

The Interim SADC EPA Agreement

Legal and Technical Issues and Challenges

1. Introduction: The present state of affairs

- 1.1 With the exception of the Caribbean, no final EPA arrangements between the EU and the ACP countries have been reached when the WTO waiver for trade in goods expired at the end of 2007. The negotiations to conclude final EPAs will have to continue in 2008. By the end of last year 35 ACP countries initialed either a full or interim agreement with the EC.
- 1.2 Within the SADC EPA there have been additional complications and only Mozambique and the BLNS states initialed an interim EPA. South Africa decided not to do so and Namibia only initialed after some delay. It has also entered certain reservations. Angola will make its decision at a later stage and will join “when it becomes possible.” Tanzania is now part of the EAC EPA; a new EPA configuration.
- 1.3 On 23 November 2007 Botswana, Lesotho, Swaziland and Mozambique on the one hand and the EU member states and the European Commission on the other, initialed an interim EPA. Namibia raised concerns and initialed on 5 December 2007; on the understanding that its concerns will be addressed through the negotiations in the new year. Its statement reads: *“The Republic of Namibia has initialed the Interim Economic Partnership Agreement on the understanding that concerns which Namibia had identified throughout the negotiations of the Interim Economic Partnership Agreement would be addressed through the negotiations towards a comprehensive Economic Partnership Agreement.”*
- 1.4 This statement has been annexed to the interim SADC EPA. This suggests that Namibia will sign and ratify the interim EPA only if her concerns are accommodated. South Africa has not initialed this document. It will in the mean time continue to trade with the EU in terms of the TDCA.

- 1.5 It should also be noted that although this particular EPA is referred to as the “SADC EPA”, the members of this regional organization are negotiating their EPAs with Brussels in four different configurations. The implication of FTAs being established with the EU (ensuring compatibility under Article XXVI, GATT) will have serious implications for SADCs own integration agenda under the RISDP. There will be difficult technical issues with respect to overlapping membership and the costs connected to the implementation of these various EPAs. One of the objectives behind the EPAs is the promotion of deeper integration among ACP countries. In order for that to be possible, suitable and effective institutional and legal arrangements must be established and they must make sense in terms of geographical, historical and economic factors. The jury is still out on the future of deeper integration in sub-Saharan Africa.
- 1.6 The EC took the implementation of the interim EPA (despite the fact that it is not yet in force) further and adopted a Regulation to ensure uninterrupted access for SADC goods imported into the EU after 1 January 2008.¹ This is a very important additional legal aspect which provides certainty to SADC exporters. One of the major concerns of Namibia in particular has been accommodated now.²

2. Overview of the Agreement

- 2.1 This agreement is not the final outcome of the EPA negotiations but contains its own provisions on entering into force and implementation. Negotiations to conclude full EPAs will continue during the course of 2008, but the present text covers quite a comprehensive area. The first chapter deals with general provisions and objectives and is followed by chapters on development cooperation and areas of cooperation. There is a part on trade in goods, on trade defense instruments, and on ongoing negotiations

¹ South African goods are excluded; they will enter the EU in terms of the TDCA.

² Namibian exporters of beef and table grapes stood to lose these rather important markets had no transitional arrangement been found.

- for a full EPA. The agreement also provides for dispute avoidance and settlement and concludes with general and final provisions such as on amendment and entering into force. It is then followed by a protocol on mutual administrative assistance in customs matters and there are further annexes containing schedules and other technical information.
- 2.2 In terms of the official documentation of the negotiators this agreement allows for 100% liberalization by value by the EU as from 1 January 2008 (with transition periods for rice and sugar) and 80% liberalization by value by Botswana, Lesotho, Namibia and Swaziland. For 44 sensitive tariff lines liberalization is envisaged by 2015. Three further lines will not be liberalized until 2018. The tariff offer for Mozambique covers 80.5% for trade, most of which is liberalized of entering into force. Some 100 additional tariff lines will be liberalized by 2018.
- 2.3 A development cooperation chapter has been included which covers cooperation in trade in goods, supply side competitiveness, infrastructure, trade in services, trade related issues, institutional capacity building and fiscal adjustments. The Parties agreed also to negotiate on competition and government procurement only when adequate capacity has been built.³
- 2.4 The overall legal framework includes the EU regulation to give effect to this interim EPA agreement. This document⁴ refers to all the EPA negotiations and provides that: *“Those agreements establishing, or leading to the establishment of, Economic Partnership Agreements for which negotiations have been concluded provide that the parties may take steps to apply the agreement, before provisional application on a mutual basis, to the extent feasible. It is appropriate to take action to apply the agreements on the basis of these provisions.”* The implementation of the interim EPAs is a complicated matter and is dealt with in Article 105; discussed below.

