



Economic Commission for Africa

North-South FTAs After all? A Comprehensive and Critical Analysis of the Interim Economic Partnership Agreements

**And recommendations on how they could be made to really address
Africa's developmental objectives**

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EXECUTIVE SUMMARY

After negotiations since September 2002, thirty-five African Caribbean and Pacific countries, out of 79, initialled new trading arrangements with the European Union in November and December 2007. For these ACP countries, the new trading arrangements replaced the 25-year Lome Convention regime. This regime was first put in place in 1975 and had been extended up to December 2007 by the Cotonou Agreement concluded on 23 June 2000. Since 2003, the Conference of African Union Trade Ministers adopted Declarations on Negotiations for EPAs at their meetings in Mauritius (2003), Cairo (2005), Nairobi (2006), and Addis Ababa (2007). The African Union Executive Council of Foreign Ministers and the Assembly of Heads of State and Government also adopted decisions and declarations on EPAs. These declarations were the Common African Positions on EPA negotiations. The declarations set out key priorities and concerns, key demands and concessions, and provided guidelines.

This paper is an audit of the interim EPAs as initialled in order to assist the next phase of the negotiations, with a critical and comprehensive analysis and with clear recommendations. The objectives of the paper are the following:

- a. Analyse the provisions of the interim agreements for similarities and differences;
- b. Analyse the provisions of the interim agreements for consistency and inconsistency with the African Union EPA declarations; and
- c. Propose recommendations for the way forward under each of the issues covered by the interim agreements.

Structure of the EPAs

The interim EPAs initialled by the EU on the one hand and SADC, ESA, Ghana, Cote d'Ivoire, Cameroon and EAC countries all deal with objectives and principles, trade in goods including trade remedies or trade defence instruments and rules of origin, development cooperation, further negotiations for a broader EPA called a comprehensive or full EPA, establishment of institutions, general and final provisions covering a wide variety of issues including the usual ones of entry into force, membership and accession, amendment or review, relation with other agreements, and authentic text.

However, there are differences in certain cases, where some agreements deal with areas others don't; as well as some differences in the actual headings and provisions on similar subject matter. Negotiations for full EPAs as envisaged by the EC side, on the basis of the CARIFORUM-EU full EPA, and taking into account the areas for ongoing negotiations, will cover controversial areas that African countries have had considerable discomfort with, particularly the issues of competition, government procurement, and investment, as well as intellectual property, environment, labour standards, data protection, liberalisation of the capital account, and to some extent the area of services. There is scope for additional areas due to the open-ended final item on the list of areas.

Yet, these areas have been included in the full CARIFORUM-EU EPA, and to some extent in a quite circumscribed manner in the SADC-EU EPA. This is likely to be a source of pressure on the African groups to adopt extensive or substantive commitments different from the positions adopted by developing countries including Africa at the WTO negotiations and during the earlier phases of EPA negotiations.

The structures of the EPAs, in terms of the sequencing of the areas covered and the naming of the headings of the actual articles or provisions, can be adjusted to be similar as an initial step to promote harmony among the agreements. This can facilitate coordination among the African negotiating groups in the ongoing negotiations and in the interpretation and implementation of the agreements when concluded and in force.

Differences in the agreements caused by unique circumstances of some regions might not do much harm to other African groups and to coordination towards harmony and the continental integration process, and may be maintained. However, differences arising from non-consideration of certain pertinent or appropriate issues could be revisited with a view to developing a common approach among the regions. Also, differences that arise from differing concessions extracted from the EC side during the negotiations could be similarly addressed. Differences that set back or discourage the regional and continental integration process should be resisted and harmony insisted upon in order to support and expedite the integration process.

Ongoing negotiations for a comprehensive or full EPA will require caution and much better preparation, given that controversial issues are up for negotiation and given that the time frame for the finalisation of the negotiations is quite short. The positions taken should be evidence-based and in this regard technical input could be useful. Common positions among the groups could be more effective in the negotiations.

Objectives of the interim EPAs

The objectives of the EPAs are considerably similar, focusing on development, market access, regional integration, a legal framework for promoting trade and investment, and solidarity and mutual interest. There, however, are some differences in that some agreements contain objectives that other agreements don't; distinguish between general and specific objectives; or locate objectives under different provisions.

The distinction between general and specific objectives is understandable, given that an interim agreement was concluded possibly to last only a year or so and in order to avoid imminent trade disruption; while at the same time it would not have been prudent to leave out the objectives of the envisaged full EPAs already negotiated and agreed upon. If other areas not so far fully explored are brought into the negotiations, the objectives might need adding to.

The objectives of the various African EPAs should be the same and the same wording could be used. A basic reason for this is that all the objectives listed in the African EPAs apply to the African situation in the areas of development, market access, regional

integration, and solidarity and mutual interest with the EU. In light of the same wording already considerably used, this can be taken forward by harmonising the objectives across the board for the African EPAs.

There could be difficulties on agreeing the common wording for the objectives. This is a systemic matter in harmonisation of the African EPAs or coordination of the negotiations among the groups. Such matters are usually amenable to establishment of a task force or a technical or drafting committee to assist produce initial drafts that may be largely acceptable and feasible at a technical level for consideration at the political level and in final sessions of the negotiations.

Some thought will be required on how to deal with the specific objectives provided in the interim EPAs, in the full EPAs. The specific objective of compatibility with article 24 of GATT will continue to be an objective for the comprehensive or full EPA. However, the areas for further negotiations might not, except, if no agreement is reached and if the parties will wish to keep them on board, as outstanding issues for ongoing negotiations as a built-in agenda for the full EPA.

In the SADC interim EPA, for instance, the approach taken on competition and government procurement is that there will be a capacity building programme as a pre-condition for envisaging negotiations in the future. On services, the approach is that subsequent to conclusion of the full EPA, SADC countries may liberalise more than the one sector in order to contribute to meeting the requirement under Article 5 of GATS for substantial sectoral coverage.

Principles underpinning the interim EPAs

There are two broad approaches taken in provisions on principles. On the one hand, the EAC and ESA interim EPAs set out basic principles allowing special and differential treatment and granting of regional preferences without extending these to the EU, and building the agreements on the acqui of the Cotonou Agreement. Other principles include promotion of regional integration and ensuring asymmetry in trade liberalisation, trade related measures and trade defence instruments. The ESA EPA goes further; it has specific and additional special and differential treatment provisions for LDCs.

On the other hand, the CARIFORUM, Pacific and SADC EPAs incorporate the fundamental principles and essential elements and the fundamental element contained in the Cotonou Agreement. To take care of the special circumstances of SADC, the EPA provides for the application of the TDCA in the case of South Africa. The SADC EPA additionally provides for the principles of consistency with development policies and regional programmes, and facilitation with fulfilment and implementation of commitments.

It may be that some African countries continue to be uncomfortable with EU demands on human rights, democracy, and good governance; particularly in the context of a trade agreement. A good reason for this discomfort is that African countries have initiated

home grown initiatives in these areas, under the Constitutive Act of the African Union and complementary instruments such as the New Partnership for Africa's Development and its Africa Peer Review Mechanism. They would then argue that they don't need these to be additionally imposed upon them by the EU negotiators. A standard response of the EU negotiators has usually been that in the partnership to be created, these are important matters that should be openly addressed by the parties, and conditions of democracy, respect for human rights and good governance are pre-requisites for social economic development.

It may well be a plausible argument that the Cotonou Agreement continues to apply notwithstanding the modification of its trade chapters by the EPAs; and therefore that there shouldn't be any strong reason for including its principles in the EPAs. It is this similar argument that the EC negotiators have made in declining to undertake financial obligations that exceed those in the Cotonou Agreement.

It is feasible for African EPAs to contain the same principles with the same wording. The principles could include, special and differential treatment and asymmetry in obligations and commitments for LDCs and the other African countries that are not high income countries, the promotion of regional integration, building upon the acqui of ACP-EU trade agreements, and development cooperation to assist African countries fulfil and implement their obligations and commitments as well as respect for internationally accepted African practices regarding social and political governance contained in relevant African Union instruments.

Should there be discomfort with references to articles 2 and 9 of the Cotonou Agreement, there are equivalent African Union instruments covering these principles that could be incorporated as might be considered appropriate. Another approach would be to list principles de novo without reference to other instruments, along the lines taken in the ESA and EAC interim EPAs, in a manner that produces the same principles for all the African EPAs.

The key issue of development dimension of the EPAs

The interim EPAs, as well as the full CARIFORUM EPA, contain dedicated parts and chapters on development. The approaches taken, however, differ in some respects though there are considerable similarities. One approach, taken by the EAC, more or less along the lines that EC negotiators initially proposed, is to have just a few clauses setting out basic principles on development cooperation. However, the EAC EPA clearly recognises that further work is required on the two clauses and accordingly provides for further consideration of development cooperation in the next phase of the negotiations.

Another approach, taken by CARIFORUM and to some extent the Pacific, is to have a scheme for development cooperation which sets out a basic understanding of sustainable development and priorities for cooperation against the background of key objectives and principles for the entire agreement as well as commitments on regional integration and monitoring. Yet another approach, taken by SADC, is to elaborate a more detailed

scheme that sets out areas for cooperation and the interventions, after key objectives and principles and commitments on monitoring, regional integration, and development finance cooperation. The other approach, taken by ESA, is to set out the understanding of development, specific commitments and obligations, detailed areas for development cooperation including a development strategy and matrix that are incorporated into the EPA as annexes, and a specific undertaking by the European Community and the member states to contribute resources.

All these approaches may have merit, though the more detailed approaches seem the better ones. The more detailed approaches provide a fuller picture of development, which should be helpful given the fuzzy understandings put to this fundamental goal of the EPAs in the negotiations by some negotiators. The detailed approaches clearly set out the expectations, shared understandings, commitments of the parties or the other party, and render the provisions into justiciable or at least monitorable obligations as may be appropriate. They already reflect the considerable work and thought put into the development component of the EPAs, leaving less room for unfortunate imponderables in the implementation of the agreement while providing clearer guidance for the implementation exercise and for any further refinements and adjustment subsequent to the conclusion of the agreements.

The full EPAs should have parts or chapters on development cooperation, setting out specific commitments and obligations for the parties, and indicating the areas of cooperation, and required interventions. Part I of the CARIFORUM-EU full EPA is on the trade partnership for sustainable development. While it is a full EPA, it is comparable in detail and content to the interim SADC-EU EPA, and to some extent with the interim Pacific-EU EPA. Improvements, as appropriate, may still be made perhaps drawing on the more detailed interim EPAs such as the interim ESA-EU EPA.

Development will continue to be a matter for further consideration in the next phase of the negotiations, as explicitly set out in some interim EPAs (EAC and ESA), or by virtue of negotiating additional areas with implications for development. There is therefore room for comparisons of the various approaches taken in the various EPAs, and drawing appropriate lessons, especially given that the EU side has agreed to certain commitments and obligations such as those in the ESA-EU EPA. However, some language in the detailed parts and chapters can benefit from improvement, particularly to weed out repetitions and certain very minor details.

The meaning put to sustainable development has political overtones, particularly the references to human rights, which some ACP countries have felt uncomfortable to accept in a trade agreement. It can be possible to render sustainable development in economic terms to suit a trade agreement, without prejudice to the broader meaning that can apply in political or social instruments. On this basis, it can be recommended that African countries consider including sustainable development in their development cooperation chapters.

A development chapter should have the following key elements: shared understanding of development including references to overcoming major trade-related constraints and achieving certain satisfactory living standards within given time frames; shared unequivocal commitments to putting development at the centre of the EPA and the understanding that all provisions of the EPA are about and should support development; clear commitments on adequate resources with clear obligations on the European Community and the member states; and an appreciable indication at some length of areas of cooperation and interventions with a clear prioritisation of regional integration, infrastructure, regional and global competitiveness, diversification and value addition, investment generation and industrialisation, and references to key international instruments on development and aid.

Market access provisions in the interim EPAs

The market access provisions on trade in goods are quite similar across the EPAs, though they differ in some significant respects. The similarities mainly occur in the treatment of customs duties, non-tariff measures, and the special provisions on administrative cooperation; as well as in the provisions on trade defence measures though the Pacific and CARIFORUM EPAs contain in this part provisions on agricultural export subsidies. Also, the SADC, Pacific and CARIFORUM EPAs have additional provisions covering customs and trade facilitation, TBT and SPS measures.

Some of the differences are fundamental, and provide useful areas for improvement in certain EPAs. These may include, the exceptions created such as those in the Pacific and CARIFORUM EPAs on free trade agreements with major economies or for small island countries and LDCs, the duration of certain provisions and measures, and the idea of special cooperation on priority products and sectors included in the SADC and Pacific EPAs. There are differences also with respect to the additional areas covered in the full CARIFORUM-EU EPA, such as investment and trade in services, and government procurement. Other groups have taken positions that make such provisions controversial in the negotiations.

The provisions on trade in goods contain some far-reaching obligations that may have fundamental implications for ACP countries under the EPAs, such as the obligation to eliminate export taxes and duties, the prohibition of quantitative restrictions, the requirement to accord national treatment to EC imports; the maintenance of current subsidy levels in the EU and the offer to phase them out over unspecified periods for some ACP countries on products that they undertake to eliminate customs duties.

The EU market access offer is similar in the EPAs – entry of all goods free from customs duties at the commencement of the EPA except for the products subject to transition periods; South Africa is excluded from many of the concessions. The Pacific EPA includes the general, security and taxation exceptions under the part on trade in goods, while other EPAs have them in the last part. Also, the CARIFORUM EPA includes in the part on trade in goods the provisions on agriculture and fisheries, while the EAC and ESA EPAs deal with fisheries as separate chapters.

There is scope for the ACP groups to learn from each other and as appropriate harmonise provisions in key areas drawing on the important provisions in the various interim EPAs. Particular attention would need to be paid to the exceptions made to some of the far-reaching obligations, and the periods in various areas. In many cases, it is difficult to see whether the periods were based on good objective criteria for setting their duration.

Where certain obligations imposed might prove to be far reaching, the negotiating parties might usefully have another look at them in the continuing negotiations if possible with a view to improving upon them through appropriate modifications to better take into account the trade and development needs of ACP and African countries particularly LDCs and other small and vulnerable economies.

There could be merit in achieving a degree of coherence or harmony in the structures and subject matter dealt with under the chapters on trade in goods. The uniform EU offer to the ACP regions enables the EU to maintain a quite manageable common regime in respect of imports from ACP countries under the EPAs. While ACP regions have specificities, there are also large areas of commonality that enable a large degree of coordination or harmonisation. Also, the different agreements and obligations and rights for the regions are likely to contribute to a further weakening of the solidarity of the ACP group of states, if there are good reasons for maintaining the group as a global player and in particular in relations with the EU.

Fisheries

The gist of the fisheries chapter is to promote investment, capacity building and improved market access into the EU for the fishery sector of the East African and Southern African countries; as well as the sustainable management of stocks. The fisheries sector has been up for negotiation in other EPAs as well, but no outcomes, except on rules of origin, were included in the agreements. The ESA and EAC chapter on fisheries may provide a useful starting point for the other African regions.

The next phase of the negotiations

There are four kinds of approach to the next phase of the negotiations: a general approach (Pacific); an approach that specifies a few areas while providing for continuation of negotiations on all outstanding issues (SADC); an approach that lists in precise terms the areas for the next phase of the negotiations albeit with a saving clause for inclusion of any other areas (EAC and ESA); and an approach that emphasises that the next phase should be one that aims for and ensures a region-wide EPA to which all members of the negotiating group are happy to be parties (West and Central Africa).

Some areas listed for the next phase of the negotiations may be contentious, being areas that African countries have consistently objected to negotiating, particularly the Singapore issues. The African interim EPAs take different approaches to the mandate for

the next phase of the negotiations; and there are significant differences in the EAC and ESA provisions though largely similar.

To assist better coordination of the negotiations, and the unity and solidarity of Africa, the mandates for the next phase of the negotiations could be harmonised as appropriate. Any regional specificity could then be clearly set out separately as additional specific areas for negotiation, which could still benefit from discussion at the African Union level and among the regions at coordination events.

There should be a clear understanding for the next phase of the negotiations, that the mere listing of areas for negotiation does not pre-judge the outcome of the negotiations, and indication of desired outcomes is an objective expected to be achieved rather than a binding obligation in advance of the negotiations. This understanding is consistent with the nature of negotiations.

Dispute settlement provisions

The EPAs take two main approaches to dispute settlement provisions: the brief and the detailed. The EAC and ESA EPAs have brief provisions, along the lines of those of the Cotonou Agreement. The SADC, Ghana, Pacific and CARIFORUM EPAs have quite detailed and specific provisions that attempt provisions on various aspects of dispute settlement both the procedural and institutional or organisational. However, these provisions are not as detailed and specific as those of the WTO dispute settlement system though they may read alike in some key areas of substance. Some of the EPAs attempt to deal with pertinent problems African countries have raised in WTO negotiations on improving the WTO dispute settlement system, for instance, the SADC EPA's provision for financial compensation from the EC Party where appropriate measures would hurt the country taking them.

The brief approach still manages to contain the essential elements of dispute settlement, and could be maintained. However, there could be merit in adding the institutional or organisation aspects, to have ready lists of arbitrators and expertise particularly within the region, to take into account the concern expressed by African countries that there was need to use individuals from African countries who could contribute a balanced understanding of development and other pertinent issues at stake. In this regard, the appointment of arbitrators could be made from such lists. Also, there is need to build institutional readiness for African governments to take up cases that arise.

Final provisions

Final provisions in the EPAs cover the following: parties, signature, ratification, entry into force, denunciation, depositary, accession to the EPA, accession to the EU, accession to African regional economic communities, territorial scope, review or revision, relation to the full EPA, conflict with other agreements or relation to other agreements particularly the WTO and the Cotonou Agreement, duration of the EPA, amendments, authentic texts, and annexes. But not all the African EPAs have all these provisions.

In some EPAs, provisions establishing the institutions are also included under final provisions, and in others, dispute settlement as well. Some EPAs cover additional miscellaneous matters, such as illegal financial activities. Perhaps a better approach could be to have provisions establishing institutions under a separate part or chapter, and those on dispute settlement also under a separate part or chapter; as these are substantive matters of a specific category.

Final provisions are important and could be given careful attention. This may require dedicated sessions in the negotiations. It would be preferable if all the African EPAs covered the same areas and had similar provisions in the final provisions, subject to regional specificity. Caution may be advisable in accepting to act collectively. As indicated in the negotiations, the possibility of collective sanctions against African groups under EPAs could be explicitly excluded.

The initialling of the EPAs has averted the EU threat of trade disruption through imposing high customs duties on certain products under the GSP. This now allows sober consideration of all key issues. There should be no rush or pressure to sign and ratify the interim EPAs particularly given that controversial issues have been included in the interim EPAs and that some provisions were not subject to a negotiating process in accordance with established structures (they were introduced at the last minute).

The focus should rather be on the continuation of the negotiations. The controversial issues in the interim EPAs could be prioritised, as starting points of the on-going negotiations; as well as development in the interim EPAs where this was not adequately covered. Once the ongoing negotiations are concluded, preferably on the basis of consensus of all countries in the groups, then the steps to bring the agreements into force should be taken.

For African EPAs, accession provisions should explicitly proceed from the premise of the ongoing regional integration processes, which aim to create regional customs unions and common markets as building blocs for the continental customs union and common market. It is envisaged that the African regional economic communities will have closer trade and economic ties among themselves and eventually form the African common market, which will be the institution under which African countries will jointly have trade relations with other countries including the EU. Steps should therefore be taken to ensure that EPAs, as agreements of indefinite duration, do not purport to be stand-alone agreements that will operate outside the ongoing integration process.

Provision should be made for a continental review of the EPAs at the time when sufficient progress will have been made towards launching the African customs union and common market and in any case no later than the year 2020. The purpose of this particular review will be to align the EPAs to the common external trade regime of the African common market.

How consistent are the interim EPAs with the Common African Positions

The Assembly of Heads of State and Government and the Conference of Trade Ministers of the African Union have adopted common African positions on EPA negotiations, as guidelines for African negotiators. In many respects, the common African positions were addressed to the European Union at a political level, with the expectation that in the spirit of partnership, EU negotiators would fully take these concerns and priorities into account. But there are various areas where there are no common African positions.

It would appear that some effort was made to have interim EPAs that reflected the common African positions, for instance in the area of market access by providing DFQF market access to EU markets, regional integration by references to the process, and development cooperation by provision for regional EPA funds.

The interim EPAs initialed by African countries don't satisfactorily reflect the common African positions in some significant respects, such as the fact that so far inadequate resources have been committed for EPAs under commitments that are not as legally binding as envisaged though fairly sensible if supported by generous and good faith implementation; and that DFQF market access is not available at the moment to all African countries, with possible complications for countries that have not initialed the interim EPAs.

The common African positions will remain pertinent during the next phase of the negotiations and should be adhered to. It is politically important for negotiators to faithfully abide the common African positions as adopted collectively at the summit and ministerial levels; and not depart from them in the blink of an eye.

In light of developments since the last meeting of the African Union trade ministers, it seems appropriate to refine the common African positions in order to squarely address the current specific issues on the negotiating table, such as, the further fragmentation of Africa into new categories of countries with EPAs and those without within regional economic communities, the further fragmentation of trade regimes under bilateral EPAs or bilateral schedules of tariff elimination, the implications of EPAs for regional and continental customs unions and common markets, the treatment of African countries that will not conclude EPAs or for which EPAs will not enter force both LDCs and non-LDCs, adequacy of resources, private sector standards and institutional and legal capacity to enforce the WTO agreements on TBT and SPS measures, and areas for the next phase of the negotiations.

In light of the discussion in other parts of this paper, it is clear that there are no common African positions on several other issues, such as, fisheries, certain elements of agriculture (net food importing countries, phasing out of subsidies by the EU as a concession for elimination of customs duties), trade-related areas of data protection and social aspects as well as environment, implications of EPAs for the programmes for formation of regional and continental customs unions and common markets, institutions under the EPAs, parties, ratification and entry into force, dispute settlement, and structure

of the agreements. These are not peripheral issues at all and guidelines on them could be useful. Some of these are essential components of any agreement, such as the institutional and final provisions; or are key African priorities, such as agriculture and fisheries; while others are considered important for the EU and there is therefore a likelihood that EU negotiators might be keen to have them included during the next phase of the negotiations in some other African EPAs.

As for possible improvements in coordination of the negotiations, there could be merit in considering the formal establishment of an African working group or drafting group on EPAs, with specific functions of producing text for the negotiations and advising on text on evolving text in between negotiating sessions as appropriate. The next phase of the negotiations will require text in areas not yet addressed, but where improvements in the interim agreements will be considered appropriate, text will also be required and in this regard such text could endeavour to harmonise approaches under all the African EPAs as may be appropriate.

A. BACKGROUND

Introduction

1. After negotiations since September 2002², thirty-five African Caribbean and Pacific countries, out of 79, initialled new trading arrangements with the European Union in November and December 2007. For these ACP countries, the new trading arrangements replaced the 25-year Lome Convention regime. This regime was first put in place in 1975 and had been extended up to December 2007 by the Cotonou Agreement concluded on 23 June 2000.³

2. CARIFORUM initialled a comprehensive EPA. Due to major outstanding areas of disagreement, the rest of the countries could not initial comprehensive agreements. They initialled interim or framework EPAs and negotiations towards conclusion of comprehensive EPAs were to continue for an additional year. In the case of the EAC, the deadline to conclude negotiations is July 2009.

3. The interim agreements cover many areas and subjects. They have provisions on objectives and principles, development, and market access. They also address the mandate for continuation of the negotiations, institutions, and dispute settlement. They at the same time touch on final provisions on signature, ratification, entry into force, and depositories. The annexes have the rules of origin. The EAC and ESA interim agreements cover fisheries as well.

4. According to the parties, the main justification for the initialling of the interim agreements notwithstanding the outstanding areas of disagreement was to put in place a market access regime to replace the preferential trade regime under the Cotonou Agreement⁴. The Cotonou Regime expired on 31 December 2007, and with the initialling of the interim EPAs, exports of ACP countries covered by the agreements could enter the EU under duty free quota free market access conditions the EU offered in the EPA negotiations. This would avoid the exports being faced with the GSP tariffs, which was reckoned to be worse than for non-LDCs the preferential regime, extended under the Cotonou Agreement.

5. The EU emphasised during the negotiations that the deadline of 31 December 2007 set on 23 June 2000 in the Cotonou Agreement⁵, could not be extended. The main

² The first phase of EPA negotiations was at the all ACP-EU level, and took place in Brussels from September 2002 to October 2003, with 18 main meetings. The second phase of the negotiations took place between the EC on the one hand and groups of ACP countries on the other up to November and December when the new trading arrangements were initialled.

³ LDCs which did not initial EPAs could export to the EU under the EBA Initiative; and non-LDCs under the GSP or if admitted the GSP+

⁴ The Cotonou Agreement was concluded on 23 June 2000 in the Benin City of Cotonou between the EU and ACP countries, to last for 20 years until the year 2020.

⁵ Article 37.1 of the Cotonou Agreement states: "EPAs shall be negotiated during the preparatory period which shall end by 31 December 2007 at the latest. Formal negotiations of the new trading arrangements

argument being that the deadline had to be complied with not necessarily because of the provisions of the Cotonou Agreement, but fundamentally because the waiver the WTO granted subsequently on 14 November 2001 at the Doha Ministerial Conference expired on 31 December 2007. The waiver permitted the preferential regime for the duration of the waiver. It was therefore widely feared especially by EC negotiators that some developing countries would bring a WTO case challenging the preferential regime any time after 31 December 2007 upon the expiry of the waiver. The interim agreements therefore were to provide a trade regime between the ACP and EU that was safe from legal challenge at the WTO, which is expected to assist the sustainability and predictability of the new trade regime.

6. The Lome Convention regime and the succeeding Cotonou trade regime was based on unilateral preferences accorded to ACP imports by the EU. But under the WTO dispute settlement system the preferences were found to contravene WTO rules requiring non-discriminatory treatment for countries in the same objective conditions.⁶ The new trading arrangements, based on the requirements of Article 24 of GATT, were to be interim arrangements for creation of full free trade areas over transition periods. In the case of some few products the transition periods could be as long as 25 years.⁷

Key issues

7. The interim agreements raise various key issues, which include: relating to their structures and obligations and rights; regional integration particularly in Africa; and the market access provisions. Other important issues pertain to the mandate, priorities and modalities for the continuing negotiations; adequacy and predictability of resources. And very importantly the issue of implementation and monitoring of development cooperation especially in order to address the implementation and adjustment costs of the agreements and to build the production, supply and trade capacity of ACP countries.

8. The various interim agreements have some similarities but also many significant differences in substantive provisions and tariff elimination schedules. The interim agreements are also different legal regimes possibly of indefinite duration. However, the similarities may be bases for harmonising them provided the parties agree. The differences need to be identified and appropriate ways forward charted. This is particularly important for Africa as the harmonisation and coordination among the various agreements and groups will be required to support and take forward the regional and continental integration programmes.

