatriate earnings without delay in case of expropriation and nationalisation[19].

[18]Notwithstanding this detailed framework for the regulation of foreign investment, NAFTA does have some important exceptions, particularly in the energy sector, with the most significant being those accorded to Mexico to perform a range of energy-related activities, and to refuse investment in the areas of exploration and exploitation of crude oil and natural gas. Consequently, it is only the non-basic petrochemical sector which is to open to foreign investment.

[19]Article 13, assures the principle of full compensation following expropriation of investments made by investors from other contracting parties. It pertinently provides that investments “shall not be nationalized, expropriated or subjected to a measure or measures having effect equivalent to nationalization or expropriation except where such

To understand the importance of the innovative system of promotion and protection of foreign investment in the ECT, Part III of the ECT needs to be read together with ECT Article 26, which establishes a particularly strict enforcement mechanism in Investor-State Arbitrations. If a dispute concerning the application or the interpretation of a provision in Part III of ECT cannot be settled amicably within three months, the dispute shall be resolved in a forum elected by the investor, which could be the national court or administrative tribunal in the contracting party where the investment is made, a previously agreed dispute settlement procedure, or international arbitration (the ICSID, the ICSID Additional facility, an arbitral tribunal established under the UNCITRAL Arbitration Rules or the Arbitration Institute of the Stockholm Chamber of Commerce).

This Investor-State dispute settlement mechanism is distinguished by the acceptance of the parties of compulsory arbitration, pursuant to which they give their "unconditional consent" to submit a dispute arising to international arbitration: foreign investors from member states can sue the host state directly, before an international arbitral tribunal, without the need for a specific arbitral agreement to be concluded. Furthermore, compulsory arbitration applies even when proceedings have already begun, or even concluded, in one of the Contracting Parties, in clear contradiction of the principle of res judicata and the notion of arbitration as a consensual process of dispute resolution. For this reason, the combination of the detailed discipline of the Investment protection in ECT Part III, with the Investor-State arbitration mechanism set in Article 26 ECT, creates an energy innovative investment protection regime, unique in the international arena, not only for the broad scope of covered issues but also for the number of countries that subscribed and made use of this arbitration system.

ECT Article 26, in fact, has been also the subject of interpretation by a number of tribunals creating a well-established jurisprudence on the application of the principle of national treatment and fair and equitable treatment in energy investment cases. Twenty cases have thus far been brought by investors to international arbitration pursuant to ex Article 26[20].

5.E Energy Efficiency and related Environmental Aspects in the ECT

While energy security has dominated the discourse both at the national and international level, energy efficiency is increasingly receiving attention due to environmental concerns, particularly climate change and global warming and the interface with competitiveness of firms.

The NAFTA does not have a dedicated environmental chapter, but contains a number of environment-related provisions which are relevant for the energy sector. Chapter 11 mandates that investment activities should be undertaken in a manner sensitive to environmental concerns. The relevance of this provision is reflected in NAFTA jurisprudence on investment in the field of health and environment, as highlighted in the following cases: Ethyl Corporation, Desona and Metalclad. In the regulation of the energy sector, the ECT explicitly includes the innovative concept of sustainable development, the precautionary principle and the polluter pays principle, already introduced in some multilateral environmental treaties. Moreover, the ECT takes an expansive view of what constitutes an environmental impact, to include effects on cultural heritage and socio-economic effects.

In practice, the ECT also provides a forum for sharing experiences on energy efficiency issues through the Energy Charter Protocol on Energy Efficiency and Related Environmental Aspects (PEEREA). The Protocol pays particular attention to policies which are the core of an effective national energy efficiency strategy, including taxation, pricing policy and environment-related subsidies and other mechanisms for financing energy efficiency objectives.

expropriation is: (a) for a purpose which is in the public interest; (b) not discriminatory; (c) carried out under due process of law; and (d) accompanied by the payment of prompt, adequate and effective compensation".

[20]There has been only one award on jurisdiction (Ioannis Kardossopoulos v Georgia) and seven final awards mostly on the obligation of fair and equitable treatment of investors, Article 10 (1); (Nykomb Synergetics Technology Holding AB v the Republic of Latvia; Petrobart Limited v the Kyrgyz Republic; Ukraine and Plama Consortium Limited v Republic of Bulgaria; Amto (Latvia) v. Ukraine; Azpetrol International Group (the Netherlands) v. Azerbaijan; Cementownia "Nowa Huta" S.A. (Poland) v. Republic of Turkey; Europe Cement Investment and Trade S.A. (Poland) v. Republic of Turkey) have been issued under the ECT .

For example, Article 18(1) ECT requests its Contracting Parties to take environmental factors into account in formulating energy policy, to "promote market-oriented price formation and a fuller reflection of environmental costs and benefits throughout the Energy Cycle", to promote the use of cleaner fuels and renewable energy sources, and to promote transparent and early environmental assessment of energy projects.

6. The Optimal WTO Regime or Possible Improvements

As pointed out earlier, while several WTO provisions, including those relating to transit, state-monopolies, subsidies and a broad range of energy-related services are relevant to energy trade, the WTO does not have a comprehensive framework which would fully address the energy security concerns of its members. It is in this context that efforts are being made in the Doha negotiations specifically in the negotiations on trade facilitation (transit), in the NAMA negotiations (export taxes), and in the services negotiations (energy-related services, including pipeline services) to develop disciplines which would further enhance the rights of energy-importing and exporting countries. However, a key aspect of the international debate on energy in the WTO context is identification of the appropriate framework for the development of energy-related disciplines.

Arguably comprehensive negotiations, focused on the specific needs of energy trade, are needed to fill the gaps in the WTO framework with a view to promoting energy-related investment and competition within and among countries. For this reason, the adoption of a "decision" clarifying how WTO rules apply to some specific energy sectors does not appear to be the most efficient and effective solution given the sketchy nature of the WTO rules and the fact that there are no multilateral disciplines on investment and competition policy.[21].

A new "Energy Agreement", multilateral or plurilateral that would include a series of specific sectorial rules on energy could represent an optimal solution to be introduced within the WTO framework. The negotiations would afford Members the opportunity to address all the pertinent problems, ranging from issues of classification of goods and services, to disciplines on subsidies, to issues of competition policy and state trading, as well as intellectual property rights and government procurement. An integrated approach would ensure uniformity in the application of standard rules and promote competition in all energy sectors, from oil, gas, coal, wood, electricity to atomic energy and renewable forms of electric energy production (solar, wind, wave, tidal), as well as biofuels.
In particular, a separate agreement would have the distinct advantage of addressing the specificities of energy trade, taking into consideration the peculiarities of the energy market. For multilateral liberalisation of cross-border energy (in particular electricity and gas) trade will not be able to achieve its full potential if there is not secure and predictable access to energy networks. A parallelism could be established with the telecommunications market where access of competing providers to the networks of established state-owned companies is the key to improving telephony services and reducing cost. There are examples where the WTO has been able to conclude dedicated sectoral agreements to further liberalise trade. A case in point is the WTO negotiations on basic telecommunications (1994-1998), whose results were consolidated into the Fourth Protocol of the General Agreement on Trade in Services (GATS) and entered into force in February 1998.

The Reference Paper for the Telecommunication Protocol is also another successful dedicated agreement concluded by WTO Members and adopted on 24 April 1996 to promote competition in the telecommunications sector[22]. As to whether it would be possible for a dedicated agreement on energy to be adopted by WTO Members in the context of the Doha Round is doubtful considering that there is no mandate at present and also considering the difficult political context. Progress in the Doha Round has been very slow, so Members would not like to introduce new and difficult issues which can only complicate efforts to conclude the Round. The opposition of several developing

[21]An interpretative decision, in fact, could be adopted by consensus by the General Council, with a much simpler process than an amendment. Also, a decision would have the important advantage to interpret the application of the general rules and principles founding the multilateral trading system, to the specific needs and specific requirements of an opportune international regulation of trade in energy products, assuring at the same time coherence and accuracy in the discipline. However, an interpretative declaration is, in fact, not helpful in the case of a clear gap in the WTO discipline, as in the case of export restrictions.

countries, including oil-producing countries, to commencing negotiations on the so-called Singapore negotiations (competition policy, trade and investment and government procurement) is a harbinger of the difficulties that lay ahead in negotiating dedicated disciplines for the energy sector. The oil-exporting countries entertain the fear that multilateral disciplines would encroach upon their sovereign rights over their natural resources.

It is undeniable that the evident discrepancy in the balance of rights and obligations of energy-importing and energy-exporting countries in the WTO system reflects the priorities and differences in the interests of these two groups of countries. The limited membership of the major oil-producing countries in the GATT/WTO until recently contributed to the partial treatment of the energy sector within the WTO legal framework. Having a comprehensive framework for the liberalisation of not only energy trade but also international investment related to energy would be of interest to most countries, if the agreement strikes a careful balance between the rights of energy-exporting and those of energy-importing countries. While specific trade rules are important to encourage energy trade flows, investment rules are necessary to attract investments in energy infrastructures, which are also indispensable for energy trade flows. Given the importance of the energy sector to developing countries, they stand to gain immensely from multilateral disciplines. They will be able to attract new technologies, which should help to increase production in an environmentally friendly manner.

In crafting multilateral disciplines on energy trade and investment, it would be advisable for WTO members to look at how the rules have evolved regionally, especially considering the comprehensive rules in the ECT and NAFTA. The integration of the regional regimes into the multilateral trading system could represent an optimal solution in that it would combine the advantages of tested regional energy disciplines with the structural benefits offered by the WTO legal framework. However, before the new comprehensive WTO rules on energy are agreed or become fully operational, it would be important to have detailed rules to govern the relationship between current WTO rules that are relevant for the energy sector and those in bilateral and regional trade agreements in the event of a conflict, so as to ensure the orderly development of uniform multilateral rules.

The interface between the WTO and RTAs in the energy sector represents, in fact, a growing area of potential conflicts and overlaps of jurisdictions. The RTAs regulating the energy sector have established sophisticated enforcement regimes with specific dispute settlement mechanisms to resolve State-State and Investor-State disputes, which have developed an impressive body of case law.

A case in point is the dispute settlement system of NAFTA. The process begins with government-to-government consultations. Should consultations fail to resolve the dispute between the parties, it is then referred to a meeting

[22]In order to guarantee the respect of competition concerns, under paragraph 5 of the Annex on Telecommunications to the GATS, each Member is required to ensure that the service suppliers of other Members are given access to and use of "public telecommunications transport networks and services on reasonable and non-discriminatory terms and conditions". Moreover, Paragraph 5(g) of the Annex also permits developing country Members to place reasonable conditions on access to and use of telecommunications network in order to strengthen their domestic capacity, introducing a clause that could be extremely important if applied or extended to energy networks

of the ministerial level Free Trade Commission, and thereafter referred to a formal arbitral panel[23]. Other RTAs, including the ECT and ECOWAS, also have specific mechanisms for resolving disputes between the contracting parties. They envisage recourse to a panel system along the lines of the WTO Dispute Settlement system, should the parties fail to resolve their dispute through bilateral diplomatic channels.

This overlap between RTAs and WTO disciplines creates the basis for what is called a "double breach" jurisdictional overlap between the two dispute settlement systems, in cases where the same measure is challenged at the same time in both forums. To the extent that these RTAs are WTO-compatible, then WTO members, who are parties to such RTAs, can have recourse to the internal dispute settlement mechanisms to enforce the agreed norms. It would be advisable to have agreed procedures to handle WTO-RTA conflicts of jurisdiction problems, so as to prevent confrontational challenges which could compromise the ability of WTO Members to agree on multilateral disciplines for the energy sector.

7. Conclusion

Notwithstanding the importance of the energy sector, the WTO does not have comprehensive rules which strike a careful balance between the rights of energy-exporting and importing countries. The lack of a coherent multilateral framework has spurred the conclusion of bilateral and regional trade agreements, some of which contain dedicated disciplines for the energy sector. For African countries, many of whom are rich in hydrocarbons which have attracted the interest of established firms in Western countries and new entrants from emerging economies, particularly China, it would be important to have multilateral disciplines owing to their weak negotiating capacities which compromise their ability to derive significant economic benefits from their natural resources.

Ensuring security of supply, guaranteeing the protection of investors and addressing climate change mitigation needs are priorities which should guide any multilateral effort to establish dedicated disciplines for the energy sector. Given the differing interests of energy-exporting and importing countries, it would not be easy to achieve an agreement. However, WTO Members do not have to start from a blank slate. They can build on the disciplines on energy trade and investment established in a number of regional trade agreements, including the ECT, NAFTA and the ECOWAS treaty. Some of these RTAs have incorporated GATT rules and disciplines and gone further by enacting dedicated rules for energy goods, services and investment, backed by specific dispute settlement mechanisms. Pending the full implementation of any multilateral disciplines to regulate the energy sector, it would be important to have detailed rules and procedures for handling potential conflicts that may arise as a result of inconsistencies between current WTO rules relevant for the energy sector and relevant RTA rules. If the WTO does not seize the moment to enact comprehensive rules for the energy sector, it could soon be asked by its members to adjudicate disputes arising out of existing WTO rules that were not negotiated with the energy sector in mind. A comprehensive multilateral agreement would address the uncertainty surrounding energy trade and investments, enhance production and security of supplies for the benefit of both energy-exporting and importing countries. It would also bolster the influence of the WTO and strengthen its position as the principal forum for the negotiation of multilateral trade rules.

[23]*The consistency between the NAFTA and the WTO dispute settlement mechanisms is assured because of Article 2002 NAFTA, which provides a forum selection clause and an exclusive forum clause. Disputes regarding any matter arising under both NAFTA and the WTO Agreements may be settled in either forum at the discretion of the complaining party. An exception is made in respect to claims involving environmental, SPS, and technical standards matters, for which the responding Party may demand that the matter may be settled by a NAFTA panel.*

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CHINA IN AFICA: AN AGENDA TOWARDS RULES OF ENGAGEMENT

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1. INTRODUCTION

The upsurge in trade and investment relations between China and Africa over the current decade has been the subject of considerable interest within the academic, civil society and policy-making communities. Likewise, not surprisingly, countries beyond Africa are closely observing the burgeoning Sino-Africa relations. Beyond its economic ramifications, attention is now also focused on political, military and strategic aspects of the relations.[24] Thus, countries with a long history of control and leverage over Africa are now joined by newer entrants, particularly from Asia, in competing for a share of the opportunities in the African market place.

The upsurge of interest in Africa is both welcome and overdue: viewed by some as the final frontier of growth and development, Africa presents many obvious advantages and opportunities to the global community. Its large and young population, endowment of critical natural resources and a large domestic market that is now moving towards closer and deeper regional integration, offers opportunities reminiscent of the earlier stages of integration and development of the United States in the 19th century. Because of its vast and under-exploited resources, which may be rivalled only by the United States, Africa cannot be ignored by countries concerned about resource security. While it is the poorest region in the world, there is, as Professor Prahlad[25] suggests, a "fortune at the bottom of the pyramid."

The upsurge of interest in Africa is reflected in increased flows of foreign direct investment, official finance, improved trade performance and the perception of improving institutions of governance and investment[26]. From the standpoint of China, the core of its strategy vis-à-vis Africa is a vent for natural resources. Until recently, its development had been export-driven but without significant presence of its investors in global markets. It is now increasingly realising that a model based on ever expanding economies of scale in domestic manufacturing is no longer sufficient to sustain growth. Further global integration now requires Chinese firms to establish direct presence in foreign markets: indeed, policy makers are publicly discussing making direct investments abroad as an alternative to accumulating reserves. Recycling its considerable holdings of fast depreciating US dollars into real assets through purchase of Africa's resources reflects a concerted strategy to simultaneously deal with its long-term needs of natural resources and immediate need of managing its reserves, now close to US$2.5 trillion.

At the same time, concern is being voiced in many quarters, but most prominently within the civil society and the African academic community[27] regarding the longer term implications of attention currently directed towards Africa. These concerns revolve around issues such as:

- What are the risks associated with the recent influx of newer actors and participants in the economy of Africa?
- Is this a newer, modern and perhaps even more challenging version of colonial conquest and predation?
- What are the implications for the future development of the continent if non-renewable resources of Africa are depleted at current rates of externally driven and financed exploitation?
- Is Chinese financial assistance more effective, less intrusive and less likely to lead to a debt trap?
- Does the presence of China provide an alternative to the conditional lending and diktat associated with the activities of multilateral financial institutions?
- Are there environmental consequences that have yet to be factored into the current phase of growth and foreign direct investment?

[24]See the proceedings of a Conference organised by College of Europe: "The EU and China: Partners or Competitors", February, 2010.
[25] Late Professor C.K. Prahlad in his study "The Fortune at the Bottom of the Pyramid: Eradicating Poverty through Profits."(Wharton School Publishing, Philadelphia, 2004) argues that if the world ceases to treat the poor as victims or as a burden and recognise them as resilient and creative entrepreneurs and value-conscious consumers, a whole new world of opportunities to address global poverty will emerge.
[26]See, for example, Jian-Ye Wang and Abdoulaye Bio-Tchane ''Africa's Burgeoning Ties with China '' in IMF Finance and Development, Washington.D.C, March, 2008.
[27] "African Perspectives on China in Africa" Edited by Firoze Manji and Stephen Marks (Fahamu, Nairobi, 2007)

- ❖Does the current model of interaction with the newer investors in particular affect Africa's capacity to diversify its output into a progressively higher value-added chain?
- ❖Does this model, largely of a turn-key project variety, promote local employment generation? Or] encourage procurement of local resources? Does it facilitate technology transfers?
- ❖Does the objective of what appears to be an externally driven model of engagement affects objectives espoused by NEPAD for a self-reliant and internally driven and resourced model of development?

And what are the implications of the current interactions on governance and environment?

These are some of the questions addressed in what follows. The approach is normative; it outlines policy issues and area for transforming the ongoing trade and investment relations into a 'win-win' partnership.[28]

African governments themselves need to take initiatives to evolve policy responses to contain some of the egregious aspects of their relationship with China and instead promote industrialisation and raise productivity, facilitate absorption of appropriate technologies, improve governance, transparent financial transfers, more effective management of official assistance and safeguard labour and environmental standards.

These objectives can be pursued in a variety of ways and in several fora: in the first place, individual countries in Africa need to undertake a critical assessment of ongoing trade, investment and other areas of cooperation and interactions with China. In tandem, regional blocs such as EAC, SADC and COMESA should be encouraged to initiate research and analysis designed to maximise the benefits of trade and investment. Likewise, African multilateral bodies such as ECA, AU and the NEPAD Secretariats can play a similar role in designing a coherent strategy and supportive policies for strengthening the relationship in directions that are mutually beneficial. Active participation of academic and civil society will be crucial in promoting the objective of a balanced interaction with China. They should be actively involved in the work of Forum for China-Africa Cooperation (FOCAC).

The rest of the paper attempts to identify an agenda for pursuing the above objectives. In some cases, this may require norm setting and negotiations. In others, it may require China to work with multilateral bodies on rules that affect China-Africa trade and financial flows. For example, it would be a step in the right direction for China (and major OEDC countries) to join global compacts such as the Extractive Industries Transparency Initiative (EITI), an international coalition of governments, corporations, civil society and investors designed to implement standardised and internationally recognised procedures for transparency in natural resource management.[29]

II Background to China-Africa Relations

Meaningful bilateral economic interaction between China and Africa is largely a post-independence phenomenon[30]. The first major area of economic cooperation began with a political commitment by China in 1967 to help build a new railway linking Tanzania and Zambia (earlier request for the support of the project had been declined by western donors and multilateral institutions). In many ways, this episode set the stage and framework for later Chinese support to Africa: this is characterised by non-conditional and turnkey project support (rather than programme delivery associated with conditional support from OECD countries).Project completion is frequently timely but often implemented with scant attention to environmental or social consequences. Minimum scrutiny or audit of the end-use of resources transferred may help explain – at least among official and political circles – the popularity of Chinese assistance. A notable feature of Chinese investments is that it is found in countries and in projects considered too risky by Africa's traditional donors and investors. Chinese projects have sprung up in countries like Burundi with significant rebel activities. Conflict-shattered Sierra Leone, Liberia, Rwanda, and the Democratic Republic of Congo have all attracted Chinese investments. Likewise, in line with its policy to acquire

[28]The European Commission has adopted a proposal for a new EU Strategy for Africa. The "EU Strategy for Africa" proposes a strategic partnership for security and development between the European Union and Africa for the coming decade. The strategy follows the decisions by the European Council in June to provide more and better development aid, to increase the speed of implementation and to focus aid in particular on Africa. The strategy focuses on key requirements for sustainable development such as peace and security, good and effective governance, trade, interconnectivity, social cohesion and environmental sustainability. In addition, it reaffirms the commitment to increase EU aid to Africa and to improve aid effectiveness.