³ <http://www.acp-eu-trade.org/epa/SADC.thp;2008/01/22>.

⁴ 14970/1/07, Brussels, 18 December 2007, Council of the European Union, Legislative Acts and other Instruments.

3. Entry into force

3.1 This aspect is covered by Article 105, which reads as follows:

1. This Agreement shall be signed, ratified or approved in accordance with the applicable constitutional or internal rules and procedures.
2. This Agreement shall enter into force the first day of the second month following the deposit of the last instrument of ratification, acceptance or approval.
3. Notifications shall be sent to the Secretary General of the Council of the European Union, who shall be the depositary of this Agreement.
4. Pending entry into force of the Agreement, the European Community, the EC Party and the SADC EPA States agree to apply the provisions of this Agreement which fall within their respective competences ("provisional application"). This may be effected either by provisional application where possible or by ratification of the Agreement.
5. Provisional application shall be notified to the depositary. The Agreement shall be applied provisionally 10 days after the latter of the receipt of notification of provisional application from the European Community or of ratification or provisional application from all the SADC EPA States.
6. Notwithstanding paragraph 3, the European Community, the EC Party and SADC EPA States may unilaterally take steps to apply the agreement, before provisional application, to the extent feasible.

3.2 This agreement (interim EPA) still requires signature and ratification before it will enter into force as an interim EPA. In the mean time it has to be implemented; via unilateral steps or provisional application.

3.3 The implication is that the SADC EPA states will have to take certain steps in terms of Article 105 in order to give effect to this interim EPA; before they undertake the formalities of signature and ratification.

3.4 In the mean time (till the end of 2008) further negotiations will continue in order to agree on the text of the "full EPAs". This will have to include the controversial services part. It would be wise to synchronize these technical matters with due care in order to ensure that the validity of

undertakings is clear. The final agreement will also have to be notified to the WTO.

4. The Namibian Concerns

- 4.1 Namibia is in a sui generis position since it has made its future involvement in the finalization of this EPA dependent on the accommodation of its concerns about certain matters. Exactly what these concerns are is not quite clear because they have not been added to its statement quoted above. Indications are that the EC has accepted these reservations. This will mean that there will have to be negotiations about these concerns and Namibia will have to be accommodated.
- 4.2 Does the apparent acceptance by the EC of the Namibian reservations bind the other SADC EPA states which initialed without any qualifications? There is no indication that they have been consulted in this matter.
- 4.3 There will in all likelihood be complicated initial technical discussions and prior negotiations to answer these questions. Only then will it be possible to resume negotiations on substantive issues to conclude full EPAs.
- 4.4 And what will South Africa do? It seems unlikely that it can, on the basis of this interim EPA, join the negotiations of 2008, unless it becomes a party in terms of Article 67, discussed below.⁵ It may of course invoke other arguments such as the promotion of deeper integration in SACU or the provision in Article 31 of the SACU Agreement which requires the consent of all SACU members before preferential trade agreements with third parties are concluded. The latter route will raise numerous new complications; such as the fact that the TDCA did not meet with concurrence of all the BLNS states. The most obvious implication is that the integrity of SACU qua customs union is in jeopardy as a result of past and present acts and omissions of the member States. The consolidation of this organization will

⁵ Which will not remove the EC obstacle introduced by the EC decision not to grant SA goods DFQF treatment.

require concerted action over a wide spectrum; not only an ad hoc response to the present problem.

5. Remember Article 67

5.1 This provision deals with the “Second stage of negotiations” and provides as follows:

The Parties agree to continue negotiations in 2008 to extend the scope of the present Agreement. For the purpose of this Title, the SADC EPA States will be constituted of Botswana, Lesotho, Mozambique and Swaziland. The remaining SADC EPA States may join the process of negotiation on a similar basis. To this end, they will notify in writing the EC Party and the other SADC EPA States.

5.2 These “second stage negotiations” will not be about trade in goods, but will focus on services and investment. These are the matters to be agreed upon before there can be “full EPAs”.

5.3 Three negotiating clusters lie ahead; about the reservations of Namibia, the technicalities around Article 105 and the substantive issues mentioned in Article 67.