9. Individual countries in the African groups, except the EAC, have undertaken different obligations to the EU. These different obligations include in the tariff

shall start in September 2002 and new trading arrangements shall enter into force by 1 January 2008, unless earlier dates are agreed between the Parties”.

⁶ EC- Bananas III (WT/DS27/AB/R)

⁷ In the interim EPAs, only up to 2% of the products have transition periods this long; some EPAs don't have this long transition period.

elimination schedules both in scope and transition periods. As argued in this study, this specifically complicates the formation of regional customs unions and common markets.

10. Not all members of each of the various groupings, except the EAC and CARIFORUM, initialled the agreements. In addition, not all negotiating members of the different EPAs configurations concluded them. Therefore, the agreements won't be in force for all members; not all members will benefit from them; and not all members of those given groupings will export to the EU under the same regime or maintain a common trade regime with the EU.

11. In the next phase of the negotiations, there is a high likelihood that the full EPA initialled by CARIFORUM could become the benchmark for the other EPAs to be concluded. Some of the provisions and approaches could be useful for the other regions. This full EPA therefore may require some specific attention in the on-going negotiations. While that EPA was the deal reached after painstaking negotiations, some of its provisions and approaches can be improved upon and in some cases might not be entirely appropriate for African countries given their programmes, priorities and circumstances.

12. Since 2003, the Conference of African Union Trade Ministers⁸ adopted Declarations on Negotiations for EPAs at their meetings in Mauritius (2003), Cairo (2005), Nairobi (2006), and Addis Ababa (2007). The African Union Executive Council of Foreign Ministers and the Assembly of Heads of State and Government also adopted decisions and declarations on EPAs. These declarations were the Common African Positions on EPA negotiations. The declarations set out key priorities and concerns, key demands and concessions, and provided guidelines.

13. In the negotiations, the groups did not always adhere to all the Common African Positions and deviated from some of them in key respects. Yet, the Common African Positions were to assist in the coordination of EPA negotiations among the African groups. The non-adherence to the positions complicated the coordination at the all-Africa level. The coordination was to assist maintain the solidarity and unity of Africa and support harmonious progress in the regional and continental integration programmes. In this regard then, inconsistency with the Common African Positions should have been avoided whenever possible. The interim agreements initialled are in key respects inconsistent with the Common African Positions contained in the African Union EPA declarations; though they are consistent in some other respects. The inconsistency has implications for the solidarity and unity of Africa and for the integration programmes.

14. As initialled, the interim agreements could raise some fundamental legal and institutional questions that need to be carefully studied. Under their constitutive instruments, some regional economic communities can be parties to treaties. However, the other aspect is that WTO rules also cover the question of parties to regional trade agreements under Article 24 of GATT. The Article requires that the countries or

⁸ The Conference is provided for and established as a Specialised Technical Committee under both the Constitutive Act of the African Union and the Treaty Establishing the African Economic Community. The Conference meets in annual ordinary sessions and may meet in extra-ordinary sessions.

territories party to the trade agreements should be WTO members with autonomy in the conduct of their external trade relations in the areas of goods, services and intellectual property; unless WTO members give a specific exemption from this requirement.⁹

15. Moreover, the fact that some parties to an interim agreement belong to a customs union has the implication that they are required to maintain a common external trade regime against the rest of the world. The requirement in GATT Article 24.8(a)(ii) that “substantially the same duties and other regulations of commerce are applied by each of the members of the union to the trade of territories not included in the union” needs careful thought. This provision has been understood to require the maintenance of a common external tariff that applies to all third countries.

16. This requirement, however, seems to be consistent with the maintenance of preferential trade regimes for some third countries provided all countries in the customs union maintain that regime for those third countries. The preferential regime becomes part of the common external trade regime, and would be an exception to the rates set under the common external tariff. But to invoke GATT Article 24 for maintenance of the preferential rates, the customs union would need to be a member of the WTO, because the exception is for the members. The customs union would need to have autonomy in the conducts of its external trade relations in the areas covered by the WTO Agreement, particularly, goods, services and intellectual property. These conditions could be qualified under a principle, if recognised, that in the area of trade in goods what a member can do individually, it can do as part of a customs as well.¹⁰

Similarities and differences

17. Notwithstanding the similarities, the differences between the EPAs could cause interpretation and implementation complications for countries from different groups that will subsequently join the same customs unions and common markets. This is the challenge particularly in Africa where there are ongoing programmes for formation of customs unions and common markets at the regional and continental levels.

18. As shown in this paper, there are substantial similarities in the structure of the EPAs and the substantive provisions, due to various factors. The African Union and the ACP provided fora for coordination and a degree of harmonisation of negotiating positions taken by the groups. The groups were supported by intergovernmental and civil society organisations through analytical literature and events they organised, which brought the groups together to share experience and compare notes. The Economic Commission for Africa in particular have since 2004 conducted numerous studies at country, sub-regional and continental level. It also organised many meetings under the auspices of the African Trade Policy Centre (ATPC), and with support of UNDP and the

⁹ According to its drafting history, and as interpreted, paragraph 10 of GATT Article 24 was meant to allow members to enter FTAs or customs unions with non-members; through approval by two-thirds majority of the members

¹⁰ Footnote 1 in article 2 of the WTO Agreement on Safeguards provides: “A customs union may apply a safeguard measure as a single unit or on behalf of a member State ...”

Danish Government to ensure that the negotiating countries benefited from these studies. The negotiators themselves maintained informal contacts among themselves, and shared documents. The European negotiators produced similar text for all the groups in key areas, particularly market access. These and other factors contributed to the similarity in the interim EPAs.

19. On the other hand, a veneer of differences was found and has resulted in differences in key areas in the agreements. The main basis for dividing up Africa into groups was that there were regional specificities that needed to be fully taken into account in the negotiations. As pointed out in this paper, the key differences in the agreements may not necessarily reflect regional specificities. But rather better deals on the same subject matter, for instance in terms of better wording, exceptions created, length of periods, or additional provisions that may be lacking in some agreements. This category of differences may not be regional specificities as such. As it turned out, the major areas for negotiations – development issues particularly adequacy of resources for adjustment and implementation, building infrastructure and production capacity, market access including trade remedies and rules of origin, institutions, and final provisions – were substantially the same priorities for all the groups. The African groups took the same positions, on the basis of the common African positions, even on the contentious Singapore issues of investment, competition and government procurement. They put priority on establishing and strengthening the regional frameworks in these areas rather than undertaking non-discrimination obligations towards EU entities; CARIFORUM took a different approach on these issues.

20. While the Pacific and Caribbean regions may be considered to have regional specificities fundamentally different from African regions, a look at their agreements reveals some extensive similarities with the African agreements, particularly the SADC EPA. This seems to suggest that regional differences need not cause fundamental differences. The differences can be contained alongside the similarities, in a coordinated manner that need not be portrayed as cause for disunity and disconnected differentiation. Perhaps equally important, is the possibility that the division into groups fuelled some of the perceived regional specificities that have now resulted in differences in the agreements.

21. In the SADC EPA, however, South Africa has been treated differently in many cases because the EU considers it to be relatively advanced in development over the other countries. In addition, it already has trade relations with the EU under the TDCA. South Africa, however, was not expected to participate in the EPA negotiations at the formulation of this approach. In any case, the problem of different trade regimes within a negotiating group is not only in SADC. All the African groups face this problem, and the solution adopted has been to integrate the different regimes as far as possible.

22. For Africa, the differences in the agreements arise from the parallel nature of the negotiations. The interim agreements reflect more of the negotiated outcomes, rather than fundamental regional specificities. In the actual negotiating sessions, the groups did not have continental backstopping to assist coordinate and harmonise the negotiated

outcomes. The fact that some groups did not know what had been agreed in other groups might have been played upon in some cases to the detriment of some groups. Some outcomes were the result of impromptu thinking on the floor, rather than duly adopted regional or continental negotiating text.

Tasks of the paper

23. Against this background, this paper is an audit of the interim EPAs as initialled in order to assist the next phase of the negotiations, with analysis and recommendations. The objectives of the paper are the following:

- a. Analyse the provisions of the interim agreements for similarities and differences;
- b. Analyse the provisions of the interim agreements for consistency and inconsistency with the African Union EPA declarations; and
- c. Propose recommendations for the way forward.

Organisation of the paper and the key recommendation

24. After this background, the succeeding parts this paper analyse the substantive provisions of the interim agreements, indicating the similarities and differences. This is followed by the part on consistency and inconsistency with the African Union EPA declarations, and finally the summary and recommendations.

25. The main recommendation from the analysis in this paper is that the interim EPAs need to be carefully studied to appreciate their implications. This could assist a better approach to the ongoing negotiations for the comprehensive EPAs with regard to contentious areas and prospects for harmonisation and supporting regional integration, and in this regard, this paper is an initial analysis of the agreements.¹¹

26. In terms of the way forward, at the Africa level, a technical working group or a drafting committee could be established to assist with preparation of negotiating text or model clauses. Such text or model clauses would translate the common African positions adopted by the Assembly of Heads of State and Government and the Conference of Trade Ministers into concrete and harmonised negotiating text. The technical working group would draw on the regional texts where they are available. Essentially, this approach would be to support the negotiators from a continental perspective as appropriate. It is indicated also that there are various key areas where there aren't common African positions, which need urgent attention at the continental level.

¹¹ Various analyses and updates already exist, for instance, by ECA, Oxfam, Traidcraft, ECDPM and ODI.

B. STRUCTURE, OBJECTIVES AND PRINCIPLES

THE STRUCTURES OF THE INTERIM EPAS

27. The interim EPAs are arranged in parts, chapters, and titles, with specific provisions or articles that are continuously serially numbered from the beginning to the end. But the CARIFORUM-EU EPA is arranged into parts, titles, and chapters, and the provisions numbered separately for each title.¹² The West African interim EPAs (Cote d'Ivoire and Ghana) are arranged into titles and chapters. The Pacific interim EPA (Papua New Guinea and Fiji), on the other hand, is arranged into parts and chapters only, avoiding the discordance with titles. The agreements have annexes that are integral parts of the agreements. The provisions or articles have clear headings (but not marginal notes).

28. According to their tables of contents and arrangement of articles, and on the basis of the headings of the articles, the interim EPAs, in broad terms, cover the following areas.

- a. An extended preamble after the title page, table of contents and listing of the parties; but SADC has a signed Statement of the Chief Negotiators just after the title page;
- b. The preamble is followed by general provisions which include –
 - i. Objectives; though the ESA and EAC interim EPAs set out general objectives and specific objectives separately, and
 - ii. Principles;
- c. The general provisions are immediately followed by
 - i. The part and chapters on trade in goods, called Trade Regime for Goods in the EAC and free movement of goods in the ESA interim EPAs;
 - ii. The part and chapter on development cooperation, called Trade Partnership for Sustainable Development, in the CARIFORUM EPA and SADC and Pacific interim EPA. CARIFORUM, ESA, Pacific (Papua New Guinea and Fiji), SADC, and West Africa (Cote d'Ivoire and Ghana) have substantive chapters or titles while EAC has only two short clauses. The substantive chapters in the EPAs take different approaches but with some similarities between CARIFORUM, Pacific, and SADC;
- d. After trade in goods and development cooperation, the agreements deal with
 - i. Areas for future negotiations (except for CARIFORUM that initialled a full EPA). Pacific and West Africa EPAs deal with this under the general and final provisions;

¹² The Cotonou Agreement is arranged in parts, titles and chapters.

- ii. Dispute avoidance¹³ and settlement; West Africa, SADC, Pacific and CARIFORUM have detailed provisions while ESA and EAC have not, perhaps the reason for including this in the areas for ongoing negotiations;
- iii. Exceptions; namely, general, security and taxation exceptions; the Pacific EPA deals with these just at the end of the part on trade in goods;
- iv. Institutional provisions (in EAC, ESA, West Africa, these are included in the chapter on general and final provisions). All the EPAs establish joint institutions but these are called different names – EPA committee (ESA and West Africa), EPA council (EAC), joint council (CARIFORUM, SADC), or Trade Committee (Pacific). CARIFORUM and SADC additionally establish a joint trade and development council; and in the case of CARIFORUM there are also a parliamentary committee and a consultative committee. Some specialised institutions are established under specific parts or chapters of some EPAs, such as the customs committee;
- v. General and final provisions;
- vi. Annexes covering the rules of origin, tariff elimination schedules though these have not been finalised and exchanged in some cases, and mutual assistance in customs administrative matters;
- vii. ESA has additional annexes containing the development matrix, and exceptions on customs duties, export taxes and national treatment;

29. ESA and EAC have substantive chapters on fisheries covering marine and inland fisheries.

30. SADC additionally has declarations on, financial procedures, dispute avoidance and settlement, and Angola and Tanzania; there are also the Namibian declarations on origin of fisheries products and on initialling of the interim EPA.

31. The part and chapters on trade in goods cover a broad range of similar areas, but there are significant differences.

- a. In all the agreements, provisions on trade in goods cover
 - i. Interim free trade areas to be established over given transition periods
 - ii. Duties, fees, other charges
 - iii. Classification of goods
 - iv. Rules of origin

¹³ The agreements don't have clear, substantive provisions on avoiding the arising of disputes, and don't define a dispute; but the idea seems to be to emphasise consultations (which take place after a dispute has arisen) and non-litigious cooperation including in the area of compliance with health and technical standards

- v. Administrative cooperation; though this is covered under customs and trade facilitation in the case of CARIFORUM and SADC
 - vi. Standstill obligation
 - vii. Non-tariff barriers (prohibition of quantitative restrictions, national treatment obligation)
 - viii. Trade defence instruments
- b. In the CARIFORUM EPA and SADC interim EPA, the provisions on trade in goods additionally cover
 - i. Customs and trade facilitation;
 - ii. TBT, and SPS measures; SADC additionally has annexes setting out priority products and sectors for regional harmonisation and for exportation;
 - iii. Current payments and capital movement, though this is treated under a substantive title in the case of CARIFORUM;
 - iv. Relations with the business community.
 - c. The EAC and SADC interim EPAs additionally have provisions on free circulation of goods; ESA rejected this provision.

32. Regarding areas for future negotiations,

- a. The SADC EPA sets out a precise list of areas, namely, services – each SADC party should liberalise one sector and should attain substantial sectoral coverage three years after the conclusion of the full EPA. An investment chapter taking the SADC Finance and Investment Protocol into account; the issues of competition and government procurement may be envisaged after capacity building;
- b. The ESA and EAC EPAs adopt a listing approach, and list the following areas: customs and trade facilitation, outstanding trade and market access issues, TBT and SPS, and services. The list also includes the trade related areas of competition, investment and private sector development, environment, IPR, and transparency in public procurement; agriculture, dispute settlement, development, and any other areas¹⁴. ESA additionally lists current payments and capital movements, good governance in taxation and judicial matters, and consultations under article 12 of the Cotonou Agreement;
- c. The Pacific and West Africa EPAs provide for ongoing negotiations in general provisions, in the case of the Pacific indicating that they will be the areas in the previous declarations and instruments. The West African EPAs have a specific provision on the Singapore issues, calling for a common approach and a global EPA for all countries in the configuration.

33. The full CARIFORUM-EU EPA covers the following other areas.

- a. Agriculture and fisheries as a chapter in the title on trade in goods;

¹⁴ This is quite open-ended, and can literally mean that any other trade areas may be negotiated

- b. Investment, trade in services and electronic commerce as title II in part II;
- c. Current payments and capital movement as title III in part II;
- d. In title IV of part II, there are separate chapters on competition, innovation and intellectual property, transparency in public procurement, environment, social aspects, and protection of personal data. SADC include data protection in the areas of cooperation under the chapters on development cooperation, but without substantive obligations on SADC parties.

Summary and recommendations on the structure of EPAs

34. The interim EPAs initialled by the EU on the one hand and SADC, ESA, EAC, two West African and one Central African countries all deal with objectives and principles, trade in goods including trade remedies or trade defence instruments and rules of origin, and development cooperation. Further negotiations for a broader EPA called a comprehensive or full EPA, establishment of institutions, general and final provisions covering a wide variety of issues including the usual ones of entry into force, membership and accession, amendment or review, relation with other agreements, and authentic text also feature in the interim agreements.

35. However, there are differences in certain cases, where some agreements deal with areas others don't; as well as some differences in the actual headings and provisions on similar subject matter.

36. Negotiations for full EPAs as envisaged by the EC side, on the basis of the CARIFORUM-EU full EPA, and taking into account the areas for ongoing negotiations, will cover controversial areas that African countries have had considerable discomfort with. These are particularly the issues of competition, government procurement, and investment, as well as intellectual property, environment, labour standards, data protection, liberalisation of the capital account, and to some extent the area of services. There is scope for additional areas due to the open-ended final item on the list of areas. Yet, these areas have been included in the full CARIFORUM-EU EPA, and to some extent in a quite circumscribed manner in the SADC-EU EPA. This is likely to be a source of pressure on the African groups to adopt extensive or substantive commitments different from the positions adopted by developing countries including Africa at the WTO negotiations and during the earlier phases of EPA negotiations.

37. The structures of the EPAs, in terms of the sequencing of the areas covered and the naming of the headings of the actual articles or provisions, can be adjusted to be similar as an initial step to promote harmony among the agreements. This can facilitate coordination among the African negotiating groups in the ongoing negotiations and in the interpretation and implementation of the agreements when concluded and in force.

38. Differences in the agreements caused by unique circumstances of some regions might not do much harm to other African groups and to coordination towards harmony and the continental integration process, and may be maintained. However, differences

arising from non-consideration of certain pertinent or appropriate issues could be revisited with a view to developing a common approach among the regions. Also, differences that arise from differing concessions extracted from the EC side during the negotiations could be similarly addressed. Differences that set back or discourage the regional and continental integration process should not be agreed, rather harmony should be insisted upon in order to support and expedite the integration process.

39. Ongoing negotiations for a comprehensive or full EPA will require caution and much better preparation. This is particularly so because controversial issues are up for negotiation and given that the time frame for the finalisation of the negotiations is quite short. The positions taken should be evidence-based and in this regard technical input could be useful. Common positions among the groups could be more effective in the negotiations.

40. The following extract from Oppenheim's International Law may be helpful.

Paragraph 587, Parts of treaties: International law lays down no rules concerning the arrangement of the parts of treaties. However, in the more formal treaties the following order is usually observed. After the title, a first part, known as the preamble, comprises the names of the contracting parties (and sometimes their duly authorised representatives), and the motives for the conclusion of the treaty. A second part consists of the principal provisions, in numbered articles, and perhaps supplemented by annexes. A third part – usually referred to as 'final clauses' – consists of miscellaneous provisions concerning the duration of the treaty, its ratification, the accession of third states, and the like. The last part – the testimonium – comprises the signatures of the representatives. However, this order is by no means essential. In the past, treaties have sometimes contained secret stipulations in an additional part; but this practice must tend to disappear having regard to the requirement of registration and publication. It is a question of construction whether in any particular case an instrument referred to in a treaty forms, in the intention of the parties, an integral part of the treaty.¹⁵

¹⁵ Sir Robert Jennings and Sir Arthur Watts, eds, Oppenheim's International Law, ninth edition, Vol 1. London and New York: Longman 1996. Paragraph 587 on parts of treaties.

OBJECTIVES OF THE INTERIM EPAs

41. The entire interim EPAs set out the objectives meant to be pursued and achieved under the agreements. In their provisions on objectives, the interim EPAs are not different from the full CARIFORUM-EU EPA.

42. In their objectives, the agreements share the following similarities.

- a. The agreements all focus on development aspects such as poverty eradication, gradual integration into the world economy, economic adjustment and diversification, building trade policy and trade related capacity, establishment of legal frameworks consistently with WTO rules and with the drive to generate trade and investment;
- b. They equally focus on maintaining or promoting market access for ACP products into EU markets;
- c. Equal focus is placed on promoting regional integration in ACP regions; and
- d. On solidarity and mutual interest between ACP countries/ regions and EU.

43. There is considerable similarity in the wording used in the objectives, particularly the objectives of poverty eradication and regional integration.

44. Unlike in the other regions, the ESA and EAC EPAs distinguish between general and specific objectives under separate articles. The specific objectives are closely similar, for they seek compatibility with Article 24 of GATT, and set out areas for further negotiations and potential areas for further negotiations. These objectives are written with the same wording. The EAC EPA additionally contains the specific objective of entering an interim EPA in order to avoid trade disruption.

45. In the body of the EAC and ESA agreements, however, the distinction drawn between areas for further negotiations and potential areas for further negotiations is practically lost. This is because both agreements list only areas for further negotiations and include in these also the controversial areas. There is in addition a clause for negotiating any other areas the parties agree.

46. If negotiations for the comprehensive or full EPAs also run into difficulties or become delayed, there could be concerns about the regime to replace the interim EPAs after the expiry of the one-year or one year and half period for continuation of negotiations to conclude full EPAs. It may be noted that this period is not all that long; also taking into account the controversial nature of several issues to be negotiated. In light of possible ways forward on the controversial issues provided by the SADC EPA, progress can be made within this time frame if the negotiators don't exhibit some of the difficult approaches they adopted in the last phase of the negotiations that resulted in the interim EPAs.

47. The Pacific EPA provides the objectives in quite specific terms and in terms of tasks to be accomplished by the actual agreement. It sets out the objectives of benefiting from improved market access and avoiding trade disruption. The objectives also include establishing a free trade area in complying with WTO rules, providing for dispute settlement mechanisms and the institutions for the agreement. The objectives include also integration into the world economy. The objective of poverty eradication, in the Pacific EPA, appears under the provisions for sustainable development¹⁶, rather than under the provision on objectives.

Summary and recommendations on objectives

48. The objectives of the EPAs are considerably similar, focusing on development, market access, regional integration, a legal framework for promoting trade and investment, and solidarity and mutual interest.

49. There, however, are some differences in that some agreements contain objectives that other agreements don't; distinguish between general and specific objectives; or locate objectives under different provisions.

50. The distinction between general and specific objectives is understandable, given that an interim agreement was concluded possibly to last only a year or so and in order to avoid imminent trade disruption. Moreover, it would not have been prudent to leave out the objectives of the envisaged full EPAs already negotiated and agreed upon. If other areas not so far fully explored are brought into the negotiations, the objectives might need adding to.

51. The objectives of the various African EPAs should be the same and similar wording could be used. A basic reason for this is that all the objectives listed in the African EPAs apply to the African situation in the areas of development, market access, regional integration, and solidarity and mutual interest with the EU. In light of the same wording already considerably used, this can be taken forward by harmonising the objectives across the board for the African EPAs.

52. There could be difficulties on agreeing the common wording for the objectives. This is a systemic matter in harmonisation of the African EPAs or coordination of the negotiations among the groups. Such matters are usually amenable to establishment of a task force or a technical or drafting committee to assist produce initial drafts that may be largely acceptable and feasible at a technical level for consideration at the political level and in final sessions of the negotiations.

53. Some thought will be required on how to deal with the specific objectives provided in the interim EPAs, when finalising the full EPAs. The specific objective of compatibility with Article 24 of GATT will continue to be an objective for the comprehensive or full EPA. However, the areas for further negotiations might not,

¹⁶ Article 3 of the Pacific-EU EPA

except, if no agreement is reached and if the parties will wish to keep them on board, as outstanding issues for ongoing negotiations as a built-in agenda for the full EPA.

54. In the SADC interim EPA, for instance, the approach taken on competition and government procurement is that there will be a capacity building programme as a pre-condition for envisaging negotiations in the future. On services, the approach is that subsequent to conclusion of the full EPA, SADC countries may liberalise more than one sector in order to contribute to meeting the requirement under Article 5 of GATS for substantial sectoral coverage.

PRINCIPLES IN THE INTERIM EPAs

34. The EPAs contain the principle that they should build on the achievements or the acqui of the Cotonou and previous ACP-EU agreements. They specifically mention the areas of regional cooperation and integration, and trade and economic cooperation.

35. The EAC and ESA interim EPAs are largely similar in their provisions on principles, in both subject matter and wording. Both interim EPAs include the following in the principles: building on the acqui of the Cotonou Agreement, promoting regional integration, asymmetry in trade liberalisation as well as the application of trade related measures and trade defence instruments, and regional preferences without extending these to the EU.

36. There are differences in certain respects. The EAC EPA additionally includes the principle of contributing to addressing the production, supply and trading capacity of the EAC. However, the EAC EPA does not include the references to special and differential treatment in the level and pace of trade liberalisation, for LDCs, taking into account the vulnerability of small, island and landlocked countries, as contained in ESA EPA. The EAC EPA does not include principles that LDCs should benefit from the agreement even where they have not yet submitted tariff offers, and that they may submit these after signature of the agreement. The EAC EPA doesn't contain the principle of variable geometry where some countries can undertake faster trade liberalisation.

37. These omissions in the EAC EPA could be explained on the basis that the agreement includes the principle of special and differential treatment and that the EAC is a customs union and as such made a single tariff liberalisation offer to the EU side.

38. The CARIFORUM, Pacific and SADC EPAs have similar wording in drawing on and by incorporating the principles in Articles 2 and 9 of the Cotonou Agreement. Article 2 of the Cotonou Agreement contains the fundamental principles of equality of the partners and ownership of the development strategies, participation by other actors, dialogue and fulfilment of mutual obligations, and differentiation and regionalisation. Article 9 of the Cotonou Agreement contains the essential elements of human rights, democratic principles and the rule of law and the fundamental element of good governance. Also, these EPAs have the principle that the EPAs and the Cotonou Agreement should be implemented in a complementary and mutually reinforcing manner.

39. The SADC EPA additionally contains the principle that for South Africa, the TDCA shall apply. It also has the principle of consistency of the interim agreement with the development policies and regional programmes. Lastly it has the principle that the parties should fulfil their commitments but SADC states should be facilitated in this regard.

Summary and recommendations on principles

40. There are two broad approaches taken in provisions on principles. On the one hand, the EAC and ESA interim EPAs set out basic principles allowing special and differential treatment and granting of regional preferences without extending these to the EU, and building the agreements on the *acqui* of the Cotonou Agreement. Other principles include promotion of regional integration and ensuring asymmetry in trade liberalisation, trade related measures and trade defence instruments. The ESA goes further to specific and additional special and differential treatment provisions for LDCs.

41. On the other hand, the CARIFORUM, Pacific and SADC EPAs incorporate the fundamental principles and essential elements and the fundamental element contained in the Cotonou Agreement.

42. To take care of the special circumstances of SADC, the EPA provides for the application of the TDCA in the case of South Africa.

43. The SADC EPA additionally provides for the principles of consistency with development policies and regional programmes, and facilitation with fulfilment and implementation of commitments.

44. There is a possibility that some ACP countries continue to be uncomfortable with EU demands on human rights, democracy, and good governance; particularly in the context of a trade agreement.

45. A good reason for this discomfort is that African countries have initiated home grown initiatives in these areas, under the Constitutive Act of the African Union and complementary instruments such as the New Partnership for Africa's Development and its Africa Peer Review Mechanism. For that reason, they see no need for these issues to be additionally imposed upon them by the EU negotiators. The response of the EU negotiators remains that in the partnership to be created, these are important matters that should be openly addressed by the parties, and conditions of democracy, respect for human rights and good governance are pre-requisites for social economic development.

