



# **Economic Commission for Africa Africa Trade Policy Centre\***

## **Towards the African Template**

**for**

## **Economic Partnership Agreements**

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\* This draft paper is a product of the African Trade Policy Center. The paper puts together clauses and provisions towards an African EPA template following the legal audit of interim-EPAs by the Economic Commission for Africa. The paper indicates texts from existing interim and full EPAs that closely approximate the common African position for purposes of having harmonized texts and also indicates where modifications may be required. Dr. Francis Mangeni, Advisor on African Integration and International Trade Policy together with the staff of Trade and International Negotiations produced the paper.

## INTRODUCTION

This effort towards an African EPA template is meant and designed to assist the African Union member states in their negotiation of economic partnership agreements with the European Commission. It is produced as requested by the Conference of African Union Trade Ministers at their meeting of 1 to 4 April 2008.

The approach taken towards the template has been based on at least four important factors. The first is that the European Union General Affairs and External Relations Council has concluded that in negotiating the EPAs, provisions from other agreements that have been agreed may be used. The Council stated that:

Acknowledging concerns expressed by our ACP partners and the existence of, in some cases, problematic issues still outstanding in the negotiation, the Council underlines the need for a flexible approach while ensuring adequate progress, and calls on the Commission to use all WTO-compatible flexibility and asymmetry, in order to take account of different needs and levels of development of the ACP countries and regions. The Council emphasises that ACP countries and regions who so wish could draw, if appropriate, on provisions agreed by others in their EPA negotiation.<sup>1</sup>

EC negotiators are expected to adhere to this conclusion. Therefore, clauses from the various interim EPAs as well as the Cariforum-EU EPA have been recommended as template where appropriate, so that they can be readily acceptable as already agreed elsewhere. This conclusion, by acknowledging ACP concerns and calling on the European negotiators to be flexible while emphasising that provisions in other EPAs could be drawn upon, envisages the possibility of re-opening contentious clauses.<sup>2</sup>

The second factor taken into account is that the groups have already made quite some progress in the on-going negotiations for comprehensive EPAs. They have produced text and in some cases, joint text between the groups and the EC negotiators has been produced. The template should be relevant to this process and build upon it. Therefore, where such proposed text has been considered useful, it has been recommended for consideration. Such text is not to be considered agreed, but it can already form a good basis for negotiations. In addition, in line with the recommendation of the Trade Ministers at their meeting on 5 June 2005 that the groups should harmonise their positions before reaching final decisions, this exercise of considering proposed text can be an important step towards harmonisation of negotiating positions and text before finalising the negotiations.

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<sup>1</sup> Council Conclusions on Economic Partnership Agreements (EPAs), 2870<sup>th</sup> EXTERNAL RELATIONS Council meeting, Brussels, 26 and 27 May 2008, Paragraph 3

<sup>2</sup> In the case of SADC, this possibility was an explicit condition that Namibia attached for initialing the EPA. At the December 2007 Lisbon Summit, the EU Commission President said that contentious clauses would be re-opened.

The third important factor is that EPAs have demonstrated the imminent potential to destroy rather than support the ongoing integration process in Africa. The groups have had the benefit of common African positions that the African Union Trade Ministers have adopted since 2003, but in the actual negotiations, there hasn't been a facilitative mechanism for approximating the actual language of the provisions, partly because the negotiating groups have not had the other groups as observers, partly because continental institutions such as the Commission of the African Union and the Economic Commission for Africa have not been parties to the negotiations or consistently been present with the role of assisting the harmonisation. The final template to be prepared under the auspices of the African Union Commission could be a facilitative basis for coordination among the groups, particularly if the further steps are taken of establishing a standing working or coordinating group on EPA positions and language, and of the groups reaching agreement that wherever appropriate the groups will adopt common language and text for the EPA provisions.

The fourth important factor is that the African negotiating groups have faced serious constraints in undertaking the negotiations. They face various sets of negotiations that equally demand their scarce human resources and technical expertise, at the regional and multilateral levels. Together with the pressure of deadlines, and the avalanche of proposed texts from the EC negotiators at the last minute, inadequate care may result in permanently fatal provisions that ruin the development prospects of Africa. The future of Africa will be affected by the paradigm the EPAs will introduce. There is therefore immense responsibility on negotiators not to let down future generations and fully appreciate the weight of history they now carry. Lawyers have not always been on board, though some measures have been taken to include them, with the result that some legal finesse and concepts might not have been adequately taken on board. The template should respond to these needs through the suggestions for text; and additionally through explanations in the ECA study on the interim EPAs.

It will be recalled that at the April 2008 meeting of the African Union Trade Ministers, the Economic Commission for Africa presented a comprehensive study on the interim EPAs, entitled "North-South FTAs Afterall, A Comprehensive and Critical Analysis of the Interim Economic Partnership Agreements". As the title indicates, the study is a comprehensive and critical analysis of the interim EPAs, and contains comparisons and contrasts, indicating the various outcomes on key provisions, which can therefore be helpful in ascertaining better approaches. This contribution towards the final template is drawn on that study. It is recommended that this template be read together with that study.

What follows are recommendations that a final template should consider in the various areas under negotiations. Indications are given which among the interim-EPAs approximate the Common African positions as earlier agreed during AU Ministers of Trade Conferences. The provisions in the various chapters of the proposed inclusions to the African template are based on the explanatory notes and recommendations in the remainder of this brief.

## **REGIONAL INTEGRATION**

EPAs are supposed to promote regional integration. However, concerns have been expressed that the provisions don't adequately reflect this.

It has been argued that in the African interim EPAs, regional integration has in fact been undermined; in the case of SADC by tariff liberalisation schedules that don't respect the obligation of SACU countries to maintain a common external tariff and by the different treatment for South Africa; in the case of ESA, by the separate schedules each of the countries has attached to the agreement whereas COMESA is expected to become a customs union in December 2008; and in the case of EAC by adopting tariff elimination schedules inconsistently with the Customs Union Protocol which requires the application of the three-band common external tariff to all imported products; and in the cases of Central and West Africa, by adoption of bilateral EPAs with individual countries.

Given the importance of the matter, it might be advisable to have explicit obligations on regional integration, with the main purpose of spelling out the exact relation between EPAs and regional integration. The SADC and Cariforum EPAs attempt this, by indicating that regional integration will proceed on the basis of the integration instruments in place.

It would have been useful to include comprehensive clauses on regional integration, clearly providing for the precedence of regional integration over EPAs, for the review of EPAs at the attainment of landmark stages such as the formation of regional and continental customs unions and common markets, identification of priority integration programs such as those indicated in the EAC 2006-2010 Development Strategy for development cooperation on a priority basis, and the sequencing of negotiations in the trade-related areas, particularly investment, government procurement and competition, to follow the completion and adoption of regional integration regimes in accordance with the common African position (paragraph 14 of the 2006 Nairobi Declaration on EPAs). Also, the preamble could recall and stress the importance of adhering to the common African positions adopted over the years to guide the EPA negotiations.

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SADC-EU EPA

### **Regional integration**

1. The Parties recognise that regional integration is an integral element to their partnership and a powerful instrument to achieve the objectives of this Agreement.
2. The Parties reaffirm the importance of regional and sub-regional integration amongst the SADC EPA States to achieve greater economic opportunities, enhanced political stability and to foster the effective integration of developing countries into the world economy. Without prejudice to the commitments undertaken in this Agreement, the

pace and content of their regional integration is determined exclusively by the SADC EPA States in the exercise of their sovereignty.

3. The Parties support in particular the integration processes based on the Southern African Customs Union Agreement signed on 21<sup>st</sup> October 2002, the Southern African Development Community Treaty signed on 21<sup>st</sup> October 2002 and the Constitutive Act of the African Union adopted on 11 July 2000, development policies and political agendas. They aim at building and deepening their partnership on the basis of those processes and at implementing the present Economic Partnership Agreement in a mutually supportive manner with those instruments, as well as with the TDCA, taking into account the respective levels of development, needs, geographical realities and sustainable development strategies.

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Cariforum-EU EPA

### **Regional integration**

1. The Parties recognise that regional integration is an integral element to their partnership and a powerful instrument to achieve the objectives of this Agreement.
2. The Parties recognize and reaffirm the importance of regional integration among the CARIFORUM States as a mechanism for enabling these States to achieve greater economic opportunities, enhanced political stability and to foster their effective integration into the world economy.
3. The Parties acknowledge the efforts of the CARIFORUM States to foster regional and sub-regional integration amongst themselves through the Revised Treaty of Chaguaramas establishing the Caribbean Community and Caribbean Single Market and Economy, the Treaty of Basseterre establishing the Organization of Eastern Caribbean States and the Agreement establishing a Free Trade Area between the Caribbean Community and the Dominican Republic.
4. The Parties further recognize that, without prejudice to the commitments undertaken in this Agreement, the pace and content of regional integration is a matter to be determined exclusively by the CARIFORUM States in the exercise of their sovereignty and given their current and future political ambitions.
5. The Parties agree that their partnership builds upon and aims at deepening regional integration and undertake to cooperate to further develop it, taking into account the Parties' levels of development, needs, geographical realities and sustainable development strategies, as well as the priorities that the CARIFORUM States have set for themselves and the obligations enshrined in the existing regional integration agreements identified in paragraph 3.
6. The Parties commit themselves to cooperating in order to facilitate the implementation of this Agreement and to support CARIFORUM regional integration.

## **DEVELOPMENT**

The ESA-EU EPA has a comprehensive chapter on development; and may form a good basis for including important development concerns in the EPAs. Important provisions include: the annexing of the ESA development cooperation strategy and matrix to the EPA as the basis for cooperation and that way incorporating these documents into the text of the EPA, extension of the EDF cycles to the duration of the agreement though this needs to be clearer, and identification of fairly detailed cooperation areas that are key to addressing key constraints to production, trade and competitiveness.

The SADC-EU and Cariforum EPAs have useful provisions on sustainable development. It can be noted that the ESA-EU development chapter includes provisions on natural resources and environment.

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ESA-EU EPA

### **ECONOMIC AND DEVELOPMENT COOPERATION TITLE I GENERAL PROVISIONS**

#### **ARTICLE 36**

##### **General provisions**

1. The Parties agree to address the developmental needs of the ESA States in order to promote sustained growth in the ESA region, increase production and supply capacity of the States concerned foster structural transformation and competitiveness of their economies and their diversification and value addition; and support regional integration.
2. The Parties commit themselves to cooperating in order to facilitate the implementation of this Agreement and to support regional integration and development strategies. The Parties agree that cooperation will be based on the ESA Development Cooperation Strategy and the jointly agreed Development Matrix. The matrix is attached as Annex IV to this Agreement. The strategy and matrix will be regularly reviewed subject to the provisions of Chapter VI on dispute avoidance, settlement, Institutional and Final provisions. This cooperation will be measured against jointly agreed development benchmarks to be developed and adopted and annexed to this Agreement. The cooperation shall be in form of financial and non financial support to the ESA region.
3. In this regard, the financing pertaining to development co-operation between the ESA Region and the EC Party for the implementation of this Agreement shall be carried out

within the framework of the rules and relevant procedures provided for by the Cotonou Agreement in particular the programming procedures of the EDF within successive financial frameworks of the EU during the period of this Agreement as well as within the frameworks of relevant instruments financed by the General Budget of the European Union.-In this context, taking into account the new challenges deriving from enhanced regional integration and competition on the global markets, the Parties agree that supporting the implementation of the EPA shall be one of the priorities.

4. Both Parties shall cooperate to mobilize resources additional to the financial framework of the EU, from EU Member States and other donors, in particular expanding Aid for Trade commitments, relating specifically to EPA support requirements and adjustment costs. The programmes/projects proposed for financing will be worked out jointly based on a detailed costed development matrix.

5. Sufficient resources should be mobilised on a predictable, timely and sustainable basis including through grants and concessional loans based on the development matrix. The European Community shall contribute to these efforts under its international commitment on the scaling up of Official Development Aid. The Parties agree to monitor and coordinate the use of these resources.

6. Consistent with the Paris Declaration on Aid Effectiveness, the Parties agree to use and support as appropriate nationally and/or regionally owned delivery mechanisms, funds or facilities for channelling and coordinating resources for implementing the EPA. The Parties shall, in that regard, support the establishment of an EPA Fund to channel EPA related resources. The Parties also agree that all forms of aid delivery pertaining to their cooperation under this Agreement shall be guided by the Paris Declaration on aid effectiveness.

7. The trade-related issues to be provided for in the comprehensive EPA shall be the subject of development co-operation in accordance with this Article taking into consideration the Paris Declaration on Aid effectiveness.

9. The Parties agree that EPA monitoring, on the basis of agreed indicators, will need to address all aspects of the EPA, including achievements of the national level and at the level of regional integration and development strategies, as well as the effectiveness of the institutional arrangements and their achievements in meeting Aid effectiveness objectives, including ensuring predictability of the resources

10. The Parties agree that, without prejudice to the provisions of Art 95.4 of the Cotonou Partnership Agreement, the review process provided therein will constitute an opportunity for the Parties to review the achievements, constraints and way forward regarding their development cooperation strategies as provided for within the Agreement

## ARTICLE 37

## **Objectives**

1. The economic and development co-operation shall aim at enhancing the competitiveness of ESA economies, building up supply capacity and enabling Signatory ESA States in implementing the EPA smoothly.
2. The economic and development co-operation shall aim at the structural transformation of ESA economies by establishing a strong, competitive and diversified economic base in the ESA States through enhancing production, distribution, transport, marketing; developing trade capacity of ESA States as well as capacity to attract investment; and strengthening the Signatory ESA States' trade and investment policies and regulations and deepening regional integration.

## **ARTICLE 38**

### **Scope**

1. The Parties shall set out the development objectives related to the EPA that are specific to the ESA region and needed for the success of regional integration within the areas and sectors highlighted in this Article.
2. The areas that will be addressed by the cooperation are:
  - a) Regional cooperation and integration to ensure trans-regional coordination in all sectors;
  - b) Trade policy and regulations in order to assist the ESA States in participating more effectively in trade negotiations, in implementing international trade related conventions, and trade related legislations and regulatory reforms amongst others;
  - c) Trade development which covers namely business development and activities aimed at improving information management systems; partnerships, linkages, joint ventures and exchange of information and experiences; access to credit and investment finance; trade promotion and market development; Institutional support as well support to trade in services, including financial services;
  - d) Trade related infrastructure including transport, energy and water;
  - e) Building productive capacities in relevant sectors of ESA economies;
  - f) Research and development, innovation and technology transfer ;
  - g) Trade related adjustment costs which include restructuring and social costs arising from the reduction of production by firms in import competing sectors and the loss of fiscal revenues dues to the tariff reductions;

- h) Gender mainstreaming;
  - i) Empowerment of local communities which includes social and cultural Development; and
  - j) Mainstreaming of environmental issues into trade and development.
3. The cooperation shall, in particular, cover the following sectors:
- a) Private Sector Development, particularly Industrial Development, Micro-enterprises, Small and Medium Sized Enterprises; Mining and Minerals and Tourism;
  - b) Infrastructure Development, namely in the Transport, Energy and Information and Communications Technology (ICT) sectors;
  - c) Natural Resources and Environment including Water Resources, Biodiversity and Environment;
  - d) Agriculture;
  - e) Fisheries;
  - f) Services including Tourism; and
  - g) Trade related issues, namely Investment, Competition, Intellectual Property Rights, Standards, Trade Facilitation and Statistics.

## **TITLE II**

### **PRIVATE SECTOR DEVELOPMENT**

#### **ARTICLE 39**

##### **Scope and Objectives**

1. The Parties recognise the importance of cooperation to develop the ESA region's private sector as the main engine of wealth creation in view to set up an appropriate enabling environment which is conducive to investment and growth. The Community support and cooperation shall take account of the economic structure of the ESA States and their priorities in strengthening productive capacities and value addition, and the application of Production, Marketing, Distribution, and Transportation (PMDT) functions to improve supply capacities and competitiveness.

2. The scope of cooperation of private sector development will cover, *inter-alia*, investment, industrial development and competitiveness enhancement, micro-enterprises, small and medium sized enterprises development, mining and minerals and tourism

development as well as other productive sectors which are directly and indirectly covered by this Agreement.

