

## Chapter 6

### State of play in the SADC-EU EPA negotiations

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#### 1. Introduction

In June 2009, four members of the Southern African Development Community (SADC) Economic Partnership Agreement (EPA) negotiating group – Botswana, Lesotho, Mozambique and Swaziland – signed an interim EPA (IEPA) with the European Union (EU). This was a significant development for regional integration in southern Africa, and has led to considerable debate over the future of integration initiatives in the region. Concerns have been raised over the effects the signing of the IEPA will have on the Southern African Customs Union (SACU), two of whose members – South Africa and Namibia – chose not to sign the IEPA.

This paper aims to provide an update on the SADC-EU EPA negotiations, focusing in particular on some of the most contentious issues that have arisen during the negotiations. It begins by tracing the history of the EPAs through the various trade agreements and conventions that have regulated trade between the EU and the African, Caribbean and Pacific (ACP) states. The paper then highlights recent developments in the SADC-EU EPA, including the signing of the IEPA in 2009. The paper then focuses on the state of play in the SADC-EU EPA negotiations as of early 2010. In particular, it addresses the main sticking points in the negotiations, including the so-called 'MFN Clause', the coherence of the SACU common external tariff and the definition of the parties to the agreement. Finally, the paper concludes with some remarks on the significance of the current impasse in the negotiations.

#### 2. Background to the EPA negotiations

Formal relations between the EU (and its former incarnation, the European Economic Community) and the ACP states date back to the 1957 Treaty of Rome which established the European Common Market and made provision for the creation of European Development Funds (EDFs) (EC, 2009a). These EDFs were created to provide technical and financial aid to colonies of the European states, and to those

overseas countries and territories with which the European states had special historical links. The Yaounde Convention (Yaounde I), signed in 1963 and applied from 1964 to 1969, was the first association agreement between the European Economic Community (EEC) and 18 former colonies in Africa (Ibid). The convention, and its successor Yaounde II (1969-75), provided the majority of EDF financial assistance to Francophone Africa in order to improve infrastructural development following decolonisation.

In 1973 the United Kingdom (UK) became a member of the EEC. One of the results of UK membership was the signing in 1975 of the Lomé Convention (Lomé I) by the then nine EEC member states and 46 ACP countries, including members of the Commonwealth (EC, 2009b). Under Lomé I (1975-80) the EEC extended non-reciprocal preferences to exports from the ACP states (Ibid). Lomé I and its successors also established separate trading protocols for EEC imports of beef, bananas and sugar from the ACP states.

The Lomé Convention was renewed and renegotiated three times. Lomé II (1980-85) did not introduce any significant changes, other than a system to assist heavily mineral-reliant ACP countries suffering export losses, but extended the ACP group to 58 states (Ibid). Lomé III (1985-90), which extended the coverage to 65 ACP countries, shifted focus from the promotion of industrial development to development on the basis of self-sufficiency and food security. Finally, Lomé IV (1990-2000), the first convention to cover a 10-year period, emphasised human rights, democracy, good governance and economic diversification among other issues (Ibid). Under Lomé IV the ACP group increased to 70 countries.

With the expiry of Lomé IV in 2000, a new agreement between the EU and the ACP states was instituted. The Cotonou Partnership Agreement, concluded for a period of 20 years, attempted to improve ACP-EU cooperation in light of the fact that the ACP countries' share of the EU market had actually declined over the course of the successive Lomé Conventions (Ibid). The Cotonou Agreement, which has seen the ACP group swell to 78 states, also provided for the implementation of a new trade regime between the EU and the ACP states by the beginning of 2008.

This was necessary as during the 1990s certain aspects of EU trade with the ACP countries were successfully challenged under the General Agreement on Tariffs and Trade (GATT) (Sanoussi & Stevens, 2009: 14). By implication, the Lomé trade regime was found to be WTO incompatible as it involved discrimination by the EU in favour of certain developing countries (the ACP states) at the expense of others in ways that could not be justified under WTO rules. The EU was able to negotiate two waivers from WTO members to allow this discrimination to be continued first until 2000 and then until the end of 2007. From then on however, the EU-ACP trade regime would have to be WTO compatible.

The method chosen by the EU for ensuring WTO compatibility of its preferential access for ACP exports was to replace the non-reciprocal regime that had been in place since Lomé I with a regime based on reciprocity. Article XXIV of GATT, which establishes the conditions governing regional agreements, provides for an exception to the Most Favoured Nation (MFN) principle by allowing WTO members to provide preferential access to specific trading partners provided the countries concerned are all part of an FTA or customs union (Ibid: 14). A key requirement of such arrangements is that the each party liberalise trade with all the other parties. Because the EPAs provide for the removal of substantially all barriers to trade in goods between the EU and the ACP states, and not just barriers applied by the EU, they can be classified as a form of WTO-compatible FTAs.