46. Nonetheless, it may be a plausible argument that the Cotonou Agreement continues to apply notwithstanding the modification of its trade chapters by the EPAs. Therefore there shouldn't be any strong reason for including its principles in the EPAs. In any case, it is this similar argument that the EC negotiators have made in declining to undertake financial obligations that exceed those in the Cotonou Agreement.

47. It is feasible for African EPAs to contain the same principles with the same wording. The principles could include, special and differential treatment; asymmetry in obligations and commitments for LDCs and the other African countries that are not high-income countries. Other principles would be the promotion of regional integration, building upon the *acqui* of ACP-EU trade agreements, and development cooperation to assist African countries fulfil and implement their obligations and commitments as well as respect for internationally accepted African practices regarding social and political governance contained in relevant African Union instruments.

48. Should there be discomfort with references to Articles 2 and 9 of the Cotonou Agreement, there are equivalent African Union instruments covering these principles that could be incorporated as might be considered appropriate.

49. Another approach would be to list principles de novo without reference to other instruments, along the lines taken in the ESA and EAC interim EPAs, in a manner that produces the same principles for all the African EPAs.

C. DEVELOPMENT IN THE INTERIM EPAs

55. The interim EAC-EU EPA has the briefest provisions on development. The economic and development cooperation chapter has two clauses containing, a confirmation by the EC Party (meaning the European Community and/or its member states) to contribute towards the resources required under the EDF 10 Regional Indicative Programme, Aid for Trade and the EU General Budget. In the clauses there is a recognition of the development needs of EAC; and the agreement of the parties to “define and address EAC development needs in order to promote sustained growth, strengthen regional integration and foster structural transformation and competitiveness to increase production, supply capacity and value addition”.¹⁷ Development cooperation will be included in the next phase of the negotiations. One would expect that those provisions will be improved upon.

56. The interim ESA-EU EPA, on the other hand, has the most detailed provisions on economic and development cooperation. During the EPA negotiations, ESA was the first group to propose text with an elaborate development chapter that covered various identified priorities. The EU negotiators, particularly after agreement by the EU development ministers at an informal dialogue with ACP ministers hosted by Germany as EU President on 13 March 2007 in Bonn, seemed to agree that EPAs could contain appropriate provisions on development that exceeded the two clauses they initially proposed. This assisted in the elaboration of development provisions by other negotiating groups as well.

57. The ESA development chapter contains the following: general provisions, objectives, and areas and sectors for cooperation.

58. The ESA general provisions on development contain: agreement of the parties “to address the developmental needs of the ESA States in order to promote sustained growth in the ESA region, increase production and supply capacity of the States concerned, foster structural transformation and competitiveness of their economies and their diversification and value addition”¹⁸; and support regional integration”. They also include commitment to cooperate to facilitate implementation with an agreement that “cooperation will be based on the ESA Development Cooperation Strategy and the jointly agreed Development Matrix” attached as annex IV to the EPA. The use of the Cotonou Agreement rules and procedures is envisaged particularly the programming procedures of the EDF “within successive financial frameworks of the EU during the period of this Agreement as well as within the frameworks of relevant instruments financed by the General Budget”. Moreover, there is obligation to mobilise additional resources from EU member states and other donors; a commitment that “sufficient resources should be mobilised on a predictable, timely and sustainable basis including through grants and concessional loans based on the development matrix”. Other important elements of the

¹⁷ Article 36 of the EAC-EU interim EPA

¹⁸ In its short two clauses on economic and development cooperation, the EAC-EU EPA uses the wording in this ESA provision.

provisions is the intended use of nationally/ regionally owned delivery mechanisms, funds or facilities and an obligation to support the establishment of an EPA fund; development cooperation on trade-related issues; the commitment that EPA monitoring should address all aspects; and a commitment to review achievements, constraints and way forward on development cooperation.¹⁹

59. These are fairly clear obligations that the parties have undertaken including the European Community and the member states. Some of the obligations may be fundamental; such as mobilisation of sufficient, though not adequate²⁰, resources on a predictable, timely and sustainable basis. Other important obligations is the extension of the successive financial frameworks of the EU to the indefinite²¹ duration of the EPA rather than limiting them to the duration of the Cotonou Agreement up to 2020; and implementation of the ESA Development Matrix which as an annex is an integral part of the EPA.²²

60. The ESA development chapter sets out the following areas for cooperation: regional integration, trade policy and regulations, trade development, trade-related infrastructure including transport energy and water, building productive capacities, research and development innovation and technology transfer, trade-related adjustment costs, gender mainstreaming, empowerment of local communities, and mainstreaming environment into trade and development. The sectors for cooperation are include private sector development, infrastructure, natural resources, agriculture, fisheries, services including tourism, trade related issues of competition, investment, intellectual property rights, standards, trade facilitation and statistics. The chapter then has detailed provisions on development cooperation in the three key areas of private sector development, infrastructure, and natural resources.

61. This amount of detail, together with the development matrix, may be considered extra-ordinary in a long term agreement of indefinite duration; given the likely adjustments that will need to be made with changing circumstances over time.

62. However, the EPAs are meant to be about the social economic development of ACP countries and a serious endeavour that is as comprehensive and far-reaching as possible may not be out of place. Besides, provision has been made for revising the development matrix from time to time. Also, all indications are that the development priorities and needs of ESA countries, as indicated in the EPA, are unlikely to cease in the short to long term. This is particularly the case in the key areas of private sector development including investment and industrial development and competitiveness, infrastructure including transport and energy as well as ICT, and natural resources.

¹⁹ Article 36 of the ESA-EU interim EPA

²⁰ “Sufficient” may not be as potent as “adequate”.

²¹ It is argued though that “indefinite” does not mean unending; that it simple means a period for the moment un-determined. In light of the possibility of denunciation, giving efficacy to the provision for indefinite duration requires understanding the agreement to be continuous until terminated by both parties.

²² Article 70 of the ESA-EU interim EPA states: “The Annexes and Protocols to this Agreement form an integral part thereof and may be reviewed and or amended by the EPA Committee”.

Various developed countries and high-income developing countries still grapple with similar priorities and needs.

63. The chapter ends with a provision on financial undertakings in the following terms: “The EC Party shall put at the disposal of the ESA financial assistance to contribute to implement the programmes and projects to be developed under the areas of cooperation identified in this Agreement and relevant chapters and under the detailed Development Matrix”.²³

64. This provision does not meet the ESA demand for an unequivocal legal obligation on the EU to provide adequate resources; it is scaled down to an obligation to contribute resources towards implementation. However, it is a significant obligation, particularly when understood in the context of the obligations in the general provisions, such as the obligation to implement the attached development matrix.

65. The CARIFORUM and Pacific EPAs are quite schematic, setting out a basic framework for development cooperation.

66. The part on trade partnership for sustainable development in the CARIFORUM and Pacific EPAs contain provisions on: objectives, principles, sustainable development, regional integration and cooperation in international fora. The CARIFORUM EPA has additional provisions on monitoring, development cooperation and development priorities.

67. On sustainable development, the CARIFORUM EPA provides as follows: “The Parties reaffirm that the objective of sustainable development is to be applied and integrated at every level of their economic partnership, in fulfillment of the overarching commitments set out in Articles 1, 2 and 9 of the Cotonou Agreement, and especially the general commitment to reducing and eventually eradicating poverty in a way that is consistent with the objectives of sustainable development”.²⁴ The Pacific EPA has more or less the same wording: “The Parties reaffirm that the objective of sustainable development shall be an integral part of the provisions of this Agreement, consistent with the overarching objectives and principles set out in Articles 1, 2 and 9 of the Cotonou Agreement, and especially the general commitment to reducing and eventually eradicating poverty in a way that is consistent with the objectives of sustainable development”.²⁵ The CARIFORUM version seems to have the better political message, while the Pacific version strives for accuracy particularly in the reference to the Cotonou Agreement.

68. The CARIFORUM and Pacific provisions on regional integration and cooperation in international fora differ; though both agreements contain a mandatory obligation for the parties to cooperate in international fora “where issues relevant to this agreement are discussed”. The Pacific provisions leave out the specific references to the integration

²³ Article 52 of the ESA-EU interim EPA

²⁴ Article 3(1) of the CARIFORUM-EU EPA

²⁵ Article 2 of the Pacific-EU interim EPA

instruments and arrangements in CARIFORUM, understandably. But the Pacific EPA has the encompassing provision, put not under regional integration but under cooperation in international fora, as follows: “The parties recognize the valuable contribution that regional organizations can make to the achievement of the objectives of this Agreement. The Parties agree to work closely with existing Pacific regional organizations and programmes wherever useful and possible to support the implementation of this Agreement”.²⁶ The determination of occasions when it would be “useful and possible” can be subjective and controversial; perhaps objective criteria will be subsequently agreed. Alternatively, it could be understood that regional integration organizations may only be left out when including them would be harmful to achievement of given aspects of the partnership or impossible. The Pacific region is geographically dispersed and has water-locked countries; such specificities could be the basis for the approach taken in that provision.

69. The Pacific article headed “regional integration” provides: “Nothing in this Agreement shall prevent any Party from entering into any agreement for the establishment of a free trade area, customs union or other free trade agreement with any third countries”.²⁷ This provision does not appear in the CARIFORUM EPA provision on regional integration under the part on trade partnership for sustainable development.

70. The CARIFORUM EPA has a specific provision on development cooperation, within the part on trade partnership for sustainable development. The provision contains: a recognition by the parties that development cooperation is a crucial element of the partnership. There is also provision for use of the financing rules and procedures of the Cotonou Agreement particularly the EDF; undertaking by the parties “commensurate with their respective roles and responsibilities” to mobilise, provide and utilise resources; collective undertaking of the EU member states to support development cooperation; and an obligation to cooperate to facilitate the participation of other donors.

71. The CARIFORUM EPA sets out the following cooperation priorities²⁸:

- (i) The provision of technical assistance to build human, legal and institutional capacity in the CARIFORUM States so as to facilitate their ability to comply with the commitments set out in this Agreement;
- (ii) The provision of assistance for capacity and institution building for fiscal reform in order to strengthen tax administration and improve the collection of tax revenues with a view to shifting dependence from tariffs and other duties and changes to other forms of indirect taxation;
- (iii) The provision of support measures aimed at promoting private sector and enterprise development, in particular small economic operators, and enhancing the international competitiveness of CARIFORUM firms and diversification of the CARIFORUM economies;

²⁶ Article 5 of the Pacific-EU interim EPA

²⁷ Article 4(2) of the Interim Pacific-EU EPA

²⁸ Article 8 of the CARIFORUM-EU EPA

- (iv) The diversification of CARIFORUM exports of goods and services through new investment and the development of new sectors;
- (v) Enhancing the technological and research capabilities of the CARIFORUM States so as to facilitate development of, and compliance with, internationally recognised sanitary and phytosanitary measures and technical standards and internationally recognised labour and environmental standards;
- (vi) The development of CARIFORUM innovation systems, including the development of technological capacity;
- (vii) Support for the development of infrastructure in CARIFORUM States necessary for the conduct of trade.

72. These priorities set out a scheme for development cooperation.

73. Also, the CARIFORUM States agreed to endeavour to establish a regional development fund within two years after signature of the agreement.

74. The interim SADC-EU EPA is more detailed than the scheme set in the CARIFORUM EPA, but less detailed than the ESA chapter IV on economic and development cooperation. Part I of the SADC EPA is entitled trade partnership for sustainable development. The part has chapters on general provisions, development cooperation and areas for cooperation.

75. The chapter on general provisions covers objectives, principles, sustainable development, regional integration, monitoring and cooperation in international fora.

76. The chapter on development cooperation sets out the development cooperation framework. This is a commitment to cooperate “in order to implement this Agreement and to support the SADC EPA States’ trade and development strategies within the overall SADC regional integration process” and spelling out that the cooperation “can take financial and non financial forms”. The chapter then proceeds to set out the obligations on development finance cooperation, which resemble those of the CARIFORUM EPA. After recognition of the importance of development cooperation as a crucial element of the partnership, and confirming that the rules and procedures in the Cotonou Agreement will be applicable to European Community financing, particularly the EDF procedures, a separate provision sets out the undertaking by the European member states. This is a provision “to support, by means of their respective development policies and instruments, development cooperation activities for regional economic cooperation and integration and for the implementation of this agreement in the SADC EPA States and at the regional level, in conformity with the complementarity and aid effectiveness principles”. There is recognition that “adequate resources will be required for the implementation of this Agreement and the fullest realisation of its benefits”. Both parties undertake to cooperate to enable SADC countries “to access other financial instruments as well as facilitate other donors willing to further support the efforts of the SADC EPA States in achieving the objectives of this Agreement”. There is then agreement to set up a regional EPA fund as a “useful instrument for efficiently channelling development financial resources and for

implementing EPA accompanying measures”, and agreement by the EC Party to support this and contribute to the fund.²⁹

77. The chapter on cooperation sets out the following areas: goods, supply side competitiveness, business enhancing infrastructure, services, trade data, EPA institutional capacity building, and fiscal adjustment. Types of intervention are then listed, as: policy development, legislative and regulatory framework development, institutional/organisation development, capacity building and training, technical advisory services, administrative services, support in SPS and TBT areas, operational support including equipment, material and related works.

78. EPAs are supposed to be development tools to assist the social economic development of ACP countries. Both the ACP and the EU sides avowedly accepted this in the negotiations and have endeavoured to incorporate development provisions in the EPAs.

79. However, the ACP groups had different approaches to building development into the EPAs, now demonstrated in the differences in the provisions on development contained in the various interim EPAs. EU negotiators on their part did not all the time seem to share the same understanding of development and how it might be built into the EPAs with the various negotiating groups. Development was therefore a hotly contested issue in the EPA negotiations.

80. ACP regions on the whole understood development in broad terms. Specifically though, the understanding remains more in terms of strengthening their regional integration in accordance with ongoing integration programmes. Development also means provision mainly by the EU in the context of EPAs of adequate resources to address structural bottlenecks and build required infrastructure, flexibility and preservation of policy space for undertaking development programmes as well as asymmetry in obligations, and the fullest possible market access to EU markets while not at all prejudicing market access to global markets and south-south trade.

81. EU negotiators on the other hand, seemed to understand development in the sense of ACP countries adopting substantial reciprocal trade liberalisation and non-discrimination obligations in the areas of competition, investment and transparency in government procurement and liberalising services sectors. They also understood development in the sense that 22.7 billion euros under EDF 10 and the additional two billion euros annually to developing countries by the year 2010 under Aid for Trade amounted to considerably increased development assistance for ACP countries. EC negotiators regularly indicated that they supported regional integration, though it never seemed clear whether they wholly supported the integration process on the basis of ongoing integration programmes particularly in Africa.

82. In a trade framework, in order for trade to assist in poverty eradication and social economic development, development requires the fullest possible market access to

²⁹ Article 8 of the interim SADC-EU EPA

regional and global markets, as well as adequate financial and technical resources to address production and supply constraints including infrastructure bottlenecks.³⁰ The constraints and appropriate areas of intervention can be varied, as indicated in the SADC and ESA EPAs. The initial ESA proposals for the development matrix demonstrated simply how vast the task of addressing the constraints can turn out to be and how huge the resources required can be. Even after prioritisation, resources under EDF 10 and Aid for Trade, seem inadequate; reason why the contribution of other donors is now a major component of development cooperation. For instance, it is estimated that the ESA countries will have only five billion euros under EPA funding, whereas the cost estimates under the development matrix are about 27 billion euros.

83. Development should be reflected in the whole EPA. All the provisions of the EPA, including those on dispute settlement and institutions, should aim to promote the social economic development of ACP countries. It is this approach that can be consistent with the premise that EPAs are tools for the social economic development of ACP countries.

84. However, it is in a dedicated part or chapters on development cooperation that streamlined approaches can be set out to infuse the entire agreement.

Summary and recommendations

85. The interim EPAs, as well as the full CARIFORUM EPA, contain dedicated parts and chapters on development. The approaches taken, however, differ in some respects though there are considerable similarities.

86. One approach, taken by the EAC, more or less along the lines that EC negotiators initially proposed, is to have just a few clauses setting out basic principles on development cooperation. However, the EAC EPA clearly recognises that further work is required on the two clauses and accordingly provides for further consideration of development cooperation in the next phase of the negotiations.

87. Another approach, taken by CARIFORUM and to some extent the Pacific, is to have a scheme for development cooperation, which sets out a basic understanding of sustainable development, and priorities for cooperation against the background of key objectives and principles for the entire agreement as well as commitments on regional integration and monitoring.

88. Yet another approach, taken by SADC, is to elaborate a more detailed scheme that sets out areas for cooperation and the interventions, after key objectives and principles and commitments on monitoring, regional integration, and development finance cooperation.

89. The other approach, taken by ESA, is to set out the understanding of development, specific commitments and obligations, detailed areas for development

³⁰ Paragraph 57 of the Hong Kong Ministerial Declaration contains this understanding.

cooperation including a development strategy and matrix that are incorporated into the EPA as annexes, and a specific undertaking by the European Community and the member states to contribute resources.

90. All these approaches may have merit, though the more detailed approaches seem the better ones. The more detailed approaches provide a fuller picture of development, which should be helpful given the fuzzy understandings, put to this fundamental goal of the EPAs in the negotiations by some negotiators. The detailed approaches clearly set out the expectations, shared understandings, commitments of the parties or the other party, and render the provisions into justiciable or at least monitorable obligations as may be appropriate. They already reflect the considerable work and thought put into the development component of the EPAs, leaving less room for unfortunate imponderables in the implementation of the agreement while providing clearer guidance for the implementation exercise and for any further refinements and adjustment subsequent to the conclusion of the agreements.

91. The full EPAs should have parts or chapters on development cooperation, setting out specific commitments and obligations for the parties, and indicating the areas of cooperation, and required interventions.

92. Part I of the CARIFORUM-EU full EPA is on the trade partnership for sustainable development. While it is a full EPA, it is comparable in detail and content to the interim SADC-EU EPA, and to some extent with the interim Pacific-EU EPA. Improvements, as appropriate, may still be made perhaps drawing on the more detailed interim EPAs such as the interim ESA-EU EPA.

93. Development will continue to be a matter for further consideration in the next phase of the negotiations, as explicitly set out in some interim EPAs (EAC and ESA), or by virtue of negotiating additional areas with implications for development. There is therefore room for comparisons of the various approaches taken in the different interim EPAs, and drawing appropriate lessons, especially given that the EU side has agreed to certain commitments and obligations such as those in the ESA-EU EPA.

94. The meaning put to sustainable development has political issues, particularly the references to human rights, which some ACP countries have felt uncomfortable to accept in a trade agreement. It can be possible to render sustainable development in economic terms to suit a trade agreement, without prejudice to the broader meaning that can apply in political or social instruments. On this basis, it can be recommended that African countries consider including sustainable development in their development cooperation chapters.

95. A development chapter should have the following key elements: shared understanding of development including references to overcoming major trade-related constraints and achieving certain satisfactory living standards within given time frames; shared unequivocal commitments to putting development at the centre of the EPA and the understanding that all provisions of the EPA are about and should support development;

clear commitments on adequate resources with clear obligations on the European Community and the member states; and an appreciable indication at some length of areas of cooperation and interventions with a clear prioritisation of regional integration, infrastructure, regional and global competitiveness, diversification and value addition, investment generation and industrialisation, and references to key international instruments on development and aid.

D. MARKET ACCESS FOR GOODS IN THE EPAs

96. The interim EPAs have provisions on market access, entitled trade in goods in the SADC, Pacific and CARIFORUM EPAs; trade regime for goods in the EAC EPA; and free movement of goods in the ESA EPA.

97. The provisions deal with treatment of customs duties; trade remedies called trade defence instruments in the SADC, Pacific and CARIFORUM EPAs or trade defence measures in the EAC and ESA EPAs. The trade remedies cover antidumping and countervailing measures, and multilateral and bilateral safeguards. They also include non-tariff measures, prohibition of quantitative restrictions and require national treatment in internal taxation and regulation. The Pacific and CARIFORUM EPAs include agricultural export subsidies under non-tariff measures.

98. The EAC and ESA EPAs have provisions on administrative cooperation in customs matters. The SADC, Pacific and CARIFORUM EPAs have a detailed chapter on customs and trade facilitation. The SADC, Pacific and CARIFORUM EPAs have chapters on TBT and SPS measures, but the Pacific EPA combines TBT and SPS measures in one chapter.

The objective to liberalise trade

99. The objectives of the chapters on market access in the EAC and ESA EPAs are the provision of DFQF entry of EAC and ESA products into the EU. Other objectives are the improvement and preservation of market access, and gradual liberalisation of EAC and ESA good markets. In the case of ESA, they include promotion of trade between the parties and acceleration of export led growth to enable the integration of ESA countries into the global economy.³¹ The SADC EPA does not have the heading entitled objectives. Under the heading entitled free trade area, it provides for establishment of a free trade area among the parties in conformity with Article 24 of GATT and respecting the principle of asymmetry in terms of levels and timing of commitments.³² The Pacific and CARIFORUM EPAs don't have provisions on objectives under trade in goods provisions.

The scope is limited to signatory countries, originating products or HS chapters 01 to 97

100. The ESA EPA sets out the scope of the agreement in terms of the condition that only ESA countries listed in the annex are to take commitments under the agreement and that EU commitments apply only to signatory ESA countries. Provision is made for other ESA countries to notify their intention to be added to the annex, done by a decision of the EPA committee.³³ The EAC EPA doesn't have a provision entitled scope under market access. The CARIFORUM EPA provides, under scope, that the chapter on customs

³¹ Article 5 of the EAC-EU and Article 5 of the ESA-EU interim EPAs

³² Article 19 of the interim SADC-EU EPA

³³ Article 6 of the interim ESA-EU EPA

duties applies to all products originating from the EC party or any CARIFORUM state.³⁴ On the other hand, the SADC and Pacific EPAs, under scope, provide that the agreement (Pacific) or the chapter (SADC) apply to originating products in chapters 01 to 97 of the tariff nomenclature in the parties' schedules in conformity with the Harmonised Commodity Description and Coding System (HS System).³⁵ Also, goods are classified according to the tariff nomenclature in the parties' schedules in conformity with the HS System, but the CARIFORUM EPA simply states that the classification will be according to the HS system.³⁶

A customs duty is any duty or charge

101. The EPAs set out the meaning of a customs duty. A customs duty is defined as follows: "a customs duty includes any duty or charge of any kind, including any form of surtax or surcharge, imposed in connection with the importation or exportation of goods, but does not include any: internal taxes or other internal charges ...; antidumping, countervailing or safeguards measure ...; fees or other charges ...".³⁷ The SADC EPA excludes also fees and charges for consular services.

Fees and other charges should be the cost of the service

102. Fees and other charges may be levied but should be equivalent to the approximate cost of the service and should not be used for protective purposes. The Pacific EPA specifically provides that "any such fees and charges shall not be applied on an ad valorem basis". Other EPAs provide that the fees and charges shall be based on specific rates that correspond to the real value of the service. The SADC, EAC and CARIFORUM EPAs prohibit consular fees.³⁸

The basic duty is that indicated in the schedules, or the MFN rate

103. The EAC and ESA EPAs indicate that the basic duty, to which reductions will be applied, is that set out in the party's schedule.³⁹ The SADC EPA indicates that the basic duty is "... the most-favoured-nation rate ... effectively applied at the date of entry into force of the Agreement", and in cases where the reductions start subsequent to the entry into force of the agreement, the basic duty is either the MFN rate or "the duty applied on an erga omnes basis on the starting day of the relevant tariff dismantlement schedule, whichever is the lower".⁴⁰ The SADC caution here is evident.

³⁴ Article 1 of title I of the Criforum-EU EPA

³⁵ Article 20 of the SADC-EU and Article 6 of the Pacific-EU interim EPAs

³⁶ Article 4 of CARIFORUM-EU EPA; and Articles 8 of the ESA-EU, 7 of the EAC-EU, and Article 9 of the Pacific-EU interim EPAs

³⁷ Article 3 in title II of the CARIFORUM-EU EPA; and Articles 7 of the ESA-EU, 6 of the EAC-EU, 22 of the SADC-EU, and 7 of the Pacific-EU interim EPAs.

³⁸ Articles 9 of the EAC-EU, 10 of the ESA-EU, 22(2) of the SADC-EU, 7(2) of the Pacific-EU interim EPAs; and 5 of the CARIFORUM-EU EPA

³⁹ Articles 8 of the EAC-EU and 9 of the ESA-EU interim EPAs

⁴⁰ Paragraphs 3 and 4 of Article 22 of the interim SADC-EU EPA

Duties are to be eliminated on products or according to the schedules over transition periods

104. The EPAs have provisions on elimination of duties on products originating in the territories of the parties. Under the agreements, goods from the ACP countries “shall be imported in the EC Party free of customs duties” from the commencement of the EPAs with transition periods for certain products, namely, sugar and rice. Goods from the EU are to enter the signatory ACP countries according to the tariff elimination schedules annexed to the EPAs. The SADC EPA makes reference to duty free and quota free market access, and specifies the eligible countries (Botswana, Lesotho, Mozambique, Namibia and Swaziland), excluding South Africa and Angola.

105. The scheduling of tariff elimination for EU imports varies from EPA to EPA. In the case of ESA, each signatory country has its own tariff elimination schedule but these may be subsequently harmonised taking into account the regional integration programmes. The CARIFORUM EPA provides for the possibility of modifying the schedules and suspending them for up to one year. The EPA states “in the event of serious difficulties in respect of imports of a given product, the schedule of customs duty reductions and eliminations may be reviewed by the CARIFORUM-EC Trade and Development Committee by common accord with a view to possibly modifying the time schedule for reduction or elimination”. Conditions are that the overall set period for tariff elimination is not to be exceeded and the changes should not result in incompatibility with GATT Article 24.⁴¹

Rules of origin will be finalised over a next phase of the negotiations

106. Quite elaborate rules of origin are set out, annexed to the EPAs, for determining the products that qualify for preferential treatment. For all EPAs, however, the rules of origin are to be reviewed with a view to simplifying them further, taking into account the needs of ACP countries, “development of technologies and production processes and all other factors”. The Pacific EPA includes “providing certainty for investors” among the factors to be taken into account. The EPAs differ on the period for finalising the review and modifications; and the institution that will effect the agreed modifications. The review is to be finalised in five years for the Pacific and CARIFORUM EPAs, and the modifications to be effected by a decision of the Trade Committee for the Pacific EPA and a decision of the joint council for the CARIFORUM EPA. In the case of SADC EPA, the review will be in three years and the modifications will be effected by a decision of the joint council. For the EAC and ESA EPAs, the review will be in the period between the entry into force of the interim EPA and the comprehensive EPA, and the modifications will be effected by a decision of the EPA council for the EAC EPA and the EPA committee for the ESA EPA.⁴²

⁴¹ Articles, 10 and 11 of EAC-EU, 11 and 12 of ESA-EU, 25 and 26 of SADC-EU EPA, and 11 and 12 of Pacific-EU interim EPAs; and 7 and 8 of the CARIFORUM-EU EPA. Please see the part of this paper in tariff elimination schedules.

