A proposal for renegotiation of the Economic Partnership Agreements between the EU and African regional economic communities

This Version: 27th June 2017. Comments and corrections welcome.

The Economic Partnership Agreements between the European Union and African country groups are highly contested. In East and West Africa, some governments refuse to sign. One possibility to solve the political blockade is to make African regional economic communities (REC) a fair offer to renegotiate certain articles. Here is a simple proposal.[1] It works as well when implementation is already underway as in the case that the EU gives in to frequent requests to freeze the full EPAs in East and West Africa and the Interim EPAs, until a better outcome is reached.

The proposal refers directly to the EAC-EPA, the ECOWAS-EPA (including Mauritania) and the so-called SADC-EPA, that comprises six out of the 15 SADC member states. All EPAs contain long lists with clauses for support and protection of industry and agriculture in the African partner states. However, almost all of them are worded in a way that makes practical application difficult and cannot serve the stated needs. Moreover, the texts of the three treaties in East, West and South Africa are surprisingly different for identical problems. Partly, regulations constrain policy space even more than applied WTO rules. A possible negotiation offer should be based on these facts:

1. **Standstill or Status-Quo Clauses** effectively bar later tariff increases for all goods liberalised under EPA.[2] Instead, clauses should be couched in a way that explicitly allows subsequent periodic revisions of the common external tariff (CET) by the African regional economic communities, without prior consent of the EU (= of the Joint EPA Council), as long as tariff value equivalence between liberalised and non-non-liberalised goods is respected (at the final stage about 80-85% to 20-15%).[3] Quite many goods to be liberalised under EPA are already tariff-free in the CETs, too; but the contractual freeze within the EPAs deprives African RECs exactly of the liberty to later modernise the tariff system in the context of common sector policies or overall tariff system reform, in their sovereign decision making capacity. [EAC-EPA Art. 12; ECOWAS-EPA Art. 9; SADC-EPA Art. 23,2] (South Centre 2016a: 15-16)

2. **Multilateral and bilateral safeguards**, anti-dumping and countervailing measures for selected goods serve as under general WTO law as temporary protection against economic or social damage from import surges. Relevant problems in Africa, however, are mostly (a) no dumping in the technical sense, (b) not the result of prior tariff reductions, as required in EPAs, (c) not

[1] The proposal is inspired by a UNECA analysis which is critical on signing the EPA in East Africa but states: „*If there is a collective decision to sign the EAC-EU EPA, then it would be prudent to insist on changes in the .. articles which would, in their current form, constrain the implementation of an effective and dynamic industrial policy*."(UNECA 2017: 37)

[2] That is without goods on the so-called exclusion lists, regarding which countries remain relatively free to act. The Interim EPAs with Ghana and Ivory Coast put these countries in a worse position as restriction to raise tariffs refers to 100% of imports, including those on the exclusion lists – a first example why iEPAs offer no alternative in substance to a good regional EPA.

[3] Through tariff value equivalence the EU interpretation of the WTO guideline is preserved, according to which liberalisation of „essentially all trade" means 90% of the bilateral trade sums (100% in one, about 80% in the other direction). Note that this quantification of the WTO guideline is arbitrary in trade law and could be made far more beneficial for the African contracting parties.

temporary. Think of the import gluts of frozen chicken parts, milk powder or used clothes which have structural causes in the EU (Mari 2013; Mari and Buntzel 2007) The safeguard clauses should be revised accordingly:

2.1. The contractual link to prior tariff reductions (see SADC EPA Art. 34,2: "*result* of the obligations… under this agreement") should be deleted.
2.2. For compensatory protection, the full use of WTO policy space should be preserved: restoration of the possibility given to developing countries under the WTO agreement on safeguards to raise protective tariffs at least to the level, if not beyond, of WTO *bound* tariffs and not only (as in present EPAs) up to the lower *applied* tariffs [EAC EPA Art. 50,3 (b); ECOWAS EPA Art. 22,3(b); SADC EPA Art. 34,3] and to impose unilateral quantitative restrictions.
2.3. Time bounds (typically to 2 or 4 years, renewable) of tariff and non-tariff import restrictions should be maintained as a matter of principle. However, they should be given permanent status in the EPA Council if the European side cannot prove that causal subsidies or other market distorting factors have not been removed (reversal of the burden of proof).
NB: At present, African governments which have imposed lasting developmental protection measures against frozen chicken or second-hand clothes can do it also within WTO only at the margin of or somewhat beyond legality.