[29] WWW.eiti.org/

[30]Joshua Eisenman in: China and the Developing World, Beijing's Strategy for the Twenty First Century, M.E.Sharpe, US, 2007). Manji, op cit, notes that 2006 was the 50th anniversary of the establishment of the first diplomatic ties between China and Africa.

real resources, Chinese enterprises outbid competitors largely as a result of highly subsidised credits provided by the state to its enterprises.

Successful implementation of economic reforms by the post-Mao regime heralded a new phase of sustained growth and interactions with the rest of the world. In this drive, Africa is but a component of a wider strategy to secure political support for its claims on Taiwan, acquire energy and natural resources from all regions and secure its military and commercial interests. Insofar as Africa-specific strategy is concerned, China sees it as a valuable ally: in a speech before the Africa Business Forum, Chinese President stated that as a developing country China considers friendship and cooperation as a cornerstone of its commercial relations with Africa and Asia.

Ties between China and Africa have been formalised in the context of FOCAC which first met in 2000. The Forum is expected to coordinate interactions with the continent: it has met once at the Heads of State level in 2006 and meets at Ministerial levels every three years to review progress in the implementation of decisions taken earlier. During the Beijing Summit[31] of the Forum in November 2006, China announced new commitments to Africa for 2007–2009:

- Preferential credits: US$5 billion, consisting of US$3 billion concessional loans and US$2 billion export buyer's credits.
- Direct investment: A US$5 billion China-Africa Development Fund to support Chinese FDI in Africa.
- Trade: Further opening up China's market to Africa by expanding the list of duty-free African exports and setting up trade cooperation zones in Africa.
- Grants and debt relief: a doubling of 2006 assistance, to build hospitals, malaria prevention and treatment centres, and rural schools in Africa and a conference centre for the African Union; and cancellation of all interest-free loans owed by eligible countries that had matured by the end of 2005.
- Technical assistance: Training for African professionals.

More recently, at the 2009 Fourth Ministerial FOCAC meeting, a US$10 billion low -loan was announced[32] , together with a US$1 billion special loan for small and medium-sized African businesses and write-offs of the debt of some of the poorest African nations. China has also promised to further open its market to African countries with an offer to grant tariff exemption to 95 per cent of exports from the least developed countries (LDCs) in Africa having diplomatic relations with China. As a first step, the goal of zero tariff treatment for 60 per cent of products originating therefrom will be met in 2010.

[31] These commitments apparently do not include trade and project financing by Chinese banks on commercial terms. In May 2007, during the African Development Bank's Annual Meetings in Shanghai, officials of China Exim Bank reportedly stated that they plan to provide about US$20 billion in infrastructure and trade financing to Africa over the next three years.

[32]China will construct 100 new clean-energy projects on the continent covering solar power, bio-gas and small hydro-power and gradually lower customs duties on 95 per cent of products from African states with which it has diplomatic ties. China would undertake 100 joint demonstration projects on scientific and technological research, receive 100 African postdoctoral fellows to conduct scientific research in China and assist them in going back and serving their home countries. The number of agricultural technology demonstration centres built by China in Africa will be increased to 20, 50 agricultural technology teams would be sent to Africa and 2,000 agricultural technology personnel would be trained for Africa, in order to help strengthen Africa's ability to ensure food security. (www.focac.org/2009)

II Trade and Finance: Major Channels of China-Africa Interaction

The rapid expansion of China-Africa trade has also been accompanied by a marked rise in financial flows, both official and quasi-official such as export credits and FDI. Total international trade over the period 2000-2009 has increased more than tenfold (from about US$10 billion to more than US$100 billion); likewise, the growth in financial flows has risen from an estimated US$3.4 billion in 2001 to over US$16 billion by 2006[33].

Links between trade and finance takes a variety of forms and directions: for example, exports of certain types of natural resources are a direct consequence of Chinese investments and financial support in sectors such as mining (copper in Zambia,) energy (oil in Angola and Sudan) and timber (in Cameroon and Congo). Similarly, investment in infrastructure projects such as pipelines, roads, power, ports and water is often linked in support of and complements investment in extractive sectors. Likewise EPZs, a sector that reportedly has been marked as a priority by China, typically integrates FDI with production for exports

(a) Some Stylised Features of the Trade-Finance Nexus

First, while the growth in international trade between China and Africa is undoubtedly impressive, it represents less than 10 per cent of sub-Sahara Africa's total trade with industrialised countries[34]. Overall, the share of Chinese trade with Africa remains, in 2008, less than 4 per cent (compared with more than 45 per cent with Asia in the same year). For Africa, however, the importance of the expansion stems from the fact that it is a new and diversified source of markets and meets the long avowed ambition of many African countries to lessen their dependence on Europe and US as principal sources of imports and destinations of its exports. If the growth continues at this pace over the next several years, it will have far-reaching consequences both for Africa and its traditional trading partners in the North.

Second, a very large share of such trade is overwhelmingly concentrated in a few sectors of critical importance for China. For example, mineral products, oil, timber and base metals account for 90 per cent of Chinese imports from Africa in 2008. A corollary of this is that the handful of producers and suppliers of these exports also account for the bulk of FDI destined for Africa. Third, in line with the product concentration, almost 90 per cent of Chinese Africa-based imports originated in 2008 from just six countries (viz Angola, Sudan, Congo, Equatorial Guinea, Libya and South Africa). Over the short to medium term, the prospect of this becoming a meaningful component of trade are virtually nil. Longer-term prospects will depend on tariff and non-tariff policies in China as much as improvements in supply capacities and competitiveness of African exporters.

Fourth, while Africa's imports are almost entirely dominated by manufactured and finished goods, China's imports reverse the pattern: they are wholly dominated by raw materials. Fifth, overall trade balance is slightly in favour of Africa: however, much of it is concentrated in about five countries who are major suppliers of oil and minerals. For the vast majority of African countries, over 40, there is trade deficit on account of the rapid growth of imports from China. This has also been the pattern of trade with advanced industrial countries.

Sixth, there is some evidence to suggest that the penetration of African markets by manufactures from China may

[33] *IMF: Finance and Development, March 2008, Volume 45, Number 1, Table 1.*
[34] *Raphael Kaplinsky et al in "The Impact of China on Sub-Sahara Africa", DFID China Office, 2006*

be undermining the viability of nascent and established manufacturing sector.[35] Sectors such as textiles and apparel, furniture and some processed commodities have been noted as having experienced serious challenges from low-cost and competitive imports from China.

The expansion of intra-African trade in manufactures under the framework of regional trading arrangements such as COMESA and East African Community is also likely to be affected under pressure of competition from Chinese exports, now facilitated by low tariffs established under more liberalised trade regimes now in place in much of Arica. It is also likely to have adverse affects on ability to switch from primary commodity dependence to more dynamic value-added sectors.

Many observers have noted the decline of the manufacturing sector in Africa: this has been due in part to Breton Woods-induced liberalisation resulting in reduction of tariffs from GATT- WTO bound values, disappearance of subsidies and reduced incentives for investing in this sector, often in consequence of trade measures such as export subsidies adopted by partner countries .The decline has been bridged in many cases by competitive imports from Asia. While this has contributed to an improved choice of consumer goods, it has also resulted in the reduction of domestic productive capacities. Even goods produced for centuries in Africa are now threatened by cheaper and subsidised imports.

With their current levels of productivity and competitiveness, African countries have limited prospect of competing with imports from China. In this regard, South Africa has shown the way by negotiating a quota system that limits Chinese textiles exports to South Africa. Given growing popular discontent in other parts of Africa against some Chinese products, it is in China's interest, as it is in Africa's, to replicate the South African agreement across Africa. China stands to lose little because except in the textiles and clothing industry, Africa has little cross-product specialisation with China. However, unlike imports of capital goods which add to productive capacity, imports of consumer goods do little to strengthen domestic productive capacity. They either compete with other suppliers of such goods or with domestic producers.

Seventh, the tariff rates of imports by China from Africa are high and in most cases significantly higher than those by other countries in Asia. With respect to products of export interest to Africa, primarily in SITC 0 and 1 categories (food and live animals and beverages and tobacco) the tariff rates are three times higher than the average Asian tariffs for the same products. In respect of crude materials (SITC 2), the low tariff rates may have the adverse effect of encouraging such exports as the value addition is likely to take place in the importing country. A fuller analysis of the impact of Chinese tariff regime on African exports – in particular of agro-processing sector at a disaggregated level of SITC would be necessary to establish more accurately the impact of the tariff regime on African exports. In general, however, there is considerable scope for improved export performance of non-traditional

[35] *Kaplinsky et al, op cit.*

exports if the non-tariff barriers facing African exports were removed. [36]

It is known that primary commodities dependence provides limited forward or backward linkages with domestic economy and consequently employment and scope for investments in newer industries. Manufactures, and especially medium and high-technology manufactures, have a production structure that has close forward and backward linkages with the rest of the economy, including the services sector. The major source of dynamism in an economy derives from productivity growth and infusion of technology in the production processes. But since the benefits of such progress are generally captured through a reduction in prices without off-setting growth in long-term demand, the typical commodity producer will face long-term declines in terms of trade.

The recent boom in commodity exports from Africa, largely driven by the cycle of current phase of growth in demand from the major Asian importers, has resulted in short-term improvements in terms of exchange: however, once the current growth rates begin to moderate, terms of trade are likely to resume their longer-term trend values. Recent increase in export earnings must therefore be weighed against the cost of locking Africa further into the cycle of boom and bust commodity dependence.

Eighth, the ongoing pattern of trade with China and indeed other developing countries of Asia appear to be replicating the generally unfavourable linkages with traditional trading partners. The composition of exports and its concentration in low value-addition goods and services has a direct bearing on development and future growth. Exactly how this challenge is to be addressed depends a great deal on domestic policies: but tariff and related trade regimes of trading partners can play an important role in facilitating value-added exports. To the extent that Chinese non-tariff barriers, tariff peaks and tariff escalation affect African exports, their redress would be a positive development.

(b) Issues in FDI and Financial Flows

Unlike trade data, whose reporting and coverage is customs-based, much of the data concerning Chinese financial flows stems in part from anecdotal evidence and from a multiplicity of other sources, rendering an objective evaluation of the numbers cited above difficult. Then again, in the absence of independent official or other supporting records, it is difficult to ascertain whether the announced commitments regarding financial transfers in the context of forums such as FOCAC are implemented. For example, evaluation of the 2009 commitment to double concessional aid (in US dollars) is difficult in the absence of a definition of what constitutes 'concessional aid' or what is the threshold for qualifying as concessional aid (DAC of OECD considers 25 per cent grant element as a threshold for determining concessionality of ODA.)
In view of the particular features of the State and Government in China, it is difficult to establish the differences between official and non-official flows: it is likely to be the case that there is little for the purposes of funding overseas projects. There is, likewise, little or no official reporting from recipients regarding inward receipts of funds, let alone the sectors to which they are destined. Equally, there is no data available to assess the terms under which the aid is provided or utilised. It is known, on the other hand, that all Chinese bilateral aid is tied to procurement in China and not subject to international competitive bidding as is the case with a growing share of ODA from OECD and multilateral financial agencies. Likewise, country and sector distribution of such assistance is not known since there is no comparable official reporting from either the recipient or the supplier agency/entity.

Similarly, in the case of loan guarantees provided by EXIM Bank of China or by export credit agencies, there is no independently verifiable assessment of the terms, conditions, debt accumulation and/¬or debt relief granted. As

[36]*Ray Sandrey et al in "Non-tariff measures inhibiting South African Exports to China and India" in TRALAC Working Paper No 6, August 2008.*

regards the latter point, whilst several announcements have been made about debt relief, little is known about the countries benefiting from such relief, or the terms of such relief: for example, are debts converted into grants? Are they refinanced, rescheduled (in whole or in part) and at which terms and conditions? Is debt relief tied to imports from China? These questions warrant answers and transparent information; if only to address questions such as who in the debtor country benefits from debt relief and what factors triggered the need for debt relief in the first place?

Equally challenging are the problems posed by the category of overseas direct investment: exactly what consists of FDI is largely unknown and as a result there are huge variations in the amounts – both stocks and flows – of reported overseas direct investment and the respective shares of private and or non-official component involved. For example, UNCTAD[37] estimates that the total stock of Chinese FDI to Africa in 2008 amounted to US$7.8 billion. On the other hand, an IMF study[38] notes that:

China's direct investment in Africa, as reported by the National Bureau of Statistics of China, amounted to US$392 million in 2005, up from US$317 million in 2004. Data from other sources show significantly higher figures: in 2004, Chinese FDI was estimated to be more than US$900 million; total FDI in Africa was US$15 billion (Table 2). China's Ministry of Commerce puts China's direct investment to Africa for 2000–06 at US$6.6 billion.

The IMF study goes on to argue that Chinese official statistics may not fully capture the true magnitude of direct investment by Chinese entities in African countries. The dividing line between trade and project financing by China's financial institutions and direct investment by Chinese enterprises is often unclear. It is believed that China's private enterprises also rely heavily on retained earnings and informal arrangements rather than capital markets and bank borrowing to finance investments.[39]

The foregoing discussion suggests, first, that in the absence of an agreed and independent data source for determining the flow of funds, its distribution, terms and conditions, a genuine dialogue about the value and effectiveness of the financial flows is difficult. Secondly, the lack of a formal dialogue about the quality of aid tends to engender suspicion and doubts about both the end use to which the assistance is put and the motives of the provider. A useful start would be to ask China to adopt DAC norms and practice of reporting of financial flows.

(c) Selected Issues in the Area of Mining Investments

By far the largest share of foreign direct investment from China to Africa (and indeed, much of Latin America as well as Asia) is concentrated in the extractive sectors, most notably mining, energy and timber. Of the estimated inflow to Africa of US$1 billion in 2008, almost 80 per cent was destined for the mining and related extractive sectors. The increase in mining investment in Africa can be attributed in part to major changes in mining codes that have helped orchestrate a state withdrawal from the sector, expanded opportunities for the private sector and increased incentives to attract FDI.

Recent evidence from a number of African countries which have been successful in attracting FDI to the mining sector suggests that to date, the trade-off has not been favourable for these host countries, considering the revenues

[37]UNCTAD "South-South Cooperation: Africa and New Forms of Development Partnership, United Nations, New York and Geneva, June, 2010.

[38]IMF, Africa Department: What Drives China's Growing Role in Africa? Prepared by Jian-Ye Wang October 2007

[39]In regard to FDI, additional issues arise with respect to definition of what constitutes a flow of this type: for example, a company's nationality can be defined in terms of (i) place of incorporation (ii) location of the company or (iii) location of owners. Finally, distinctions between Greenfield investments and investments associated with mergers and acquisitions are also hard to quantify on account of data limitations and standards of verification (full verification would require reporting by both the source and destination and by category)

actually generated from their export booms (10 per cent Tanzania, 5 per cent Ghana), particularly when environmental and social costs are factored into the equation.

Given the many benefits and advantages that derive from mining sector activities, most notably in revenues from royalty payments, export earnings and taxes, many countries have put in place an elaborate system of incentives to draw the benefits of mining-related FDI. However, the risks of competition among recipient countries to attract such flows are obvious. UNCTAD has characterised the provision of large panoply of incentives for investors as a 'race to the bottom'. Foregone fiscal earnings and loss of policy options are some of the more obvious costs of this process. Moreover, most countries have little say in areas such as depletion of non-renewable resources, lax labour standards and conditions of work or costs of environmental neglect and damage.

Several countries in Africa and elsewhere are actively pursuing and monitoring the immediate and longer-term consequences of FDI in this sector. In particular, there is a widespread perception that commodities and mining riches often benefit the elite rather than the poor. This is all the more so, given the known preference of Chinese investors to deal directly with less accountable political leadership rather than technical and other bodies competent to assess and analyse the financial, social and development consequences of investments .

The presence of Chinese FDI in Africa, it has been suggested, replicates many of the egregious features of the earlier colonial model of mining exploration and exploitation: opaque contracts signed among unequal parties, scant regard for land, water and other environmental consequences or impacts on local communities. Anecdotal[40] evidence tends to support the view that the Chinese model of investment in the extractive sector is not far different from that of the western companies. But it should be kept in mind that the new contracts and mining agreements are engaged into by sovereign independent countries and hence the primary responsibility for the misuse and exploitation of its natural resources should be national (**vide caveat emptor**).
The foregoing suggests the case for a stronger public awareness and policy intervention to ensure that agreements involving domestic enterprises and FDI follow certain basic norms, such as public scrutiny, accountability and meeting essential labour and environmental standards. Guaranteeing local social and economic welfare should be a standard requirement of all new agreements and arrangements.

A recent report on Africa prepared under the aegis of the former British Prime Minister, Tony Blair, has recommended the provision of support and technical advice for countries to negotiate mining and related contracts and leases. Earlier, UNCTAD had also suggested support along similar lines to strengthen domestic capacities for negotiating contractual arrangements with experienced mining TNCs.

It is therefore suggested that as a first step, African multilateral institutions seek to expand and deepen legal and economic research into the area of mining investments with a view to provide states with policy advice and guidance in their negotiations with overseas enterprises. Secondly, they should consider establishing a repository of existing and new contractual agreements between China and individual countries.
This would require China and its mining enterprises to share all data and information with African institutions.

[40]*Promoting Fair Tax System for Developing Countries: Issues and role of key actors Samuel K. GAYI, mimeo, 2008.*

Thirdly, these institutions should encourage Chinese and other investors to be part of codes and norms such as Multi-Stakeholder Working Group of the Extractive Industries Transparency Initiatives (EITI) designed to implement principles and criteria in promoting transparency and accountability in revenues generated from minerals, oil and gas.[41]

In this connection, it is worth taking note of the practice in the United States making it mandatory for oil, gas and mining companies listed on their stock exchanges to disclose what they pay foreign governments for the right to extract natural resources and to make it an offence to import illegally sourced timber. The foregoing suggests the case for stronger public awareness and policy intervention to ensure that agreements involving domestic enterprises and FDI follow certain basic norms, such as public scrutiny, accountability and meeting essential labour and environmental standards.

In this regard, the Secretary-General of UNCTAD has argued, "International companies, including from Asia and Latin America, are stepping up their investments in Africa. There is no doubt that Africa's hydrocarbon sector has become very attractive. But how much will the continent benefit from this in the end? The answer will depend not only on the use that governments make of their large revenues and windfall gains, but also on the efforts of these oil companies to integrate into their host economies and on the effectiveness of local content strategies."[42] Some of the large windfalls from resource rents should encourage African governments to pursue aggressive national development goals, including strategically consolidating their local firms and positioning them as a matter of policy to partner, and learn from, Chinese companies in major contracts.

(d) Issues in Transfer of Technology

The question of technology or knowledge transfer would be expected to occupy a key place in discussions and assessment of China's role in Africa. Considered as a process of acquisition and application of knowledge in its broadest sense to enhance production of goods and services and to improve societal welfare, the role of technology is central to the process of development.

Actual transfers can take a variety of forms and modalities, often depending on the nature of the technology, its provider and its end-use. The transfers may be affected via foreign direct investment, entering into joint ventures or provision of capacity building support through development assistance. Then again, it can be embodied in machinery and capital equipment as well as in production processes and embodied in the workers. It can also be acquired through licensing (compulsory or otherwise) and reverse engineering.