#### ARTICLE 40

##### **Investment**

1. The Parties recognise the importance of investment. The objectives in this area are to:
  - a) Create an environment for sustainable and equitable economic development of ESA through investment, including Foreign Direct Investment (green field or portfolio), technology transfer, capacity building and institutional support from the EC Party;
  - b) Provide deeper cooperation with institutions and intermediary organisations dealing with investment promotion in the EC Party, including the CDE and ESA through, *inter alia*, business dialogue, cooperation and partnership;
  - c) Support through appropriate instruments, the promotion and encouragement of investment in the ESA region including establishing a framework for funding and assistance to support economic development programmes in ESA;
  - d) Strengthen and build the capacity of private development institutions such as investment promotion agencies, chambers of commerce, associations and indigenous development organisations in individual ESA States and the region as a whole so as to enable the emergence of dynamic and vibrant private sector; and
  - e) Develop a legal interim framework that promotes investment by both Parties, with a view to promoting and protecting investment and work towards harmonised and simplified procedures and administrative practices.

##### **Areas of cooperation**

2. Subject to the provisions of Article 36 the Parties agree to cooperate, including by facilitating support, in the following areas:
  - a) Support to policies and strategies for investment to help to create and maintain a predictable and secure investment climate;
  - b) Support policy reforms and advocacy, human resource development, institutional capacity-building or other forms of institutional support to strengthen the capacities of the private financial and non-financial intermediaries, investment facilitation and promotion and competitiveness enhancement activities;

- c) Encourage the EU-ESA private sector partnership and joint ventures to promote investment, venture capital financing for greenfield investment and technology transfer;
- d) Support efforts of the ESA States to attract financing, with particular emphasis on private financing, for infrastructure investments and revenue generating infrastructure critical for the private sector, including SMEs;
- e) Support to develop regulatory capacity;
- f) Improve access of ESA enterprises investment finance instruments in the EU such as the EIB;
- g) Establishment of financial instruments adapted to SMEs of the ESA region;
- h) Ensure the increasing availability and use of risk insurance as a risk-mitigating mechanism in order to boost investor confidence in the ESA States; and
- i) Offer guarantees and assist with guarantee funds covering risks for qualified investment.

#### ARTICLE 41

##### **Industrial development and competitiveness**

1. The Parties recognise the importance of cooperation in industrial development and competitiveness. The objectives in this area are:
  - a) To facilitate the establishment, development, restructuring and modernisation of the Signatory ESA States' industry while fostering its competitiveness and self-sustainable and balanced growth taking into account environmental protection, sustainable development and economic empowerment; and
  - b) To establish an environment favourable to the development of private enterprise in order to stimulate the growth and diversification of industrial production.

##### **Areas of Cooperation**

2. Subject to the provisions of Article 36, the Parties agree to cooperate, including by facilitating support, in the following areas:
  - a) Promote the development of activities in the areas of processing, marketing, distribution and transportation of products;
  - b) Transfer of technology, knowledge and research and development;
  - c) Support ESA States financial institutions and the development of capital market for the purpose of enhancing the private sectors' access to both short term and long term capital;

- d) Capacity building for public and private sector;
- e) Encourage EU-ESA partnerships, linkages and joint ventures between economic operators; and
- f) Promote and strengthen innovation, diversification and value addition product development and quality.

#### ARTICLE 42

#### **Micro-Enterprises, Small and Medium Sized Enterprises**

1. The Parties recognise the importance of cooperation in Micro-Enterprises, Small and Medium Sized Enterprises. The objectives in this area are to:
  - a) Promote a favourable environment for the development of micro enterprises, small and medium sized enterprises (MSMEs) and for attracting investment therein; and
  - b) Support MSME to adjust to trade liberalisation.

#### **Areas of Cooperation**

2. Subject to the provisions of Article 36, the Parties agree to cooperate, including by facilitating support, in the following areas:
  - a) Capacity building and institutional support,
  - b) Technology development and transfer, innovation, information exchange and networks, and marketing;
  - c) Development of MSME databases
  - d) Access to finance;
  - e) Encourage EU-ESA partnerships, linkages and joint ventures between economic operators;
  - f) Trade and investment promotion;
  - g) Strengthen value chains;
  - h) Promote diversification and value addition.

#### ARTICLE 43

#### **Mining and Minerals**

1. The Parties recognise the importance of cooperation in the development and management of the mining and minerals sector. The objectives in this area are to:

- a) Establish a conducive environment for attracting investment in the sector;
- b) Promote value addition and environmentally friendly technologies in the mining productive processes; and
- c) Ensure participation of local communities.

### **Areas of cooperation**

2. Subject to the provisions of Article 36, the Parties agree to cooperate, including by facilitating support, in the following areas:

- a) Capacity building and institutional support for exploration, exploitation and marketing of minerals;
- b) Information exchange;
- c) Encourage EU-ESA partnerships, linkages and joint ventures between economic operators;
- d) Improve health and safety standards in the mining industry;
- e) Transfer of technology, knowledge, innovation and Research and Development; and
- f) Address vulnerability of mineral export dependency.

## ARTICLE 44

### **Tourism Development**

1. The Parties recognise the importance of cooperation in the development of tourism. The objectives in this area are to:

- a) Develop and strengthen a competitive tourism industry as a generator of economic growth and empowerment, employment and foreign exchange;
- b) Strengthen the linkages between tourism and other sectors of the economy; and
- c) Preservation, safeguarding and promotion of natural, historical and cultural tourist attractions, while respecting the integrity and interests of local communities, particularly in rural areas.

### **Areas of cooperation**

2. Subject to the provisions of Article 36 the Parties agree to cooperate, including by facilitating support, in the following areas:
  - a) Establish strategic alliances involving public, private and local community interests in order to ensure the sustainable development of tourism;
  - b) Promote partnerships, exchange of know-how and joint operations in areas such as development of products, markets and eco-tourism;
  - c) Capacity building in human resources, improvement in service standards, and institutional structures; and
  - d) Regional cooperation in tourism promotion.

## **TITLE III**

### **INFRASTRUCTURE**

#### **ARTICLE 45**

##### **Scope and Objectives**

1. The Parties recognise the importance of cooperation in the development and management of infrastructure, as a means to overcome the supply-side constraints and strengthen regional integration.
2. The Community support and cooperation for infrastructural development shall take account of priority development areas as articulated in the respective ESA States' national and regional development programmes.
3. The scope of Cooperation in infrastructure will cover the development of physical infrastructure namely, transport, energy and information technology and communication.

#### **ARTICLE 46**

##### **Transport**

1. The Parties recognise the importance of cooperation in the development and management of transport. The objectives in this area are to:
  - a) Develop, restructure, rehabilitate upgrade and modernise the ESA region's transport systems, on a sustainable basis;

- b) Improve the movement of people and flow of goods and provide better access to markets through road, air, maritime, inland water and rail transport.

### **Areas of cooperation**

2. Subject to the provisions of Article 36, the Parties agree to cooperate, including by facilitating support, in the following areas:

- a) Improve management of transport systems;
- b) Improve and develop the state of infrastructure at all levels, including the development of inter-modal infrastructure networks;
- c) Capacity building in human resources, improvement in service standards, and institutional structures;
- d) Technology development and transfer, innovation, information exchange and networks, and marketing;
- e) Encourage EU-ESA partnerships, linkages and joint ventures between economic operators;
- f) Improve safety and reliability of the transport sector, including the management of hazardous goods and emergency response; and
- g) Support to the development of regional transport policies.

### **ARTICLE 47**

#### **Energy**

1. The Parties recognise the importance of cooperation in the energy sector as a vehicle for supporting the ESA economies competitiveness at the regional and global level. The objectives in this area are to:

- a) Improve the access of ESA States to modern, efficient, reliable, diversified and sustainable and renewable sources of clean energy at competitive prices;
- b) Enhance the production, distribution and management capacity of energy nationally and regionally; and
- c) Promote regional energy cooperation.

### **Areas of cooperation**

2. Subject to the provisions of Article 36, the Parties agree to cooperate, including by facilitating support, in the following areas:

- a) Enhance the production and distribution capacity of existing energy sources, in particular hydro, petroleum and biomass;
- b) Expand and diversify the energy mix to include other potential sources of energy, that are socially and environmentally acceptable and that reduce dependency on oil;
- c) Support the development of energy infrastructure, including for rural areas;
- d) Support the development of appropriate energy regulatory and policy reforms, including commercialisation and privatisation;
- e) Promote regional interconnectivity and cooperation in the production and distribution of energy;
- f) Capacity building in human resources, improvement in management, service standards, and institutional structures;
- g) Support the creation of a conducive environment for attracting investment in the sector;
- h) Technology development and transfer, Research and Development, innovation, information exchange, development of databases and networks;
- i) Encourage EU-ESA partnerships, linkages and joint ventures between economic operators.

#### ARTICLE 48

##### **Information and communications technology**

1. The Parties recognise the importance of cooperation in the development of Information and Communications Technology, as a key sector in the modern society to foster competitiveness and innovation, as well as for the smooth transition towards the information society. The objective in this area is to develop the ICT sector and promote its contribution to other socio-economic sectors.

##### **Areas of cooperation**

2. Subject to the provisions of Article 36, the Parties agree to cooperate, including by facilitating support, in the following areas:

- a) Facilitate connectivity at the national, regional and global level
- b) Dissemination of new information and communication technologies
- c) Support the development of the legal and regulatory frameworks on ICT;

- d) Technology development, transfer and applications, R&D, innovation, information exchange and networks, and marketing
- e) Capacity building in human resources, improvement in service standards, and institutional structures
- f) Encourage and facilitate EU-ESA partnerships, linkages and joint ventures between economic operators
- g) Promotion and support for the development of niche markets for ICT-enabled services.

**TITLE IV  
NATURAL RESOURCES AND ENVIRONMENT**

**ARTICLE 49**

**Scope and objectives**

1. The Parties recognise the importance of cooperation in the sustainable management of natural resources and environment. Cooperation in this area shall take account of differentiated and trans-boundary needs of ESA States.
2. The scope of Cooperation in natural resources and environment will cover natural assets including water resources, and environment including biodiversity, as well as enhancing the linkages between trade and environment. It will also cover support for the implementation of international environmental agreements and Conventions and Treaties.

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**Water resources**

1. The Parties recognise the importance of cooperation in the development of water resources (including irrigation, hydropower and water supply) for the improvement of the livelihoods of the populations. The objectives in this area are:
  - a) The sustainable development and management of water resources in the region;
  - b) Regional cooperation for the sustainable utilisation of trans-boundary water resources.

**Areas of cooperation**

2. Subject to the provisions of Article 36, the Parties agree to cooperate, including by facilitating support, in the following areas:
  - a) Development of infrastructure of water resources in the region;
  - b) Support the development of the legal and regulatory frameworks;

- c) Promote integrated water management;
- d) Capacity building in human resources, improvement in service standards, water management, and institutional structures;
- e) Encourage and facilitate EU-ESA partnerships, linkages, regional water partnerships, and joint ventures between economic operators;
- f) Technology development, transfer and applications, R&D, innovation, information exchange and networks;
- g) Water pollution control, purification and conservation, wastewater treatment and sanitation; and
- h) Promotion of sustainable irrigation schemes.

## ARTICLE 51

### **Environment**

1. The Parties recognise the importance of cooperation in the protection and sustainable management of the Environment and implementation of trade-related environmental policies. The objectives in this area are to:

- a) Protect, restore and conserve the environment and biodiversity: flora, fauna and microbial genetic resources including their ecosystems;
- b) Develop new ESA industries related to the environment; and
- c) Reduce environmental degradation, including clean air and desertification.

### **Areas of cooperation**

2. Subject to the provisions of Article 36, the Parties agree to cooperate, including by facilitating support, in the following areas:

- a) Support the implementation of international environmental agreements, Conventions and Treaties;
- b) Strengthen and promote sustainable environmental management systems;
- c) Sustainable utilisation of biodiversity, forestry and wildlife resources;
- d) Reinforcing institutional and legal frameworks and the capacity to develop, implement, administer and enforce environmental laws, regulations and standards and policies;
- e) Capacity building in human resources and institutional structures to comply with environmental and biodiversity requirements;

- f) Encourage and facilitate EU-ESA partnerships, linkages, and joint ventures between economic operators;
- g) Mitigation of natural disasters, prevention of environmental disasters and the loss of biodiversity;
- h) Technology development and adaptation, transfer and applications, R&D, and innovation;
- i) Protection and management of coastal and marine resources and domestic and wild indigenous biological resources;
- j) Support the development of alternative environmentally friendly activities and livelihoods;
- k) Support the production and facilitate trade of goods and services for which eco-labelling is important;
- l) Exchange of information and networking on products and their requirements in terms of production process, transport, marketing and labelling;
- m) Support the development of infrastructure facilities on environmental friendly products;
- n) Integration of local communities in the management of biodiversity, forestry, and wildlife resources;
- o) Waste management and disposal of industrial and toxic wastes; and
- p) Sustainable management of forests and similar mechanisms.

## ARTICLE 52

### **Financial undertakings**

1. The EC Party shall put at the disposal of the ESA financial assistance to contribute to implement the programmes and projects to be developed under the areas of cooperation identified in this Agreement and relevant chapters and under the detailed Development Matrix.
  2. The Parties agree to establish adequate joint institutional arrangements to effectively monitor the implementation of the development cooperation of this Agreement. Such arrangements shall include the establishment of a joint development committee.
  3. The Parties agree that the institutional arrangements shall remain flexible to adapt to the evolving national and regional needs
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## SUSTAINABLE DEVELOPMENT

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SADC-EU, CARIFORUM-EU EPAs

### **Sustainable development**

1. The Parties reaffirm that the objective of sustainable development is to be applied and integrated at every level of their economic partnership, in fulfilment of the overriding commitments set out in Articles 1, 2 and 9 of the Cotonou Agreement, and especially the general commitment to reducing and eventually eradicating poverty in a way that is consistent with the objectives of sustainable development.
  2. The Parties understand this objective to apply in the case of the present Economic Partnership Agreement as a commitment that:
    - a) the application of this Agreement shall fully take into account the human, cultural, economic, social, health and environmental best interests of their respective population and of future generations;
    - b) decision-taking methods embrace the fundamental principles of ownership, participation and dialogue.
  3. As a result the Parties agree to work cooperatively towards the realization of a sustainable development centred on the human person, who is the main beneficiary of development.
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## MARKET ACCESS

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In the continuing negotiations for the comprehensive EPA, the ESA group and the EU have adopted the approach of extending the interim EPA by adding other chapters to it, while at the same time considering improvements to the provisions of the interim agreement. This may be an appropriate way of correcting the contentious issues.

The market access chapter could have the following key elements, drawn from the various EPAs<sup>3</sup>:

- a. Specifying the goods subject to the agreement in terms of the HS codes
- b. A commitment on the EU to immediately eliminate all forms of export and domestic subsidies that adversely affect African countries
- c. Prohibition of levying fees and other charges on an ad valorem basis
- d. Provision for modification of tariff reduction schedules in the event of serious difficulties or in consideration of the circumstances of LDCs
- e. Elimination of the standstill obligation
- f. Inclusion of an exception on free circulation of goods, for products on which customs duties are not zero, pending the finalisation of the question of revenue collection and sharing
- g. Elimination of the prohibition of export taxes, or at least provision for a transition period and inclusion of an annex of exceptions such as ensuring fiscal solvency or for specific revenue needs and protection of the environment
- h. Elimination of the MFN clause due to conceptual difficulties and the little utility in it
- i. Inclusion of a requirement that the EU should match any better treatment that the third country gives African countries
- j. Introduction of an exception to the MFN clause that where the third country gives the African country better treatment than under the EPA, there may be consultations in the Development Council whether to extend the better treatment to the EU
- k. An explicit obligation on the EU to accord to African countries the better treatment accorded to other ACP groups and under other FTAs with third countries
- l. Elimination of the prohibition of quantitative restrictions on the basis that these are addressed in GATT 1994

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<sup>3</sup> Please see: Economic Commission for Africa, North-South FTAs After all? A Critical and Comprehensive Analysis of the Interim Economic Partnership Agreements, April 2008; Part D, p.40

- m. Elimination of the national treatment obligation on the basis that this is covered by GATT 1994 or at least introduction of a list of more exceptions
- n. Introduction of the requirement on the EU to assist African exporters proposing constructive remedies where the EU intends to take trade remedy measures
- o. Extension of the period for taking bilateral measures for infant industries beyond 10 years – the period varies from 12 to 20 years in other EPAs

The following provisions from various EPAs indicate some useful improvements that could be considered for the other EPAs.