⁴² Articles 8 of Pacific-EU, 21 of SADC-EU, 12 of EAC-EU, and 13 of ESA-EU interim EPAs; and Article 2 of title II of the CARIFORUM-EU EPA

Standstill obligation: not to increase duties or introduce new ones

107. A standstill obligation is included in the EPAs except the CARIFORUM EPA. "... the parties agree not to increase their applied customs duties on products imported from the other Party" in the case of ESA; or "... on their mutual trade" in the case of EAC. The SADC and Pacific standstill provisions state that: "No new customs duties shall be introduced, nor shall those already applied be increased in trade between the Parties as from the entry into force of the Agreement for all products subject to liberalisation".⁴³

Schedules for tariff elimination on imports from EU may be modified

108. The CARIFORUM and Pacific EPAs, however, specifically provide for the possibility of modifications to tariff elimination schedules on imports from EU countries. The CARIFORUM EPA provides for modifying the levels and commitments on customs duties for some countries: "In the light of the special development needs of Antigua and Barbuda, Belize, Dominica, Grenada, Guyana, Haiti, Saint Lucia, Saint Vincent and the Grenadines and Saint Christopher and Nevis, the Parties may decide in the CARIFORUM-EC Trade and Development Committee to modify the level of customs duties stipulated in Annex 2, which may be applied to a product originating in the EC Party upon its importation into the CARIFORUM States. The Parties shall ensure that any such modification does not result in an incompatibility of this Agreement with the requirements of Article XXIV of the GATT 1994. The Parties may also decide to simultaneously adjust customs duty commitments stipulated in Annex 2 and relating to other products imported from the EC Party, as appropriate." The Pacific EPA provides for the possibility of modifying the scheduling of customs duty reductions and eliminations for any of the Pacific countries, as well as for modification of "Annex II, Customs Duties on Products Originating in the EC Party, in any manner the Parties deem appropriate", provided the modifications do not result in incompatibility with GATT Article 24.

Goods are to circulate freely: duties should be levied only once

109. The EPAs have provisions on circulation of goods, which require that duties should be levied only once in the EU and in the region of the ACP countries signatory to the given EPA. The duties should be refunded when the product is re-exported and the duty then paid in the country of consumption. As pointed out in the Pacific EPA, this means that: "once customs duties have been levied, goods originating in any of the Parties shall circulate within the territory of the EC Party or of the Pacific States respectively without any further payment of customs duties". The provisions contain agreement to cooperate in facilitating free circulation of goods.

⁴³ Articles 14 of ESA-EU, 13 of EAC-EU, 23 of SADC-EU, 15 of Ghana-EU, and 14 of Pacific-EU interim EPAs

110. The ESA EPA doesn't have the provision on free circulation of goods. The CARIFORUM EPA calls it "movement of goods" and doesn't contain an obligation to ensure free circulation; rather, in the provision, "the Parties recognize the goal of having customs duties levied only once on originating goods imported into the EC Party or into the Signatory CARIFORUM States. Pending the establishment of the necessary arrangements for achieving this goal, the Signatory CARIFORUM States will exercise their best endeavours in this regard. The EC Party will provide the technical assistance necessary for the achievement of this goal." The Pacific EPA contains the exception that this requirement doesn't apply "for goods of tariff headings whose duties have not yet been eliminated in all of the Pacific States", where refunds are also to be made upon exportation and the duties paid in the countries of consumption.⁴⁴

Export duties and taxes are prohibited

111. There is a prohibition of export duties and taxes. They are called "export duties and taxes" in the EAC and ESA EPAs; "customs duties on exports or charges having equivalent effect" in the SADC EPA; "duties, taxes or other fees and charges in connection with the exportation" or "any internal taxes, fees and charges on goods exported" in the Pacific EPA; and "customs duties" in the CARIFORUM EPA. In the SADC, EAC and ESA EPAs, the prohibition is of "new" duties or taxes; and in the SADC EPA the prohibition is also on increasing those already applied; while the Pacific EPA prohibits any party from maintaining or instituting the taxes. The EAC, ESA and Pacific EPAs prohibit the export taxes "in excess of those imposed on products destined for internal sale". In the CARIFORUM EPA, the countries in Annex A are to eliminate the customs duties within three years of signature of the EPA.

112. The ESA EPA provides for exceptions to the prohibition of export taxes in Annex III to the EPA. The EAC EPA provides for imposition of the duties with authorisation of the EPA council, where they assist "to foster the development of domestic industry; or to maintain currency value stability, when the increase in the world price of an export commodity creates the risk of a currency value surge"; but only for "a limited number of products for a limited period of time, and the measures are to be reviewed by the EPA Council after 24 months". In the SADC EPA, the exception is made for "specific revenue needs, protection of infant industries, or protection of the environment" but South Africa may not use these exceptions; and the prohibition provision is to be reviewed no later than three years after entry into force of the agreement. Exceptions are made in the Pacific EPA for "ensuring fiscal solvency of a Pacific State or for the protection of the environment; and in exceptional circumstances, where the Pacific State can justify specific protection to develop infant industries".⁴⁵

Better treatment under other free trade agreements is to be given to the other party (MFN clause)

⁴⁴ Articles 14 of EAC-EU, 27 of SADC-EU, 15 Pacific-EU interim EPAs; and Article 10 of the CARIFORUM-EU EPA

⁴⁵ Articles 24 of SADC-EU, 15 of EAC-EU, 15 of ESA-EU, and 10 of Pacific-EU interim EPAs; and 6 of title II of the CARIFORUM-EU EPA

113. The signatories will be required to give each other the most favourable treatment under any free trade agreement entered with developed or high-income developing countries or the organisations after the signature of the EPA. The requirement is in the following terms: “With respect to the subject matter covered by this chapter, (the signatories) shall accord to (the other party) any more favourable treatment applicable as a result of (the signatory) becoming party to a free trade agreement with any major trading economy/ country after signature of this Agreement”. The requirement doesn’t apply for agreements in place at the time of signature of the EPA, and for preferential agreements with other African countries (ESA), or with ACP or African countries (EAC), or at the regional level in the framework of regional integration (Pacific).⁴⁶

114. This obligation applies to free trade agreements, called economic integration agreements in the EAC EPA⁴⁷, with major trading economies, which are defined as follows: “For the purposes of this article, 'major trading economy' means any developed country, or any country or territory accounting for a share of world merchandise exports above 1 percent in the year before the entry into force of the free trade agreement referred to in paragraph 2, or any group of countries acting individually, collectively or through an free trade agreement accounting collectively for a share of world merchandise exports above 1.5 percent in the year before the entry into force of the free trade agreement ...”.⁴⁸ These figures may include in this obligation free trade agreements with high-income developing countries, as well as with certain south regional trade arrangements in Latin America, Asia, and the Gulf.

There will be consultations where there is better treatment under other FTAs

115. However, the Pacific, CARIFORUM and SADC EPAs have the exception that where there is substantially more favourable treatment under the free trade agreement with major trading economies than under the EPAs, the better treatment will not be automatically given to the EU countries; consultations will take place. This exception may for the moment be lacking in the EAC and ESA interim EPAs as initialled.

116. The Pacific EPA puts this exception in the following terms: “Where a Pacific State or the Pacific States can demonstrate that they have been offered by a third Party a substantially more favourable treatment in goods, including rules of origin, than that offered by the EC Party, the Parties will consult and may jointly decide how best to

⁴⁶ Articles 11 of the CARIFORUM-EU EPA; and 28 of SADC-EU, 16 of the EAC-EU and 16 of the ESA-EU interim EPAs

⁴⁷ The definition of regional trade agreements or economic integration agreements is of the free trade agreements, which are defined along the lines of Article 5 of GATS (services liberalisation agreements) rather than Article 24 of GATT: ie, an agreement substantially liberalising trade and providing for the absence or elimination of substantially all discrimination between or among Parties thereto through the elimination of existing discriminatory measures and/ or the prohibition of new or more discriminatory measures, either at the entry into force of that agreement or on the basis of a reasonable time frame. Article 16(5) of EAC-EU EPA

⁴⁸ The EAC, ESA, and SADC EPAs make reference to “major trading country” but define “major trading economy”. The Pacific and CARIFORUM EPAs use consistent expressions.

implement the provisions of paragraph 2”. This rendition means that the EU does not automatically get the better treatment offered by another country to Pacific countries, and the use of “may jointly decide” means that there is no mandatory obligation, but a possibility, to have a joint decision on the matter. It is plausible to then argue that absence of the joint decision may not necessarily constitute a breach of obligations by the Pacific state in this regard; the Pacific state would continue to benefit from and to honour its obligations under the other agreement.

117. The CARIFORUM EPA, puts the exception as follows: “Where any Signatory CARIFORUM State becomes party to a free trade agreement with a third party referred to in paragraph 2 and such a free trade agreement provides for more favourable treatment to such third party than that granted by the Signatory CARIFORUM State to the EC Party pursuant to this Agreement, the Parties shall enter into consultations. The Parties may decide whether the concerned Signatory CARIFORUM State may deny the more favourable treatment contained in the free trade agreement to the EC Party. The Joint CARIFORUM-EC Council may adopt any necessary measures to adjust the provisions of this Agreement.” There is a possibility here, but no mandatory obligation, for the parties to take a decision whether or not the CARIFORUM country can deny the EU the better treatment. The provision proceeds from the premise that it is the CARIFORUM country that offers the other country the better treatment than it has offered the EU, while the Pacific provision proceeds from the premise that it is the other country that has given the Pacific country the better treatment than the EU has given to the Pacific country.

118. The SADC exception is as follows: “where a SADC EPA State can demonstrate that it has been given by a third Party substantially more favourable treatment than that offered by the EC Party, the Parties will consult and jointly decide how best to implement the provisions of paragraph 2”. This wording creates the obligation for the parties to jointly reach a decision on the matter, and while clearer, it might well be less flexible where the SADC country doesn’t consider it appropriate to give the EU the better treatment offered by another country.

119. The conceptual basis of the requirement to give the EU the more favourable treatment offered by another country to an African or other ACP country needs better clarity. Where another country gives an ACP country better treatment than the EU gives to that ACP country, there would appear to be no basis for the EU to have the equally better treatment given to the ACP country by that other country. For instance, where Brazil or China, or India, or Japan, or the USA gives an African country better market access for a given product, say entry on the basis of zero duty and with less cumbersome procedures or better rules of origin; there is a conceptual difficulty in requiring the African country to extend that better treatment from that other country to the EU; basically because the EU is not a party to that agreement and the other country cannot be compelled to deal with the EU under that agreement. It would be equally difficult to require the ACP country to always enter a new agreement with the EU after such a better agreement in order for the EU to be party to the better agreement.

120. It would make better sense if there was an obligation for the EU to unconditionally match such better treatment; in this example, for the EU to similarly offer market access for products from the African countries on the basis of zero duty, with better customs procedures, and rules of origin. While the EU will now give ACP countries that have initialed the EPAs duty free and quota free access to EU markets, with transition periods for rice and sugar, there is still a lot that can be done to further improve this market access, in the areas of rules of origin, customs procedures, and technical and health standards, as well as the building of production and trade capacity and trade-related infrastructure in African countries. Many of these crucial matters are not covered by the scope of the requirement on the more favourable treatment, for the technical and drafting reason that they are not part of the chapter on treatment of customs duties in the EPAs; the requirement only applies to the subject matter in that chapter. The issue could be raised for those matters covered by the chapter, particularly rules of origin. Also, in the ongoing negotiations, the provision could be reformulated to provide for an obligation on the EU to match the better treatment in any relevant areas.

121. Where the African country offers another country, such as Brazil or China or India better conditions of access to its market, than it has offered to the EU, then the obligation is for the African country to give the EU the same conditions of access to its market. Such a requirement on small African economies could be based on equity in dealings, but the relation between Europe and African countries is expected to fully take into account the trade and development needs of African countries. The requirement may raise certain difficulties for a given African country. In negotiations for trade liberalization agreements with other countries, including high-income developing countries, the African country will have always to consider the impact on its economy of extending similar trade terms to the EU, for instance imports from the EU as well. Brazil raised this matter at a meeting of the WTO General Council.⁴⁹ The effect might be to discourage South-South trade between African countries and high income developing countries of Asia and Latin America. It has been demonstrated that south-south trade is increasing more rapidly than north-south trade.

122. This is one of the important matters that may require some further reflection before the EPAs are signed and steps taken to bring them into force; or at least in the ongoing negotiations.

The non-tariff measures

123. The EPAs have two provisions on non-tariff measures: prohibition of quantitative restrictions and the requirement of national treatment in internal taxation and regulation.

Quantitative restrictions are prohibited

124. The EAC, Pacific and SADC EPA provide that all prohibitions or restrictions on importation, exportation or sale for export, in the form of quotas or export or import

⁴⁹ Brazil raised this matter in an intervention made by its ambassador at the WTO General Council meeting of 5 February 2008.

licences or other measures, are to be eliminated upon the entry into force of the EPA and no new measures are to be introduced other than duties, fees and other charges. Exceptions are provided in the EAC EPA for trade defence measures, for prohibitions to relieve critical food shortages and other essential products and for measures for application of standards or regulations. The SADC EPA also allows the exceptions for antidumping and countervailing measures but not the multilateral or bilateral safeguards; and all the exceptions in Article XI of GATT, for instance measures to relieve critical food shortages and for application of standards or regulations. The Pacific EPA provides for the exceptions of antidumping and countervailing measures, and the multilateral and bilateral safeguards. The CARIFORUM EPA provides that no such quantitative restrictions shall be maintained as of the date of entry into force of the EPA, but provides for the exceptions of antidumping, countervailing and the multilateral safeguards, but not the bilateral safeguard. The ESA EPA does not contain these exceptions.⁵⁰

Products from the other party are to be given national treatment in taxation and regulation

125. There is then a requirement to give to imports national treatment on internal taxation and regulations. The rules are that, products imported from the other party are not to be subject to internal taxes or other charges directly or indirectly in excess of those applied to like national products, which are not to be protected by the taxes or charges. Imported products are to be given treatment no less favourable in respect of all laws, regulations and requirements affecting their internal sale, purchase, transportation, distribution or use, except differential internal transportation charges. And there are to be no internal quantitative regulation on the mixture, processing or use of products requiring supply from domestic sources. But subsidies including from internal taxes or charges may be paid exclusively to national producers and subsidies may be effected from governmental purchases of national products. National treatment does not apply to government procurement; the SADC EPA doesn't contain this government procurement exception. The ESA EPA provides additionally the exceptions to promote domestic production and for infant industries, which the EPA committee may authorise. Then annex III of the ESA EPA provides a list of derogations from the national treatment obligation.⁵¹

New agricultural export subsidies are prohibited, will be phased out where duties are eliminated

126. The CARIFORUM EPA includes under non-tariff measures provisions on agricultural export subsidies, prohibiting introduction of new subsidy programmes or increasing existing ones for products destined for the territory of the other party. The exception is that CARIFORUM countries can still provide marketing and transportation subsidies as allowed in the Agreement on Agriculture and that those countries listed in Annex VII to the WTO Agreement on Agriculture can still provide export subsidies.

⁵⁰ Articles 1 of chapter 3 of title II of the CARIFORUM EPA; and 17 of the ESA-EU, 35 of the SADC-EU, 17 of the EAC-EU and 22 of the Pacific-EU interim EPAs

⁵¹ Articles 18 of ESA-EU, 18 of the EAC-EU, 36 of SADC-EU, and 23 of Pacific-EU interim EPAs; and Article 2 in chapter 3 of title II of the CARIFORUM-EU EPA.

Under the provision, the European Community and the member states undertake to phase out all existing subsidies on those products listed in annex I to the WTO Agreement on Agriculture (agricultural products), on which CARIFORUM countries have committed to eliminate customs duties.⁵²

The trade defence instruments

127. The EPAs provide for trade remedies, called trade defence instruments in the SADC, Pacific and CARIFORUM EPAs, and trade defence measures in the EAC and ESA EPAs; namely, antidumping measures, subsidies countervailing measures, multilateral safeguard measures, and bilateral safeguard measures, in fairly similar wording.

WTO rules on dumping, subsidies and safeguards apply

128. The antidumping, subsidy countervailing, and multilateral safeguard measures provided for under the WTO agreement apply to the EPAs. In the case of the Pacific EPA, it is explicitly provided that non-WTO members may also have recourse to them⁵³. The ESA EPA provides that WTO obligations do not apply to non-members beyond those expressly undertaken in the EPA and where there is inconsistency the EPA prevails⁵⁴. The dispute settlement mechanisms established under the EPAs do not apply to these measures. The SADC EPA provides that “any disputes related to these measures can only be settled under WTO Dispute Settlement”. On the other hand, the WTO dispute settlement measures are not to apply to the bilateral safeguard measures

129. The constructive remedies provided for under the WTO agreements on dumping and subsidies also apply. The Pacific EPA provides that in this regard “the EC Party shall provide appropriate assistance to the exporters from the Pacific States which are proposing such constructive remedies”.⁵⁵

National and regional measures should not be taken simultaneously

130. There can be a possibility of taking antidumping and subsidy countervailing measures either at the national level or at the regional level by the ACP countries. The EPAs provide that where the measures are taken at a regional level, there should be one forum for judicial review; and also that a national and regional measure should not be applied simultaneously on the same product. As to which takes precedence, the CARIFORUM EPA is explicit that “A Signatory CARIFORUM State shall not apply an anti-dumping or countervailing measure on a product where it falls within the scope of a regional or sub-regional measure imposed on the same product. Similarly, the CARIFORUM States shall ensure that a regional or sub-regional measure imposed on a

⁵² Article 3 of chapter 3 of title II, CARIFORUM-EU EPA

⁵³ Articles 19-21 of the Pacific-EU, 32-34 of SADC-EU, 19-21 of ESA-EU, and 19-21 of EAC-EU interim EPAs; and chapter 2 of title 2 of CARIFORUM-EU EPA

⁵⁴ Article 65(3) of ESA-EU EPA

⁵⁵ Article 19(2) of the Pacific-EU interim EPA

product does not apply to any Signatory CARIFORUM State which is applying such a measure on the same product”. The EC is required to notify the ACP countries under the EPAs where it receives a complaint, before initiating investigation.

131. The provision for taking multilateral safeguard measures includes both Article 19 of GATT and the Agreement on Safeguards, as well as article 5 of the Agreement on Agriculture. An important exception made is that the European Community and its member states may exclude products from ACP countries under the EPAs, from the application of a multilateral safeguard measure, “in the light of the overall development objectives of this Agreement and the small size of the economies ...”. This exclusion is for a period of 5 years, and will be reviewed within the 120 days before expiry. In the case of SADC EPA, this exclusion does not apply to South Africa.

Bilateral safeguard measures may be taken to remedy social economic disturbances

132. The parties may take bilateral safeguard measures, in the form of suspension of further import duty reductions, increase of the customs duty to WTO levels, and quotas. Bilateral safeguard measures in the form of surveillance measures may be taken by the EC for the outermost regions or by the ACP countries under the EPAs.

133. The bilateral safeguard measures may be taken where imports cause or threaten serious injury to a domestic industry producing like or directly competitive products. They may also be taken when “disturbances in a sector of the economy, particularly where these disturbances produce major social problems, or difficulties which could bring about serious deterioration in the economic situation of the importing Party, or disturbances in the markets of agricultural like or directive competitive products or mechanisms regulating those markets”.⁵⁶

134. Bilateral safeguard measures may be taken to protect an infant industry; but this provision is to be available for given specified periods: 10 years for the EAC EPA; 12 years in the case of Botswana, Namibia and Swaziland, and 15 years for LDCs in the SADC EPA, with the possibility of extension after review by the joint council; 10 years for non-LDCs and 15 years for LDCs for the ESA EPA; 20 years for the Pacific EPA and the measures may be taken for an initial period of 7 years with the possibility of extension for 3 years, but this initial period is 12 years for island states and LDCs.

135. Specific rules apply to the application of bilateral safeguard measures. The measures may be taken only to the extent necessary and should not last more than 2 years or in the case of ACP countries more than 4 years, these periods may be extended for 2 or 4 years respectively. The measures that least disturb the operation of the EPA are to be applied; the designated committees are to be notified of the intention to take the measures and consultations should be maintained; but in exceptional circumstances, the measures may be taken on a provisional basis; and the WTO dispute settlement system should not apply to these measures.

⁵⁶ Articles 34 of SADC-EU, 21 of Pacific-EU, 21 of EAC-EU, and 21 of ESA-EU interim EPAs; and 3 of chapter 2 title II of CARIFORUM-EU EPA

Liberalisation of current payments and capital movements

136. The SADC EPA provisions on current payments and capital movement differ from those of the CARIFORUM EPA.

137. In the SADC EPA, the parties “undertake to impose no restrictions and to allow all payments for current transactions between residents of the EC Party and of the SADC EPA States to be made in freely convertible currency”. But the SADC states may take necessary measures to ensure that this is “not used by its residents to make unauthorised capital outflows”.⁵⁷ There is provision also for “safeguard measures with regard to capital movements that are strictly necessary” where payments and capital movements “cause or threaten to cause serious difficulties for the operation of monetary policy or exchange rate policy”.⁵⁸

138. The CARIFORUM-EU EPA has similar provisions on current payments and safeguard measures. But in addition, capital movement is liberalised in the following terms: “With regard to transactions on the capital account of balance of payments, the Signatory CARIFORUM States and the EC Party undertake to impose no restrictions on the free movement of capital relating to direct investments made in accordance with the laws of the host country and investments established in accordance with the provisions of Title II of this Agreement, and the liquidation and repatriation of these capitals and of any profit stemming therefrom”.⁵⁹ There is provision for consultations to facilitate capital movement, and for informing the joint council of adoption of safeguard measures.

Special provisions on administrative cooperation

139. The EPAs have special provisions on administrative cooperation, where the preferential treatment may be suspended for a renewable period of 6 months on the ground of failure to provide administrative cooperation, which means repeated failure to verify originating status, repeated refusal or failure to do or communicate results of subsequent verification of proof of origin, or repeated refusal or undue delay in authorisation for administrative cooperation missions. A finding of irregularities or fraud may be made from a rapid increase in imports without a satisfactory explanation.⁶⁰

140. The purpose of the temporary suspension is to protect the financial interests of the party, and these may be imposed for specified periods (6 months). The measures are to be notified and subject to consultations in EPA bodies; and notice to importers is to be published in the official journal of the party.

Customs and trade facilitation

⁵⁷ Article 65 of interim SADC-EU EPA

⁵⁸ Article 66 of the interim SADC-EU EPA

⁵⁹ Article 2 of Title III of the CARIFORUM-EU EPA

⁶⁰ Articles 29 of SADC-EU, 17 Pacific-EU, 22 of ESA-EU and 22 of EAC-EU interim EPAs.

141. The SADC EPA provisions on customs and trade facilitation deal with objectives, customs and administrative cooperation, customs and legislative procedures, facilitation and transit movements. The provisions also deal with customs fees and charges (“Fees and charges shall not be imposed for consular services” Article 41(2)), relations with the business community, customs valuation, harmonisation of customs standards at regional level, support to SADC EPA customs administrations, transitional arrangements, and establishment of a special committee on customs and trade facilitation. The Pacific EPA is similar but contains other provisions: objectives, relationship with existing programmes and assistance, customs and administrative cooperation, customs procedures, relations of customs with the business community, customs valuation, harmonisation of customs standards at regional level, and review clause (the chapter on customs and trade facilitation is to be reviewed no later than 3 years “with a view to determining further steps to be taken” Article 32). The full CARIFORUM-EU EPA has similar provisions: objectives, customs and administrative cooperation, customs and legislative procedures, relations with the business community, customs valuation, regional integration, cooperation, and establishment of a special committee on customs cooperation and trade facilitation.

TBT and SPS measures

142. The SADC, Pacific and CARIFORUM EPAs have provisions on TBT and SPS measures, providing that WTO rules on TBT and SPS measures apply in the EPAs. The Pacific EPA deals with TBT and SPS measures under the same chapter and heading, while SADC and CARIFORUM have a separate heading for each. The SADC EPA provisions on TBT cover the following, multilateral obligations, objectives, scope and definitions, collaboration and regional integration, transparency; measures for identifying, preventing and eliminating TBT; implementation, capacity building and technical assistance concerning TBT. While the provisions on SPS measures cover the following: multilateral obligations, objectives, scope and definitions, competent authorities, transparency, information exchange, implementation, consultations, and cooperation, capacity building, and technical assistance on SPS measures.

143. The Pacific EPA chapter, dealing with both TBT and SPS measures at the same time, covers the following: scope and definitions, objectives, priority products; rights and obligations which include the provisions that non-WTO members shall apply TBT and SPS measures according to WTO rules. Moreover, that “The EC Party will take full account of the capacity constraints in the short-term of non-WTO members to comply with the provisions of this Article”, and that “Where necessary and possible, the Parties agree that the provisions concerning special and differential treatment in the WTO SPS and TBT agreements are applicable to the trade between the Parties to this Agreement, including Pacific States that are not WTO members”⁶¹; equivalence, competent authorities, resolution of SPS and TBT problems, transparency and exchange of information, and implementation.

⁶¹ Article 36(3) and (4) of the interim Pacific-EU EPA

144. The SADC EPA makes provision for cooperation on priority products and sectors both for exportation and for regional harmonisation: “The parties undertake to cooperate in strengthening regional and specifically SADC EPA integration and cooperation on matters concerning (SPS measures) and to address problems arising from SPS measures on agreed priority sectors and products whilst giving due consideration to regional integration”.⁶² The SADC EPA has appendices to the chapter listing the products. Appendix IA lists the following priority products and sectors for regional harmonisation: fish and fishery products and aquaculture products (fresh or processed), cattle and sheep and poultry, fresh meat, processed meat products, cereals, vegetables and spices, oilseeds, coconut, copra, cotton seeds, groundnut, cassava, beer and juices, and dried and canned fruits. Appendix IB lists the following priority products and sectors for export to the EC: fish and fishery products and aquaculture products (fresh and processed), beef and beef products, other meat products, fruit and nuts, vegetables, cut flowers, coffee and sugar.

145. The Pacific EPA also makes provision for priority products: “To better achieve the objectives of this Chapter, the Parties agree to define a list of priority products for export from the Pacific States to the EC Party and a list of priority products for trade among the Pacific States. These lists shall be contained in Annex III.A and III.B respectively, which shall be reviewed and may be modified by a decision of the Trade Committee as and when appropriate”.⁶³

Other areas

146. The interim SADC-EU EPA has additional provisions on customs unions and free trade areas, permitting the parties to enter other free trade areas or customs unions. This appears under different parts or chapters in other EPAs.

147. The CARIFORUM and West African EPAs make provision for cooperation in tax administration and fiscal reforms.

148. There is provision also for management of administrative errors, by taking corrective measures, and for application of the WTO rules on customs valuation.

