



**Towards the African Template**  
**for**  
**Economic Partnership Agreements**  
**Explanation and Recommendations**

**Trade and International Negotiations Section and the African Trade  
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## INTRODUCTION

This effort towards an African EPA template is meant and designed to assist the African Union member states in their negotiation of economic partnership agreements with the European Commission. It is produced as requested by the Conference of African Union Trade Ministers at their meeting of 1 to 4 April 2008.

The approach taken towards the template has been based on at least four important factors. The first is that the European Union General Affairs and External Relations Council has concluded that in negotiating the EPAs, provisions from other agreements that have been agreed may be used. The Council stated that:

Acknowledging concerns expressed by our ACP partners and the existence of, in some cases, problematic issues still outstanding in the negotiation, the Council underlines the need for a flexible approach while ensuring adequate progress, and calls on the Commission to use all WTO-compatible flexibility and asymmetry, in order to take account of different needs and levels of development of the ACP countries and regions. The Council emphasises that ACP countries and regions who so wish could draw, if appropriate, on provisions agreed by others in their EPA negotiation.<sup>1</sup>

EC negotiators are expected to adhere to this conclusion. Therefore, clauses from the various interim EPAs as well as the Cariforum-EU EPA have been recommended as template where appropriate, so that they can be readily acceptable as already agreed elsewhere. This conclusion, by acknowledging ACP concerns and calling on the European negotiators to be flexible while emphasising that provisions in other EPAs could be drawn upon, envisages the possibility of re-opening contentious clauses.<sup>2</sup>

The second factor taken into account is that the groups have already made quite some progress in the on-going negotiations for comprehensive EPAs. They have produced text and in some cases, joint text between the groups and the EC negotiators has been produced. The template should be relevant to this process and build upon it. Therefore, where such proposed text has been considered useful, it has been recommended for consideration. Such text is not to be considered agreed, but it can already form a good basis for negotiations. In addition, in line with the recommendation of the Trade Ministers at their meeting on 5 June 2005 that the groups should harmonise their positions before reaching final decisions, this exercise of considering proposed text can be an important step towards harmonisation of negotiating positions and text before finalising the negotiations.

The third important factor is that EPAs have demonstrated the imminent potential to destroy rather than support the ongoing integration process in Africa. The groups have

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<sup>1</sup> Council Conclusions on Economic Partnership Agreements (EPAs), 2870<sup>th</sup> EXTERNAL RELATIONS Council meeting, Brussels, 26 and 27 May 2008, Paragraph 3

<sup>2</sup> In the case of SADC, this possibility was an explicit condition that Namibia attached for initialing the EPA. At the December 2007 Lisbon Summit, the EU Commission President said that contentious clauses would be re-opened.

had the benefit of common African positions that the African Union Trade Ministers have adopted since 2003, but in the actual negotiations, there hasn't been a facilitative mechanism for approximating the actual language of the provisions, partly because the negotiating groups have not had the other groups as observers, partly because continental institutions such as the Commission of the African Union and the Economic Commission for Africa have not been parties to the negotiations or consistently been present with the role of assisting the harmonisation. The final template to be prepared under the auspices of the African Union Commission could be a facilitative basis for coordination among the groups, particularly if the further steps are taken of establishing a standing working or coordinating group on EPA positions and language, and of the groups reaching agreement that wherever appropriate the groups will adopt common language and text for the EPA provisions.

The fourth important factor is that the African negotiating groups have faced serious constraints in undertaking the negotiations. They face various sets of negotiations that equally demand their scarce human resources and technical expertise, at the regional and multilateral levels. Together with the pressure of deadlines, and the avalanche of proposed texts from the EC negotiators at the last minute, inadequate care may result in permanently fatal provisions that ruin the development prospects of Africa. The future of Africa will be affected by the paradigm the EPAs will introduce. There is therefore immense responsibility on negotiators not to let down future generations and fully appreciate the weight of history they now carry. Lawyers have not always been on board, though some measures have been taken to include them, with the result that some legal finesse and concepts might not have been adequately taken on board. The template should respond to these needs through the suggestions for text; and additionally through explanations in the ECA study on the interim EPAs.