On 27 September 2002 the EU and the ACP countries officially opened negotiations on EPAs in Brussels, and by late-2004 negotiations with each of the individual regions had commenced (Karl, 2002). The ACP countries were originally divided into six regional groupings: Caribbean states (CARIFORUM), Pacific states, West African states (ECOWAS), Central African states (CEMAC), East and Southern African states (ESA) and Southern African states (SADC)<sup>1</sup>. The EU's aim was to conclude EPAs with each of these six regional blocs by the time the Cotonou waiver expired at the end of 2007.

The EPAs were to be based on four pillars (EC, 2010). Firstly, they would reflect a partnership between the EU and the ACP states, one in which both sides would be

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<sup>1</sup> Subsequently, certain countries from the SADC and ESA groups decided to negotiate a common EPA as the East African Community (EAC) group, bringing the total number of EPA groups to seven.

subject to rights and obligations. Secondly, the EPAs would support regional integration efforts among the ACP states. In other words, the EPAs would be based on pre-existing regional integration efforts among the ACP states and would keep step with these initiatives. Thirdly, the EPAs were to be understood ultimately as instruments for development, and would therefore be sensitive to the particular constraints and circumstances facing the ACP states. Finally, the EPAs were created to ensure that the EU-ACP trading regime complied with WTO rules. This, it was claimed, would aid in efforts by the ACP states to integrate into the world economy.

Somewhat controversially, however, the EU's negotiating mandate for the EPAs went beyond what was required to ensure that its trade regime with the ACP states was WTO compliant (an FTA covering trade in goods), and included other 'new generation' trade-related issues including trade in services, investment liberalisation, government procurement issues and competition policy rules (Sanoussi & Stevens, 2009: 14-15). These were particularly contentious issues for the African states, many of which did not feel that they were in a position to negotiate on such issues.

These and other contentious issues contributed to a particularly slow negotiating process. By early 2007 it was clear that little progress had been made in the negotiations, and that it would be impossible for the envisaged agreements to be completed by the 31 December deadline (Ibid: 15). The European Community (EC), the executive body of the EU mandated to negotiate the EPAs on behalf of the EU member states, therefore took the decision to split the process into two phases. The first phase would see the EU and ACP countries initial an IEPA – essentially an FTA on goods – by the end of 2007. Further negotiations towards full EPAs, which would include other trade-related issues, would then be continued at a regional level (Ibid: 15).

The EU offered duty-free quota-free market access for ACP exports (deferred for rice and sugar) to all ACP states that had initialled an IEPA by the end of December 2007<sup>2</sup> (Ibid: 15). This meant that these states would not lose their preferential access to EU markets when the Cotonou waiver expired. The rushing through of the IEPAs

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<sup>2</sup> For ACP states that had not initialled an IEPA by this deadline, exports would revert to the 'next most favourable' regime for which they were eligible. For least-developed countries this was the EU's Everything But Arms (EBA) initiative, while for non-LDCs it was the standard Generalised System of Preferences (GSP).

did, however, mean that the goods offers were completed in a hurry, and it is likely that this haste accounts for at least some of the contentious issues that have arisen in the subsequent negotiations.

Despite concerns over a potential loss of preferences for their exports, by the end of 2007, only 18 of the 46 African states had initialled IEPAs (one more, Zambia, initialled in 2008) (Ibid: 19-21). In addition, only one of the African EPA groups – the EAC – was able to initial an IEPA as a region. By contrast, the 15 Caribbean EPA states had initialled a full EPA by the December 2007 deadline. A number of African states also continued to press the EU for guarantees that specific contentious issues would be revisited in future negotiations (Ibid: 16).

During 2008 the full CARIFORUM EPA was signed. Progress in the African EPA negotiations remained slow, however. Much of the discussion during the year focused on the contentious issues arising from the initialled agreements. These issues were highlighted during a meeting of the Ministers of Trade and Finance of the African Union in April 2008 (Sanoussi & Stevens, 2009: 17). The issue of contentious clauses in the EPAs was also included in the ACP Council's June 2008 Declaration and the ACP Heads of State summit in Accra in October 2008. The only African country to sign an EPA during 2008 was the Ivory Coast, a member of the ECOWAS EPA group.

