

CONTRIBUTING TO A CONSTRUCTIVE DEBATE ON EPAs IN THE SADC AND THE EAC

Please find hereafter the following documents:

1. The report of the introductory meeting in Nairobi, Kenya;
2. The report of the SADC meeting in Cape Town, South Africa;
3. The report of the EAC meeting in Dar es Salaam, Tanzania;
4. And the Policy Brief document.



International Centre for Trade
and Sustainable Development

CONTRIBUTING TO A CONSTRUCTIVE DEBATE ON THE EPA IN THE EAST AFRICAN COMMUNITY

October 29, 2013 – Nairobi, Kenya

1.

Introductory Meeting - Report



International Centre for Trade
and Sustainable Development

1. Introduction

The East African Community (EAC) is a regional economic community comprising five countries in Eastern Africa, namely the Republics of Burundi, Kenya, Rwanda, Tanzania and Uganda.

In 2007, the EAC agreed to an interim EPA with the European Union, mainly covering trade in goods and fisheries. Negotiations have continued and common ground has been found on several issues, including SPS, TBT, as well as Customs and Trade Facilitation.

Despite progress in the negotiations, several issues remain outstanding and have yet to be resolved in order to bring closure to these drawn-out negotiations

2. The meeting

The meeting was organized by the International Centre for Trade and Sustainable Development (ICTSD) in collaboration with the Ministry of Foreign Affairs of The Netherlands through a personal initiative of the Hon. Lilianne Ploumen, Minister for Foreign Trade and Development Cooperation. The meeting took place on the 29th October 2013 at the Hotel Villa Rosa Kempinski in Nairobi from 08:30 to 11:00 am.

Participants were drawn from all five EAC countries and included senior government officials and negotiators, private sector representatives and members of the civil society. Attendance was good, considering the short notice. Of the 17 invited participants who had confirmed their attendance, five were absent, including Peter Mwaniki, Senior Assistant Director, Ministry of Trade of Kenya. Betty Maina, of the Kenya Association of Manufacturers, was not present but was represented by two colleagues. Another notable absence was that of the delegate from Burundi, who could not make it to the meeting although he was expected. This means that no representative from Burundi was present at the meeting.

The Presence of the Minister and ICTSD staff was significant in clarifying issues and setting the tone for a constructive discussion.

Amb. Mwape, who facilitated the meeting, opened the event by explaining the objectives of the dialogue against the backdrop of a difficult EPA negotiations process. He explained that the key objective of the meeting was to commence a process of constructive discussion on the EPA negotiations, to address issues still outstanding and, more importantly, to brainstorm possible solutions to move the process forward. The Minister presented herself as an honest broker who was keen to hear from stakeholders about the concerns of their region in the EPA negotiations. She offered to carry these concerns to the European Commission with a view to addressing them so that the process can move forward. A representative from ICTSD then explained the role that the Centre – as an independent and non-partisan think-tank – was playing in organizing the meeting. He informed participants that a series of larger stakeholder dialogues was planned to take place in three different regions of Africa in the months of January and February 2014, and that the Nairobi meeting could be viewed as a kick-off to those dialogues.

The meeting was very interactive and time had to be extended to accommodate participants' contributions.

3. Issues of process and politics

It was evident from the discussions that an inclusive consultative process at the country level has been lacking in most EAC members. Civil society and the private sector seem to have been left out of some consultations in certain cases. In other cases, policymakers have not engaged sufficiently with these stakeholders to understand fully their concerns and benefit from their insights. It was recognized that the EAC should do more to resolve this issue and promote truly inclusive consultations on the EPAs.

The recent situation in Kenya, where the Vice President's announcement of Government's intention to sign the EPA was received with objection from Parliamentarians, was cited to illustrate internal failures in the consultative process.

The EAC has maintained that the EPA should foster, rather than impede, the process of regional integration. Lack of clarity on how the EPA would interact with on-going efforts at deeper integration was seen as a barrier towards an early conclusion of the EAC-EPA. Recent developments on this front have not been very encouraging, either. For example, the postponement of the EAC-EU Ministers meeting last September has brought to light the friction in the region. Unless this issue is addressed at a political level, the EU will not have a single unit to negotiate with.

It is in the interest of all parties that these political issues are addressed expeditiously.

At the continental level, the recent AU position calling on member States not to sign EPAs before the EU-Africa Summit in April 2014, presents both a challenge and an opportunity. Challenge, in that the momentum on this process will be lost. Opportunity, in that the summit may possibly address the political issues confronting this process as suggested by the Nairobi meeting.

4. Issues of substance

Dr Ancharaz, from ICTSD, presented a paper on the current state of play and the way forward in the EPA negotiations, which became the basis for the ensuing discussion, which was so lively and engaging that the meeting continued after the Minister had left (at 10.00 a.m.) The following outstanding issues in the negotiations were discussed:

1. Export Taxes

Participants expressed the view that the EAC considers export taxes as an instrument of development and so wishes to maintain policy space in their use. Specifically, export taxes were seen as an effective instrument for promoting food security. However, the point was later made that, if food security was truly the motive for insisting on the use of export taxes, then it could be more effectively achieved through other measures, such as safeguards.

2. The Most Favoured Nation clause

The EAC has resisted the EU proposal on the MFN clause on the ground that its adoption could affect future trade talks with potential major partners. Participants raised the question whether the EU was specifically troubled by any particular country and called on the EU to openly express their concerns on this matter.

3. Agriculture (EU domestic support and export subsidies)
The EAC position is that EU's agricultural policy limits the ability of local producers to benefit from otherwise duty-free market access, and calls on the EU to remove all domestic support and export subsidies. Participants expressed surprise that this issue was still under negotiations when it was resolved during the Hong Kong Ministerial in 2005 to remove such support.
4. Rules of Origin
Participants were resolute on the aspect of cumulation. They are of the view that this will further deepen integration as well as allowing individual EAC member states to benefit more fully from market access preferences.
5. Good governance in taxation regime
This issue was not considered to be particularly problematic. Participants agreed that, with appropriate support from the EU, it could easily be integrated into the EAC-EPA.
6. Dispute Settlement
Participants were of the view that this issue was one to be resolved at political level. However, some participants stressed that the issue might be overrated. They recalled that experience under Lomé and Cotonou shows that parties are capable of resolving potential disputes internally, without a full-fledged dispute settlement regime.

