

CONTENTIOUS ISSUES IN THE GOODS EPAs: WHAT IS THE VALUE OF THE 2009 RENEGOTIATIONS?

SYNOPSIS

A large part of the discomfort of many ACP countries vis-à-vis the EPAs have to do with what are now known as 'contentious issues' or 'unresolved issues'. Negotiations on these issues took place between the EU and some African sub-regions in 2009, with agreements on some of these issues emerging for SADC and ESA countries.

This note analyses the results of the negotiations on the standstill clause; modification of tariff commitments provision; duties and taxes on exports; the infant industry clause; prohibition of quantitative restrictions; the food security clause; free circulation of goods and definition of the 'parties'. These form only part of the list of the overall basket of contentious issues, but they are those negotiated in 2009.

Whilst the EU claims that it was flexible in the 2009 renegotiations, the results of these negotiations are disappointing. There are some positive improvements in certain areas. However, on other issues, the new language provides only clarification. In yet other areas, the new remedy could even be worse.

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EXECUTIVE SUMMARY

There have been many contentious issues in the EPA negotiations between ACP countries and the EU. Some of these were renegotiated in 2009. This paper looks into these renegotiations and evaluates the value of the agreed texts. Some were positive improvements, others were fairly minor improvements and yet others only offered clarification or even worsened the original language.

Overall, the new language that emerged from the renegotiations exemplified the unequal bargaining power between the EU and the African subregions.

If seen from the overall damage the EPA would cause to ACP countries, the new texts, even if finally incorporated into the EPA agreements, would not go far enough to prevent the long lasting negative consequences of deindustrialisation and agricultural production opportunities foregone. Even with this new language, the EPA remains the wrong development model and will strip countries of their trade policy space. The ultimate goal of regional integration, which Europe claims the EPAs will foster – that of development – would not be achieved.

The following is a very brief assessment of the new language emerging from the 2009 renegotiations.

On some issues, there were **positive improvements**:

- Prohibition of Quantitative Restrictions for SADC – the new language allows SADC countries to take on quantitative restrictions where these are allowed in the WTO, such as on export and import licenses which are considered non-trade restrictive, and under various GATT exceptions.

On others, there were only **minor improvements**:

- Standstill Clause for ESA - coverage of the standstill clause is now limited to the tariff lines to be liberalized for ESA, not all tariff lines, i.e. sensitive lines are excluded from the standstill clause.
- Modification of Tariff Commitments for ESA – this is an improvement for ESA to have this new provision. However, the benefit is tempered by the need to comply with Article XXIV and also the need for EU approval.
- Infant Industry Clause for ESA - Whilst having a standalone clause is good, and the condition of usage was also expanded, to include instances where the *establishment* of infant industries are being threatened; usage of this clause is still dependent on a 'thorough examination of the situation, with a view to seeking a solution acceptable to the Parties concerned'.

- Prohibition of Quantitative Restrictions for ESA - The GATT's Article XI on the General Elimination of Quantitative Restrictions provides language on prohibiting quantitative restrictions, with some exceptions. There are other exceptions in the GATT allowing for quantitative restrictions. ESA obtained the right to use QRs for 2 of these GATT Article XI exceptions, including for commodities trade. However, the third more useful exception for agriculture was not included, nor the other GATT exceptions such as balance of payments difficulties (GATT XII) and industrial development (GATT XVIII).

In other areas, the improvement is even **less than minor** because what has been given has either been diluted with a conditionality, or the supposed benefit in fact provides no additional instruments to the ACP countries that they can use. Clearly, the EU has not been very generous:

- Duties and Taxes on Exports for SADC - SADC States negotiated a new paragraph on the right to introduce export duties and taxes on a limited number of additional products temporarily, but only after agreement with the EC. The EU also insisted inserting that compliance with Article XXIV is necessary, hence diluting the already very limited benefits of the new language.
- Food Security Clause for SADC - the new language obtained does not seem to add any real additional benefit for SADC. Firstly, the remedy, the bilateral EPA safeguard with all its limitations is the only remedy offered. Secondly, the grounds upon which countries can invoke the food security clause have been written in a way that countries may find difficult to use (use of the bilateral safeguard in order to prevent or relief food shortages).
- Free Circulation of Goods for SADC - the new language does not change SADC's obligations in the EPA. It is simply a clarification that SACU exists as a customs union.

Changes where the value of what was attained **may even be worse than the existing language**:

- Infant Industry Clause for SADC - Whilst the SADC countries did get a standalone infant industry clause that does not expire after 10 or 12 years (as is the case with the existing language), the remedy for this new infant industry clause is actually worse than the existing infant industry clause! The SADC EPA bilateral safeguard is the only one where remedy for tariffs can go up to the WTO bound tariff level. For other EPA bilateral safeguards, the remedy offered is only up to the MFN applied tariff rate. Even the WTO bound tariff level may not be adequate. In the new SADC infant industry clause language, the infant industry remedy only allows for tariffs up to the applied MFN rate, not the bound WTO rate (as in the original text).

In addition, the new language allows for the Botswana, Lesotho, Namibia and Swaziland (BLNS) to have recourse to the SACU Agreement's infant industry clause (Article 26). That Article allows Botswana, Lesotho, Namibia and Swaziland (BLNS) to apply infant industry tariffs against South Africa. That clause cannot be used in

the EPA context vis-à-vis the EU since the EU is not part of the SACU Agreement. The implication is that the BLNS can use the infant industry clause against South Africa, but the BLNS market could be reserved for the EU i.e. EU will be given preference to the regional market over South Africa.

In one area, there is **no agreement, but the EC has published their preferred language as the agreed language:**

According to SADC sources, in the area of Definition of the Parties, there seems to have been no agreement. SADC countries do not want to have to take on collective responsibilities in dispute settlement when only one state may have infringed EPA law. There are also other collective responsibilities littered through the EPA that poses a challenge since the SADC EPA configuration of countries is not a customs union. Despite this apparent non-agreement, the EC has published a Declaration giving its own interpretation (EC 2009 'Note for the Members of the ACP Working Party', Doc.no 109/09 ACP, 3 April), sidelining SADC's own options and choices. From a process standpoint, this is highly problematic.

A longer summary of the paper can be found in Annex I.

I. INTRODUCTION

1. The Economic Partnership Agreement (EPA) negotiations between the African, Caribbean and Pacific (ACP) countries and the European Union (EU) have been extremely controversial within the ACP countries. Most countries are rightly suspicious of their supposed development benefits. Hence, thus far in Africa, only 10 of 47 countries engaged in these negotiations have signed an EPA. Nine others have initialed, but have stalled when it has come to penning their signatures. In large part, this has been due to what is now widely known as the 'contentious issues' or the 'unresolved issues' - referring to the various elements of disagreement between EU and the ACP parties in relation to the liberalization of goods (industrial and agricultural products).¹

2. Quite intense negotiations on these 'contentious issues' took place in 2009 as the EU was trying hard to push countries which had initialed the EPAs at the end of 2007 to sign them before end 2009. However, these negotiations resolved only some of the problematic issues, not all. Some of the most critical ones - such as the Most Favoured Nation treatment (MFN) clause - remain on the table.

3. The value of these renegotiations is the subject of this paper. In some areas, there was some clawing back of policy space. In other cases, the changes were extremely superficial. In yet other areas, the change could even be for the worse! If seen in terms of the EPA being the wrong development model for ACP countries, even the positive changes by no means go anywhere near averting the impending problems of ACP countries giving up their use of an effective trade policy for development. Clearly, the new language that emerged from the renegotiations exemplified the unequal bargaining power between the EU and the African subregions engaged in these negotiations.

4. Even despite these very limited 'clawing back' of only a modicum of policy space, the outcome of the renegotiations were not even incorporated into the EPAs that were subsequently signed in 2009! The European Commission (EC) insisted that the changes be brought on board only in the 'full' EPAs. This is a strategy of the EC to pressure African and Pacific countries to continue broadening the scope of the EPAs beyond goods liberalisation.² This strategy however, may not bear fruit for the EC since it has put some countries off the EPA negotiations, and could eventually even force some African countries to make the unenviable choice of deciding between close integration with the EU or integration with their own neighbours.

¹ The EU has structured the EPA negotiations such that most of them are taking place in two phases, the first is on negotiations in goods and the second (which not all ACP sub-regions have agreed to) are to do with services, investment, competition and government procurement liberalisation.

² It should be emphasised that the interim (goods only) EPAs are already full-fledged free trade agreements and are compatible with Article XXIV of the GATT on regional trade agreements.

5. What was 'agreed' to by EC and ESA, and EC and SADC, but not incorporated into their signed EPAs is currently of questionable legal value. It should also be noted that the 'full EPA' - including the liberalization of services and investment and other issues such as competition and government procurement - is by no means necessary for compatibility with the WTO.

6. This paper highlights the 'agreements' that were reached between the European Commission and two African sub-regions - SADC and ESA, and to a more limited extent the EAC in 2009. There is variation between what the different sub-regions concentrated on in these negotiations. Hence, some of the agreements arrived at differ between sub-regions, and it is worthwhile collating and comparing these outcomes. The issues covered in the renegotiations, and thus in this paper include the following:

- The standstill clause
- Modification of tariff commitments
- Export taxes and restrictions
- Infant industry
- Prohibition of quantitative restrictions (QRs)
- Food security clause
- Free circulation of goods
- Definition of the Parties

7. On the last bullet point, there was no agreement on the issue of the Definition of the Parties between the EC and SADC in Swakopmund, Namibia in March 2009. Nevertheless, the EC (in the cover page of Doc. No. 109/09 ACP, 3 April 2009) states that agreement was reached.

8. Aside from the above list of issues, the renegotiations between the EU and SADC in March in Swakopmund were also about retrofitting the South Africa-EU Trade Development and Cooperation Agreement (TDCA) to the EPA. The EC stance however, - refusing to include the renegotiated language in the interim EPAs - seems to have stalled any further negotiations in this regard in 2009.

9. There are other very significant items in the Contentious Issues basket that were not resolved or even not discussed in the 2009 renegotiations. Among others, these include, substantially all trade, the Most Favoured Nation (MFN) Clause, non-execution clause, development cooperation, the bilateral safeguard and rules of origin. They will not be touched on in this paper (with the exception of the bilateral safeguard).

10. The exact list of remaining issues would again differ between the different EPA sub-regions and even within sub-regions. In fact, the SADC group had tabled 19 outstanding issues over and above those that had been dealt with at the Swakopmund meeting.

II. STATUS OF THE ISSUES THAT HAVE BEEN RENEGOTIATED: EU'S REFUSAL TO INCORPORATE AGREED CHANGES INTO SIGNED TEXTS

11. The most disappointing outcome of the renegotiations in 2009 on the 'contentious issues', was that even the very minimal improvements that were agreed to were not incorporated into the final signed ESA or SADC texts!

12. The EC's refusal to be flexible and to formalize the agreements reached was reflected, for instance in the letter by then Commissioner Catherine Ashton to all the SADC EPA Ministers (see Annex II for the full letter) on 20 March where she notes:

'As discussed in Gaborone, we need now to agree on a way forward in order to sign the interim EPA, notify it to the WTO and move on with the negotiations of the final EPA. Time is not on our side.'

I would therefore suggest that the new texts worked out by our Chief Negotiators in Namibia be agreed as providing the solution to these issues with a view to their incorporation in the final EPA.'

13. According to some, this EC position halted any further negotiations on the outstanding contentious issues in 2009, since proceeding further seemed rather pointless.