It will be recalled that at the April 2008 meeting of the African Union Trade Ministers, the Economic Commission for Africa presented a comprehensive study on the interim EPAs, entitled "North-South FTAs Afterall, A Comprehensive and Critical Analysis of the Interim Economic Partnership Agreements". As the title indicates, the study is a comprehensive and critical analysis of the interim EPAs, and contains comparisons and contrasts, indicating the various outcomes on key provisions, which can therefore be helpful in ascertaining better approaches. This contribution towards the final template is drawn on that study. It is recommended that this template be read together with that study.

What follows are recommendations that a final template should consider in the various areas under negotiations. Indications are given which among the interim-EPAs approximate the Common African positions as earlier agreed during AU Ministers of Trade Conferences. The provisions in the various chapters of the proposed inclusions to the African template are based on the explanatory notes and recommendations in the remainder of this brief.

## **REGIONAL INTEGRATION**

EPAs are supposed to promote regional integration. However, concerns have been expressed that the provisions don't adequately reflect this.

It has been argued that in the African interim EPAs, regional integration has in fact been undermined; in the case of SADC by tariff liberalisation schedules that don't respect the obligation of SACU countries to maintain a common external tariff and by the different treatment for South Africa; in the case of ESA, by the separate schedules each of the countries has attached to the agreement whereas COMESA is expected to become a customs union in December 2008; and in the case of EAC by adopting tariff elimination schedules inconsistently with the Customs Union Protocol which requires the application of the three-band common external tariff to all imported products; and in the cases of Central and West Africa, by adoption of bilateral EPAs with individual countries.

Given the importance of the matter, it might be advisable to have explicit obligations on regional integration, with the main purpose of spelling out the exact relation between EPAs and regional integration.

The SADC and Cariforum EPAs attempt this, by indicating that regional integration will proceed on the basis of the integration instruments in place.

It would have been useful to include comprehensive clauses on regional integration, clearly providing for the precedence of regional integration over EPAs, for the review of EPAs at the attainment of landmark stages such as the formation of regional and continental customs unions and common markets, identification of priority integration programs such as those indicated in the EAC 2006-2010 Development Strategy for development cooperation on a priority basis, and the sequencing of negotiations in the trade-related areas, particularly investment, government procurement and competition, to follow the completion and adoption of regional integration regimes in accordance with the common African position (paragraph 14 of the 2006 Nairobi Declaration on EPAs).

Also, the preamble could recall and stress the importance of adhering to the common African positions adopted over the years to guide the EPA negotiations.

## **DEVELOPMENT CHAPTER**

The ESA-EU EPA has a comprehensive chapter on development; and may form a good basis for including important development concerns in the EPAs.

Important provisions include: legal commitments on the EU to contribute resources, the annexing of the ESA development cooperation strategy and matrix to the EPA as the basis for cooperation and that way incorporating these documents into the text of the EPA, extension of the EDF cycles to the duration of the agreement though this needs to be clearer, and identification of fairly detailed cooperation areas that are key to addressing key constraints to production, trade and competitiveness.

The SADC-EU and Cariforum EPAs have useful provisions on sustainable development. It can be noted that the ESA-EU development chapter includes provisions on natural resources and environment.

## **MARKET ACCESS**

In the continuing negotiations for the comprehensive EPA, the ESA group and the EU have adopted the approach of extending the interim EPA by adding other chapters to it, while at the same time considering improvements to the existing provisions of the interim agreement. This may be an appropriate way of correcting the contentious issues.