Discussions over the contentious issues in the IEPAs as well as the various trade-related issues to be included in full EPAs continued to dominate the negotiating process in 2009. During the year, however, a number of African countries put their signatures to IEPAs. By December 2009 Cameroon (from the CEMAC EPA group), Madagascar, Mauritius, the Seychelles, Zimbabwe (all ESA), Botswana, Lesotho, Swaziland and Mozambique (all SADC) had joined the Ivory Coast as signatories to IEPAs.

### **3. SADC-EU EPA negotiations**

EPA negotiations between the EU and the SADC EPA Group were launched in July 2004. Of the 15 members of SADC, seven agreed to negotiate as part of the SADC EPA Group: Angola, Botswana, Lesotho, Mozambique, Namibia, Swaziland and Tanzania (who later opted to join the EAC EPA Group). South Africa, also a member

of SADC, initially participated in the negotiations only as an observer but became an official member of the SADC Group in 2007. The first couple of years of the negotiating process were largely devoted to addressing the issue of multiple trading arrangements with overlapping membership in the southern African region, and to formulating a framework for the negotiations. Central to this framework was the demand by South Africa to be included as a formal negotiating party to the EPA.

The SADC EPA Group presented its proposed framework for the negotiations to the EC at a meeting of SADC and EC senior officials in March 2006. Notable aspects of the SADC Group's proposal were a revision of the existing Trade and Development Cooperation Agreement (TDCA) between the EU and South Africa, with South Africa becoming an official member of the SADC EPA Group, separate treatment for individual SADC members, including Everything But Arms (EBA) treatment for LDCs, and the exclusion of new generation trade-related issues such as investment and trade in services from the SADC EPA negotiations (Julian, 2006). These proposals necessitated the EC to request an amended negotiating mandate from the EU member states – always a lengthy process – and the Commission was only able to respond to SADC at a meeting in March 2007.

At the March 2007 meeting, the first between EC negotiators and the SADC EPA Group, a revised SADC EPA roadmap was adopted, with the aim of concluding negotiations by the end of the year (Julian, 2007a). This roadmap saw the focus of the negotiations shift towards trade in goods, development issues, trade in services and investment. It also emphasised the establishment of common regional policies. SADC used the meeting to press the EC for the inclusion of a development chapter in the EPA.

In the months following this meeting, tensions arose within the SADC Group over the sensitivities of Botswana, Lesotho, Namibia and Swaziland (BLNS) to SACU's market access offer, which was largely based on the TDCA. A split also appeared within the SADC Group over the inclusion of trade in services provisions in the EPA. The position of the majority of the group's members was that they would be willing to cooperate with the EU on new generation trade issues, but would not undertake any binding commitments other than in the area of trade in services (Julian, 2007b). South Africa, however, did not want to see services included in the negotiations at all.

At the end of 2007 Botswana, Lesotho, Mozambique, Namibia and Swaziland initialled an IEPA with the EU (Julian, 2008a). Namibia did so only after assurances that certain unresolved issues would be re-opened for negotiation during 2008. A statement containing a list of issues to be resolved before signature accompanied the initialled agreement. South Africa chose not to initial the IEPA due to disagreement over key provisions in the text, while Angola did not initial as it had not presented a market access offer to the EC.<sup>3</sup> As a result the initialling countries secured duty-free, quota-free (DFQF) access to the EU market, South Africa's trade with the EU continued to be conducted under the TDCA and Angola continued to receive EBA preferences (Ibid). The main features of the IEPA were a single goods market deal between the EU and the initialling SADC states, a commitment to continue negotiations towards a full EPA in 2008 and a development cooperation chapter (Ibid).

The split between those countries wishing to push ahead with the second phase of negotiations and those prioritising a resolution of contentious issues was highlighted when Angola, Namibia and South Africa (ANSA) submitted a joint list of concerns relating to the IEPA at a meeting between SADC and EC negotiators in June 2008 (Julian, 2008b). ANSA wanted these issues addressed in the full EPA. It was decided that the ANSA concerns and other trade-related issues would be discussed in a process parallel to the second phase of EPA negotiations, and in September, the then EU Trade Commissioner, Peter Mandelson, stated that the EC was ready to address these contentious issues in the framework of the full EPA negotiations, but only once the IEPAs had been signed (Julian, 2008c).