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## Objectives

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ESA-EU EPA

### **TRADE REGIME FOR GOODS**

#### **TITLE I**

#### **GENERAL PROVISIONS**

#### **ARTICLE 5**

#### **Objectives**

The objectives of cooperation in the area of trade are:

- (a) the provision of full duty free and quota free market access conditions for goods originating in the ESA States into the market of the EC party on a secure, long term and predictable basis;
  - (b) the promotion of trade between the Parties and the acceleration of export led growth to enable the integration of ESA countries into the global economy;
  - (c) the progressive and gradual liberalisation of goods market in ESA in accordance with the modalities established in this Agreement; and
  - (d) preservation and improvement of market access conditions to ensure that all ESA Member States are better and not worse off.
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## FTA

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SADC-EU EPA

### General Provisions

#### TITLE 1 Trade in Goods

#### Article 19

### **Free Trade Agreement**

1. This Agreement establishes a free trade area (FTA) between the Parties, in conformity with the General Agreement on Tariffs and Trade (hereinafter referred to as "GATT 1994"), in particular Article XXIV.
  2. The FTA shall respect the principle of asymmetry, commensurate to the specific needs and capacity constraints of the SADC EPA States, in terms of levels and timing for commitments under this Agreement.
  3. The FTA will apply to trade between, on one side, the Community and, on the other side, the SADC EPA States.
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#### Scope

SADC-EU EPA

#### Article 20

##### Scope

This Chapter shall apply to products:

- a) falling within Chapters 01 to 97 set out in each Party's respective tariff nomenclature in conformity with the rules of classification applicable to the Harmonized Commodity Description and Coding System (HS);
  - b) originating in the Community or in the SADC EPA States.
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#### Free circulation of goods

Cariforum-EU EPA

#### Article 10

##### **Movement of goods**

The Parties recognize the goal of having customs duties levied only once on originating goods imported into the EC Party or into the Signatory CARIFORUM States. Pending the establishment of the necessary arrangements for achieving this goal, the Signatory CARIFORUM States will exercise their best endeavours in this regard. The EC Party will provide the technical assistance necessary for the achievement of this goal.

Pacific-EU EPA

Exception for: goods of tariff headings whose duties have not yet been eliminated in all of the Pacific States

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Elimination of duties and the possibility of suspension (the Cariforum and Pacific-EU EPAs provide for the possibility of modification of schedules

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Cariforum-EU EPA

#### Article 7

##### **Customs duties on imports of products originating in the CARIFORUM States**

Products originating in the CARIFORUM States shall be imported in the EC Party free of customs duties except for the products indicated, and under the conditions defined, in Annex 1.

#### Article 8

##### **Customs duties on imports of products originating in the EC Party**

1. Products originating in the EC Party shall, on their importation into the CARIFORUM States, not be subject to customs duties higher than those indicated in Annex 2.
2. Products originating in the EC Party shall, on their importation into the CARIFORUM States, be exempt from all customs duties within the meaning of Article 3 other than those listed in Annex 2.
3. For a period of ten years after the signature of this Agreement, the CARIFORUM States may continue to apply any such customs duties within the meaning of Article 3 other than those listed in Annex 2 to any imported product originating in the EC Party, provided that these duties were applicable to this product on the date of signature of this Agreement, and that the same duties are imposed on the like product imported from all other countries.
4. The Signatory CARIFORUM States shall not be required to begin a phased elimination of the customs duties other than those listed in Annex 2 and referred to in paragraph 2 in the seven years subsequent to the signature of this Agreement. This process shall be accompanied by the support of the necessary fiscal reforms as provided for under Article 14.
5. With a view to ensuring transparency such duties shall be notified to the CARIFORUM-EC Trade and Development Committee within six months from the date of signature of this Agreement. Their elimination shall also be notified promptly to the CARIFORUM-EC Trade and Development Committee.
6. In the event of serious difficulties in respect of imports of a given product, the schedule of customs duty reductions and eliminations may be reviewed by the

CARIFORUM-EC Trade and Development Committee by common accord with a view to possibly modifying the time schedule for reduction or elimination. Any such modification shall not lead to the time periods in the schedule for which the review has been requested being extended in respect of the product concerned beyond the maximum transitional period for duty reduction or elimination for that product as provided for in Annex 2. If the CARIFORUM-EC Trade and Development Committee has not taken a decision within thirty days of an application to review the timetable, the CARIFORUM States may suspend the timetable provisionally for a period that may not exceed one year.

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#### Modification of tariff commitments for certain countries

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Cariforum-EU EPA

#### Article 9

#### **Modification of tariff commitments**

In the light of the special development needs of Antigua and Barbuda, Belize, Dominica, Grenada, Guyana, Haiti, Saint Lucia, Saint Vincent and the Grenadines and Saint Christopher and Nevis, the Parties may decide in the CARIFORUM-EC Trade and Development Committee to modify the level of customs duties stipulated in Annex 2, which may be applied to a product originating in the EC Party upon its importation into the CARIFORUM States. The Parties shall ensure that any such modification does not result in an incompatibility of this Agreement with the requirements of Article XXIV of the GATT 1994. The Parties may also decide to simultaneously adjust customs duty commitments stipulated in Annex 2 and relating to other products imported from the EC Party, as appropriate.

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#### Customs duty

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Cariforum-EU EPA

#### **Customs duty**

A customs duty includes any duty or charge of any kind, including any form of surtax or surcharge, imposed in connection with the importation or exportation of goods, but does not include any:

- (a) internal taxes or other internal charges imposed in accordance with Article 2 of Chapter 3;
- (b) antidumping, countervailing or safeguards measure applied in accordance with Chapter 2;

(c) fees or other charges imposed in accordance with Article 5.

### **Fees and other charges**

Fees and other charges referred to in Article 3 shall be limited in amount to the approximate cost of services rendered and shall not represent an indirect protection for domestic products or a taxation of imports or exports for fiscal purposes. They shall not exceed the real value of the service rendered. Fees and charges shall not be imposed for consular services.

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Pacific-EU EPA

Any such fees and charges shall not be applied on an ad valorem basis.

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Basic duty

ESA-EU EPA

### **ARTICLE 9**

#### **Basic Duty**

For each product, the basic customs duty to which the successive reductions are to be applied shall be that specified in each Party's Tariff Schedules.

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Reviewing the rules of origin (Cariforum and Pacific EPAs provide for up to 5 years)

ESA-EU EPA

#### **Rules of origin**

For the purposes of this Chapter, "originating" means qualifying under the rules of origin set out in Protocol 1 to this Agreement. For the purpose of the comprehensive EPA, and during the period between the entry into force of this agreement and entry into force of the comprehensive EPA, the Parties shall review the provisions of this Protocol with a view to their further simplification. In such review the Parties shall take into account the development needs of the ESA States and development of technologies, production processes and all other factors, including on-going reforms of rules of origin, which may require modifications to the provisions of this Protocol. Any such modifications shall be effected by a decision of the EPA Committee.

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Standstill clause

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Cariforum-EU EPA

A standstill clause is not included in the Cariforum-EU EPA

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Prohibition of export taxes – exceptions

ECA, paragraph 112

The ESA EPA provides for exceptions to the prohibition of export taxes in Annex III to the EPA. The EAC EPA provides for imposition of the duties with authorisation of the EPA council, where they assist “to foster the development of domestic industry; or to maintain currency value stability, when the increase in the world price of an export commodity creates the risk of a currency value surge”; but only for “a limited number of products for a limited period of time, and the measures are to be reviewed by the EPA Council after 24 months”. In the SADC EPA, the exception is made for “specific revenue needs, protection of infant industries, or protection of the environment” but South Africa may not use these exceptions; and the prohibition provision is to be reviewed no later than three years after entry into force of the agreement. Exceptions are made in the Pacific EPA for “ensuring fiscal solvency of a Pacific State or for the protection of the environment; and in exceptional circumstances, where the Pacific State can justify specific protection to develop infant industries”.<sup>4</sup>

The ESA group has made the following proposal in the continuing negotiations:

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**ARTICLE 15**

**Duties, taxes on exports and quantitative restrictions**

1. The Parties shall not institute any new duties or taxes on or in connection with the exportation of goods to the other Party in excess of those imposed on like products destined for internal sale.
2. All prohibitions or restrictions in trade on the importation, exportation or sale for export between the Parties, other than customs duties, taxes, fees and other charges provided for under Article 7, whether made effective through quotas, import or export licenses or other measures, shall be eliminated upon the entry into force of this Agreement.
3. Notwithstanding paragraph 1 and 2, the Signatory ESA State can impose a duty or tax in connection with the exportation of goods, or impose prohibitions or restrictions in

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<sup>4</sup> Articles 24 of SADC-EU, 15 of EAC-EU, 15 of ESA-EU, and 10 of Pacific-EU interim EPAs; and 6 of title II of the CARIFORUM-EU EPA

trade on the importation, exportation or sale for export between the Parties, under the following circumstances:

- (a) to foster the development of domestic industries;
- (b) to relieve critical shortages of foodstuffs or other products essential to the Signatory ESA State;
- (c) to maintain currency value stability, when the increase in the world price of an export commodity creates the risk of a currency value surge;
- (d) in pursuance of obligations under any intergovernmental commodity agreement [not inconsistent with the WTO Agreement];
- (e) for environmental protection;
- (f) restrictions necessary to the application of standards or regulations for the classification, grading or marketing of commodities in international trade; and for fiscal purposes.

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MFN clause

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Cariforum-EU EPA

### **More favourable treatment resulting from free trade agreements**

1. With respect to matters covered by this Chapter, the EC Party shall accord to CARIFORUM States any more favourable treatment applicable as a result of the EC Party becoming party to a free trade agreement with third parties after the signature of this Agreement.
2. With respect to matters covered by this Chapter, the CARIFORUM States or any Signatory CARIFORUM State shall accord to the EC Party any more favourable treatment applicable as a result of the CARIFORUM States or any Signatory CARIFORUM State becoming party to a free trade agreement with any major trading economy after the signature of this Agreement.
3. The provisions of this Chapter shall not be so construed as to oblige the EC Party or any Signatory CARIFORUM State to extend reciprocally any preferential treatment applicable as a result of the EC Party or any Signatory CARIFORUM State being party to a free trade agreement with third parties on the date of signature of this Agreement.
4. For the purposes of this article, 'major trading economy' means any developed country [], ..... **(Please Note: the rest of this provision could be omitted)** or any country or territory accounting for a share of world merchandise exports above 1 percent

in the year before the entry into force of the free trade agreement referred to in paragraph 2, or any group of countries acting individually, collectively or through a free trade agreement accounting collectively for a share of world merchandise exports above 1.5 percent in the year before the entry into force of the free trade agreement referred to in paragraph 2.<sup>5</sup>

5. Where any Signatory CARIFORUM State becomes party to a free trade agreement with a third party referred to in paragraph 2 and such a free trade agreement provides for more favourable treatment to such third party than that granted by the Signatory CARIFORUM State to the EC Party pursuant to this Agreement, the Parties shall enter into consultations. The Parties may decide whether the concerned Signatory CARIFORUM State may deny the more favourable treatment contained in the free trade agreement to the EC Party. The Joint CARIFORUM-EC Council may adopt any necessary measures to adjust the provisions of this Agreement.

**Please note:** clause 5 could contain an obligation on the EU to match the better treatment offered by the third country

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National treatment

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ESA-EU EPA

## ARTICLE 18

### **National treatment on internal taxation and regulation**

1. Imported products originating in the other Party shall not be subject, either directly or indirectly, to internal taxes or other internal charges of any kind in excess of those applied, directly or indirectly, to like national products. Moreover, the Parties shall not otherwise apply internal taxes or other internal charges so as to afford protection to national production.

2. Imported products originating in the other Party shall be accorded treatment no less favourable than that accorded to like national products in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use. The provisions of this paragraph shall not prevent the application of differential internal transportation charges which are based exclusively on the economic operation of the means of transport and not on the nationality of the product.

3. No Party shall establish or maintain any internal quantitative regulation relating to the mixture, processing or use of products in specified amounts or proportions which

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<sup>5</sup> For this calculation official data by the WTO on leading exporters in world merchandise trade (excluding intra-EU trade) shall be used.

requires, directly or indirectly, that any specified amount or proportion of any product which is the subject of the regulation must be supplied from domestic sources. Moreover, no Party shall otherwise apply internal quantitative regulations so as to afford protection to national production.

4. The provisions of this Article shall not prevent the payment of subsidies exclusively to national producers, including payments to national producers derived from the proceeds of internal taxes or charges applied consistently with the provisions of this Article and subsidies effected through governmental purchases of national products.

5. The provisions of this Article shall not apply to laws, regulations, procedures or practices governing public procurement.

6. The EPA Committee may decide to authorise a Signatory ESA State to depart from the provisions of this Article to promote the establishment of domestic production and protect infant industry. In this respect the development needs of Signatory ESA States and, in particular, the special needs and concerns of ESA LDCs will be taken into account.

7. A list of provisional derogations is attached as Annex III. Such derogations are granted to the interested Signatory ESA States for the periods of time which are set out in the same Annex.

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## Trade remedies

Provisions on trade remedies are quite similar. The special bilateral safeguard, however, doesn't envisage consistency with WTO rules.

The ESA-EU negotiations for the comprehensive agreement, proposals have been made for a special safeguard mechanism as follows:

### **Special Agricultural Safeguard**

5. Notwithstanding the above paragraphs, if given the sensitivity of agricultural markets, imports of agricultural products originating in the Community cause or threaten to cause serious injury in the markets of ESA, the Parties shall immediately consider the matter to find an appropriate solution. Pending a decision by the parties and where exceptional circumstances require immediate action, ESA shall take provisional measures necessary to limit or redress the injury.

6. In the event that subsidies provided by the Community cause or threaten to cause material injury to the domestic industry producing like or directly competitive products in any of the ESA Member States, the latter shall take the necessary measures to remedy the

situation through the imposition of countervailing duties equivalent to the margin of the [export] subsidy.

7. In the event of;

- (a) a decrease in the price by (x%) of a product over the reference period 2001 to 2002, or,
- (b) an increase in the volume of trade in a product by 10% as compared to the previous year,

as a result of the tariff concessions granted by the ESA member States, a special safeguard clause shall apply in the form of an additional duty equivalent up to a maximum MFN duty of the ESA member concerned by that product.]

ESA proposal

#### **Article [ ] infant industry**

A Signatory ESA State may take safeguard measures where a product originating in the EC Party as a result of the reduction of duties is being imported into its territory in such increased quantities and under such conditions as to cause or threaten to cause disturbances to an infant industry producing like or directly competitive products. Such [measure may be applied for a period of up ten years]. [This provision shall remain in force for 20 years from the date of entry into force of this Agreement and will be reviewed at its expiry.] Measures must be taken in accordance with the procedures laid down in paragraphs 6 to 9.]

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## SPS measures

An important provision in the SADC-EU and Pacific-EU EPAs on SPS measures is the introduction of the idea of priority products and sectors relating to regional integration and exportation. This approach can be useful in addressing the possibility of adverse consequences following adoption of SPS measures against key export products, and in addressing the need for promoting intra-regional trade. Also, institutions are established.

An improvement, then, could be to add explicit provisions on the purpose of including priority products and sectors.

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### SADC-EU EPA

#### Sanitary and Phytosanitary Measures

##### Article 56

##### Multilateral Obligations

1. The Parties reaffirm the principles and objectives of the WTO SPS Agreement (herein after referred to as the SPS Agreement), the International Plant Protection Convention (IPPC), the Codex Alimentarius Commission and the World Organisation for Animal Health (OIE).
2. These principles and objectives shall underlie the activities of the Parties and the SADC EPA States, as the case may be, under this Chapter.

##### Article 57

##### Objectives

1. The Parties agree to facilitate trade and investment within the SADC EPA States and between the Parties while ensuring that measures adopted shall apply only to the extent necessary to protect human, animal or plant health or life in accordance with the provisions of the SPS Agreement.
2. The Parties undertake to co-operate in strengthening regional and specifically SADC EPA integration and co-operation on matters concerning sanitary and phytosanitary measures (herein after referred to as "SPS measures") and to address problems arising from SPS measures on agreed priority sectors and products<sup>6</sup> whilst giving due consideration to regional integration.
3. As a result thereof, the Parties agree to promote bi-regional collaboration aiming at recognition of appropriate levels of protection in SPS measures.
4. The Parties agree to establish and enhance SADC EPA technical capacity to implement and monitor SPS measures, including promoting greater use of international standards and other matters concerning SPS.

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<sup>6</sup> The priority products and sector list annexed to this Chapter.

## Article 58

### Scope and definitions

For the purposes of this Chapter, definitions used in the SPS Agreement and international standard-setting bodies, namely the Codex Alimentarius Commission, the International Plant Protection Convention (IPPC) and the World Organisation for Animal Health (OIE) shall apply.