The market access chapter could have the following key elements, drawn from the various EPAs<sup>3</sup>:

- a. Specifying the goods subject to the agreement in terms of the HS codes
- b. A commitment on the EU to immediately eliminate all forms of export and domestic subsidies that adversely affect African countries
- c. Prohibition of levying fees and other charges on an ad valorem basis and a requirement that they are based on the cost of service
- d. Provision for modification of tariff reduction schedules in the event of serious difficulties or in consideration of the circumstances of LDCs
- e. Elimination of the standstill obligation
- f. Inclusion of an exception on free circulation of goods, for products on which customs duties are not zero, pending the finalisation of the question of revenue collection and sharing
- g. Elimination of the prohibition of export taxes, or at least provision for a transition period and inclusion of an annex of exceptions such as ensuring fiscal solvency or for specific revenue needs and protection of the environment
- h. Elimination of the MFN clause due to conceptual difficulties and the little utility in it for African countries
- i. Inclusion of a requirement that the EU should match any better treatment that the third country gives African countries
- j. Introduction of an exception to the MFN clause that where the third country gives the African country better treatment than under the EPA,

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<sup>3</sup> For the various EPA provisions to draw on, please see: Economic Commission for Africa, North-South FTAs After all? A Critical and Comprehensive Analysis of the Interim Economic Partnership Agreements, April 2008; Part D, p.40

there may be consultations in the Development Council whether to extend the better treatment to the EU

- k. An explicit obligation on the EU to accord to African countries the better treatment accorded to other ACP groups and under other FTAs with third countries
- l. Elimination of the prohibition of quantitative restrictions on the basis that these are addressed in GATT 1994
- m. Elimination of the national treatment obligation on the basis that this is covered by GATT 1994 or at least introduction of a list of more exceptions
- n. Introduction of the requirement on the EU to assist African exporters proposing constructive remedies where the EU intends to take trade remedy measures
- o. Extension of the period for taking bilateral measures for infant industries beyond 10 years – the period varies from 12 to 20 years in other EPAs

Provisions from various EPAs have been compiled to indicate some useful improvements that could be considered for the other EPAs.

### **SPS measures and TBT**

An important provision in the SADC-EU and Pacific-EU EPAs on SPS measures is the introduction of the idea of priority products and sectors relating to regional integration and exportation. This approach can be useful in addressing the possibility of adverse consequences following adoption of SPS measures against key export products, and in addressing the need for promoting intra-regional trade. Also, institutions are established.

An improvement could be to add explicit provisions on the purpose of including priority products and sectors.

The Pacific-EU EPA has the following special and differential treatment provisions covering both SPS and TBT:

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”

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

Important provisions on TBT measures include the mechanism for monitoring NTBs. It would have been advisable to introduce the idea of priority products and sectors, just like

in the case of the SPS provisions. The Pacific-EU EPA combines both the SPS and TBT provisions in one part.

## **CURRENT PAYMENTS AND CAPITAL MOVEMENT**

The SADC-EU EPA doesn't liberalise the capital account, and provides for the taking of safeguard measures in respect of both the current and capital accounts.

## **CUSTOMS AND TRADE FACILITATION**

Some EPAs, the SADC-EU EPA for instance as well as the Pacific and Cariforum EPAs, have detailed provisions on customs and trade facilitation, including provision for development cooperation and transition periods.

## **CROSS BORDER SUPPLY OF SERVICES**

The Cariforum-EU EPA has provisions on trade in services. While the preferred approach is the one taken in the SADC-EU EPA of liberalising one sector and continuing the negotiations after conclusion of the comprehensive EPA, this part sets out the Cariforum-EU EPA provisions on cross-border supply of services, indicating some minor adjustments, through omissions, that could be considered in the other EPAs; that is, where square brackets are placed.

One major change, however, is to exclude non-service sectors and investment from the part on trade in services. Also, the MFN obligation is limited to developed or OECD countries, and not extended to developing countries.