14. In the ESA region, a joint statement between ESA and EC was made at the time of the signing of the interim EPAs:

'We further recognize that new texts have been agreed on the following key issues: infant industry, prohibition of quantitative restrictions, standstill and modification of tariff commitments... We hereby agree that these new texts shall be incorporated in the full Economic Partnership Agreement currently being negotiated. We further agree to expedite the negotiations on the remaining contentious and other outstanding issues with a view to the conclusion of a full and inclusive EPA as soon as possible'.³

15. The unincorporated new texts resulting from the renegotiations have questionable legal standing. Countries remain bound to the 'old'/ existing language of the contentious issues. As a result of this, as well as what has been seen by certain countries as unsatisfactory handling of the contentious issues, some have refused to sign the EPAs e.g. Namibia, Angola and South Africa in the SADC region, and Zambia and Malawi in the ESA countries. Some others that have signed are now refraining from

³ Joint ESA-EC Ministerial Statement on Conclusion of A Full Economic Partnership Agreement. Signed by Hon. Minister Felix Mutati (Zambia) on behalf of the ESA Group and Baroness Catherine Ashton, EC Trade Commissioner, 29 August 2009.

ratification until the sub-region is able to move ahead together (e.g. Botswana and Lesotho as talks regarding the South African Customs Union (SACU) are underway).

III. THE RENEGOTIATIONS IN THE 'CONTENTIOUS ISSUES'

A. The Standstill Clause

16. The EU has introduced 'standstill' commitments in all the EPAs. In the African interim EPAs, all texts except the SADC text contain a standstill clause freezing all applied tariffs once the EPA is in force. Even the tariffs on sensitive lines excluded from liberalization are 'frozen'. For example, the ESA text is reproduced in the box below.

BOX: Current ESA Text on Standstill Clause Covering All Tariff Lines

'...The parties agree not to increase their applied customs duties on products imported from the other Party'. (Article 14, ESA text, 30 April 2009).

17. The only exception is the SADC text where the standstill applies only to products subject to liberalization.

BOX: SADC Text on Standstill Clause Covering Tariff Lines Subject to Liberalisation

'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 this Agreement for all products subject to liberalisation'. (Article 23, SADC text, 22 September 2008; 2 February 2009).

18. The EAC and ESA, in the contentious issues renegotiations in 2009 have asked for changes to be made to the standstill so that it applies only to products to be liberalized, as was granted to SADC. Very interestingly, this change was granted to the EAC and has already been incorporated into the 3 April 2009 version of the EAC interim EPA (which the EAC countries have initialed but not yet signed). Article 13 notes

BOX: New EAC Text on Standstill Clause Covering Tariff Lines Subject to Liberalisation

'Except for measures adopted according to Articles 19 (Anti-dumping and Countervailing measures) and 21 (Bilateral Safeguards), the Parties agree not to increase their applied customs duties for products subject to the liberalization schedule.' (Article 13, EAC text, 3 April 2009).

This seems to be the only instance where the EC has allowed changes agreed upon in the renegotiations of the contentious issues to be incorporated into the current texts. The

ESA region was not so fortunate. The new text was agreed to by both parties on the eve of the signing of the EPA, but was not incorporated into the region's EPA.⁴

ESA Text on Standstill Clause That is Yet to be Incorporated into the EPA

'Subject to Article 12 and Article XXX, the Parties agree not to increase their applied customs duties on products imported from the other Party. This provision shall not apply to products not subject to the liberalization schedule'.*

*Article on modification of tariff commitments

Article 12 refers to the Article concerning 'Customs duties on products originating in the EC Party'

Source: Article 14, ESA iEPA, 'Joint Conclusions', EC-ESA EPA Senior Official Meeting, 28 August 2009, Mauritius

Assessment of the Standstill Clause

19. Even when the standstill clause applies only to products to be liberalised, freezing tariffs of 80% of countries' tariff lines or trade is problematic. Whilst countries may have 15 or 25 years to implement their tariff elimination for the 80% of lines to be liberalised, during this transition period, the EPA text does not allow for tariffs to be increased. It means that countries have to contend with essentially a static trade policy, and by the end of the transition period, they would have given up having any trade policy on 80% of trade with a major partner, the EU. This is unlikely to support their need to combine a robust and dynamic trade policy with other development policies such as industrialisation and agriculture.

20. Article XXIV of the WTO on customs unions and free trade areas does not require countries to have a standstill clause. Those who have not yet signed the EPA should still call for the removal of the standstill clause on this basis.

21. It is worth noting that at the WTO, countries have both bound and applied tariff rates. Countries cannot raise their tariffs above their bound WTO rates. However, they are free to raise their usually much lower applied tariffs to the bound rates at any time. The EPA, freezing African countries' tariffs (those that will eventually be brought to zero) at applied rates until these tariffs are eliminated, would prevent countries from using a very important development policy instrument.

⁴ Other texts, such as Cote d'Ivoire's signed EPA (Article 15) and the Ghana interim EPA (also Article 15) also have standstill clauses that freeze all tariffs. The only exception to the standstill is Article 15.2 in both these interim EPAs which addresses the ECOWAS Common External Tariff (CET) which is still being developed. Unfortunately, Article 15.2 tackles the CET in a way that is inadequate, stating that the EPA scheduled tariffs of Ghana and Cote d'Ivoire can only be revised downwards to be compatible with the ECOWAS CET, not upwards. This will be problematic for ECOWAS since it has internally agreed on a 5th band in their CET of 35%. A look in the schedule for Cote d'Ivoire shows that the highest EPA tariff level is 20%.

B. Modification of Tariff Commitments

22. With the exception of the CARIFORUM EPA, all the other EPA texts do not have a Modification of Tariff Commitments provision. The CARIFORUM EPA says that 'in the event of serious difficulties in respect of imports of a given product', the tariff lines subject to liberalization and elimination can be modified during the implementation period of liberalization *if* there is agreement within the CARIFORUM-EC Trade and Development Committee. The modification is limited. It cannot

'lead to time periods in the schedule for which the review has been requested being extended in respect of the product concerned beyond the maximum transition period for duty reduction or elimination of the product' as already scheduled (Article 16.6, CARIFORUM EPA text).

23. Nevertheless, within the interim period, if no solution for the problem has been found by the CARIFORUM -EC Trade and Development Committee, CARIFORUM States can suspend the timetable provisionally for one year (Article 16.6).

Box: Article 16.6 of the Cariforum EPA

'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. Any such modification shall not lead to the time periods in the schedule for which the review has been requested being extended in respect of the product concerned beyond the maximum transitional period for duty reduction or elimination for that product as provided for in Annex III. If the CARIFORUM-EC Trade and Development Committee has not taken a decision within 30 days of an application to review the timetable, the CARIFORUM States may suspend the timetable provisionally for a period that may not exceed one year.'

24. A broader and more permanent Modification provision (Article 17) applies to a limited group of smaller CARIFORUM economies. There is no need for 'serious difficulties' to arise before tariff changes can be made in Article 17, only the presence of 'special development needs'.

25. The limited value of Article 17 though, is that the Parties must still seek the permission of the CARIFORUM-EC Trade and Development Committee. Assuming this is granted, they can modify the customs duties already scheduled and adjust their commitments in their schedules. The other condition is that the changes should be in keeping with Article XXIV of the GATT (i.e. it should fulfill the 'substantially all the trade' provision, as well as the 'within a reasonable length of time' provision).

Box: Modification of Tariff Commitments - Cariforum EPA Text Article 17

In the light of the special development needs of Antigua and Barbuda, Belize, the Commonwealth of Dominica, Grenada, the Republic of Guyana, the Republic of Haiti, Saint Christopher and Nevis, Saint Lucia, and Saint Vincent and the Grenadines, the Parties may decide in the Cariforum-EC Trade and Development Committee to modify the level of customs

duties stipulated in Annex III [Annex III is 'Customs Duties on Products Originating in the EC Party], 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 simultaneously to adjust the customs duty commitments stipulated in Annex III and relating to other products imported from the EC Party, as appropriate.

26. It should be possible within Article 17, for the CARIFORUM countries listed to seek a longer transition period for a product to be liberalized, or to shift it to the sensitive list. The problem is getting the approval of the joint EPA Committee.

27. The ESA group renegotiated to introduce the 'Modification of tariff commitments' provision in its 'full' EPA. *This was tentatively agreed to by both sides (i.e. there could still be changes).*⁵ The text borrows elements from the CARIFORUM EPA's Articles 16.6 and 17.

BOX: ESA's 'Modification of Tariff Commitments' (tbc) That is Yet to be Incorporated into the Existing EPA

1. In the light of the special development needs of ESA States, the Parties may decide in the EPA 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 an ESA State. 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.

2. In the event of serious difficulties and in respect of imports of a given product originating from EC Party, the schedule of customs duty reductions and eliminations may be reviewed by the EPA Committee by mutual agreement with a view to possibly modifying the time schedule for reduction or elimination. If the EPA Committee has not taken a decision within thirty days of an application to review the timetable, the ESA States may suspend the timetable provisionally for a period that may not exceed one year.

3. 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.

Source: Article 14, ESA iEPA, 'Joint Conclusions', EC-ESA EPA Senior Official Meeting, 28 August 2009, Mauritius

Assessment of the Modification of Tariff Commitments Provision

28. Countries in the WTO's GATT can, under certain conditions, permanently modify their MFN schedules, although they might have to offer compensation to affected parties.⁶ The GATT does not provide this possibility for preferential trade

⁵ To be precise, the EC-ESA Senior Official Meeting's 'Joint Conclusions' of 28 August 2009 states: 'Modification of tariff commitments: -a text was agreed and is attached as annex (tbc on both sides).'

⁶ Article XXVIII GATT is the principal provision of GATT 1994 on renegotiations of tariff concessions. It provides for a possibility of modification or withdrawal of tariff concessions after negotiation. In addition,

agreements. Hence, CARIFORUM and now the ESA's new language on modification of schedules that mirror some similar language to the GATT can be of benefit.

29. However, this benefit is quite limited since any modification has to be approved by the EC in the joint EPA Committee. The only action allowed where this approval is not required is the suspension of the liberalization timetable provisionally for a year, and this can only take place 'in the event of serious difficulties'. This provision is more akin to a safeguard than a permanent renegotiation of the tariff schedule. The EU might argue that other safeguards which are less trade-restrictive should be utilized instead.

30. In addition, the other limitation to both CARIFORUM and ESA's texts is the mention of Article XXIV conformity which the EC will no doubt use in the EPA Committee to argue against any major change in an ACP countries' modification of schedules.

C. Duties and Taxes on Exports

31. Many developing countries use export taxes and duties for very valid reasons:

- A source of government revenue
- Discourage the exportation of primary products and to encourage diversification and processing of a sector – to engine industrialization, to attain value addition from selling the processed rather than the primary product. This also leads to the provision of employment
- Ensure sufficient domestic supply for the domestic industry
- Benefit from terms of trade gains for the local diversified product since domestic producers can access the product at lower prices than foreign producers.

32. Some examples of countries' use of export taxes have been highlighted in a study by Roberta Piermartini⁷ (between 1995 – 2002). They include Benin (diamonds, precious stones and metals, cocoa beans and crude oil); Botswana, Namibia, Lesotho (rough, unpolished diamonds); Ethiopia and Kenya (fish and timber); Uganda (coffee); Guinea, Côte d'Ivoire (rough timber, plywood, coffee, raw cocoa, cola nuts and uranium ores and concentrates); Mali (gold, fish); Mozambique (cashews) etc.⁸

33. All the EPAs have restrictions on countries' ability to impose export taxes and duties. It should be noted that export duties, taxes or other charges are completely legitimate under WTO's GATT. (GATT Article XI states that 'duties, taxes and other

other articles provide for grounds to renegotiate tariff schedules, such as paragraph 5 of Article 2 (Schedule of Concessions)

⁷ Piermartini R 2004 'The Role of Export Taxes in the Field of Primary Commodities', WTO. www.wto.org/english/res_e/booksp_e/discussion_papers4_e.pdf

⁸ For further discussion on this issue pertaining to developing countries, see Third World Network 2009 'Benefits of Export Taxes'.

charges' are allowed). The restriction in the EPA therefore goes beyond the WTO's ambit and is not required for EPAs to be WTO-compatible.

34. There are only slight variations in the different EPA sub-regions' export duties and taxes provision. Most allow the continuation of existing export duties and taxes (SADC, EAC, Cameroon, Ghana, Côte d'Ivoire, ESA). Some of these specifically mention that existing duties and taxes should not be increased (SADC, Cameroon, Ghana, Cote d'Ivoire).