Mandelson was replaced as Commissioner by Baroness Catherine Ashton in October 2008, however, and the new commissioner appeared to take a more conciliatory approach in the negotiations. This was exemplified in a letter to Action Southern Africa (ACTSA) dated 15 December 2008 in which she stated:

With SADC our objective remains to consolidate the regional integration and if possible include South Africa in the EPA. To that effect we have started to negotiate the concerns that have been expressed by South Africa, Namibia and Angola. Our objective is to reach agreement on all these issues that would be

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<sup>3</sup> Angola's intention was to accede to a full EPA once such an agreement had been concluded.

acceptable to the region as a whole, including those who have not raised these concerns (Roux, 2009).

Furthermore, on the issue of services and investment in the IEPA she stated that '[o]nly those countries wishing to negotiate in these areas will do so', while on the issue of competition and government procurement, '[n]egotiations will only be envisaged once adequate regional capacity has been built' (Ibid).

Although ongoing discussion on the contentious issues and the market access offers meant that the 31 December 2008 deadline for the signing of the IEPA was missed, December did see the EU take a considerable step towards addressing ANSA concerns by releasing a 'non-paper' proposing a tariff alignment deal aimed at preserving SACU tariff coherence (Julian, 2009a). The non-paper proposed that South Africa should align its tariffs with the commitments made by the BLNS in the IEPA. In exchange South Africa would receive improved access to the EU market. This proposal was welcomed by ANSA in a joint démarche to the EU member states as a positive acknowledgement that the IEPA in its original form would undermine the SACU common external tariff.<sup>4</sup> Nevertheless, it was seen as an inadequate solution as it did not resolve the problem of two differing legal instruments covering trade between the two regions, namely the IEPA and the TDCA.

In addition, ANSA raised four further concerns in the démarche. The first was the fact that the EPA negotiating process would result in four separate EPAs being established between the EU and members of SADC, thereby undermining regional integration efforts in southern Africa. A second, related, concern was that these four EPAs would involve varying commitments in a number of trade-related areas, such as investment and competition policy, and that this would also undermine regional integration efforts. A third concern was related to the implications for Angola's accession to an EPA given its vulnerable LDC status. Finally, ANSA raised the concern that the IEPAs would result in legal frameworks which would be difficult to alter after the fact.

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<sup>4</sup>The démarche is available at:  
[http://www.acp-eu-trade.org/library/files/ANSA%20EN\\_070109\\_Demarche-to-EU-MS.pdf](http://www.acp-eu-trade.org/library/files/ANSA%20EN_070109_Demarche-to-EU-MS.pdf).



A special negotiating session between the EC and the SADC EPA Group was held in Swakopmund, Namibia from 9 to 12 March 2009. At this meeting, the EC addressed a number of concerns that had been submitted by the SADC Group following a meeting of SADC EPA Ministers in February (Julian, 2009b). At the Swakopmund meeting, the EC accepted a number of SADC proposals, and agreed to: i) a simple reaffirmation of the rights and obligations of the WTO Agreement on Quantitative Restrictions, ii) a provision on food security in the IEPA, iii) a requirement that free circulation be effected in accordance with national customs legislation and iv) a stand-alone clause allowing all SADC EPA Group members other than South Africa to impose duties for infant industry protection (Ibid).

The EC also backed down on its opposition to the use of export duties by the SADC states, settling for a provision calling only for export duties not to be in conflict with WTO rules. Any new export taxes, however, would require the agreement of the EC. On the issue of market access, the EC agreed to base the EPA schedule on the TDCA and to allow a freeze on TDCA liberalisation of 54 tariff lines considered sensitive by the BLNS (Ibid). This proposal did not address the differing rules of origin between the EPA and the TDCA.

Two contentious issues were not resolved at the Swakopmund meeting, however. Firstly, the EC appeared unwilling to back down on the issue of the MFN clause, instead proposing an even more restrictive version of the clause (Ibid). Similarly, no final agreement was forthcoming on the issue of the definition of parties in the IEPA. The EC continued to insist that the SADC EPA Group act collectively, while the SADC countries insisted there was no legal basis for doing so as the SADC EPA Group is not a legally constituted entity (Ibid). It was decided that a temporary declaration would be drafted by the SADC EPA Group but that the issue would be fully resolved during negotiations towards a full EPA. In addition, a number of smaller issues were not discussed, with the EC indicating that it would only be willing to address these in the context of full EPA negotiations.