In each of these ways of acquiring technology, there is much that can be learnt from China's experience as well as from its investments so far in Africa, be they in mining or constructing roads, ports and EPZs. In light of the many investment projects undertaken by Chinese enterprises in Africa, it is worth asking whether the transfer of know-how and expertise to local economy has been along the expected lines. Some evidence suggests that the model of investment China has pursued so far in Africa may hinder the transfer and diffusion of technology to local workers and enterprises. This model, as noted earlier, is based largely on using a turnkey type of project delivery in which a large share of the material is resourced from China as are a large proportion of labour, management and all skilled services such as architectural and engineering designs. If the Chinese model of investment is to become sustainable over the longer haul, different and more explicit and forward-looking policies will have to be adopted both by China and the recipient counties to establish an effective technology transfer and cooperation regime.

It has been suggested that the Chinese way of doing business and language barriers may limit opportunities for technology transfer; if true, this may explain in part the absence of local African players to enter into joint ventures with Chinese multinationals. Except in textiles, and to a less extent in footwear industries, Chinese companies do

[41] *The EITI is a global coalition of governments, companies, civil society, and investors to implement standardised and internationally recognised procedures for transparency in natural resource management.*

[42] *Statement at the 10th UNCTAD African Oil & Gas Trade and Finance Conference in Algiers, Algeria, 2008.*

not compete with African enterprises. In sectors like telecommunications and construction and engineering works, the major competitors are foreign multinationals, with which Chinese companies often cooperate in large contracts. Except in South Africa, local African firms in these sectors are often small and weak players.

Appropriate organs of government should start the process of devising explicit technology transfer policy which would be embedded in all future investment and development agreements and projects funded by China. One component of such a strategy would be to insist on the transfer of the so-called appropriate technology (AT) i.e. technology that reflects local needs, stage of development and which gives special attention to the social and economic conditions of the peoples and society it is intended for. It has been argued that AT requires fewer resources per unit of output, is easier to maintain, and has less damaging environmental consequences.

(e) The Special Case of Export Processing Zones (EPZs)

Export processing zones (EPZ) have emerged as an important policy tool in many African countries for attracting foreign direct investment and promoting exports: among the related and additional benefits cited in favour of EPZs include scope for creating new employment, assured access to foreign markets, transfer of modern technology and management skills and incentives to improve infrastructure.

However, attracting FDI for the purposes of promoting EPZs require a panoply of supporting incentives and measures which most frequently include generous tax holidays, subsidised water, power, transport and duty-free imports of raw materials. Many agreements also require freedom from local content obligations as well as waivers from labour standards.

It is estimated that by 2002, more than 110 countries had established some 3,000 EPZs around the world.[43]

An assessment of their performance and effectiveness in attracting FDI, generating employment, transferring technology and raising export volumes has been difficult, given the wide variety of countries and activities involved, not to mention variations in packages of incentives. But a broad conclusion is that the benefits of EPZs have varied depending upon the capacity of the host country to negotiate the terms of an EPZ, priority for safeguarding its development objectives, the sectors chosen and the quality of infrastructure on offer. Recent evidence also suggests that countries with a better and higher skill profile have benefited most (below).

Among the more strategic policies adopted by China in its engagement with Africa is the decision to establish, to

[43]International Labour Office "Employment and Export Processing Zones" Geneva, 2002. The ILO notes that EPZs can take a wide variety of institutional and legal forms: they can be one product, one company, or for one in Africa and cover specific sectors such as technology or even tourism.

start with, more than half a dozen EPZs across Africa[44]. While these zones are being identified as important economic models of cooperation between the two, they also represent an important option for China to move its low-cost manufacturing base offshore, compete with local and other manufacturers for export market share and benefit from special preferential arrangements such as AGOA and several EU schemes[45].The experience with EPZs so far raises the obvious question whether the model is sustainable from the standpoint of Africa. Lax environmental and labour standards (role of local trade unions is generally eschewed), foregone fiscal revenues as a consequence of generous tax holidays and increased scope for rent seeking are common features of the EPZs. And yet there is little evidence to suggest that the avowed objective of establishing them in the first place is achieved. There is little or no technology transfer, management is almost exclusively in the hands of non-residents, and there is little impact on employment as most of the labour, including in the construction and design of the EPZs, is externally sourced[46].

EPZs in Africa and Latin America have generally fared less well than in Asia: in Africa, the available evidence suggests that barring the experience of Mauritius, many of the EPZs have experienced difficulties in attracting initial investors; in other cases, they have generally been confined to AGOA or EU-related schemes of preferences and hence necessarily attract footloose investors. Increasingly, investors have preferred EPZs that embrace high-technology and skilled labour-based products. It is therefore not surprising that the main beneficiaries of the EPZs have been relatively advanced among developing countries (e.g. China, Malaysia, Singapore, and Thailand). In Africa, it has been noted that EPZs have largely focused on textiles and apparel sector, often taking advantage of the MFA and AGOA incentives. With the end of the MFA in 2005, many countries experienced serious dislocations and adjustment problems: likewise, the benefits of AGOA have also been mixed. In a study of Namibia's experience with EPZs and AGOA,[47] it has been observed that the experience was a "disaster for the country" and some hard lessons will have to be learnt by other countries in Africa to avoid similar problems.

In light of the recent policy adopted by China to accelerate investments in EPZs in Africa, there is a strong case to evolve policies that rebalance the benefits of EPZs in Africa's favour. In particular, attention will have to be given to promoting local content and linkages with the domestic economy, maximise use of local labour and transfer technology and knowledge if these initiatives are to succeed. When dealing with foreign investors, there is an urgent need to ensure compliance with national laws and regulations, workers rights, as well as environmental, health and safety standards. Experiences elsewhere have shown that compromises on social, environmental and labour standards in the name of international competitiveness lead to a "race to the bottom", leading to a process of self-defeating competition for attracting FDI.

(f) Capital Flows, Dutch Disease Syndrome and Governance

In tandem with massive shifts of global savings towards developing countries, Africa during the current decade has also experienced an unprecedented infusion of funds either in the form of export revenues or large financial inflows

[44] *"China to hike SEZs in Africa" China Daily, September 15, 2010.*

[45] *Among them include Generalized System of Preferences(GSP) Everything But Arms (EBA) and duty free-access for LDCs.*

[46] *Moreblessings Chidaushe in African Perspectives on China in Africa (Ed: Firoze Manji and Stephen Marks, op cit.)*

[47] *Herbert Jauch "Pitfalls of Export Processing Zones" Pambazuka, 2008, Issue 357 3http://www.pambazuka.org/en/category/comment/46932*

as a result of increased ODA, FDI, and other forms of commercial credits.[48] Of this expansion, a significant share originates from China and other developing countries; however, it is concentrated in a handful of resource-rich countries, benefiting both from higher export revenues and related investments in the oil and extractive sectors.

The social, political and economic implications of a rapid infusion of external capital in relatively undeveloped economies has been the subject of much research and analysis: the consequences of this phenomenon are often referred to as the Dutch Disease Syndrome (so named following the decline of manufacturing in the Netherlands in consequence of windfall receipts from gas discovery and exploitation), a ‘paradox of plenty’ or a ‘resource curse’. The analysis of this phenomenon has ranged from impact on domestic financial system, to national savings and consumption, national entrepreneurship and distortions in the allocation of public resources. Often, an immediate trigger for these macro-economic consequences is an unplanned appreciation of the domestic currency.[49] A parallel literature and concern has documented the impact of sudden and large financial flows on governance and rent seeking, on human rights and on larger political consequences, most notably on the democratic processes and survival of regimes responsible for inflows in the first place. This phenomenon, often observed in countries characterised by an absence of effective administrative services, an effective judiciary and lack of probity and accountability, has been referred to as “resource curse”.[50]
In respect of Chinese assistance, it has been argued that it contrasts sharply with that now originating from OECD countries: it is presumed to be less conditional and less coercive in political terms. Its investments are analogous to unrequited financial transfers, entailing the high risk that the investments will cause harm rather than improve the lives of people living in Africa and risks undermining some of the progress that is being made in the fight against corruption and capital flight. Keenan argues that China’s recent investments in Africa are unconditioned wealth transfers and as such are likely to decrease social welfare.

Given the political conditions in many recipient states, there is reason to worry about how these governments will use aid: lack of interest by China in the political economy of recipients appears to undermine aid effectiveness. The strong preference China has exhibited for dealing directly with heads of state or government and the political establishment raises worrisome issues: in bypassing normal administrative channels and procedures, it is very difficult to get the full details of agreements that governments enter into with China. There is less than full disclosure and access to information regarding the amounts which in turn compromises accountability and makes analysis of expenditure tracking particularly difficult.

Circumventing the critical role of technocrats in assessing the value of specific Chinese interventions raises further questions about how transparently the aid resources are distributed. Given the political conditions in many recipient states, Keenan argues that there is reason to worry about how these governments and their administrative services will use the windfall.

[48] *The Petersen Institute of International Finance estimates that about US$825 billion will flow into developing countries this year, 42 per cent more than in 2009.*
[49] *A natural resources boom can affect a domestic economy through two closely linked causal pathways. First, in a typical domestic economy, one reason that goods manufactured for export are valuable is that they generate foreign exchange, which can be used to import goods from other countries. But if, for example, natural gas is discovered and begins to generate significant amounts of foreign exchange, there is no longer a need to manufacture other goods for export because the domestic demand for foreign currency has already been satisfied. One consequence of this is to make products produced solely for the domestic market relatively more expensive and to suppress the profitability of goods (other than natural resources) produced for export. Put slightly differently, it is the effect of increased earnings from the sale of natural resources on demand that matters.*
[50] *Patrick.J.Keenan: “Curse or Cure? Chinese Investments in Africa and their effects on Human Rights” Draft, Georgetown Law Journal.*

III: An Agenda towards Rules of Engagement with China

China's presence in Africa will grow over the foreseeable period, as economic and political ties of many more countries with China deepen. The evolving engagement can be a 'win-win' relationship provided Africa has a clear strategy, and supporting policies and rules of engagement to sustain the relations. In the absence of well-defined rules of engagement, there is a real risk that the agenda by default will be established by the far more powerful interlocutor.

It is taken as given that a major responsibility for maximising benefits of interaction with China will be, and should be, borne by individual countries. Issues such as protection of environment, immigration rules, employment of national citizens in projects funded by China (and other foreign investors) and measures to safeguard depleting natural resources will naturally remain a national responsibility. At the same time, and as Africa's economies begin to integrate further through regional trading agreements such as COMESA and ECOWAS, a larger number of trade, investment, services and cross-border issues will warrant regional responses. In this regard, the role of African institutions in support of research and policy design for engagement with China will assume greater importance. Indeed, over time, many cross-border issues will have to be negotiated by regional authorities on behalf of its members.

Africa-wide bodies such as AU and NEPAD could be the appropriate institutions to serve as the main interlocutors of Africa with China in the context of FOCAC. However, there are doubts whether these bodies can, as presently funded and constituted, provide meaningful support to its members in designing Africa's response.

At present, the main multilateral forum for any formal interaction and dialogue between China and Africa is FOCAC. As was noted earlier, this body was established by China in 2000 and serves primarily as a secretariat for organising various meetings between China and Africa. It also reports on various follow-up activities but the primary orientation of FOCAC is to promote interests, policies and perspectives of China. In the absence of any comparable institutional framework in the service of Africa, it is not surprising that there is a near-absence of any formal African response to the decisions and commitments made in the context of FOCAC. Moreover, the agenda of FOCAC meetings is set by China as is the organisation of its meetings and discussions. The latter tend to be formal diplomatic pronouncements about the importance of Sino-African cooperation and the issuance of communiqués and press releases of meetings. If there are any discordant voices raised at FOCAC meetings, there are no reports or records to document them.

In as much as the financing of African participation at these gatherings is provided by China, there is understandable reluctance on the part of the Ministers and others to raise issues critical of Chinese activities. The fact that China is building a new conference centre for the Africa Union is also likely to compromise the stance of beneficiary countries and its secretariat. The most glaring lacunae in the FOCAC process is the absence of any joint and shared agenda setting, of informed dialogue or substantive inputs by African bodies in the preparatory process. Active involvement and participation of African civil society, notably trade unions, business representatives, the media, academics and the NGO community in FOCAC (as well as at the national levels) would help rebalance the process.

The first step in the direction of making meaningful contacts between Africa and China is for Africa to empower its own institutions to prepare an agenda that sets out the concerns and priorities of its membership. Many of these concerns have been identified in Section II of this report: they include adoption of policies to encourage greater value-added African exports to China; support in diversifying production from primary commodities to agro-processing and manufacturing; improved labour standards; greater use of both skilled and semi-skilled workers from

Africa in Chinese projects; immigration and labour rights issues; rules and norms in areas of technology transfer, environmental protection and mining and other extractive sectors; greater association of Chinese investors with existing global norms on corruption and fuller transparency in provision of aid and its distribution.

Many of these issues will require considerable research by African scholars and institutions, a process that is ongoing thanks to the work of many activists in the academia and the civil society. A third broad set of agencies and institutions that should play a central role in the design of Africa's strategy include bodies and their secretariats such as SADC, EAC, COMESA, and ECOWAS. Their expertise in trade issues can be an indispensable contribution towards designing a trade and investment component of the strategy. Equally important would be analysis drawing attention to the consequences of Chinese market penetration on local production. One of the major arguments for regional integration is that it would provide larger markets and scale economies for promoting industrialisation. In this regard, the question arises: does the enlargement of liberalised markets help foreign investors at the expense of domestic producers?

Finally, the need to render financial flows (and related issues of debt accumulation) transparent and accountable requires further research and analysis. Accordingly, in the context of FOCAC, it may be useful for an African organisation such as NEPAD or the UNECA to engage in a dialogue, on behalf of the members of AU, with China and its agencies to improve research, data collection and reporting with a view to influence the direction and quality of financial flows.

[51] *Feroze Manji et al, op cit.*

DISPUTE SETTLEMENT CLAUSES IN CHINA-AFRICA TRADE AND INVESTMENT AGREEMENTS

By Ife Ogbonna (Brunel Law School, UK)

1. INTRODUCTION

Following her accession[52] to the ICSID Convention[53], China currently has ninety bilateral investment treaties (BITs) registered at the International Centre for the Settlement of Investment Disputes (ICSID) of which only five are with African countries, namely, Botswana, Egypt, Ghana, Morocco and South Africa[54]. China also has other BITs with Benin, Ethiopia [55], Ivory Coast, Tunisia and Uganda that are not registered at the ICSID but notified to the United Nations Conference on Trade and Development (UNCTAD)[56]. However, even though ICSID has 205 concluded cases and 122 cases that are pending, fourteen[57] of which involve African countries, none is with China.

[52]China signed the ICSID Convention on 9 February 1990, ratified it on 7 January 1993 and the Convention came into force in the Peoples' Republic on 6 February 1993.

[53] Convention on the Settlement of Investment Disputes between States and Nationals of Other States 18 March 1965, entered into force 14 October 1966 following its ratification by 20 countries. There are currently 155 signatory States to ICSID Convention; of these, 144 States have deposited their instruments of ratification, acceptance or approval of the Convention and have become ICSID Contracting States.

[54] http://icsid.worldbank.org/ICSID/FrontServlet visited 1 November 2010.

[55] Ethiopia, Guinea-Bissau, Namibia and Sao Tome and Principe are the African countries that have not ratified the ICSID Convention; Canada, Russia and Thailand have also not ratified the Convention and so it is not directly in force in these countries. Bolivia and Ecuador both ratified the signed and ratified the Convention but later deposited instruments of denunciation in accordance with Article 71 of the ICSID Convention 1965 and so are no more members.

[56]Available at www.uctad.org

[57] The following are the cases currently pending at the ICSID against African countries:

- *i. Antoine Goetz and Others v Republic of Burundi (ICSID Case No. ARB/01/2) on the subject matter of mining, banking and service enterprises registered on 27 March 2001 with the tribunal constituted on 25 June 2002 and reconstituted on 4 March 2010,*
- *ii. ABCI Investments N.V. v Republic of Tunisia (ICSID Case No. ARB/04/12) about the acquisition of shares, registered on 6 April 2004 and the constituted on 5 October 2007,*
- *iii. RSM Production Corporation v Central African Republic (ICSID Case No. ARB/07/2) on the subject matter of petroleum exploration and exploitation contract registered on 18 January 2007 with the tribunal constituted on 20 May 2008;*
- *iv. M. Meerapfel Söhne AG v Central African Republic (ICSID Case No. ARB/07/10) on the subject matter of the tobacco indus try registered on 25 April 2007 and the tribunal constituted on 17 December 2007,*
- *v. Shell Nigeria Ultra Deep Ltd v. Federal Republic of Nigeria (ICSID Case No. ARB/07/18) about hydrocarbon concession, registered on 26 June 2007 and the tribunal constituted on 21 January 2009,*
- *vi. Participaciones Inversiones jPoprtuarias SARL v. Gabonese Republic (ICSID Case No. ARB/O8/17 on the concession of two ports, registered on 16 December 2008 with the tribunal constituted on 9 June 2009,*
- *vii. Malicorp Ltd v. Arab Republic of Egypt (ICSID Case No. ARB/08/18) about airport construction project, registered on 16 December 2008 with the tribunal constituted on 2 June 2009,*
- *viii. Millicom Int'l Operations B.V. and Sentel GSM S.A. v. Republic of Senegal (ICSID Case No. ARB/08/20) about telecommu nications enterprise, registered on 31 December 2008 with the constituted on 12 June 2009,*
- *ix. Mærsk Olie, Algeriet A/S v. People's Democratic Republic of Algeria (ICSID Case No. ARB/09/14) about oil exploration and production of liquid hydrocarbons, registered on 29 July 2009, tribunal constituted on 10 March 2010,*

Therefore, due to the non-existence of BITs cases between China and even one African country, this article will analyse prospectively the provisions of the BITs between China and six African countries at the textual level to show their essential characteristics, the challenges likely to arise from the applicable laws and conflict of laws chosen in the BITs and also from the court or the seat of arbitration. Again knowing that disputes are bound to occur in international trade and investment, we will first compare the China-Africa BITs clauses with other well known BITs models by ICSID, the UK and the USA to see if the Chinese present more favourable terms to African countries and finally see if the China-Africa BITs are drafted carefully enough to give Africa any realistic hope of a successful dispute settlement with China should a case arise.

First we will examine the key characteristics of the three BITs between China and Botswana, Egypt and Ghana which are registered at the ICSID. Secondly we will look at another set of three between China and the Republic of Benin, Tunisia and Uganda. The remaining parts of this article will look at the ICSID and the challenges they present to African countries. Finally suggestions will be made, in light of the present stage of development of most African countries, about realistic steps to be taken to square up to China in a bilateral trade or investment dispute.

1.2. Foreign Investment and Bilateral Investment Treaty

The title of each of the BITs that will be examined in Part I below ends with the phrase 'the Encouragement and Reciprocal Protection of Investments,' but what qualifies as an 'investment' in the eye of the law? Sornarajah defines foreign investment as 'the transfer of tangible and intangible assets from one country into another for the purpose of their use in that country to generate wealth under the total or partial control of the owner of the assets.'[58] This is different from portfolio investment which also involves the movement of money for the purpose of buying shares in a company or other security instruments through which capital is raised for ventures in another country without seeking to manage or control such a company. It has been maintained that there should be no distinction

x. H&H Enterprise Investment, Inc. v. Arab Republic of Egypt (ICSID Case No. ARB/09/15) registered on 11 August 2009, tribunal constituted on 2 February 2010,

xi. Carnegie Minerals (Gambia) Ltd v. Republic of The Gambia (ICSID Case No. ARB/09/19) about mineral concession, registered on 23 December 2009, tribunal constituted on 3 March 2010,

xii. Antoine Abou Lahoud and Leila Bounafeh-Abou lohoud v. Democratic Republic of the Congo (ICSID Case No. ARB/10/4) on the subject of a trading company registered on 4 March 2010, tribunal constituted on 27 July 2010,

xiii.Bernhard von Pezold and Others v. Republic of Zimbabwe (ICSID Case No. ARB/10/15) about commercial farms, registered on 8 July 2010, tribunal not yet constituted, and

xiv. Int'l Quantum Resources Ltd, Frontier SPRL and Compagnie Minére de Sakania SPRL v. Democratic Republic of the Congo (ICSID Case No. ARB/10/20) about mining concession, registered on 22 October 2010, tribunal yet to be constituted.