35. Some of the African EPAs have certain exceptions, allowing for *temporary* export taxes and duties under certain circumstances: to 'foster the development of domestic industry', to 'maintain currency value stability...' (EAC: Article 15.2) and for 'specific revenue needs, protection of infant industries or protection of the environment' (SADC: Article 24:2).

36. It is important to note that when using these exceptions, 'authorization' (EAC Article 15.2) by the EC is necessary in some EPAs (EAC), whilst for others such as SADC, 'consultation' is needed (SADC Article 24.2). The SADC Parties however, have to 'justify' the 'exceptional circumstances' necessitating the use of these measures.

37. The CARIFORUM EPA has been the most restrictive, where all export duties and taxes are prohibited and a few existing ones are to be phased out in three years.

38. Given the importance of this issue for industrialization and income, it has been a key item in the 2009 renegotiations.

39. The EAC has requested the addition of new language which the EC has not yet agreed to.

Box: EAC Proposed Additional Paragraph - No Agreement by the EC

'In cases of emergency regarding the circumstances spelt out in paragraph 2 and where the EPA Council is not scheduled to meet within one month, and notwithstanding paragraph 1, the EAC Party can impose a duty or tax in connection with the exportation of goods and promptly notify any such taxes to the EPA Council'.

Source: Summary and Status of the Contentious Issues Under the FEPA as at 30th June 2009 Annex VII

40. There has been agreement in Swakopmund in the case of SADC, to broaden the exception for the introduction of temporary duties and taxes. The new SADC text adds a separate paragraph on allowing for export duties in cases when SADC parties can 'justify' 'industrial development needs'. This exception is for a limited number of products, is temporary, and requires the 'mutual agreement with the EC Party' (Article 24.3 of the 'Agreed' Swakopmund Provisions).

41. Another element added is for export taxes and duties to be introduced 'where essential for the prevention or relief of critical general or local shortages of foodstuffs or

other products essential to ensure food security’ (Article 24.2 of the ‘Agreed’ Swakopmund Provisions). The language in this new paragraph is an adaptation of GATT Article XI where countries are already allowed to introduce export prohibitions and restrictions when there are food shortages, although the SADC language broadens this slightly and makes it explicit that countries can indeed take these measures in the context of their EPA.

Box: GATT Article XI - General Elimination of Quantitative Restrictions

‘1.No prohibitions or restrictions other than duties, taxes or other charges whether made effective through quotas, import or export licences or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party.

‘2. The provisions of paragraph 1 of this Article shall not extend to the following:

(a) Export prohibitions or restrictions temporarily applied to prevent or relieve critical shortages of foodstuffs or other products essential to the exporting contracting party...’

42. Another new element, this time added by the EC side, is a paragraph noting the need for the new SADC provision on export duties to be compatible with Article XXIV of GATT. The EC has argued in the negotiations that export taxes and duties also constitute restrictions to trade.

Box: SADC Text on Export Duties Agreed in Swakopmund – Still to be Incorporated into the SADC EPA

(The parts in bold are the new additions made to the current SADC EPA text. The parts in strikethrough is language deleted from the current SADC text).

Article 24

Export duties

1. No new customs duties or taxes imposed on, **or in connection with the exportation of goods**, shall be introduced, nor shall those already applied be increased, in the trade between the European Community and the SADC EPA countries from the date of entry into force of this Agreement.
2. In exceptional circumstances where the SADC EPA States can justify specific revenue needs, protection of infant industries, protection of the environment **or where essential for the prevention or relief of critical general or local shortages of foodstuffs or other products essential to ensure food security**, these SADC EPA States may introduce, after consultation with the EC Party, ~~temporary export taxes or charges having equivalent effect on a limited number of additional products~~ **temporary customs duties or taxes imposed on, or in connection with the exportation of goods, on a limited number of additional products.**
3. **In exceptional circumstances where the SADC EPA States can justify industrial development needs those SADC EPA States may introduce temporary customs duties**

	or taxes imposed on, or in connection with the exportation of goods, on a limited number of additional products, by mutual agreement with the EC Party as expressed in a decision of the Joint Council.
4	The Parties shall ensure that any application of this provision does not result in an incompatibility of this Agreement with Article XXIV of GATT 1994.
5	Any customs duties or taxes imposed on, or in connection with the exportation of goods, applied pursuant to this Article shall be applied to goods exported to all destinations.
6	Paragraph 2 shall not be applicable to South Africa.
7	The Parties agree to review the provisions of this Article in the Joint Council no later than three years after the entry into force of this Agreement, taking fully into account their impact on development and diversification of the SADC EPA States' economies.

43. Negotiations on Export Taxes also took place within ESA. Whilst there is a text, it has a 'tbc (to be confirmed)' status and was not obtainable at the time of writing of this paper.

Assessment of the Renegotiations on Export Taxes

44. The outcome of these renegotiations, for instance for SADC, are at best disappointing, particularly in the context where export taxes are completely legitimate in the WTO. Rather than providing SADC countries with any real gains, the very existence of this clause in the EPA is subtracting from SADC countries rights which they would otherwise enjoy in the WTO.

45. The intransigence of the EC is clear from the EAC demands - emergency implementation of export taxes by the EAC without consultation with the EC - has up to now been refused.

46. Whilst the new yet-to-be-incorporated SADC text broadens the scope of exceptions, allowing for export taxes to be imposed for 'industrial development needs', these are temporary and limited, and the EC can refuse to give consent. This makes the exception very weak. And in exchange for this conditioned carve out, Article XXIV has been brought into the picture when it was not there before.

47. The EC's bringing on board of Article XXIV is problematic and its objectivity can be questioned. By doing so, it is suggesting that export taxes and duties are part of the 'duties and other restrictive regulations of commerce' (GATT Article XXIV:8(b)) which should be eliminated on substantially all the trade. EC's subsidies in agriculture, and in the past year in certain industrial sectors can also be conceived as part of the 'duties and other restrictive regulations of commerce'. Yet the EC has insisted that subsidies can be continued and are not disciplined in the EPAs or brought under Article XXIV conformity.

48. It is best that ACP countries take the same line in export taxes as the EC in relation to agricultural domestic supports – that this issue should be dealt with only in the WTO, and not in the context of the EPAs.

49. ACP countries should remain free to introduce new export taxes and increase existing ones, without having to consult or attain agreement from the EC (the same way the EC implements subsidies without informing, consulting or gaining agreement from the ACP countries). The best option in order to maintain this flexibility is to delete the article on Export duties in the EPAs.

50. The argument has also been made that the export taxes issue is a multilateral one, and therefore should be dealt with in the multilateral forum, not the EPAs. If ACP countries remove export taxes, supplies for their domestic producers are likely to be higher in price, making their industry less competitive. For example, removal of export taxes on animal hides may make it more expensive for the ACP domestic industries to attain supplies. In contrast, the leather industry in Brazil or Argentina may still be enjoying cheaper inputs because they still have export taxes and will therefore be more competitive.⁹

D. Infant Industry Clause

51. All the Infant Industry clauses in the signed EPAs have been incorporated into the bilateral safeguard provision and have the following features:

- 1) *Invocation grounds.* The infant industry clause gets activated when a product is imported into an EPA territory ‘in such increased quantities or under such conditions as to cause or threaten to cause disturbances to an infant industry producing like or directly competitive products.
- 2) *Remedy.* The remedy can either be i) (temporary) suspension of tariff reductions ii) increase in the tariff and iii) introduction of tariff quotas, or iv) a combination of these measures. The remedy, by way of a higher tariff is limited to an increase to the MFN applied duty (duty applied to other WTO Members). The only text that is different in this regard is the SADC original infant industry clause, which allows countries to raise tariffs up to the *bound* WTO rate.
- 3) *Choose least trade restrictive remedy.* The Party using the safeguard should also give ‘priority’ to the measure which ‘least disturb(s) the operation of this Agreement (i.e. the EPA)’. Safeguards are subject to periodic reviews with a view to establishing a timetable to abolish the safeguard when circumstances permit.
- 4) *Notification and examination.* When immediate action is required, the EPA Party (or ACP State) can introduce the safeguard measure for 200 days. If the safeguard is to be used for a longer period, a decision to this effect is required by the EPA

⁹ Lui D and Bilal S 2009 ‘Contentious Issues in the Interim EPAs: Potential Flexibility in the Negotiations’, Discussion Paper No. 89, March, p. 18.

Committee based on a 'thorough examination... with a view to seeking a solution acceptable to the parties concerned'.¹⁰

- 5) *Duration*. The duration of the bilateral safeguard is equal to the duration of a multilateral safeguard under WTO Safeguard Agreement, a maximum of 8 years.
- 6) *Expiry of Infant Industry Clause*. The provision is time-limited and the entire provision expires after 10 years for non LDCs and 15 years for LDCs (ESA text). In the SADC text, it is 12 years for non-LDCs and 15 years for LDCs.

52. The old texts seemed to presume that countries will no longer have infant industries after 10 to 15 years. Also, an increase to MFN applied duty could be insufficient to counter the injury due to increased imports. Therefore, the infant industry clause was a major part of the 'renegotiations' on the contentious issues by both ESA and SADC. These countries wanted a stand alone infant industry provision that did not expire after 10 or 15 years.

53. The final outcome is somewhat different for both these two subregions - there are pluses and minuses on both sides. The boxes below provide the texts of the Infant Industry Clause for both these sub-regions.

¹⁰ There is a slight exception: 'If no recommendation has been made by the EPA Committee aimed at remedying the circumstances, or no other satisfactory solution has been reached within 30 days of the matter being referred to the EPA Committee, the importing Party may adopt the appropriate measures to remedy the circumstances in accordance with this Article' (ESA Text, Article 21:7b, 30 April 2009).

Box: ESA's Stand-alone Infant Industry Clause - to be Incorporated into a 'Full' EPA

1. ESA States may temporarily suspend further reductions of the rate of customs duty or increase the rate of customs duty up to a level which does not exceed the applied MFN duty or introduce tariff quotas or a combination of these measures, where a product originating in the EC Party, as a result of the reduction of duties, is being imported into its territory in such increased quantities and under such conditions as to threaten the establishment of an infant industry cause or threaten to cause disturbances to an infant industry producing like or directly competitive products

2.
 - (a) Where a ESA Signatory State takes the view that the circumstances set out in paragraph 1 exist, it shall immediately refer the matter to the EPA Committee for examination.

 - (b) The EPA Committee may make any recommendation needed to remedy the circumstances which have arisen. If no recommendation has been made by the EPA Committee aimed at remedying the circumstances, or no other satisfactory solution has been reached within 30 days of the matter being referred to the EPA Committee, the ESA Signatory State concerned may adopt measures in accordance with this Article.

 - (c) Before taking any measure provided for in this Article the ESA Signatory State concerned shall supply the EPA Committee with all relevant information required for a thorough examination of the situation, with a view to seeking an acceptable solution.

 - (d) In the selection of measures pursuant to this Article, priority must be given to those which least disturb the operation of this Agreement.

 - (e) Any measure taken pursuant to this Article shall be notified immediately to the EPA Committee and shall be the subject of periodic consultations within that body.

 - (f) In critical circumstances where delay would cause damage which it would be difficult to repair, the ESA Signatory State concerned may take measures provided for in paragraph 1 on a provisional basis without complying with the requirements of subparagraphs (a) to (e). Such action may be taken for a maximum period of 200 days. The duration of any such provisional measure shall be counted as part of the period referred to in paragraph 3. In taking such provisional measures, the interest of all parties involved shall be taken into account. The importing ESA Signatory State concerned shall inform the EC Party, and it shall immediately refer the matter to the EPA Committee for examination.

3. Such measures may be applied for a period of up to 8 years. Application of the measures may be further extended by decision of the EPA Committee.