Possible additional provisions in a full EPA

149. The CARIFORUM EPA has in addition, provisions under substantive titles for investment, trade in services and electronic commerce; current payments and capital movement; and the trade-related areas of competition policy, innovation and intellectual property; public procurement; environment; social aspects; and protection of personal data. The Pacific, SADC, ESA and EAC EPAs don't have substantive provisions on investment, services, electronic commerce, current payments and capital movement, public procurement, environment, social aspects, and protection of personal data except that, as indicated, the SADC EPA has some provisions on current and capital movement and protection of personal data.

⁶² Article 57(2) of the interim SADC-EU EPA

⁶³ Article 35 of the interim Pacific-EU EPA

General observations

150. Together with the development issue, the market access provisions on trade in goods are notably important in the interim EPAs and the full CARIFORUM-EU EPA. This is because avoiding disruption of ACP imports into the EU markets, for non-LDCs, was given as the overriding ground for concluding the agreements within the agreed timeframe of 31 December 2007. This was despite of several outstanding matters in the negotiations. In essence the interim EPAs reflect the varying levels of progress made within that timeframe.

151. The interim EPAs were concluded largely in order to have in place market access provisions that allowed continuation of importation into the EU markets of ACP products on terms that were better than those that would have applied in the absence of the agreements, namely the GSP. The regime under the Cotonou Agreement was to expire on 31 December 2007 in accordance with the duration of the WTO waiver granted at the Doha Ministerial Conference on 14 November 2001.

152. This ground applied to non-LDCs because products from LDCs could continue to be imported under the regime provided by the EBA Initiative, under which all products except arms enter the EU markets without duties and quota restrictions.

153. However, several LDCs also initialled the interim EPAs, indicating their preference for the contractual and binding nature of the EPAs and the provisions on development cooperation.

154. Another equally drastic reason for the importance of market access provisions is their expected impact on ACP countries arising from the pace and depth of the scheduling of tariff elimination. Impact assessments recommended gradual and asymmetrical liberalisation, with ACP countries eliminating customs duties on not more than 60% of imports from the EU.

155. The market access provisions are important also because they directly affect ACP regional integration processes particularly the ongoing programmes in Africa. The integration programme in Africa, for the progressive establishment of the African Economic Community, provides for establishment of free trade areas and customs unions at the regional level by the recognised regional economic communities. This is to be followed by the creation of a customs union and a common market at the continental level, which in turn is to be followed by the establishment of a monetary and economic union. EPAs have implications for this programme for they are free trade areas of indefinite duration with third countries, allowing the EU preferential trade and economic relations with Africa whereas the regional economic communities and Africa at large are supposed to negotiate and as appropriate maintain a common external trade regime against other countries that would otherwise include the EU. Similar initiatives by other major partners, would presumably result in similar rights and obligations as the EU have.

Summary and recommendations on market access

156. The market access provisions on trade in goods are quite similar across the EPAs, though they differ in some significant respects. The similarities mainly occur in the treatment of customs duties, non-tariff measures, and the special provisions on administrative cooperation; as well as in the provisions on trade defence measures though the Pacific and CARIFORUM EPAs contain in this part provisions on agricultural export subsidies. Also, the SADC, Pacific and CARIFORUM EPAs have additional provisions covering customs and trade facilitation, TBT and SPS measures.

157. Some of the differences are fundamental, and provide useful areas for improvement in certain EPAs. These may include, the exceptions created such as those in the Pacific and CARIFORUM EPAs on free trade agreements with major economies or for small island countries and LDCs, the duration of certain provisions and measures, and the idea of special cooperation on priority products and sectors included in the SADC and Pacific EPAs.

158. There are differences also with respect to the additional areas covered in the full CARIFORUM-EU EPA, such as investment and trade in services, and government procurement. Other groups have taken positions that make such provisions controversial in the negotiations.

159. The provisions on trade in goods contain some far-reaching obligations that may have fundamental implications for ACP countries under the EPAs, such as the obligation to eliminate export taxes and duties, the prohibition of quantitative restrictions, the requirement to accord national treatment to EC imports; the maintenance of current subsidy levels in the EU and the offer to phase them out over unspecified periods for some ACP countries on products that they undertake to eliminate customs duties.

160. The EU market access offer is similar in the EPAs – entry of all goods free from customs duties at the commencement of the EPA except for the products subject to transition periods; South Africa is excluded from many of the concessions.

161. The Pacific EPA includes the general, security and taxation exceptions under the part on trade in goods, while other EPAs have them in the last part. Also, the CARIFORUM EPA includes in the part on trade in goods the provisions on agriculture and fisheries, while the EAC and ESA EPAs deal with fisheries as separate chapters.

162. There is scope for the ACP groups to learn from each other and as appropriate harmonise provisions in key areas drawing on the important provisions in the various interim EPAs. Particular attention would need to be paid to the exceptions made to some of the far-reaching obligations, and the periods in various areas. In many cases, it is difficult to see whether the periods were based on good objective criteria for setting their duration.

163. Where certain obligations imposed might prove to be far reaching, the negotiating parties might usefully have another look at them in the continuing negotiations if possible. This would allow them to improve upon them through appropriate modifications to better take into account the trade and development needs of ACP and African countries particularly LDCs and other small and vulnerable economies.

164. There could be merit in achieving a degree of coherence or harmony in the structures and subject matter dealt with under the chapters on trade in goods. The uniform EU offer to the ACP regions enables the EU to maintain quite a manageable common regime in respect of imports from ACP countries under the EPAs. While ACP regions have specificities, there are also large areas of commonality that enable a large degree of coordination or harmonisation. Also, the different agreements and obligations and rights for the regions are likely to contribute to a further weakening of the solidarity of the ACP group of states, if there are good reasons for maintaining the group as a global player and in particular in relations with the EU.

E. INLAND, MARINE, AND AQUACULTURE FISHERIES

165. The ESA and EAC EPAs have a specific chapter on inland and marine fisheries and aquaculture, with same wording.

166. During the negotiations, the EU side clearly wanted provisions on fisheries as an important sector. It was explained that the EU put quite some priority to accessing fishery resources outside Europe, and largely considered this as a market access issue, rather than a development one. The ESA side (before the EAC group was formed) put equal emphasis on this sector, in terms both of access to the EU market and of development of the sector through investment and diversification.

167. To this end, the ESA side prepared a draft stand-alone framework agreement on fisheries for the negotiations. This framework approach was rejected by the EU side, preferring to include fisheries in the market access provisions; the main reason advanced being that it was this approach that ensured compatibility with GATT article 24, and not the approach of a stand-alone framework agreement. Though wholly without merit and with textual support in the WTO Agreement, the EU proposal was accepted.

168. But once the negotiations started on the revised ESA proposal the EU side challenged practically all the development provisions, insisting that market access provisions had to be treated together with the market access provisions for other goods. The negotiations were therefore tough, just like in the other areas as well. The outcome was a scaled down version of the original ESA proposals.

169. The EPAs contain the general provision for recognition that “fisheries constitute a key economic resource, contribute significantly to the economies, and have great potential for future regional economic development and poverty eradication ... are an important source of food and foreign exchange ... (and that) fisheries resources are of considerable interest to the EC Party”. They therefore “agree that the appropriate strategy to promote economic growth of the fisheries sector and to enhance its contribution to the economy ... through value adding activities within the sector”.⁶⁴

170. The objectives of cooperation in the fisheries sector include the following: promote sustainable development and management of fisheries, develop regional and international trade based on best practices, assist industrial and small scale fisheries cope with stringent market requirements, support productivity and competitiveness in the sector, and build links with other economic sectors.⁶⁵ In this regard, the EPAs aim to generate financial and other support to improve competitiveness and production capacity of processing factories, diversification and improvement of port facilities in the EAC and ESA countries.⁶⁶

⁶⁴ Articles 25 of EAC-EU and 25 of the ESA-EU interim EPAs

⁶⁵ Articles 26 of the EAC-EU and 26 of the ESA-EU interim EPAs

⁶⁶ Article 29 of the EAC-EU and ESA-EU interim EPAs

171. The principles of cooperation are set out as: regional integration, preservation of Cotonou acqui, SDT, use of the best available scientific information for resource assessment and management, effective monitoring of environmental, economic and social impact, conformity with national, regional and international instruments including UNCLOS, and prioritisation of particular needs of artisanal/ subsistence fishers. These principles are expected to assist “sustainable and responsible development of living inland, marine resources, aquaculture; and optimise benefits for present and future generations through increased investment, capacity building and improved market access”.⁶⁷

172. After the general provisions and those on objectives and principles, the EPAs deal with marine and inland fisheries separately, setting out the objectives and areas of cooperation.

173. For marine fisheries, the areas of cooperation in general terms are set out as follows: “cooperation will include fisheries management and conservation issues, vessel management and post harvest arrangement and financial and trade measures and development of fisheries products and marine aquaculture”, and “the EC Party will contribute resources for the implementation of the identified areas of cooperation at national and regional levels, which will also include support for regional capacity building, furthermore, the EC Party shall contribute to the measures as described in the section concerning financial and trade measures, and on infrastructure development specific for fisheries and marine aquaculture”.⁶⁸

174. The detailed areas of cooperation are then specified: fisheries management and conservation issues, vessel management and post harvest arrangements, and financial and trade measures and development issues. The specific provision on financial and trade measures is supposed to constitute a mandatory binding obligation on the EC Party, but the language might not have that clear effect, for it is an undertaking by both parties to cooperate: “the parties undertake to cooperate in the setting up of joint ventures in fishing operations, fish processing, port services, enhance production capacity, improve competitiveness of fishing and related industries and services, downstream processing, development and improvement of port facilities, diversification of the fishery to include non-tuna species which are under-exploited or not exploited”.

175. Regarding inland fisheries and aquaculture, the objective of cooperation is set out as follows: “The objectives of cooperation in inland fisheries and aquaculture development will be to promote sustainable exploitation of inland fisheries resources, and enhance aquaculture production, remove supply side constraints, improve fish and fish products quality to meet SPS standards in EC Party market, improve access to the EC Party market, address intra regional trade barriers, attract capital inflows and investment into the sector, build capacity and enhance access to financial support for the private investors for inland fisheries and aquaculture development”.⁶⁹

⁶⁷ Articles 28

⁶⁸ Articles 32

⁶⁹ Articles 34

176. The specific areas of cooperation are then specified: capacity building and export market development, infrastructure building and funding, technology transfer and research and data collection, legal and regulatory framework, investment and finance, environmental and stocks conservation, and socioeconomic and poverty alleviation measures.⁷⁰

Summary and recommendations

177. The gist of the fisheries chapter is to promote investment, capacity building and improved market access into the EU for the fishery sector of the East African and Southern African countries; as well as the sustainable management of stocks.

178. The fisheries sector has been up for negotiation in other EPAs as well, but no outcomes, except on rules of origin, were included in the agreements. The ESA and EAC chapter on fisheries may provide a useful starting point for the other African regions.

⁷⁰ Articles 35

F. CONTINUATION OF EPA NEGOTIATIONS

179. The SADC and Pacific EPAs provide for the next phase of EPA negotiations in quite broad terms; but the SADC EPA has specific provisions on the treatment of services and on investment, competition and government procurement in the continuing negotiations, as well as the condition added by Namibia that contentious issues included in the interim EPAs will continue to be negotiated.

180. The Pacific EPA provides that “The EC Party and the Pacific States covered by this agreement are committed to the continuation and successful conclusion of the currently ongoing negotiations of a comprehensive Economic Partnership Agreement in line with the Cotonou Agreement and previous Ministerial Declarations and Conclusions, including all components and involving all interested countries in the Pacific region. They confirm their commitment to the objective of concluding these negotiations by 31 December of 2008”. The parties recognise that “development cooperation will be a crucial element of the comprehensive EPA” and “reaffirm their commitment to supporting the objective of development cooperation for regional economic cooperation and integration as provided for in the Cotonou Agreement shall be carried out so as to maximise the expected benefits of the comprehensive EPA”, and “agree that provisions on development cooperation will be finalised in the wider context of the Pacific Island ACP States as soon as possible”.⁷¹

181. There is explicit understanding in the Pacific EPA that “this Interim Partnership Agreement does not predetermine the positions that the region will be taking in the negotiations of a comprehensive EPA on development cooperation.”⁷²

182. The SADC EPA provides that “the Parties agree to continue negotiations in 2008 to extend the scope of the present Agreement”.⁷³ On services, SADC states undertake to liberalise one sector as an outcome of the continued negotiations by 31 December 2008, and to liberalise other sectors within three years “following the conclusion of the full EPA” to comply with the requirement in GATS⁷⁴ for substantial sectoral coverage. There will be “a prohibition of new or more discriminatory measures”, “for all services sectors”.⁷⁵ This standstill commitment alone could satisfy the requirement of GATS Article 5 for absence of discriminatory measures and substantial sectoral coverage. There is recognition of the importance of services sectors, the need to build capacity and “to this end the EC Party agrees to support capacity building aimed at strengthening the regulatory framework of the participating SADC EPA States”.

183. The provision sets out the SADC states that will be party to the continuing negotiations, namely, Botswana, Lesotho, Mozambique and Swaziland; and leaves open

⁷¹ Article 69(1) and (2) of the interim Pacific-EU EPA

⁷² Article 69(3) of the interim Pacific-EU EPA

⁷³ Article 67 of the interim SADC-EU EPA

⁷⁴ Article V of the WTO General Agreement on Trade in Services

⁷⁵ Article V:1(a)(ii) of GATS and Article 67:(1a)(2) of the interim SADC-EU EPA

the possibility for the others to “join the process of negotiation on a similar basis”. By leaving out South Africa, a member of the Southern African Customs Union together with the BNLS countries, this provision has adverse implications for the customs union, which is required to have a common external trade regime. And by leaving out Angola, it has adverse implications for the broader integration process within the SADC region of establishing a customs union subsequent to the free trade area that came into force at the beginning of January 2008. It is arguable, that this provision was unnecessary in the first place, particularly in light of the already agreed EPA configurations; and that it contravenes the basis that the ongoing negotiations will be a continuation of the negotiations that resulted in the interim EPA, not a new set of negotiations on new issues between different parties.

184. Namibia initialled the interim EPA subsequently after the deadline set of 29 November 2007, with the condition that negotiations on issues which Namibia has been raising will continue. The condition is that concerns, which Namibia had identified throughout the negotiations of the Interim Economic Partnership Agreement, would be addressed through the negotiations towards a comprehensive Economic Partnership Agreement.

185. The concerns as set out are that Namibia will continue to engage the other SADC States and the European Commission to find solutions for issues in the Interim Economic Partnership Agreement with long-term detrimental policy implications for Namibia. These issues include, but are not limited to, the non-negotiable Most Favoured Nation treatment provision sought by the EC; the freezing of export taxes/levies/charges and thus the country’s ability to use such measures as incentives for value addition and manufacturing; the abolition of quantitative restrictions on imports with impacts on cereal production and thus food security in Namibia; inadequate provision made for Infant Industry Protection; the abolition of restrictions on local content in manufactured or processed goods; and the modalities of administering the free movement of goods within the SADC EPA States in a manner that may not be compatible with the country’s current Southern Africa Customs Union (SACU), or would predicate the modalities for a future SADC Customs Union.

186. This condition is in line with the Declaration of the ACP Council of 13 December 2007 calling for continuation of negotiations on controversial issues included in the interim EPAs. The declaration by the Ministers built on the assurances given by the President of the European Commission, Mr. Manuel Barroso at the EU-Africa Summit, held in Lisbon, Portugal, on 8 and 9 December 2007 that the discussions on the Economic Partnership Agreements would continue beyond the initialling of interim arrangements and that the contentious clauses therein would be opened up for re-negotiation.

187. This position that negotiations will continue on “contentious clauses” can have serious implications. It could mean for instance that those clauses should not be implemented should the interim EPAs enter force; because they are subject to ongoing negotiations and are yet to be finalised. It could mean also that there in fact was never

consent to initial the EPAs; that this was done under some form of duress or undue influence. The ACP Council in its declaration “deplored the enormous pressure that has been brought to bear on the ACP States by the European Commission to initial the interim trade arrangements, contrary to the spirit of the ACP-EU partnership”. The ACP Secretary General, in an interview, described the cataclysmic nature of the last minute negotiations. It could further mean that the interim EPAs did not represent a balanced outcome; that as a whole they should be re-opened and rebalanced.

188. In effect, then, no conclusive deal was reached in the interim EPAs, but rather provided opportunity for extending the period for the negotiations, with the merit of saving face through demonstrating a certain degree of progress made in the negotiations and a brave commitment to finalise them within a short period of 12 months. Another view could be that reciprocal market access, presented as WTO compatibility, was a key priority of EU negotiators and has been achieved in the interim EPAs.

189. On investment, the SADC EPA provides that “The Parties agree to negotiate an Investment chapter, taking into account the relevant provisions of the SADC Protocol on Finance and Investment, no later than 31 December 2008”; and there is agreement by the EC Party to provide “adequate technical assistance to facilitate negotiations and implementation of the Investment chapter”. These provisions reflect the position taken by the European Commission, which was heavily criticised, that resources would be provided to SADC on the basis of clear commitments to negotiate the Singapore issues. However, the approach to competition and government procurement is slightly different, for the provision states that “The EC Party agrees to cooperate with a view to strengthening regional capacity in these areas. Negotiations will only be envisaged once adequate regional capacity has been built”.⁷⁶

190. The EAC and ESA EPAs on the other hand contain a specific list of areas to be negotiated during the next phase. The lists are not identical. The ESA EPA lists the following areas: “customs and trade facilitation, outstanding trade and market access issues including rules of origin and other related issues and trade defence measures including outermost regions; trade in services; trade related issues namely: competition policy, investment and private sector development, trade environment and sustainable development, intellectual property rights, transparency in government procurement; agriculture; current payments and capital movements, development issues, cooperation and dialogue on good governance in the tax and judicial area; an elaborated dispute settlement mechanism, institutional arrangements; and any other areas that the parties find necessary including consultations under Article 12 of the Cotonou Agreement”. The EAC EPA, while similar, does not include: outstanding trade and market access issues of trade defence measures and outermost regions, current payments and capital movements, and cooperation and dialogue on good governance in the tax and judicial area.⁷⁷

191. There is reference elsewhere in the agreements to the ongoing negotiations, in the provisions on principles. The chapeau to the ESA EPA provision on principles states that

⁷⁶ Article 67 of the interim SADC-EU EPA

⁷⁷ Articles 53 of the ESA-EU and 37 of the EAC-EU interim EPAs

“The principles of this Agreement and on the basis of which further negotiations between the Parties shall be held with a view to reaching a comprehensive EPA are the following”. The chapeau to the EAC EPA provision on principles is similar, with the word “full” added: “The principles of this Agreement and on the basis of which further negotiations between the Parties shall be held with a view to reaching a full and comprehensive EPA are the following”.⁷⁸

192. The areas listed in the EAC and ESA EPAs may in some respect be inconsistent with the long-held positions of Africa and other developing countries in general, namely, not to undertake obligations on the Singapore issues of competition, government procurement and investment. It could have been helpful, then, and consistent with the common African positions, to explicitly limit any negotiations in these areas to issues of development cooperation particularly for assisting the finalisation and implementation of regional frameworks in these areas as adopted in the context of building the regional and continental common markets, which by definition cover goods, services, capital, labour and judgments.⁷⁹

193. With regard to the inclusion of an explicit mandate to negotiate the issues of investment, competition and government procurement, the interim EPAs have now provided a firm mandate, where there was no such firm mandate before. Under the Cotonou Agreement⁸⁰ and the negotiating mandates of the regions and the European Commission, the expectation was that the treatment of these issues would be along the same lines as the outcome in WTO negotiations. Though the WTO negotiations are still ongoing, on 1 August 2004, the WTO General Council took a clear decision to remove these issues from the WTO negotiations, and that is the outcome. On this basis, then, these issues, in terms of rule making as had been envisaged in WTO negotiations, should no longer have been for consideration in EPA negotiations. Rather, the quite elaborate provisions in the Cotonou Agreement on development cooperation in the area of investment should be satisfactorily implemented, with or without EPAs. The mandate for the next phase of the negotiations could, in this regard, be considered a “contentious clause” in the interim EPAs that should be subject to further negotiation.

194. The Central (Cameroon) and West African (Cote d’Ivoire and Ghana) interim EPAs are predicated on the understanding that they will be integrated into the region-wide EPAs, with which they will be consistent. The Central and West African interim EPAs stress that the next phase of the negotiations should aim for region-wide EPAs, not bilateral EPAs, to which all members of the negotiating group will be parties.

Summary and recommendations on the next phase of negotiations

195. There are four kinds of approach to the next phase of the negotiations: a general approach (Pacific); an approach that specifies a few areas while providing for continuation of negotiations on all outstanding issues (SADC); an approach that lists in

⁷⁸ Articles 4 of the ESA and 4 of EAC interim EPAs

⁷⁹ Paragraph 14 of the African Union Nairobi Declaration on EPAs

⁸⁰ For instance, Article 78(3) of the Cotonou Agreement

precise terms the areas for the next phase of the negotiations albeit with a saving clause for inclusion of any other areas (EAC and ESA); and an approach that emphasises that the next phase should be one that aims for and ensures a region-wide EPA to which all members of the negotiating group are happy to be parties (West and Central Africa).

196. Some areas listed for the next phase of the negotiations may be contentious, being areas that African countries have consistently objected to negotiating, particularly the Singapore issues.

197. The African interim EPAs take different approaches to the mandate for the next phase of the negotiations; and there are significant differences in the EAC and ESA provisions though largely similar.

198. To assist better coordination of the negotiations, and the unity and solidarity of Africa, the mandates for the next phase of the negotiations could be harmonised as appropriate. Any regional specificity could then be clearly set out separately as additional specific areas for negotiation, which could still benefit from discussion at the African Union level and among the regions at coordination events.

199. There should be a clear understanding for the next phase of the negotiations, that the mere listing of areas for negotiation does not pre-judge the outcome of the negotiations, and indication of desired outcomes is an objective expected to be achieved rather than a binding obligation in advance of the negotiations. This understanding is consistent with the nature of negotiations.

G. THE GENERAL, SECURITY, AND TAXATION EXCEPTIONS

200. As can be expected, obligations or rights in agreements can have far-reaching implications, and certain parties could be uncomfortable with them if there were no limitations imposed or flexibility created, without which the negotiations could even fail.

201. In trade agreements, there are usually exceptions, which operate as flexibility or limitations. The exceptions may be in various categories, but particularly as specific or general exceptions. Specific exceptions are to specific provisions and are linked or built into the specific provision. There may be stand-alone specific exceptions, particularly those relating to pre-eminent issues of national importance such as balance of payments or food security. General exceptions are to the entire obligations of the agreement and take the form of “Nothing in this Agreement shall (prevent the following measures)”; there may be conditions governing the taking of the measures. These exceptions are normally entitled clearly as general exceptions. Though listed as a shopping list or residual measures, each of the measures is important and requires careful consideration, due to their importance to the country or the likelihood of abuse by other parties. Measures listed under general exceptions have over the years come to take a quite standard format, drawing from the GATT, but as shown in the EPAs, slight but important variations can be made.

202. There are general exceptions that may not be entitled general exceptions, but that still operate as exceptions to all obligations and rights in the agreement. In the EPAs, for instance, these are the security and the taxation exceptions in addition to the provisions entitled general exceptions. Again, in the GATT, Article 24 provides that “Accordingly, the provisions of this Agreement shall not prevent, as between the territories of the contracting parties, the formation of a customs union or a free-trade area or the adoption of an interim agreement necessary for the formation of a customs union or of a free-trade area”⁸¹ The security exception is common in trade agreements for the obvious overriding security considerations of the countries parties to the agreement and the entire United Nations family at large in accordance with the founding charter.

203. The interim EPAs have general, security, and taxation exceptions with substantially the same wording, except for some differences in some of the paragraphs of the general exceptions.

204. The general exception provision is called “the general exception clause” in the EPAs under the general heading of “general exceptions” except the Pacific EPA where the general heading is “exceptions”. On the whole, the general exceptions are as follows:

“Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between the Parties where like conditions prevail, or a disguised restriction on trade in goods, services or establishment, nothing in this Agreement shall be

⁸¹ Paragraph 5, chapeau

construed to prevent the adoption or enforcement by the EC Party, the (ACP states collectively or individually) of measures which:

- (a) are necessary to protect public security and public morals⁸² or to maintain public order;
- (b) are necessary to protect human, animal or plant life or health;
- (c) are necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement including those relating to:

- (i) the prevention of deceptive and fraudulent practices or to deal with the effects of a default on contracts;
- (ii) the protection of the privacy of individuals in relation to the processing and dissemination of personal data and the protection of confidentiality of individual records and accounts;
- (iii) safety;
- (iv) customs enforcement, or
- (v) protection of intellectual property rights;

- (d) relate to the importation or exportation of gold or silver;
- (e) are necessary to the protection of national treasures of artistic, historic or archaeological value;
- (f) relate to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption of goods, domestic supply or consumption of services and on domestic investors;
- (g) relate to the products of prison labour; or
- (h) are inconsistent with ... National Treatment, provided that the difference in treatment is aimed at ensuring the effective or equitable imposition or collection of direct taxes in respect of economic activities, investors or service suppliers of the EC Party or (an ACP state).”

205. These general exceptions differ from the traditional GATT rendition in a few significant respects, particularly the inclusion of the reference to “a disguised restriction on trade in goods, services or establishment” in the chapeau. The GATT rendition is “a disguised restriction on international trade”. Except for the CARIFORUM EPA and to some extent the SADC EPA, the interim EPAs don’t have obligations on trade in services and on investment. This reference could have been included on the basis that the comprehensive EPAs might contain obligations in the areas of services and investment, or by oversight. The exceptions for enforcement of certain monopolies, obligations under intergovernmental commodity agreements, and restriction of exports “of domestic materials necessary to ensure essential quantities of such materials to a domestic processing industry during periods when the domestic price of such material is held

⁸² The Parties agree that, in accordance with Chapter 5 of Title IV, measures necessary to combat child labour shall be deemed to be included within the meaning of measures necessary to protect public morals or measures necessary for the protection of health.

below the world price as part of a governmental stabilization plan”⁸³, are not included in the EPAs; presumably because such might be considered anathema in agreements for trade and economic liberalization.