Visit Home>Cases>List of Cases>Pending List at http://icsid.worldbank.org last visited 1 November 2010.

[58] *M Sornarajah, The International Law of Foreign Investment, 2nd edn Oxford University Press, Oxford 2004) 7. He compares his definition with that in the Encyclopaedia of Public International Law (vol. 8, p. 246) where foreign investment is defined as 'a transfer of funds or materials from one country (called the capital exporting country) to another country (called the host country) in return for a direct or indirect participation on the earnings of the enterprise' which he criticises for being too wide as to include portfolio and saying that The IMF Payments Manual (1980), para. 408, used a narrower definition which excluded portfolio investment. It defined foreign investment as 'investment that is made to acquire a lasting interest in an enterprise operating in an economy other than that of an investor, the investor's purpose being to have an effective choice in the management of the enterprise.' See n 10.*

between the protection offered by international law to foreign direct investment[59] and portfolio investments.

While physical property and the rights associated with it such as leases, mortgages and liens were initially considered as 'investments' it was quite difficult in the case of company shares as demonstrated by the International Court of Justice in the *Barcelona Traction Case*[60] where it was held that shareholder's rights could not be conferred with diplomatic protection. However, much later, intangible rights such as intellectual property rights came to be included as 'investment' the justification being that its protection by investment treaties will encourage technological transfer from an investor in a developed country to a local partner or within a joint venture in a developing country.

Arguments have also been put forward that even the administrative rights, the costs involved in the work of preparing an agreement or a treaty and even the legitimate expectation of the foreign investor should be regarded as 'investment' and compensated should the arrangement collapse. In *Mihaly v. Sri Lanka*[61] what was submitted to ICSID for determination was that the tendering for a project and the negotiations that followed should be considered as investment if the deal turned out unsuccessful due to improper reasons.

There have also been other attempts to make the meaning of investment as expansive and purposive as possible. ICSID has been seized by attempts to make loans and promissory notes count as investments. In the *Ceskoslovenska Case*[62] what was in issue before ICSID was whether the failure to repay a loan which the Slovak government had guaranteed could pass as foreign investment within the meaning of the ICSID Convention; and in Fedex *NV v. Venezuela*[63] the claimant wanted to be compensated for an interest it had acquired in promissory notes which it argued should count as foreign direct investment. ICSID often favours a broad and expansive definition of the term 'foreign investment.'

1.3. Justification for BITs

Bilateral investment treaties 'seek to set out the rules according to which the investments made by the nationals of the two state parties in each other's territory will be protected.'[64] The key features of BITs are that 'they are made between unequal partners'[65] and create *lex specialis* between the parties. While some writers believe that BITs give support to 'standards of customary international law'[66] others argue about the existence of such customary international law in the first place.[67] The developed countries which are in most cases the capital seek through the BITs to legalise the notion of 'prompt, adequate and effective compensation' while the developing countries which again in most cases are the host states would like 'appropriate compensation' to be the standard of treatment of aliens in the event of expropriation of foreign property.

The main reason for BITs is that there is no multilateral agreement on investment and so the 'states had to resort to the second best solution by making BITs,' or as the ICJ put it in the *Barcelona Traction Case*:

[59]*Ian Brownlie, 'Treatment of Aliens: Assumption of Risk and International Law' in w Flume, H J Hain, G Kegel and K R Simmond (eds), International Law and Economic Order: Essays in Honour of F A Mann (1997) 309 at 311.*
[60]*[1970] ICJ Rpts 1.*
[61]*(2002) 17 ICSID Rev 21.*
[62]*Ceskoslovenska Obchodni Banka v. Slovak Republic (1999) 14 ICSID Rev 251.*
[63]*(1998) 37 ILM 1378.*
[64]*Sornarajah supra p. 205.*
[65]*Ibid 207*
[66]*F A Mann, 'British Treaties for the promotion and Protection of Investment' (1981) 52 BYIL 241 and E Denza and S Brooks, 'Investment Protection Treaties: The United Kingdom Experience' (1987) 36 ICLQ 908 at 912.*
[67]*Sornarajah Ibid.*

Considering the important developments of the last half-century, the growth of foreign investments and the expansion of international activities of corporations, in particular of holding companies, which are often multinational, and considering the way in which the economic interests of states have proliferated, it may at first sight appear surprising that the evolution of the law has not gone further and that no generally accepted rules in the matter have crystallised on the international plane.

2. The Characteristics of China-Africa Dispute Settlement Clauses registered at the ICSID

2.1. China-Ghana BIT

The BIT between China and Ghana was signed on 12 October 1989 but has not entered into force up to the time of writing (November 2010). It has two articles devoted to dispute settlement: Article 9 captioned 'Settlement of Disputes of Contracting States' and Article 10 'Settlement of Dispute on Quantum of Compensation." Article 9(1) states clearly that it is concerned with 'dispute between contracting states' about 'the interpretation or application' of the agreement and prescribes settlement 'by consultation through diplomatic channel' but if not resolved within six months it should 'be submitted to an ad hoc arbitral tribunal.' The arbitral tribunal should comprise three arbitrators, each contracting party appointing an arbitrator and the third who should be a national of a state with diplomatic relations with both contracting parties to be appointed by the first two arbitrators. However, to become the chairman of the tribunal Article 9(3) demands that the third arbitrator has to be 'appointed by the two Contracting States.' So, all that the two arbitrators do is select a candidate to be endorsed by the Contracting States. In the event of any difficulty with the selection and appointment of the third arbitrator and chairman, the President of the International Court of Justice (if he is not a national of any of the Contracting States) will make the appointment, otherwise the next senior officer does.

The applicable laws are 'the laws of the Contracting State accepting the investment, the provisions of (the) Agreement and the principles of international law recognised by both Contracting States.'[68] The tribunal 'award shall be final and binding on both Contracting States.'[69] Even though the tribunal 'upon the request of either Contracting State' may 'explain the reason of its award,' the Agreement does not provide for a review or an appeal or for the enforcement of the award.

Article 10 is about State-investor dispute settlement as it provides for 'any dispute between either Contracting State and the investor of other Contracting State.' The constitution and composition of the arbitral tribunal is like that under Article 9 except that here the two arbitrators appointed by the parties have the right to designate the third arbitrator they will appoint as chairman. While the tribunal has the power to determine its procedure, it may 'take guidance from the Rules of the Arbitration Institute of the Stockholm Chamber of Commerce or the Arbitration Rules of the ICSID.' Again while the 'decision shall be final and binding on both parties to the dispute' the

[68] *Article 9(5) 'Agreement Between the Government of the People's Republic of China and the Government of the Republic of Ghana Concerning the Encouragement and Reciprocal Protection of Investments,' 12 October 1989.*
[69] *Article 9(6).*

enforcement provision states that it has to be 'in accordance with the respective domestic law'[70] of the Contracting States.

2.2. China-Egypt BIT

The BIT between China and Egypt was signed on 21 April 1994 and has not yet entered into force. The dispute settlement clauses are contained in two articles: Article 8 – 'Disputes between Contracting Parties' and Article 9 'Settlement of Investment Disputes.' The procedure for the handling of disputes between Contracting Parties is very much similar to the one discussed above subsection (a).

In Article 9 which is on investor-State arbitration, the steps are as follows:

i. The dispute should 'be settled amicably through negotiations between the parties.'[71]
ii. Submission of 'the dispute to the competent court of the Contracting Party accepting the investment,'[72] and
iii. 'If a dispute involving the amount of compensation for expropriation cannot be settled within six months,' the constitution of an arbitral tribunal.

Steps (ii) and (iii) are mutually exclusive because step (iii) 'shall not apply if the investor concerned has resorted to the procedure specified in (ii)'[73]

On procedural law the arbitral tribunal can determine its own procedure but may take as guidance ICSID Rules. The applicable laws as spelt out in Article 9(7) are 'the law of the Contracting Party to the dispute accepting the investment including its conflict of laws, the provisions of (the) Agreement as well as the generally recognised principles of international law accepted by both parties' (Italics mine).

2.3. China-Botswana BIT

The BIT between China and Botswana was signed on 12 June 2000 and is yet to come into force. It is essentially the same with the one between China and Egypt with corresponding Articles 8 and 9 entitled in the same way and the paragraphs written in the same words.

However, in Botswana when the dispute is between the investors of one Contacting Party and the other Contracting Party (that is, investor-State arbitration) 'the Contracting Party involved in the dispute may require the investor concerned to exhaust the domestic administrative review procedure specified by the laws and regulations of that Contracting party before submission of the dispute' to ICSID arbitration.

In summary the three BITs examined above are mere political documents with absolutely no legal force since none

[70] *Article 10(4)*
[71] *Article 9(1) 'Agreement Between the Government of the Arab Republic of Egypt and the Government of the People's Republic of China Concerning the Encouragement and Reciprocal Protection of Investments. 21 April 1994.*
[72] *Article 9(2).*
[73] *Article 9(3).*

of them has come into force. In addition to signing, international treaties, agreements or conventions have to be ratified to acquire the force of law, otherwise they are not legally enforceable.

3. China-Africa BITs known to UNCTAD but not registered with ICSID

3.1. China- Benin BIT

The China-Benin BIT has Articles 8 and 9 on settlement of disputes. Like those analysed above Article 8 is on 'dispute between Contracting Parties' and Article 9 on investor-State arbitration. What is peculiar about this Agreement is that in any dispute involving an investor and the State, apart from providing that it could be submitted to either the court of the State where the investment was made or to international arbitration, it is the only one which designates ICSID or UNCITRAL (United Nations Commission on International Trade Law) as the applicable law. Again its proviso before submission to international arbitration is couched in stronger words than we usually find in similar China-Africa BITs. It stipulates, 'provided that the Contracting Party involved in the dispute may require the investor to go through the domestic administrative review procedures specified by the laws and regulations of that Contracting Party before submission to international arbitration.'[74] So here the host State has the power to insist that domestic remedies be exhausted before submission to international arbitration.

Again the China-Benin BIT has more applicable laws and extensive coverage than any other one. The Agreement provides as follows:

> The arbitral tribunal shall make arbitral award based on:
> (a) provisions of this Agreement;
> (b) laws of the State where the investment was made including its rules on conflict of laws;
> (c) the principles of international law accepted by both Contracting Parties;
> (d) specific bilateral agreements on investment between the Contracting Parties;
> (e) other international treaties on investment to which both Contracting Parties are or may become parties.[75]

This is the widest China-Africa BIT article on applicable laws as it covers past, present and future laws that the parties signed before or may sign up after the agreement. It also urges both parties 'to commit themselves to the enforcement of the award.'[76]

3.2. China-Tunisia BIT

The China-Tunisia BIT is the only one having only two paragraphs on investor-State arbitration. It provides for submission of the dispute to either 'the competent court of the Contracting Party' or 'to the ICSID.'[77] It is also the only BIT under examination here with a Protocol attached to it. Still remarkable, it is also the only one that has a 'maximum period of three months' clearly spelt out for the exhaustion of domestic administrative procedures[78] (see footnote for the provision of the protocol).

3.3. China- Uganda BIT

The China-Uganda BIT is unique in many respects. It reverses the order of its Articles 8 and 9 on the settlement of disputes by providing under Article 8 for investor-State dispute settlement and Article 9 for dispute between the Contracting Parties.

[74] Aricle 9(3), 'Agreement Between the Government of the People's Republic of China and the Republic of Benin.
[75] Article 9(5).
[76] Article 9(6).
[77] Article 9(2).
[78] Ad Article 9, Protocol to the Agreement Between the People's Republic of China and the Republic of Tunisia for the Reciprocal Encouragement and Protection of Investments, 21 June 2004.

> *1.The Republic of Tunisia takes note of the statement that the People's Republic of China requires that the investor concerned exhausts the domestic administrative review procedure specified by the laws and regulations of the People's Republic of China, before submission of the dispute to international arbitration under Article 9 paragraph 2. The People's Republic of China guarantees that such a procedure will take a maximum period of three months.*
> *2. The procedure specified in paragraph 1 allows the investor to apply to the competent administrative authorities but in any way to judicial authorities for settlement of dispute.*

Article 8 on investor-State arbitration provides for the settlement of any 'legal dispute… through negotiations between the parties. However, if such a 'dispute cannot be settled within six months' Article 8(2) has the most radical of any China-Africa BIT that leaves the State at the mercy of the investor. It provides:

> If the dispute cannot be settled through negotiations within six months from the date it has been raised by either party to the dispute, it shall be submitted by the choice of the investor
>
> (a) to the competent court of the Contracting Party to the dispute;
> (b) to the International Centre for the Settlement of Investment Disputes (ICSID) …, provided that the Contracting Party involved in the dispute may require the investor concerned to go through the domestic administrative review procedures specified by the laws and regulations of that Contracting Party before the submission to ICSID. Once the investor has submitted the dispute to the competent court of the Contracting Party concerned or to the ICSID, the choice of one of the two procedures shall be final,[79] (Italics added).

Note that submission of dispute is 'to the competent court of a Contracting Party and not to the court of 'the State where the investment was made.' As drafted, does this Agreement preclude the State Party from suing the investor in a competent court or submitting the case to ICSID? Again why should the choice of either a domestic competent court or ICSID by the investor be final while the State Contracting Party may only require the investor to 'go through domestic administrative review procedures?' This does not seem to balance the scale of justice as it is tilted in favour of the investor, leaving the State Party powerless.

4. Structure and Contents of Bilateral Investment Treaties

The structure and features of BITs are as follow: (a) the preface or statement of purpose, (b) identification of property to be protected, (c) treatment to be accorded foreign investors, (d) the dispute settlement clause and (e) entry into force, duration and termination.

4.1. The Purpose of the BIT

As mentioned at the outset, BITs generally (China-Africa BITs inclusive) usually state that they are for the reciprocal encouragement and protection of investments. However, a respected authority has observed that '(t)he statement disguises the important fact that the flow that is contemplated is in reality a one-way flow of investment from the developed state to the developing state… there is an erosion of sovereignty by one party without a corresponding erosion in the other party'[80] (italics added). This statement appears to have been overstated and it contended here that it is not that there is no corresponding erosion of sovereignty in the other party but that the weaker party lacks the means to invoke it, that is, suffers from the inability to make operative the machinery of justice. As will be expanded at the end, a legal right could be nominal or substantive depending on the means, resources or power of the right holder.

Still pandering to the view of the one-sidedness of BITs, Salacuse stated:
A BIT purports to create a symmetrical legal relationship between the two states, for it provides that either party may invest under the same conditions in the territory of the other. In reality, an asymmetry exists between the par-

3. If the dispute still exists after the maximum period of the administrative procedures specified in paragraph 1, the investor may submit the dispute to the competent court or to the International Centre for the Settlement of Investment Disputes for arbitration according to Article 9 paragraph 2 of the Agreement.

[79] *Article 8(2) Agreement Between the Government of the People's Republic of China and the Government of the Republic of Uganda on the Reciprocal Promotion and Protection of Investments.*

[80] *Sornarajah supra 218.*

ties to the BITs since one state will be the source and the other the recipient of any investment flows between the two countries.[81]
Again it is submitted that this state of affairs is not due to the BIT but the systemic deficiency and often low level economy of the recipient state.

As to the legal position of the preface, Sornarajah raises two pertinent questions begging for answers:

(i) Does the prefatory statement create a positive duty on the part of the capital-exporting state to en courage its investors to take investments to the other party? and

(ii) Can it be argued that the host state can escape its obligations by showing that a particular foreign investment coming from the capital-exporting state did not in fact contribute to its economic development or that it was positively harmful to such and therefore fell outside the protection of the treaty?[82]

On both the jury is still out. Nonetheless, Article 31(2) of the Vienna Convention on the Law of Treaties provides that [t]he context for the purpose of the interpretation of a treaty shall comprise, in addition to the text … its preamble and annexes.'

4.2. Investments – a Changing Tide in Definitions

Back in 1931 Verdross excluded 'literary, artistic and industrial property'[83]from his definition of property that should be recognised by international law. This, he argued, was because the creation of intangible property and the rights in intellectual property such as licensing agreements, management and consultancy contracts, patents, copyright, know-how, legal concessions and franchises is the domain of the domestic law and as such outside the province of international law. Case law has, however, long recognised intangible rights. Both in *Le Courturier v. Rey*[84] and in the *Carl Zeiss Stiftung*[85]cases the subject of litigation in French and English courts respectively were trademarks.

In modern BITs the term 'investment' has come to include (1) real property and all the rights associated with it such as mortgages, liens and pledges, (2) stocks and shares in companies, (3) legitimate expectation from contracts (4) intellectual property, (5) concessions for the exploration and exploitation of natural resources, and as is contained in the US model BIT, licences and permits for manufacture, use, sale, search and utilisation of natural resources.

One argument is that all this need to be protected in order to make foreign investment worth the effort and money of the investor. A counter argument is that to include privileges conferred by public law on the investor as rights that should enjoy protection under international law would be unfair to the host state. If the effect of the treaty is to

[81] *(1990) 24 Int Lawyer 655 at 662.*
[82] *Sornarajah supra 219 and 220.*
[83] *A Verdross, 'Les Regles Internationales Concernant le Traitement des Etrangers' (1931) 37 Hague Recueil 364.*
[84] *[1910] AC 262.*
[85] *[1967] 1 AC 853.*

make 'public law rights irrevocable once granted' then the central purpose of public law, which is to serve public interest, is defeated. Some states like Australia and Indonesia have sought to reserve public interest law rights for themselves by including in their BITs that only those investments 'made in accordance with the laws, regulations and policies, from time to time in existence' are to be protected. Expectedly this has been criticised as leaving the investor in a state of uncertainty.

Again it has been argued that permanent sovereignty over natural resources is a peremptory norm of international law regarded as *ius cogens* protected by Article 53 of the Vienna Convention on the Law of Treaties[87] from which no derogation is permitted. Therefore, the argument persists that the assertion that states enter into BITs voluntarily does not mean that the treaties they purport to make are valid. The counter argument here is that the BIT revokes the state's discretion throughout the time that it remains in force.

What needs to be noted before leaving this subsection is that despite the tendency to make the definition of investment as expansive and all-embracing as possible, it must be approved by the host State. In *Greslin v. Malaysia*[88] an ICSID arbitration tribunal ruled that investors who did not have state approval could not invoke the treaty.

4.3. Dispute Resolution: Arbitration under the ICSID Convention

Three conditions are required to be fulfilled in order to bring a dispute to ICSID for arbitration:

a. the case must be between a Contracting State and a national of another Contracting State,
b. prior consent must have been given in writing for a dispute arising between the parties to be submitted to ICSID, and
c. such a dispute must be a legal dispute arising directly out of an investment.

Where the host State and the investor's country of origin are parties to the ICSID Convention, the arbitration arising from their dispute is said to be a direct contractual ICSID arbitration. However, it is not always that the State accepting the investment and the investor's country of origin are both signatories to the ICSID Convention. There could be an indirect consent to ICSID arbitration in (a) the host State's domestic law, (b) another bilateral investment agreement between the host State and the investor's home country, or (c) a multilateral investment treaty between the relevant countries.[89]

As we have seen above, all the China-Africa BITs contain a reference to the ICSID for dispute settlement, but is that enough? According to Broches, the mere reference to ICSID in a BIT is not enough to create jurisdiction under the Convention. Broches has identified four types of words and phrases referring to the ICSID in BITs:

a. where it is stated that the dispute 'shall, upon agreement by both parties, be submitted for arbitration to the Centre.' This does not give jurisdiction to the ICSID because an agreement may not be reached after a dispute has arisen;
b. where the requirement is a 'sympathetic consideration to a request for conciliation or arbitration by the Centre' which is short of consent;
c. where the host State holds the prerogative 'to assent to any demand on the part of the national to submit for conciliation or arbitration any dispute arising from the investment,' and may not be keen to give it and so stalls the process, and

[86] *See Sornarajah supra n 44 on p 222.*
[87] *Article 53 provides, 'A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognised by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.'*
[88] *(2000) 5 ICSID Rpts 483.*
[89] *L Reed, J Paulsson and n Blackaby, Guide to ICSID Arbitration, (The Hague, Kluwer Law International, 2004) 7.*

d. where as in a UK BIT it is clearly stated, 'Each contracting Party hereby consents to submit to the ICSID for settlement by conciliation or arbitration under the Convention on the Settlement of Investment Disputes between States and Nationals of other States… any legal disputes arising between that Contacting Party and a national or company of the other contracting Party concerning an investment of the latter in the territory of the former.' This gives ICSID full jurisdiction.[90]

On the issue of the exhaustion of local remedies, the ICJ held in the *ELSI Case*[91] that there is a duty to exhaust local remedies if there is a treaty of friendship, commerce and navigation between the parties. It was the opinion of the court that local remedies could only be excluded by express words to that effect. But where the violation is of the treaty and not the contract, the dispute could be submitted directly to the ICSID.