Source: 'Joint Conclusions', EC-ESA EPA Senior Official Meeting, 28 August 2009, Mauritius

Box: SADC's Stand-alone Infant Industry Clause - to be Incorporated into a 'Full' EPA

- 1 Botswana, Lesotho, Namibia, Mozambique and Swaziland may temporarily suspend further reductions of the rate of customs duty or increase the rate of customs duty up to a level which does not exceed the applied MFN duty, where a product originating in the EC Party, as a result of the reduction of duties, is being imported into its territory in such increased quantities and under such conditions as to threaten the establishment of an infant industry cause or threaten to cause disturbances to an infant industry producing like or directly competitive products.
- 2 Measures adopted in accordance with the conditions of paragraph 1 by a SADC EPA State which is also a SACU Member State shall take the form of the levying of additional duties exclusively by the SADC EPA State invoking this provision.
- 3
 - (a) Where a SADC EPA State takes the view that the circumstances set out in paragraph 1 exist, it shall immediately refer the matter to the Trade and Development Committee for examination.
 - (b) The Trade and Development Committee may make any recommendation needed to remedy the circumstances which have arisen. If no recommendation has been made by the Trade and Development Committee aimed at remedying the circumstances, or no other satisfactory solution has been reached within 30 days of the matter being referred to the Trade and Development Committee, the SADC EPA State concerned may adopt measures in accordance with this Article.
 - (c) Before taking any measure provided for in this Article the SADC EPA State concerned shall supply the Trade and Development Committee with all relevant information required for a thorough examination of the situation, with a view to seeking an acceptable solution.
 - (d) In the selection of measures pursuant to this Article, priority must be given to those which least disturb the operation of this Agreement.
 - (e) Any measure taken pursuant to this Article shall be notified immediately to the Trade and Development Committee and shall be the subject of periodic consultations within that body.
 - (f) In critical circumstances where delay would cause damage which it would be difficult to repair, the SADC EPA State concerned may take measures provided for in paragraph 1 on a provisional basis without complying with the requirements of sub-paragraphs (a) to (e). Such action may be taken for a maximum period of 200 days. The duration of any such provisional measure shall be counted as part of the period referred to in paragraph 4. In taking such provisional measures, the interest of all parties involved shall be taken into account. The importing SADC EPA State concerned shall inform the EC Party, and it shall immediately refer the matter to the Trade and Development Committee for examination.
- 4 Such measures may be applied for a period of up to 8 years. Application of the measures may be further extended by decision of the Joint Council.

5 Article 25 of the TDCA shall continue to apply to South Africa.

6 **SACU Member States shall have the right to have recourse to Article 26 of the SACU Agreement 2002.**

Source: 'Note: for the Members of the ACP Working Part', DG EII Development, Brussels, 3 April 2009 Dec no. 109/09 ACP.

Assessment of the Renegotiations on Infant Industry

54. The stand-alone infant industry clauses obtained by ESA and SADC are improvements in limited ways:

- *No Expiry of Infant Industry Clause.* These are stand alone provisions (although they are yet to be incorporated) that do not expire after 10 or 15 years, as is in the current EPA texts.
- *Increased grounds for invocation.* Both texts have broadened the circumstances under which the Infant Industry Provision can be triggered, as compared to the original Safeguard Infant Industry Provision. With the new language, the Clause can be activated when imports enter in such increased quantities or under such conditions as to 'threaten the *establishment* of an infant industry' (emphasis added). This is broader than the original Clauses where the infant industry clause is activated when imports 'cause or threaten to cause disturbance to an *existing* infant industry'.
- *More room for trade restrictive measures of longer duration.* Periodic review of safeguards within the EPA Committee remains a requirement. However, unlike the 'old' safeguard language in the current Infant Industry Clause, there is no language saying that these consultations should be with the view to establishing a timetable for the remedy's abolition.

55. The rest of the language is similar to the original EPA safeguard texts - tariff increases without authorization from the EPA Committee can be taken for 200 days. Thereafter, the EPA Committee must examine the case. There is also the same caveat that countries can nevertheless go ahead if 'no other satisfactory solution has been reached within 30 days'. The infant industry remedy can apply for up to 8 years. The new ESA text has the same remedies as ESA's original infant industry clause.

56. Inclusion of a reference to the infant industry clause in the SACU Agreement (paragraph 6 of SADC's new language) seems to be a Pyrrhus victory. SACU's own infant industry clause (Article 26, pasted in the Box below) is drafted in a more general way. It would allow countries more invocation grounds and higher remedies up to a rate that is sufficient to support their infant industry. It does not stipulate a ceiling to the tariff increase, which would imply that tariffs could be increased to the WTO bound rate or beyond if compatible with the multilateral trade rules. However, SACU members cannot use this clause in their trade relations with the EU or with non-SACU members (Mozambique, or possibly later, Angola), since this clause governs trade relations between SACU Members. Inclusion of paragraph 6 is effectively pointless since SACU

member states would have had recourse to the SACU Agreement in any case, even if this was not mentioned in the SADC EPA. Therefore, strict reading suggests that paragraph 6 is redundant.

57. At the same time, SADC EPA states seemed to have lost the right to increase tariffs up to the WTO bound level. Paragraph 1 of SADC's new language limits the remedy to i) suspending tariff reductions or ii) increasing the tariff to the MFN duty. The leeway to allow for increasing duties to the bound rate has been dropped, and also the possibility to introduce tariff quotas on the product concerned!

58. This result may be contrary to the intentions of the SADC states in the renegotiations. They would probably have read paragraph 6 as 'SACU Member States shall have the right to have recourse to Article 26 of the SACU Agreement 2002, **mutatis mutandis applied to imports originating from the EC Party (or European Union)**'

59. Even if the SADC EPA States would publicly back this interpretation, for instance through a unilateral declaration, it would be uncertain whether tariffs could be raised up to the bound level and if quotas can be introduced vis-à-vis the EU. The Infant Industry Clause in the SACU Agreement speaks in more general terms about possible remedies ('levy additional duties') whereas the SADC EPA specifies the ceiling of those additional duties ('increase the rate of customs duty up to level which does not exceed the applied MFN duty'). So, it would appear that the more specific interpretation would apply. On the other hand, the older SADC text does allow SADC EPA States to raise duties up to the bound level, and there should have been common understanding between the parties that this would remain so in negotiations aimed at resolving contentious issues. In conclusion, the reference to the SACU Agreement is not helpful and leaves behind the SADC EPA States in a legal quagmire. In hindsight, it would have been better to take elements from the SACU Infant Industry Clause and to transplant them into the EPA Infant Industry Clause.

BOX: SACU Protection of Infant Industries (art. 26 of SACU Agreement)

- 1.. The Government of Botswana, Lesotho, Namibia or Swaziland may as a temporary measure levy additional duties on goods imported into its area to enable infant industries in its area to meet competition from other producers or manufacturers in the Common Customs Area, provided that such duties are levied equally on goods grown, produced or manufactured in other parts of the Common Customs Area and like products imported from outside that area, irrespective of whether the latter goods are imported directly or from the area of another Member State and subject to payment of the customs duties applicable to such goods on importation into the Common Customs Area.
2. Infant industry means an industry which has been established in the area of a Member State for not more than eight (8) years.
3. Protection afforded to an infant industry in terms of paragraph 1 shall be for a period of eight (8) years unless otherwise determined by the Council.

4. The Council may impose such further terms and conditions as it may deem appropriate.

Source: 2002 Southern African Customs Union (SACU) Agreement

60. All in all, the new infant industry Article is limited in its improvements for both ESA and SADC. The key advantage is that the clause does not expire after 10 or 15 years. The other advantage is the coverage for industries that are still to be established rather than only existing infant industries.

61. For SADC, the new language is disadvantageous in the sense that they would give up their right to use tariff quotas and the ability to raise tariffs to the bound rates (as in the original SADC infant industry clause). With the new language, they can only raise tariffs to MFN rates. This is a high price for a permanent infant industry clause.

E. Quantitative Restrictions

62. All the interim EPA agreements have a clause on the 'Prohibition of Quantitative Restrictions'. All these clauses are modified versions of GATT Article XI: 1.

BOX: Existing SADC Article 35 Prohibition of Quantitative Restrictions

All prohibitions or restrictions applying to the import or export of goods between the Parties, other than customs duties and taxes, and fees and other charges provided for under Article 22 of this Agreement, whether made effective through quotas, import or export licenses or other measures, shall be eliminated upon the entry into force of this Agreement, unless justified under the exceptions of Article XI of GATT 1994. No new such measures shall be introduced. The provisions of this Article shall be without prejudice to the provisions of Article 32, Title II, on antidumping and countervailing measures.

63. The ESA text is almost the same, except that it does not allow ESA countries to avail of the GATT XI exceptions. These exceptions are:

- Export prohibitions or restrictions temporarily applied to prevent or relieve critical shortages of foodstuffs essential to the exporting WTO Member (Paragraph 2 (a))
- Import and export prohibitions or restrictions necessary to the application of standards or regulations for the classification, grading or marketing of commodities in international trade (Paragraph 2 (b));
- Import restrictions on any agricultural or fisheries product, necessary to the enforcement of governmental measures which operate to restrict production of the domestic product or for certain other purposes; remove a temporary surplus etc (Paragraph 2 (c))

BOX: Existing ESA Article 17 - 'Prohibition of Quantitative Restrictions'

Except as otherwise specified in Annexes I and II of this Agreement, all prohibitions or restrictions in trade on the importation, exportation or sale for export between the Parties, other than customs duties, taxes, fees and other charges provided for under Article 7 (Customs Duties), whether made effective through quotas, import or export licenses or other measures, shall be eliminated upon the entry into force of this Agreement. No new such measures shall be introduced.

64. The ESA and EC 'mostly agreed' to a new text on 28 August 2009. Notably, the text has eliminated the wording in the current ESA EPA that 'no new such measures (quantitative restrictions) shall be introduced'. The text is largely a reproduction of GATT Article XI, and it includes the first two exceptions allowed for in the GATT XI. The third broader, more useful exception in GATT XI pertaining to import restrictions on agricultural or fisheries products was not included.

BOX: ESA 'Mostly Agreed' to Text on Quantitative Restrictions (draft article 17)

1. Except as otherwise specified in Annexes I and II of this Agreement, all prohibitions or restrictions in trade on the importation, exportation or sale for exports between the Parties, other than customs duties, taxes, fees and other charges provided for under Article 7, whether made effective through quotas, import or export licenses or other measures, shall be eliminated upon the entry into force of this Agreement. .

2. The provisions of paragraph 1 of this Article shall not extend to the following:

- (a) Export prohibitions or restrictions temporarily applied to prevent or relieve critical shortages of foodstuffs or other products essential to the exporting contracting party;
- (b) Import and export prohibitions or restrictions necessary to the application of standards or regulations for the classification, grading or marketing of commodities in international trade.

Source: 'Joint Conclusions', EC-ESA EPA Senior Official Meeting, 28 August 2009.

65. The 'Joint Conclusions' of the EC-ESA EPA Senior Official Meeting notes, on the issue of Quantitative Restrictions, that

66. 'A text was mostly agreed and is attached as annex (see above Box). However, Parties agreed to continue discussions on the issue of environment. ESA insists that the provisions on general exceptions do not adequately provide for the environmental protection while EC considers that quantitative restrictions are not the appropriate tool to address environmental protection'.

67. This conclusion touches upon the relationship between Multilateral Environmental Agreements (MEAs) and the WTO Agreement. Some MEAs allow for QRs in certain situations, such as the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal and the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES). In the WTO context, it is unclear whether QRs applied according to MEAs would fall under the general exception environment protection (Article XX(b) GATT). ESA argues that they would. The EC's position is that quantitative restrictions applied to implement an MEA cannot be justified by the general exception on environmental protection.

68. The EC's position is at odds with the EU's practice, since the EU uses QRs to address environmental protection. The 1995 "Ban Amendment" of the Basel convention prohibits export from OECD countries¹¹ to non-OECD countries of hazardous wastes intended for final disposal or recovery. Most EU Member States have ratified the Amendment and the EU has approved it. The EU has transposed the "Ban Amendment" into European Regulation (EC) N° 1013/2006. ¹² However, the Ban Amendment never came into force and currently an informal process has been initiated by Switzerland and Indonesia to explore alternatives to the Ban Amendment in order to achieve the same objective.¹³

69. The SADC countries, according to one analyst, wanting to ensure that their import licensing arrangements could be continued, sought to have new language on the quantitative restrictions article, which would reaffirm their rights under the WTO Agreements on this issue. What SADC obtained in the renegotiations is as follows:

BOX: SADC's Prohibition of Quantitative Restrictions - Yet to be Incorporated into 'Full' EPA

The Parties to this Agreement may apply quantitative restrictions provided such restrictions are applied in conformity with the WTO Agreement.