## **REGULATORY FRAMEWORK**

While the preferred approach is the gradual one, for instance along the lines of the approach taken in the SADC-EU EPA, the provisions from the Cariforum-EU EPA can be used with various important modifications. In the efforts towards the final template, some indication of possible improvements, through omissions, has been made, where square brackets are placed.

## **FINANCIAL SERVICES**

The provisions on financial services from the Cariforum-EU EPA may be used, with various adjustments, for instance, by removing a mandatory obligation and introducing discretion in permitting new financial services and in having to transmit data. The suggested provisions towards a common African EPA template indicate the adjustments that could be made.

## **TELECOMMUNICATIONS**

As with financial services, the Cariforum-EU EPA provisions on telecommunications can commit countries to certain WTO-like obligations they didn't undertake.

In the case of telecommunications, while closely following the WTO provisions, it should be noted that it is not mandatory to subscribe to the reference paper though the paper has various useful provisions such as those on dealing with monopolistic practices. In addition, there are provisions for appeals against decisions of regulators and for settlement of disputes.

## **TOURISM**

Tourism is an important sector in Africa. Provisions from Cariforum-EU EPA indicate some useful provisions, for instance on dealing with anti-competitive practices that adversely affect gains for destination countries; and on development cooperation.

## **TEMPORARY PRESENCE OF NATURAL PERSONS**

The market access envisaged under the provisions in this area in some of the interim EPAs can be welcome, if broadened and readily useable.

The conditions attached to the provisions by the EC are highly restrictive and could well have the effect of denying the market access otherwise envisaged. They therefore could be considered inappropriate.

## **ELECTRONIC COMMERCE**

The main development on e-commerce in terms of multilateral rule-making has been the moratorium on imposition of duties.

The Cariforum-EU EPA provisions, however, seek to provide the reasoning behind this, namely, that e-commerce should be considered to be a service. A better understanding of e-commerce might be required.

The provisions on development cooperation could, however, be useful.

## **TRADE RELATED AREAS – GRADUAL APPROACH**

There can be at least two main approaches to negotiating services and the trade-related areas of investment, competition and government procurement.

One approach could be that taken in the SADC-EU EPA. On services, the parties agreed to liberalise one sector under the comprehensive agreement; they agreed to negotiate other services areas within three years after concluding the comprehensive agreement. Where this approach is taken, the EU should undertake commitments as well, in a manner that assists the meeting of the requirements of Article V of the General Agreement on Trade in Services, bearing mind the principles of asymmetry, the development objectives and WTO services negotiating modalities including those on Least Developed Countries for a waiver.

On investment, the parties agreed to base the provisions on the SADC Finance and Investment Protocol. And on competition and government procurement, the parties postponed the negotiations to a time after capacity building.

A second approach could be to negotiate full-scale provisions in all these areas, as in the Cariforum-EU EPA. Where this approach is taken, careful attention to recent analysis of these provisions, indicating some possible improvements, could be helpful. It has been indicated for instance that the combination of services, investment and electronic commerce may be considered inappropriate, as well as the stringent conditions and drastic limitations for access to the EU market in a manner that could make the market access very difficult to utilise.

## **TRANSPARENCY IN GOVERNMENT PROCUREMENT**

The Common African Position is not to have rules on government procurement in the EPAs, but rather to elaborate and implement regional regimes in the context of creating and consolidating the regional and continental common market. The approach in the SADC-EU approach, which the EC agreed to, is consistent with this position.

There are certain other important considerations to have in mind in deciding whether, after the negotiations, to agree to rules on government procurement.

The EU is unlikely to undertake commitments that exceed their commitments under the Government Procurement Agreement (GPA) of the WTO. This means that the EU gives in the EPAs what it already gives to other parties to the GPA. Given this, it might be advisable to join the GPA rather than negotiate a bilateral arrangement giving the EU certain preferential concessions in exchange for existing EU concessions to be shared with other parties to the GPA. This alternative would introduce competition among entities or potential bidders from all parties to the GPA seeking government contracts from African governments.