While noting the remaining issues, it was recognized that the EU continues to be an important trading partner of the region, currently destination of 22% of the region's exports. It was further noted that the benefits of signing an EPA have not been talked about enough. The negative publicity has overshadowed the benefits and prevented a constructive debate based on issues.

The meeting converged on the view that the major part of the negotiations has been completed and that the remaining gap was a narrow, albeit critical, one.

A number of participants highlighted two key principles that should be adhered to in the conclusion of EPAs:

- a. Development should be the yardstick in reaching any agreement in the negotiations. In this regard, concern was expressed to the effect that the EU now see the EPAs more as a market access mechanism than a development tool.
- b. Concluding EPAs should deepen regional integration.

Other issues that were raised at the meeting included: (i) the urgent need to address the region's supply-side constraints; (ii) the complication created by the fact that Kenya was the only non-LDC in the region; (iii) the question of additionality of development aid in the proposed EPA Development Program; and (iv) lessons to be learnt from existing experiences, for example, the CARIFORUM-EPA.

The point was made that EU's Market Access Regulation 1528 was hanging like Damocles' sword on the region. Some participants argued that the EU should show greater consideration for African countries by lifting the deadline of October 1, 2014. Others, however, were of the view that, if the unresolved issues were known, they should be addressed urgently to ensure a predictable environment for the business sector.

CONTRIBUTING TO A CONSTRUCTIVE DEBATE ON THE EPA IN THE SOUTHERN AFRICAN DEVELOPMENT COMMUNITY

January 30-31, 2014 – Cape Town, South Africa

2.

SADC - FINAL REPORT



International Centre for Trade
and Sustainable Development



1. Introduction

The Southern African Development (SADC) is an inter-governmental organization comprising 15 States in Southern Africa, namely Angola, Botswana, Democratic Republic of Congo, Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, Swaziland, Tanzania, Zambia and Zimbabwe.

Of these 15 States, seven - Angola, Botswana, Lesotho, Mozambique, Namibia, South Africa and Swaziland - are negotiating an Economic Partnership Agreement (EPA) with the EU as the SADC EPA group.

An interim EPA was concluded with Botswana, Lesotho, Namibia, Swaziland and Mozambique in 2007. All except Namibia signed the interim agreement in 2009.

blocking the negotiations could be addressed with a bit of flexibility and a dose of political will, and that an agreement was within reach soon.

3. Substance

Dr Ancharaz from ICTSD presented a background paper that briefly described the current state of play in the negotiations and highlighted the outstanding issues, which, he said, would be elaborated in subsequent presentations. He argued that the negotiations have been skewed by the fact that the weaknesses of the EPAs have often been blown out while the benefits have not been adequately emphasized, and called for a balanced assessment of the EPAs.

The discussion that ensued brought out additional elements on the negotiation table. It was noted that that negotiations have progressed substantially and that few contentious issues remained. Further progress will require parties to come out of their defensive positions and demonstrate flexibility and good faith. The recent communication from some EU Member States to the European Commission and the completion of an EPA in West Africa suggested that there was hope for an agreement to be concluded in time.

Other issues that emerged from the debate included: (i) the need for appropriate processes to be put in place to facilitate discussion on the remaining issues; (ii) concern about the October 1st deadline in view of the lengthy process of ratification on both sides; and (iii) the wish that the EPA supports the process of regional integration in the SADC, and at the continental level.

3.1. Regional MFN clause

Prof Gerhard Erasmus from TRALAC presented the current negotiating text of the MFN provision and explained the rationale behind the clause from a legal perspective.

The clause has been controversial because it is seen as curtailing the policy space of African States. The clause potentially affects how SADC EPA states treat their trade partners and places the EU in a perpetually privileged position relative to other “major trading economies” with which the SADC may contract a free trade agreement (FTA) in the future. While the EU party has shown flexibility by limiting the provision to “major trading economies” only, participants argued that this did not help since the latter are precisely the countries of interest to Africa. Further complicating the negotiations on this clause is the divergent positions of the SADC EPA states. While SACU stands firmly by its proposition to have the MFN clause removed, Angola and Mozambique are more sympathetic towards it. This suggests that the deadlock in the negotiations is as much the result of internal divergences within the SADC EPA group as it is due to disagreement between the two negotiating parties.

Concern was also expressed about the EC position to limit the MFN clause to customs duties only. Because the EC is already offering 100% duty free access to SADC EPA states, there is no future improvement to be made on the EC’s market access offer. This means that the SADC EPA States do not stand to benefit from an improved deal under the MFN clause should the EC offer trade preferences to major trading partners in the context of an FTA. It was suggested that, in such cases, the EC offers equivalent benefits in other forms, for example, improved rules of origin.

3.2. Export Taxes

The discussion paper on this subject was presented by Trudi Hartzenberg from TRALAC. She explained that export taxes are primarily used by developing and least developed countries as a development tool. The concern, however, is that export taxes are viewed as trade-distorting. They represent a form of export restriction, and, additionally, they may not achieve the objectives for which they were intended.

The EU position on export taxes in the EPA negotiations is clear. It is the same position as in the Doha Development Round, is clear: the EU supports binding commitments by WTO members to eliminate or reduce export taxes.

The SADC EPA States justify their position on export taxes in terms of their use as a tool for industrial development, value addition, including through raw materials beneficiation and the development of regional value chains, employment creation and food security.

The text of the export taxes provision in the signed Interim EPA was presented and considered in the meeting. The provision provides for a prohibition of imposition of new export taxes. However, in exceptional circumstances the SADC EPA States could impose such taxes with prior consultation with the EC. There is no clarity on the modalities of the consultation process nor are there provisions on institutional arrangements on how to resolve resulting issues. The text also provides for a review of the export taxes provision, no later than three years after the entry into force of the Agreement.

The views of participants reflected the contentious nature of this matter. The economic efficiency of export taxes and their effectiveness in achieving stated objectives are both debatable. Proponents of the export tax provision were challenged to provide practical examples where the use of export taxes has triggered higher value-added activities. Despite this lack of evidence, negotiators insisted on the necessity for preserving policy space by either removing the clause altogether, or revisiting the language to make it more acceptable.