70. This ensures that the SADC countries have the same recourse to quantitative restrictions, as they would have without the SADC EPA, provided they are WTO compatible.

Assessment of the Renegotiations on Prohibition of Quantitative Restrictions

71. SADC gained something in the renegotiations.

- *Clarification on the use of certain policy instruments.* Essentially a clarification in the area of import licenses, that what is allowed under the WTO, is also legal in the EPA.

72. Nevertheless, even without this clarification, SADC should have been able to use import licenses in accordance with the WTO law. This is because the 'old' EPA language for SADC in prohibition of quantitative restrictions is largely cut and paste language from GATT's own Article XI:1 (General Elimination of Quantitative Restrictions). No definition is provided in the EPA (and the same thing in GATT XI:1) on what is an import license that does not prohibit or restrict trade. However, the WTO does contain an Agreement on Import Licensing Procedures, setting out conditions under which import licenses can be used. Anyone looking to interpret the 'old' SADC EPA language

¹¹ OECD, EU and Liechtenstein

¹² EU submission to the questions of the first meeting of the Country Led Initiative (CLI), driven by Switzerland and Indonesia, <http://www.basel.int/convention/cli/comments/eu.doc>

¹³ <http://www.basel.int/convention/cli/index.html>

would look to the interpretation of the WTO's Agreement on Import Licensing Procedures. Hence, import licenses, it can be argued, would have been allowed.

73. If the drafters of the EPA did not have the intention of using the WTO understanding on import licenses, arguably, they could have used completely different language, not a reproduction of WTO's GATT Article XI:1.

- *Access to a range of other WTO exceptions allowing the use of quantitative restrictions.*
 - Article XI exceptions (of which the new ESA text covers only the first two items)
 - Article XII on balance of payments difficulties
 - Article XVIII on industrial development for a WTO Member in its early stages of economic development
 - Article XIX on sudden imports requiring emergency action and the GATT Safeguard Agreement
 - General exceptions in the GATT which have been expunged from the EPA texts relating to measures regarding commodity agreements; export restrictions of domestic materials; measures essential to the acquisition or distribution of products in general or local short supply.

74. The EPA has a shorter list of general exceptions, hence SADC's new language will allow them to take QRs and 'other measures' in response to a broader range of situations.

75. For ESA, more preferable language would be what was obtained by SADC, reaffirming their rights to use quantitative restrictions that are in conformity with the WTO. Even without their 'new' language, it is likely that they can use import licenses which are legal under the WTO, for reasons noted above for SADC. What ESA did not get is additional exceptions available in the WTO, but not spelt out in the EPA.

76. It should also be noted that despite the 'old' EPA language prohibiting all quantitative restrictions in all the EPA texts, the EU maintains a QR on sugar in the EPA, without even noting this as an exception in the EPA Article on the Prohibition of QRs. This is definitely a Special and Differential Treatment for the EU and the ACP countries should also think of having a list of QRs, or the policy space to be able to introduce such QRs in the future.

BOX: EU Use of Quantitative Restriction in the EPA

The EU has reserved the right (Annex 1 of the ESA and SADC EPA texts) to maintain a tariff-rate-quota for sugar until 2015. Beyond a certain quantity that is stipulated, the MFN tariff is charged.

Furthermore, up to 2015, Annex 1 in both the SADC and ESA texts notes that 'no preferential import license shall be granted unless the importer undertakes to purchase such products at a price not lower than 90 percent of the reference price set by the EC Party for the relevant marketing year'.

After 2015, a very flexible bilateral safeguard provision would kick when, during two consecutive months, the EU market price of white sugar falls below 80 % of the price in the previous marketing year.

Whilst this is clearly a carve-out from the EPA Article prohibiting quantitative restrictions, this carve-out is not even mentioned in the 'Prohibition of Quantitative Restrictions' (QRs) Article.

F. Food Security Clause

77. All the following EPA texts: Central Africa, Cote d'Ivoire, Ghana, CARIFORUM and Pacific contain a separate stand-alone clause on food security. The clause gives additional grounds for the EPA country to invoke the bilateral safeguard available in all the EPAs. The current SADC, EAC and ESA interim EPAs do not have such a food security clause.

78. The CARIFORUM EPA's food security clause is provided in the Box below.

BOX: Food Security Clause in CARIFORUM EPA (Article 40).

1. The Parties acknowledge that the removal of barriers to trade between the Parties, as envisaged in this Agreement, may pose significant challenges to CARIFORUM producers in the agricultural, food and fisheries sectors and to consumers and agree to consult with each other on these issues.

2. Where compliance with the provisions of this Agreement leads to problems with the availability of, or access to, foodstuffs or other products essential to ensure food security of a Signatory CARIFORUM State and where this situation gives rise or is likely to give rise to major difficulties for such a State, that Signatory CARIFORUM State may take appropriate measures in accordance with the procedures laid down in paragraphs 7(b) to (d), 8 and 9 of Article 25 (Bilateral Safeguard Measures).

79. The Clause, as can be seen, is limited since its main tool – the bilateral safeguard, is already available to EPA states. The main problem with the bilateral safeguard is that beyond 200 days, any use of the bilateral safeguard has to be subject to an examination by the joint EPA committee, 'with a view to seeking a solution acceptable to the parties concerned'.

80. The Food Security Clause in the Central Africa EPA is essentially paragraph 2 of the CARIFORUM EPA.

BOX: Food Security Clause in Current Central Africa EPA (Article 25).

Should the implementation of this Agreement lead to problems with the availability of, or access to, the foodstuffs necessary to ensure food security, and where this situation gives rise or is likely to give rise to major difficulties for the Central Africa Party or a signatory Central African State, the Central Africa Party or this signatory Central African State may take appropriate measures in accordance with the procedures laid down in Article 31 (Bilateral Safeguard Measures).

81. The ESA renegotiations did not provide for the addition of a food security clause. However, the SADC renegotiations did. Nevertheless, what was offered to SADC is even more limited than the CARIFORUM or Central Africa EPA food security clause.

BOX: SADC Article 27 bis on Food Security - Yet to be Incorporated into EPA

1. The Parties acknowledge that the removal of barriers to trade between the Parties, as envisaged in this Agreement, may pose significant challenges to SADC EPA State producers in the agricultural and food sectors and agree to consult with each other on these issues.
2. Where essential for the prevention or relief of critical general or local shortages of foodstuffs or other products in order to ensure food security of a Party or SADC EPA State and where this situation gives rise or is likely to give rise to major difficulties for such a Party or SADC EPA State, that Party or SADC EPA State may adopt safeguard measures in accordance with Article 34, following the procedure set out in paragraphs 8(b) to (d), 9 and 10. The measure will be reviewed at least annually, and shall be removed as soon as the circumstances leading to its adoption cease to exist.

Assessment of the Renegotiations on Food Security

82. It is an irony to insert a food security clause when the main thrust of the EPA towards dismantling tariffs will inevitably have a major impact on food security, in part also because the EU remains a major subsidizer of agriculture. The enormity of this negative consequence cannot be addressed by the Food Security Clause for the following reasons:

Shortcomings of the Bilateral EPA Safeguard

83. The provision of such a clause - allowing SADC additional grounds to invoke the bilateral safeguard - is perhaps helpful, but the question is whether it is enough to address the food security problems the EPA is likely to cause. Probably not. This is because countries can only invoke the safeguard on a product-by-product basis. A lot of administrative work is required. To give detailed information to the EC for a 'thorough examination' (Article 34.8c, SADC EPA) requires monitoring the market conditions and justifying why the safeguard was needed. This kind of information requiring up-to-date data and very efficient bureaucracies and customs with sufficient human resource capacity remains a challenge for most ACP countries. In contrast to a product-by-product investigation before a safeguard is invoked, the liberalization schedule will be activated across hundreds of tariff lines.

84. In addition, as mentioned above, limiting the remedy to the bilateral safeguard is problematic since the safeguard beyond 200 days can only be used if the EU is also in agreement. There are further constraints. After a safeguard on a product has been used, it cannot again be used for the same product for 1 year. Another condition is that the measure should 'least disturb the operation of this (EPA) Agreement' (Article 34.8d, SADC EPA).

Can the Food Security Clause be Used?

85. The following situations are common occurrences that jeopardize food security when trade liberalization takes place:

- When imported foodstuffs enter in large quantities displacing locally produced products, and hence squeezing small farmers out of their livelihoods, leading to food security problems
- When imported foodstuffs enter at prices which are lower than domestic prices, hence local producers are again squeezed out of the market and find themselves more food insecure.

86. One would expect that in these situations caused by EPA liberalisation, it should be possible for countries to use the food security clause. However, the food security clause language in the CARIFORUM and Central African EPA text does not make it clear that this will be possible. The CARIFORUM text notes that

87. 'Where compliance with the provisions of this Agreement leads to problems with the availability of, or access to, foodstuffs or other products essential to ensure food security...', the bilateral safeguard can be invoked.

88. The EU can argue that imports enhance availability, and all the more so cheap imports. It is therefore questionable whether with the language in their food security clause, CARIFORUM and Central Africa can even use the clause.

89. The SADC new language is slightly different though no better. The bilateral safeguard can be used where 'essential for the prevention or relief of critical general or local shortages of foodstuff... in order to ensure food security...'. Once again, liberalization of trade can be argued to increase food supplies, not lead to shortages.

90. The deficiency in the food security clause is that it does not acknowledge the importance of local, national or regional food production in the attainment of food security, or that local producers and subsistence farmers need access to the local /regional markets in order for them to have access to food and employment. In other words, the concept of 'food sovereignty' - a right of countries and regions to define their agricultural and food policy, which entails protection of agricultural producers from lowly priced imports (these may be genuinely or artificially lowly priced) and policy space to become food self-sufficient - is not recognized in the food security clauses.

91. Ironically, the EU's Common Agricultural Policy was founded upon a deliberate policy of attaining a minimum level of food self-sufficiency, hence the tens of billions in agricultural subsidies provided each year to EU producers even today, plus other instruments EU has used to protect the domestic market, to ensure that EU production continues.

92. The 'Food Security' Clause attained by SADC adds no real benefit. Access to the Clause and its remedy might be problematic due to the very narrow focus on averting food shortages. The conditions allowing for countries to use the Food Security Clause should be expanded, for example, to include the deluge of imports or price drops in imported foods, as well as for products where the level of food self sufficiency has dropped below a desired level of food self-sufficiency. If the EU is serious in supporting ACP countries to increase their own food production and hence food security, the bilateral remedy should be improved – allowing countries to go beyond the bound Uruguay Round tariff levels, and also giving countries the right to impose safeguards unless the EU is able to prove that the sector concerned is very healthy, has a self sufficiency rate that is high, local farmers are thriving well and are by no means threatened by imports. I.e., the burden of proof should be on the EU to show why the ACP countries should not be using the bilateral safeguard.

G. Free Circulation of Goods

93. Almost all EPA texts have provisions relating to the free circulation of goods, which basically state that customs duties should only be levied once for goods entering an EPA region. If the goods are re-exported within the EPA territory and duties are collected, the duties collected at the initial entry into the territory 'shall be refunded fully' (current SADC EPA, Article 27.2).

BOX: Current SADC EPA Text on Free Circulation of Goods (Article 27)

- | |
|---|
| <ol style="list-style-type: none">1. Customs duties shall be levied only once for goods originating in the EC Party or in the SADC EPA States in the territory of the other Party.2. Any duty paid upon importation into an SADC EPA State shall be refunded fully when the goods are re-exported from the customs territory of the SADC EPA State of first importation. Such products shall then be subject to the duty in the country of consumption.3. The Parties agree to cooperate with a view to facilitating the circulation of goods and simplifying customs procedures. |
|---|

94. The only EPA text that does not have a provision on free circulation of goods is the ESA EPA. This would be the best option for other ACP countries for reasons elaborated below. The CARIFORUM text contains a clause on 'Movement of goods' (Article 18) which is a best endeavour provision, and requires the EC to provide technical assistance to bring about free circulation of goods within CARIFORUM.