This result of competition among more entities other than only EU entities, could also be achieved through domestic or regional legislation that autonomously introduces government procurement rules.

The EU government procurement market open to non-EU enterprises is so miniscule that African enterprises cannot be expected to have a realistic chance of competing in it. Estimates are that only 0.3% of contracts are available to non-EU enterprises.

Non-discrimination obligations would undermine the nature of government procurement as a tool for promoting key public policy objectives such as eradicating poverty and promoting equitable development for instance through supporting local enterprises and directing contracts to depressed areas. Thresholds do not adequately respond to this concern as local enterprises end up with remote chances of getting important contracts above the threshold, which may well be the contracts that have a more meaningful role in achieving those public policy objectives. In addition, the possibility of joint ventures is usually prohibited.

Transparency rules would impose stringent rules that African governments will lack the flexibility to regularly revise in light of developments and would impose additional institutional costs. The transparency model proposed and preferred by the EU does not adequately accommodate the developmental needs of African countries, related for instance to assisting depressed areas and marginalized populations, supporting the key employment and income generating SMEs, and consolidating national and regional integrated economies.

Domestic and regional frameworks can be adequate to answer the major concerns raised in seeking rules on government procurement, particularly ensuring good value for money; and are therefore adequate. Development partners can have the important role of supporting these domestic and regional initiatives. Provisions on government procurement could therefore focus on development cooperation.

## **INVESTMENT**

Generation of local investment and attraction of foreign direct investment are priorities of countries all over the world. Africa needs both types of investment. The question has been about best practices and strategies for generating local investment and attracting foreign direct investment (FDI).

EC negotiators have vigorously argued that investment rules will lead to increasing flows of FDI, and have understood the development component of EPAs to rest largely in this rule-making. However, study after study has demonstrated that rules by themselves don't lead to increasing inflows of FDI. According to various studies, what is required in Africa in particular, is improvement of location factors such as infrastructure, relevant skills, political and economic stability, as well as focused investment promotion activities taking into account new developments such as the fact that South-South FDI inflows are growing faster than the North-South.<sup>4</sup>

It is to be noted though that African countries have laws and regulations protecting investment. These include constitutional provisions on expropriation, dedicated investment laws, and laws in various key sectors including natural resources and infrastructure. National investment agencies have been established. In addition, all African countries are part of the integration process of forming regional and the continental common markets, where there will be free movement of goods, services, labour, capital, and people, and the right of residence will be recognised. Already, various regions have protocols on some of these elements, well ahead of the timeframe for establishment of their common markets. For instance, SADC has the Finance and Investment Protocol and COMESA has the Agreement on the COMESA Common Investment Area. Development cooperation could target these efforts and support them as part of the integration process, rather than smother them. In addition, various countries have Bilateral Investment Treaties with development partners, and have made appropriate commitments in the services sectors in the WTO framework. All these initiatives together, fully respond to the case made for rule-making, while at the same time

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<sup>4</sup> UNIDO, African Investment Survey, 2005

accommodating some policy space and flexibility, which EPA rules as proposed by the EC would permanently take away for the duration of the EPA.

The common African position is that the regional economic communities can adopt regional instruments on investment, and there shouldn't be investment rules in the EPAs.<sup>5</sup> So far, African regions have indicated their approach. In the period up to the 31 December 2007 deadline, African regions declined to include investment rules in EPAs proposed by EC negotiators. West Africa took the view that a regional framework should first be elaborated before investment negotiations could be considered. In the SADC-EU interim EPA, it was agreed that the investment chapter in the comprehensive EPA would be based on the SADC Finance and Investment Protocol. In the ESA-EU EPA, investment and private sector development were included in the development chapter as areas for development cooperation, rather than rule-making.

It is recommended that investment and private sector development could be areas for development cooperation, including in terms of elaboration of regional instruments that form part of the integration process.