The issue of export taxes has become emblematic of the region's discontent on the negotiating draft of the EPA. Concessions on this issue – from both sides – would go a long way towards rebuilding trust and bridging the divide between the parties.

3.3. Agriculture Market Access

Christopher Wood of SAIIA presented the issue paper on this subject. He noted from the outset that accounts of the current position of the negotiations in this respect are mixed. In the SADC, the sticking point is that the EU has accepted SACU's offer on condition that SACU accepts a less favourable offer from the EU. Others contend that agricultural market access is largely resolved, with only some issues, such as safeguard measures, still outstanding. While, on the one hand, the EU can offer little more than DFQF market access, the SADC is cautious in committing to the deep liberalization demanded by the EU.

The dialogue was more optimistic in this area, however. Agriculture market access seems to be moving towards a resolution. Differences on the exact coverage for South African exports still remain. South Africa has made significant concessions on geographical indications (GIs) with consultations underway on the list of names for protection requested by the EC. These concessions need to be acknowledged. They could be used as a bargaining chip to advance the negotiating group's interest on market access, which remains as yet unresolved.

There are differences within the SADC EPA group. Mozambique has excluded agriculture from its market access offer to the EC whereas South Africa has opened up more.

Participants continued to call for agriculture-specific safeguards to be included in the EPA. They argued that this is necessary to create appropriate trigger mechanisms that can be applied in emergency situations. General safeguard provisions are not considered adequate and suitable enough to apply to agricultural products.

There is need to bear in mind the competitive gap between the two regions in the agriculture sector and the lasting role of subsidies in assuring the high productivity of EU exports. Development assistance could overcome this gap and help address other supply-side constraints.

3.4. Rules of Origin

Eckart Naumann of TRALAC presented the fourth issue paper on rules of origin. The subject of RoO is complex and highly technical. It therefore required a detailed presentation.

The EPA RoO follow from the Cotonou Agreement, along with the reforms adopted in January 2011. Some of the more fundamental and expansive changes to the SADC-EU RoO relate to the cumulation provisions. EPA cumulation provisions, including those in the SADC-EU EPA, have changed through the introduction of new forms of cumulation while limiting cumulation between ACP Member States.

While progress has been recorded in this area of negotiations, some stumbling blocks still remain, calling for both technical and political attention.

RoO in fisheries, particularly in Namibia, remain an area of contention. Namibia has argued that any fish caught in its territorial waters should automatically qualify. The EC, on the other hand, seems to be concerned about the implications of such overly simplistic rules in fisheries for fish produced in other regions. Participants took the view that the EC should consider the current SADC proposal on its own merit and not be overly concerned with setting a precedent in other regions.

Cumulation is critical to facilitate regional integration and the development of regional value chains. While the EC may have the capacity to bring the rules on cumulation into force, SADC does not currently have the necessary administrative systems in place. This capacity must be developed in order for the region to take advantage of any provisions on cumulation. Cumulation is also important to consider in relation to other EPAs signed in Africa in order to facilitate progress on a Tripartite FTA or a continent-wide FTA.

3.5. Regional integration

Prof Erasmus presented a paper on how the EPA can promote deeper regional integration.

Many of the greatest challenges of regional integration are to be found in the region itself, and there is need to deepen integration in order to maximize potential benefits from the EPA. The SADC EPA group faces a number of overlapping regional formations that complicate the integration agenda. The group does not include all SADC countries and must manage the presence of SACU, a customs union.

Implementing an EPA will be particularly challenging in the SADC region given the diverse nature of the group. It is not clear what role the SADC and SACU secretariats will play in this process. It was

proposed that this issue be addressed as soon as possible rather than allowing it to remain until after the EPA is signed. A specific dialogue between the EU and SADC EPA states on the potential impact of the EPA on regional initiatives was proposed.

It was clear, however, that better coordination on EPAs was needed at the continental level, with greater transparency and information sharing. Improving transparency should also remain a priority for each country's domestic actors, particularly the private sector, which will be applying any final agreement.

4. Conclusion

The meeting was concluded on the 31st January at about 12:00. The second day of the dialogue started with a presentation by Mr Wood on lessons from the CARIFORUM EPA experience. The presentation highlighted the specificity of the SADC region, and suggested that caution be exercised in drawing broad conclusions. Problems in implementing the CARIFORUM EPA were discussed in some detail, with the warning that similar problems may beset a future SADC EPA.

The penultimate session was devoted to the presentation of the rapporteur's report. The report was jointly prepared by Catherine Grant (SAIIA) and Kiranne Guddoy (ICTSD) and presented by Christopher Wood. It summarized the main points of the dialogue and concluded with a reminder of some of the recommendations made to move the negotiations forward. This included the need for flexibility on the EC's part, the interaction between the EPA and regional integration processes – these should be complementary, not destructive, and the crucial need to ensure linkages and compatibility among the three EPAs currently being negotiated in Africa.

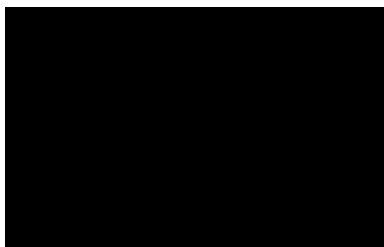
In conclusion, Mrs Akkerman thanked the participants for a fruitful dialogue and said that she has taken good note of the key recommendations emerging from the meeting, which she would transmit to her Minister, and to the EC. Dr Ancharaz thanked all participants, and especially TRALAC and SAIIA for their constructive support to the dialogue, and informed that the next dialogue would take place in Dar es Salaam on February 13-14, 2014.

CONTRIBUTING TO A CONSTRUCTIVE DEBATE ON THE EPA IN THE EAST AFRICAN COMMUNITY

February 13-14, 2014 – Dar es Salaam, Tanzania

3.

EAC - FINAL REPORT



International Centre for Trade
and Sustainable Development

1. Introduction

The East African Community (EAC) is a regional inter-governmental organisation comprising 5 States in Eastern Africa, namely the Republics of Burundi, Kenya, Rwanda, Uganda and the United Republic of Tanzania.