206. Some EPAs need cleaning up in this provision. For instance, the SADC EPA has a repetition of measures to prevent deceptive practices and the use of “or”. It would appear that some paragraphs could have been omitted, for instance, the ESA EPA does not have the paragraph of the exception for measures inconsistent with the national treatment obligation if “the difference in treatment is aimed at ensuring the effective or equitable imposition or collection of direct taxes”. But some of the omissions could have been for good reason if done; for instance, the paragraphs still contain exceptions for security, when there is a substantive security exception. Or the exception for sanitary and phytosanitary measures when the EPAs have substantive provisions incorporating the WTO Agreement on SPS measures, which, according to the last recital in its preamble, “(elaborates) rules for the application of the provisions of GATT 1994 which relate to the use of SPS measures, in particular the provision of Article XX (b)”. GATT Article XX (b) is the exception for measures “necessary to protect human, animal and plant life or health”. Some EPAs don’t contain the last general exception listed in the GATT, namely, measures “essential for the acquisition or distribution of products in general or local short supply”⁸⁴ – the EAC and ESA EPAs have this exception.⁸⁵

207. The exceptions may be taken by the ACP signatory states collectively or individually. The SADC EPA, however, makes references to “SADC EPA States”, the expression defined to mean SADC EPA states acting individually.⁸⁶ The Pacific EPA also makes reference to “Pacific States”, the expression defined to mean the states acting individually.⁸⁷

208. The security exception has substantially the same wording:

“Nothing in this Agreement shall be construed:

(a) to require the EC Party or (a signatory ACP state) to furnish any information the disclosure of which it considers contrary to its essential security interests;

(b) to prevent the EC Party or (a signatory ACP state) from taking any action which it considers necessary for the protection of its essential security interests;

(i) relating to fissionable and fusionable materials or the materials from which they are derived;

⁸³ GATT Article XX (d) (h) and (i)

⁸⁴ GATT Article XX(j)

⁸⁵ Article 56(h) of ESA-EU interim EPA

⁸⁶ Article 97.2(b) of the SADC-EU interim EPA

⁸⁷ Article 70.2(b) of the Pacific-EU interim EPA

- (ii) relating to economic activities carried out directly or indirectly for the purpose of supplying or provisioning a military establishment;
 - (iii) connected with the production of or trade in arms, munitions and war materials;
 - (iv) relating to government procurement indispensable for national security or for national defence purposes; or
 - (v) taken in time of war or other emergency in international relations; or
- (c) to prevent the EC Party or (a signatory ACP state) from taking any action in order to carry out obligations it has accepted for the purpose of maintaining international peace and security.”

209. The EPAs differ in the obligation to notify security measures. The notification is to be made to the other signatory states (Ghana, ESA, EAC) or to a joint institution (SADC – Joint EPA Implementation Committee; Pacific – the Trade Committee; CARIFORUM – Trade and Development Committee). The measures to be notified are those taken under paragraphs b or c, that is, measure for protection of essential security interest or for carrying out international obligations for peace and security.

210. The SADC EPA takes a different approach regarding action for international peace and security. While other EPAs don't make reference to the UN charter, the SADC EPA does: "... to prevent the EC Party or the SADC EPA States from taking any action in pursuance of its international obligations under the United Nations Charter for the maintenance of international peace and security".⁸⁸ Failure to refer to the UN charter could be interpreted to justify unilateral use of force in invading other countries for whatever noble reasons; but it could justify joint action under regional institutions such as the African Union; but then explicit reference to regional institutions would be better than the blanket reference to "obligations (a country) has accepted for the purpose of maintaining international peace and security".

211. The taxations exception has the same wording as follows:

“1. Nothing in this Agreement or in any arrangement adopted under this Agreement shall be construed to prevent the EC Party or (a signatory ACP state) from distinguishing, in the application of the relevant provisions of their fiscal legislation, between taxpayers who are not in the same situation, in particular with regard to their place of residence or with regard to the place where their capital is invested.

“2. Nothing in this Agreement or in any arrangement adopted under this Agreement shall be construed to prevent the adoption or enforcement of any measure aimed at preventing the avoidance or evasion of taxes pursuant to the tax provisions of agreements to avoid double taxation or other tax arrangements or domestic fiscal legislation.

⁸⁸ Article 91(c) of the SADC-EU interim EPA

“3. Nothing in this Agreement shall affect the rights and obligations of the EC Party or (a signatory ACP state) under any tax convention. In the event of any inconsistency between this Agreement and any such convention, that convention shall prevail to the extent of the inconsistency.”

212. The Ghana-EU interim EPA is different, however, in using “Parties” rather than drawing the distinction made in other EPAs between the EC Party and signatory ACP countries in the group acting individually. But as the Ghana EPA defines “Parties” to refer to Ghana and the EC Party, the similar effect is that the exception can be used by Ghana as an individual country; whereas in other EPAs with various ACP signatories, use of “Parties” or “Party” would have meant the ACP countries acting collectively.

213. There are differences in the location of the exceptions. In the Pacific EPA, the exceptions come under the part dealing with trade in goods, rather than later in or just before the final provisions. Notwithstanding their location, the exceptions are to provisions of the entire agreement. In their wording, the exceptions state that “Nothing in this Agreement shall (prevent the measures)”.

Summary and recommendations

214. The taxation exception in the EPAs has the same wording. The security exception also has the same wording except that the SADC EPA appropriately makes reference to the UN charter. An improvement in other EPAs could be explicit reference to regional institutions such as the African Union.

215. The general exception has some differences in the EPAs. The SADC and Pacific EPAs provide that individual signatory ACP countries may take measures. The ESA, EAC and CARIFORUM EPAs additionally provide that the signatory ACP countries may take the measures collectively. Regarding the substantive exceptions in the paragraphs, the ESA EPA doesn’t have the exception on national treatment for tax purposes. Measures taken under the general exceptions should not be disguised restrictions on trade in goods, services or investment.

216. There is scope for harmonisation of the general exceptions. In the security exception, reference could be made to obligations under the UN charter for maintenance of international peace and security, or at least to the regional organisations such as the African Union. It may be worth noting, though, that EPAs are not essentially security agreements, but trade agreements.

H. DISPUTE SETTLEMENT

217. The EPA dispute settlement system is a framework for resolving matters that arise under the agreements, particularly breach of obligations.

218. According to the headings, the dispute settlement mechanism is also supposed to assist avoid disputes. However, other than consultations and other proceedings within the joint institutions set up, it would appear that the actual provisions on dispute avoidance and settlement deal with situations where a dispute has already arisen. What seems to be meant by dispute avoidance is avoidance of full scale arbitration procedures, with emphasis on resolving disputes during the initial stage of consultations.

The brief approach

219. The EAC and ESA EPAs have brief provisions on dispute settlement and list this as one of the areas for continuation of negotiations.⁸⁹ These EPAs have two provisions on dispute settlement, the first dealing with consultations and the other with arbitration.⁹⁰ They are with the same wording, but there are some variations and additions.

220. On consultation, the main obligation or right is that “The Parties shall endeavour to resolve any dispute concerning the interpretation and application of this Agreement by entering into consultations in good faith with the aim of reaching an agreed solution”. The EAC and ESA EPAs don’t define the expression “Parties”, while other EPAs define it to refer to both the EC Party and the ACP countries in the group acting collectively. Under this meaning, the consultation obligation would apply to EAC or ESA countries acting collectively. Also, it is “a Party” that may seek consultations; other EPAs define “Party” to refer to either the EC Party or the ACP countries in the group acting collectively. The EAC and ESA EPAs state that for individual action, reference is made to “signatory ESA States” or “EAC Partner State” respectively; these expressions are not used in the provisions on dispute settlement. Therefore, this provision needs some clarity, to clearly state that any dispute under the agreement should be resolved through consultations and that any country party to the EPA may request consultations.

221. If the intention is that ESA or EAC countries should act collectively in dispute settlement, the approach in other EPAs of defining “Parties” and “Party” may be appropriate to provide better clarity, notwithstanding the agreement in the provisions on parties by EAC and ESA countries to act collectively.⁹¹

⁸⁹ Articles 53(j) of the ESA-EU and 37(g) of the EAC-EU interim EPAs

⁹⁰ Articles 38 and 39 of the EAC-EU and 54 and 55 of the ESA-EU interim EPAs

⁹¹ Articles 44.2 of EAC-EU and 61(2) of ESA-EU interim EPAs

222. The consultations are to be sought by written request and should commence within 40 days of the request, and are deemed concluded within 60 days of the request, which leaves a period of 20 days for the consultations in the case of delay to commence them. In matters of urgency, such as where perishable or seasonal goods are involved, the consultations are to commence within 15 days of the request and will be deemed concluded within 30 days of the request. The consultations are confidential (ESA) and the information disclosed is to remain confidential (EAC). The EAC EPA provides that the consultations should take place under the auspices of the EPA council; the ESA EPA is silent on this matter.
223. Failure of consultations may lead to arbitration. The two EPAs adopt slight variations on the right to resort to arbitration. The ESA EPA provides that “If consultations do not succeed in settling the dispute within the 60 days or 30 days referred to in Article 54 either Party may request settlement of the dispute by arbitration. To this end, each Party shall appoint an arbitrator within thirty days or the request for arbitration by notifying the other Party and the EPA Committee. The request for arbitration shall identify the measure at issue and the provisions of the Agreement that the complaining Party considers the measure not to be in conformity with. In the event of failure to do so, either Party may ask the Secretary General of the Permanent Court of Arbitration to appoint the second arbitrator”; while the EAC EPA provides that “If consultations do not succeed in settling the dispute within the sixty days referred to in the Article 38, either Party may request settlement of the dispute by arbitration by notifying the other Party and the EPA Council. The request for arbitration shall identify the measure at issue and the provisions of the Agreement that the complaining Party considers the measure not to be in conformity with. To this end, each Party shall appoint an arbitrator within thirty days of the request for arbitration. In the event of failure to do so, either party may ask the Secretary General of the Permanent Court of Arbitration to appoint the second arbitrator”.⁹² These variations can demonstrate certain instances for easy harmonisation; for either there is an obvious omission (the non-reference to the shorter period for emergency cases), the placement of sentences (the second and third sentences are inter-changed), or difference in punctuation.
224. The procedure for appointment of the arbitrators is that each party to the arbitration should appoint one arbitrator, and the two appoint the third; but where a party fails to appoint an arbitrator or the two fail to appoint the third, a party may request the secretary general of the Permanent Court of Arbitration to appoint the other arbitrator. The arbitration regulation of the court governs the arbitration unless the arbitrators decide that it shouldn't. The ESA and EAC provisions are similar to provision in the Cotonou Agreement, but the two EPAs omit the word “that” and thus read differently. The Cotonou Agreement provides that “Unless the arbitrator decide otherwise, the procedure applied shall be that laid down in the optional arbitration regulation of the Permanent Court of

⁹² Articles 39.1 of the EAC-EU and 55.1 of the ESA-EU interim EPAs

Arbitration for International Organisations and States”.⁹³ But the two EPAs provide that “Unless the arbitrators decide otherwise, the procedure applied shall be laid down in the optional arbitration regulation of the Permanent Court of Arbitration for International Organisations and States”.⁹⁴ The arbitration process is to be completed within 3 months (EAC) or 90 days (ESA) or in cases of emergency within 60 days (ESA). The EAC EPA does not have a provision on the total duration of the arbitration period in emergency cases. The parties to arbitration are bound by the arbitration decision.

The detailed approach

225. The SADC, Pacific and CARIFORUM EPAs have comparably more provisions on dispute settlement covering more aspects, than the EAC and ESA EPAs.

226. These EPAs provide the objective of the part on dispute settlement in differing terms. The Pacific EPA provides that “The Objective of this Part is to avoid and settle any dispute between the EC Party and Pacific States with a view to arriving at a mutually agreed solution”. The CARIFORUM EPA provides that “The objective of this Part is to avoid and settle any dispute between the Parties with a view to arriving at a mutually agreed solution”. The SADC EPA provides that “The objective of this Part is to avoid or settle any dispute between the parties”. These provisions are dissimilar. The objective is stated as either to “avoid and settle any dispute”, which can be baffling in that if the dispute has been avoided there is no need to go ahead and seek to settle it, or to “avoid or settle any dispute”. The objective is further stated as “reaching a mutually agreed solution” in the Pacific and CARIFORUM EPAs, an addition omitted in the SADC EPA. It could be doubtful whether when consultations and mediation fail to result in a mutually agreed solution and the dispute proceeds to arbitration and the panel produces a ruling, that ruling could still be considered a mutually agreed solution. In this regard, the Ghana EPA provides that “The objective of this Title is to avoid and settle any dispute between the Parties with a view to arriving, where possible, at a mutually agreed solution”.

227. The confusion on parties is evident. The Pacific EPA makes reference to “the EC Party and Pacific States”, and doesn’t mention “Parties”, thus avoiding the confusion. The SADC EPA, however, refers to “parties” (in lower case); rather than “Parties” (capitalized), which the EPA defines to mean both the SADC EPA States acting collectively on the one part and the EC Party. In subsequent provisions, the Pacific EPA makes reference to “parties to the dispute”, which is a clearer expression. The CARIFORUM EPA makes reference to “the Parties”, the expression defined to mean both the CARIFORUM States acting collectively on the one part and the EC Party. This could mean that it is envisaged that the parties to the disputes will be the CARIFORUM States acting collectively on the one part

⁹³ Article 98.2(c) of the Cotonou Agreement

⁹⁴ Articles 39.3 of EAC-EU and 55.3 of ESA-EU interim EPAs

and the EC Party, rather than say one signatory CARIFORUM State against the EC Party, of even one CARIFORUM State proceeding against another CARIFORUM State.⁹⁵ As the Ghana-EU EPA is a bilateral arrangement, the “Parties” including to disputes are clear.

228. The possibility of an ACP country in the group proceeding against another ACP country in that group perhaps requires careful thought; it need not be ruled out especially in light of the undertaking by ACP countries to act collectively, but then rights and obligations as between ACP countries under the EPAs are not explicitly or clearly set out. The EPAs take the form of reciprocal rights and obligations as between the EC Party on the one hand and the group of ACP countries on the other, which would suggest that a breach can occur only as between the EC Party on the one hand and the ACP countries in the group on the other.

229. On scope, the CARIFORUM EPA provides that “This Part shall apply to any dispute concerning the interpretation and application of this Agreement.” The provision then makes the exception that “Notwithstanding paragraph 1, the procedure set out in Article 98 of the Cotonou Agreement shall be applicable in the event of a dispute concerning development finance cooperation as provided for by the Cotonou Agreement”. A further exception is made subsequently that the procedures set out under the provisions on environment and social aspects apply to those areas rather than the procedures under the general part on dispute settlement. It may be noted that the chapter on trade remedies also has exceptions, providing that the EPA dispute settlement procedures don’t apply to antidumping, subsidy countervailing and safeguard measures; it is the WTO procedures that apply.⁹⁶ A careful examination of the EPA may be appropriate to know the exceptions drawn. In this regard, the Pacific and SADC EPAs provide quite simply that “The Part shall apply to the interpretation and application of this Agreement except where otherwise expressly provided for in this Agreement”. The Pacific EPA, but not the SADC EPA, adds the exception for the continuing application of Article 98 of the Cotonou Agreement. The Ghana EPA provides that the title on “partnership for sustainable development” is also not subject to the EPA dispute settlement procedures, and provides for the continuing application of Article 98 of the Cotonou Agreement.⁹⁷

230. Though the exceptions will apply as exceptions where they are provided for whether or not reference is made to them in the general provision on scope, it could read better in light of those exceptions elsewhere and alert users to those exceptions, if the provision on scope clearly indicates that there are exceptions to the application of the EPA dispute settlement procedures. While Article 98 of the Cotonou Agreement may continue to apply, providing for reference of the matters on development finance to the joint ACP-EU Council established under the

⁹⁵ Articles 1 of Part III of the CARIFORUM-EU, 68 SADC-EU, 47 Pacific-EU, and 45 of Ghana-EU EPAs

⁹⁶ Articles 1.7 and 2.4 of chapter 2, Title I of Part II of the CARIFORUM-EU EPA

⁹⁷ Articles 48 of the Pacific-EU, 69 of the SADC-EU and 46 of Ghana-EU EPAs

Cotonou Agreement⁹⁸, or the committee of ambassadors, with the possibility of establishing an arbitration panel, the EPA dispute settlement procedures may be appropriate in this area as well, because the Cotonou Agreement expires in the year 2020, together with the institutions established, while EPAs are of indefinite duration. Also arbitration is still applicable in both cases; but the arbitration procedure under the Cotonou Agreement in accordance with the Optional Protocol of the Permanent Court of Arbitration⁹⁹ may be different from those under EPAs that adopt other procedures and that provide for appointment of arbitrators by the chair or co-chair of the EPA joint institutions rather than the secretary general of the permanent court of arbitration.

231. The EPAs have the following provision on consultations, which is supposed to avoid disputes proceeding to arbitration:

“1. The Parties shall endeavour to resolve any dispute referred to in Article [] by entering into consultations in good faith with the aim of reaching an agreed solution.

2. A Party shall seek consultations by means of a written request to the other Party, copied to [the Trade and Development Committee/ Trade Committee/ EPA Committee], identifying the measure at issue and the provisions of the Agreement that it considers the measure not to be in conformity with.

3. Consultations shall be held within 40 days of the date of the submission of the request. The consultations shall be deemed concluded within 60 days of the date of the submission of the request, unless both Parties agree to continue consultations. All information disclosed during the consultations shall remain confidential.

4. Consultations on matters of urgency, including those regarding perishable or seasonal goods shall be held within 15 days of the date of the submission of the request, and shall be deemed concluded within 30 days of the date of the submission of the request.

5. If consultations are not held within the timeframes laid down in paragraph 3 or in paragraph 4 respectively, or if consultations have been concluded and no agreement has been reached on a mutually agreed solution, the complaining Party may request the establishment of an arbitration panel in accordance with Article [].”

232. The CARIFORUM EPA provides that the separate procedures on environment and social aspects should apply, and only if consultations have not

⁹⁸ Article 14 of the Cotonou Agreement

⁹⁹ The EAC and ESA EPAs provide that the procedures under the Optional Protocol apply

resulted in a solution after nine months can the consultation procedures under the general EPA dispute settlement procedures apply.

233. The SADC, Ghana, Pacific and CARIFORUM EPAs provisions on dispute settlement cover also: mediation (CARIFORUM and Pacific EPAs include timelines while the SADC EPA doesn't); initiation of arbitration procedure (the Pacific EPA specifies that it may be a "complaining Party or Pacific State" to bring the proceedings while the CARIFORUM and SADC EPAs simply refer to "the complaining Party"¹⁰⁰); establishment of the arbitration panel (SADC EPA has different wording though the substance is the same, and the CARIFORUM EPA includes provision that for disputes on environment and social aspects the arbitrators should be experts); interim panel report (SADC EPA provides that in cases of urgency this should be produced within 60 days while the general period is 120 days); arbitration panel ruling (is to be notified within 150 days and not later than 180 days in cases of delay; SADC EPA has the period of 90 days for emergency cases while Pacific and CARIFORUM EPAs provide for 75 days and in case of delay no later than 90 days; also, the SADC EPA uses "party" rather than "Party"; the Pacific EPA uses "parties to the dispute"; there is provision for the panel to make recommendations on compliance with the ruling); compliance with the arbitration panel ruling; the reasonable period of time for compliance (if there is disagreement over the period, the arbitration panel is to "take into consideration the length of time that it will normally take the defending Party to adopt comparable legislative or administrative measures to those identified by the defending Party as being necessary to ensure compliance. The arbitration panel shall also take into consideration demonstrable capacity constraints which may affect the defending Party's adoption of the necessary measures"); review of any measure taken to comply with the arbitration panel ruling; temporary remedies in case of non-compliance (providing for adoption of appropriate measures; the impact on the economy is to be taken into account; SADC EPA provides that where taking appropriate measures by the complaining SADC country would "result in significant damage to the economy", the EC Party shall provide financial compensation instead); review of any measure taken after adoption of appropriate measures; mutually agreed solution can always be sought; rules of procedure (the SADC and Pacific EPAs add also "code of conduct"; the SADC EPA provides that the question of whether proceedings should be open to the public will be addressed by the rules of procedure, and closed sessions should be held where there is confidential information; the EPAs differ on the timeframe for adoption of the rules – the period is open in the Pacific EPA, it is set at 1 July in SADC EPA, and within 10 days of the provisional application in the CARIFORUM EPA); information and technical advice may be obtained (*amicus curiae*); languages of the submissions; rules of interpretation (Pacific EPA doesn't have this provision); arbitration panel rulings (panels are to reach their decisions by consensus or failing this by majority vote; and the ruling is to be reasoned); list of arbitrators (SADC EPA provides for 21 arbitrators by the Trade and

¹⁰⁰ "Party" is defined to mean either the EC Party or the group of ACP countries acting collectively

Development Committee and 8 selected by each Party); relation with WTO obligations (WTO obligations are not to be covered); and time lines.

Africa's concerns about the WTO dispute settlement system

234. Experience at the WTO and the concerns developing countries have raised in the negotiations for improvement of the WTO dispute settlement system should be taken into account, with a view to avoiding problems associated with that system. In the assessment of the Group, "African Members, many of them being least-developed country Members, have not been active participants in the WTO dispute settlement system (DS). This diminutive participation is not because they have never had occasion to want to enforce their rights, or the obligations of other Members, but due to structural difficulties of the DS. An equitable outcome of the negotiations must include solutions that will clearly facilitate and support the full participation of African Members in the DS".¹⁰¹

235. The Africa Group proposal to the WTO negotiations on dispute settlement indicates the problems that African countries have had seeking to use the WTO dispute settlement system, as follows:

"The major problems African Members face in seeking to use the DS include the following:

- The DS is complicated and overly expensive;
- Injury suffered has not been satisfactorily compensated in situations where the offending measures are withdrawn before or after the commencement of proceedings;
- The means provided for enforcement of findings and recommendations (trade retaliation) are skewed against and disadvantage African Members;
- In its operation, the DS should not abstract itself from the development fundamentals. Experience has shown that the DS has not satisfactorily and clearly aimed in its operation to contribute towards the tangible attainment of the development objectives of the WTO Agreement;
- The special procedures for developing country Members have not addressed the core difficulties African Members face in seeking to use the DS;
- In their interpretation and application of the provisions, the panels and the Appellate Body have in several instances exceeded their mandate and fundamentally prejudiced the interests and rights of developing-country Members as enshrined in the WTO Agreement;
- The panel and Appellate Body composition and operation have not been conducive to ensuring the achievement of the development objectives of the WTO and of equity in geographical distribution; and
- The core development and equity concerns of African Members have not been taken into account in assessing the operation and the need for

¹⁰¹ Paragraph 1 of the Africa Group Proposal on WTO Negotiations on the WTO Dispute Settlement System, WTO document TN/DS/W/15 dated 25 September 2002

improvement of the DS. From the perspective of the African Group, any assessment and improvement of the DSU should be primarily based on the development objectives set in the WTO Agreement.”¹⁰²

236. On the basis of these concerns, an appropriate dispute settlement system should have the following elements. The system should fully reflect and implement the development objectives of the EPAs. It should be simple and affordable for African countries. It should address all injury suffered, and not focus on technicalities to deny justice. It should equip African countries with effective sanctions in case of breach of obligations by the EU side. It should be predicated upon the principle of special and differential treatment for African countries. Provision should be made for the panels of arbitrators or judges to always include individuals from Africa.

237. A dispute settlement system in the EPAs has various important implications that should be fully taken into account. There are resource implications, for litigation or arbitration or any other dispute settlement is quite expensive to initiate and conclude, in terms of fees, expenses and materials. Also, there are resource implications in terms of educating, hiring and retaining sufficiently skilled lawyers and other experts. Then there are institutional implications. Within the Justice ministries or the attorneys-general chambers, or the institution of the government lawyer by whatever name known, there must be the institutional readiness to take on cases expeditiously. This requires a close working relation with the private sector and a good monitoring system to notice any breached of the rules where redress would be required.

Summary and recommendations

238. The EPAs take two main approaches to dispute settlement provisions: the brief and the detailed. The EAC and ESA EPAs have brief provisions, along the lines of those of the Cotonou Agreement. The SADC, Ghana, Pacific and CARIFORUM EPAs have quite detailed and specific provisions that attempt provisions on various aspects of dispute settlement both the procedural and institutional or organisational. However, these provisions are not as detailed and specific as those of the WTO dispute settlement system though they may read alike in some key areas of substance. Some of the EPAs attempt to deal with pertinent problems African countries have raised in WTO negotiations on improving the WTO dispute settlement system, for instance, the SADC EPA’s provision for financial compensation from the EC Party where appropriate measures would hurt the country taking them.

239. The brief approach still manages to contain the essential elements of dispute settlement, and could be maintained. However, there could be merit in adding the institutional or organisation aspects, to have ready lists of arbitrators

¹⁰² Paragraph 2 of the Africa Group Proposal on Negotiations on the Dispute Settlement Understanding, WTO document TN/DS/W/15 dated 25 September 2002

and expertise particularly within the region, to take into account the concern expressed by African countries that there was need to use individuals from African countries who could contribute a balanced understanding of development and other pertinent issues at stake. In this regard, the appointment of arbitrators could be made from such lists. Also, there is need to build institutional readiness for African governments to take up cases that arise.

I. FINAL PROVISIONS

240. The interim EPAs have final provisions.

241. These cover, for EAC and ESA, relation of the interim EPA to the full EPA (ESA provides that the comprehensive EPA will prevail over the interim EPA in cases of inconsistency, while EAC provides that the interim EPA will cease upon the entry into force of the full EPA), parties, entry into force and denunciation, territorial application, relation with other agreements, access of new members to EU (and to EAC), outermost regions of the EC, and authentic text. ESA EPA additionally has provisions on duration (the framework agreement is of indefinite duration but the comprehensive EPA will prevail in cases of inconsistency), and amendments.

242. SADC general and final provisions cover: parties, exchange of information, transparency, temporary difficulties in implementation, regional preferences, outermost regions, relation with the Cotonou Agreement, TDCA, and WTO Agreement; entry into force, duration (the agreement is of indefinite duration), territorial application, revision clause (providing for reviews), amendment, accession (any third country or organisation can accede), language and authentic text.

243. CARIFORUM general and final provisions cover: parties, coordinators and exchange of information, transparency, dialogue on financial matters, collaboration against illegal financial activities, regional preferences, outermost regions, balance of payments, relation with the Cotonou Agreement and with the WTO Agreement, entry into force, duration (indefinite duration), territorial application, revision clause (providing for review at expiry of Cotonou Agreement and for extension), accession, authentic texts.

244. Final provisions are important and need careful attention in the ongoing negotiations. To highlight this importance, the rest of this chapter deals with parties, signature, ratification, entry into force, and accession. It could be worth noting that there aren't any or clear common African positions on most of the final provisions. This deserves urgent attention, so that the regions can have due guidance in the negotiations.