On the basis of the approach agreed by SADC and the EC negotiators in the SADC-EU interim EPA, investment chapters could be based on regional instruments. Regions without such frameworks could be assisted to finalise them as soon as possible. The SADC Finance and Investment Protocol has an annex on investment covering various areas, including, investment promotion and protection, preferential treatment for qualifying investments, corporate responsibility, natural resources and environment, the right to regulate, capital movement, harmonisation of domestic laws, special treatment for least developed countries, dispute settlement. The SADC Finance and Investment Protocol, on which the investment chapter is to be based, doesn't have pre-establishment provisions, particularly those requiring national and most-favoured-nation treatment. It should therefore be taken that the EC negotiators have agreed not to include such pre-establishment provisions in the investment chapter; and that they agreed to support the SADC region in the terms of the provisions of the protocol. EPA provisions could be considered based on the SADC protocol where the same approach is adopted, that is cooperation, and where the EPA provisions reflect, are consistent with and don't exceed the SADC protocol.

In drafting terms, the various provisions of the protocol could form areas of cooperation as appropriate.

If any rules are to be considered, they could take the form of regional instruments such as the Agreement on the COMESA Investment Area, where all FDI, from Europe and elsewhere, is equally addressed and prioritised in accordance with the integration process. Any entity that qualifies to be a "COMESA investor" is entitled to non-discriminatory treatment, and this includes foreign investors with substantial business activity in the COMESA member state where they are registered.

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<sup>5</sup> Nairobi Declaration on EPAs, paragraph 14

It may be advisable to closely study the available regional instruments on investment, and to fully utilise them as a good basis for finalising positions on investment negotiations. In the negotiations, detailed areas of cooperation could be included, drawn for instance from the ESA-EU EPA development chapter; the text proposed in the ESA-EU negotiations could also be useful.

## **COMPETITION**

As with government procurement, the SADC-EU EPA provides that negotiations on competition will be envisaged after a process of capacity building.

Also, as with investment and government procurement, the common African position is that the regional economic communities can adopt regional instruments on competition in the context of the integration process for building regional and the continental common markets.

Competition negotiations could therefore be limited to development cooperation, the main aim being to build regional and national institutions. Proposed text in the ESA-EU negotiations could be useful.

## **INTELLECTUAL PROPERTY**

Developing countries, in many cases led by Africa, for instance on issues of access to medicine and flexibility, have secured some major improvements to the TRIPS Agreement. The Doha Declaration on the Public Health of November 2001, the August 2003 Decision on Countries with Inadequate Manufacturing Capacity in the Pharmaceuticals Sector and the subsequent amendment of Article 31 of the TRIPS Agreement at the December 2005 Hong Kong Ministerial Conference, have been milestones in this regard. These gains for the whole world should be respected and affirmed in the EPAs.

Attempts to elaborate stringent rules on intellectual property that take away the rights and flexibilities now agreed in the multilateral trade system should therefore be considered inappropriate. In EPAs, provisions on intellectual property could therefore concern development cooperation while re-affirming the rights and flexibilities in the TRIPS Agreement, as well as the Convention on Biological Diversity and the International Treaty on Plant Genetic Resources of the FAO.

Draft text proposed in the ESA-EU negotiations could be useful.

## **GENERAL EXCEPTIONS**

The EPAs have more or less same provisions on general, security and taxation exceptions.

While a proliferation of institutions has been considered a bad thing, certain important institutions can be useful addressing challenges likely to arise from EPAs.

The Cariforum-EU EPA provides for various institutions.

### **DISPUTE SETTLEMENT**

While the Cariforum, Pacific and SADC EPAs have quite detailed dispute settlement provisions, the others contain comparably limited provisions. Detailed provisions can assist deal with various aspects of dispute settlement.

### **FINAL PROVISIONS**

Various provisions can be included under final provisions, as in the SADC-EU EPA. The Cariforum-EU EPA contains a provision for a balance of payments safeguard.