4.4. Exhaustion of Host State Remedies – the Channel Tunnel Case

In the *Channel Tunnel Group Ltd and Another v. Balfour Beatty Construction Ltd Clause 67*[92] of the contract provided for the initial reference of disputes to a panel of experts (much like the China-Uganda BIT) and if unsuccessful for reference to arbitration in Brussels. Clause 67 is as follows:

Settlement of disputes

(1) If any dispute or difference shall arise between the employer and the contractor during the progress of the works … such dispute or difference shall at the instance of either the employer or the contractor in the first place be referred in writing to and be settled by a panel of three persons (acting as independent experts but not as arbitrators)…

(2) The contractor shall in every case continue to proceed with the works with all due diligence \ and the contractor and the employer shall both give effect forthwith to every such decision of the panel (provided that such decision shall have been made unanimously) unless and until the same shall be revised by arbitration…

(3) If (a) either the employer or the contractor be dissatisfied with any decision given under Clause 67(1), or (b) the panel shall fail to give a unanimous decision for a period of 90 days, or (c) any unanimous decision of the panel is not given effect in accordance with Clause 67(2)…either party may notify the other in writing that the dispute be referred to arbitration.

(4 All disputes or differences in respect of which a notice has been given under Clause 67(3) by either party that such dispute or difference is to be referred to arbitration and any other dispute or difference of any kind whatever… shall be finally settled under the Rules of conciliation and Arbitration of the ICSID. The seat of such arbitration shall be in Brussels.[93]

In the case, the plaintiffs employed the defendants, a consortium of English and French companies, to build a tunnel under the English Channel between England and France and, by a letter of variation, to construct a cooling

[91]*A Broches, 'Bilateral Investment Treaties and Arbitration of Investment Disputes' in J Schulsz and J A van den Berg (eds), The Art of Arbitration quoted by Sornarajah supra 251.*
[92]*[1989] ICJ Rpts 15.*
[93]*[1993] AC 334*

system. At issue before the court was how much that should be paid for the cooling system. The defendants threatened to suspend work alleging breach of contract by the plaintiffs. The plaintiffs sought an injunction to restrain the defendants from stopping work. In the court of first instance Evans J. held that he would be inclined to grant the injunction and dismissed the defendant's action to stay the plaintiffs' action in favour of arbitration.

The Court of Appeal allowed the defendants' appeal and granted a stay of the action holding that where there is an agreement to arbitrate, a party will not be allowed to disregard it merely because a preliminary step was not taken, (and of much interest to us here) that the court had no power to grant an injunction under section 12(6)(h) of the Arbitration Act 1950.

The plaintiffs appealed the decision of the Court of Appeal and the House of Lords held that 'the court had an inherent power to stay proceedings brought before it in breach of an agreement to decide disputes by an alternative method.'[94] Concluding a unanimous judgment of the House Lord Mustill states:

The appellants now regret their choice. To push their claim for a mandatory relief through the mechanisms of clause 67 is too slow and cumbersome to suit their purpose, and they now wish to obtain far reaching relief through the judicial means which they have been so scrupulous to exclude. Notwithstanding that the court can and should in the right case provide reinforcement for the arbitral process by granting interim relief I am quite satisfied that this is not such a case, and that to order an injunction here would be to act contrary both to the general tenor of the construction contract and the spirit of international arbitration.[95]

5. ICSID Model BIT Clauses

The ICSID has written a model for parties to BITs to copy or modify as they wish.

5.1. Basic Submission Clause

The Government of… (hereinafter the "Host State") and … (hereinafter the "Investor") hereby consent to submit to the International Centre for Settlement of Investment Disputes (hereinafter the "Centre") any dispute arising out of or relating to this agreement for settlement…

It is worthy to note Article 25 of the Convention which provides: 'When the parties have given their consent, no party may withdraw its consent unilaterally.' A more binding commitment is in the next article which provides that 'Consent of the parties to arbitration under this Convention shall, unless otherwise stated, be deemed consent to such arbitration to the exclusion of any other remedy.'[96] Article 27 rules out 'diplomatic protection' for nationals involved in ICSID disputes.
On what constitutes 'investment' the parties are allowed to stipulate 'that the transaction to which this agreement relates is an investment,'[97] whatever it is.

[93] *Ibid at 345 & 346.*
[94] *Ibid at 335.*
[95] *Ibid at 368.*
[96] *Article 26, ICSID Convention, 1965.*

5.2. The Model Clause on the Applicable Law

This is based on Article 41 of the Convention which provides as follows:

(1) The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rule on the conflict of laws) and such rules of international law as may be applicable.
(2) The Tribunal may not bring in a finding of *non liquet* on the ground of silence or obscurity of the law.
(3) The provisions of paragraphs (1) and (2) shall not prejudice the power of the Tribunal to decide a dispute ex aequo et bono if the parties so agree.

An ICSID award is 'binding on the parties' and is not 'subject to any appeal or to any other remedy,'[98] but can be annulled on the following five grounds:

(a) that the Tribunal was not properly constituted;
(b) that the Tribunal has manifestly exceeded its power;
(c) that there was corruption on the part of a member of the tribunal;
(d) that there has been a serious departure from a fundamental rule of procedure; or
(e) that the award has failed to state the reasons on which it is based.[99]

5.3 The Exhaustion of Domestic Remedies

What the ICSID Model Clause has on the exhaustion of local remedies is much stronger than what we find in all China-Africa BITs. The Model Clause provides in Clause 13:

Before either party hereto institutes an arbitration proceeding under the Convention with respect to a particular dispute, that party must have taken all steps necessary to exhaust the [following] [administrative] [and] [judicial] remedies available under the laws of the Host State with respect to that dispute [list of required remedies], unless the other party hereto waives that requirement in writing.[100]

6. BITs or a Multilateral Agreement like the GATT 1994 with the Most-Favoured-Nation (MFN) and National Treatment Principles

6.1. Object and Purpose of Article I GATT 1994: MFN

Much like the BITs, the object and purpose of the MFN obligation of Article I:1 of the GATT 1994 is 'to ensure equality of opportunity to import from, or to export to, WTO Members.'[101] The Appellate Body referred to it as a 'cornerstone of the GATT' and 'one of the pillars of the WTO trading system.'[102]

But the central position of the MFN obligation notwithstanding, the principle appears to be more honoured in

[97]Clause 3, ICISD Model Clauses.
[98]Article 53, ICSID Convention 1965.
[99]Article 52, ICSID Convention 1965.
[100]See also Article 26, ICSID Convention 1965.
[101]Peter Van den Bossche, The Law and Policy of the World Trade Organisation 2nd edn (Cambridge University Press, Cambridge 2008) 324

breach than in observance as it has been very much vitiated by regional trade agreements. As the WTO itself noted:

By July 2005, only one WTO Member – Mongolia – was not party to a regional trade agreement. The surge in these agreements has continued unabated since the early 1990s. By 2005, a total of 330 had been notified to the WTO (and its predecessor, GATT. Of these 206 were notified after the WTO was created in January 1995, 180 are currently in force; several others are believed to be operational although not yet notified.[103]

The Sutherland Report on *The Future of the WTO* concluded that in the face of too many exceptions to the MFN obligation due to regional trade agreements entered into by WTO Members, the non-discriminatory principle could now be rightly regarded as the exception rather than the rule. In their words:

[N]early five years after the founding of the GATT, MFN is no longer the rule; it is almost the exception. Certainly, much trade between the major economies is still conducted on an MFN basis. However, what has been termed the 'spaghetti bowl' of customs unions, common markets, regional and bilateral free trade areas, preferences and an endless assortment of miscellaneous trade deals has almost reached the point where MFN treatment is exceptional treatment.'[104]

Article I:1 covers both de jure (origin-based) EC – *Bananas III*[105] and de facto (superficially origin-neutral) measures as both the GATT Panel in EEC – *Import of Beef*[106] and Appellate Body in and *Canada – Autos*[107] made clear.

6.2 Applications of Article I: MFN

As stated at the outset, 'economists have argued that there are fundamental, efficiency-enhancing properties to trade agreements having MFN'[108] but the underlying argument is that there is a threshold to international trade which a country must reach in order to be competitive. Otherwise it may be better off outside the GATT. 'The central issue is,' according to Hudec, 'whether developing countries would do better by accepting the same GATT discipline as everyone else.'[109] In Hudec's view, 'the GATT's current policy is harming developing countries more than it is helping them.'[110] This is due to the fact that the developing countries that accede to the GATT/WTO regime and submit to its disciplines cannot protect their infant industries based on Articles XVIII and XX which offer 'general exceptions' which the WTO Dispute Settlement Body will declare WTO-inconsistent.

[102] *EC – Tariff Preferences, WT/DS246/AB/R, adopted 20 April 2004.*

[103] *Quoted by Peter Van den Bossche, The Law and Policy supra 323*

[104] *Report by the Consultative Board to the Director-General Suachai Panitchpakdi, The Future of the WTO: Addressing Institutional Challenges in the New Millennium (the 'Sutherland Report') (WTO, 2004), para. 60.*

[105] *Appellate Body Report, European Communities – Regime for the Importation , Sale and Distribution of Bananas, WT/DS27/AB/R, adopted 25 September 1997, para. 190. EC – Bananas has been dubbed 'Dollar Bananas v. ACP Bananas' because the measure at issue was the place of origin of bananas imported into the European Communities. The 'dollar' bananas refer to bananas exported from Latin America by U.S. companies, while the 'ACP' bananas refers to the bananas from the former European colonies in Africa, the Caribbean and the Pacific states hence the names.*

It was alleged that the 'dollar' bananas from Latin America were treated less favourably than bananas from the former European colonies. The case acquired the notoriety of being one of the longest lasting cases in the history of the WTO.

[106] *GATT Panel Report, EEC – Imports of Beef from Canada, paras. 4.2 and 4.3.*

[107] *Appellate Body Report, Canada – Certain Measures Affecting the Automotive Industry, WT/DS139/AB/R, WT/DS142/AB/R, adopted 19 June 2000.*

[108] *K Bagwell and R W Staiger, The Economics of the World Trading System (2002).*

[109] *Hudec, Developing Countries, supra 5.*

6.3 National Treatment

The Appellate Body described the national treatment principle of non-discrimination as 'a cornerstone of the world trading system.'[111] Article III captioned 'National Treatment on Internal Taxation and Regulation' stipulates to Contracting Parties that 'internal taxes and other charges … should not be applied to imported or domestic products so as to afford protection to domestic products'[112] and also that '[t]he products of the territory of any contracting party imported into the territory of any other party shall not be subject, directly or indirectly, to internal taxes or other internal charges of any kind in excess of those applied, directly or indirectly, to like domestic products' [113] and still further that the products imported from abroad 'shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use.' [114]

6.4. The Object and Purpose of Article III of the GATT 1994

The title of Article III is often used half-way: 'National Treatment' giving the wrong impression that all protection is prohibited. If taken fully: 'National Treatment on Internal Taxation and Regulation,' it will be clear that Article III endorses customs duties. Therefore, Article III generally prohibits discriminatory internal taxation once the goods have been cleared through the customs. The following cases bring out the object and purpose of Article III: In *Italy – Agricultural Machinery* the WTO Panel held: 'That the intention of the drafters of the Agreement was clearly to treat the imported products in the same way as the like domestic products once they had been cleared through customs. Otherwise indirect protection could be given.'[115] Again, in US – Section 227, the Panel pointed out that 'the purpose of Article III …is to ensure that internal measures 'not be applied to imported or domestic products so as to afford protection to domestic production.'[116]

In Japan – Alcoholic Beverages II it was stated that:

> The broad and fundamental purpose of Article III is to avoid protectionism in the application of internal tax and regulatory measures. More specifically, the purpose of Article III 'is to ensure that internal measures "not be applied to imported or domestic products so as to afford protection to domestic producers"'. Toward this end, Article III obliges Members of the WTO to provide equality of competitive conditions for imported products in relation to domestic products. '[T]he intention of the drafters of the Agreement was clearly to treat the imported products in the same way as the like domestic products once they had been cleared through customs. Otherwise indirect protection could be given.[117]

[110] *Ibid 159.*
[111] *Appellate Body Report, US – Section 211 Appropriations Act, para. 241*
[112] *Paragraph 1*
[113] *Paragraph 2*
[114] *Paragraph 4*
[115] *GATT Report, Italy – Agricultural Machinery, para. 11.*
[116] *GATT Panel Report, US – Section 337, para. 5.10.*
[117] *Appellate Body Report, Japan – Alcoholic Beverages II, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 1 November 1996, 109.*

In summary the Appellate Body in Korea – Alcoholic Beverages stated the object and purpose of Article III as 'avoiding protectionism, requiring equality of competitive conditions and protecting expectations of equal competitive relationships.'[118] It covers de jure and de facto discrimination such as an 'origin-based' measure such as in Korea – *Various Measures* [119] where the measure at issue was a dual retail distribution system selling imported beef in a separate store or a different section of a supermarket and 'origin-neutral' measure as in *Japan – Alcoholic Beverages* where a tax legislation provided for higher taxes on vodka (domestic and imported) than on *shochu* (domestic and imported). The national treatment principle also extends to internal taxation on directly competitive or substitutable products.[120]

6.5. National Treatment and TRIPS

Underscoring the 'fundamental significance of the obligation'[121] in the TRIPS Agreement in US–Section 211 Appropriations Act the Body observed:

Indeed, the significance of the national treatment obligation can hardly be overstated. Not only has the national treatment obligation long been a cornerstone of the Paris Convention and other international intellectual property conventions. So, too, has the national treatment obligation long been a cornerstone of the world trading system that is served by the WTO.[122]

But even though national treatment is of much importance to TRIPS, its application to TRIPS is limited in scope to IP rights addressed in the TRIPS. As the Panel noted in *Indonesia – Autos*

As is made clear by the footnote to Article 3 of the TRIPS Agreement, the national treatment rule set out in that Article does not apply to use of intellectual property rights generally but only to 'those matters affecting the use of intellectual property rights especially addressed in this Agreement.[123]

The footnote states:

For purposes of Articles 3 and 4 "protection" shall include matters affecting the availability, acquisition, scope, maintenance and enforcement of intellectual property rights as well as those matters affecting the use of intellectual property rights specifically addressed in this Agreement.

6.6. Applications of Article III of the GATT 1994 on Development

While the principles of non-discrimination have been hailed as the pivot of the WTO,[124] the developing countries that are writhing under a situation of near-destitution see them as 'kicking away the ladder' so that they will remain forever undeveloped.[125] Again while countries who have industrial goods and services for export see the GATT provisions as a means of extending their markets worldwide, those who have little for export and keen to build and nurture their domestic industries see the principles as handicaps to their development.

[118] *Appellate Body Report, Korea – Alcoholic Beverages WT/DS75/AB/R, WT/DS84/AB/R, adopted 17 February 1999; see also Argentina – Hides and Leather, para. 11.182.*
[119] *Appellate Body Report, Korea – Various Measures on Beef, WT/DS161/AB/R, WT/DS169/AB/R, adopted 10 January 2001.*
[120] *Article II:2.*
[121] *Appellate Body Report, US – Section 211 Appropriations Act, para. 240*
[122] *Ibid, para. 241*
[123] *Panel Report, Indonesia – Autos, para. 14.275.*
[124] *Peter Van den Bossche, The Law and Policy of the World Trade Organization 2nd edn (Cambridge University Press, Cambridge 2008) 321-98*
[125] *Ha-Joon Chang, supra.*

Moreover, each WTO Ministerial Declaration enticed developing and least developed countries with some promise of economic welfare; for example, in the Tokyo Declaration recognition was, as is always the case, given to the special needs of developing countries 'so as to achieve a substantial increase in their foreign exchange earnings, the diversification of their exports (and) the acceleration of the rate of growth of their trade…'[126] But the preceding round of trade negotiations which held a similar promise offered little. At the end of the Kennedy Round, 'the less developed nations which participated issued a statement indicating their disappointment over the paucity of benefits that they had received.'[127] Two major disappointments of the developing countries were their failure to achieve a reduction or elimination of duties on particular products that are of interest to the developing countries, 'particularly tropical crops,'[128] and the fact that non-tariff barriers remained much unaffected in the developed countries. An independent analysis done by UNCTAD found that the average tariff reductions were more on products of interest to developed countries and less on those of interest to developing countries.[129] The odds are still against developing countries even after concluding a round of trade negotiations.

Conclusion

From the above analysis, we can conclude that the zeal to be seen in the company of China, a fast developing country, has beclouded the importance to execute a legally binding document between China and the African countries we have reviewed their BITs. None of the BITs is registered at the ICSID or has any date of entering into force. Again the drafting of the treaties is so loose that none evinces an intention to move from politics to creating a legally binding document.

As shown above, the major reason for entering into BITs is to boost investor confidence and thereby attract more investors and boost the economy. However, the examples of developed and developing countries that have not ratified the ICSID Convention that are recording economic growth and large volumes of foreign direct investments (FDI) casts doubt as to the veracity of the claim. UNCTAD states, 'An aggregate statistical analysis does not reveal a significant independent impact of BITs in determining FDI flows. At best, BITs play a minor role in influencing global FDI flow and explaining differences in their size among countries,'[130] The World Bank is also of the view that 'countries that had concluded a BIT were no more likely to receive additional FDI than were countries without such a pact.'[131]

In giving an example of the near-zero impact of BITs in attracting FDI, Sornarajah compared Sri Lanka which after the collapse of its socialist government concluded seven BITs within three years while both Singapore and Ma-

[126] *Tokyo Ministerial Declaration, para. 2.*
[127] *Leslie Alan Glick supra 6*
[128] *Ibid.*
[129] *UNCTAD, Supp. 2 (Sept, 1967).*
[130] *UNCTAD, World Investment Report, 2003, 89.*
[131] *World Development Report, 129.*

laysia took 12 years to conclude the same number of BITs but are more prosperous and have more FDI inflow. He concludes that some countries use the signing of a BIT as a façade for 'dispelling any impression of risk associated with the country in the past. Investors know better and he concludes that 'attracting foreign investment depends more on the political and economic climate being favourable to such foreign investment than on the creation of a legal structure for its protection.'[132] In summary, there is no correlation between the numbers of investment treaties a country enters into and the attraction of FDI into the country.

Giving that African countries and their BITs are ill-suited to take on China legally, as the BITs lack the features of a legally binding document, the options that are open to the countries that have signed BITs with China are very limited. No country has dared take on China legally even when there are allegations of violations of intellectual property rights. There is no case known to this writer both at the ICSID or the WTO in which China is either the claimant or the defendant, as if she lives outside the precincts of international economic law.

Again Canada is developed while both Russia and Thailand are developing outside the ICSID. The choice of ICISD arbitration which African countries can ill-afford finds little justification. Since the costs of raw material and oil appear relatively the same, the driving force for the decision of where to invest seems to be the cost of labour and a stable political climate including the judicial system for the settlement of disputes and enforcement of court decisions and arbitration awards. African countries have an abundance of the former but are gravely deficient in the latter and, very unfortunately, it is the former that is the first consideration of foreign investors. So the rule of law and good governance may do the magic of attracting FDI that the multiplicity of BITs has failed to do for Africa.