Because the EC had already submitted the IEPA to the EU Council, it was decided following negotiations that the text of the IEPA would not be changed to incorporate the concessions agreed to at the Swakopmund meeting. Instead, the EC confirmed it would provide the best possible political and legal assurances that these concessions

would be included in the full EPA (Julian, 2009c). These would take the form of declarations inserted into the final act of the IEPA and a letter of confirmation outlining the details of the deal reached in Swakopmund. It was also indicated that the IEPA and SACU tariff schedules would be aligned at the earliest opportunity. South Africa, however, voiced concerns over the legal status of these assurances.

Despite these concerns, Botswana, Lesotho and Swaziland finally signed the IEPA on 4 June 2009, with Mozambique following suit on 15 June. South Africa immediately raised concerns as to the effect this would have on the operations of SACU given the fact that two different trade agreements with differing rules of origin were now applicable to the region (Julian, 2009d).

In the months following the signing of the IEPA, work has continued on three tracks: aligning the EPA and TDCA tariff schedules, resolving outstanding issues and, for the signatories, negotiating services and investment issues. Discussion between SADC EPA officials has largely centred around these issues as well as the ratification and implementation of the agreement, notification of the agreement to the WTO, the way forward for finalising a full EPA and the treatment of Namibia given that it initialled the IEPA (and thus gained duty-free quota-free access to the EU market) but has decided not to sign the agreement (Julian, 2010a). The most significant development since the signing of the agreement, however, was the decision taken by the SACU members early in 2010 to move forward on the EPA negotiations as a bloc, and to delay ratification and implementation of the IEPA until all the outstanding issues between the EC, South Africa and Namibia have been resolved (Julian, 2010b).

#### **4. The main sticking points in the SADC-EU EPA negotiations**

The events surrounding the SADC-EU EPA negotiations raise the question of why there has been a split in the SADC EPA Group, with Botswana, Lesotho, Mozambique and Swaziland signing the interim agreement and Angola, Namibia and South Africa preferring not to sign. There are clearly numerous factors at play here, and the thinking behind each country's decision almost certainly entails a number of considerations relating to the interests of various sections of their respective economies as well as the goals of regional integration in southern Africa.

For instance, it is clear that a major factor behind the decision by the four signees to sign the IEPA was to ensure the uninterrupted flow of their exports to the EU market. These countries took seriously the EU's threat to revoke their duty-free quota-free access should they not sign the IEPA. Conversely, this threat was not relevant to South Africa, which already has a bilateral agreement with the EU (the TDCA), and was therefore not concerned about a potential loss of preferential access. Similarly, Angola knew that it would still receive duty-free quota-free access to the EU market under the EBA programme, even if it did not sign the IEPA.

The aim of this section, however, is not to provide a full explanation of why certain SADC EPA Group members signed the IEPA while others did not. Indeed, this would be a very difficult task given the numerous factors at play as well as the shifting attitudes prevalent during the negotiating process. Instead, the aim is merely to analyse three of the most significant issues that have been used as justification by ANSA, and in particular South Africa, for not signing the IEPA, and to show why these issues have fuelled a belief that the EPA process is detrimental to regional integration in southern Africa.

#### *The 'MFN Clause'*

One of the main concerns raised by ANSA with regard to the IEPA relates to Article 28 of the agreement, and in particular to Paragraph 2 of Article 28, which states:

[T]he SADC EPA States shall accord to the EC Party any more favourable treatment applicable as a result of the SADC EPA States or any Signatory SADC EPA State becoming party to a free trade agreement with any major trading economy after the signature of this Agreement.

This clause, which has become known as the 'MFN Clause', essentially means that if any SADC EPA Group signatory to the IEPA were to offer more favourable market access to a third party 'major trading economy' through an FTA with that party, then it would have to offer the same access to the EU (Bursvik, 2010: 285).<sup>5</sup> Currently, this would only apply to trade in goods, but is possible that a similar provision for trade in

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<sup>5</sup> More favourable access in this case applies to all of the provisions of Chapter 4 of the IEPA which covers tariffs, rules of origin, standstill and safeguards.

services could be included in the final SADC-EU EPA.<sup>6</sup> The definition of a major trading economy, meanwhile, is provided in Paragraph 5 of Article 28:

For the purposes of this Article, ‘major trading economy’ means any developed country, or any country accounting for a share of world merchandise exports above 1 percent in the year before the entry into force of the economic integration agreement referred to in paragraph 2, or any group of countries acting individually, collectively or through an economic integration agreement accounting collectively for a share of world merchandise exports above 1.5 percent in the year before the entry into force of the economic integration agreement referred to in paragraph 2.”