## Article 59

### Competent Authorities

1. The respective SPS authorities shall be the competent authorities in the SADC EPA States and the EC Party for the implementation of the measures referred to in this Chapter.
2. The Parties or the SADC EPA States, as the case may be, shall, in accordance with this Agreement, inform each other of their respective competent SPS authorities and any changes thereto.

## Article 60

### Transparency

1. The Parties reaffirm the principle of transparency in the application of SPS measures, in accordance with the SPS Agreement.
1. 2. The Parties recognise the importance of effective mechanisms for consultation, notification and exchange of information with respect to SPS measures in accordance with the SPS Agreement.
2. 3. The importing Party shall inform the exporting Party of any changes in its sanitary and phytosanitary import requirements that may affect trade falling under the scope of this Chapter. The Parties undertake to establish mechanisms for the exchange of such information where appropriate.
3. 4. The Parties will apply the principle of zoning or compartmentalization when defining import conditions, taking into account international standards. Zones or compartments of defined sanitary or phytosanitary status may also be identified and proposed jointly by the Parties, on a case by case basis, wherever possible, in order to avoid disruption to trade.

## Article 61

### Information Exchange

4. 1. The Parties agree to establish an early-warning system to ensure that the SADC-EPA States are informed in advance of new EC SPS measures that may affect SADC EPA exports to the EU. This system shall be based on existing mechanisms where appropriate.
5. 2. The Parties or the SADC EPA States, as the case may be, agree to collaborate in the further development of the epidemiological surveillance network on animal

disease and in the domain of plant health the parties will exchange information on the occurrence of pests of known and immediate danger to the other Party.

#### Article 62 Implementation

The Parties agree that the Trade and Development Committee shall be competent under this Chapter to:

1. Monitor and review the implementation of this Chapter;
2. Advise and make recommendation for the implementation aimed at achieving the objectives of this Chapter;
3. Provide a forum for discussion and exchange of information as well as issues of cooperation provided for in this Chapter;
4. Make recommendations for modifications to this Chapter if necessary and appropriate
5. Review the list of priority sectors and products and the resulting priority areas for cooperation
6. Enhance cooperation on the development, application and enforcement of SPS measures; and
7. any other relevant matters relating to this Chapter.

#### Article 63 Consultations

If either Party or a SADC EPA State, as the case may be, considers that another Party has taken measures which are likely to affect, or have affected, access to its market, appropriate consultations will be used with a view to avoiding undue delays and finding an appropriate solution in conformity with the WTO SPS Agreement. In this regard the Parties shall exchange names and addresses of contact points with sanitary and phytosanitary expertise in order to facilitate communication and the exchange of information.

#### Article 64 Cooperation, capacity building and Technical Assistance on Sanitary and phyto-sanitary measures

1. The Parties agree to promote cooperation between SADC EPA State SPS institutions and equivalent EC Party institutions.
2. The Parties agree to cooperate in facilitating regional harmonization of measures and development of appropriate regulatory frameworks and policies within and between the SADC EPA States thereby enhancing intra-regional trade and investment.
3. The Parties agree that the following are priority areas for cooperation:
  - (a) The building of technical capacity in the public and private sectors of SADC EPA States to enable sanitary and phytosanitary control, including training and information events for inspection, certification, supervision and control.

- (b) The building of capacity in SADC EPA States to maintain and expand their market access opportunities.
- (c) The building of capacity to ensure that measures adopted do not become unnecessary barriers to trade, while recognizing members' rights to set their own appropriate levels of protection.
- (d) The enhancement of technical capacity for the implementation and monitoring of SPS measures, including promoting greater use of international standards.
- (e) The promotion of cooperation on the implementation of the SPS Agreement, particularly strengthening SADC EPA State notification and enquiry points as well as others matters concerning relevant international standards setting bodies;
- (f) The development of capacities for risk analysis, harmonization, compliance, testing, certification, residue monitoring, traceability and accreditation including through the upgrading or setting up of laboratories and other equipment to help SADC EPA States comply with international standards. In this regard, the Parties acknowledge the importance of strengthening regional cooperation and the need to take into account the priority products and sectors identified in accordance with this Chapter; and
- (g) The support for the participation of SADC EPA States in relevant international standards setting bodies.

**Appendix I A:**

**Priority products and sectors for SADC-EPA State regional harmonisation**

Fish, fishery products, aquaculture products, fresh or processed

Cattle, sheep and poultry

Fresh meat

Processed meat products

Cereals

Vegetables and spices

Oilseeds

Coconut

Copra

Cotton seeds

Groundnut

Cassava

Beer, juices

Dried and canned fruits

**Appendix I B:**

**Priority products and sectors for export from SADC EPA States to the EC Party:**

Fish, fishery products and aquaculture products, fresh or processed

Beef and beef products

Other meat products

Fruit and nuts

Vegetables

Cut flowers

Coffee

Sugar

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## TBT measures

The Pacific-EU EPA has the following special and differential treatment provisions covering both SPS and TBT:

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### Pacific-EU EPA

The EC Party will take full account of the capacity constraints in the short-term of non-WTO members to comply with the provisions of this Article”

Where necessary and possible, the Parties agree that the provisions concerning special and differential treatment in the WTO SPS and TBT agreements are applicable to the trade between the Parties to this Agreement, including Pacific States that are not WTO members

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Important provisions on TBT measures include the mechanism for monitoring NTBs. It would have been advisable to introduce the idea of priority products and sectors, just like in the case of the SPS provisions. The Pacific-EU EPA combines both the SPS and TBT provisions in one part.

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### SADC-EU EPA

#### Technical Barriers to Trade

##### Article 48

##### Multilateral obligations

1. The Parties and the SADC EPA States, as the case may be, confirm their commitment to the rights and obligations provided for in the WTO Agreement on Technical Barriers to Trade (herein after referred to as the TBT Agreement).
2. These rights and obligations shall underlie the activities of the Parties under this Chapter.

##### Article 49

##### Objectives

1. The Parties and the SADC EPA States, as the case may be, agree to co-operate in order to facilitate and increase trade in goods between them, by identifying, preventing and eliminating unnecessary barriers to trade within the terms of the TBT Agreement.

2. The Parties undertake to co-operate in strengthening regional and specifically SADC EPA States integration and co-operation on matters concerning technical barriers to trade.
3. The Parties undertake to establish and enhance SADC EPA States technical capacity on matters concerning technical barriers to trade.

#### Article 50

##### Scope and definitions

1. The provisions of this Chapter shall apply to technical regulations, standards and conformity assessment procedures as defined in the TBT Agreement in so far as they affect trade covered by this Agreement.
2. For the purposes of this Chapter the definitions used by the TBT Agreement shall apply.

#### Article 51

##### Collaboration and regional integration

The Parties agree that collaboration between national and regional authorities dealing with TBT matters, in both the public and private sector, is important to facilitate trade in the region and between the Parties, as well as for the overall process of SADC EPA integration and undertake to cooperate to this end.

#### Article 52

##### Transparency

1. The Parties reaffirm the principle of transparency in the application of technical regulations and standards in accordance with the TBT Agreement.
2. The Parties recognise the importance of effective mechanisms for consultation, notification and exchange of information with respect to technical regulations and standards in accordance with the TBT Agreement.

#### Article 53

##### Measures for identifying, preventing and eliminating technical barriers to trade

The Parties agree to identify and implement mechanisms among those supported by the TBT Agreement that are the most appropriate for particular priority issues or sectors. Such mechanisms may include:

6. 1. Intensifying their collaboration, with a view to facilitating access to their respective markets, by increasing the mutual knowledge and understanding of their respective systems in the field of technical regulations, standards, metrology, accreditation and conformity assessment;
7. 2. Exchanging information, identifying and implementing appropriate mechanisms for particular issues or sectors, i.e. alignment to international standards, reliance on the supplier's declaration of conformity, the use of

- internationally recognised accreditation to qualify conformity assessment bodies and the use of international product testing and certification schemes;
8. 3. Identifying and organising sector-specific interventions on technical regulations and conformity assessment with a view to facilitating understanding of and access to their respective markets. These sectors will be chosen taking into account key areas of trade, including priority products;
  9. 4. Developing co-operation activities and measures with a view to support the implementation of the rights and obligations under the TBT Agreement;
  10. 5. Where appropriate, developing common views and approaches on technical regulatory practices, including transparency, consultation, necessity and proportionality, the use of international standards, conformity assessment requirements, the use of impact and risk assessment, enforcement and market surveillance;
  11. 6. Promoting harmonisation, whenever possible and in areas of mutual interest, towards international standards, and the use of such standards in the development of technical regulations and conformity assessment procedures;
  7. Undertake to consider, in due course, negotiating mutual recognition agreements in sectors of mutual economic interest;
  8. Promoting collaboration between the Parties' and SADC EPA States, as the case may be, organizations responsible for technical regulations, metrology, standardisation, testing, certification, inspection and accreditation; and
  9. Promoting the participation by the SADC EPA States in international standards-setting bodies.

#### Article 54

##### Implementation

The Parties agree that the Trade and Development Committee shall be competent under this Chapter to:

1. Monitor and review its implementation;
2. Provide coordination and consultation on TBT issues;
3. Identify and review priority sectors and products and the resulting priority areas for cooperation; and
4. Make recommendations for modifications to it if necessary and appropriate.

#### Article 55

##### Capacity Building and Technical Assistance concerning technical barriers to trade

1. The Parties recognize the importance of cooperating in the areas of technical regulations, standards, metrology, accreditation and conformity assessment in order to achieve the objectives of this Chapter.
2. The Parties agree that the following are priority areas for cooperation: The establishment of appropriate arrangements for the sharing of expertise, including

appropriate training intended to ensure adequate and enduring technical competence of the relevant standardization and conformity assessment bodies of the SADC EPA States and mutual understanding between such bodies in the territories of the Parties;

3. The development of capacities of the SADC EPA States in the fields of technical regulations, metrology, standards, accreditation and conformity assessment including through the upgrading or setting up of laboratories and other equipment. In this regard, the Parties acknowledge the importance of strengthening regional cooperation and the need to take into account priority products and sectors;
  4. The development and adoption, within the SADC EPA States, of harmonized technical regulations, standards, metrology, accreditation and conformity assessment procedures based on relevant international standards;
  5. The support for the participation of SADC EPA States in international standardization, accreditation and metrology activities; and
  6. The development of TBT enquiry and notification points within the SADC EPA region.
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## CURRENT PAYMENTS AND CAPITAL MOVEMENT

The SADC-EU EPA doesn't liberalise the capital account, and provides for the taking of safeguard measures in respect of both the current and capital accounts.

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### SADC-EU EPA

#### Article 65 Current payments

1. Subject to the provisions of Article 66, the SADC EPA States and the EC Party undertake to impose no restrictions and to allow all payments for current transactions between residents of the EC Party and of the SADC EPA States to be made in freely convertible currency.
2. SADC EPA States may take the necessary measures to ensure that the provisions of paragraph 1, which liberalise current payments, are not used by its residents to make unauthorised capital outflows.

#### Article 66 Safeguard measures

1. Where, in exceptional circumstances, payments and capital movements between the Parties cause or threaten to cause serious difficulties for the operation of monetary policy or exchange rate policy in one or more SADC EPA States or one or more Member States of the European Community, safeguard measures with regard to capital movements that are strictly necessary may be taken by the EC Party or the concerned SADC EPA State for a period not exceeding six months.
2. The Joint EPA Council shall be informed forthwith of the adoption of any safeguard measure and, as soon as possible, of a time schedule for its removal.

## CUSTOMS AND TRADE FACILITATION

Some EPAs have detailed provisions on customs and trade facilitation, including provision for development cooperation and transition periods.

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### SADC-EU EPA

#### Customs and Trade Facilitation

##### Article 37

##### Objectives

The objectives of the Parties in this Chapter are:

- a) To reinforce cooperation in the area of customs and trade facilitation with a view to ensure that the relevant legislation and procedures, as well as the administrative capacity of the customs authorities, fulfil the objectives of effective control and the promotion of trade facilitation;
- b) To promote harmonisation of customs legislation and procedures;
- c) To ensure that legitimate public policy objectives, including in relation to security and the prevention of fraud in the area of customs and trade facilitation shall not be compromised in any way.
- d) To provide the necessary support for SADC EPA States customs administrations to effectively implement this agreement.

##### Article 38

##### Customs and administrative cooperation

1. In order to ensure compliance with the provisions of this Title and effectively respond to the objectives laid down in Article 37, the Parties shall:
  - (a) Exchange information on customs legislation and procedures;
  - (b) Jointly develop initiatives relating to customs and trade facilitation and the strengthening of administrative capacity,;
  - (c) Exchange experience and best practices on combating corruption and fraud in matters relating to this chapter;
  - (d) Exchange experience and best practices on issues relating to import, export and transit procedures and on issues relating to improving the service to the business community;
  - (e) Exchange experience and best practices on facilitating transit.
  - (f) Facilitate the exchange of experts between customs administrations;
  - (g) Promote coordination between all related agencies, both internally and across borders;
2. The EC Party and SADC EPA States will prepare and develop an enhanced cooperation on the implementation of the World Customs Organisation Framework of Standards to Secure and Facilitate Global Trade. The conditions, as stipulated by the World Customs Organisation, will have to be met and in

- particular the relevant legislation and measures in this area will have to be implemented in the EU and in the said SADC EPA States. This cooperation shall include initiatives in view of working towards the mutual recognition of the Authorised Economic Operator (AEO) status and the exchange of advance information to allow an effective risk assessment and management for security purposes.
3. Notwithstanding paragraphs 1 and 2, the Parties shall provide mutual administrative assistance in customs matters in accordance with the provisions of Protocol n. 2 on Administrative Cooperation.

### Article 39 Customs and Legislative Procedures

1. The Parties agree that their respective trade and customs legislation and procedures shall be based on:
  - (a) The revised Kyoto Convention on the Simplification and Harmonization of Customs Procedures, the substantive elements of the World Customs Organisation Framework of Standards to secure and Facilitate Global Trade, the International Convention on the Harmonised System and other international instruments and standards applicable in the field of customs and trade;
  - (b) The need to protect and facilitate legitimate trade;
  - (c) The need to avoid unnecessary and discriminatory burdens on economic operators, the need to safeguard against fraud and corruption and the need to provide further facilitation for operators that meet high level of compliance;
  - (d) The need for each Party to apply a single administrative document or electronic equivalent;
  - (e) The application of modern customs techniques, including risk assessment, simplified procedures for entry and release of goods, post release controls, and company audits;
  - (f) Transparency, efficiency and proportionality, in order to reduce costs and increase predictability for economic operators;
  - (g) The need for non discrimination in terms of requirements and procedures applicable to import, export and goods in transit, though it is accepted that consignments might be treated differently according to objective risk assessment criteria;
  - (h) The progressive development of systems, including those based upon information technology, for both export and import operations, to facilitate the exchange of information between economic operators, customs administrations and other agencies;
  - (i) The adoption of systems that facilitate the importation of goods through the use of simplified customs procedures and processes, including pre-arrival clearance;
  - (j) The elimination of any requirements for the mandatory use of pre-shipment inspections as defined by the WTO Agreement on Pre-shipment Inspection, or their equivalent;

- (k) The application of rules that ensure that any penalties imposed for minor breaches of customs regulations or procedural requirements are proportionate and, in their application, do not give rise to undue delays in customs clearance;
  - (l) A system of binding rulings on customs matters, notably on tariff classification and rules of origin, in accordance with rules laid down in their respective legislation;
  - (m) The facilitation of transit movements;
  - (n) The elimination of all requirements for the mandatory use of customs brokers; and,
  - (o) Transparent, non-discriminatory and proportionate rules in respect of the licensing of customs brokers.
2. In order to improve working methods and to ensure transparency and efficiency of customs operations, the Parties shall:
- (a) Ensure that the highest standards of integrity be maintained, through the application of anti-corruption measures in this field ;
  - (b) Take further steps towards the reduction, simplification and standardization of data in the documentation required by customs and other related agencies;
  - (c) Simplify requirements and formalities wherever possible, in respect of the rapid release and clearance of goods;
  - (d) Provide effective, prompt and non-discriminatory procedures enabling the right of appeal, against customs and other agency administrative actions, rulings and decisions affecting imports, exports or goods in transit. Procedures for appeal shall be easily accessible, including to small or medium enterprises; and,
  - (e) Create the environment for the effective enforcement of legislative requirements.