If used sparingly for strategic economic interests, BITs are good. For example, Botswana has four BITs only registered at the ICSID, none of which is with an African country. In Africa Egypt tops the list with ninety-one (91) BITs it has signed with other countries (higher than the USA which has only 48); however, not that is between Egypt and an African country has entered into force. Tanzania has only twelve, all of which have entered into force except the one with Egypt. The only exception of an African-to-African country BIT that has entered into force is between South Africa and Mozambique. One may therefore conclude that intra-Africa BITs are not taken seriously by the governments that sign them. Perhaps the Chinese may have read levity into African BITs as none they have signed with an African country has entered into force except the one they did with South Africa.

To do business with the Dragon, African legal draftsmen need to be more concise to make sure that the BITs that emerge cover consents with respect to existing and future disputes, scrupulously define what constitutes investment with regard to the agreement and clearly specify the law and procedure to be applied to the disputes that may arise, whether strict legal rules apply or whether good faith could apply and, very importantly, the place that the proceedings are to be held which determines the *lex fori*. Since the ICSID Convention allows arbitrations under it to be held outside Washington DC, it is disappointing that no China-Africa BIT designated Abuja, Johannesburg or Cairo as the seat of arbitration.[133] Going by the costs of travel and boarding, it is time to sit within Africa perhaps in Arusha.

[132]Sornarajah supra 217.

[133]Under Articles 62 and 63 of the Convention, proceedings may be held at:

a) the seat of the Centre (in Washington, D.C.);

b) the seat of any institution with which the Centre has made the necessary arrangements (Article 63(a) of the Convention singles out the Permanent Court of Arbitration at The Hague as an example of such an institution; or

c) any other place agreed by the parties (in which case Article 63(b) of the Convention requires that the venue also be approved by the Tribunal after consultation with the Secretary-General). [Other such institutions include the Asian-African Legal Consultative Committee's Regional Centres for Commercial Arbitration at Cairo and Kuala Lumpur].

EPA NEGOTIATIONS AND REGIONAL INTEGRATION IN AFRICA: BUILDING OR STUMBLING BLOCKS?

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1 INTRODUCTION

The start of 2008 marked the quiet death of over 30 years of Lomé/ Cotonou preferences, and yet most African, Caribbean and Caribbean (ACP) countries did not lose their privileged access to European markets. Eighteen African states, including most non-least developed and some least developed countries (LDCs), have initialled interim economic partnership agreements (IEPAs) with the European Union (EU), as have two Pacific non-LDCs, Fiji and Papua New Guinea (PNG); the Caribbean countries (CARIFORUM) have gone further and entered full economic partnership agreement (EPA), signed on 15 October 2008. The remaining ACP countries, apart from South Africa, now export to the European market under the EU Generalised System of Preferences (GSP): its favourable Everything But Arms (EBA) sub-regime in the case of LDCs, and the less favourable standard GSP for Nigeria, Republic of the Congo, Gabon and seven Pacific countries (Cook Islands, Federated States of Micronesia, Nauru, Niue, Palau, Marshall Islands and Tonga). South Africa continues to export under its own free trade agreement (FTA) with the EU, the Trade, Development and Cooperation Agreement (TDCA).

As World Trade Organisation (WTO)-compatible free trade deals, the (interim) EPAs have removed the risk that the end of the Cotonou waiver would result in some ACP losing their preferential EU market access. Free from the pressure to meet WTO commitments, the parties can now continue negotiations towards more comprehensive EPAs, based on their initial development objectives.

But what exactly have countries agreed to and what are the implications so far for regional integration in Africa?

2 Background

2.1 From Lomé to Cotonou

The Lomé Agreements were initially considered as highly innovative development cooperation agreements. Predictable aid flows whose management was entrusted primarily to the ACP countries, non-reciprocal trade preferences and several export price stabilisation mechanisms as well as commodity protocols for bananas, rum, sugar and beef and veal were considered to be very progressive measures that would enable ACP governments to achieve their development goals. However, over the years the Lomé relationship came under increasing pressure, especially after the end of the Cold War.

The Lomé trade regime did not achieve its expected results. Despite preferential access to EU markets in as much as 99 per cent of all products, the ACP share in European imports had dwindled, from nearly 8 per cent in 1975 to 2.8 per cent in 2000. Perhaps most strikingly, non-ACP developing countries that did not benefit from the trade preferences have been outperforming the ACP countries in exports to the EU.
The export price stabilisation mechanisms and the commodity protocols, while providing a lifeline to many (small) ACP countries has not led to the much-needed export diversification of the ACP: in 2007, over three quarters of EU imports from the ACP consisted of primary products, mainly agricultural products (23.8 per cent) and energy (42 per cent) . In 2006, 31 ACP countries relied on only one agricultural commodity for more than 20 per cent of their total export earnings . As a result, in 2007, 10.2 per cent of EU imports in agricultural products originated in the ACP, even though in total, products from the ACP accounted for a mere 2.82 per cent of the share of EU total imports. However, gains from agricultural exports are shrinking, as ACP exporters are facing declining prices in the EU market in the context of the reform of the EU Common Agricultural Policy.

Besides the disappointing results of the EU preferential trade regime in favour of ACP countries, tension has been growing between the preferences and the rules of the World Trade Organisation (WTO). WTO rules do permit preferences as such, as long as they are based on objective and transparent criteria related to development. The inherent discrimination between ACP and non-ACP developing countries within the Lomé and Cotonou trade regime, based on historical grounds (the ACP group being composed of former colonies from European countries) does not fit any of the WTO criteria and hence cannot be allowed under the Enabling Clause. Facing increasing pressure from WTO non-ACP developing country members (in particular banana producing countries), and the high price the EU had to pay to obtain a WTO waiver , the EU became convinced that a new ACP-EU trade relationship was needed, which was WTO-compatible and would foster the ACP integration in the world economy.

2.2 Key features of Economic Partnership Agreements

Addressing the weaknesses of the Lomé Conventions, the EU and the ACP agreed to radically reform the ACP-EU trade relationship through the negotiation of the EPAs. The Cotonou Partnership Agreement (CPA), signed in June 2000, stipulates that the negotiations on EPAs would start in September 2002 and would be concluded no later than 31 December 2007 (CPA Art. 37.1). The preferential trade regime was extended throughout this transitional period .

The Cotonou Agreement sets out four principles along which the EPAs should be formed:

Development: EPA negotiations must be placed in the context of the overall development objectives of ACP countries and of the CPA. To be of benefit to the ACP, EPAs must be 'economically meaningful, politically sustainable, and socially acceptable'. Hence, EPAs are not just ordinary agreements on trade. Rather, they are intended to be development-oriented trade arrangements to foster development and economic growth in ACP countries which will ultimately contribute to poverty eradication.
Reciprocity: The most important element of an EPA is the establishment of an FTA, which will progressively abolish substantially all trade restrictions between both parties (CPA Art. 37.7). This is a radically new element in ACP-EU trade relations and also a necessary requirement to make the EPAs WTO-compatible, in line with Article XXIV of the General Agreement on Tariffs and Trade (GATT). For the first time, ACP countries will have to open up, on a reciprocal basis, their own markets to EU products in order to retain their preferential access to the EU market. The rationale for reciprocity rests on the principle that liberalisation of ACP markets towards the EU will increase competition within ACP economies, thereby stimulating local and foreign (including EU) investment and the necessary adjustment of their economies, leading to growth and development.
Regionalism: The EU clearly envisages negotiations with ACP regional groupings which are in a position to do so, though it has not ruled out the possibility of concluding agreements with single countries in exceptional cases, such as in some of the interim deals. The principle of basing future trade cooperation on regional integration stems from the conviction that regional integration is a key stepping stone towards further integration into the world economy, as well as an important instrument to stimulate investment and lock in the necessary trade reforms (CPA Art. 35.2).
Differentiation: Considerable weight is given to differentiation and special treatment, which affirms the North-South nature of the relationship. The CPA states that EPAs will take into account the different levels of development of the contracting parties (CPA Art. 35.3). Hence, EPAs should provide sufficient scope for flexibility, special and differential treatment and asymmetry. In particular, LDCs, small and vulnerable economies, landlocked countries and small islands should be able to benefit from special and differential treatment.

Hence, the EPA negotiations constitute a shift in ACP-EU trade cooperation relations, ending an era of non-reciprocal trade preferences and replacing the all-ACP-EU trading arrangement by several separate agreements that are negotiated between the EU and six ACP negotiating regions, with the objective of fostering regional integration in the ACP. In essence, the EPAs should thus be essentially enhanced, development-oriented free trade areas between

ACP regional groupings and the EU. They aim to cover not only trade in goods and agricultural products, but also in services, and should address tariff, non-tariff and technical barriers to trade. As proposed by the European Commission, other trade-related areas would also be covered, including by increased cooperation between the EU and the ACP, such as competition, investment, protection of intellectual property rights, standardisation and certification, sanitary and phytosanitary (SPS) measures, trade facilitation, trade and environment, trade and labour standards, consumer policy regulation and consumer health protection, food security, public procurement, etc.

3 The Negotiation Process

The EPA process has not been an easy or friendly one; words and deeds have often been at odds, and tension has flared up. From the outset, EPA negotiations have been extremely challenging, in terms of both process and substance. As a result, and amidst much tension and frustration on either side of the table, there had been only limited substantive progress in most negotiations a few months ahead of the 31 December 2007 deadline.

Officially launched on 27 September 2002, the EPA negotiations have been structured around two main phases. The first phase of the negotiations, extending until September 2003, took place between the European Commission (EC) and the ACP Group as a whole. The objectives were to define the format, structure and principles for the negotiations. After this initial phase of negotiations (consisting mainly in exchange of views and clarifications from both parties) at the all-ACP Group level with the EU, a second phase of negotiations started at the regional level, in view of concluded regional EPAs. Each of the main ACP regional groupings has thus entered into bilateral negotiations with the EU: Central Africa (CEMAC-plus) and West Africa (ECOWAS-plus) in October 2003, East and Southern Africa (ESA) in February 2004, the Caribbean (CARIFORUM) in May 2004, Southern Africa (SADC-minus) in July 2004, and Pacific in September 2004. These negotiations were thus intended to build on and foster the regional integration process of the ACP groupings.

For various reasons, EC and ACP negotiators have in most cases not been able to reach a common understanding and approach on the cornerstones of the new trading arrangement, notably, and quite surprisingly, on the development component and regionalism. A good, but striking, illustration in this respect is the fundamental divergence between the negotiating parties in terms of their approach towards development. For the EU, EPAs will foster development mainly through trade liberalisation and the creation of the right policy framework to attract investment. In addition, by building on the ACP regional integration processes, EPAs should contribute to the establishment of effective regional markets in the ACP, thus attracting and stimulating both domestic and foreign investment, a necessary condition for sustainable development. While most of the ACP states would agree with the EU on the development opportunities offered by an EPA, they tend to consider trade liberalisation and regional integration as necessary, yet far from sufficient, conditions to foster development and alleviate poverty. From an ACP perspective, an EPA must also be accompanied by appropriately arranged financial support to address supply-side constraints as well as measures to mitigate the related adjustment costs. Such support should be binding, predictable and made available in addition to the existing EDF, albeit in a more flexible manner. While the EC recognises the structural and institutional constraints impeding ACP countries' productive and trading capacities, it has, however, been reluctant to discuss these issues in the EPA negotiating sessions, arguing that the latter were about trade and trade-related issues only, and not development financing, which is covered already by the EDF under the Cotonou Agreement and complemented by EU Member States bilateral cooperation.

Early in 2007, the EC furthermore conceded to the inclusion of development chapters in the scope of the negotiated agreements and a clear link between AfT and the development support for EPAs was established in the EU Strategy on Aid for Trade adopted in October 2007 . However, the EPA texts do not contain any binding financial commitments on development cooperation, as demanded by the ACP side.

A deadline can often be regarded as a stimulus for the parties to move ahead and may have helped to put trade higher on the agenda of policy-makers. But both parties certainly started too late to negotiate on substantive issues while spending the initial years discussing systemic questions without being able to reach an agreement. The push given by the looming deadline may thus have helped to propel both parties to the negotiating table and to focus on the major issues (notably market access, a core issue in any free trade agreement). However, the recent events also demonstrate that too much pressure in an asymmetric relationship like that between the EU and the ACP, can lead to a lot of suspicion and a lack of ownership of the final result and is certainly not conducive to a harmonious relationship.

The lack of institutional and technical capacity on the ACP side, as well as insufficient political leadership in many regions, has also taken its toll on a smooth progress in the negotiations. EPA negotiations brought to the table two groups of countries between which there was a wide gap in terms of negotiating power. This was formally recognised in the Cotonou Agreement, in which the EC and the ACP also agreed to use the preparatory period in the run up to December 2007 to build ACP capacity for the purpose of the negotiations and future implementation of the new trading arrangements (CPA Article 37.3). However, since 2002 the ACP countries have repeatedly voiced their concerns about persisting capacity constraints, which affect their ability to negotiate effectively and implement the EPAs.

The EU therefore may have succeeded in getting countries to sign through pressure and the threat of imposing tariffs from 2008 onwards. But many ACP stakeholders are left with the perception that the agreements have been externally imposed. As a consequence, there is a loss of domestic ownership and they may be less willing to bring forward the process and related reforms.

In addition, by the end of 2007, many were left with the perception that commercial and political interests, in both the EU and ACP countries, too often prevailed over development concerns. It seems that largely pragmatic concerns ultimately overshadowed the outcome of the negotiations. While conformity with the WTO rules of its trade regimes available to ACP countries as of 1 January 2008 was paramount to the EU, preserving access to the EU market was of prime importance for most of its ACP counterparts.

Furthermore, the EPA process clearly exposed the weak regional cohesion in most EPA regions in which national interests still prevail over regional integration agenda. Conducting interim agreements bilaterally provided the opportunity to also safeguard market access in those regions where regional solutions were not possible in the remaining time. The bilateral approach adopted by the EC and some ACP counterparts, however, is clearly at odds with one of the key objectives of the EPAs, which is to build on and reinforce regional integration.

The first challenge for the ongoing negotiations towards full agreements is thus to mend bruised feelings, restore some confidence and trust and build a true partnership. To that end, positive rhetoric will not suffice. It will be necessary to allow for the adjustment of interim texts that do not fully reflect the interests of all parties. In revising an interim agreement it may be helpful to draw on texts concluded in other ACP regions, adopting some provisions from these as suitable.

4 The Agreements Initiated in 2007

4.1 Which countries have concluded (interim) EPAs

The list of countries, within their regional groupings, that have concluded an (interim) EPA is presented in the Annex.

In two regions all members have signed. These are the Caribbean Forum (CARIFORUM) and the East African Community (EAC). The latter is perhaps the more noteworthy, since all but one signatory are LDCs and, hence, have no immediate need to join an EPA to avoid tariffs being increased on their exports to the EU. It is also an 'EPA negotiating region' that emerged only in the final months of the five-year process.

In EAC all parties appear to have agreed to the same liberalisation schedule and so the EPA should not in principle cause any problems for achieving a CET. In fact, EAC is the only region for which this is the case. The end point for CARIFORUM (apart from Dominican Republic) is understood from those involved in the negotiations to be very similar but not identical, although there are many variations in how countries arrive, evident in complex variations in the schedules for the implementation.

At the other end of the spectrum is West Africa. Only two countries have signed interim EPAs, and they are significantly different from each other. This means that over four-fifths of the Economic Community of West African States (ECOWAS) have not joined the interim EPA, and that there is no established accord that, if all joined, would provide a region-wide agreement. In principle it would be possible for all the non-signatories to accede to the text agreed by Ghana, or that agreed by Côte d'Ivoire – but even if this were to happen there would still be at least one country in the region with different tariff obligations towards the EU from all the rest. The interim agreement with Côte d'Ivoire specifically raises the possibility of re-negotiating the liberalisation schedule as part of a wider ECOWAS EPA. Although the agreement with Ghana does not do so, Commission officials have confirmed orally that it is current policy to allow a re-negotiation of both accords in the context of a broader ECOWAS EPA. For the present, though, all that can be analysed are the texts and schedules of these two bilateral accords.

The Communauté Economique et Monétaire de l'Afrique Centrale (CEMAC) is notionally in the same position as CARIFORUM and EAC, in that there is just one text and liberalisation schedule. But this is because Cameroon is the only country in the group to have initialled an interim EPA. As with ECOWAS, over four-fifths of members have not so far joined.

The other 'regions' – Eastern and Southern Africa (ESA), the Pacific ACP countries (PACP) and the Southern African Development Community (SADC)-minus – are in a midway position. Each of the signatories within the group has agreed an identical text, but their liberalisation schedules differ, with implications for future regional integration.

The word 'region' is in inverted commas above because both ESA and SADC-minus are now different groupings from those that were engaged in negotiations with the EU until the middle of 2007 (and, of course, from those that have agreed FTAs or customs unions under Common Market of Eastern and Southern Africa (COMESA) and under SADC). Apart from the unresolved position of South Africa (see below) the differences are relatively small for SADC-minus: Tanzania has joined EAC and Angola has not signed an interim EPA. That leaves Botswana, Lesotho, Namibia and Swaziland (BLNS) and Mozambique as signatories, with the position of South Africa still under a question mark.

In the case of ESA, though, the changes are substantial. The 'ESA region', as determined by the signatory states, now consists just of four islands plus Zimbabwe (the current ability of which to implement any trade agreement must be a matter for conjecture). Unless other countries join, it is hard to see how this grouping can be considered

a 'real' region. The implications for COMESA are clearly very important.

The position of the Southern African Customs Union (SACU) is an anomaly. Under the 2004 SACU Agreement, no member can agree a new trade regime with a foreign country without the consent of all. Since South Africa has not initialled an interim EPA, this consent has clearly not been given. What happens now is uncertain. South Africa would appear to have the right, if it so chose, to support autonomously a change in the SACU CET towards the EU that brought it into line with the obligations that BLNS have accepted. In other words, there would appear to be a prima facie case that South Africa would not need actually to sign an EPA in order for the situation to be regularised; it would merely need to accept autonomously the required changes to the SACU tariff. But, unless the 'common' SACU external tariff were to have separate BLNS and SACU schedules (at least during the EPA implementation period) the EU would also need to accept some changes to the provisions of its TDCA. This is because some goods will be liberalised later under the EPA than is scheduled under the TDCA. Unless and until both of these things happen it would appear that the commitments to which BLNS have agreed are not enforceable in law within SACU.

As a result of the conclusion of interim EPAs, the EU is now trading with Sub-Saharan African countries under four different regimes: interim EPAs for those countries that have initialled one, and for the others, the standard GSP (or most-favoured-nation (MFN) tariffs) on imports from non-LDC ACP countries (Congo, Gabon and Nigeria), and the duty-free quota-free Everything-But-Arms regime for other LDCs, and the TDCA with South Africa. This is hardly conducive to strengthening regional integration, as discussed in Section 5.

4.2 Provisions in the Texts of the Agreements

The impact of the provisions laid down in the legal texts of the agreements is highly dependent on their interpretation and enforcement. Despite this need for caution in drawing bold conclusions on the texts, there are some clear patterns on some specific issues. These are summarised below.

4.2.1 Border Measures

Specific border measures are provided in the EPAs which may slightly alter some of the features of the liberalisation regimes. CEMAC has provision to halt tariff reduction unilaterally for a maximum period of one year, and the 'standstill clause' phrasing in the SADC EPA does not apply to goods excluded from liberalisation. All the African EPAs except ESA allow for the temporary introduction/increase of export duties in 'exceptional circumstances' following 'joint agreement' with the EC (EAC) or 'consultations' (CEMAC, Ghana, Côte d'Ivoire and SADC).
A general prohibition on import barriers other than customs duties and taxes (apart from measures taken in the context of anti-dumping and countervailing measures/safeguards) is subject to exemptions in all EPA texts (e.g. for infant industry protection or in case of public finance difficulties). The maintenance of national subsidies conforming to WTO provisions is also allowed in all the texts. The CEMAC text refers to the gradual phasing out by the EU of its agricultural export subsidies, which it is already committed in the WTO to do by 2013.
There are strict provisions on customs and trade facilitation with sanctions in case of failure to provide administrative cooperation. If the Joint Council/Committee cannot come to a mutually accepted solution within three months, the complaining party can suspend preference for up to six months (renewable).

