

Situating the EPA Negotiations

Issues and Unresolved Debates in Africa-EU Trade Relations

For a long time it has been necessary to move beyond sterile debates for or against Economic Partnership Agreements (EPAs). The real issue is: what kind of EPAs will support African governments in their efforts to promote the structural transformation of their economies, so that they can move beyond the production of simple and unprocessed products to the production of a range of higher value products, for national, regional and international markets, and in the process help them tackle poverty and employment issues. This paper seeks to situate the ongoing EPA negotiations and debate around contentious issues in the context of the wider European Union (EU) trade policy and African aspirations for sustainable development and poverty reduction.

Introduction

The EPA (economic partnership agreement) negotiations were launched in September 2002 at the all-ACP level. The outcome of these negotiations with the European Commission (EC) were disappointing, with major substantive issues related to the scope and coverage of the proposed EPAs left unresolved. Many of these remain bones of contention in the ongoing EPA negotiations.

In September 2004, negotiations were launched at the regional level with self-selected groupings of ACP countries, in the expectation that it would prove easier to deal with complex and sometimes controversial issues at the regional level. However, the difficulties in establishing common regional positions, given the diversity within ACP regions, were greatly underestimated. The difficulties faced in these regional negotiations were compounded over time, as the EC shifted the weight in its policy focus between the stalled WTO negotiations and its network of free trade agreement (FTA) negotiations, in efforts to establish a new and more advanced basis for multilateral negotiations, once the stalled negotiations restarted. This provides the immediate background to the unresolved and contentious issues in the EPA negotiations, as they continue in 2009. However, deeper roots to these unresolved and contentious issues can be found in the fundamental differences in policy perspectives between the EC and ACP negotiating partners.

The European Context

Despite repeated references to the development content of the ongoing EPA negotiations between the EU and African

countries, in reality the EC's approach to these negotiations is firmly rooted in the EU's broader trade policy. Since 1993 the EC has been developing a twin-track approach to promoting the EU's trade policy agenda and wider economic interests. Track 1 consists of the WTO (World Trade Organization) negotiations aimed at establishing multilateral rules for the conduct of trade relations. Track 2 consists of bilateral or region-to-region free trade agreement negotiations. These two tracks are intimately linked. If policy initiatives designed to promote EU objectives are blocked on one track, the emphasis is shifted to the second track, with the aim of removing bottlenecks in the pursuit of EU policy objectives.

Thus we find after the September 2003 WTO Ministerial Meeting in Cancun that the EC placed enormous emphasis on trade in services, trade-related area issues and the elimination of non-tariff barriers in the EPA negotiations with African countries. This was a direct response to the EC's frustration with the failure to make 'progress' on these issues in a situation where it was felt that WTO rules 'have not kept pace with the expanding range of trade barriers'. Addressing gaps in WTO rules and issues of enforcement are increasingly seen as critical under the various EU free trade area negotiations. This, it is held, will allow the establishment of a new foundation for the re-launching of negotiations on these issues in the WTO. However, these EC frustrations were masked by Trade Commissioner Peter Mandelson's bland assertion that binding commitments on trade in services and in a multiplicity of trade-related areas in fact represented *the* development dimension of EPAs, since they provide the 'hard wiring' of a modern economy.

This twin-track approach is brought together under the EC's **market access partnership** strategy, which is described by the EC as being '*at the heart of the work of the European Commission*'. This involves close collaboration between the EC, EU member states and European business representatives involved in exporting to the target market, to systematically identify and remove all barriers to EU exports of goods and services. Currently, market access teams are active in 36 countries around the globe, including Nigeria, South Africa, Algeria and Egypt. Trade negotiations provide a critical means of supporting the work of these market access teams, with the emphasis *on making better use of opportunities presented by negotiations – in particular*

the Doha Round and the new generation of EU free trade agreements – to progress on non-tariff barriers, through a ‘tougher emphasis on the enforcement of bilateral and global rules’.

The commercial importance of this approach cannot be underestimated. A 2007 EC-commissioned study found that ‘ambitious’ FTAs with India, South Korea and ASEAN countries could increase EU exports of goods and services by nearly €42 billion per annum, with most of these gains being in the service sector. This assumed such ‘ambitious’ FTAs included the kind of provisions on trade in services and trade-related areas being promoted under the Africa-EU EPAs. In many respects, therefore, given the relatively weak trade negotiating capacity of many African governments, EPA agreements are seen by the EC as a ‘stalking horse’ for concluding FTAs which will strengthen the EU’s hand in systematically removing obstacles to exports of EU goods and services across the globe.