The EAC is negotiating an EPA as a bloc. In November 2007, the EAC agreed to an interim EPA covering mainly trade in goods and fisheries. In the latest meeting of Ministers from the EAC partner States with the EU Trade Commissioner, agreement was reached on the outstanding issues regarding Institutional Arrangements, Dispute Settlement and Final Provisions (except for the non-execution clause).

Key outstanding issues still remain to be resolved. These include Export Taxes, MFN Clause, Agriculture (domestic and export subsidies) and asymmetry in Rules of Origin.

The dialogue was held with the objective of providing a platform for the EAC to reflect on the outstanding issues and explore possible solutions for the negotiations to move to conclusion.

2. The Dialogue

The dialogue was organized by the International Centre for Trade and Sustainable Development (ICTSD) on the initiative of Hon. Lilianne Ploumen, Minister for Foreign Trade and Development Cooperation of The Netherlands, with financial support from the Ministry, and in collaboration with Trade Policy Training Centre in Africa (trapca). The meeting was held on the 13th and 14th February 2014 at the Sea Cliff Hotel in Dar es Salaam, Tanzania.

Participants were drawn from all five EAC member states, and included negotiators and senior government officials, private sector associations and NGOs. The Netherlands delegation was headed by the deputy Director-General of Foreign Economic Relations, Mr. Marten van den Berg, and included Matthijs van Eeuwen, Trade Policy Officer, Directorate General for Foreign Economic Relations of the Ministry of Foreign Affairs and Renet van Der Waals, Head of Development Cooperation of the Embassy of the Kingdom of The Netherlands in Tanzania.

Ambassador Darlington Mwape, who was moderator for the meeting, opened the dialogue by providing the context and setting out the objectives of the meeting. Emphasizing the need to focus on a forward-looking process, Mr. van den Berg underscored the role of the Dutch government as a facilitator keen to see the EPA negotiations move towards closure. He said that their presence in the meeting was to learn and take note of recommendations to be conveyed to the Minister and the European Commission. Mr. van den Berg reminded the audience that The Netherlands, along with four other EU Member States, recently wrote to the European Commission (EC), urging the EC to show greater flexibility in the EPA negotiations in view of meeting the deadline of October 2014.

The ICTSD representative also corroborated the role of the Dutch and explained the choice of ICTSD as an independent think-tank and partner in the process. ICTSD is generally supportive of the EPAs since it sees in them a promise to deliver sustainable development in Africa in line with its own mission.

The meeting was very engaging due to the active participation of stakeholders and the quality of the background papers and presentations. The technical presentations were short and succinct, and they formed the basis for the discussion that followed. The meeting brought up diverse perspectives. Yet the emerging consensus was that the issues blocking the negotiations could be addressed with a bit of flexibility and a dose of political will.

3. Substance

The Programme of the meeting was designed in a similar fashion to the one in Cape Town, South Africa. Discussions were centered on the outstanding issues relevant to the region: the MFN clause, export taxes, rules of origin, agricultural and export subsidies, regional integration and lessons drawn from other EPAs.

The discussion commenced with consideration of a paper presented by Dr Ancharaz from ICTSD on the current state of play and challenges of the negotiations. The background paper guided the discussions. He noted that the EAC was one of the most integrated regional communities in Africa, and that the member-countries were more homogeneous in their economic structure than anywhere else in Africa. He noted that if the ECOWAS was able to conclude an EPA in January 2014 against all odds and despite its numerous challenges, then there was no reason why the EAC, whose problems were much smaller in comparison, could do the same.

Dr Ancharaz observed that some progress has been made in the negotiations since the preparatory meeting in Nairobi last October, with issues like institutional arrangements, dispute settlement and final provisions now resolved. However, the most challenging of the contentious issues – export taxes, the regional MFN clause, agriculture and rules of origin – remain yet to be addressed. While the remaining issues are clear, it was reminded that what is lacking is a clear vision of how they could be overcome. Dr. Ancharaz called for pragmatic and realistic solutions to the EPAs: What does the process need to move forward? Is it political willingness? Is there public support for an EPA in the EAC, and if not, how could it be promoted? How to ensure that all relevant stakeholders are involved in the process? These were some of the questions that he put forward for the meeting to discuss.

Participants were then invited to explore the state of negotiations in a general manner before tackling the specific outstanding issues. Participants emphasized that there was need for greater flexibility at this stage of the negotiations in order to break the deadlock on the contentious issues. Representatives from the private sector called for a more inclusive and consultative process to ensure that their interests are adequately reflected in an eventual agreement. The point was made that, while jobs and workers' welfare are often a prime concern in the negotiations, it is the private sector that provides such jobs; hence, it was only natural that they participated substantively in the on-going negotiations.

Participants showed a clear understanding of the remaining challenges, and suggested that the way forward was mostly political. Several participants confirmed that the major part of the negotiations has been completed and that the residual gap was relatively narrow. It was pointed out that there was a certain urgency to complete negotiations carefully and cautiously given the deadline of 1st October 2014. Participants were unanimous in emphasizing that in concluding the negotiations,

regional integration and development should be the priority. EPAs should be more about development than simply a market access tool.

3.1 Export Taxes

Dr. Ancharaz presented the discussion paper on export taxes. He outlined the economics of export taxes and explained how the provision is defined in the EPA draft.

He noted that the rationale for the use of export taxes usually included government revenue, domestic price stabilisation, food security and industrial development (domestic value addition, infant industry protection). He cited evidence showing that removal of all export taxes would increase global welfare by 0.23%, more than what the Doha Round would have accomplished, if ever concluded. Additionally, Dr Ancharaz noted that export taxes have not proved effective as an instrument of industrial development and challenged participants to provide any example from Africa where export taxes, in and by themselves, have worked, citing the case of Tanzania where export taxes on cashew nuts were increased progressively from 20% to 90%, without making an impact on domestic processing activity. (To this, a participant from Uganda said that export taxes on raw skins and hides in Uganda have helped a leather industry, producing a wide range of leather products, to spring up. However, he could not say whether this 'success' was attributed to export taxes alone, or to complementary policies and factors.)

Participants had the opportunity to consider the text in the draft EPA. The gist of the text is that no new export taxes can be imposed. However, two exceptions are defined in the text: export taxes can be levied, with authorisation of the EPA Council, if the objective is to foster the development of domestic industry and to maintain currency value stability. Even then, export taxes can only be imposed on a limited number of products and for a limited period of time. Such imposition is also subject to a review clause. The terms "limited number of products" and "limited period of time" constitute grey areas in the text, and additional uncertainty arises from the delay in decision-making by the EPA Council, and the nature of such decision.