4.2.2 Areas for Continued Negotiation

There are big differences in the 'rendezvous clauses' in the interim EPAs which establish the areas in which negotiations must continue. How important these differences are in practice remains to be seen since the clauses are 'guidelines' for the areas to be negotiated, and all texts foresee additional topics deemed by the parties to be relevant coming up in the ongoing negotiations towards a full EPA.

4.2.3 Dispute Settlement

The dispute avoidance and settlement provisions are more extensive and rigid than in some previous EU FTAs, such as the TDCA with South Africa. The procedures for consultations, seeking advice from a mediator and establishing an arbitration panel are detailed and the time-frames are very strict. The procedures are largely identical except in EAC and ESA, where negotiations continue. The application of temporary trade remedies is envisaged in cases of non-compliance with an arbitration decision.

4.2.4 Development Cooperation and Finance

All the African EPAs except EAC have comprehensive but wholly non-binding provisions for development cooperation, mentioned in each and every chapter as well as in a section on development cooperation (most extensively in the ESA text). The EAC, ESA and CEMAC texts also explicitly foresee continued negotiations on this.

4.3 Market Access Commitments

The interim EPAs in Africa and the Pacific focus on market access in goods; discussions on liberalising trade in services and on trade-related areas are kept for the ongoing negotiations towards full EPAs. Whereas the EC market access offer is the same for all regions – duty and quota-free market access with transition periods for sugar and rice – market opening by the ACP differs across countries and is specified in liberalisation schedules annexed to the agreements .

4.3.1 Comparing Levels of National Commitment

The interim EPAs were finalised in a rush to beat the end of 2007 deadline – and it shows. All of the African EPAs are different and in only one region does more than one country have the same commitments as the others: this is the East African Community (EAC). At the other extreme is West Africa, where the only two EPA countries have initialled significantly different texts with different liberalisation commitments.

Table 1 identifies five key features of the liberalisation schedules and, in relation to each of these, aggregates the African states analysed into one of three categories. The five features are the time period over which liberalisation will be implemented, the date at which countries will start to remove tariffs on goods that are not already duty-free, the extent to which the early tranches of liberalisation remove high tariffs on goods that the EU can export and which might compete with domestic production, the 'hypothetical revenue loss' in the early tranches, and the relative size of the exclusion basket. Some categories are defined in wholly objective terms (such as the duration of implementation or size of the exclusion basket). Others involve an element of judgment by the authors (notably the adjustment and revenue impact of the early tranches). Between them they aim to provide a picture of how quickly and extensively the EPAs will begin to 'make a difference'. This is an essential starting point for identifying the support that countries need both to take advantage of new opportunities and to help them adjust to the competitive and revenue shocks.

Table 1. Comparison of Liberalisation Schedules

Duration	**15 years or fewer**	**16–20 years**	**20+ years**
	BLNS	Cameroon	All EAC
	Comoros	Zimbabwe	
	Côte d'Ivoire		
	Ghana		
	Madagascar		
	Mauritius		
	Mozambique		
	Seychelles		
Liberalisation starts for positive -tariff goods	**2 years or fewer**	**3–5 years**	**6+ years**
	BLNS	Cameroon	All EAC
	Côte d'Ivoire		Comoros
	Ghana		Madagascar
	Mauritius		Seychelles
	Mozambique		Zimbabwe
Impact of early tranche(s)	**High**	**Medium**	**Low**
	BLNS	Ghana	All EAC
	Côte d'Ivoire	Madagascar	Cameroon
Adjustment	Mozambique	Mauritius	Comoros
Revenue	Zimbabwe		
	Seychelles		
	30%+	**10–30%**	**Under 10%**
	Burundi	Cameroon	Botswana
	Côte d'Ivoire	Comoros	Lesotho
	Kenya	Ghana	Swaziland
	Madagascar	Mauritius	
	Mozambique	Namibia	
	Rwanda		
	Seychelles		
	Tanzania		
	Uganda		
	Zimbabwe		
Exclusions	**Under 15%**	**15–20%**	**20+%**
	Lesotho	Côte d'Ivoire	Botswana
	Mauritius	Kenya	Burundi
	Namibia	Uganda	Cameroon
	Seychelles	Comoros	Ghana
	Swaziland	Madagascar	Mozambique
			Rwanda
			Tanzania
			Zimbabwe

Source: ODI-ECDPM (2008), The New EPAs, www.ecdpm.org/pmr14

No clear pattern can be identified that the poorer countries have longer to adjust than the richer ones or of the EPAs being tailored to development needs (however defined). Some of the richer countries among the list have to adjust quickly – but so do some of the poorest.

The picture that emerges is entirely consistent with the hypothesis that countries have a deal that reflects their negotiating skills: that countries able to negotiate hard, knowing their interests, have obtained a better deal than those lacking these characteristics. Côte d'Ivoire and Mozambique will face adjustment challenges that are among the largest and will appear soonest. Côte d'Ivoire, for example, will have removed completely tariffs on 60 per cent of its imports from the EU two years before Kenya even begins to start reducing its tariffs as part of the EPA; Ghana will have liberalised completely 71 per cent of its imports by the time Kenya is three years into this process which, after a further six years, will result in just 39 per cent of its imports being duty-free.

4.3.2 Market Opening in the Agricultural Sector

Given the importance of agriculture for ACP economies and concerns about surges of cheap European imports, agricultural products make up a significant share of the tariff lines excluded from liberalisation. The proportion varies across the national exclusion lists between 9 per cent (Zimbabwe) and 67 per cent (Comoros); in most cases agricultural products make up roughly a third of excluded tariff lines.

5 Implications for Regional Integration in Africa

A common perception, expressed by many countries in the independent Article 37.4 review of the negotiations, and illustrated by the partial conclusion of interim EPAs, is that there is little coherence between the EPA agenda and the regional integration processes in Africa.

5.1 Insufficient Synergies between EPAs and Regional Integration

EPAs are supposed to build on and reinforce regional integration within the negotiating regions. According to the European Commission, by negotiating EPAs on a regional basis, the ACP countries would have an opportunity to strengthen their regional integration processes and create dynamic regional markets, conducive to investment and development. This would be possible if the ACP countries and regions embrace a wider scope than just trade liberalisation, as trade-related issues covered in an EPA – a legally enforceable text – will help to drive much-needed economic reforms in the region. The regional partnership with the EU would also enhance the credibility of regional integration processes, notably in Africa, whereby the EU would act as an "external guarantor" to avoid a reversal of economic and integration policy.

However, this approach presented serious challenges and problems for many of the parties, particularly in Africa. Indeed, with the start of the EPA negotiations in 2002, an additional layer of complexity was added to the already intricate picture of regional integration in Africa. The regional groupings within which African countries chose to negotiate their respective EPAs did not match the contours of the formally recognised regional economic communities (RECs) to which they belong, except in the recent case of EAC. A closer look further shows that some regional sub-groupings are more fully integrated than the broader EPA configurations within which they are negotiating with the EU. Besides this, many African countries are members of more than one REC with often conflicting objectives and obligations and, in recognition of this, have taken up the challenge of rationalising the RECs at pan-African level. In assessing the impact of an EPA, the parallel implementation of EPAs and endogenous regional integration initiatives in the ACP poses some challenges in terms of identifying the consequences of the different processes.
While it remains that regional integration in Africa has seen slow progress and been hampered by various obstacles

and challenges, both internal and external, little consideration seems to have been given to the complexity and importance of existing regional integration efforts in the context of the EPA negotiations. Many African countries, in particular in ESA, opted to favour national interests over commitments to regional solidarity and agenda when considering which regional EPA grouping to join, with some countries shifting from one configuration to another a few years into the negotiations. Whether a regional integration process can be driven or supported by external forces such as the EU or should be internally driven in order to be sustainable is a question that can ultimately only be answered by the African (and by extension, the ACP) countries themselves.
Nevertheless, in the context of the ongoing EPA negotiations, EC proposals for tariff harmonisation and liberalisation cut across or even pre-empted existing regional integration initiatives. Indeed, ACP countries were pressured to negotiate on trade-related issues, such as investment and government procurement, in cases where there is little capacity or incentive at either regional or national level to enter into commitments in such areas. This raised the concern that the pace set by the EPA negotiations left little time to focus on internal factors relating to autonomous regional integration and could, in fact, undermine such efforts. At the same time, it has been recognised that the EPA negotiations process provided some impetus for further focus on regional integration agenda (e.g. ESA and West Africa regions) and revived otherwise somewhat dormant economic cooperation initiatives (e.g. the Indian Ocean Commission). Yet, calls for integration at the regional level before opening up to the EU under an EPA remained unanswered.

5.2 Conflicting Market Access Commitments

Of particular concern is that countries in the same economic region might liberalise different baskets of products and so create new barriers to intra-regional trade in order to avoid trade deflection. This concern has been vindicated by the interim EPAs that have been agreed.

In the case of Central and West Africa the principal challenge for regional integration is that most countries have not initialled an EPA, but Cameroon, Côte d'Ivoire and Ghana have done so. The countries in the regions that do not currently belong to an EPA will reduce none of their tariffs towards the EU, maximising the incompatibility between their trade regimes and those of Cameroon, Côte d'Ivoire and Ghana.

Only in the case of EAC have all members joined the EPA and accepted identical liberalisation schedules. If these are implemented fully and in a timely way economic integration will have been reinforced.

Those Eastern and Southern Africa (ESA) countries and the five Southern Africa Development Community subgroup (SADC-minus) states that have initialled, have done so to single agreements, but there is considerable dissimilarity in the country liberalisation schedules and exclusion baskets. All of the ESA states have established their liberalisation schedules in relation to the common external tariff (CET) (presumably of the Common Market for Eastern and Southern Africa – COMESA), but it is not only the details of their liberalisation and of their exclusion baskets that are different – so is their classification of goods. The agreed phasing of liberalisation is made in relation to the product groups established by COMESA for its CET. Although the COMESA members agreed that the CET should be set at different levels for these groups, they have not so far agreed a formal definition that allocated each item in the nomenclature to one or other group. The EPAs have required countries to make this specific link – and they have done so differently, which will create problems for implementing any eventual COMESA CET. There are over a thousand items being liberalised by one or more of the ESA countries where there is some degree of discrepancy in the CET classification.

Provided that there is goodwill and flexibility on all sides, it ought to be possible to avoid the EPA process creating new barriers to African integration. But this requires a recognition that not all the details of the current texts are set in stone. The demands that will arise from moving towards the agreement of full EPAs will reinforce this need.

5.3 Regional Scope of Agreements

Having concluded interim agreements with one sub-region and individual countries, it remains to be seen whether it will be possible to indeed extend interim agreements to full EPAs that cover all the countries belonging to each of the negotiating regions. Instead of creating full EPAs at the regional level, different countries within the same region might make different choices about the trade regimes: (i) a full and comprehensive EPA; (ii) a narrow (or permanent interim) EPA; (iii) the standard GSP (or GSP-plus); and (iv) the Everything-But-Arms for LDCs. Note that, as interim agreements are open for other countries in the region to join, the regional scope of the agreements could be widened without extending the range of issues covered to a full EPA.

Box 1 presents possible consequences related to choices made in terms of the regional scope of any agreement.

Box 1. Scenarios Regarding the Regional Coverage of the Agreements

Scope of the agreements	Threats and opportunities
Agreements at the regional level	• Provided all countries within one region can agree on a common liberalisation schedule towards the EU, it will foster regional integration dynamics and allow for the formation and implementation of customs unions with CETs and policies, e.g. for the existing customs unions CEMAC, EAC, SACU and UEMOA, as well as for the emerging/expected customs unions in COMESA, ECOWAS and SADC. • Possible difficulties in arriving at a regional list of sensitive products/reduced opportunity to protect nationally sensitive sectors from EU competition. • Even though varying degrees of commitment on services and trade-related issues are possible within an EPA, a common understanding across the region on coverage of these issues will be conducive to regional integration. Different positions on these issues may create political tensions and weaken the cohesion of the regional grouping.
Agreements at the sub-regional level (leaving out some members of the negotiating group)	• Preserve narrow deeper regional integration, such as exists in EAC, SACU and UEMOA, but prevent broader regional integration, as in COMESA, SADC and ECOWAS. • Offer the possibility for some countries in the region not to open their markets to EU imports, e.g. for LDCs that export under EBA or for non-LDCs that apply for GSP+.
Agreements at the level of individual countries	• Counteract regional integration processes and create political tension, e.g. in the case of Côte d'Ivoire and Ghana initialling interim agreements alongside the negotiations at regional level in West Africa. • Offer the possibility for some countries in the region not to open their markets to EU imports, e.g. for LDCs that export under EBA or for non-LDCs that apply for GSP+ or opt for the standard GSP. • Market access offers at individual country level provide the largest policy room for determining sensitive products specific to each country's situation. • Create a need to introduce new barriers to trade and border controls within a region in order to implement rules of origin to avoid trade deflection.

Source: ODI-ECDPM (2008), The New EPAs, www.ecdpm.org/pmr14

In the process of designing a regional agreement, countries will have to determine a common regional position on services liberalisation and trade-related issues, based on the interests of each country defined at the national level. Where differences of opinion prevail in a region, it is possible that a full EPA could contain regional provisions that would apply to all members of the group, and country-specific ones (e.g. on services, investment) that would apply on an individual basis. This would allow a regional agreement to be concluded which is in line with existing integration dynamics, while respecting the choices made by individual countries.

However, if the status quo in some countries persists and regional partners continue to hold significantly different positions, the regional integration process could be seriously jeopardised. Regional cooperation and the dynamic of further integration would be interrupted: customs unions will be unable to apply the same CET; new border controls will be required; heterogeneous rules of origin might thwart production integration and political tensions would rise across the region. Nevertheless, preserving regional unity may not be a sufficiently strong argument to continue negotiations and conclude regional (potentially full) EPAs. Strategic considerations on development should determine whether an EPA should be signed, and if so, what that agreement would entail.

5.4 Possible Scenarios for the African Negotiating Regions

Negotiations have continued in 2008 and should be concluded in 2009. The European Commission has the mandate to conclude full EPAs and it intends to do so. None of their ACP partners has so far renounced this objective. But what is the likelihood of success?

The rushed conclusion of interim agreements at the end of 2007 may have created a sense of urgency about the need to improve on the situation created by these agreements. However, for those countries that have already committed to an interim trade deal, the market access bargaining-chip has been lost, which may weaken their stance vis-à-vis the EU. This is a point well understood by the Caribbean, which ruled out an interim deal for this very reason. Further, some LDCs that have not initialled an interim agreement may find the duty and quota-free market access under EBA a suitable trade regime to continue exporting to Europe (despite the less favourable rules of origin), and may have no appetite to pursue a broader trade-related agenda.

The remainder of this section considers the situation in each of the four African groupings negotiating an EPA with the EU, outlining key options and indicating the most likely scenarios.

5.4.1 Possible Scenarios for West Africa

The West Africa-EC EPA negotiations were essentially frozen during the last few weeks of 2007 and were replaced by bilateral talks between the EC and individual countries in the region, which led to the initialling of interim agreements by Côte d'Ivoire and Ghana. Since then, the West Africa EPA grouping has clearly indicated its commitment to concluding a full and regional EPA by June 2009. In line with this, a detailed action plan has been drafted and will be further detailed. More recently, the region also confirmed that the interim agreements of Côte d'Ivoire and Ghana would be superseded by a regional EPA.

To meet this objective, some key issues will need to be addressed. These include the development framework for the EPA, which has been a major stumbling block in the negotiations so far. Concerns relate to the net fiscal impact of EPA implementation, as well as the necessary development programme and accompanying measures that need to be in place to enable the region to take advantage of the new opportunities provided by an EPA and to respond to the various adjustment costs incurred through the implementation of the new trade regime with the EU.

While the region has confirmed that the interim agreements will be superseded by a comprehensive regional EPA, it remains to be seen whether negotiations will be based on existing texts, and if so, which one (the last draft agreed at the regional level in 2007, or the text of the interim deal of Côte d'Ivoire, or the one of Ghana) and to what extent it can be amended or re-drafted. More fundamentally, the challenge for the West African region will be to adopt a common position that reflects their regional ambitions while respecting their national sensitivities and interests.

A priority for West Africa is to determine its common market access offer. First, each country will have to identify its list of sensitive products to be excluded from liberalisation. It is expected that all national lists will be submitted by the end of March 2008, on the basis of which the region will draw up the common regional exclusion list. The outcome of such an exercise will have to be acceptable to all in the region and reflect in a balanced manner the interests of each country, while still falling within the scope of 'WTO-compatibility'. This will be most challenging. Côte d'Ivoire and Ghana already rushed through such a process at the end of 2007. But their market access offers differ and extending any of them to the region would lead to an exclusion basket of goods whose coverage would be well beyond the levels acceptable to the EC. In this context, either the EC will have to demonstrate flexibility by lowering its interpretation of the 'substantially all trade' threshold to significantly less than 80 per cent of trade liberalisation (which would be in line with what West Africa has been calling for), or Côte d'Ivoire and Ghana will have to adjust their market access offer to accommodate the interests of their regional partners (which might trigger discontent in the private sector).

A second and crucial challenge for the West African region and integration efforts, relates more specifically to the liberalisation process towards the EU. This will largely depend on the outcome of the internal discussions currently taking place on the implementation of the ECOWAS CET. This was adopted in January 2006 and was to be implemented after a two-year transition period, building on the existing UEMOA CET. Entry into force would have therefore coincided with the start of the implementation of the EPA on 1 January 2008. However, despite a fast-track approach, the harmonisation of the ECOWAS CET with that of the UEMOA has been delayed for various reasons, notably because of a controversial request a fifth level of customs duty to be introduced. In addition to the four categories agreed for UEMOA and ECOWAS CET rates (at 0 per cent, 5 per cent, 10 per cent and 20 per cent), a 'fifth band' at 50 per cent had initially been proposed by Nigeria, with the support of many non-state actors in the region. The principle of a fifth band has now been approved by the region, set at the lower level of 35 per cent though. In this context a key aspect to consider is the starting point for liberalisation towards the EU. Will it be the maximum fourth band at 20 per cent as already applied by UEMOA or the fifth band at 35 per cent proposed for ECOWAS CET? This could raise some problems for future liberalisation at the regional level within the framework of an EPA. Some West African countries could find themselves in a situation where they would have first to increase their tariffs towards the EU (to the level of the fifth band) before dismantling them. Fortunately, in practice, the fifth band covers goods mainly produced by Nigeria. Tariff increases may also contradict the standstill clause in the interim EPAs of Côte d'Ivoire and Ghana. The time frame for the liberalisation schedules may also prove tricky. With the market opening starting as early as 2009 for Côte d'Ivoire and Ghana under the terms of their respective interim agreements, these countries may have to re-impose tariffs on EU imports to accommodate the new liberalisation schedule of a full regional EPA which would replace their interim agreements sometime after June 2009 or beyond. Here, a further consideration to bear in mind is whether such countries would, in this process, also be forced to go beyond their MFN commitments at the WTO level and face a possible sanction from multilateral partners.

In spite of the optimistic and positive rhetoric in the region on the prospect of concluding a full regional EPA, given the current situation, the road ahead remains unclear. Harmonisation of tariff liberalisation in West Africa will by no means be smooth and straightforward. The issues to be addressed are sensitive and highly political.

In this context, another scenario could emerge, albeit one which is less favourable to regional integration efforts, in which a differentiation is made between UEMOA and non-UEMOA countries within the ECOWAS grouping. The former constituting a customs union with an established CET would have a common market access offer, while ECOWAS' non-UEMOA countries could have a separate market access offer and liberalisation schedules, specific to individual countries. Should a common understanding prevail on the scope and content of the agreement, it would still be possible to envisage a common EPA text. Regional integration in West Africa would then be essentially driven by the pace of liberalisation towards the EU, while the UEMOA sub-grouping and other West African countries would undertake separate liberalisation commitments. These could gradually converge over time

to reach a common level of liberalisation towards the EU. But in the meantime, this would prevent the implementation of an ECOWAS customs union with a CET. This will also have an affect on other aspects under negotiation, notably services.