According to 2008 data from the International Trade Centre’s online *Trade Map* database, developing countries that would be so classified include China, Mexico, Malaysia, Brazil, India and Thailand among others.<sup>7</sup> In addition, key regional blocs of the ‘South’ such as the Association of East Asian Nations (ASEAN) and the Common Market of the South (Mercosur) would also be classified as major trading economies.

As it stands, the MFN clause would only apply to *free trade agreements* concluded with third parties.<sup>8</sup> Under WTO rules, regional trade agreements including a developed country must be notified under Article XXIV of GATT, while those between developing countries should be notified under what is commonly known as the ‘Enabling Clause’ (Ibid: 287). Article XXIV requires that free trade agreements lead to an elimination of duties on ‘substantially all trade’ within a ‘reasonable length of time’ (Ibid: 287). There is no exact definition of ‘substantially’, but in practice an agreement liberalising around 80% of goods trade is generally considered a free trade agreement.

Things are further complicated, however, by the fact that there is no exact definition of ‘developing’ or ‘developed’ country in the WTO, as members select their own status. South Africa is currently identified as a developed country in the WTO, and this might explain why the SACU and SADC agreements were notified under Article

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<sup>6</sup> This is the case, for instance, in the CARIFORUM-EU EPA.

<sup>7</sup> See <http://www.trademap.org>.

<sup>8</sup> During the Swakopmund negotiating session in March 2009, the EC proposed to extend the coverage of the MFN Clause to preferential trade agreements with countries accounting for 1.5% or more of world merchandise trade. The SADC EPA states did not agree to this amendment, however, and it has not been reflected in the IEPA.

XXIV (Ibid: 287). While it is widely believed that South Africa would like to have its status changed to that of a developing country, thereby making it possible for SACU to notify any future trade agreements it concludes with other developing countries or regional blocs under the Enabling Clause, there is no guarantee that such a change would be accepted by other WTO members (Ibid: 288).

It is therefore not entirely clear whether the MFN clause would apply to a PTA or partial scope agreement that SACU might enter into with another developing country or region. If it was possible for such agreements to be notified under the Enabling Clause, it could be argued that they do not constitute free trade agreements, and should therefore not be subject to the MFN Clause provisions (Bilal & Stevens, 2009: 87). If, however, SACU agreements with the likes of Mercosur are required to be notified under Article XXIV, which seems to be the case, then, according to WTO rules, such agreements would have to be interim agreements leading to a free trade agreement or customs union. In this case, the MFN Clause would ultimately apply.

South Africa in particular has made the claim that the MFN Clause is one of the main reasons why it has not signed the IEPA. The country is concerned that the clause would limit its policy space for concluding future regional trade agreements (presumably as part of SACU) with large emerging economies such as China and India. This is because SACU would be unable to offer these and other potential partners anything that could confer any trade advantage over the EU. Concluding regional trade agreements with key emerging economies of the South appears to be very much part of South Africa's trade policy going forward, and the South African government is therefore wary of any factors that would undermine its efforts to diversify its trade relations through the conclusion of such South-South agreements.

Furthermore, because of SACU dynamics – SACU member countries are supposed to negotiate trade agreements with third parties as a bloc<sup>9</sup> – and the fact that three SACU members are now party to the IEPA, South Africa and Namibia are likely to be indirectly affected by the MFN clause even if they do not become party to the SADC-EU interim or full EPA (Bursvik, 2010: 286-287). Any regional trade agreements that South Africa and Namibia enter into with a major trading economy would involve Botswana, Lesotho and Swaziland (BLS) as well. BLS would then have to provide

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<sup>9</sup> See Article 31 of the 2002 SACU Agreement.

any more preferential access to the EU. This would create a situation whereby members of the same customs union (SACU) would be offering different levels of market access to a third party (the EU), thus undermining SACU's common external tariff.

Nonetheless, it is debatable whether the MFN clause would really have that significant a limiting effect on SACU's ability to conclude future trade agreement, as the IEPA and the TDCA already provide the EU with significantly liberalised access to the SACU market (Ibid: 297). Those goods on which high duties for EU imports remain tend to be in sensitive sectors of the South African economy, such as automobiles, clothing and textiles and certain agricultural products. Because these sectors are considered critical to South African industrial policy, they are unlikely to be liberalised as part of any future regional trade agreement with the likes of China, India or Mercosur, especially given the fact that these economies compete internationally with South Africa in a number of those sensitive sectors.