#### Article 40 Facilitation of transit movements

1. The Parties or the SADC EPA States, as the case may be, shall ensure freedom of transit through their territory via the route most convenient for transit. Any controls or requirements must be non-discriminatory, proportionate and applied uniformly.
2. Without prejudice to legitimate customs control, the Parties shall accord to traffic in transit, treatment no less favourable than that accorded to domestic goods, exports and imports, and their movement.
3. The Parties or the SADC EPA States, as the case may be, shall operate bonded transport regimes that allow the transit of goods without payment of duties or other charges, subject to the provision of an appropriate guarantee.
4. The Parties or the SADC EPA States, as the case may be, shall promote and implement regional transit arrangements.
5. The Parties or the SADC EPA States, as the case may be, shall use international standards and instruments relevant to transit.

6. The Parties or the SADC EPA States, as the case may be, shall promote co-ordination between all concerned agencies, both internally and across borders;

Article 41  
Customs fees and charges

1. Fees and charges shall be reasonable and shall not be more than the cost of the service provided in relation to any specific transaction, they shall not be calculated on an ad valorem basis.
2. Fees and charges shall not be imposed for consular services

Article 42  
Relations with the Business Community

The Parties agree:

- (a) To ensure that all customs legislation, procedures and fees and charges are made publicly available, as well as whenever possible the necessary explanations, and as far as possible through electronic means;
- (b) On the need, as far as possible, for timely and regular consultation with trade representatives on legislative proposals and procedures related to customs and customs related trade issues;
- (c) That, where appropriate, new or amended legislation and procedures and their entry into force are introduced in a way to allow traders to become well prepared for complying with them. The Parties shall make publicly available relevant notices of an administrative nature, including agency requirements and entry procedures, hours of operation and operating procedures for customs offices at ports and border crossing points, and points of contact for information enquiries;
- (d) To foster co-operation between operators and relevant administrations through the use of instruments such as Memoranda of Understanding.

Article 43  
Customs Valuation

1. The Agreement on the implementation of Article VII of the GATT 1994, shall govern customs valuation rules applied to trade covered by this Agreement.
2. The Parties shall cooperate with a view to reaching a common approach to issues relating to customs valuation.

Article 44  
Harmonisation of customs standards at regional level

The Parties shall promote harmonisation of customs legislation, procedures, standards and requirements. The content and pace of this process shall be determined by each Party.

Article 45  
Support to SADC EPA customs administrations

1. The Parties recognise the importance of supporting SADC EPA States customs administrations for the implementation of this Chapter, in line with the provisions of Part I, Chapter 2.
2. The priority areas for support are:
  - (a) The application of modern customs techniques, including:
    - (i) risk management,
    - (ii) post release controls,
    - (iii) and automation of customs procedures;
  - (b) Control of customs valuation, classification and rules of origin, including in view of meeting the requirement of Article 39.1.j;
  - (c) The facilitation of transit and the enhancement of the efficiency of regional transit arrangements;
  - (d) Transparency issues relating to the publication and administration of all trade regulations, as well as relevant fees and formalities;
  - (e) The introduction and implementation of procedures and practices which reflect international instruments and standards applicable in the field of customs and trade, inter alia the revised Kyoto Convention on the simplification and harmonisation of customs procedures and the WCO Framework of Standard to Secure and Facilitate Global Trade.
3. The Parties recognize the need for specific needs assessment studies taking into account the situation in each country, using WTO and WCO needs assessment instruments or any other mutually agreed instrument.

Article 46  
Transitional arrangements

1. The Parties recognize the need for transitional arrangements to ensure the smooth implementation of the provisions of this Chapter.
2. In view of the need to enhance their capacity in the area of customs and trade facilitation and without prejudice to their WTO commitments, SADC EPA States shall benefit from a transitional period of 5 years to meet those requirements referred to in Articles 39, 40, 41 and 42 of this chapter where the need for capacity building exists at the time of entry into force of this Agreement.
2. The Joint Council may accord a two year extension of this transitional period in case attainment of the necessary capacity has not yet been achieved.

Article 47  
Special Committee on Customs and Trade Facilitation

1. The Parties hereby establish a Special Committee on Customs and Trade Facilitation, composed of the representatives of the Parties.

2. The functions of the Special Committee on Customs and Trade Facilitation shall, inter alia, be as follows:
    - (a) monitoring the implementation and administration of this section and of the Protocol on rules of origin;
    - (b) providing a forum to consult and discuss on all issues concerning customs, including rules of origin, general customs procedures, customs valuation, tariff classification, transit and mutual administrative assistance in customs matters;
    - (c) enhancing cooperation on the development, application and enforcement of rules of origin and related customs procedures, general customs procedures and mutual administrative assistance in customs matters;
    - (d) enhancing cooperation on capacity building and technical assistance;
    - (e) follow-up on the implementation of Article 44 of this chapter;
    - (f) Any other issues agreed by the Parties in respect of this chapter.
  3. The Special Committee on Customs and Trade Facilitation shall meet on a date and with an agenda agreed in advance by the Parties.
  4. The Special Committee on Customs and Trade Facilitation shall be chaired alternatively by either Party.
  5. The Special Committee on Customs and Trade Facilitation shall report to the Trade and Development Committee.
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## **CROSS BORDER SUPPLY OF SERVICES**

The Cariforum-EU EPA has provisions on trade in services. While the preferred approach is the one taken in the SADC-EU EPA, this part sets out the Cariforum-EU EPA provisions on cross-border supply of services, indicating some minor adjustments, through omissions, that could be considered in the other EPAs; that is, where square brackets are placed.

One major change, however, is to exclude non-service sectors and investment from the part on trade in services. Also, the MFN obligation is limited to developed or OECD countries, and not extended to developing countries.

It can be pointed out also that the ESA group has elaborated extensive text for services negotiations. However, the text is still at an early stage.

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Cariforum-EU EPA

### **CROSS BORDER SUPPLY OF SERVICES**

#### Article 14

##### **Coverage and definitions**

1. This Chapter applies to measures by the Parties or by the Signatory CARIFORUM States affecting the cross border supply of all services sectors with the exception of:

- (a) audio-visual services;
- (b) national maritime cabotage<sup>7</sup>, and;
- (c) national and international air transport services, whether scheduled or non-scheduled, and services directly related to the exercise of traffic rights, other than:
  - (i) aircraft repair and maintenance services during which an aircraft is withdrawn from service;
  - (ii) the selling and marketing of air transport services;
  - (iii) computer reservation system (CRS) services; and
  - (iv) other ancillary services that facilitate the operation of air carriers, such as groundhandling services, rental services of aircraft with crew, and airport management services.

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<sup>7</sup> National maritime cabotage covers transport services within a signatory Cariforum State or within a Member State of the Community for the carriage of passengers or goods originating and terminating in that Cariforum State or in that Member State.

2. For the purpose of this Chapter:
- (a) cross-border supply of services is defined as the supply of a service:
    - (i) from the territory of a Party into the territory of the other Party (Mode 1)
    - (ii) in the territory of a Party to the service consumer of the other Party (Mode 2)
  - (b) ‘services’ includes any service in any sector except services supplied in the exercise of governmental authority.  
‘a service supplied in the exercise of governmental authority’ means any service which is supplied neither on a commercial basis, nor in competition with one or more service suppliers.
  - (c) ‘service supplier’ of the EC Party or the Signatory CARIFORUM States means any natural or juridical person of the EC Party or the Signatory CARIFORUM States that seeks to supply or supplies a service.
  - (d) ‘supply of a service’ includes the production, distribution, marketing, sale and delivery of a service.

#### Article 15

#### **Market Access**

1. With respect to market access through the cross-border supply of services, the EC Party and the Signatory CARIFORUM States shall accord services and service suppliers of each other treatment not less favourable than that provided for in the specific commitments contained in Annex [ ...] (commitments on [] trade in services).

2. In sectors where market access commitments are undertaken, the measures which the EC Party and the Signatory CARIFORUM States shall not maintain or adopt either on the basis of a regional subdivision or on the basis of its entire territory, unless otherwise specified in Annex [ ...] (commitments on [] trade in services), are defined as:

- (a) limitations on the number of services suppliers whether in the form of numerical quotas, monopolies, exclusive service suppliers or the requirements of an economic needs test;
- (b) limitations on the total value of service transactions or assets in the form of numerical quotas or the requirement of an economic needs test;
- (c) limitations on the total number of service operations or on the total quantity of service output expressed in the terms of designated numerical units in the form of quotas or the requirement of an economic needs test.

[Note: add Article XVI.2 paragraphs (d), (e) and (f) of the General Agreement on Trade in Services, as additional flexibilities that could be incorporated in the schedules]

## Article 16

### **National Treatment**

1. In the sectors where market access commitments are inscribed in Annex [...] (commitments on [] trade in services), and subject to any conditions and qualifications set out therein, the EC Party and the Signatory CARIFORUM States shall grant to services and service suppliers of each other, in respect of all measures affecting the cross-border supply of services, treatment no less favourable than that they accord to their own like services and services suppliers.
2. The EC Party or the Signatory CARIFORUM States may meet the requirement of paragraph 1 by according to services and service suppliers of the other Party, either formally identical treatment or formally different treatment to that they accord to their own like services and service suppliers.
3. Formally identical or formally different treatment shall be considered to be less favourable if it modifies the conditions of competition in favour of services or service suppliers of the EC Party or of the Signatory CARIFORUM States compared to like services or service suppliers of the other Party.
4. Specific commitments assumed under this Article shall not be construed to require the EC Party or the Signatory CARIFORUM States to compensate for inherent competitive disadvantages which result from the foreign character of the relevant services or services suppliers

## Article 17

### **Lists of commitments**

The sectors liberalised by the EC Party or the Signatory CARIFORUM States pursuant to this Chapter and, by means of reservations, the market access and national treatment limitations applicable to services and services suppliers of the other Party in those sectors are set out in lists of commitments included in Annex [...] (commitments on [] trade in services).

## Article 18

### **Most-favoured-nation treatment**

1. With respect to any measure affecting cross-border supply of services covered by this Chapter,
  - (a) the EC Party shall accord to services and services suppliers of the Signatory CARIFORUM States a treatment no less favourable than the most favourable they may accord to like services and services suppliers of

- any third country with whom they conclude an economic integration agreement after the signature of this Agreement;
- (b) the Signatory CARIFORUM States shall accord to the EC Party's services and services suppliers a treatment no less favourable than the most favourable they may accord to like services and services suppliers of any [developed country] [OECD country] with whom they conclude an economic integration agreement after the signature of this Agreement.
2. When a Party concludes a regional economic integration agreement creating an internal market or requiring the Parties thereto to significantly approximate their legislation with a view to removing non-discriminatory obstacles to trade in services, the treatment that such Party grants to services and services suppliers of third countries in sectors subject to the internal market or to the significant approximation of legislation is not covered by the provision of paragraph 1.<sup>8</sup>
3. The obligations set by paragraph 1 of this provision shall not apply to treatment granted:
- a) under measures providing for recognition of qualifications, licences or prudential measures in accordance with Article VII of the General Agreement on Trade in services or its Annex on Financial Services,
  - b) under any international agreement or arrangement relating wholly or mainly to taxation, or
  - c) under measures benefiting from the coverage of an MFN exemption listed in accordance with Article II.2 of the General Agreement on Trade in Services.
4. For the purpose of this provision, a "major trading economy" means any industrialised developed country [].
5. Where any Signatory CARIFORUM State becomes party to a free trade agreement with a third party and such a free trade agreement provides for more favourable treatment to such third party than that granted by the Signatory CARIFORUM State to the EC Party pursuant to this Agreement, the Parties shall enter into consultations. The Parties may decide whether the concerned Signatory CARIFORUM State may deny the more favourable treatment contained in the free trade agreement to the EC Party. The Joint CARIFORUM-EC Council may adopt any necessary measures to adjust the provisions of this Agreement.

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8 By the time of signature of this agreement, the European Economic Area, pre-accession agreements to the European Union, the CARICOM Single Market and Economy, and the CARICOM-Dominican Republic Free Trade Agreement fall in their entirety under this exception



## **REGULATORY FRAMEWORK**

While the preferred approach is the gradual one, for instance along the lines of the approach taken in the SADC-EU EPA, the provisions below are from the Cariforum-EU EPA. Some indication of possible improvements, through omissions, has been made, where square brackets are placed.

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Cariforum-EU EPA

### **PROVISIONS OF GENERAL APPLICATION**

#### Article 24

##### **Mutual recognition**

1. Nothing in this Title shall prevent the EC Party and the Signatory CARIFORUM States from requiring that natural persons must possess the necessary qualifications and/or professional experience specified in the territory where the service is supplied, for the sector of activity concerned.
2. The Parties shall encourage the relevant professional bodies in their respective territories to jointly develop and provide recommendations on mutual recognition to the Joint Committee, for the purpose of the fulfilment, in whole or in part, by [] service suppliers of the criteria applied by each Party for the authorisation, licensing, operation and certification of [] service suppliers and, in particular, professional services.
3. In particular, the Parties shall encourage the relevant professional bodies in their respective territories to start negotiations no later than three years after entry into force of this agreement in order to jointly develop and provide such recommendations on mutual recognition, among others, in the following disciplines: accounting, architecture, engineering and tourism [].
4. On receipt of a recommendation referred to in the preceding paragraph, the Joint Committee shall, within a reasonable time, review the recommendation with a view to determine whether it is consistent with this Agreement.
5. When, in conformity with the procedure set in paragraph 2, a recommendation referred to in paragraph 1 has been found to be consistent with this Agreement and there is a sufficient level of correspondence between the relevant regulations of the Parties, the Parties shall, with a view to implement that recommendation, negotiate, through their competent authorities, an agreement on mutual recognition of requirements, qualifications, licences and other regulations.

6 Any such agreement shall be in conformity with the relevant provisions of the WTO Agreement and, in particular, Article VII of GATS.

7. The Joint Committee shall review progress made in mutual recognition every two years.

#### Article 25

### **Transparency and disclosure of confidential information**

1. Each Party shall respond promptly to all requests by the other Party for specific information on any of its measures of general application or international agreements which pertain to or affect this Agreement. Each Party shall also establish one or more enquiry points to provide specific information and services suppliers of the other Party, upon request, on all such matters. Such enquiry points are listed in Annex [ ] (Enquiry points). Enquiry points need not be depositories of laws and regulations.

2. Nothing in this Agreement shall require any Party to provide confidential information, the disclosure of which would impede law enforcement, or otherwise be contrary to the public interest, or which would prejudice legitimate commercial interests of particular enterprises, public or private.

#### Article 26

### **Procedures**

1 Where authorization is required for the supply of a service or commercial presence on which a specific commitment has been made, the competent authorities of a Party shall, within a reasonable period of time after the submission of an application considered complete under domestic laws and regulations, inform the applicant of the decision concerning the application. At the request of the applicant, the competent authorities of the Party shall provide, without undue delay, information concerning the status of the application.

2. Each Party shall maintain or institute judicial, arbitral or administrative tribunals or procedures which provide, at the request of an affected [ ] service supplier, for a prompt review of, and where justified, appropriate remedies for, administrative decisions affecting commercial presence, cross border supply of services or temporary presence of natural persons for business purpose. Where such procedures are not independent of the agency entrusted with the administrative decision concerned, the Parties shall ensure that the procedure in fact provide for an objective and impartial review.



## **FINANCIAL SERVICES**

The following provisions on financial services are from the Cariforum-EU EPA. Some slight adjustments are proposed. For instance, the proposal is to remove a mandatory obligation and introduce discretion in permitting new financial services and in having to transmit data.