It is therefore crucial for the West African region to make sufficient effort to define as soon as possible its market access offer to the EU under an EPA, in a manner which is satisfactory to all its members. While this is technically challenging, it requires strong political leadership and commitment. Several issues will have to be addressed to meet this objective, including that of RoO. This last matter will most likely prove to be equally challenging: while these rules are still in the process of being defined at the regional level, they are at the same time being further discussed between the EC and the signatories to an interim agreement. Here again a careful balance will have to be found between the various interests at stake and forces at work.

Besides, with many West African countries, and in particular LDCs and Nigeria, having shown little interest in all the trade-related issues advocated by the EU in the EPA agenda, the parties need to give careful consideration to the development cooperation issue and accompanying reforms if the negotiations are to be successfully concluded. Otherwise, some countries, notably LDCs, may ultimately decide to opt out from an agreement with the EU, which for most of them would result in only a marginal loss of effective preferences, if any at all. By the same token though, the EU should not be perceived as enticing reluctant governments to conclude an EPA they dislike simply to obtain more financial aid.

Efforts will have to be directed towards identifying a common position that will be sustained at the regional institutional level, with a strong buy-in from all members. In this respect, the establishment and operationalisation of a Regional Fund to support EPA implementation could play a key role in drawing various interests together.

5.4.2 Possible Scenarios in Central Africa

The Central African region is facing the challenge of defining a common regional position after initialling an interim agreement between an individual country, Cameroon, and the EU. At a joint technical meeting on 6-7 February 2008 in Douala, Central African and European negotiators re-stated their objective of concluding a regional EPA. The parties agreed to use the conclusions of previous Central Africa-EC ministerial meetings in 2007 as a basis for future negotiations, rather than building on the text of the interim agreement. Although the text of the Cameroon-EU interim agreement is accordingly expected to be superseded by a full regional EPA, an open question relates to the extent to which commitments taken on by Cameroon in the interim agreement will influence the regional agreement, including in terms of the definition of sensitive products. However, extending the exclusion list of Cameroon to the whole region would likely result in an exclusion of more than 20 per cent of imports from the EU. The percentage would increase even more if additional products of interest to other Central African countries were added to the list. Accordingly, either adjustments will have to be made in the range of products excluded or an agreement will have to be reached on a higher threshold for exclusion. Moreover, Cameroon will start liberalising its tariffs from the CEMAC CET level in 2010. Given that this CET is not yet fully implemented, a delay in the conclusion of a regional agreement would require some additional effort to realign tariffs within the region during the implementation of a full EPA. Should the conclusion of a regional agreement be delayed beyond that date, this would mean that Cameroon would already have cut tariffs below the CEMAC CET level applied by other countries in the region. Accordingly, in order to implement a regional EPA, either Cameroon would have to re-increase tariffs to the regional level, other countries would have to accept rapid cuts in tariffs to reach the level of Cameroon, or the regional EPA would have to specify a transition period during which Cameroon would apply different tariff levels than other countries in the region, until these gradually reach the same level of liberalisation as Cameroon.

The economic interest in concluding a regional EPA is likely to be stronger for some countries than for others. The non-LDCs Gabon and the Republic of the Congo would benefit from improved market access under an EPA, compared to the standard GSP under which they currently export to the EU. So far, Gabon has shown greater interest in

concluding an agreement than the Republic of the Congo. For the non-LDCs in the region, political considerations on regional integration and the expectation of gaining easier access to development finance may well be stronger incentives for continuing EPA negotiations than provisions on market access. Hence, based on the experience from negotiations up to 2007, binding EU commitments on the availability of finance for accompanying measures and compensation of net fiscal revenues are likely to remain a key issue in the region.

Another matter that needs to be taken into account when reflecting on the negotiations in Central Africa is the limited technical negotiating capacity in the region. This may lead to little regional ownership of the outcome of negotiations at the technical level, e.g. in areas such as intellectual property rights or services. Yet, rather than technical issues, political concerns about regional coherence and development cooperation with the EU are likely to be decisive in determining whether to sign an EPA or not, and in defining its scope.

Based on the above and information from the negotiating circles, four scenarios can be put forward as possible outcomes of the future negotiations:

(1) A very comprehensive regional EPA could be concluded which would be only marginally owned by the region. Central Africa and the EC were close to adopting such a solution in November 2007.
(2) A less complex regional EPA may be signed which would reflect the different levels of ambition within the region as well as a desire for regional unity.
(3) Cameroon could keep its individual agreement with the EU while the other countries in the region would negotiate a separate or differentiated deal with the EU. This might occur if the challenges of aligning the interim agreement with a regional position were perceived to be too great, notably in the area of market access. Such an outcome would most likely disrupt the regional integration process of Central Africa.
(4) Some countries in the region might decide against an EPA. In this case, Gabon and possibly some other countries may join the Cameroon-EU interim agreement, while the remaining countries would export to the EU under the standard GSP or EBA initiative without taking on any reciprocal commitments. This scenario would run counter to the regional integration dynamics of the region, preventing the implementation of the CEMAC CET. But it might best reflect the national interests of CEMAC countries regarding an EPA.

Which of these options will be chosen is likely to be determined to a large extent by political considerations. Given the fragile security situation in the Central African Republic, Chad and the Democratic Republic of the Congo – concerns about political stability, in particular, could turn the question of whether to join an EPA into a strategic political matter rather than a purely economic one.

5.4.3 Possible Scenarios for ESA

The post-2007 deadline for a new WTO-compatible trade regime between the EU and the ACP gives a splintered picture of the ESA region which, to a large extent, reflects the inherent disparity of the grouping. Now six countries have initialled the ESA agreement, but with separate schedules for liberalisation (Comoros, Madagascar, Mauritius, Seychelles and Zimbabwe), and five others have initialled under the recently emerged EAC EPA grouping (Burundi, Kenya, Rwanda, Tanzania and Uganda). The remaining five countries are LDCs (Djibouti, Eritrea, Ethiopia, Malawi and Sudan) and continue to export to the EU under the EBA initiative since 1 January 2008.

At this stage, the regional character of the ESA EPA grouping is difficult to see and, indeed, the initialling of a separate agreement by EAC partner states has created some tensions within the grouping. Restoring the ESA configuration is further complicated by the high degree of variation between the liberalisation schedules of the different ESA

signatories and EAC signatories. To be aligned, the new liberalisation schedules will have to be negotiated. All the parties involved in the ESA EPA negotiations have made the political commitment to pursue negotiations towards a full and comprehensive EPA, building on and improving the existing texts. It is expected that countries signing the ESA or EAC text (including liberalisation schedules on trade in goods and services) will be in a position to do so by July 2009 at the latest. In addition, all ESA members, including the EAC countries, have committed to coordinate and harmonise their positions in the negotiation of a comprehensive EPA with the EU. More recently, EAC Ministers tabled a proposal to their SADC and ESA partners which aim to create a larger trading bloc encompassing EAC, COMESA and SADC, aiming at the "expeditious establishment" of an FTA among them, "with the ultimate goal of establishing a single Customs Union". Countries in the region are openly committed to restoring the regional coherence beyond that of just the EAC and the broader framework of the ESA configuration. But they are confronted by challenging realities.

In this respect, the scenario officially expected for the ESA region would be the successful conclusion of a comprehensive ESA-EC EPA, to which all countries in the configuration, including the EAC Member States, would adhere. Looking at the existing provisions, this appears to be technically feasible as each of the signatories of the ESA group has agreed to identical provisions and, the EAC ones are fairly similar. However, the fact that ESA countries tabled separate individual market access offers is a serious concern, which could prevent the formation of a customs union in COMESA. Harmonisation of liberalisation schedules between ESA and EAC will prove most challenging.

In this context, another possible scenario emerges in which the EAC market access offer would remain unaltered and ESA countries would table offers in line with their specific interests and where possible, on the basis of a common agenda for all areas of negotiation, including trade-related issues and services. This might lead to an ESA EPA as a framework agreement, with various degrees of commitment for different ESA countries or sub-groups of countries (as in the case of EAC for market access in goods). This should preserve some regional unity; however, it could limit deeper integration processes and would most likely prevent the formation of an effective COMESA customs union.

While there is a clear political drive to move towards a comprehensive and regional EPA, each country within the ESA configuration will have to look carefully at where its interests lie. Those countries, like Mauritius or Kenya, that had a clear interest in concluding an agreement with Europe have already done so and will most likely spearhead the process towards a full EPA. Throughout the EPA negotiating process, such leadership has been key in overcoming the diverse composition of the region and in ensuring progress in the negotiations. However, as the unfortunate recent events in Kenya show, security and political considerations will most likely take their toll on both the EPA negotiations and implementation in this country and have an impact on political leadership at the broader regional level.

Either of the above scenarios also implies that those LDCs that have opted out of an interim agreement with the EU are convinced of the benefits of signing at least an FTA with the EU and possibly a comprehensive and full EPA. However, in the absence of an established CET for COMESA, it is less clear what interest such countries would have in tabling a market access offer. Beyond the crucial need for regional coherence and establishing a common regulatory framework, development cooperation and the extent to which accompanying measures are adequately addressed within the framework of an EPA can therefore play a key role in galvanising support from the LDCs. This will be crucial to avoid a situation where countries opt for a pick-and-mix EPA and regional integration processes in the ESA are further jeopardised. The risk remains, however, that providing adequate development support and aid to accompany an EPA could be used by the EU as a way to 'induce' reluctant ESA countries to sign an EPA; an outcome which cannot in any way be conducive to the development objectives owned by the countries of the region. Since no additional resources will be provided by the EU for the conclusion and implementation of an EPA, several LDCs in the ESA have informally been suggesting that they are not interested in signing an EPA

with the EU.

5.4.4 Possible Scenarios for the SADC EPA Configuration
Uncertainty about the position of South Africa makes predictions about future developments in the SADC region difficult. While then South African President Thabo Mbeki in his State of the Nation Address expressed his willingness to 'ensure that the negotiations on the Economic Partnership Agreement are completed as soon as possible', South Africa has repeatedly expressed concern about a number of provisions in the interim agreement.

Trade in services and trade-related rules are key issues in the region. In the interim agreement, Botswana, Lesotho, Mozambique and Swaziland took on the commitment to continue negotiations on these areas in 2008, while South Africa and Namibia have been reluctant to do so. Contrary to other regions, commitments on development finance do not play a key role in the SADC configuration, even though the definition of support measures is important for the effective implementation of specific EPA provisions.

Considering South Africa's firm opposition to binding commitments in the area of services and trade-related issues, a comprehensive regional EPA covering these areas and including South Africa is unlikely to be concluded, unless South Africa reverses its position held so far. Given that the countries that initialled the interim agreement have expressed a strong interest in the EPA, several possible options can be imagined as outcomes of the second stage of negotiations:

(1) A regional EPA including South Africa may be signed with identical liberalisation commitments on trade in goods but possibly varying degrees of commitments on services and trade-related issues. This would foster the customs union, SACU and allow some members to go beyond a goods-only deal without compelling South Africa to negotiate on issues it prefers to exclude from an agreement. It would require harmonisation of the liberalisation schedule of the interim EPAs agreed so far and the one of the TDCA.

(2) A regional EPA including South Africa may be signed covering trade in goods only. Provided a single liberalisation schedule for SACU is agreed upon, this would preserve regional integration within SACU with all members. The possibility of concluding a common agreement on trade in ser vices and trade-related issues with the EU at some later stage, after increased capacity building and integration within SADC, could be kept open. However, a goods-only agreement would contradict the commitments taken on by Botswana, Lesotho, Mozambique and Swaziland in the interim agreement.

(3) South Africa may decide not to join an EPA and to continue exporting under its current FTA with the EU, the TDCA, while other countries would conclude a full EPA. This would solidify the status quo further to initialling the interim agreement, thereby creating a permanent split in the region. This may jeopardise the relevance, and ultimately survival, of SACU. Hence, the opportunity of promoting stronger coherence in SACU and SADC through an EPA would be lost.
Under SACU, the conclusion of an EPA by those countries that have initialled the interim agreement is legally possible with the consent of South Africa even if it is not a practical possibility for most goods. A refusal to give this consent, however, might put the existence of SACU in question.
The extent and the urgency of the threat to economic regional integration posed by a possible non-participation of South Africa in an EPA depends on the differences in liberalisation schedules under an (interim) EPA compared to those under the TDCA. Fortunately, recent progress in the negotiations has contributed to harmonised liberalisation schedules.

The extent of the participation of Angola and Namibia remains to be seen. Angola has expressed its 'intention of acceding to the full EPA once this agreement is concluded', but has not initialled the interim agreement. As an oil-rich country, it has little direct incentive to do so. Namibia, on the other hand, is party to the interim agreement and has strong interest in access to the EU market in goods (notably for its beef exports). But Namibia has shown less

interest in negotiations on services and trade-related issues, and has initialled the interim agreement on the condition that several issues of concern would be addressed in the ongoing negotiations. It is now siding with South Africa in refusing to make substantive commitments on these issues in the context of a final EPA.

6 Conclusion and Recommendations for the Way Forward

EPA negotiations continued in 2008 with the aim of reaching comprehensive agreements at the regional level with a broader coverage of subject areas and corresponding in their geographic scope more closely to integration processes in the ACP.

It remains to be seen to what extent and by what date such full EPAs will be realised. In some cases, the interim agreements – once signed and ratified – might become a long-term solution. However, all parties to the interim deals have expressed their commitment to continue striving for comprehensive EPAs, in order to realise the objectives in terms of development, ACP regional integration and integration into the world economy. From our analysis of the negotiation process up to now, several elements emerge that might be kept in mind for the future in an effort to make the process as effective as possible:

The Need for Ownership

The EPA negotiation process has too often been chaotic and led by the EC. To reach truly development-oriented outcomes, it will be necessary to allow for the adjustment of interim texts that do not fully reflect the interests of all parties. In revising an interim agreement it may be helpful to draw on texts concluded in other ACP regions, adopting some provisions from these where suitable.

The range of issues to be covered in a full EPA should reflect both national and regional ACP interests. If interests among countries within a region differ, an EPA might include varying degrees of commitment on trade in services and trade-related issues. Further, signing an EPA should be a sovereign decision by each country: if a country chooses not to take part it should not be compelled to join through political pressure or through aid conditionality.

Timing

It will be crucial to allow sufficient time to negotiate a truly development-friendly, comprehensive EPA that is owned by all involved; while the momentum of the negotiations should not be lost, there is no need to rush into an agreement with ill-conceived provisions. A clear agenda and calendar for negotiation that is acceptable to both partners should be defined. In particular, this should avoid leaving contentious or difficult issues until the end.

Increasing Transparency

There is a need to increase transparency in the negotiations and their outcome, in order to allow for public scrutiny by policy makers, parliamentarians, private sector and civil society representatives. This will foster a more participatory approach and contribute to increasing ownership of the agreements reached.

Reducing Negotiation Asymmetries

The asymmetries in negotiating capacity (between the EU and ACP and among the ACP) that have contributed to the incoherence of the interim agreements need to be taken into account in future negotiations if the problems arising from the rushed conclusions of the interim EPAs are not to be exacerbated. This needs to be done through adapting the pace of negotiations as well as the style of interaction between the parties and through capacity building measures under the Aid for Trade initiative.

Development Support for EPAs

In order for ACP countries and regions to benefit from EPAs, accompanying measures will be essential. These include for instance compensation for lost customs revenue, strengthening the competitiveness of local producers

to enable them to face liberalisation and supporting the implementation of EPA provisions. Attention needs to be paid both to the availability of sufficient resources, notably under the EU Aid for Trade Strategy, as well as to the improvement of delivery mechanisms and effective programming.

Coherence with Regional Integration Processes

Given that except in the case of EAC, the interim agreements have been concluded by individual countries and sub-groupings that form part of larger regional communities, it will be crucial to ensure coherence between EPAs and ACP regional integration processes. Liberalisation schedules and other commitments need to be harmonised in order to reach a sustainable outcome. This entails responsibilities on both sides of the table as well as providing appropriate policy initiative from ACP countries to take their regional agenda forward.

But the reality is that, for many African LDCs, EPAs are not perceived as an opportunity to reform their economies and foster their development. They thus have no appetite to conclude an agreement with the EU. They may be forced to do so for the sake of preserving the regional integration processes they are actively engaged in, which include non-LDCs that need an EPA to maintain their preferential market access to the EU. Unless African countries succeed in aligning EPAs with their reform and development agenda, they may either conclude an undesirable EPA for the sake of safeguarding regional integration, or downplay their regional ambitions and reject an EPA; none of these options can be conducive to their development, let alone lead to constructive relations with their EU partners.

Annex I - Overview of EPA Signatory States
Table a. Overview of EPA Signatory States

	Members	States having concluded as of October 2008	Countries falling into EBA/ standard GSP	Proportion of signatory countries	Number of liberalisation schedules
ESA EPA	Comoros Djibouti Eritrea Ethiopia Madagascar Malawi Mauritius Seychelles Sudan Zambia Zimbabwe	*Comoros* *Madagascar* Mauritius Seychelles Zimbabwe *Zambia*	Djibouti Eritrea Ethiopia Malawi Sudan	55%	6
EAC EPA	Burundi Kenya Rwanda Tanzania Uganda	*Burundi* Kenya *Rwanda* *Tanzania* *Uganda*	—	100%	1
SADC EPA	Angola Botswana Lesotho Mozambique Namibia South Africa Swaziland	Botswana *Lesotho* *Mozambique* Namibia Swaziland	Angola	71%	2
CEMAC EPA	Cameroon Chad Cent. African Rep. Congo DR Congo Eq, Guinea Gabon S. Tomé/Principe	Cameroon	Chad Cent. African Rep. **Congo** DR Congo Eq. Guinea **Gabon** S. Tomé/Principe	12.5%	1
ECOWAS EPA	Benin Burkina Faso Cape Verde Côte d'Ivoire Gambia Ghana Guinea Bissau Liberia Mali Mauritania Niger Nigeria Senegal Sierra Leone Togo	Côte d'Ivoire Ghana	Benin Burkina Faso Cape Verde [b] Gambia Guinea Bissau Liberia Mali Mauritania Niger **Nigeria** Senegal Sierra Leone Togo	13%	2

PACP EPA	Cook Islands Fed. Micronesia Fiji Kiribati Marshall Islands Nauru Niue Palau Papua New Guinea Samoa Solomon Islands Tonga Tuvalu Vanuatu	Fiji Papua New Guinea	**Cook Islands** **Fed. Micronesia** Kiribati **Marshall Islands** **Nauru** **Niue** **Palau** Samoa Solomon Islands **Tonga** Tuvalu Vanuatu	14%	2
CARIFORUM	Antigua/Barbuda Bahamas Barbados Belize Dominica Dominican Rep. Grenada Guyana Haiti Jamaica St Kitts/Nevis St Lucia St Vincent/Grenadines Suriname Trinidad/Tobago	Antigua/Barbuda Bahamas Barbados Belize Dominica Dominican Rep. Grenada Guyana *Haiti* Jamaica St Kitts/Nevis St Lucia St Vincent/Grenadines Suriname Trinidad/Tobago	—	100% 1	

Notes:

(a) Countries in italics are classified as LDCs. In the table compiled by the Commission (http://europa.eu/rapid/press ReleasesAction.do?reference=MEMO/08/15&format=HTML&aged=0&language=EN&guiLanguage=en), Somalia and Timor Leste are listed as LDC non-signatories (in the ESA and PACP groupings respectively). Since neither has played any part in the negotiation of EPAs, they are omitted here.

(b) Cape Verde has been classified as non-LDC since January 2008 but will be able to export to the EU under the EBA initiative for a transitional period of three years.

Source: ODI-ECDPM (2008), The New EPAs, www.ecdpm.org/pmr14

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