The African Context

It has been a longstanding position of African, Caribbean and Pacific trade negotiators that WTO-compatible EPAs should provide a basis for supporting the structural transformation of their economies, away from the currently excessive dependence on volatile primary commodity markets. From an African perspective the negotiations are not solely about trade with the EU, but also about the structural development of their economies to better serve national and regional markets for goods and services, as well as dynamic third-country markets. The ongoing EPA negotiations need to be seen in this wider context. Only in this wider context can issues such as the precise scope of the Most Favoured Nations (MFN) provisions, the impact of specific EPA provisions on regional integration processes and the controversies over the continued use of a range of trade policy tools be understood.

Given the diversity between African countries, what this means concretely for the conduct of negotiations varies considerably. This diversity has never fully been accommodated in the EC’s regional approach. Thus in Namibia, high priority is accorded to defending the continued use of trade policy tools such as import licensing arrangements, export taxes, infant, industry protection and agricultural safeguards so as to support the continued development of agro-food sectors, which are already creating many new jobs and expand rural income earning opportunities. In neighbouring Botswana, however, establishing clear regulatory frameworks for the development of trade in services, in the hope of stimulating a new economic sector, to carry the economy beyond its diamond days, is given a very high priority. This has made maintaining common regional positions in the EPA negotiations extremely difficult, particularly when accommodating specific national concerns runs into conflict with wider EU policy objectives.

With the arrival of Trade Commissioner Ashton, far greater emphasis in EU policy is being placed on successfully accommodating diverse African concerns in the EPA process. However, these efforts run up against the problem of **how this can be achieved without undermining wider EU policy objectives**. Thus, a number of African governments, lacking the financial means which the EU routinely deploys to promote value-added food processing to serve growing

market components,¹ wish to continue to make extensive use of export taxes and other export restrictions, to stimulate local value-added processing. At the global level, however, the EU is seeking to prohibit export taxes and other export restrictions. Indeed, in June 2009 the EU requested WTO consultations to limit China’s use of export restrictions on raw materials. Clearly, accommodating African concerns over export taxes in the text of the Interim-EPAs (IEPA) could undermine the credibility of EU efforts to limit China’s use of these same policy tools: policy tools which according to the EC badly affect EU industries, accounting for 4% of EU industrial activities and around 500,000 jobs.

This issue of how the EU is to accommodate African concerns without undermining its wider trade policy objectives recurs across a number of areas. Not surprisingly, in resolving this dilemma the EC has consistently leaned towards giving primacy to EU concerns and objectives rather than accommodating African concerns.

Thus we find that while in Swakopmund, Namibia, in March 2009, broad agreement was reached on compromise texts to address a wide range of the contentious issues in the SADC-EU IEPA negotiations, the EC has refused to incorporate these agreed changes into the text of the IEPA prior to signing. While in early June 2009 four SADC configuration governments signed the IEPA, the governments of Namibia, South Africa and Angola decline to sign the IEPA at this time, fearing that they would be held to provisions in legally binding international agreements with which they remain in fundamental disagreement. This has not only de facto split the SADC EPA configuration, but has sown considerable discord within what is Africa’s longest established customs union, the Southern African Customs Union.

Contentious Issues and Unresolved Debates

Within the regionally based EPA negotiations not only have a multiplicity of ‘contentious issues’ emerged but major substantive issues have been left unresolved despite nearly seven years of negotiations.

The debate on ‘substantially all trade’

Many African EPA configurations consist of a mixture of advanced developing countries, least developed countries and lower or middle income countries hovering above LDC status and facing major economic and social development challenges. These mixed groupings of developing countries are involved in reciprocal preferential trade negotiations with the largest, most advanced developed-economy trading bloc in the world. Against this background how extensive should the tariff elimination commitments expected of African regions be? In West Africa, it has been argued, there is a legal gap in WTO rules with regard to the treatment of ‘mixed regional trade agreements (RTAs)’ such as the EPAs. It is argued there is nothing explicit in WTO rules on either the level of tariff liberalisation required of least developed and developing countries or the length of the transition period which should be followed. It is argued that taking a weighted average of 80% of all trade as the appropriate product coverage (so as to accommodate LDCs in the re-

1. €53 billion in public aid to enhancing the competitiveness of EU food and agricultural sector enterprises is being deployed under axis 1 of the EU’s rural development policy between 2007 and 2013.

gional grouping) would allow West Africa to liberalise only 60% of its imports from the EU, since the EU is liberalising 100% of its imports. This is important within the region, since the consolidation of nationally sensitive product lists, which include various products, requires far more limited tariff liberalisation commitments than under bilateral IEPAs so far initialled.