Export taxes have always been a contentious issue in the negotiations generally, and it has also proved particularly divisive among the EAC countries. The political attractiveness of export taxes – due to their WTO legality, their simplicity and alleged effectiveness as a tool of industrial policy, and their scope to raise much-needed government revenue – makes it difficult for the EAC to accept the current provision on export taxes in the draft EPA text. The EAC insists that export taxes should be part of their toolkit regardless of the evidence on their effectiveness. Many participants stressed that this was a matter of their governments preserving their policy space more than anything else.

Dr Ancharaz argued that export taxes alone may not be sufficient to promote value-added industrial activities, citing numerous supply-side constraints, including policy failures, poor business environment, and high production costs due to unreliable utilities, inefficient transportation systems and burdensome road blocks, as the real culprits. He suggested that, if the right conditions were in place, export taxes would be redundant as a policy tool. In conclusion, he suggested that EAC member-states could rather use the contentious issue of export taxes as a bargaining chip in the EPA negotiations to extract a more favourable deal on the development chapter, including commitments of greater, and additional, Aid for Trade that could be directed to industrial capacity building in EAC region.

3.2 Most Favoured Nation Clause

John Bosco Kanyangoga, consultant at Trade and Development Links (Rwanda), led the discussions on the issue of the Most Favoured Nation Clause (MFN clause). He provided background information on the MFN principle, its meaning and purpose, including the available exceptions in GATT Articles XXIV and the "Enabling Clause". He explained that the Framework EPA agreed on in 2007 has met the conditions of the MFN provision – as prescribed in GATT Article XXIV – when the Parties exchanged their respective market access offers. What is at issue now is how the Parties deal with each other in respect of future free trade agreements (FTA).

Mr. Kanyangoga examined the draft negotiating text and informed the meeting of the EAC's position and a counter-proposal by the EU.

He reminded participants that the MFN clause requires the EAC to extend to the EU any more favourable preferences granted to any major trading economy in the future. This provision excludes trade agreements between ACP countries or other African countries and regions. From the discussions, it was clear that the EAC was cautious not to set a bad precedent for other ACP countries still in negotiations. Participants also expressed concern that such a clause would restrict the EAC from concluding meaningful trade agreements in future since it would have nothing more attractive to offer to potential partners. On this point, however, a participant argued the reverse: such a clause should serve as a benchmark for future agreements, a limit to market access preferences that is not to be exceeded.

From the discussions that ensued, it appears that the gap on MFN has narrowed recently, with parties proposing workable solutions. Regarding EAC's concern about the MFN clause hampering juicy trade deals with major economies in the future, a point was made about how, practically, the EAC could extend preferences to a major trading partner beyond those already accorded to the EU. In other words, if under the proposed market access deal, the EAC has agreed to liberalize 82.6% of its tariff lines, and has opted to keep the remaining 17.4% as sensitive products, how can it then liberalize some of these tariff lines, which is tantamount to claiming that these products were sensitive with respect to the EU but are not sensitive in relation to its trade with a major trading economy with which it might be contemplating an FTA?

This issue may be academic and not of a real concern. Participants were advised to avoid "what-if scenarios" that could detract the parties from real considerations. There was general agreement that the MFN issue could be easily resolved. It was just a matter of time.

3.3 Agriculture (EU domestic support and export subsidies)

The background paper on this issue was presented by Edgar Odari, a programme officer from EcoNews Africa. It seems this is a largely settled issue and the outstanding divergence relates mainly to domestic support measures. EAC countries fear that these trade distorting measures could prevent EAC farmers from taking advantage of duty free market access to the EU market.

With regard to export subsidies, participants disagreed on whether to address the issue within the EPA or at the multilateral level. Inclination was towards the multilateral process in that the EAC could tap into collective leverage to secure better commitments. It was also observed that EU's offer not to provide export subsidies on exports destined to the EAC was both insufficient and infeasible. The fact remained that export subsidies, whether applied to exports to the EAC or not, had the

effect of depressing world prices, including of agricultural goods in which the EAC has a comparative advantage, thus hurting EAC exports and their economies.

Further concerns were raised regarding the EU Common Agricultural Policy reform. It was noted that the reform has implications that are trade-distorting in nature.

In the course of this discussion, participants raised the idea that a stand-alone text on infant industry could have been useful. Participants wondered why the language in the Hong Kong Ministerial Declaration was not being implemented in this respect.

3.4 Rules of Origin

The paper on Rules of Origin was prepared by Eckart Naumann from the Trade Law Centre (tralac). Dr. Ancharaz presented the findings of the paper during the meeting.

The paper was a comprehensive piece, discussing the objectives, fundamentals, methodologies and the recent negotiating history of rules of origin. The EAC-EU RoO Protocol has not yet been agreed. However, the RoO issues in the EAC are much less challenging than elsewhere and most of the contentious issues can be resolved as they are technical in nature.

Asymmetric rules of origin are a new concept in the EU-ACP relations. This principle has received acceptance in the negotiations. The draft text proposes that the EAC shall extend to the EU the same rules of origin as the EU applies to the EAC after a transitory period of 5 years. The EAC position is that such asymmetry should not be time-bound, that is, it reserves the right to not grant reciprocal rules of origin to the EU indefinitely.

Another other issue that raised interest is the ability to cumulate with South Africa. The fact that the EAC cannot cumulate with South Africa on Annex XII products is viewed by the EAC as undermining both industrial development and regional integration in the context of the proposed tripartite FTA. Dr Ancharaz explained that cumulation with South Africa on Annex XII products was not allowed because these products were classified as sensitive by South Africa in its Trade, Development and Cooperation Agreement (TDCA) with the EU. However, he pointed out that the market access offer in the SADC-EU EPA negotiations had not been finalized yet, and so there was a possibility that South Africa revised its sensitive products list – in a positive direction. In this regard, the EAC could formally ask the EU that any product that is not on the EU sensitive list in the SADC-EU EPA negotiations are automatically be graduated out of the exclusion list for the purposes of regional cumulation. Finally, Dr Ancharaz argued that there was little evidence to support the claim that limited cumulation with South Africa would undermine processing activity in the EAC since the bulk of the excluded products was finished foodstuffs, which offered little prospect for use as inputs. He therefore urged participants to get real with the issues at hand in the spirit of moving the negotiations ahead.