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Cariforum-EU EPA

### **FINANCIAL SERVICES**

#### Article 42

#### **Scope and definitions**

1. This Section sets out the principles of the regulatory framework for all financial services liberalised pursuant to Chapters II, III and IV of this Title.
2. For the purpose of this Chapter and of Chapters II, III and IV of this Title
  - (a) 'financial service' means any service of a financial nature offered by a financial service supplier of the EC Party and the Signatory CARIFORUM States. Financial services comprise the following activities:
    - A. Insurance and insurance-related services
      1. direct insurance (including co-insurance):
        - (a) life;
        - (b) non-life;
      2. reinsurance and retrocession;
      3. insurance inter-mediation, such as brokerage and agency; and
      4. services auxiliary to insurance, such as consultancy, actuarial, risk assessment and claim settlement services.
    - B. Banking and other financial services (excluding insurance):
      1. acceptance of deposits and other repayable funds from the public;
      2. lending of all types, including consumer credit, mortgage credit, factoring and financing of commercial transaction;
      3. financial leasing;
      4. all payment and money transmission services, including credit, charge and debit cards, travellers cheques and bankers drafts;
      5. guarantees and commitments;
      6. trading for own account or for account of customers, whether on an exchange, in an over-the-counter market or otherwise, the following:
        - (a) money market instruments (including cheques, bills, certificates of deposits);

- (b) foreign exchange;
  - (c) derivative products including, but not limited to, futures and options;
  - (d) exchange rate and interest rate instruments, including products such as swaps, forward rate agreements;
  - (e) transferable securities;
  - (f) other negotiable instruments and financial assets, including bullion;
7. participation in issues of all kinds of securities, including underwriting and placement as agent (whether publicly or privately) and provision of services related to such issues;
  8. money broking;
  9. asset management, such as cash or portfolio management, all forms of collective investment management, pension fund management, custodial, depository and trust services;
  10. settlement and clearing services for financial assets, including securities, derivative products, and other negotiable instruments;
  11. provision and transfer of financial information, and financial data processing and related software;
  12. advisory, intermediation and other auxiliary financial services on all the activities listed in subparagraphs (1) through (11), including credit reference and analysis, investment and portfolio research and advice, advice on acquisitions and on corporate restructuring and strategy.
- (b) ‘financial service supplier’ means any natural or juridical person of the EC Party and the Signatory CARIFORUM States that seeks to provide or provides financial services. The term ‘financial service supplier’ does not include a public entity.
- (c) ‘public entity’ means:
1. a government, a central bank or a monetary authority, of the EC Party or a Signatory CARIFORUM State, or an entity owned or controlled by the EC Party or a Signatory CARIFORUM State, that is principally engaged in carrying out governmental functions or activities for governmental purposes, not including an entity principally engaged in supplying financial services on commercial terms; or
  2. a private entity, performing functions normally performed by a central bank or monetary authority, when exercising those functions.
- (d) ‘new financial service’ means a service of a financial nature, including services related to existing and new products or the manner in which a product is delivered, that is not supplied by any financial service supplier in the territory of the EC Party or the Signatory CARIFORUM States but which is supplied in the territory of the other Party.

#### Article 43

## **Prudential carve-out**

1. The EC Party and the Signatory CARIFORUM States may adopt or maintain measures for prudential reasons, such as:
  - (a) the protection of investors, depositors, policy-holders or persons to whom a fiduciary duty is owed by a financial service supplier;
  - (b) ensuring the integrity and stability of their financial system.
  
2. Nothing in this Agreement shall be construed to require the EC Party or the Signatory CARIFORUM States to disclose information relating to the affairs and accounts of individual consumers or any confidential or proprietary information in the possession of public entities.

## Article 44

### **Effective and transparent regulation**

1. The EC Party and the Signatory CARIFORUM States shall endeavour to provide in advance to all interested persons any measure of general application that the EC Party or the Signatory CARIFORUM State proposes to adopt in order to allow an opportunity for such persons to comment on the measure. Such measure shall be provided:
  - (a) by means of an official publication; or
  - (b) in other written or electronic form.
  
2. The EC Party and the Signatory CARIFORUM States shall make available to interested persons its requirements for completing applications relating to the supply of financial services.

On the request of an applicant, the concerned EC Party or Signatory CARIFORUM State shall inform the applicant of the status of its application. If the concerned EC Party or Signatory CARIFORUM State requires additional information from the applicant, it shall notify the applicant without undue delay.

The EC Party and the Signatory CARIFORUM States shall endeavour to facilitate the implementation and application in their territory of internationally agreed standards for regulation and supervision in the financial services sector.

## Article 45

### **New financial services<sup>9</sup>**

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<sup>9</sup> This Article applies only to financial services activities comprised in article 42 on Scope and Definitions, and liberalised according to this Title.

[] The EC Party and the Signatory CARIFORUM States [] may permit a financial service supplier of the other Party to provide [] a new financial service of a type similar to those services that the EC Party and the Signatory CARIFORUM States permit its own financial service suppliers to provide under its domestic law in like circumstances.

The EC Party and the Signatory CARIFORUM States may determine the juridical form through which the service may be provided and may require authorisation for the provision of the service. Where such authorisation is required, a decision shall be made within a reasonable time [].

#### Article 46

[]

#### **Data processing**

1. The EC Party and the Signatory CARIFORUM States [] may permit a financial service supplier of the other Party to transfer information in electronic or other form, into and out of its territory, for data processing where such processing is required in the ordinary course of business of such financial service supplier.

2. The EC Party and the Signatory CARIFORUM States shall adopt adequate safeguards to the protection of privacy and fundamental rights, and freedom of individuals, in particular with regard to the transfer of personal data.

#### Article 47

#### **Specific exceptions**

1. Nothing in this Title shall be construed to prevent the EC Party and the Signatory CARIFORUM States, including their public entities, from exclusively conducting or providing in its territory activities or services forming part of a public retirement plan or statutory system of social security, except when those activities may be carried out, as provided by the domestic regulation of the EC Party or the Signatory CARIFORUM State, by financial service suppliers in competition with public entities or private institutions.

2. Nothing in this Agreement applies to activities conducted by a central bank or monetary authority or by any other public entity in pursuit of monetary or exchange rate policies.

3. Nothing in this Title shall be construed to prevent the EC Party and the Signatory CARIFORUM States, including their public entities, from exclusively conducting or providing in its territory activities or services for the account or with the guarantee or using the financial resources of the EC Party or the Signatory CARIFORUM State, or its public entities.

## **TELECOMMUNICATIONS**

As with financial services, the Cariforum-EU EPA provisions on telecommunications can commit countries to certain WTO-like obligations they didn't undertake.

In the case of telecommunications, while closely following the WTO provisions, it should be noted that it is not mandatory to subscribe to the reference paper though the paper has various useful provisions such as those on dealing with monopolistic practices. In addition, there are provisions for appeals against decisions of regulators and for settlement of disputes.

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Cariforum-EU EPA

### **TELECOMMUNICATIONS SERVICES**

#### Article 33

#### **Definitions and scope**

1. For the purpose of this Title:
  - (a) 'telecommunications services' means all services consisting of the transmission and reception of electro-magnetic signals and do not cover the economic activity consisting of the provision of content which requires telecommunications for its transport.
  - (b) a 'regulatory authority' in the telecommunications sector means the body or bodies charged with the regulation of telecommunications mentioned in this Chapter
  - (c) 'essential telecommunications facilities' mean facilities of a public telecommunications transport network and service that
    - are exclusively or predominantly provided by a single or limited number of suppliers; and
    - cannot feasibly be economically or technically substituted in order to provide a service.
  - (d) a 'major supplier' in the telecommunications sector is a supplier which has the ability to materially affect the terms of participation (having regard to price and supply) in the relevant market for telecommunications services as a result of control over essential facilities or the use of its position in the market.
  - (e) 'interconnection' means linking with suppliers providing public telecommunications transport networks or services in order to allow the users of one supplier to communicate with users of another supplier and to access services provided by another supplier.
  - (f) 'universal service' means the set of services of specified quality that must be made available to all users in the territory of a Party regardless of their

geographical location and at an affordable price; its scope and implementation are decided by each Party.

2. This Section sets out the principles of the regulatory framework for the following telecommunications services, other than broadcasting, liberalised pursuant to Chapters II, III and IV of this Title: voice telephone services, packet-switched data transmission services, circuit-switched data transmission services, telex services, telegraph services, facsimile services, private leased circuit services and mobile and personal communications services and systems.

#### Article 34

##### **Regulatory Authority**

1. Regulatory authorities for telecommunications services shall be legally distinct and functionally independent from any supplier of telecommunications services.
2. The regulatory authority shall be sufficiently empowered to regulate the sector. The tasks to be undertaken by a regulatory authority shall be made public in an easily accessible and clear form, in particular where those tasks are assigned to more than one body.
3. The decisions of and the procedures used by regulators shall be impartial with respect to all market participants.
4. A supplier affected by the decision of a regulatory authority shall have a right to appeal against that decision to an appeal body that is independent of the parties involved. Where the appeal body is not judicial in character, written reasons for its decision shall always be given and its decisions shall also be subject to review by an impartial and independent judicial authority. Decisions taken by appeal bodies shall be effectively enforced.

#### Article 35

##### **Authorisation to provide telecommunications services**

1. Provision of services shall, as much as possible, be authorised following mere notification.
2. A licence can be required to address issues of attributions of numbers and frequencies. The terms and conditions for such licences shall be made publicly available.
3. Where a licence is required:

- (a) all the licensing criteria and a reasonable period of time normally required to reach a decision concerning an application for a licence shall be made publicly available;
- (b) the reasons for the denial of a licence shall be made known in writing to the applicant upon request;
- (c) the applicant of a licence shall be able to seek recourse before an appeal body in case that a licence is unduly denied;
- (d) licence fees required by the EC Party or the Signatory CARIFORUM States for granting a licence shall not exceed the administrative costs normally incurred in the management, control and enforcement of the applicable licences.

#### Article 36

### **Competitive safeguards on major suppliers**

In accordance with the provisions of Chapter 1 of Title IV (Competition), appropriate measures shall be maintained for the purpose of preventing suppliers who, alone or together, are a major supplier from engaging in or continuing anti-competitive practices. These anti-competitive practices shall include in particular:

- (a) engaging in anti-competitive cross-subsidisation;
- (b) using information obtained from competitors with anti-competitive results, and;
- (c) not making available to other services suppliers on a timely basis technical information about essential facilities and commercially relevant information which are necessary for them to provide services.

#### Article 37

### **Interconnection**

1. Any supplier authorised to provide telecommunications services shall have the right to negotiate interconnection with other providers of publicly available telecommunications networks and services. Interconnection should in principle be agreed on the basis of commercial negotiation between the companies concerned.
2. Regulatory authorities shall ensure that suppliers that acquire information from another undertaking during the process of negotiating interconnection arrangements use that information solely for the purpose for which it was supplied and respect at all times the confidentiality of information transmitted or stored.
3. Interconnection with a major supplier shall be ensured at any technically feasible point in the network. Such interconnection shall be provided:
  - (a) under non-discriminatory terms, conditions (including technical standards and specifications) and rates and of a quality no less favourable than that

- provided for its own like services or for like services of non-affiliated service suppliers or for its subsidiaries or other affiliates;
- (b) in a timely fashion, on terms, conditions (including technical standards and specifications) and rates<sup>10</sup> that are transparent, reasonable, having regard to economic feasibility, and sufficiently unbundled so that the supplier need not pay for network components or facilities that it does not require for the service to be provided, and;
  - (c) upon request, at points in addition to the network termination points offered to the majority of users, subject to charges that reflect the cost of construction of necessary additional facilities.

4. The procedures applicable for interconnection to a major supplier shall be made publicly available.

5. Major suppliers shall make publicly available either their interconnection agreements or their reference interconnection offers.

6. A service supplier requesting interconnection with a major supplier shall have recourse, either at any time or after a reasonable period of time which has been made publicly known, to an independent domestic body, which may be a regulatory body as referred to in Article [...], to resolve disputes regarding appropriate terms, conditions and rates for interconnection.

#### Article 38

##### **Scarce resources**

Any procedures for the allocation and use of scarce resources, including frequencies, numbers and rights of way, shall be carried out in an objective, timely, transparent and non-discriminatory manner. The current state of allocated frequency bands shall be made publicly available, but detailed identification of frequencies allocated for specific government uses is not required.

#### Article 39

##### **Universal service**

1. The EC Party and the Signatory CARIFORUM States have the right to define the kind of universal service obligations it wishes to maintain.

2. Such obligations will not be regarded as anti-competitive per se, provided they are administered in a transparent, objective and non-discriminatory way. The administration of such obligations shall also be neutral with respect to competition and be not more burdensome than necessary for the kind of universal service defined by the EC Party or the Signatory CARIFORUM State.

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<sup>10</sup> Such rates are cost-oriented rates in the EC Party, and cost-based rates in Signatory Cariforum States.

3. All suppliers should be eligible to ensure universal service. The designation shall be made through an efficient, transparent and non-discriminatory mechanism. Where necessary, the EC Party and the Signatory CARIFORUM States shall assess whether the provision of universal service represents an unfair burden on organisations(s) designated to provide universal service. Where justified on the basis of such calculation, and taking into account the market benefit if any which accrues to an organisation that offers universal service, national regulatory authorities shall determine whether a mechanism is required to compensate the supplier(s) concerned or to share the net cost of universal service obligations.

4. The EC Party and the Signatory CARIFORUM States shall ensure that:
- (a) directories of all subscribers are available to users in a form approved by the national regulatory authority, whether printed or electronic, or both, and are updated on a regular basis, and at least once a year;
  - (b) organisations that provide the services referred to in paragraphs (a) apply the principle of non-discrimination to the treatment of information that has been provided to them by other organisations.

#### Article 40

### **Confidentiality of information**

The EC Party or the Signatory CARIFORUM States shall ensure the confidentiality of telecommunications and related traffic data by means of a public telecommunication network and publicly available telecommunications services without restricting trade in services.

#### Article 41

### **Disputes between suppliers**

1. In the event of a dispute arising between suppliers of telecommunications networks or services in connection with rights and obligations that arise from this Chapter, the national regulatory authority concerned shall, at the request of either party, issue a binding decision to resolve the dispute in the shortest possible timeframe.
  2. When such a dispute concerns the cross-border provision of services, the national regulatory authorities concerned shall co-ordinate their efforts in order to bring about a resolution of the dispute.
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## **TOURISM**

Tourism is an important sector in Africa. These provisions from Cariforum-EU EPA indicate some useful provisions, for instance on dealing with anti-competitive practices that adversely affect gains for destination countries; and on development cooperation.

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Cariforum-EU EPA

### **TOURISM SERVICES**

Article 49

#### **Scope**

This Section sets out the principles of the regulatory framework for all tourism services liberalised in accordance with Chapters II, III and IV of this Title.

Article 50

#### **Prevention of anticompetitive practices**

In accordance with the provisions of Chapter 1 of Title IV, appropriate measures shall be maintained or introduced for the purpose of preventing suppliers, in particular in the context of tourism distribution networks<sup>11</sup>, to affect materially the terms of participation in the relevant market for tourism services by engaging in or continuing anti-competitive practices, including, inter alia, abuse of dominant position through imposition of unfair prices, exclusivity clauses, refusal to deal, tied sales, quantity restrictions or vertical integration.

Article 51

#### **Access to technology**

The EC Party and the Signatory CARIFORUM States shall [] facilitate the transfer of technology on a commercial basis to [] service suppliers in the Signatory CARIFORUM States.

Article 52

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<sup>11</sup> For the purpose of this section, tourism distribution networks means tour operators and other tourism wholesalers (both out-bound and in-bound), computer reservation systems and global distribution systems (whether or not connected to airlines or provided through the internet), travel agencies and other distributors of tourism services.

### **Small and medium-sized enterprises**

The EC Party and the Signatory CARIFORUM States shall [] facilitate the participation of small and medium-sized enterprises in the tourism services sector.

Article 53

### **Mutual Recognition**

The Parties shall cooperate towards the mutual recognition of requirements, qualifications, licenses or other regulations in accordance with Article 24 of this agreement.

Article 54

### **Increasing the Impact of Tourism on Sustainable Development**

The Parties shall [] facilitate the participation of CARIFORUM services suppliers in international, regional, sub-regional, bilateral and private financing programs to support the sustainable development of tourism.

Article 55

### **Environmental and quality standards**

The EC Party and the Signatory CARIFORUM States shall encourage compliance with environmental and quality standards applicable to tourism services in a reasonable and objective manner, without constituting unnecessary barriers to trade, and shall [] facilitate the participation of the Signatory CARIFORUM States in relevant international organizations setting environmental and quality standards applicable to tourism services.

Article 56

### **Development cooperation and technical assistance**

1. The Parties shall cooperate for the advancement of the tourism sector in the Signatory CARIFORUM States, given the inherent asymmetries in respective levels of development of the Parties.
2. Subject to the provisions of [the development chapter], the Parties agree to cooperate, including by facilitating support in the following areas:
  - i. The upgrading of national accounting systems with a view to facilitating the introduction of Tourism Satellite Accounts (TSA) at the Regional and local level;

- ii. Capacity building for environmental management in tourism areas at the Regional and local level;
- iii. The development of Internet marketing strategies for small and medium-sized tourism enterprises in the tourism services sector;
- iv. Mechanisms to ensure the effective participation of Signatory CARIFORUM States in international standard setting bodies focused on sustainable tourism standards development; programmes to achieve and ensure equivalency between national/regional and international standards for sustainable tourism; and for programmes aimed at increasing the level of compliance with sustainable tourism standards by regional tourism suppliers;
- v. Tourism exchange programs and training, including language training, for tourism services providers.