BOX: CARIFORUM EPA on Movement of Goods (Article 18)

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 shall exercise their best endeavours in this regard. The EC Party shall provide the technical assistance necessary for the achievement of this goal.

95. The free circulation clause is extremely problematic for ACP countries. Many are not yet customs unions, and often for good reasons:

- i) Within sub-regions, countries are at different levels of development. Hence, the weaker countries may not want to rush into customs unions with economically stronger countries. This process needs to be gradual, progressing further as the less developed countries advance in their development.
- ii) The EPA sub-regional configurations are not always the same as the regional integration configuration of countries in most of the sub-regions.
- iii) Creating customs unions requires not only political will, but also institutional arrangements that require resources.

96. It should be noted that the EU took at least 34 years to achieve what they are asking ACP countries to do in almost no time – since the Treaty of Rome (1957) to 1992 which seen as the year when the ‘internal market’ was realized.

97. The Central African EPA text, signed by Cameroon also brings free circulation of goods to a new level – essentially mandating the harmonization of technical standards and sanitary and phytosanitary standards within the CEMAC region in four years (Article 46.1 and 46.2)!

98. It is ironic that the above mentioned Article 46 has been named ‘regional integration’ since its effect will be quite the opposite. Pending harmonization of technical standards and barriers to trade within CEMAC, Article 46 notes that an EC product legally accepted into one Central African country should not face further restrictions if re-exported to other CEMAC countries. Again, EC products will therefore be given Special and Differential Treatment, compared to regionally produced products. The likely result is that regionally produced products will lose out, hence negating one of the key objectives of regional integration - the building of regional markets for regional producers. Instead, there will be integration with the EC.

BOX: Enforcing Harmonisation of the CEMAC Region’s Technical Standards and other Measures (Article 46.1 and 46.2 of CEMAC EPA)

**Article 46
 Regional Integration**

1. The Central Africa Party undertakes to harmonise the standards and other measures within the scope of this Chapter at regional level within four years of this Agreement’s entry into force.

2. With a view to facilitating trade between the Parties and in conformity with Article 40, the signatory Central African States agree on the need to harmonise import conditions applicable to products originating in the territory of the EC Party when these products enter a signatory Central African State. Where national import conditions already exist at the time of this Agreement's entry into force, and pending the introduction of harmonized import conditions, the existing import conditions shall be implemented by the signatory Central African States on the basis that a product from the EC Party legally placed on the market of a signatory Central African State may also be legally placed on the market of all other signatory Central African States without any further restriction or administrative requirement.

99. Even in the European Union, the situation of free circulation is not at the level EU has asked for from Central Africa. Exporters from developing countries have been complaining about the different standards they face, imposed by the different EU States.¹⁴ To then force ACP countries to quickly reach a high level of harmonization is unrealistic and could even harm their fledgling producers.

100. Fortunately, with the exception of Central Africa, the language for the other EPAs on customs procedures and standards is less stringent. In the Ghana and Cote d'Ivoire EPAs, 'The Parties undertake to ensure the free movement of goods covered by this Agreement...'. Harmonization of standards and other customs procedures and requirements across sub-regions is on a best endeavour basis in the CARIFORUM EPA. The Pacific EPA provides an agreement to cooperate or to 'push forward customs reforms' in the sub-region, but without a deadline.

101. In the renegotiations, the SADC and EU did produce a new text on free circulation reproduced below. The issue does not seem to have been raised by ESA. This is logical since they have the best deal so far by not having a Free Circulation of Goods provision.

BOX: SADC Article 27 on Free Circulation of Goods - Yet to be Incorporated in the EPA

**Art. 27
Free circulation**

1. Customs duties shall be levied only once for goods originating in the EC Party or in the SADC EPA States when imported into the territory of the EC party or the SADC EPA States as the case may be.
2. By derogation from paragraph 1, any duty paid upon importation in a SADC EPA State which is also a SACU Member State shall be refunded fully when the goods are re-exported from the customs territory of that SADC EPA State of first importation to a SADC EPA State which is not also a SACU Member State. Such products shall then be subject to the duty in the country of

¹⁴ This is not an uncommon complaint by WTO developing country members within the WTO's Technical Barriers to Trade Committee. See Bassilekin A 2009 'The Normative Dynamism of the European Community Regarding Technical Barriers to Trade and Its Impact on the WTO and the EPAs'.

consumption. Pending agreement by the parties on the procedures for this paragraph, the operation of this paragraph shall be in accordance with applicable customs legislation and procedures.

3. The Parties agree to cooperate with a view to facilitating the circulation of goods and simplifying customs procedures, within SADC EPA States, in particular as foreseen in Article 10.

Source: European Commission 2009 'NOTE for the Members of the ACP Working Part', Brussels', Brussels, 3 April 2009, Doc no. 109/09 ACP.

Assessment of the Renegotiations on Free Circulation by SADC

102. The result of what SADC renegotiated is disappointing. In fact, there is little value in what they obtained apart from the acknowledgement that SACU is a customs union (paragraph 2). There is also acknowledgement that in enforcing the free circulation provision, existing customs legislation and procedures can apply until such time they are changed. All in all, this is little more than a clarification of the existing text on free circulation of goods.

103. What would have been more valuable is if SADC had attained a best endeavour clause, as with the CARIFORUM EPA, or better still, the deletion of the Free Circulation provision altogether (to be on par with the ESA EPA).

104. Possibly in the case of ESA, not having the free circulation provision is an acknowledgement that the ESA only exists because of the EPA. There is no other existing ESA configuration. Countries in the ESA EPA negotiating bloc belong to the COMESA or the SADC.

105. Currently, there is no existing customs union amongst the SADC EPA States, making it more logical for the free circulation provision to be a best endeavour provision. Alternatively, the free circulation provision should only commit countries to implementation if and when their customs unions have been formed.

H. Definition of the 'Parties'

106. The issue regarding the definition of the 'Parties' has been quite a controversial one for ACP countries. Many provisions in the EPA texts refer to the 'Parties', i.e. the EC States as a collective, and the ACP sub-region, acting as a collective. This raises difficulties for countries negotiating within an EPA grouping, but are not in a customs union and may not even have the intention of forming a customs union of that particular configuration!

BOX: Article 97 of SADC EPA on Definition of the Parties and Fulfilment of Obligations

<p>1. The contracting Parties on this Agreement shall be Botswana, Lesotho, Namibia, Swaziland and Mozambique hereinafter referred to, for ease of reference, as the “SADC EPA States”, of the one part, and the European Community or its Member States or the European Community and its Member States, within their respective areas of competence as derived from the Treaty establishing the European Community, hereinafter referred to as the “EC Party”, of the other part.</p> <p>2. For the purposes of this Agreement: (a) 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 acting collectively or the EC Party as the case may be; (b) the term “SADC EPA States” shall refer to the SADC EPA States acting individually.</p> <p>3. The SADC EPA States and the EC Party shall adopt any general or specific measures required for them to fulfil their obligations under this Agreement and shall ensure that they comply with the objectives laid down in this Agreement.</p>

107. As seen above, the EPAs define four types of parties. The table below lists them and provides examples for each type.

BOX: The Different parties in the EPA (Article 97 SADC EPA)

Term in the Agreement	Right are conferred to/ obligations are imposed on:	Examples
SADC EPA States	Individual SADC EPA countries: Botswana, Lesotho, Namibia, Swaziland and Mozambique	<ul style="list-style-type: none"> • (...) SADC EPA States may introduce (...) temporary export taxes (art. 24.2)
EC party	The European Community or its Member States or the European Community and its Member States, within their respective areas of competence as derived from the Treaty establishing the European Community	<ul style="list-style-type: none"> • The EC Party will contribute to the EPA fund following a satisfactory audit (art 8.5) • The EC Party shall provide duty free, quota free (DFQF) treatment for all products, except (...) (art. 25.1)
Party	SADC EPA States acting collectively <u>or</u> the EC Party	<ul style="list-style-type: none"> • A Party (or SADC EPA State) may apply safeguard measures (art. 34.1 and 6 on bilateral safeguards and art 27bis on food security)
Parties	SADC EPA States acting collectively <u>and</u> the EC Party	<ul style="list-style-type: none"> • The Parties shall provide mutual administrative assistance in customs matters (art. 38.3)

107. A look through the various EPAs shows that there is not necessarily a clear-cut logic as to which rights and obligations are bestowed upon EPA States individually, and which ones are collective rights and obligations.

108. In the area of *export taxes and duties*, the SADC text allows individual ‘SADC EPA States’, in exceptional circumstances, to act individually to impose temporary export taxes (Article 24 of SADC EPA). Nevertheless, in the newly agreed version, ‘The Parties’ i.e. the SADC EPA collective shall ensure that these export taxes are compatibility with Article XXIV (Article 24.4 of European Commission, Doc. N 109/09 ACP).

109. In the area of *bilateral safeguards*, Article 34.6 mentioning SADC EPA States allows countries to act collectively or individually to take bilateral safeguards if they wish to do so.

110. Nearly all the provisions on *dispute settlement* refer to action taken between ‘Parties’ – consultations, mediation and establishment of an arbitration panel. The SADC EPA States seem to be required to act together. Article 70 stipulates that a ‘Party shall seek consultations by means of a written request to the other Party’ and Article 72 prescribes that a Party should submit the written request for the establishment of an arbitration panel to the other Party etc.

111. There is an exception to this collective action. Article 79 on ‘Temporary remedies in case of non-compliance’ allows SADC States to act individually, either as the complainant or the defendant.

- SADC EPA State as *defendant*: ‘the Party complained against, or as the case may be, the relevant SADC EPA State, shall take any measure necessary to comply with the arbitration panel ruling’ (art. 76).
- SADC EPA State as *complainant*: ‘where a Party or the relevant SADC EPA State, as the case may be, has, with regard to a particular measure, initiated a dispute settlement proceeding under this Agreement or under the WTO Agreement, it may not initiate a dispute settlement proceeding regarding the same measure until the first proceeding has ended’ (art. 88.2)

112. On the issue of *information sharing on sanitary and phytosanitary (SPS) measures* (Article 60.3), ‘the importing Party’ (i.e. SADC States acting collectively) are to provide information regarding any change to their SPS import requirements. This assumes that there is harmonization of SPS requirements amongst the SADC EPA States, an assumption not borne out in reality.¹⁵

¹⁵ A possible interpretation of this article is that only changes in common SPS measures need to be notified. Since SADC has not many common SPS measures and new common measures are not a ‘change’ of common measures, the scope of this article seems to be rather limited.

113. More such problems are apparent in the area of *customs procedures and legislation*, where the SADC text assumes collective commitments:

- The *Parties* agree to cooperate with a view to facilitating the circulation of goods and simplifying customs procedures. (art. 27.3)
- The *Parties* agree that their respective trade and customs legislation and procedures shall be based on : (15 paragraphs, art. 39.1)
- The *Parties* agree to ensure all customs legislation, procedures and fees and charges are made publicly available. (art. 42)
- The *Parties* shall cooperate with a view to reaching a common approach to issues relating to customs valuation. (art. 43)

114. The concerns articulated by ACP countries regarding this issue of collective or individual rights and obligations in the EPA include:

1) In the area of dispute settlement, the implication is that should one state infringe the EPA obligation, the entire group is penalized in dispute settlement.

2) EPA 'Parties' are assumed to act collectively in many areas where in fact such collective action is only possible within customs unions. Most of the sub-regional EPA groupings are not the same countries as the customs union groupings they aspire to. Hence, 'forcing' regional integration on an artificial configuration is problematic and not workable. The institutions are not there, nor probably the political will to institute customs unions of a somewhat arbitrary grouping.