There was some concern with the definition of "other ACP States" in the draft text, and its implications for regional cumulation. Dr Ancharaz explained that such fear was unfounded since cumulation with "other ACP states" was assured through "extended cumulation" provisions.

Discussion also focused on the administrative needs coming with cumulation mechanisms: the EAC will have to build such capacity and concern whether the EU would support its implementation was expressed.

3.5 Regional Integration

The discussion paper on “How the EPA can promote deeper Regional Integration?” was presented by Peter Kiguta, Director-General for Customs and Trade of the EAC Secretariat.

He stated that the overarching objectives of the EPA are to: contribute to economic growth and development in the EAC region; promote the gradual integration of the EAC partner States into the global economy; and foster the structural transformation of the EAC economies, their diversification and competitiveness.

As for the EAC, four main principles should be achieved with the EPA: strengthening regional integration in the EAC; an asymmetric approach with respect to liberalisation of trade and in the application of trade-related measures and trade defence instruments; allowing the EAC States to maintain regional preferences with other African countries and regions; and contributing to addressing the production, supply and trade capacity of the EAC countries.

It was reiterated that this region was far more integrated than other African regions. Preserving and boosting intra-regional trade should be a key objective of the EPA, and the EPA should complement and strengthen the ongoing integration process. Participants were unequivocal on this issue. They maintained that the EPA should be guided by the existing EAC integration agenda, and hailed the fact that the EAC common external tariff served as the basis for, and greatly facilitated, the EPA market access deal.

3.6 Lessons for the EAC from existing EPAs

In the last presentation at the dialogue, Dr Ancharaz tried to draw lessons from existing EPAs that could be relevant to the EAC in the ongoing negotiations. He explained that this exercise was complicated by the fact that the only two ‘functional’ EPAs – the CARIFORUM-EU comprehensive EPA effective since March 2009 and the ESA-EU interim EPA, which entered into force in May 2012 – have been in operation for too short a period to allow for meaningful analysis. His presentation highlighted 5 key issues of relevance to the EAC, all of which related to the implementation of the EPA, once signed and ratified. These include: (i) slow progress on implementation; (ii) need for stepped-up EU support in implementation; (iii) delay in institution-building; (iv) interaction between the EPA and regional integration processes; and (v) the need to build customs/administrative capacity.

It transpired that implementation of the CARIFORUM EPA was marred by the absence of regional buy-in, weak political will (due to doubt, mistrust and uncertainty created by the negotiations process), and a lack of enforcement mechanisms and penalties. This was made worse by delays in the operationalization of key institutions, such as the EPA Council. While implementation requires significant financial resources, Dr Ancharaz asked whether the EAC EPA development chapter guaranteed such resources – especially in light of the fact that the EU could not assure the additionality of aid in the recently agreed ECOWAS EPA on senior officials’ level.

The presentation triggered a long and lively discussion on the question of implementation. Stakeholders from the private sector present at the meeting stressed on the need for early implementation, saying that delays would defeat the spirit of the EPA. Several participants queried whether their governments had the political will and energy (after such protracted negotiations) and

the financial capacity to implement the EPAs. A view emerged that the EAC should own the EPA, and should mobilize its domestic resources to implement it, regardless of aid from the EU.

4. Conclusion

The rapporteur's report, presented by Kiranne Guddoy from ICTSD, provided an excellent summary of the discussions up till that point, and served as the basis for a final discussion on the way forward. The following points emerged from this discussion:

- Flexibility is needed from both sides to reach an agreement. There should be no red lines on any issue.
- Parties may consider an "Early Harvest" on issues that are stabilised and agree on a sort of "rendez-vous" clause to continue negotiations on the outstanding issues. Alternative voices should be heard and considered. There is need to bring on board all relevant stakeholders so that the process is as inclusive and consultative as it could be. For credibility reasons, this cannot be done by the government alone. It requires an independent broker.
- The private sector was categorical: they need the EPA to be concluded as soon as possible, and implemented without delay.
- There is need for a comprehensive cost-benefit analysis on the EPA. This analysis should highlight the development dimension of the EPAs, and their synergy with the ongoing regional integration process, rather than their role as a market access tool.
- To demonstrate its good faith, the EU should extend the deadline for Market Access Regulation 1528.
- The EAC would like to understand the concerns of the EU as well behind its position, especially on some of the most contentious issues.

In concluding, Dr. Ancharaz thanked participants for a very engaging and fruitful dialogue. He noted that the remaining issues were 1% of the text. A lot of progress has been made, and the remaining issues were not unsurmountable. He urged the EAC to draw inspiration from the ECOWAS, which, against all odds, managed to secure a deal on the EPA. This was possible because the region put aside their differences, mustered political will and demonstrated determination in closing the long-drawn negotiations. In this, the EU deadline should be a motivating factor rather than seen as a Damocles' sword hanging over the EAC.

Mr. van den Berg assured participants that his Minister would consider the outcomes of the meeting and convey the key messages to the European Commission. He reiterated that the concerns of the EU were to have a level playing-field with other emerging economies. Agriculture will always remain an EU issue, and it was doubtful if it could be resolved at the bilateral level. He advised participants to pay attention to issues of market entry such as SPS and assured that the deadline should not be an issue if the EAC demonstrated its will to close the talks.

Amb. Mwape thanked all participants, ICTSD, trapca and particularly the Dutch for an initiative that has generated so much interest, discussion and ideas on how to move the process forward. He closed the meeting at about 13:00 on 14th February 2014.

CONTRIBUTING TO A CONSTRUCTIVE DEBATE ON EPAs IN THE SADC AND THE EAC

4.

Policy Brief



International Centre for Trade
and Sustainable Development

1. Introduction

The EPA negotiations have been a protracted process, now running into its tenth year. During this time, however, a number of issues have been resolved. The remaining contentious issues are fewer, but these are also the most challenging ones. Negotiators on both sides have repeatedly said that moving the process ahead will require a dose of political will. The dialogues that ICTSD organized in Nairobi, Cape Town and Dar es Salaam over the past four months confirms this. In addition, African stakeholders have called for the EU to demonstrate greater flexibility on the outstanding issues and revisit the deadline for the withdrawal of Market Access Regulation 1528 as a show of good faith.