Clearly, the extent of tariff elimination expected of 'mixed' regional groupings should have been established at an early stage of the negotiations. However, resolution of this issue has been consistently deferred – a course of action which largely accounted for the fragmentation of the Eastern and Southern Africa EPA negotiating configuration at the end of 2007.² This is largely attributable to the fact that as part of its wider trade policy the EC has been pushing for a **tightening of WTO rules on free trade agreements** and not their relaxation. How then could the EU accommodate African concerns in this area without undermining its broader policy of promoting a tightening of WTO rules governing FTAs?

'WTO plus' agreements

The EPA negotiations took place against a backdrop of growing EC frustration over the shortcomings of WTO rules and enforcement mechanisms. In September 2006, this led to the EU adopting a more '*activist approach to opening markets*'. For the EC this was no longer simply an issue of tariffs but increasingly about the systematic elimination of non-tariff barriers to trade, through addressing so-called 'behind border' issues.³ The EC felt these issues were not adequately addressed under WTO rules and so adopted a policy which sought to conclude FTAs which went '*beyond what can be achieved at the global level*', and establish a more advanced platform for re-launching negotiation on these issues in the WTO at a later date. This 'WTO-plus' approach has been a major source of contention in the EPA negotiations.

According to South Africa's Minister of Trade and Industry, Rob Davies, the EU's pursuit of these 'WTO-plus' issues is not based on '*some altruistic desire to assist ACP regions to become attractive investment destinations*', but is '*linked to global strategies to promote offensive interests of European companies across the world, by addressing behind the tariff, regulatory issues judged necessary to make market access real*'. It is this dimension of the EC's approach that has profoundly divided the SADC region, despite repeated efforts to maintain a common approach. This raises the question: '*how*

does a country assert what it understands to be the priority for the EPA process, namely promoting development orientated regional integration?'⁴

Collectively, African governments have repeatedly requested the EC not to exert pressure in the EPA negotiations for the inclusion of provisions that go beyond those required to ensure compatibility with WTO rules on trade in goods. Yet, in the SADC context the EC continues to insist that major issues of contention – on which agreement in principle has already been reached – can only be formally incorporated into a full SADC-EU EPA. This would, of course, include binding agreements on trade in services and across a multiplicity of trade-related areas – binding commitments on issues which governments representing the majority of the population of the SADC region (and accounting for the majority of regional GDP) have consistently refused to negotiate on in an EPA context.⁵ In many quarters this linkage is seen as precisely the kind of leverage that African governments have called on the EC to refrain from exerting.

This reluctance to negotiate is based on recognition of the systemic implications of what would de facto amount to the adoption of EU regulatory frameworks across a range of areas. The fear is that this would immediately give EU companies a competitive edge over local companies, since EU companies already comply with EU regulatory frameworks, while local companies may need to make substantial investments in order to achieve compliance. This, it is felt, could seriously hold back the development of locally managed and locally owned service-sector companies. These concerns are particularly strongly felt in those African countries where service-sector supply companies are already being developed.

The broader policy context of specific non-tariff issues

Across a number of African regional configurations concerns exist with regard to a number of contentious issues. Often these revolve around the use of trade policy tools to support economic development and structural transformation – for example, the use in Namibia of import licensing arrangements for controlled agricultural products, used as part of broader agro-food sector development policies, designed to promote the development of key agricultural sectors.⁶ Here a provision is included in the SADC IEPA which would require the immediate elimination of import-licensing arrangements, despite the fact that this is a critical policy tool in a highly successful programme for the development of horticultural production to serve the local Namibian market. The irony is that at the time the EU insisted on the inclusion of this article, it was making use of import and

2. At the end of 2007 the following situation existed in terms of trade relations between the EU and the countries of the Eastern and Southern Africa EPA negotiating configuration. The five East African Community (EAC) countries had initialled an interim EPA with the EU (Kenya, Uganda, Tanzania, Burundi and Rwanda), another five ESA members had initialled a series of IEPAs with separate tariff elimination commitments under the title of the ESA EPA (Mauritius, Seychelles, Comoros, Madagascar and Zimbabwe), while another seven countries, all LDCs, had declined to initial an IEPA (Djibouti, Somalia, Eritrea, Ethiopia, Sudan, Malawi and Zambia) and were trading with the EU under the EBA initiative. Zambia subsequently submitted a tariff elimination offer and this was taken by the EU to indicate initialling of the interim EPA.