115. For example, some collective responsibilities for the SADC EPA grouping implies that Mozambique should become part of a SACU + Mozambique customs union, and this has been seen by commentators in Southern Africa as possibly destabilizing SACU.

116. As alluded to in the previous section on free circulation of goods, the EU, after over five decades of working on regional integration, made much easier because of financial and institutional capacities, is expecting ACP countries to assume the same level of integration in complex areas such as customs regulation, sanitary and phytosanitary issues and standards (pertaining to individual countries' democratic choices), dispute settlement, and other areas, and often within groupings that are artificially configured.

117. The EC actually does not allow the EPA to define for the European Union, the areas of collective or individual responsibilities and rights. The current Article 97 of the SADC EPA notes that 'EC Party' can mean one of three things: i) European Community; ii) EC Member States; or iii) European Community and its Member States. 'Their respective areas of competence' is 'derived from the Treaty establishing the European

Community'.¹⁶ That is, what is collective responsibility and what are Member States' individual responsibilities depend on Europe's own internal decisions.

118. In contrast, the ACP EPA groupings, lacking similar customs union treaties, are allowing the EPA to dictate *their* respective areas of competence as individual States or a collective. The outcome may not be coherent with the development needs of individual States. For instance, the 'harmonisation' of standards/ domestic regulation, if done in a top-down fashion could impact negatively on local economies and producers. Whilst harmonization can certainly be the long-term objective, in sub-regions where countries are at very different levels of development, the situation of the weaker economies and countries may not be adequately taken account of through one-size-fits all standards, legislations and procedures.

119. In SADC, the renegotiations did not produce an agreed text on Article 97. However, the EU has since published the 'declaration' it wanted SADC to accept as the agreed version by the two sides (see EC, 2009 'Note for the Members of the ACP Working Party', Doc. No. 109/09 ACP). According to SADC sources, however, this language was not accepted by SADC.

BOX: EC Declaration on SADC EPA Article 97 - Not Yet Agreed to by SADC

Declaration on Article 97

The Contracting Parties recognise that the SADC EPA States are not in a position to act collectively in all circumstances where this is required under this Agreement, and understand that the SADC EPA States will exercise their best endeavours where collective action is required under this Agreement. To this end, and during the period mentioned in the previous sentence, it is understood that in the event that the EC Party has recourse to dispute settlement under this Agreement it shall do so with respect to only those SADC EPA States which it considers have infringed the relevant obligations.

This situation shall be kept under consideration by the Joint Council and shall be reviewed no later than 2 years after the date of signature of this Agreement.

Assessment of EC's proposed 'Declaration' on Definition of the Parties

120. This declaration falls short of what the SADC countries themselves were proposing in the negotiations. The Box below provides the language SADC had proposed - Article 97*bis*, to be added directly to the EPA text itself.

¹⁶ Since the Lisbon Amendment Treaty, this Treaty is called the 'Treaty on the Functioning of the European Union'.

BOX: Options Proposed by SADC regarding Article 97bis.

Article 97 bis

1. The Contracting Parties recognise that the SADC EPA States cannot act collectively as a legally constituted regional entity in all circumstances under this Agreement.
2. Without prejudice to their Sovereign Right to act individually, and to engage in legally recognized regional integration processes, the SADC EPA States may where possible voluntarily and temporarily act jointly for the purpose of enabling implementation of the IEPA.

OR

1. The Contracting Parties understand that the SADC EPA States may on a voluntary and temporary basis act jointly for the purposes of enabling implementation of some of the provisions of this Agreement where possible.
2. To this end, it is understood that for purposes of Article 34 of this Agreement, Botswana, Lesotho, Namibia, South Africa and Swaziland will act jointly in terms of the SACU Agreement of 2002.
3. To this end, it is understood that in the event that the EC Party has a right to recourse under this Agreement, it shall do so with respect to only the SADC EPA State or States as the case may be and in the event that a SADC EPA State has a right to recourse under this Agreement it may do so individually or jointly with other SADC EPA States against the EC.
4. The Contracting Parties shall review the definitions as set out in Article 97 of this Agreement in the negotiations towards the full EPA.

121. The declaration proposed by the EC is much weaker than SADC's suggested language in the following ways:

- i) There is a major difference between having a 'declaration' and an Article 97bis. The declaration is an interpretation of Article 97, whereas an Article 97bis will be legally stronger.
- ii) It is clear that the EC wants to revisit this issue in the future, hence the sentence on the review in two years. If at that time or at any time later, EC decides that SADC members are economically strong enough to be collectively implicated in a dispute, even if only one SADC member has infringed the EPA agreement, or if the EC wants to remove the best endeavour element in the declaration, changing or deleting the declaration altogether will be very easy. However, if the same language is introduced into the text as Article 97bis, then amending the agreement will require ratification from each of the EPA States. This would be a much more protracted process, with the likelihood of even becoming political. Hence the interest of the EC in keeping this language as a 'declaration' rather than a change to the text itself.

- iii) SADC wanted it recognized that the SADC EPA grouping is not legally constituted as a regional entity. Therefore, acting together may simply not be possible in all areas called for by the EPA. This is much stronger language than the EC's proposal of best endeavour language for SADC to act collectively where such collective action is required.
- iv) SADC also wanted it recognized that some joint action by SADC States may be temporary and voluntary, and it should not be assumed they would continue to operate collectively in the same way permanently.
- v) Given that SACU is a customs union (together with South Africa, which is not a signatory of the EPA), the SACU EPA members wanted the possibility for any bilateral safeguard action taken to include all SACU members (eg. South Africa and Namibia). This makes sense as a customs union-wide safeguard would be more water-tight than a safeguard taken only by one or two of the SACU members.

122. If SADC countries are not in agreement with the EC's essentially unilateral declaration, it would be important for SADC countries to publish their own unilateral declaration on their interpretation of Article 97. Otherwise, EC's interpretation would be the only one a dispute panel would have to rely on.

Annex I – Summary of the contentious issues discussed in this Note

The following table provides a summary of the EPA contentious issues that were renegotiated in 2009, and the value of these renegotiations.

Standstill clause

What was attained; by which sub-region	Analysis of Outcome
<p>ESA: Managed to narrow down standstill clause to cover the tariff lines to be liberalized, and not those in the sensitive list. This brings the language to be on par with the SADC text on standstill.</p>	<p>This is a clawing back of some little policy space as it is an improvement from the current text for ESA, where all tariff lines are subjected to a standstill, even those that are in the sensitive list.</p>
<p>EAC: Same as above for ESA. What the EAC also got was a change of this in their current draft EPA text (which they have yet to sign).</p>	<p>The ESA, EAC and SADC now have a standstill clause applying to tariff lines for which tariffs will be eliminated. I.e., they cannot increase applied tariffs even in the transition period (before these tariffs have to be zero). In some instances, this could be a major constrain for their industrial or agricultural sectors.</p>
	<p>The standstill clause is not required for the EPA to be compatible with the WTO (GATT Article XXIV). There should therefore in fact not be any standstill provision in the EPA.</p>

Modification of Tariff Commitments

What was attained; by which sub-region	Analysis of Outcome
<p>ESA: The only EPA with a 'Modification of Tariff Commitments' provision is CARIFORUM. ESA negotiated to also have such a provision.</p> <p>The language agreed to is 'to be confirmed on both sides' i.e. it could still be changed.</p> <p>ESA countries can, due to 'special development needs' modify their tariff schedule.</p> <p>In situations of 'serious difficulties' the liberalization timetable can be suspended for up to a year even if the EC does not provide approval in the EPA Committee.</p>	<p>Having this modification of tariff commitments is a useful innovation.</p> <p>It is there in the GATT for MFN trade although Members using this are possibly subject to retaliation.</p> <p>The major drawback is the requirement for EC approval if an ESA countries wants to modify the schedule beyond a year when in 'serious difficulties'.</p> <p>The other drawback is the insertion of the need for compatibility with Article XXIV, meaning that modification can take place as long as the provision on liberalizing 'substantially all the trade' still holds, and that liberalisation is done 'within a reasonable length of time' (Article XXIV provisions).</p>

Duties and Taxes on Exports

What was attained; by which sub-region	Analysis of Outcome
<p>This issue was renegotiated by SADC. The ESA group also renegotiated it, but there is no confirmed language as yet.</p> <p>The SADC EPA already has language on export taxes allowing existing export taxes to continue, but disallowing new ones to be introduced. However, under the existing 'old' language, 'exceptional circumstances', temporary new export taxes can be allowed after 'consultation' with the EC on a limited number of products.</p> <p>The new renegotiated language includes the possibility to use export taxes for food security and to relief food shortages.</p> <p>If there is mutual agreement with the EC, temporary duties can be introduced for industrial development needs.</p> <p>However, a few conditions have been added in the new text which are not in SADC countries' favour: compatibility with Article XXIV; export taxes must be applied to all other trade partners (i.e. on MFN basis); South Africa cannot enjoy the introduction of new export taxes under paragraph 2 of the new language where a country can introduce these export taxes only after having had 'consultation' with the EU, not necessarily approval in the joint EPA committee.</p>	<p>The outcome of these renegotiations, for instance for SADC, are at best disappointing, particularly in the context where export taxes are completely legitimate in the WTO (GATT Article XI). Countries can be free to have export duties and still be compatible with Article XXIV. Rather than providing SADC countries with any gains, the existence of this clause in the EPA is subtracting from SADC countries rights which they would otherwise enjoy in the WTO.</p> <p>Compared to the current language on export duties in the EPA, the new yet-to-be-incorporated SADC text broadens the scope of exceptions, allowing for export taxes to be imposed for 'industrial development needs'. These export taxes however are temporary and limited, and the EC can refuse to give consent. This makes any benefit very limited, and in exchange, Article XXIV has also been brought into the picture when it was not there before.</p> <p>ACP countries should remain free to introduce new export taxes and increase existing ones, without having to consult or attain agreement from the EC (the same way the EC implements subsidies without informing, consulting or gaining agreement from the ACP countries). The best option in order to maintain this flexibility is to delete the article entirely on Export duties in the EPAs and for ACP countries to maintain the position that export taxes is a matter that must be tackled multilaterally (as the EC has insisted for domestic support in agriculture).</p> <p>By bringing in Article XXIV, the EU wants to be able to argue against export taxes on this basis. However, Article XXIV remains open to interpretation. Developing countries can likewise say that agricultural subsidies that effectively lead to dumping (sale price is lower than cost of production) should also be disciplined by Article XXIV.</p>

Infant Industry Clause

What was attained; by which sub-region	Analysis of Outcome
<p>Both SADC and ESA sub-regions renegotiated a stand-alone infant industry clause. The benefits arising from these negotiations were:</p> <p>i) The stand-alone infant industry clause is permanent, unlike the current text where the infant industry clause would expire after 10 or 15 years.</p> <p>ii) The new infant industry clause broadens the coverage to also include conditions threatening the <i>establishment</i> of an infant industry, not just an existing infant industry, as in the current language.</p> <p>For ESA, these are the main differences. All other elements remain as before.</p> <p>For SADC members, the advantages of the new language is as above the ESA.</p> <p>However, the new language disallows them to raise tariffs up to the bound levels. Nor can they introduce tariff quotas. These are possible for SADC with the existing/ old language.</p> <p>Also included in number 6 of the new language is the right of SACU members to have recourse to Article 26 (Protection of infant industries) of the SACU Agreement..</p>	<p>The new text is a slight improvement for ESA EPA members (see left column).</p> <p>For SADC, whilst they also got a standalone infant industry clause that does not expire after 10 or 12 years, the remedy is actually significantly worse than the existing language – from being able to apply a remedy up to the WTO bound rate, they can now only apply the remedy to the MFN rate. They no longer can apply tariff quotas. MFN applied tariffs tend to be very much lower than bound tariffs, so this difference is significant and the MFN tariff rate is not likely to be sufficient for supporting an infant industry.</p> <p>The reference to the SACU Agreement’s infant industry clause, as currently formulated, is not helpful since the EU is not part of SACU. SACU members therefore cannot use this more flexible infant industry provision vis-à-vis the EU.</p> <p>SACU’s Article 26 allows Botswana, Lesotho, Namibia and Swaziland (BLNS) to apply infant industry tariffs against South Africa. There is no ceiling to the remedy they can use. However, with the EU, the BLNS countries would have to abide by the WTO MFN applied tariff ceiling (as in para 1 of the renegotiated language). The implication is that the BLNS can cut out South Africa from the BLNS market (using the SACU Article 26), but the treatment to the EU will be much more lenient (new EPA infant industry clause). I.e. EU could be given preference to the regional market over South Africa. This does not bode well for SACU regional integration.</p> <p>Rather than the formulation in the new language, SACU should have asked for the following: ‘SACU Member States shall have the right to have recourse to Article 26 of the SACU Agreement 2002, mutatis mutandis applied to imports originating from the EC Party (or European Union).’</p> <p>This language would then allow SACU to apply a better infant industry remedy (eg. higher tariffs than the MFN tariff rate) vis-à-vis the EU.</p> <p>Apart from having access to a permanent infant industry clause, the new language for SADC is more disadvantageous than the current language.</p>