#### Article 57

#### **Exchange of information and consultation**

1. The Parties agree to exchange experiences, information and best practices and to consult on issues covered by this section and relevant to trade between the Parties. The Joint Committee shall develop modalities for this regular dialogue on the issues covered by this section.
  2. The Parties shall invite private and other relevant stakeholders to this dialogue, where relevant [ ].
  3. The Parties agree further to have [ ] regular dialogue [ ] on the issuance of travel advisories.
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## **TEMPORARY PRESENCE OF NATURAL PERSONS**

The market access envisaged under the provisions below can be welcome, if broadened and readily useable.

The conditions attached to the provisions by the EC are highly restrictive and could well have the effect of denying the market access otherwise envisaged. They therefore could be considered inappropriate. They are not reproduced here as a recommended template but rather as caution on what to avoid.

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Cariforum-EU EPA

### **TEMPORARY PRESENCE OF NATURAL PERSONS FOR BUSINESS PURPOSE**

#### Article 19

#### **Coverage and definitions**

1. This Chapter applies to measures of the EC Party and the Signatory CARIFORUM States concerning the entry into and temporary stay in their territories of key personnel, graduate trainees, business services sellers, contractual services suppliers, independent professionals and short term visitors for business purposes, in accordance with Article 1, paragraph 5, of this Title.
2. For the purposes of this Chapter:
  - (a) 'Key personnel' means natural persons employed within a juridical person of the EC Party or of the Signatory CARIFORUM States other than a non-profit organisation and who are responsible for the setting-up or the proper control, administration and operation of a commercial presence.  
  
'Key personnel' comprise 'business visitors' responsible for setting up a commercial presence and 'intra-corporate transfers'.
    - (i) 'Business visitors' means natural persons working in a senior position who are responsible for setting up a commercial presence. They do not engage in direct transactions with the general public and do not receive remuneration from a source located within the host EC Party or Signatory CARIFORUM State.
    - (ii) 'Intra-corporate transfers' means natural persons of the EC Party or of the Signatory CARIFORUM States who have been employed by a juridical person or have been partners in it for at least one year and who are temporarily transferred to a commercial presence in

the territory of the other Party. The natural person concerned must belong to one of the following categories:

1. Managers:

Persons working in a senior position within a juridical person, who primarily direct the management of the commercial presence, receiving general supervision or direction principally from the board of directors of stockholders of the business or their equivalent, including:

- directing the commercial presence or a department or subdivision thereof;
- supervising and controlling the work of other supervisory, professional or managerial employees;
- having the authority personally to recruit and dismiss or recommend recruiting, dismissing or other personnel actions.

2. Specialists:

Persons working within a juridical person who possess uncommon knowledge essential to the commercial presence's production, research equipment, techniques or management. In assessing such knowledge, account will be taken not only of knowledge specific to the commercial presence, but also of whether the person has a high level of qualification referring to a type of work or trade requiring specific technical knowledge, including membership of an accredited profession.

- (b) 'Graduate trainees' means natural persons of the EC Party or of the Signatory CARIFORUM States who have been employed by a juridical person of that EC Party or Signatory CARIFORUM State for at least one year, possess a university degree and are temporarily transferred to a commercial presence or to the parent company of the juridical person in the territory of the other Party, for career development purposes or to obtain training in business techniques or methods<sup>12</sup>.
- (c) 'business services sellers' means natural persons of the EC Party or of the Signatory CARIFORUM States who are representatives of a service supplier of that EC Party or Signatory CARIFORUM State seeking temporary entry into the territory of the other Party for the purpose of

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<sup>12</sup> The recipient establishment may be required to submit a training programme covering the duration of the stay for prior approval, demonstrating that the purpose of the stay is for training. For Spain, France and Hungary, training must be linked to the university degree which has been obtained.

negotiating the sale of services or entering into agreements to sell services for that service supplier. They do not engage in making direct sales to the general public and do not receive remuneration from a source located within the host EC Party or Signatory CARIFORUM State.

- (d) 'contractual services suppliers' means natural persons of the EC Party or of the Signatory CARIFORUM States employed by a juridical person of that EC Party or Signatory CARIFORUM State which has no commercial presence in the territory of the other Party and which has concluded a bona fide contract (other than through an agency as defined by CPC 872) to supply services with a final consumer in the latter Party requiring the presence on a temporary basis of its employees in that Party in order to fulfil the contract to provide services.
- (e) 'independent professionals' means natural persons of the EC Party or of the Signatory CARIFORUM States engaged in the supply of a service and established as self-employed in the territory of that EC Party or Signatory CARIFORUM State who have no commercial presence in the territory of the other Party and who have concluded a bona fide contract (other than through an agency as defined by CPC 872) to supply services with a final consumer in the latter Party requiring their presence on a temporary basis in that Party in order to fulfil the contract to provide services.<sup>13</sup>
- (f) 'qualifications' means diplomas, certificates and other evidence (of formal qualification) issued by an authority designated pursuant to legislative, regulatory or administrative provisions and certifying successful completion of professional training.

## Article 20

### **Key personnel and graduate trainees**

1. For every sector liberalised in accordance with Chapter III of this Title and subject to any reservations listed in Annex [...] (commitments on investment and trade in services), the EC Party and the Signatory CARIFORUM States shall allow investors of each other to employ in their commercial presences natural persons of each other provided that such employees are key personnel or graduate trainees as defined in Article 19. The temporary entry and stay of key personnel and graduate trainees shall be for a period of up to three years for intra-corporate transfers, ninety days in any twelve month period for business visitors, and one year for graduate trainees.

2. For every sector liberalised in accordance with Chapter III of this Title, the measures which the EC Party or the Signatory CARIFORUM States shall not maintain or adopt either on the basis of a regional subdivision or on the basis of its entire territory, unless

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<sup>13</sup> The service contract referred to under d) and e) shall comply with the laws, regulations and requirements of the Party where the contract is executed.

otherwise specified in Annex [...] (commitments on investment and trade in services), are defined as limitations on the total number of natural persons that an investor may employ as key personnel and graduate trainees in a specific sector in the form of numerical quotas or a requirement of an economic needs test and as discriminatory limitations.

## Article 21

### **Business services sellers**

For every sector liberalised in accordance with Chapters II or III of this Title and subject to any reservations listed in Annex [...] (commitments on [] trade in services).

the EC Party and the Signatory CARIFORUM States shall allow the temporary entry and stay of business services sellers for a period of up to ninety days in any twelve month period.

## Article 22

### **Contractual services suppliers and independent professionals**

1. The EC Party or the Signatory CARIFORUM States reaffirm their respective obligations arising from their commitments under the General Agreement on Trade in Services as regards the entry and temporary stay of contractual services suppliers and independent professionals.

2. Without prejudice to paragraph 1, the EC Party shall allow the supply of services into the territory of its Member States by contractual services suppliers of the CARIFORUM States through presence of natural persons, subject to the conditions specified in their schedules of commitments.

Without prejudice to paragraph 1, the Signatory CARIFORUM States shall allow the supply of services into their territory by EC contractual services suppliers through presence of natural persons, subject to the conditions specified in Annex [...] (commitments on investment and trade in services).

The commitments undertaken by the EC Party or the Signatory CARIFORUM States are subject to the following conditions:

a. The natural persons are engaged in the supply of a service on a temporary basis as employees of a juridical person, which has obtained a service contract for a period not exceeding twelve months.

b. The natural persons entering the other Party should be offering such services as an employee of the juridical person supplying the services for at least the year immediately preceding the date of submission of an application for entry into the other

Party. In addition, the natural persons must possess, at the date of submission of an application for entry into the other Party, at least three years professional experience<sup>14</sup> in the sector of activity which is the subject of the contract.

c. With the exception of fashion model services, chef de cuisine services, and entertainment services other than audiovisual services, the natural persons entering the other Party must possess (i) a university degree or a qualification demonstrating knowledge of an equivalent level<sup>15</sup> and (ii) professional qualifications where this is required to exercise an activity pursuant to the law, regulations or requirements of the EC Party or the Signatory CARIFORUM State where the service is supplied.

d. The natural person shall not receive remuneration for the provision of services other than the remuneration paid by the contractual service supplier during its stay in the other Party.

e. The temporary entry and stay of natural persons within the Party concerned shall be for a cumulative period of not more than six months or, in the case of Luxemburg, twenty-five weeks, in any twelve month period or for the duration of the contract, whatever is less.

f. Access accorded under the provisions of this Article relates only to the service activity which is the subject of the contract; it does not confer entitlement to exercise the professional title of the Party where the service is provided.

g. The number of persons covered by the service contract shall not be larger than necessary to fulfill the contract, as it may be decided by the laws, regulations and requirements of the Party where the service is supplied.

h. Other discriminatory limitations, including on the number of natural persons in the form of economic needs tests, which are specified in their schedules of commitments.

3. Without prejudice to paragraph 1 the EC Party shall allow the supply of services into the territory of its Member States by independent professionals of the Signatory CARIFORUM States, subject to the conditions specific below, in its schedule of commitments. Without prejudice to paragraph 1, the Signatory CARIFORUM States shall allow the supply of services into their territory by EC independent professionals, subject to the conditions specified in Annex [...] (commitments on investment and trade in services).

4. The commitments undertaken by the EC Party or the Signatory CARIFORUM States are subject to the following conditions:

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<sup>14</sup> Obtained after having reached the age of majority.

<sup>15</sup> Where the degree or qualification has not been obtained in the Party where the service is supplied, that Party may evaluate whether this is equivalent to a university degree required in its territory.

- a. The natural persons are engaged in the supply of a service on a temporary basis as self-employed persons established in the other Party and have obtained a service contract for a period not exceeding twelve months.
- b. The natural persons entering the other Party must possess, at the date of submission of an application for entry into the other Party, at least six years professional experience in the sector of activity which is the subject of the contract.
- c. The natural persons entering the other Party must possess (i) a university degree or a qualification demonstrating knowledge of an equivalent level <sup>16</sup> and (ii) professional qualifications where this is required to exercise an activity pursuant to the law, regulations or requirements of the EC Party or the Signatory CARIFORUM State where the service is supplied.
- d. The temporary entry and stay of natural persons within the Party concerned shall be for a cumulative period of not more than six months or, in the case of Luxemburg, twenty-five weeks, in any twelve month period or for the duration of the contract, whatever is less.
- e. Access accorded under the provisions of this Article relates only to the service activity which is the subject of the contract; it does not confer entitlement to exercise the professional title of the Party where the service is provided.
- f. Other discriminatory limitations, including on the number of natural persons in the form of economic needs tests, which are specified in Annex [...] (commitments on investment and trade in services).

## Article 23

### **Short term visitors for business purposes**

1. The EC Party or the Signatory CARIFORUM States shall endeavour to facilitate, in conformity with their respective legislation, the entry and temporary stay into their territories of short-term visitors for business purposes from the other Party with a view to carrying out the following activities:
  - a) Research and Design: Technical, scientific and statistical researchers on behalf of a company located in the territory of the other Party.
  - b) Marketing research: Personnel conducting research or analysis, including market research, on behalf of a company established in the territory of the other Party.

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<sup>16</sup> Where the degree or qualification has not been obtained in the Party where the service is supplied, that Party may evaluate whether this is equivalent to a university degree required in its territory.

- c) Training seminars: personnel of a company in the EC Party or the Signatory CARIFORUM States who enter the territory of other Party to receive training in techniques and work practices employed by companies or organizations in that Party, provided that the training received is confined to observation, familiarization and classroom instruction only.
- d) Trade Fairs and Exhibitions: Personnel attending a trade fair for the purpose of promoting their company or its products or services.
- e) Sales: Sales representatives and agents taking orders or negotiating contracts for goods for a company located in the territory of the other Party, but not delivering goods.
- f) Purchasing: Buyers purchasing for a company or management and supervisory personnel engaging in a commercial transaction located in the territory of the other Party.
- g) Tourism personnel (hotel representatives, tour and travel agents, tour guides or tour operators) attending or participating in tourism conventions or tourism exhibitions.

provided that they are not engaged in selling their goods or services to the general public or in supplying their goods or services themselves, do not on their own behalf receive any remuneration from a source located within the EC Party or the Signatory CARIFORUM State where they are staying temporarily, and are not engaged in the supply of a service in the framework of a contract concluded between a legal person who has no commercial presence in the EC Party or the Signatory CARIFORUM State where the short-term visitors for business purposes are staying temporarily and a consumer in this EC Party or Signatory CARIFORUM State.

2. This entry and temporary stay into their territories, when allowed, shall be for a period of up to 90 days in any twelve month period.

## **ELECTRONIC COMMERCE**

The main development on e-commerce in terms of multilateral rule-making has been the moratorium on imposition of duties.

The Cariforum-EU EPA provisions, however, seek to provide the reasoning behind this, namely, that e-commerce should be considered to be a service. A better understanding of e-commerce might be required.

The EPA has provisions on development cooperation.

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Cariforum-EU EPA

### **ELECTRONIC COMMERCE**

#### Article 58

#### **Objective and Principles**

1. The Parties, recognising that electronic commerce increases trade opportunities in many sectors, agree to promote the development of electronic commerce between them, in particular by co-operating on the issues raised by electronic commerce under the provisions of this Title.
2. The Parties agree that the development of electronic commerce must be fully compatible with the highest international standards of data protection, in order to ensure the confidence of users of electronic commerce.
3. The Parties agree that deliveries by electronic [] should not be subject to customs duties.

#### Article 59

#### **Regulatory aspects of e-commerce**

1. The Parties shall maintain a dialogue on regulatory issues raised by electronic commerce, which will inter alia address the following issues:
  - the recognition of certificates of electronic signatures issued to the public and the facilitation of cross-border certification services,
  - the liability of intermediary service providers with respect to the transmission, or storage of information,
  - the treatment of unsolicited electronic commercial communications,

- the protection of consumers in the ambit of electronic commerce,
- any other issue relevant for the development of electronic commerce.

2. Such cooperation can take the form of exchange of information on the Parties' respective legislation on these issues as well as on the implementation of such legislation.

## **CHAPTER 7**

### **COOPERATION**

#### Article 60

#### **Cooperation**

1. The Parties recognize the importance of technical cooperation and assistance in order to complement the liberalization of services [], support the Signatory CARIFORUM States' efforts to strengthen their capacity in the supply of services, facilitate the implementation of commitments under this Title, and achieve the objectives of this Agreement.
2. Subject to the provisions of [the development chapter], the Parties agree to cooperate, including by providing support for technical assistance, training and capacity building in, inter alia, the following areas:
  - a. Improving the ability of service suppliers of the Signatory CARIFORUM States to gather information on and to meet regulations and standards of the EC Party at European Community, national and sub-national levels;
  - b. Improving the export capacity of service suppliers of the Signatory CARIFORUM States, with particular attention to [the marketing of tourism and cultural services, the needs of small and medium-sized enterprises (SMEs), franchising and the negotiation of mutual recognition agreements];
  - c. Facilitating interaction and dialogue between service suppliers of the EC Party and of the Signatory CARIFORUM States;
  - d. Addressing quality and standards needs in those sectors where the Signatory CARIFORUM States have undertaken commitments under this Agreement and with respect to their domestic and regional markets as well as trade between the Parties, [and in order to ensure participation in the development and adoption of sustainable tourism standards];
  - e. Developing and implementing regulatory regimes for specific service sectors at CARIFORUM regional level and in Signatory CARIFORUM States in those sectors where they have undertaken commitments under this Agreement.

- f. Establishing mechanisms for promoting investment and joint ventures between service suppliers of the EC Party and of the Signatory CARIFORUM States, and enhancing the capacities of investment promotion agencies in Signatory CARIFORUM States.
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## **TRADE RELATED AREAS – GRADUAL APPROACH**

There can be at least two main approaches to negotiating services and the trade-related areas of investment, competition and government procurement.

One approach could be that taken in the SADC-EU EPA. On services, the parties agreed to liberalise one sector under the comprehensive agreement; they agreed to negotiate other services areas within three years after concluding the comprehensive agreement. Where this approach is taken, the EU should undertake commitments as well, in a manner that assists the meeting of the requirements of Article V of the General Agreement on Trade in Services, bearing mind the principles of asymmetry, the development objectives and WTO services negotiating modalities including those on Least Developed Countries for a waiver.

On investment, the parties agreed to base the provisions on the SADC Finance and Investment Protocol. And on competition and government procurement, the parties postponed the negotiations to a time after capacity building.