3. According to the then EU Trade Commissioner, Peter Mandelson, 'behind border' issues which need to be addressed include '*poor protection of intellectual property right and patents; closed markets for services and investment; unfair state intervention which distorts prices and fair competition; public procurement markets that remain closed to fair competition*'.

4. See 'Bridging the Divide: the SADC EPA', Rob Davies, Trade Negotiations Insights, Vol. 7, No. 4, May 2008.

5. Splitting South Africa away from the BRIC (Brazil, Russia, India and China) on these issues in the WTO is seen as a valuable by-product of this EU policy thrust. A number of governments in southern Africa would prefer these issues to be dealt with in the WTO, on the basis of common regional approaches. These governments remain open to dialogue and cooperation with the EU in these areas to strengthen their policy and institutional frameworks. Binding bilateral commitments, however, are not seen as appropriate at this stage.

6. That is, key in terms either of food security considerations in the context of higher average global food prices and increased price volatility or in terms of employment creation and rural income generation objectives.

export licensing arrangements in over 40% of all agricultural tariff lines (at the eight-digit level) subject to the CAP (Common Agricultural Policy). It was only with the full implementation of agreed CAP reform measures that in June 2008 the EU was able to reduce the use of import licences to 5.2% of tariff lines.

It is noteworthy that the EU only dismantles the use of traditional trade policy tools, when the CAP reform process – involving a shift to increased levels of direct aid to farmers and extensive programmes of public financial assistance to enhancing the competitiveness of EU food and agricultural sector enterprises – has actually removed the need for the use of such trade policy tools.

No such managed transition for terminating the use of trade policy tools is envisaged for African governments. Their abandonment is advocated regardless of the specific use to which they are being put and the policy context in which they are applied. This applies equally to the use of import licences, the use of export taxes or export restrictions, the use of infant industry protection measures or specific agricultural safeguards that seek to address the new structural distortions generated by the EU's CAP reform process. A far more nuanced approach is required. This need not involve continued tolerance of purely arbitrary non-tariff barriers. However, it will require specific provisions of the EPAs which make extensive exceptions to the general principles that the EU advocates at the global level, so as to support existing African efforts to structurally develop their economies, in a context where the range of policy tools available is very limited.

EPA-related adjustment support

Despite the extensive deployment of public assistance to trade and production adjustment within the process of CAP reform, the EU's relevance in the EPA context remains unclear. Under its current approach the issue of direct aid to production and trade adjustment processes is largely neglected while private sector associations involved in economic activities are largely sidelined from the design and management of aid for trade programmes.⁷ This stands in stark contrast to the EU's internal policies, where programmes to enhance the competitiveness of EU food and agricultural sector enterprises grant a central role to private sector bodies in designing and implementing market-led production and trade adjustment initiatives. This suggests a need to fundamentally rethink the EU's approach to EPA-related adjustment support in the operationalisation of EU aid for trade commitments.

7. There are some rare and notable exceptions to the general rule in this regard.

RECOMMENDATIONS

EU governments need to acknowledge the need for special treatment of African countries in the EPA negotiations, which may be inconsistent with wider EU trade policy positions. Specifically the EU needs to:

- delink the conclusion of WTO-compatible trade in goods agreements from agreements on trade in services and trade-related areas;
- deepen the dialogue on trade in services and trade-related areas, so that when regional policy frameworks are in place, appropriate inter-regional agreements can be established;
- refrain from asking African governments to sign EPAs containing provisions with which they are in fundamental disagreement, since this undermines the credibility of commitments entered into;
- accept the need for special dispensation with regard to the continued use of trade policy tools such as import licences; export taxes and export restrictions, infant industry protection, agricultural safeguards, extensive use of tariff protection through a redefinition of what constitutes 'substantially all trade' in 'mixed FTAs'.

The EU also needs to rethink its approach to EPA-related production and trade adjustment support, so that targeted aid for trade programmes are increasingly market led and private sector based.

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