Quantitative Restrictions

What was attained; by which sub-region	Analysis of Outcome
<p>All EPA texts have a paragraph stating that prohibitions and restrictions applying to trade are not allowed. However, the texts do not define terms such as ‘import license’ and do not define under what conditions a measure (e.g. import license, other measure) is trade prohibitive or restrictive</p> <p>For SADC, the ‘old’ EPA language provides them with recourse to GATT Article XI (on General Elimination of Quantitative Restrictions) exceptions. SADC renegotiated to ensure that QRs can be applied in conformity with all WTO Agreements.</p> <p>ESA’s ‘old’ text makes no reference to having recourse to GATT Article XI exceptions. Their renegotiated language was less far reaching than SADC, where only the first two GATT Article XI exceptions were included.</p>	<p>There are some benefits for SADC in the renegotiations.</p> <p>1) Essentially a clarification in the area of import licenses: import licenses allowed under the WTO, are also allowed in the EPA.</p> <p>Nevertheless, even without this clarification, SADC should have been able to use import licenses in accordance with the WTO law. This is because the ‘old’ EPA language for SADC in prohibition of quantitative restrictions is largely cut and paste language from GATT’s own Article XI:1 (General Elimination of Quantitative Restrictions). No definition is provided here in the EPA (and the same thing in GATT XI:1) on what is an import license that does not prohibit or restrict trade. However, the WTO does contain an Agreement on Import Licensing Procedures, setting out conditions under which import licenses can be used. Anyone looking to interpret the ‘old’ SADC EPA language would look to the interpretation of the WTO’s Agreement on Import Licensing Procedures. Hence, import licenses, it can be argued, would have been allowed.</p> <p>If the drafters of the EPA did not have the intention of using the WTO understanding on import licenses, arguably, they could have used completely different language, not a reproduction of WTO’s GATT Article XI:1.</p> <p>2) SADC did get access to a range of exceptions provided by the WTO, allowing the use of quantitative restrictions: Article XI; Article XII, Article XVIII etc. The EPA has a shorter list of general exceptions, hence SADC’s new language will allow them to take QRs and ‘other measures’ in response to a broader range of situations.</p> <p>For ESA, more preferable language would be what was obtained by SADC reaffirming their rights to use quantitative restrictions that are in conformity with the WTO. Even without their ‘new’ language, it is likely that they can use import licenses which are legal under the WTO, for reasons noted above for SADC. What ESA did not get is additional exceptions available in the WTO, but not spelt out in the EPA.</p> <p>It should also be noted that despite the ‘old’ EPA language prohibiting all quantitative restrictions in all the EPA texts, the EU maintains a QR on sugar in the EPA, without even noting this as an exception in the EPA Article on the Prohibition of QRs. This is definitely a Special and Differential Treatment for the EU and the ACP countries should also think of having a list of QRs, or the policy space to be able to introduce such QRs in the future.</p>

Food Security Clause

What was attained; by which sub-region	Analysis of Outcome
<p>Some EPA texts have a food security clause and others do not. For those that do, the remedy is the bilateral EPA safeguard.</p> <p>The grounds for invoking the food security clause has been crafted in a way that is problematic. The CARIFORUM clause allows countries to use it when they have problems with availability of or access to food.</p> <p>The ESA did not negotiate to include a food security clause. However, SADC countries did. They got the right to use the bilateral safeguard to avert general or local food shortages should this cause ‘major difficulties’ for SADC countries.</p>	<p>There are two main problems with the food security clause:</p> <p>1) The grounds upon which countries can invoke the clause is very narrowly crafted, and may not be the appropriate language allowing countries to respond to food crises. Often, with liberalization, the volume of food imports increase, displacing local farmers. Or the prices of imported products are lower than domestically produced once, hence also displacing local producers. Furthermore, countries may want to use the safeguard to protect people’s access to food if food self-sufficiency levels are at lower than desired levels, or if the sector is targeted to provide more employment than it actually does.</p> <p>2) The conditionalities and remedy of the bilateral safeguard is likely to make access to the safeguard difficult. Essentially, EU approval is required in the EPA Committee before the safeguard can be utilized (beyond 200 days). Given the unequal power relations, EU could assert considerable pressure to prevent countries from using the safeguard.</p> <p>Also, the remedies provided for the in the safeguard may not be adequate. For ESA countries, tariffs, if used, can only be raised to the MFN applied rates. For SADC, these tariffs can be raise do the bound tariff rates. In contrast, large numbers of developing countries at the WTO have been pushing hard for the ability to raise tariffs beyond the Uruguay Round rate in the Special Safeguard Mechanism (SSM) for agriculture.</p>

Free Circulation of Goods

What was attained; by which sub-region	Analysis of Outcome
<p>Most EPA texts have a free circulation of goods clause – stating that goods once entering one of the EPA States and are charged duties, will have these duties refunded, when the same goods are re-exported into another EPA State and are charged the duties of the country of consumption.</p> <p>The SADC’s new free circulation of goods article is not very different from the ‘old’ language.</p>	<p>There is little added value in the new language obtained by SADC. The new language officially recognizes SACU as a customs union, and notes that when goods are re-exported into a SADC non-SACU member, customs duties may be charged, and so the original duties collected have to be refunded.</p> <p>This clause is a best endeavour clause in the CARIFORUM EPA. The Central African EPA text mandates free circulation, and even the harmonization of technical standards within Central Africa! The ESA is the only EPA that does not have a free circulation of goods provision.</p> <p>The EU took 34 years to build its internal market (free movement of goods) . For many ACP sub-regions, even committing to a customs union may not be realistic for various reasons e.g. weaker countries may not be ready to open up to stronger economies within a sub-region. Free circulation of EU products only could be administratively difficult, and will mean that regionally produced products could be disadvantaged.</p> <p>Any free circulation provision in the EPA should only commit countries to implementation if and when their internal customs unions have been formed.</p>

Definition of the Parties

What was attained; by which sub-region	Analysis of Outcome
<p>There is no clear logic in the EPAs about what are the collective responsibilities of a sub-region and what are the responsibilities of individual States within a sub-region. Some issues in the EPAs can be taken up at the individual States level, others are collective obligations and rights eg. most of the provisions on dispute settlement.</p> <p>To date, it seems that there is still no agreement on this issue between the EU and SADC. However, the EC published a 'declaration' on Article 97's definition of the parties, stating that this had been agreed to by both sides. This unilateral declaration falls short of what SADC countries were proposing.</p>	<p>SADC countries wanted a change to the Article on definition of the parties, not just a declaration. Legally, this would be a much stronger option for SADC. The EU could quite easily amend a unilateral interpretative declaration. However, amending a text requires a ratification process.</p> <p>SADC wanted it recognized that the EPA grouping is not a legally constituted regional entity. Collective action in some areas may not be possible.</p> <p>These SADC proposals are much stronger than the EC's declaration. If the SADC countries are not in agreement with EC's published 'declaration', it would be important for SADC to publish their own interpretative declaration that goes beyond the best endeavour provision in the EC declaration.</p>

**Annex II: Copy of the Letter Sent by then European Commissioner Baroness Catherine Ashton to the Minister of Trade and Industry, Botswana, 20 March 2009
(A similar letter was sent to other SADC Trade Ministers)**

Baroness CATHERINE ASHTON
MEMBER OF THE EUROPEAN COMMISSION

B-1049 BRUSSELS
+32-2-298 85 90

Brussels, 20 March 2009
D(09) 246

Hon Neo Moroka, Minister of Trade & Industry
Chair of SADC
Ministry of Trade & Industry
Post Bag 004
Gaborone
Botswana
Fax: +267 397 1539

Dear Minister,

Further to our meeting in Gaborone on 12 February 2009, I was pleased to learn that our chief negotiators, meeting in Namibia on 10-12 March, were able to find an agreement on most of the major concerns on the text of the interim EPA, which had been highlighted by the ANSA group of countries in particular. These include export taxes, infant industry, prohibition of quantitative restrictions, food security and free circulation. Let me briefly outline the main elements agreed and for which we have new texts:

- export taxes - we now add the possibility to apply such taxes for food security reasons and, by mutual agreement, industrial development needs;
- infant industry - there is a separate article dealing with this matter which provides for recourse to temporary protection under this article which would now, no longer be time bound as foreseen before;
- quantitative restrictions - a much simpler text confirming our WTO rights and obligations in this area;
- a new article providing for temporary safeguard measures against imports for food security reasons;
- free circulation of goods - confirmation that EC products will not pay import duties twice when circulating within SACU Member States and that we will cooperate to facilitate the circulation of goods and simplification of customs procedures between SADC EPA States.

We have also managed to find a solution to the remaining tariff differences in a practical way that fully preserves the integrity of the SACU customs external tariff. This includes the acceptance by the EU of the so-called "retrofitting" to the benefit of all SADC members (including South Africa) of tariffs negotiated previously with South Africa in the Trade and Development Cooperation Agreement (TDCA) of 2001 and the waiving of the concessions on the additional tariff lines that BLNS countries had offered to the EU.

This represents substantial progress and addresses the vast majority of the concerns previously outlined by ANSA countries. We could not, however, find an agreement on the question of MFN and the issue of definition of the parties. On MFN, the SADC counterproposal did not address the fundamental concerns of the EU in this area. As I have pointed out earlier, this is an issue to which the EU attaches great importance as it deals with preventing discrimination against the EU in the future vis-à-vis other major trading partners. This is a simple question of fairness. We will have to pursue it in the context of the negotiations of the full EPA. On the definition of parties, I remain convinced that the solution that we proposed, namely a declaration to the effect that collective action by SADC be interpreted in a best endeavour manner, offers a sensible way forward on this matter pending the conclusion of the full EPA.

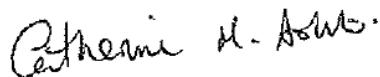
As discussed in Gaborone, we need now to agree on a way forward in order to sign the interim EPA, notify it to the WTO and move on with the negotiations of the final EPA. Time is not on our side.

I would therefore suggest that the new texts worked out by our Chief Negotiators in Namibia be agreed as providing the solution to these issues with a view to their incorporation in the final EPA.

This leaves the two pending issues of definition of parties and MFN. The definition of the parties could in my view be solved by setting out our common understanding on its interpretation in the context of the interim EPA. On MFN, I trust that continuing our discussions in the same spirit as we addressed the other issues in Namibia will allow us to find ways to improve the existing text during the negotiations of the full EPA.

I hope you can agree with this suggested way forward so that we can arrange for the signature of the interim EPA in the very near future.

Yours sincerely,

A handwritten signature in cursive script that reads "Catherine M. Ashton".

Catherine Ashton

READERSHIP SURVEY QUESTIONNAIRE
South Centre Analytical Note

THE CONTENTIOUS ISSUES IN THE GOODS EPAS:
WHAT IS THE VALUE OF THE 2009 RENEGOTIATIONS?

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Chemin du Champ d'Anier 17
Case postale 228, 1211 Geneva 19
Switzerland

Telephone : (41 22) 791 8050
Fax : (41 22) 798 8531
Email : south@southcentre.org

Website:
<http://www.southcentre.org>