3. **Infant Industry Protection Clauses** have been written into the EPA drafts after long discussions, because above mentioned anti-dumping and safeguard clauses are without exception emergency measures which refer to prior dumping or import surges that endanger *existing* businesses in Africa.[4] They simply do not apply when new industries are to established in the RECs, the markets of which have always between dominated, say, by EU or Chinese suppliers. Some such industries will take root under complete free trade conditions but not all of them. Now, the three EPAs all contain explicit rules on infant or fledgling industry protection. Their practicability within industrialisation strategies is contested at least by the governments of Nigeria and Tanzania. The critique does not appear unjustified as the East and West Africa EPA wordings (not in the SADC EPA) repeat verbatim the link of protective tariffs to prior import surges which threaten existing industries or heavily constrain sovereign quantitative restrictions. Again, they can only be used with a stretched trade law interpretation. Thus:

   3.1. The obliged reference to danger for domestic industries by import surges (especially EAC EPA Art. 50,5 (b) "*as a result of the reduction of duties*" and ECOWAS EPA Art. 23,1 "*following a reduction in the rate of customs duty*") should be deleted here as well because logically not applicable to newly created, "true" infant industries.
   3.2. For clarity's sake, wording which refers (not without contradiction to the aforementioned formulas) to the "*establishment* of an infant industry" (EAC EPA Art. 38,1) or to extraordinary "industrial development needs" (SADC EPA Art. 26,2) can be copied into all EPA texts.
   3.3. Time limits of unilateral infant protection duties to 8 or 10 years (shorter for quantitative restrictions where admitted) are coherent with the principles of modern industrial policy, which do not favour unlimited protection either. For some new agricultural or industrial businesses which need longer-lasting support or managed external trade, rendering the

[4] By verbally repeating established GATT jargon *„in such increased quantities and under such conditions as to cause serious injury or disturbances to domestic industries, major social problems [or] disturbances in the markets of agricultural products*" - all emergency circumstances.

exclusion or sensitive products lists more flexible remains as a last option. (see below) 3.4. Binding limitation of infant industry measures to the territory of a single partner state should be deleted. Such individual trade rights exist indeed in all three RECs, in order to give smaller member states more political flexibility vis-à-vis the regional hegemons (and now vis-à-vis Europe). After an initial transition phase they become highly problematic because individual tariff measures of member states run counter to the principle of a custom union and a single market (as in the EU).[5]

4. **Exclusion or Sensitive Product Lists** are in all three EPAs presently not very developmental. *On the one hand* they guarantee eternal sovereign tariff policy rights for 15-20% of imports (mainly agricultural items) to African partner states, even if the African partner states have long become competitive in these product lines or do not need flexible duty management for these product lines anymore. *On the other hand,* contractually fixed exclusion lists require that partner states know already today which new agricultural or industrial goods will need long-term shelter in a distant future. In other words, the lists are static; they should become dynamic. (Asche 2008) African RECs, at the request of member states, should have the right to unilaterally delete products from the exclusion list (= liberalise them for good) and to flag out new products as sensitive up to the duty equivalent of the former. Here, as with the safeguard clauses, it matters for contracting parties to have the choice among mere tariffs and tariff quotas, to better manage producer and consumer interests.

5. **Most Favoured Nation (MFN) Clauses** in the EPAs foresee that contracting parties grant advantages, which they give to third parties, also to the EPA partner. In actual fact, MFN advantages only benefit the EU itself. As the EU grants already 100% DFQF access to its market, the Union cannot offer any further MFN advantage to Africa in the event that a trade agreement with a third partner will be concluded. At issue is in other words whether African countries preserve the right to sign special treaties with other developing nations without being forced to hand out preferences right away to Europe. (South-South cooperation) The European Commission has not quite accepted that. Now EPAs prescribe how big the global trade share of any third party has to be for the EU to require MFN treatment, and to which trade policy areas this refers. Such MFN clauses are not exactly customary in free trade agreements with developing countries. Therefore:
   5.1. The third party's trade share should be harmonised among the EPAs at least to the level most favourable for Africa (1,5%-2%) plus additional arrangements to make separate South – South trade agreements at least with some emerging economies in Asia and Latin America possible.
   5.2. Areas covered should be restricted essentially to customs tariffs [as in ECOWAS-EPA Art. 16, but not in the EAC EPA]. (South Centre 2016a; 2016b: 26 and 29 resp.)
   5.3. In the same sense, restricting the MFN clause to application on overarching trade-in-goods agreements in the sense of GATT Art. XXIV appears sensible, in order to explicitly leave room for special sectoral trade agreements with other developing regions.

6. **Export taxes**. Many African countries discover new mineral riches, especially in oil and gas, or envisage in-country processing of raw materials. The negotiated compromises in the current EPAs overly restrict the steering of raw material beneficiation via export taxes. New export

[5] At times, EPA critical NGOs have it inversely and claim the recognition of national sovereignty in infant industry protection via duties (South Centre 2016a, p. 23f. with regard to EAC; 2016b, p. 24 with regard to ECOWAS). The claim does not gain by repetition, as it is grounded in a misunderstanding of industrial policy in customs unions.

taxes on raw materials but sequentially also on refined mineral products should be admissible not only for a duration for 4 years, but permanently. Existing export taxes should be allowed to rise if the fiscal outcome or the incentive to process turn out to be weak (not explicitly in ECOWAS- and SADC-EPA). The resulting leeway to set export taxes on processed raw materials lower than on untreated ones, would allow the African contracting parties to mount a permanent development-friendly export tax system which at the same time preserves the interest of the European side to freely access African raw materials at interesting price levels.