Parties

245. The initialled EPAs define “parties”.¹⁰³ On the EU side, the parties are the member states and the European Community referred to as the “EC Party”. For the ACP groups, the individual countries are listed as the parties in the preamble, but the provision on parties defines ACP parties in terms of collective and individual actions. For individual action, reference is made to the countries; and for collective action, reference is made to the entire group as a party, for instance, “the EAC Party”. Also, there is the agreement that the ACP groups will act collectively unless otherwise specified. For

¹⁰³ Articles 44 of EAC-EU, 61 of ESA-EU, 97 of SADC-EU, 70 of Pacific-EU, 72 of Ghana-EU, 72 of Cote d'Ivoire-EU interim EPAs; and article 1 of part VI of CARIFORUM-EU EPA

instance, the ESA EPA states: “For purposes of this Agreement, unless otherwise expressly provided, the ESA States agree to act collectively. In cases where individual action is provided for or required to exercise the rights and or comply with obligations under this Agreement reference is made to ‘signatory ESA State’ ”.¹⁰⁴

246. The SADC, Pacific, Ghana, Cote d’Ivoire and CARIFORUM EPAs draw a further distinction between “Party” and “Parties”; where party refers to either the EC party or the ACP group collectively, and parties to both the EC party and the ACP group. For instance, the SADC EPA states: “the term ‘Parties’ shall refer to the SADC EPA States acting collectively and the EC Party. The term ‘Party’ shall refer to the SADC EPA States actively collectively or the EC Party as the case may be. The term ‘SADC EPA States’ shall refer to the EPA SADC States acting individually.”¹⁰⁵ The Pacific EPA goes further to define LDCs and small island states.¹⁰⁶

247. The issue of parties became critical because the EU negotiators were keen to see the ACP regions form customs unions or adopt single starting lines, which would be the basis for their market access offers and the starting point for reduction of duties on imports from the EU. ACP groups were on the whole uncomfortable with this approach except those which were already customs unions; they preferred differentiation. They urged the EU side to respect their regional integration programmes, including in the pace and depth. In particular, ACP groups did not want to be put under pressure to form customs unions well ahead of their set timeframes. It is the individual countries in the group that they preferred to be parties to the EPAs, rather than the group as such. But as indicated, the initialled EPAs provide for the possibility of ACP groups acting collectively.

248. EU negotiators were keen to introduce the possibility of sanctions in the form of “appropriate measures”, which include “suspension”, for situations of lack of respect for human rights, democratic principles, rule of law, and corruption as provided in the Cotonou Agreement.¹⁰⁷ The ACP groups understood the EU negotiators to be keen on collective obligations with the possibility of collective sanctions for breaches by any one of the countries in the group; the groups were consistently opposed to this approach. The initialled EPAs state that they do not affect the Cotonou Agreement provisions on appropriate measures; and in the case of the CARIFORUM EPA, it is indicated that the appropriate measures may include the trade-related.

249. It became critical also because the ACP negotiating groups as such were not legal entities established by treaty, with the capacity to be parties to agreements; rather, they were informal groups formed for the purpose of the EPA negotiations. Notwithstanding this, the initialled EPAs have made provision for collective action by these informal groups now also defined as a party.

¹⁰⁴ Article 61(2) of ESA-EU interim EPA

¹⁰⁵ Article 97(2) of the SADC-EU interim EPA

¹⁰⁶ Article 70 of Pacific-EU interim EPA

¹⁰⁷ Articles 11b, 96 and 97 of the Cotonou Agreement

250. Some ACP groups took keen interest in the matter because they wanted EU member states, not just the European Community, to assume obligations particularly in the area of development cooperation with the possibility of providing additional resources above those committed under EDF 10. Provision is made in the EPAs for EU member states to continue their development cooperation in accordance with their policies and instruments. In these terms, this provision may have only little additional value rather than introducing a substantive new obligation.

251. Provisions requiring collective action may have the implication of collective responsibility, which ACP countries vigorously objected to when advanced by EU negotiators. It is not clear whether when collective obligations are breached by one country the entire group will not be held responsible and whether in the event of a breach the EU side might not seek redress against the entire group. A basic interpretation would be that the entire group is required to be collectively responsible for implementation and compliance with the obligations where they are to act collectively. However, a close examination of the provisions demonstrates some lack of consistency in the references to party, parties, or individual states. It might well be that these distinctions were not necessary with respect to the ACP groups, particularly the provision for collective action since the joint institutions will assist in collectivising action on EPAs.

252. While the EU can act collectively through the European Commission in matters within the competence of the community, African regions have not yet attained the degree of integration where autonomy in the conduct of their external trade regime is vested and shared in a specific institution that embodies the countries in the regional organisation. If the EPAs can be considered to have the result of constituting the ACP groups into legal entities with the capacity and collective obligations for purposes of trade relations with the EU, this could be considered quite drastic in counter-posing these institutions to the recognised regional economic communities without explicit provisions establishing the relation between the two sets of institutions.

Signature

253. The SADC, ESA, EAC and West African interim EPAs provide that they shall be signed.¹⁰⁸ After the initialling of the interim EPAs, marking an end of the negotiations but subject to the understanding that certain aspects would still be subject to on-going negotiations, the agreements require formal signature. The Vienna Convention on the Law of Treaties provides that the following have authority to sign treaties: heads of state, heads of government, ministers of foreign affairs, representatives accredited by states to the conference or to the international organisation, heads of permanent missions to an international organization, and persons producing appropriate full powers. Individual countries will have to be the signatories through their representatives.

254. The EAC secretary-general also initialled the interim EAC-EU EPA, though the EAC is not mentioned in the preambular recital or in the article defining the parties¹⁰⁹ as

¹⁰⁸ Articles 105 of SADC-EU, 45 of EAC-EU, 62 of ESA-EU, 75 of Ghana-EU interim EPAs

¹⁰⁹ Article 44 of the EAC-EU interim EPA

a party to the EPA. African regional organisations may sign the agreements and be party to them, where their constitutive instruments provide for this possibility, and in accordance with the authorisations required within the organisations.

255. There is merit in having the African regional economic communities, represented by their secretariats or commissions, as parties to the EPAs. The RECs would have a seat at the table, and be seen and heard; this is symbolic enough. The RECs would then hopefully ensure that aspects of regional integration are maintained on the agenda of important EPA events and programmes, such as ratification, implementation, compliance, monitoring, and review.

256. In the event of the organisation being party to the EPAs, it should be made clear that the organisations will not be subject to certain obligations, or may not exercise certain rights. This would be important, for instance, in the requirements for compatibility with GATT Article 24. The regional organisations as such are not WTO members who can invoke and benefit from the exception for FTAs and customs unions contained in Article 24. They would not be required to undertake tariff elimination and have the schedules, or be held responsible in the event that any country breaches such obligations.

Ratification

257. The interim EPAs provide that they will be ratified¹¹⁰ or accepted or approved in accordance with the domestic procedures or internal rules, by all parties. Ratification as an international act may be undertaken subsequent to internal procedures for approving the agreement. It is not compulsory; it remains open to a party to decline to ratify an agreement after signing it.

258. There can be at least two domestic ways for approving an agreement, that is, by cabinet alone or with the prior approval of parliament; after which the head of state or the foreign affairs minister can then transmit the instrument of ratification. This distinction is important to note because one is by the executive arm of government which negotiated the agreement, while the other is a parliamentary act done by the representatives of the people in a democratic environment.

259. According to Oppenheim's International Law, "Ratification normally takes the form of a document signed by the Heads of the States concerned or their foreign ministers. ... Ratification is effected by that organ which exercises the treaty-making power of the state – normally the Head of State or its government. If the Head of State ratifies a treaty without first fulfilling the necessary constitutional requirements (as, for instance, where a treaty has not received the necessary approval of the Parliament of the

¹¹⁰ Ratification is defined by the Vienna Convention, article 2(1)(b), as the "international act so named whereby a state establishes on the international plane its consent to be bound by a treaty"

said state), his purported expression of his state's consent to be bound by the treaty may be invalid.”¹¹¹

260. In light of the far reaching implications of the EPAs, and their indefinite duration, it could be advisable that the ratification process is given careful attention. Considerations in this regard could include, oversight functions of parliaments in democracies, promoting national and regional ownership of the agreements, initiating an important and comprehensive process of creating public awareness about the agreements, and providing a framework for monitoring, evaluation and political accountability under the agreements. Parliamentary approval would be appropriate in the circumstances.

261. Provision could be made in the EPAs for parliamentary approval where the possibility is provided for in the domestic laws on entering international obligations. In some countries, parliamentary approval is required for agreements with important implications for the country. Where there is absolutely no possibility of parliamentary approval, parliaments could still be involved through having opportunities to pronounce themselves on the agreements before they are ratified, on the basis of parliamentary oversight functions.

Entry into force

262. Before signature, the initialled EPAs do not have the effect of imposing obligations to be implemented. After signature, but before ratification and entry into force, the EPAs will have contractual effect, so that the signatories are required not to act in a manner that defeats the object and purpose of the EPAs; there may however be no obligation to implement the EPAs until they enter force unless the possibility of provisional application as provided has been exercised by a signatory.

263. All the interim EPAs have provisions on their entry into force.¹¹² The interim EPAs provide that the agreements will enter force upon ratification by all parties. The agreements enter force one month after receipt of the last ratification, except for SADC where the period is two months. The agreements provide for three stages in this regard: application of the agreement through a unilateral initiative (the European Union regulation of 20 December 2007 providing DFQF access for ACP countries that have initialled the EPAs, may not qualify as an action under the EPAs for it was adopted before signature of the EPAs), provisional application by the parties, and application upon entry into force of the agreement upon ratification by all the parties.

264. Ratification by all parties as a condition for entry into force can assist regional integration; for all countries in the group assume obligations and rights and this at the same time. In this way, regional integration is not disrupted through different obligations and rights assumed by some of the countries of the group, for instance those that would affect the maintenance of a common external trade regime. This reasoning, however, was

¹¹¹ Sir Robert Jennings and Sir Arthur Watts, (eds) *Oppenheim's International Law*, 9th Edition. London, New York, Longman, 1996; Paragraph 606

¹¹² Articles 76 of Pacific-EU, 105 of SADC-EU, 45 EAC-EU, 62 ESA-EU, 75 Ghana-EU interim EPAs

not extended to the signature of the EPAs; the requirement would have been that only EPAs that would be signed by all the countries in the group could be concluded; more or less along the lines of taking decisions by consensus at the level of the group.

Accession

265. The EPAs have provisions on accession.¹¹³

266. The EPAs provide for accession to the EPAs for new members of the EU, either automatically in their instrument of accession to the EU or subsequently by depositing the instrument. The EAC EPA also provides that new EAC members shall accede to the EPA. In the accession negotiations, the EU or the EAC as the case may be is to keep the other party informed and the party may raise issues. The implications are to be considered in the joint bodies.

267. The ESA EPA lists the ESA countries that can accede to the EPA, and additionally provides that any country in the region may accede. There is no such provision for other countries in the region in the EAC EPA. The SADC EPA provides in general terms that any third country or organisation can accede to the EPA. The West African EPA provides for the conclusion of a global EPA covering the countries of the West African configuration. There is a divergence in the approach taken by the African regions.

268. The Pacific and CARIFORUM EPAs provide that any Pacific or Caribbean state, respectively, can accede to the EPAs. The Pacific EPA has the condition that accession would be on the basis of a market access schedule compatible with GATT Article 24, and allows non-signatories to the Cotonou Agreement also provided they share similar characteristics with the signatories to the agreement.

Summary and recommendations on final provisions

269. Final provisions in the EPAs cover the following: parties, signature, ratification, entry into force, denunciation, depositary, accession to the EPA, accession to the EU, accession to African regional economic communities, territorial scope, review or revision, relation to the full EPA, conflict with other agreements or relation to other agreements particularly the WTO and the Cotonou Agreement, duration of the EPA, amendments, authentic texts, and annexes. But not all the African EPAs have all these provisions.

270. In some EPAs, provisions establishing the institutions are also included under final provisions, and in others, dispute settlement as well. Some EPAs cover additional miscellaneous matters, such as illegal financial activities. Perhaps a better approach could be to have provisions establishing institutions under a separate part or chapter, and those

¹¹³ Articles 110 and 111 of SADC-EU, 66 and 67 of ESA-EU, 50 and 51 of EAC-EU, 44 of the Ghana-EU, 79 and 80 of Pacific-EU interim EPAs; and 15 and 16 of Part VI of the CARIFORUM-EU EPA

on dispute settlement also under a separate part or chapter; as these are substantive matters of a specific category.

271. Final provisions are important and could be given careful attention. This may require dedicated sessions in the negotiations. It would be preferable if all the African EPAs covered the same areas and had similar provisions in the final provisions, subject to regional specificity.

272. Caution may be advisable in accepting to act collectively. As indicated in the negotiations, the possibility of collective sanctions against African groups under EPAs could be explicitly excluded.

273. The initialling of the EPAs has averted the EU threat of trade disruption through imposing high customs duties on certain products under the GSP. This now allows sober consideration of all key issues. There should be no rush or pressure to sign and ratify the interim EPAs particularly given that controversial issues have been included in the interim EPAs and that some provisions were not subject to a negotiating process in accordance with established structures (they were introduced at the last minute). Given the controversial areas and the implications, the EU side would have to be magnanimous in this regard and not narrowly focus on looking good at the WTO by putting pressure on African countries to speedily sign the agreements.

274. The focus should rather be on the continuation of the negotiations. The controversial issues in the interim EPAs could be prioritised, as starting points of the ongoing negotiations; as well as development in the interim EPAs where this was not adequately covered. Once the ongoing negotiations are concluded, preferably on the basis of consensus of all countries in the groups, then the steps to bring the agreements into force should be taken.

275. For African EPAs, accession provisions should explicitly proceed from the premise of the ongoing regional integration processes, which aim to create regional customs unions and common markets as building blocs for the continental customs union and common market. It is envisaged that the African regional economic communities will have closer trade and economic ties among themselves and eventually form the African common market, which will be the institution under which African countries will jointly have trade relations with other countries including the EU. Steps should therefore be taken to ensure that EPAs, as agreements of indefinite duration, do not purport to be stand-alone agreements that will operate outside the ongoing integration process.

276. Provision should be made for a continental review of the EPAs at the time when sufficient progress will have been made towards launching the African customs union and common market and in any case no later than the year 2020. The purpose of this particular review will be to align the EPAs to the common external trade regime of the African common market.

J. THE INTERIM EPAs AND THE AU DECLARATIONS

277. The Conference of African Union Trade Ministers has adopted the following declarations on negotiations for economic partnership agreements: The Mauritius declaration of 2003, the Cairo declaration of 2005, the Nairobi declaration of 2006, and the Addis Ababa declaration of 2007. The African Union Assembly of Heads of State and Government also adopted declarations on EPAs at their sessions in January 2007 and January 2008. The declarations constitute the common African positions on economic partnership agreements, and were prepared with the participation of the member states engaged in the EPA negotiations and the secretariats of the negotiating groups, which, with the commission of the African Union, constituted the drafting committees that prepared the drafts for the negotiations. From the declarations the following are the key common African positions on economic partnership agreements:

Unity and solidarity

278. The unity and solidarity of the ACP group and of Africa should be preserved in the EPA negotiations.¹¹⁴

279. The fact that there are five negotiating groups in Africa, and that each has initialled a separate EPA with some significant differences in the provisions, might strongly indicate that the EPA negotiations and the agreements of indefinite duration have weakened the unity and solidarity of Africa. While an all-Africa EPA was not agreed as a modality for negotiating the EPAs, there should be concerted efforts to assist the unity and solidarity of Africa through extensive harmonisation of the different agreements, while fully taking any important regional specificity into account.

280. On the other hand, a degree of unity and solidarity has been maintained by Africa through the annual sessions of the conference of African Union trade ministers where declarations on EPA negotiations have been adopted as common African positions. Besides this, there are various events that bring together African negotiators, organised by the African Union Commission, and other intergovernmental and civil society organisations. What would be required would be a mechanism that translates the outcomes of these meetings into agreed and harmonised text that can be uniformly included in the agreements in the negotiations, drawing also on the initiative of EU negotiators to produce text or model clauses for negotiations with all the various ACP groups.

Extension of the period for EPA negotiations

281. The period for EPA negotiations should be extended beyond the 31 December 2007 time frame. At its Addis Ababa summit of 29-30 January 2007, the African Union Assembly called “on the European Union to extend the deadline for the completion of

¹¹⁴ Paragraphs 1 and 2 of the Mauritius African Union Assembly Declaration on EPA Negotiations, AU document Assembly/AU/Decl.5 (II)

negotiations beyond the December 2007 time frame and to explore the alternatives of Economic Partnership Agreements as required by the Cotonou Partnership Agreement.¹¹⁵

282. After this, some EU negotiators kept pointing out it was not up to the EU to extend the deadline, but the WTO, which they then argued was an impossibility. This was going to be because of opposition from other developing countries and the huge price that would have to be paid to these countries by the ACP countries in terms of, say, reduced market access due to increased quotas and preferential treatment these developing countries were likely to demand.

283. Before the Addis Ababa declaration, the ESA and West African negotiating groups had each called for a possible extension of the period for the EPA negotiations. ESA council and summit had said the group would call off the negotiations until the EU agreed to negotiate a development chapter on the basis of the text produced by the ESA group. However, not long after the Addis Ababa declaration, the negotiating groups, in joint ministerial declarations with the European Commission, re-committed themselves, as is the nature of negotiations to finalising them within the timeframe of 31 December 2007.¹¹⁶

284. Looking back, there seems to be evidence now that the African Union summit was right in the assessment that the period needed to be extended, since negotiations will continue into 2008 and for the EAC into July 2009. Besides, some groups have already begun to indicate that just 12 additional months might not be enough for finalisation of key outstanding issues. It could therefore be put down as a fundamental issue that the ACP African ministers entered the joint declarations that were not entirely consistent with the African Union summit declaration in respect of the timeframe. Had arrangements been made in good time to extend the negotiations, with clear provision for priority areas that needed to be finalised by December 2007, better focus could have been given to negotiating and finalising a deal on market access and development. But as it turned out, valuable time was spent on many other areas where convergence of positions was not realistic in the short time of less than 12 months remaining to the deadline. The inconsistency also sent out an unfortunate political message, indicating some serious incoherence and weakness in the African negotiating structures.

285. One might argue that the damage has now been repaired to some extent by agreement to continue the negotiations beyond the 31 December 2007 time frame, and better caution will be exercised, giving due consideration to maintaining the unity and solidarity of Africa and standing by the common African positions adopted collectively.

Comprehensive review of EPA negotiations

286. The African negotiating groups were to coordinate the EPA comprehensive review, and produce a consolidated report with the assistance of the ECA and African

¹¹⁵ Paragraph 3 of the Addis Ababa African Union Assembly Declaration on EPA Negotiations, AU document Assembly/AU/Decl.1-6(VIII)

¹¹⁶ Section 2 of the joint ACP-EU report on the review of EPA negotiations

Union Commission; in this regard all alternatives were to be explored to avoid trade disruption.¹¹⁷

287. The ACP secretariat commissioned the production of the all-Africa report on the comprehensive review to the Economic Commission for Africa, which worked closely with the Commission of the Africa Union. The report was produced and presented to the ACP senior officials meeting preceding the Ministerial Trade Committee.¹¹⁸ The report had earlier been presented to the senior officials' meeting preceding the session of the conference of African Union trade ministers that took place in January 2007 in Addis Ababa just before the summit; and its findings had been endorsed and included in the declarations on EPAs adopted.

288. However, the negotiating groups subsequently produced joint reports with the European Commission, which did not satisfactorily reflect the findings and recommendations of the all-Africa report; or the independent reports the secretariats of the groups had commissioned to consultants, which were critical of the EPA negotiations. At the all-ACP level, the joint report of the ACP and European Commission was a compilation of the regional joint reports, with an initial part that contained a recommitment to completion of the negotiations by 31 December 2007 and the usual rhetoric, as it became, that EPAs should be tools for economic development and should support regional integration.

289. It would be unfair to expect that the joint reports should have included all issues raised in the all-Africa report or the independent reports, since the joint reports were negotiated outcomes that accommodated the concerns and priorities of the European Commission as well. However, it is generally felt that the joint reports amounted to a lost opportunity to squarely introduce key priorities at that stage of the negotiations, such as extension of the period for completion of the negotiations, assessment of building the competitiveness of ACP economies during the preparatory period as a pre-condition for conclusion of EPAs, the condition of the EU providing commensurate resources as a pre-condition for the agreements, and prioritisation of explicit provisions to promote and give precedence to the regional integration process and the consolidation of regional markets prior to elimination of duties on imports from the EU.

Harmonisation of the EPAs

290. "...The different EPA groupings should harmonise their positions on issues of common interest before final decisions are taken".¹¹⁹

¹¹⁷ Paragraphs 4 and 6 of the Addis Ababa Ministerial Declaration on EPA Negotiations, AU document Min/Min/Decl.2(III); and paragraph 15 of the Nairobi Declaration on EPAs, AU document TI/MIN/MIN/Decl.2(IV)

¹¹⁸ The report is entitled "EPA Negotiations: African countries continental review", dated 19 February 2007

¹¹⁹ Paragraph 3 of the Cairo Ministerial Declaration on EPA Negotiations, AU document AU/TI/MIN.DECL. (III);

291. While the clarity of this recommendation by the African trade ministers could have been better, the gist is that a harmonisation exercise was envisaged, where all the African groups would compare their positions with a view to harmonising them, and the timing of this exercise was to be before the negotiations were concluded. The initialling of the EPAs, technically marks the conclusion of the negotiations. This would mean that the harmonisation exercise has not been undertaken as recommended.

292. But in the specific circumstances of the EPA negotiations and in light of the provision in the interim agreements for continuation of the negotiations, there is still a reasonable opportunity to undertake the harmonisation exercise before conclusion of the on-going negotiations. Also, final decisions could refer to the exercise of signing the agreements, for that is when final decisions are taken. Before the signing of the EPAs, then, there could be a harmonisation exercise but this exercise would have to be undertaken sooner rather than later.

293. The form of the harmonisation exercise is not indicated. In practical terms, the form and substance of the exercise can be determined by the expected outcome. If the expected outcome is a general agreement on broad positions, then a formal meeting such as the trade ministers' meeting or a short workshop of the negotiators and secretariats could suffice. Where the expected outcome is harmonised text, or recommended model clauses, the harmonisation exercise could require the formation of a drafting committee or a technical working group, with representation from all the negotiating groups. Such a committee or working group would need to meet several times or over an extended period of time, in order to address all the various subject matter to be included in the EPAs. The work of such a committee or working group could be facilitated by resource persons, or even the secretariats of the negotiating groups, that prepare the working documents.

On-going integration processes and coordination

294. EPAs should support the on-going integration process in Africa. The fourth ordinary session of the conference of African Union trade ministers held in Nairobi, on 14 April 2006, said that "the agreements should be consistent with the objectives and process of economic integration in Africa in accordance with the Constitutive Act of the African Union and the Treaty Establishing the African Economic Community. (It urged) development partners to fully respect our fundamental concerns in this regard and to refrain from pursuing negotiating objectives that would adversely affect these existing programmes and process for economic integration in Africa"¹²⁰.

295. The African Union Assembly in its Mauritius Declaration on EPA Negotiations directed "African negotiators to ensure that EPAs are compatible with the objectives and principles of the Constitutive Act, the Abuja Treaty¹²¹ and the African Union Programme

¹²⁰ Paragraph 5 of the Nairobi Declaration on EPAs, AU document TI/MIN/MIN/Decl.2(IV)

¹²¹ This is the Treaty Establishing the African Economic Community concluded in Abuja on 3 June 1991, and entered force on 12 May 1994.

NEPAD”.¹²² The trade ministers in their declaration, in Mauritius, said that “EPAs should facilitate the implementation of regional integration initiatives in Africa and ensure coherence and consistency between the integration process in Africa including NEPAD and the AU. Consequently the EPA should be underpinned by the principle of sequencing, with ACP and African integration initiatives taking precedence”.¹²³

296. The question of regional integration could be considered to have been taken quite seriously in the EPA negotiations, given the spattering of references to it in some of the interim EPAs; and it is possible to indicate some concrete outcomes.

297. Various provisions in the interim EPAs make explicit reference to regional integration in Africa, such as those that provide for harmonization of customs legislation and standards at the regional level; or preserve the preferential treatment among members to the regional economic community and exclude the EU from benefiting from it while requiring that any better preferential treatment accorded to the EU should also be accorded to other members of the regional economic community and other African countries; or the possibility of the regional economic communities, such as the EAC, being party to the EPA though understandably such a community would have to have the same membership at that of the EPA group.

298. The East African Community partner states decided, at ministerial level, after some quite acrimonious internal meetings, to negotiate as a bloc in compliance with a longstanding directive from the Assembly of the East African Heads of State and Government given on 11 April 2002. The difficulty in finally agreeing to negotiate as a bloc, at ministerial level, was unexpected. It has been pointed out that COMESA is increasingly becoming the leading export market for some East African countries, ahead even of the European Union market and that for this reason membership or at least close association with ESA was considered crucial. This argument may not be valid, for as institutions COMESA is different from ESA and leaving ESA did not constitute leaving COMESA.

299. The transition period for the EPAs of 15 or more years could make time for consolidation of African regional markets and for the creation of the regional and the African common market in accordance with the time frame under the Treaty Establishing the African Economic Community.

300. However, the bulk of the tariff elimination is planned for an earlier period. The BNLS countries in the SADC EPA, for instance, are to eliminate tariffs on 86% of imports from the EU within 8 years, that is, by 2016. Comoros (98%), Madagascar (89.3%), Mauritius (96.6%), Seychelles (97.7%) and Zimbabwe (87%) in the ESA group are to eliminate their duties within 14 years, that is, by 2022¹²⁴. The EAC countries are to eliminate duties on 80% of the value of imports within this period and 64% within the first two years of the EPA – it has been explained that the duties on these items, being

¹²² Paragraph 7 of the Mauritius summit declaration

¹²³ Paragraph 8 of the Mauritius declaration

¹²⁴ The figures are percentages of tariff lines. The pace of the liberalisation differs for these countries.

38% of the tariff lines, is already zero percent. Ghana is to eliminate duties on 80.5% of the tariff lines and Cote d'Ivoire on 88.7% within the period. This means that by the time the African common market is established, in accordance with the set time frame, many African countries will already have obligations of indefinite duration to eliminate customs duties on imports from the EU.

301. One way of dealing with this has been to expedite the process of formation of regional and the African customs unions and common markets. The EU negotiators have done this by insisting that the groups adopt single starting lines or common external tariffs on the basis of which to make their market access offers to the EU and on the basis of which tariff reductions will be staged. This, however, does not address the problem, because once the tariff elimination schedules are agreed in the EPAs, ahead of the formation of the customs unions, the changes that would result at the formation of the customs unions would constitute changes to international obligations for which the EU side could stage some claims, unless explicit provision has been made in advance permitting the changes in due course. Also, reductions on the common external tariff under separate tariff elimination schedules with different paces and depths, as in the case of the four ESA countries as well as Ghana and Cote d'Ivoire could affect the obligation on each of the members of the customs union that "substantially the same duties and other regulations of commerce are (to be) applied by each of the members of the union to the trade of territories not included in the union"¹²⁵.

302. Membership in the EPA groups is different from membership in the corresponding regional economic communities (RECs). In addition, except for EAC, not all members of the EPA groups have initialed the respective EPAs. This means that within each of the RECs, there will be members under an obligation to accord certain preferential treatment to the EU on given terms and conditions that other members of the REC are not under, which complicates the adoption and maintenance of common external trade regimes by customs unions as envisaged in the African integration process.