The sticky issues differ across configurations. For example, in West Africa, where a deal was reached in January 2014, the negotiations had dragged on because of disagreement over the market access offer (the quantum of liberalization and its implementation period) and the EPA Development Programme (EPADP). Two issues are common to the SADC and EAC regions, namely export taxes and the regional MFN clause. Rules of origin also remain unsettled in these regions but the questions are not the same. The same is true of agriculture, where the SADC is more concerned about opening up its agricultural market, and the need for effective safeguards while the EAC is grappling with the issue of export subsidies and EU's domestic support to agriculture. This means that a one-size-fits-all approach to finding solutions would not be appropriate. It is crucial to ensure that the proposed solutions address the specific concerns of the regions.

In this policy brief, we sketch out the status of the negotiations, highlight the outstanding issues and offer some recommendations for moving the process ahead. We do this issue by issue, discussing both regions together, but, where relevant, we highlight region-specific positions – and offer tailored solutions to advance the negotiations.

2. Export taxes

2.1 Issues

The EPA draft text states that no new export taxes may be imposed. However, two exceptions are admitted in the case of the EAC – to foster the development of domestic industry and to maintain currency stability and three in the case of the SADC – to raise revenue, to protect infant industries and to protect the environment. Even then, such taxes can only be imposed with authorization of the EPA Council, on a “limited number of products” and for a “limited period of time”.

The common position of the two blocs is that the language on export taxes is strewn with grey areas. Moreover, they fear that EPA Council's decision may take long and that the outcome may not be in their favour. Both the EAC and the SADC view the EU's demand as unfairly restricting their use of export taxes as a tool of industrial development and raw material beneficiation and, thus, limiting their policy space. Some stakeholders assert that this a matter of sovereign right and have gone so far as claiming that the issue of export taxes was non-negotiable.

To their credit, export taxes are not WTO-incompatible and so there was no need for the EU to insist on them for the EPA to comply with GATT Art. XXIV. Nevertheless, export taxes *are* trade-restricting and constitute a “beggar-thy-neighbour” policy. Perhaps for this reason, it has become

SADC Trade Protocol includes a clause on export taxes). Finally, there is little evidence that export taxes are effective as a stand-alone instrument of industrial policy.

2.2 Policy options

Export taxes are by far the most contentious issue in the EPA negotiations. One way to progress on this question is for the EU to make proposals in other areas that can achieve broadly the same objectives as those claimed of export taxes. For example, if the objective is really to encourage local processing of raw materials, the EU can commit to an enhanced development chapter that provides greater amounts of Aid for Trade and technical assistance to help EAC/SADC countries build their productive capacity.

Another option – a more technical one – is to clarify the text on export taxes. For example, “limited number of products” and “limited period of time” need to be defined, and the EPA Council’s decision-making process explained. It is crucial to assure member-states of both blocs that this process will be fair and inclusive. It should also be possible for the EU to extend the allowable “exceptional circumstances” to include revenue-raising and the protection of the environment as additional reasons for imposing export duties, as in the SADC EPA draft text.

3. The MFN clause

3.1 Issues

Briefly stated, the MFN clause in the negotiation text requires that the EAC/SADC to extend to the EU any more favourable preferences granted to any major trading economy in a future FTA. This provision excludes trade agreements between ACP countries or other African countries and regions.

The main concern here is that such a clause would restrict the blocs or their member-states from concluding meaningful trade agreements in the future since they would have little extra to offer to potential partners. However, an alternative perspective is that the clause sets a benchmark for future agreements – a limit that is not to be exceeded.

The MFN clause is not formally required by GATT Art. XXIV for an FTA – in this case, the EPA – to be WTO-compliant. Nevertheless, most modern FTAs do include such a clause, as also do the EAC and the SADC.

Technically, one might ask how, for example, the EAC could liberalize more than 82.6% of its tariff lines in relation to a major trading economy in a future trade deal when this was the maximum it could offer to the EU. In other words, if the EAC opted to keep 17.4% of its tariff lines as sensitive products, how can it then liberalize some of these tariff lines, which is tantamount to claiming that these products were sensitive with respect to the EU but are not sensitive in relation to its trade with a major trading economy with which it might be contemplating an FTA?

3.2 Options

Strictly speaking, the MFN clause is a non-issue. To the extent that both the EAC and the SADC trade protocols include an MFN clause, their disapproval of this provision in the EPA negotiations is internally inconsistent and weakens their common negotiating position. In any case, it appears that disagreement on the MFN clause has narrowed recently, and that the Parties may be moving towards consensus. In the event divergence persists, the EAC/SADC can use the MFN clause (and

export taxes) as a bargaining chip to extract a more favourable deal from the EU elsewhere – for example, in rules of origin, or in economic and development cooperation. The EU should admit such a compromise.

4. Rules of origin

4.1 Issues

On rules of origin (ROO), the issues facing the EAC and the SADC EPA groups are rather different. In the SADC, the bone of contention is ROO relating to marine fisheries. Namibia has argued that any fish caught in its territorial waters should automatically qualify as originating in Namibia.

In the EAC, a key issue is “asymmetric” rules of origin. The draft text proposes that the EAC shall extend to the EU the same rules of origin as the EU applies to the EAC after a transitory period of 5 years. The EAC’s position is that such asymmetry should not be time-bound, that is, it reserves the right to not grant reciprocal rules of origin to the EU indefinitely.

The region’s inability to cumulate with South Africa on Annex XII products (that is, products classified by South Africa as sensitive in the context of the TDCA¹) is another contentious issue, with EAC negotiators claiming that such restriction impedes the development of domestic processing activities and regional value chains. However, this claim is unfounded since most of the Annex XII products are foodstuffs rather than products that can be used as inputs into the production of finished goods in the EAC.

In both regions, there is concern over cumulation provisions, and the need to build customs/administrative capacity in order to give credibility to certificates of origin when a product is made of inputs from a *region*, rather than a specific country.