#### *Tariffs and rules of origin in SACU-EU trade*

Another widely levelled criticism of the EPA process has been the charge that the agreement will serve to undermine the workings of SACU, as it will create two separate legal frameworks governing trade between SACU members and the EU. On the one hand the provisions of the IEPA will govern BLS trade while on the other hand the TDCA will continue to apply to trade between the EU and South Africa. One of the main concerns with the existence of two separate frameworks has been that it will undermine the SACU common external tariff, with the BLS applying the IEPA tariff to EU imports while South Africa applies the TDCA tariff.

This concern is largely unfounded, however, as the EC agreed at the Swakopmund meeting in March 2009 to accept the TDCA as the basis for SACU-EU trade, precisely so as to avoid the problem of conflicting tariff schedules within SACU (SADC, 2009). To this end a joint declaration was annexed to the IEPA confirming that the parties would meet at the earliest possible opportunity to amend the IEPA tariff schedule accordingly.<sup>10</sup> Furthermore, the EC also agreed to freeze TDCA liberalisation on a number of products deemed sensitive by BLNS, and to extend this

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<sup>10</sup> See [http://trade.ec.europa.eu/doclib/docs/2009/july/tradoc\\_143982.pdf](http://trade.ec.europa.eu/doclib/docs/2009/july/tradoc_143982.pdf).

to South Africa via an amendment to the TDCA (Ibid). In this way the EC has addressed both the sensitivities of the BLNS and the concern over conflicting tariff regimes governing SACU-EU trade.

A potentially more pertinent issue, however, is that of differing rules of origin (RoO) between the IEPA and the TDCA. Although a recent analysis has concluded that there is little difference in the RoO of the two instruments, there are a couple of areas where such differences as do exist might be significant (Pant, 2009: 45-46). One such area is that of the clothing and textiles trade. The RoO in the IEPA are largely based on those of the Cotonou Agreement, but one area in which they have been significantly relaxed is that of clothing and textiles (Naumann, 2009).

Previously, clothing and textile products exported to the EU would have had to undergo two stages of transformation within an ACP country (or shared between ACP countries) in order for that export to qualify as originating in the exporting country (Ibid). For example, a shirt made in Lesotho would have to have been made largely from fabric made in Lesotho. This two-stage transformation rule has been replaced by a one-stage transformation rule in the new EPAs, meaning that a shirt made in Lesotho from fabric imported from China would qualify as originating in Lesotho should it be exported to the EU under the IEPA (Ibid). Similarly, a shirt made in the EU from fabric imported from China would qualify as originating in the EU should it be exported to Lesotho under the IEPA.

While the more relaxed clothing and textile RoO in the IEPA reflect a more realistic view of the realities of international trade in these products, they do also conflict with the RoO requirements of the TDCA. That is because under the TDCA a two-stage transformation is still required to confer originating status on clothing and textile products (Pant, 2009: 45-46). A shirt made in South Africa therefore needs to have been made from South African fabric to qualify as originating in South Africa. This also applies to EU exports to South Africa. The problem is that different rules apply to countries from the same customs union (SACU), where in theory goods should be circulating freely. This could potentially necessitate the strengthening of rules of origin controls within SACU, and is certainly not consistent with efforts to strengthen regional integration in southern Africa (SADC, 2009).

### *The definition of parties*

A third contentious issue relating to the IEPA is that of the definition of the parties to the agreement. Article 97 of the agreement states that ‘the term “Parties” shall refer to the SADC EPA States acting collectively and the EC Party’.<sup>11</sup> The EC has pushed for the SADC EPA Group to be defined as a single party to the IEPA, while the SADC EPA Group member states have been unhappy with this proposal, and would prefer each member state to be an individual party to the agreements. At the Swakopmund meeting in March 2009 the EC continued to insist that the SADC EPA Group act collectively. The SADC EPA Group members opposed this on the grounds that there is ‘no legal basis to act collectively given that [the] SADC EPA Group is not a legally constituted [entity] with established legal institutions and common decision making processes’ (Ibid).

At the Swakopmund meeting the EC agreed to draft a declaration that would make collective action under Article 97 a ‘best endeavour’, and that would confirm that the EC would not treat the SADC EPA Group as a single entity when imposing retaliation in trade disputes (SADC, 2009). The SADC EPA Group also agreed to draft a declaration to be discussed later. These declarations would be temporary, however, and the issue would ultimately be resolved during negotiations towards the full EPA (Ibid).

It would appear, however, that this treatment of what is a deceptively complex issue has not served to allay the concerns of all the SADC EPA Group members, with officials from both South Africa and Namibia referring to the ‘definition of the parties’ as an issue influencing their respective countries’ decision not to sign the IEPA.<sup>12</sup> Indeed, there is a serious concern that the current definition of the SADC EPA Group as a single party to the IEPA could have negative consequences for regional integration efforts within SACU.