7. **Local Content Regulations** (LCR) determine mainly in oil- and mineral-producing countries how much input to the exported raw produce should come from domestic supplies and not from imports. LCR thus strive to redirect those oil and mining companies that import each and every input to their business from home. In the EPA articles on "national treatment" of importers LCR are completely ruled out. The wording is copy & paste from the GATT (against *„any quantitative regulation relating to products which requires that any proportion must be supplied from domestic sources*") but as for the safeguards without the GATT exceptions to the rule in favour of developing countries. EPAs thus tighten current WTO law. [EAC-EPA Art. 20,3; ECOWAS Art. 35,3; SADC Art. 40,4] The paragraphs should simply go or be replaced by the complete GATT prescription (then quite superfluous indeed).

8. **Rendezvous Clauses** can either be regarded as safe-deposit boxes for trade policy bundles about which the African partners did by no means want to talk in EPA negotiations (Asche 2015), or as the present danger of looming deep integration in the EU sense (along the Singapore issues, etc.) (SEATINI 2015). The following variants appear as doable improvements:
   8.1. The clauses are deleted without replacement, to avoid any suspicion that Europe wants to impose negotiations on Africa, on topics from which the developing countries refrained in the Doha round and which, for instance, deeply affect public provision of essential services (*Öffentliche Daseinsvorsorge*).
   8.2. Clauses should be phrased in a way that contracting parties first agree on the subjects they want to negotiate – e.g. number of trade-in-services areas, which are according to most trade experts barely separable from trade in goods anymore and should thus be added to EPAs.
   8.3. Moreover, the EC should make a concrete offer to talk about adaptations of EU agrarian and fishery policies or the compensation of their effects in developing regions (see also below), so that the list of topics for rendezvous does not appear exclusively determined by liberalisation wishes of the EU. As in real life, both sides should be interested in coming to a rendezvous.

The improvements should be made by operating a "**Best of EPA**" approach, because regulations are strangely more favourable in the one than in the other EPA. This applies to still more subjects, among them:

- The engagement of the contracting parties to follow principles of sustainable and inclusive growth in operational terms (mainly in SADC EPA, chapter II)
- The binding nature of the time-bound EU offer to compensate fiscal losses from tariff duty reductions which accrue to African states in the wake of EPA trade liberalisation.
- The binding nature of additional financial support in the framework of the "development" chapters of the EPAs.

The list of problem-laden articles to be revised in the EPA texts is not exhaustive.[6] And still: instead of referring all questions about European GAP and the effect of agricultural subsidies in Africa to WTO negotiations as the allegedly appropriate international stage, a convincing European offer to amend the EPAs should contain either precise GAP reform steps that would be beneficial for Africa or – if this is not realistic – **direct compensation** of some African producer groups who are particularly hurt by present EU-internal subsidies, e.g. cotton farmers or fishermen. Innovative ideas in that regard are in the air.

The suggested final re-negotiation round is meant to serve the purpose of

- making the EPAs as pure trade-in-goods agreements ready for signature, without major reservations on the African side,
- barring implementation of the so-called interim EPAs with single partner states (Côte d'Ivoire, Ghana, Cameroon) and a group in Southern Africa, which definitely run counter to regional economic integration in Africa, as much as a potential special regulation for Kenya,
- making EPAs attractive in principle to large African countries which so far have completely refused to join any EPA group (e.g. Ethiopia, Angola, DR Congo) or resistant middle income countries which have most to gain in comparison with other EU trade regimes but are afraid of reduced policy space for agricultural and industrial strategies by the EPAs.

Helmut Asche, University of Mainz

Selected references

Asche, Helmut (2008). Preserving Africa's economic policy space in trade negotiations. Negotiating Regions: The EU, Africa and the Economic Partnership Agreements. H. Asche and U. Engel. Leipzig, Leipziger Universitätsverlag: 79-108.

Asche, Helmut (2015) "Europe, Africa and the Transatlantic. The North-South challenge for development-friendly trade policy."

Herfkens, Eveline (2015). Global Development: the Lisbon Treaty, Trade and Sub-Saharan Africa. . Paper presented at Friedrich Ebert Foundaten workshop, 24 February 2015, Berlin.

Mari, Francisco (2013). Schnelles Geld mit Hals und Schenkel. welt-sichten. Frankfurt / Main. 12/2013.

Mari, Francisco and Rudolf Buntzel (2007). Das globale Huhn. Hühnerbrust und Chicken Wings - Wer isst den Rest? Frankfurt / Main, Brandes & Apsel.

SEATINI (2015). The Rendezvous Clause in the EAC-EU EPA: Implications on Uganda's and EAC's economy and on people's livelihoods".

South Centre (2016a). Analysis of East African Community (EAC) EPA. Geneva.

South Centre (2016b). Analysis of West Africa EPA. Geneva.

UNECA (2017). Analysis of the Impact of the EAC-EU Economic Partnership Agreement on the EAC Economies, Regional Office Eastern Africe.

[6] A number of authors would for instance suggest another adaptation of the EU Rules of Origin for trade in goods, which already have been considerably improved in the context of the EU GSP reform. (Herfkens 2015).