303. Apart from the BNLS countries of SADC and EAC, each of the countries that has initialed the EPA in Africa has its own tariff elimination schedule on imports from the EU, differing in pace and depth from others. South Africa has a separate tariff schedule under the TDCA, though it is in the Southern African customs union with the BNLS countries. The ESA EPA explicitly provides that each ESA country will have its own tariff elimination schedule but there will be a possibility of harmonization taking regional integration into account. Given that COMESA plans to launch its customs union shortly, in December 2008, this provision for harmonization in due course might not be realistic. In the circumstances, the separate tariff schedules were not necessary, though this approach could have resulted from the uncertainties over the possibility of a common ESA offer after it was attempted. The schedules should be harmonized in the ongoing negotiations before December 2008, on the basis of the planned COMESA common external tariff, if the COMESA customs union is to be formed.

¹²⁵ GATT Article 24 paragraph 8(a)(ii)

304. The formation of regional and continental customs unions and common markets, is pre-empted by the indefinite obligations in the EPAs once they enter force upon the ratifications, well ahead of the time frames for formation of those customs unions and common markets. As indicated, this may require a continental review of the EPAs before the set time for formation of regional customs unions and common markets; and before the formation of the African common market.

Coordination of the EPA negotiations

305. The African Union Assembly meeting in Mauritius mandated the Commission of the African Union “to coordinate, monitor and harmonise the efforts of the concerned RECs and Member States in the negotiations of EPAs with the EU; and establish an appropriate mechanism for cooperation and coordination between the Permanent Representatives’ Committee in Addis Ababa, the African Groups of Ambassadors and Negotiators in Brussels and Geneva, as well as the capitals of concerned Member States.”¹²⁶

306. It is widely felt that the Commission of the African Union has not implemented this mandate as well as would have been desired, particularly because coordination meetings for the secretariats and the technical negotiators have not been held regularly enough and a coordination mechanism including Brussels and Geneva based officials that would meet regularly was not put in place. Also, at the Commission of the African Union, there would appear to have been in the recent past some critical staffing shortages, which increasingly are being addressed.

307. In response to these views, the Commission of the African Union has pointed out the annual sessions of the conference of African Union trade ministers, to which Brussels and Geneva based negotiators are invited; the various workshops held; and interactions with the European Commission and EU member states in the commission-to-commission meetings, the Africa-Europe Dialogue, and the letters to the European Commission on key issues.

308. The Commission of the African Union has repeatedly pointed out that the negotiating groups have not invited it to their EPA events such as the negotiating sessions and preparatory meetings, except the ESA group; and that this has not facilitated its coordination mandate. The groups, except ESA, have not provided regular updates to the commission on the state of play of the negotiations, except at the annual sessions of the trade ministers’ conference where each of the groups is normally scheduled to present a report.

309. What seems critical at the moment, in light of the continuation of the negotiations, is for the commission of the African Union to plan and hold regular coordination meetings for all the African negotiating groups. The coordination events that have been held have been found useful and the groups have always called for more of the events in

¹²⁶ Paragraph 8

fairly quick succession, say at least quarterly a year, in order to ease the follow-up and address pertinent issues that arise from time to time.

310. A key issue that needs addressing in this regard, is how to translate the declarations of summit and the trade ministers, and the outcomes of various important workshops, into text that the negotiating groups can ensure is included in the EPAs as the concrete and detailed common African positions.¹²⁷

Rationalisation of African integration

311. At its Addis Ababa summit of 29-30 January 2007, the African Union Assembly emphasized, in reference to the possibility that the EPA configurations would replace the RECs as building blocs for the African common market, that “the negotiations of EPAs should be consistent with the measures the Assembly takes to address the questions of rationalisation and multiple membership, as well as the programmes of the Regional Economic Communities and the African Union”.¹²⁸

312. There is a possibility that priority could be given to EPAs over ongoing integration programmes including the initiatives on rationalization of the integration process in Africa. One overriding reason for entering the interim EPAs, apart from market access, was access to funding under EDF 10, and the technical cooperation expected under the EPAs. This comes with a certain degree of prioritization at the national and even regional levels, in terms of institutional inclination and accountability. EPAs are bound to generate numerous meetings and decisions, which might constantly engage government officials. The implementation process is enormous, in terms of integrating the EPAs into domestic or national laws and systems, and putting in place the procedural rules and institutions required. The continuous task of compliance with the EPA obligations is also enormous, at border points and internally, and in trade and economic relations with other countries. Above all, the political weight of the EU in shaping African priorities should not be underestimated.

Social economic development

313. EPAs should be tools to assist the social economic development of Africa and in this regard should “adequately address supply side constraints, infrastructure bottlenecks, and adjustment costs, bearing in mind that trade liberalisation together with the accompanying liberal policies, may not by itself deliver economic development. In this regard, we emphasise that the development content should include, inter alia, adequate financial and technical resources; full market access to the European markets for African goods and service providers; and policy space and flexibility for implementation of development programmes in Africa.”¹²⁹ “We endorse the maintenance of duty free and

¹²⁷ It has been suggested that a continental mechanism be found to prepare the text, such a working group or a drafting committee.

¹²⁸ Paragraph 5 of the Addis Ababa African Union Assembly Declaration on EPA Negotiations

¹²⁹ Paragraph 1 of the Cairo Declaration on EPA Negotiations, AU document AU/TI/MIN.DECL. (III); and paragraph 2 of the Nairobi Declaration on EPAs, AU document TI/MIN/MIN/Decl.2(IV)

quota free treatment for least developed countries. We urge our negotiating partners to extend the same treatment to African non-least developed countries”.¹³⁰

314. The EU has provided DFQF market access for all products from African ACP countries that have initialled the EPAs. It may be technically impossible to extend the same treatment to non-parties or non-signatories to the EPAs, including non-ACP African countries. However, a regulation of the EU could effect this, subject of course, outside a free trade agreement, to the usual argumentation and concerns and fears about waivers; and subject to the reluctance of the European Commission. The factual situation is that the EU has not effected DFQF market access to all Africa ACP countries, but only to those that have initialled the interim EPAs, and that non-ACP African countries have not been given this market access except for those North African countries that participate in the programme for creation of a free trade area with Europe, this being a separate programme from the EPAs.

315. Policy space has been constrained by various provisions, such as those prohibiting export taxes and duties and introduction of new subsidies, as well as the extensive trade liberalisation committed to be undertaken within 15 years. It should be clarified that African countries have undertaken autonomous extensive liberalisation since the 1980s, including under the structure adjustment programmes. From this experience, certain lessons have been learnt about the pace and depth of trade and economic liberalisation; particularly that it should be sequenced cautiously and adequate resources provided for adjustment and building of required capacities.

Additionality of resources

316. An additional EPA Financing Facility should be established: In the Nairobi declaration, the African trade ministers did “... further call for the urgent establishment of an additional EPA Financing Facility at national and regional levels as provided for in Declaration XIV of the revised Cotonou Agreement, to address the adjustment costs and support the EPA process and implementation over time”.¹³¹

317. The brief assessment on this is that the European Commission was categorical and did not change its position that there wouldn't be any additional resources to the 22.7 billion euros committed under EDF 10.

318. Subsequently, however, under the WTO programme of Aid for Trade, the European Union agreed to provide two billion euros annually starting in the year 2010 to all developing countries, with the promise that a substantial part of these funds would go to ACP countries. Also, the EPAs include mention that resources will be drawn from the EU general budget as well. While the aid for trade and the general budget might be put down as additional resources to the EDF 10, assessments by the EPA groups are that the funding available under EPAs is inadequate to meet the implementation and adjustment

¹³⁰ Paragraph 7 of the Nairobi declaration

¹³¹ Paragraph 2 of the Nairobi declaration

requirements; and it has been unclear how much of the resources will actually be new funds rather than recycled.

319. Regarding the EPA financing facility, the EPAs have provision for establishment of regional EPA funds. These need to be operationalised as a matter of priority ahead of the implementation process. What was envisaged, however, when the proposal was made, was not just mechanisms for channelling the funds, which the regional EPA funds are supposed to be; but a financing facility that provides additional resources above those committed under EDF 10 and as pointed out, that request repeatedly made by ACP countries did not get as generous a response from the EU as would be considered satisfactory in light of the development needs of Africa and the obligations under EPAs.

320. The other response to requests for additionality of resources has been to make provision for contributions from other donors to support implementation and adjustment under EPAs. The discomfort about this arrangement was expressed by a delegate in an intervention calling upon the EU to take responsibility for the adjustment challenges to be faced by ACP countries.

321. It might well be questionable how countries can enter obligations of indefinite duration in favour of the EU, or conclude an agreement with the EU that excludes other countries, on the basis of an expectation that other countries not necessarily or directly benefiting from the EPA will provide resources or even other organisations that have voiced serious reservations about the EPAs such as the World Bank. Development cooperation between Africa and other development partners, both countries and organisations, will continue with or without the EPAs. The link is therefore unclear, except the tenuous one of expecting resources from other sources of development cooperation to be earmarked for implementation and adjustment under EPAs.

Binding obligation on additional resources

322. There should be a binding commitment from the EU for additional resources: “In addition we call for a binding commitment from the European Union for additional resources beyond the 10th EDF to cover EPA related costs. This commitment shall be factored into the legal text of each EPA.”¹³²

323. The EU has undertaken to “contribute” resources for the EPAs. This falls short of the obligation to provide commensurate or adequate resources. In the ESA text, in particular, though the obligation on the EU is to contribute resources, there are clear commitments to provide resources on a timely, predictable and sustainable basis. There is also the extension of the EDF cycles to the duration of the EPA. The development matrix is annexed to the EPA, with the commitment that it will be the basis for development cooperation, and is therefore an integral part of the EPA. Other interim EPAs do not go that far.

The preparatory period

¹³² Paragraph 3 of the Nairobi declaration

324. There should be “effective and entire implementation of the provisions of Article 37.3 of the Cotonou Agreement which stipulates that the “*preparatory period shall also be used for capacity-building in the public and private sectors of ACP countries, including measures to enhance competitiveness, for strengthening of regional organizations and for support to regional trade integration initiatives, where appropriate with assistance to budgetary adjustment and fiscal reform, as well as for infrastructure upgrading and development, and for investment promotion.*””¹³³

325. It is well to bear in mind that development cooperation with all participating development partners continued during this preparatory period, without any particular exclusive role for the European Union in the area of capacity building in the public and private sectors. The provision in the Cotonou Agreement did not set out measurable targets and achievables, with particular to the EU. Assessments therefore might be considered difficult.

326. The comprehensive review of EPA negotiations established that the objective of capacity building in the public and private sectors of ACP countries, through certain measures such as enhancing competitiveness, strengthening regional organizations and integration initiatives, building infrastructure and promoting investment, was considered not to have been satisfactorily achieved during the preparatory period.

Amendment of GATT Article 24

327. GATT Article 24 should be amended “to allow for necessary special and differential treatment, less than full reciprocity and explicit flexibilities”, and in this regard the African Union endorsed the proposal the ACP submitted to the WTO Negotiating Group on Rules.¹³⁴

328. GATT Article 24 has not been amended or modified under the Doha work programme (the ongoing WTO negotiations) launched on 14 November 2001 in Qatar. It doesn’t seem clear whether the Africa Group or the ACP Group of ambassadors at the WTO will insist on amendment of that article as an integral component of any outcome of the ongoing WTO negotiations; though the conference of African Union trade ministers has called for raising the profile of the ACP proposal and the amendment has been listed among the priorities of Africa in the WTO negotiations.

329. Uncertainty is caused to some extent by the preparedness of African and ACP countries to proceed with conclusion of EPAs that would be required to be compatible with GATT Article 24 in its un-amended version that was considered unfriendly and not to be pro-development. During the negotiations, the African groups joined the EU negotiators in assiduously endeavouring to put in place a new trade regime that met what were considered to be the scope of coverage under the requirements of GATT Article 24 in its current un-amended form; in particular, at least 90 percent of the trade was to be

¹³³ Paragraph 6 of the Mauritius declaration

¹³⁴ Paragraph 8 of the Nairobi declaration

liberalised; though they insisted on long transition periods of up to 25 years which the EU negotiators opposed (some interim EPAs provide for 25-year transition periods for up to only 2% of products on which trade is to be liberalised).

330. The ACP guidelines and the negotiating mandates of African groups view WTO rules on regional trade agreements as “evolutionary” in nature. The next phase of the negotiations provides a good opportunity to demonstrate the clear implication of this approach, in particular, whether it is understood that EPAs can be adjusted to conform to pro-development achievements in the WTO such as possible modifications of WTO rules.

Cotonou aqui

331. The Lome/ Cotonou *acquis* should be fully and effectively maintained.¹³⁵

332. The requirement to build on the *acquis* is usually considered together with the requirement that no ACP country should be worse off after 31 December 2007 including in its the market access conditions to the EU and in respect of development cooperation. In this regard, the African Union and the ACP consistently called for full exploration of alternatives to EPAs, though there would appear not to have been clear unanimity on this from time to time.

333. Regarding market access, the understanding has been that after 31 December 2007, notwithstanding the outcome of the EPA negotiations, products from ACP countries will be imported into the EU under a regime at least equivalent to that under the Cotonou Agreement. The Cotonou Agreement provides that non-LDCs that don't conclude the EPAs would be provided with a “new framework for trade which is equivalent to their existing situation and in conformity with WTO rules”.¹³⁶

334. The DFQF market access offer from the EU can be considered to build on the *acquis* in providing improved market access; and met wide appreciation in Africa and the ACP, with quite strong reservations about the effect of terminating the Sugar Protocol and the effect of substantially removing the preferential treatment on bananas.

335. However, as is now known, in accordance with the EU Council Regulation of 20 December 2007¹³⁷, the DFQF will only be available under the EPAs and countries that don't conclude the EPAs won't be beneficiaries; rather the EU negotiators have consistently maintained that imports from such countries would face the GSP regime that is worse than the regime under the Cotonou Agreement.

336. Imports from the three non-LDCs of Africa that have not initialled the EPAs, namely, Nigeria, Gabon and Congo, are supposed to enter the EU under the GSP regime. Imports from LDCs that don't conclude the EPAs may enter the EU market under the

¹³⁵ Paragraph 2 of the Mauritius Declaration on Preparations for EPA Negotiations, AU document AU/TD/MIN/Decl. I(I)

¹³⁶ Article 37.6 of the Cotonou Agreement

¹³⁷ Council Regulation (EC) 1528/2007

Everything-but-Arms initiative; though there have been reports that some imports from LDCs under the EBA regime face unreasonable queries and delays at EU borders.

337. The EU is under an obligation under the Cotonou Agreement to provide non-LDCs that don't enter EPAs with a new regime equivalent to the regime under the Cotonou Agreement. Seeking compliance with this obligation could be appropriate, using mechanisms in place. Equally, the EBA regime should be followed unless retracted by the EU; a good would be for the EBA to be integrated into the WTO, for instance, by the EU adding it to its schedule of tariff concessions in accordance with the Hong Kong Ministerial Declaration.¹³⁸ Better certainty over the EPA regime could be expected when negotiations for the full EPAs are finalised, hopefully with certain required adjustments to the interim EPAs though it is likely that any meaningful adjustments will be difficult to get from the EU side.

Health and technical standards

338. The EU should support African exporters meet the health and technical standards, and undertake to oversee private sector standards: "market access openings have been significantly undermined by health, sanitary and phytosanitary, technical and market standards maintained by the EU partners. In this regard, we urge our trading partners to robustly support our countries with adequate financial and technical resources to enable our exporters meet the standards, and our countries to fully participate in the international standard setting. We note that many of the EU standards go beyond what would legitimately be appropriate. In this regard, we urge our trading partners to introduce appropriate control over standard setting undertaken by market-based non-governmental organisations including in the border enforcement of those standards".¹³⁹

339. The most demanding standards, it would appear, are those from private-sector organisations, enforceable at entry points and required on farms. EU negotiators have argued that governments are not responsible for setting these private-sector standards and have no role regulating them. This can contravene the provisions of the TBT and SPS agreements requiring that WTO members should assist ensure that no private-sector standards operate as non-tariff barriers to trade.¹⁴⁰ The interim EPAs don't specifically and adequately address this, though reference is made to compliance with the WTO agreements on TBT and SPS measures.

340. With regard to standards in general, the EU negotiators have taken the position that safety and health cannot be compromised by relaxing European standards, and sought to re-assert the right to impose standards. In the interim EPAs, there is re-affirmation of the application of the WTO agreements on TBT and SPS measures.

¹³⁸ Under Annex F to the declaration, developed countries and developing countries in a position to do so undertake to provide DFQF market access to LDCs. However, it has been vigorously argued that certain competitive exports, such as textiles and clothing from Bangladesh, should not be included, and only 97% of LDC imports should be covered, because African countries would be ousted from their preferential markets particularly in the US. As a LDC, Bangladesh is supposed to benefit from the EBA regime.

¹³⁹ Paragraph 4 of the Nairobi declaration

¹⁴⁰ Articles 8 of the Agreement on TBT and 13 of the Agreement on SPS Measures

341. The positive response has been to offer technical cooperation to build the capacity of African producers and exporters to comply with applicable standards in export markets and African countries to participate in standard setting by international organisations; the interim EPAs have provisions to this effect. There are similar provisions in the WTO agreements, and developing countries on the whole don't seem to be entirely satisfied with their implementation, and have therefore made proposals to make the commitments mandatory obligations on the part of developed countries so that the provisions could be legally enforceable. This may be some indication for potential shortcomings with such provisions, requiring clearer obligations.

Singapore issues

342. The Singapore issues of investment, competition and government procurement should be kept out of the agreements: "On the issues of investment policy, competition policy and government procurement, we re-iterate the concerns we have raised at the World Trade Organisation, leading to their being removed from the Doha Work Programme. We reaffirm that these issues be kept outside the ambit of Economic Partnership Agreements. We stress the importance of maintaining consistency in our negotiating objectives and positions in the various fora ... (but) we specify that regional instruments can be developed for the sole mutual benefit of member states of regional groupings."¹⁴¹

343. The West African interim EPA initialled by Cote d'Ivoire and the SADC EPA have provisions on investment, competition and government procurement.

344. The SADC EPA provides that an investment chapter will be negotiated in the next phase of the negotiations on the basis of the SADC Finance and Investment Protocol. ESA intimated a similar approach in the negotiations but this is not explicit in the interim EPA, rather, there is agreement to negotiate investment and other issues. The SADC EPA provides that there will be capacity building in the areas of competition and government procurement, as a pre-condition for envisaging negotiations at some stage.

345. Other interim EPAs don't take this approach. The EAC and ESA interim EPAs have clear provisions committing the parties to negotiate the Singapore issues, contrary to the clear prohibition from the conference of African Union trade ministers. It is arguable that the trade ministers, aware of the provisions of the Cotonou Agreement setting these areas out as areas for possible negotiations, prohibited not the negotiations as such, but the inclusion of binding obligations on African countries in the EPAs. They prohibited the inclusion of the Singapore issues in the economic partnership agreements themselves along the lines proposed by developed countries including the EU during the WTO negotiations before July 2004 when these issues were removed from the negotiations with the active leadership of the EU and other countries in a positive response to strong and united opposition from Africa and other developing countries.

¹⁴¹ Paragraph 14 of the Nairobi declaration

346. Any negotiations then should not be about imposing binding obligations on African countries, such as the non-discrimination obligations the developed countries have sought in WTO negotiations. The negotiations could be about technical cooperation, taking into account the experience in the WTO where technical cooperation on these issues was reduced more or less to short workshops largely urging developing countries to embrace obligations in these areas. A good approach could be explicit commitment by the EU to support the regional initiatives to elaborate and strengthen regional instruments and institutions in these areas.

Services

347. On services: “The flexibility currently available under Article V of GATS is constrained. ACP countries will require greater flexibility if they negotiate trade in services under the EPAs”¹⁴²; “We re-commit ourselves to pursuing the architecture under the WTO General Agreement on Trade in Services, of a positive-list approach, and underscore the absolute need for a carefully managed sequencing of services liberalisation in line with establishment of strong regulatory frameworks. We therefore shall not make services commitments in the EPAs that go beyond our WTO commitments and we urge our EU partners not to push our countries to do so. We expect and call upon the European Community to open up its services sectors in favour of African countries to satisfy, as the barest minimum, the requirements under Article V of GATS of substantial sectoral coverage and elimination of substantially all discrimination.”¹⁴³

348. Services have not been negotiated and comprehensive outcomes included in the interim EPAs.¹⁴⁴ The SADC EPA has a commitment on the part of SADC countries to liberalise one sector and three sectors in due course. The common African position should still be applicable in the next phase of the negotiations, particularly to counter the rather aggressive approach of the EU negotiators in this sector; the fourth session of the conference of African Union trade ministers noted the EU demands for extensive opening of services sectors in Africa and other developing countries.

Intellectual property

349. Any obligations in the area of intellectual property should not exceed the WTO obligations and should not undermine the flexibilities African countries have: “We welcome the progress that has been made on clarification of the flexibility available under the WTO Agreement on Trade-related Aspects of Intellectual Property Rights, including the amendment to the Agreement’s provisions on compulsory licencing. We urge our negotiating partners to fully respect this progress in the context of EPA

¹⁴² Article 9 of the Nairobi declaration

¹⁴³ Paragraph 10 of the Nairobi declaration

¹⁴⁴ The CARIFORUM EPA has comprehensive provisions on investment, trade in services and e-commerce.

negotiations and to refrain from seeking obligations that exceed those under the TRIPS Agreement.”¹⁴⁵

350. Negotiations in this area did not start in earnest for some groups, and comprehensive outcomes have not been included in the African interim EPAs.

Sequencing of EPA and WTO negotiations

351. The African Union Assembly has taken the view that “WTO Negotiations under the Doha Work Programme have important implications for the negotiations of EPAs, which are required to be compatible with WTO rules; and therefore (called) for the appropriate sequencing of the two sets of negotiations”.¹⁴⁶

352. The sequencing envisaged, though this could have been explicit, is that WTO negotiations should be completed ahead of EPA negotiations. This issue has been quite controversial, the EU negotiators taking the view that there is no requirement anywhere or basis for the WTO negotiations to be completed ahead of EPA negotiations and vigorously demanding the completion of the negotiations within the timeframe of 31 December 2007.

353. The complication is that, in the Cotonou Agreement, clear language was not used to reflect what was meant or desired by the parties particularly the ACP countries. The provision states that the EPAs will be compatible with WTO rules “then” prevailing. In the ACP guidelines and the negotiating mandates of the groups reference was made to taking into account the “evolutionary” nature of WTO rules. The European negotiating guidelines also contain the expectation that WTO rules on regional trade agreements were to be modified. The context for this understanding is that work on launching a new round of trade negotiations at the WTO started before the failed Seattle ministerial conference of 1999, and by the time the Cotonou Agreement was concluded in June 2000, there was palpable expectation that the round would be launched anyway and the areas for negotiations would include modification of GATT Article 24. The mandate for the new round of negotiations, launched on 14 November 2001, included modification of rules on regional trade agreements.

354. Another relevant aspect is that the WTO negotiations were launched with a timeframe of completion by 2005. At the launch of the WTO negotiations, on 14 November 2001, a waiver for the regime under the Cotonou Agreement was granted by the same ministerial conference, to last until 31 December 2007. The EPA negotiations were subsequently launched first at the all-ACP level in September 2002 and then at the regional level in 2003 and 2004, with the time frame of completion by December 2007. That deadline for WTO negotiations was not met and has been extended several times; while the EU insisted on respecting the deadline for EPA negotiations on the basis of the provision in the Cotonou Agreement and the period for the waiver and out of despair that other WTO members would not agree to extension of the waiver.

¹⁴⁵ Paragraph 12 of the Nairobi declaration

¹⁴⁶ Paragraph 7 of the African Union Assembly Addis Ababa Declaration on EPAs of 30 January 2007

355. There would appear to be no clear provision in a binding instrument on the sequencing of the two sets of negotiations, reflecting foresight that the WTO negotiations, like previous rounds of multilateral trade negotiations, could delay and not be concluded within the time frame, and that EPA negotiations might also stall. The understanding that WTO negotiations were to be completed first is quite clear, but that also was not put down in clear language; rather language was used that is capable of ambiguity. For instance, the reference to “then” has been understood particularly by EU negotiators to include GATT Article 24 in its un-modified version as the provision prevailing now. If it is understood that EPAs will be modified to be compatible with modified WTO rules, it is not explicitly set out, including in the interim EPAs. The controversy on sequencing might suggest that a better approach would be to set out the understanding clearly.

Summary and recommendations on final provisions

356. The Assembly of Heads of State and Government and the Conference of Trade Ministers of the African Union have adopted common African positions on EPA negotiations, as guidelines for African negotiators. In many respects, the common African positions were addressed to the European Union at a political level, with the expectation that in the spirit of partnership, EU negotiators would fully take these concerns and priorities into account. But there are various areas where there are no common African positions.

357. It would appear that some effort was made to have interim EPAs that reflected the common African positions, for instance in the area of market access by providing DFQF market access to EU markets, regional integration by references to the process, and development cooperation by provision for regional EPA funds.

358. The interim EPAs initialed by African countries don't satisfactorily reflect the common African positions in some significant respects, such as the fact that so far inadequate resources have been committed for EPAs under commitments that are not as legally binding as envisaged though fairly sensible if supported by generous and good faith implementation; and that DFQF market access is not available at the moment to all African countries, with possible complications for countries that have not initialed the interim EPAs.

359. The common African positions will remain pertinent during the next phase of the negotiations and should be adhered to. It is politically important for negotiators to faithfully abide the common African positions as adopted collectively at the summit and ministerial levels; and not depart from them in the blink of an eye.

360. In light of developments since the last meeting of the African Union trade ministers, it seems appropriate to refine the common African positions in order to squarely address the current specific issues on the negotiating table, such as, the further fragmentation of Africa into new categories of countries with EPAs and those without

within regional economic communities, the further fragmentation of trade regimes under bilateral EPAs or bilateral schedules of tariff elimination, the implications of EPAs for regional and continental customs unions and common markets, the treatment of African countries that will not conclude EPAs or for which EPAs will not enter force both LDCs and non-LDCs, adequacy of resources, private sector standards and institutional and legal capacity to enforce the WTO agreements on TBT and SPS measures, and areas for the next phase of the negotiations.

361. In light of the discussion in other parts of this paper, it is clear that there are no common African positions on several other issues, such as, fisheries, certain elements of agriculture (net food importing countries, phasing out of subsidies by the EU as a concession for elimination of customs duties), trade-related areas of data protection and social aspects as well as environment, implications of EPAs for the programmes for formation of regional and continental customs unions and common markets, institutions under the EPAs, parties, ratification and entry into force, dispute settlement, and structure of the agreements. These are not peripheral issues at all and guidelines on them could be useful. Some of these are essential components of any agreement, such as the institutional and final provisions; or are key African priorities, such as agriculture and fisheries; while others are considered important for the EU and there is therefore a likelihood that EU negotiators might be keen to have them included during the next phase of the negotiations in some other African EPAs.

362. As for possible improvements in coordination of the negotiations, there could be merit in considering the formal establishment of an African working group or drafting group on EPAs, with specific functions of producing text for the negotiations and advising on text on evolving text in between negotiating sessions as appropriate. The next phase of the negotiations will require text in areas not yet addressed, but where improvements in the interim agreements will be considered appropriate, text will also be required and in this regard such text could endeavour to harmonise approaches under all the African EPAs as may be appropriate.