Although the EC has indicated its flexibility on the matter with regard to retaliatory trade measures, some of the SADC states worry about the legal status of such

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<sup>11</sup> A copy of the IEPA is available online at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:319:0003:0658:EN:PDF>.

<sup>12</sup> See for instance <http://www.mg.co.za/article/2009-08-25-sa-wary-of-eus-new-trade-pacts> or [http://www.namibian.com.na/index.php?id=28&tx\\_ttnews\[tt\\_news\]=56809&no\\_cache=1](http://www.namibian.com.na/index.php?id=28&tx_ttnews[tt_news]=56809&no_cache=1).



promises, especially considering no such indication has been included in the IEPA or annexed to the agreement. In addition, it is possible that the EC could simply continue to push for the SADC EPA Group to be defined as a collective party in the full EPA. The SADC EPA states understandably are demanding more concrete assurances from the EC on this matter.

A number of complications would arise if the SADC EPA Group was to be defined as a collective party to the agreement. Firstly, it would mean that the group would need to establish the institutions necessary for such a bloc to act collectively, such as a secretariat to monitor the implementation of the EPA. Secondly, such a move might have a destabilising effect on SACU by creating a situation whereby Mozambique and Angola become *de facto* members of SACU.

Finally, it is unclear how the SADC Member Group can be treated as a single party if only some of its constituent members sign the IEPA. If only those countries that did sign were taken to constitute the group, a related problem arises. SACU member states are required to act collectively on a number of issues by the 2002 SACU Agreement, yet they would be unable to do so under the IEPA, where some of them would constitute the SADC EPA Group party, but others would not be party to the agreement. Clearly such a situation makes regional integration in southern Africa more difficult than it already is.

## 5. Conclusion

The economic partnership agreements were intended to usher in a new era of trade relations between the EU and the ACP states, one that would serve to bolster regional integration efforts among the ACP countries. In the case of the SADC-EU IEPA, however, this process has been fraught with difficulties, and has, if anything, complicated rather than facilitated regional integration in southern Africa.

From the outset of the SADC-EU EPA negotiations, overlapping membership of regional integration initiatives and the existence of the SA-EU TDCA have created problems for the EPA process. Ultimately the negotiations have resulted in a split in the SADC EPA Group, and what appears at the time of writing (March 2010) to be an impasse in the whole process. One way this impasse might be resolved is if South Africa and Namibia were persuaded to sign the IEPA. If their governments are to be

believed, however, such a move will only occur once a number of controversial issues have been satisfactorily resolved.

The three issues highlighted in the previous section are certainly not the only issues that are relevant in this regard. Indeed other issues such as the effect on regional integration in SADC (given the possibility that four separate and distinct EPAs could ultimately apply to the members of SADC) and the inclusion of 'new generation' trade-related issues such as services, investment and government procurement have also been raised as reasons not to sign the IEPA.

Nevertheless, the three concerns analysed in this paper provide a good indication of why the process has become so controversial, and why the IEPA has been widely perceived as threatening regional integration initiatives in southern Africa. The issues themselves are not irresolvable, however, and a number of simple solutions have been proposed in order to facilitate the EPA process. For example, it has been suggested that the MFN Clause would be far less of a concern to South Africa and Namibia if it could be amended to specify that it would not cover South-South agreements, or if it could be changed so that any extension of more preferential treatment would not be automatic but would be subject to consultation between the relevant parties, as is the case in the SA-EU TDCA (Bilal & Stevens, 2009: 90).

The EC has already indicated some flexibility in its apparent acquiescence to certain SADC Group demands during the Swakopmund meeting in March 2009. More concrete assurances that the compromises reached at that meeting will be included in the full EPA, and further flexibility on those issues that remain outstanding would go a long way towards winning over the EPA doubters and ensuring a more positive outcome for EU-SADC trade relations.

Similarly, South Africa and Namibia must recognise that in negotiations compromise is often required of both sides. By refusing to sign the IEPA, even though their fellow SACU and SADC members have done so, these countries are themselves complicating regional integration in southern Africa. In addition, it is important that South Africa and Namibia do not put too much emphasis on the importance of policy space for South-South agreements and complex regional integration configurations. The bulk of SACU's international goods trade is still conducted with the EU, and the

EU is likely to remain the region's most significant export market for the foreseeable future. As important as it is to diversify export markets and deepen regional integration, this should not be done at the expense of harming relations with existing markets.

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