4.2 Options

The issues here are technical and can easily be addressed, especially if the EU shows a bit of flexibility. In our view, the EAC’s position on asymmetric rules is a reasonable one – consistent with the differential level of development of the two Parties. The EU should show flexibility in this area of the negotiations.

Namibia’s position on ROO is a perfectly sound one too. It should either be adopted *in toto* by the EU with a view to simplifying ROO in the marine fisheries sector. (Such a development would serve as a catalyst for sweeping reforms of ROO, which are perceived as complex and unfriendly by developing countries.) Alternatively, the EU may offer a compromise whereby it relaxes one or more of the other requirements in the ROO relating to marine fisheries, e.g. crew membership or conditions attached to vessel lease or charter.

¹ Trade, Development and Cooperation Agreement.

5. Agriculture market access

5.1 Issues

There are internal divergences within the SADC on the issue of agricultural market liberalization. Mozambique, in particular, has taken a strong position on this issue, excluding agriculture altogether from its market access offer. Other SADC EPA states, however, are more flexible on this issue. In the EAC, agricultural market access is a non-issue.

5.2 Options

The latest concessions made by South Africa on geographical indications are generous. These should be acknowledged by the EU, and, as a sign of good faith, the latter should reciprocate by showing flexibility on agricultural market access.

6. Agricultural safeguards

6.1 Issues

The use of agricultural safeguards is a contentious issue in both the EAC and the SADC. In principle, the EPA provides recourse to various trade defense mechanisms, including anti-dumping and countervailing measures, and bilateral and multilateral safeguards. However, such recourse is restricted by the fact that Parties are required to obtain the prior approval of the EPA Council. Additionally, under bilateral safeguards, tariffs can only be raised to the MFN level, which, African negotiators argue, may not be sufficient to deal with import surges from the EU.

Moreover, EAC EPA states do not have access to the Special Safeguard Mechanism (SSG) under Art. V of the WTO Agreement on Agriculture. Only South Africa, Botswana and Namibia (in SADC) are allowed to use it.

Last, but not least, the EAC is concerned that the EU has used – and can continue to use – SSG provisions to calculate the trigger volumes for fruit and vegetables, which are of specific interest to EAC member states. This creates uncertainty, and prejudices, EAC exporters of fruit and vegetables.

6.2 Options

The EAC-EU EPA should provide greater flexibility for the EAC to address import surges. In this regard, Art. 16 of the TCDA could be a useful pointer:

“Notwithstanding other provisions of this Agreement and in particular Article 24, if, given the particular sensitivity of the agricultural markets, imports of products originating in one Party cause or threaten to cause a serious disturbance to the markets in the other Party, the Cooperation Council shall immediately consider the matter to find an appropriate solution. *Pending a decision by the Cooperation Council, and where exceptional circumstances require immediate action, the affected Party may take provisional measures necessary to limit or redress the disturbance.* In taking such provisional measures, the affected Party shall take into account the interests of both Parties” (emphasis added).

7. Agricultural support and export subsidies

7.1 Issues

This is an issue in the EAC EPA negotiations, but not so much for the SADC. The EU recognizes the trade-distorting effects of domestic support and proposes to address this ever-contentious issue through greater transparency. The EAC says that this will not be enough, and wants the EU to “substantially reduce trade-distorting domestic support provided to farmers, especially on products of export interest to EAC Partner States” (Art. 13a).

On export subsidies, the EAC position is that the EU should eliminate existing subsidies on all agricultural exports. The EU has proposed to eliminate subsidies on agricultural tariff lines liberalized by the EAC – on the condition that the EAC accepts the clauses on export taxes and on MFN as a single package. This is not acceptable to the EAC.

7.2 Options

The question of domestic support is unlikely to be resolved in the EPA talks. Many, including an increasing number of African negotiators, believe that this issue can only be tackled at the multilateral level. In a spirit of compromise, perhaps the EU can commit in the EPA to taking up the problem and addressing it expeditiously at the WTO level?

As regards export subsidies, the EU should make an unconditional offer – the same one as in the recently-concluded ECOWAS EPA –, that is, it will not provide export subsidies on agricultural products exported to the EAC.

8. Other issues (not related to negotiations)

There are several issues not specifically related to the negotiations, but which are of great concern to stakeholders. One is the interaction between the EPA and the regional integration processes. There is agreement across all African configurations that the EPAs should not be a mere market access tool. They should be a real catalyst for development through deeper regional integration. The EPAs should complement on-going integration processes. However, even though not of immediate concern, questions about how disparate EPAs across Africa will eventually affect continental integration – or the tripartite FTA – are beginning to emerge.

Another issue relates to implementation. Evidence suggests that implementation of the CARIFORUM-EPA – the first comprehensive EPA, concluded in Oct. 2008 – is being marred by a number of problems, including lack of political will and regional buy-in, delays in setting up critical institutions, and weak implementation capacity due to lack of funding. There are concerns that similar problems could beset the EPAs currently being negotiated.

In both cases, greater assurance from the EU is needed to dispel fears and to build an effective and trustworthy relationship with Parties that can support implementation of the EPAs. The EU has provided significant amounts of Aid for Trade to individual member-states of the two configurations. Regional AfT packages have helped build transport corridors, one-stop border posts and harmonized customs and administrative systems. These achievements need to be emphasized as EU’s contribution to deepening regional integration in Africa.

9. Conclusion

The ICTSD meetings reveal that the remaining areas of disagreement on the EPAs in the EAC and the SADC are few, and that dialogue between Parties is helping to bridge the divide. The SADC is more optimistic of an agreement. In the EAC, where stakeholders hold strong ideological positions on the questions of export taxes and the MFN clause, the EU will need to deploy greater effort – including perhaps a campaign of sensitization to the potential benefits of an EPA, and trust-building, to advance the negotiations.

At a time when the functioning of the WTO is being rethought, it would be helpful to remind all Parties that some EPA provisions are WTO-plus, aligned to the realities of the day, and forward-looking. Hence, while the EPAs must be WTO-compatible, WTO law serves only as the benchmark – not the limit. This thinking is not unique to the EPAs; most free trade agreements are even more ambitious in their scope.

The EPAs can inaugurate a new era of EU-ACP economic relations built on a win-win partnership. Instead of African countries being seen as recipients of aid and preferences, they can be equal partners in development.