A second approach could be to negotiate full-scale provisions in all these areas, as in the Cariforum-EU EPA. Where this approach is taken, careful attention to recent analysis of these provisions, indicating some possible improvements, could be helpful. It has been indicated for instance that the combination of services, investment and electronic commerce may be considered inappropriate, as well as the stringent conditions and drastic limitations for access to the EU market in a manner that could make the market access very difficult to utilise.

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### SADC-EU EPA

#### **I.a) Trade in Services**

1. The Parties recognise the growing importance of trade in services for the development of their economies and reaffirm their respective rights and obligations under the General Agreement on Trade in Services (GATS).
2. No later than 31 December 2008 the Parties will complete negotiations on services liberalisation, on the basis of the following:
  - liberalisation schedule for one service sector for each participating SADC EPA State;
  - commitment to a standstill as specified in Article V.1.b(ii) GATS, for all services sectors;
  - agreement to negotiate progressive liberalisation with substantial sectoral coverage within a period of three years following the conclusion of the full EPA.

EC to suggest language – EC more comprehensive offer

**I.b) Cooperation in Services**

1. The Parties recognise that trade capacity building can support the development of economic activities, in particular in services sectors. To this end, the EC Party agrees to support capacity building aimed at strengthening the regulatory framework of the participating SADC EPA States.
2. By the time of laying down the necessary arrangements for the liberalisation of trade in services, the Parties will define the specific cooperation objectives, principles and procedures that will accompany trade liberalisation.

**II.a) Investment**

1. The Parties agree to negotiate an Investment chapter, taking into account the relevant provisions of the SADC Protocol on Finance and Investment, no later than 31 December 2008.

**II.b) Cooperation on Investment**

1. The EC Party agrees to provide adequate technical assistance to facilitate negotiations and implementation of the Investment chapter.

**III. Competition and Government Procurement**

1. The EC Party agrees to cooperate with a view to strengthening regional capacity in these areas. Negotiations will only be envisaged once adequate regional capacity has been built.
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## **TRANSPARENCY IN GOVERNMENT PROCUREMENT**

The Common African Position is not to have rules on government procurement in the EPAs, but rather to elaborate and implement regional regimes in the context of creating and consolidating the regional and continental common market. The approach in the SADC-EU approach, which the EC agreed to, is consistent with this position.

There are certain other important considerations to have in mind in deciding whether, after the negotiations, to agree to rules on government procurement.

The EU is unlikely to undertake commitments that exceed their commitments under the Government Procurement Agreement (GPA) of the WTO. This means that the EU gives in the EPAs what it already gives to other parties to the GPA. Given this, it might be advisable to join the GPA rather than negotiate a bilateral arrangement giving the EU certain preferential concessions in exchange for existing EU concessions to be shared with other parties to the GPA. This alternative would introduce competition among entities or potential bidders from all parties to the GPA seeking government contracts from African governments.

This result of competition among more entities other than only EU entities, could also be achieved through domestic or regional legislation that autonomously introduces government procurement rules.

The EU government procurement market open to non-EU enterprises is so miniscule that African enterprises cannot be expected to have a realistic chance of competing in it. Estimates are that only 0.3% of contracts are available to non-EU enterprises.

Non-discrimination obligations would undermine the nature of government procurement as a tool for promoting key public policy objectives such as eradicating poverty and promoting equitable development for instance through supporting local enterprises and directing contracts to depressed areas. Thresholds do not adequately respond to this concern as local enterprises end up with remote chances of getting important contracts above the threshold, which may well be the contracts that have a more meaningful role in achieving those public policy objectives. In addition, the possibility of joint ventures is usually prohibited.

Transparency rules would impose stringent rules that African governments will lack the flexibility to regularly revise in light of developments and would impose additional institutional costs. The transparency model proposed and preferred by the EU does not adequately accommodate the developmental needs of African countries, related for instance to assisting depressed areas and marginalized populations, supporting the key employment and income generating SMEs, and consolidating national and regional integrated economies.

Domestic and regional frameworks can be adequate to answer the major concerns raised in seeking rules on government procurement, particularly ensuring good value for money; and are therefore adequate. Development partners can have the important role of supporting these domestic and regional initiatives. Provisions on government procurement could therefore focus on development cooperation.

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ESA-EU proposed text

### **Government procurement**

The parties recognize the importance of transparency in government procurement particularly as an important tool in [African countries] for promoting social justice, equitable social economic development, and key public policy objectives. The parties recognize further the importance of public procurement in the consolidation of the regional and continental common market through the adoption and implementation of common regional programs.

### **Scope**

The parties agree to undertake development cooperation on transparency in government procurement in relation to domestic and regional legislation, regulations, administration and programs.

The parties agree that rules on transparency in government procurement may be considered at an appropriate stage in future when [the African countries] will have reached levels of economic development permitting mutually beneficial exchange of concessions and realistic possibilities of meaningful access to the public procurement market of the European Union.

### **Areas of cooperation**

The areas of cooperation shall include

- a) preparation and modernization of domestic procurement legislation and regional instruments
- b) establishment and strengthening of domestic and regional regulatory and modern market-information institutions
- c) building of human capacity
- d) sharing of experience and best practices

## REGIONAL INTEGRATION AND DEVELOPMENT COOPERATION

The approach in the Cariforum-EU EPA is not consistent with the Common African Position. However, Cariforum negotiators sought to limit covered enterprises to regional enterprises as an important means of promoting regional integration, and to seek development cooperation. In the EPA, enterprises to which the rules apply are listed, and include both Cariforum and EU enterprises.

Two specific provisions directly addressing regional integration and development cooperation are as follows:

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### Cariforum-EU EPA

#### *Article 3.1 - Supporting the Creation of Regional Procurement Markets*

3. The Parties recognize the economic importance of establishing competitive regional procurement markets.
4. (a) With respect to any measure regarding covered procurement, each Signatory CARIFORUM State, including its procuring entities, shall endeavour not to treat a supplier established in any CARIFORUM State less favourably than another locally established supplier.  
(b) With respect to any measure regarding covered procurement, the EC Party and the Signatory CARIFORUM States, including their procuring entities:
  - (i) shall endeavour not to discriminate against a supplier established in either Party on the basis that the goods or services offered by that supplier for a particular procurement are goods or services of either Party;
  - (ii) shall not treat a locally established supplier less favourably than another locally established supplier on the basis of degree of foreign affiliation to or ownership by operators or nationals of any Signatory CARIFORUM State or of the EC Party.
5. Subject to Paragraph 6 below, each Party, including its procuring entities, shall with respect to any measure regarding covered procurement, accord to the goods and services of the other Party and to suppliers of the other Party offering the goods or services of any Party, treatment no less favourable than the treatment the Party, including its procuring entities, accords to domestic goods, services and suppliers.
6. The Parties shall not be required to provide the treatment envisaged in Paragraph 5 unless a decision by the Joint CARIFORUM-EC Council to this effect is taken. That decision may specify to which procurements by each Party the treatment envisaged in Paragraph 5 would apply, and under which conditions.

## Cooperation

1. The Parties recognize the importance of cooperating in order to facilitate implementation of commitments and to achieve the objectives of this Chapter.
  2. Subject to the provisions of Article 7 of Part I of this Agreement, the Parties agree to cooperate, including by facilitating support and establishing appropriate contact points, in the following areas:
    - (a) Exchange of experience and information about best practices and regulatory frameworks;
    - (b) Establishment and maintenance of appropriate systems and mechanisms to facilitate compliance with the obligations of this Chapter; and
    - (c) Creation of an on-line facility at the regional level for the effective dissemination of information on tendering opportunities, so as to facilitate the awareness of all companies about procurement processes.
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## INVESTMENT

Generation of local investment and attraction of foreign direct investment are priorities of countries all over the world. Africa needs both types of investment. The question has been about best practices and strategies for generating local investment and attracting foreign direct investment (FDI).

EC negotiators have vigorously argued that investment rules will lead to increasing flows of FDI, and have understood the development component of EPAs to rest largely in this rule-making. However, study after study has demonstrated that rules by themselves don't lead to increasing inflows of FDI. According to various studies, what is required in Africa in particular, is improvement of location factors such as infrastructure, relevant skills, political and economic stability, as well as focused investment promotion activities taking into account new developments such as the fact that South-South FDI inflows are growing faster than the North-South.<sup>17</sup>

It is to be noted though that African countries have laws and regulations protecting investment. These include constitutional provisions on expropriation, dedicated investment laws, and laws in various key sectors including natural resources and infrastructure. National investment agencies have been established. In addition, all African countries are part of the integration process of forming regional and the continental common markets, where there will be free movement of goods, services, labour, capital, and people, and the right of residence will be recognised. Already, various regions have protocols on some of these elements, well ahead of the timeframe for establishment of their common markets. For instance, SADC has the Finance and Investment Protocol and COMESA has the Agreement on the COMESA Common Investment Area. Development cooperation could target these efforts and support them as part of the integration process, rather than smother them. In addition, various countries have Bilateral Investment Treaties with development partners, and have made appropriate commitments in the services sectors in the WTO framework. All these initiatives together, fully respond to the case made for rule-making, while at the same time accommodating some policy space and flexibility, which EPA rules as proposed by the EC would permanently take away for the duration of the EPA.

The common African position is that the regional economic communities can adopt regional instruments on investment, and there shouldn't be investment rules in the EPAs.<sup>18</sup> So far, African regions have indicated their approach. In the period up to the 31 December 2007 deadline, African regions declined to include investment rules in EPAs proposed by EC negotiators. West Africa took the view that a regional framework should first be elaborated before investment negotiations could be considered. In the SADC-EU interim EPA, it was agreed that the investment chapter in the comprehensive EPA would be based on the SADC Finance and Investment Protocol. In the ESA-EU EPA,

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<sup>17</sup> UNIDO, African Investment Survey, 2005

<sup>18</sup> Nairobi Declaration on EPAs, paragraph 14

investment and private sector development were included in the development chapter as areas for development cooperation, rather than rule-making.

It is recommended that investment and private sector development could be areas for development cooperation, including in terms of elaboration of regional instruments that form part of the integration process.

On the basis of the approach agreed by SADC and the EC negotiators in the SADC-EU interim EPA, investment chapters could be based on regional instruments. Regions without such frameworks could be assisted to finalise them as soon as possible. The SADC Finance and Investment Protocol has an annex on investment covering various areas, including, investment promotion and protection, preferential treatment for qualifying investments, corporate responsibility, natural resources and environment, the right to regulate, capital movement, harmonisation of domestic laws, special treatment for least developed countries, dispute settlement. The SADC Finance and Investment Protocol, on which the investment chapter is to be based, doesn't have pre-establishment provisions, particularly those requiring national and most-favoured-nation treatment. It should therefore be taken that the EC negotiators have agreed not to include such pre-establishment provisions in the investment chapter; and that they agreed to support the SADC region in the terms of the provisions of the protocol. EPA provisions could be considered based on the SADC protocol where the same approach is adopted, that is cooperation, and where the EPA provisions reflect, are consistent with and don't exceed the SADC protocol.

If any rules are to be considered, they could take the form of regional instruments such as the Agreement on the COMESA Investment Area, where all FDI, from Europe and elsewhere, is equally addressed and prioritised in accordance with the integration process. Any entity that qualifies to be a "COMESA investor" is entitled to non-discriminatory treatment, and this includes foreign investors with substantial business activity in the COMESA member state where they are registered.

It may be advisable to closely study the available regional instruments on investment, and to fully utilise them as a good basis for finalising positions on investment negotiations. In the negotiations, detailed areas of cooperation could be included. The following draft text produced by the ESA group could be helpful in this regard.

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ESA-EU draft text

## INVESTMENT AND PRIVATE SECTOR DEVELOPMENT SUPPORT

### Article 69 Scope and Coverage

1. Cooperation shall, through financial and technical assistance, support the policies and strategies for investment and private sector development as set out in this Title.

Cooperation shall be in accordance with Articles 74 to 78 of the Cotonou Partnership Agreement.

Article 70  
Objectives

1. The objectives of the cooperation on investment and private sector development are to:
  - (a) Create an environment for sustainable and equitable economic development of ESA through investment, including FDI (green field or portfolio), technology transfer, capacity building and institutional support from the E.C.
  - (b) Facilitate better coordination between ESA and E.C on private sector development with specific regard to transparency in the economic space in ESA and poverty alleviation.
  - (c) Provide deeper cooperation with institutions and intermediary organisations dealing with investment promotion in E.C and ESA.
  - (d) Establish a framework for funding arrangements and assistance to support economic development programmes of ESA.
  - (e) Provide support to strengthen and build the capacity of private development institutions like the chambers of commerce associations and indigenous development organisations in individual ESA countries and the region as a whole so as to enable the emergence of dynamic and vibrant private sector (investment promotion agencies)
  - (f) Ensure constructive engagement between ESA and EU on continuous improvement of the investment climate in ESA through diagnostic reviews and assessments.
  - (g) establish mechanisms for providing information, identifying and disseminating investment rules, opportunities and other related information.
  - (h) develop a legal framework that favours investment in both Parties, by conclusion, where appropriate of agreements to promote and protect investment and avoid double taxation;
  - (i) work towards uniform intra-ESA harmonised and simplified procedures and administrative practices in the field on investment;

- (j) incorporate technical assistance activities for training initiatives between the Parties government agencies dealing with the matter; and
- (k) support through appropriate instruments, the promotion and encouragement of investment in ESA region
- (l) Promote business dialogue, cooperation and partnership between EU and ESA

Article 71  
Investment Climate

1. The parties undertake to take the necessary measures to create a conducive investment environment. In this regard they agree to the following:

- (i) eliminate bottlenecks to investment and streamline investment procedures
- (ii) establishing appropriate administrative structures to (one-stop shops) for the entry and setting up of investments so as to accelerate the establishment of business enterprises

Article 72  
Investment promotion

The ESA countries and the E.U shall, subject to their general policy on investment, including Foreign Direct Investment, encourage the deepening of cooperation on inter-regional investment. On the EU side this will be through grant of incentives, preferences and privileges, special policies and measures which will increase the level of investment from the E.U into the ESA.

2. The aim of the co-operation is to promote, within the bounds of their own competence, an attractive and stable investment climate, which favours and promotes mutually beneficial investment, both domestic and foreign, especially through improved conditions for investment protection, investment promotion, the transfer of capital and the exchange of information on (incentives), opportunities and other relevant information.

3. The ESA Countries and the EU, within the scope of their respective competencies, recognizing the importance of private investment in the promotion of their development cooperation and acknowledging the need to take steps to promote such investment, shall:

- a) implement measures to encourage participation in their development efforts by private investors who comply with the objectives and priorities of ESA-EU development cooperation and with the appropriate laws and regulations of their respective States;

- b) take measures and actions which help to create and maintain a predictable and secure investment climate as well as enter into negotiations on agreements which will improve such climate;
  - c) encourage the EU private sector to invest and to provide specific assistance to its counterparts in the ESA countries under mutual business cooperation and partnerships;
  - d) facilitate partnerships through joint ventures and encourage venture capital financing for greenfield investment and others, in line with ESA countries' regulations ;
  - e) sponsor sectoral investment fora to promote partnerships and external investment;
  - f) support efforts of the ESA Countries to attract financing, with particular emphasis on private financing, for infrastructure investments and revenue generating infrastructure critical for the private sector;
  - g) support efforts of ESA countries to establish financial frameworks adapted to investment needs of SMEs and promotion of industrial linkages between TNCs and SMEs.
  - h) support capacity building for investment promotion agencies of ESA member countries and institutions involved in promoting and facilitating foreign and local investment;
  - i) disseminate information on investment opportunities and business operating conditions in the ESA Countries; and
- h) promote national and ESA-EU private sector business dialogue, cooperation and partnerships, in particular through an ESA-EU private sector business forum. Support for operations of an ESA-EU private sector business forum shall be the creation of a business council which has the following objectives:
- (i) to facilitate dialogue within the ESA/EU private sector and between the ESA/EU private sector and the bodies established under the Agreement;
  - (ii) to analyse and periodically provide the relevant bodies with information on the whole range of issues concerning relations between the ESA and EU private sectors in the context of the Agreement or, more generally, of economic relations between the EU and the ESA countries; and

- (iii) to analyse and provide the relevant bodies with information on specific problems of a sectoral nature relating to, inter alia, branches of production or types of products at national or regional level.

4. In order to encourage European investment in development projects of special importance, ESA Countries and the EU may also conclude agreements, to the extent consistent with the principles and objectives of this Agreement, relating to specific projects of mutual interest through public- private sector partnerships and joint venture arrangements.

#### Article 73 Investment Support

1. Cooperation shall be in the following areas;
  - (a) Capacity building and financial assistance to develop regulatory capacity
  - (b) Promotion of ESA as an investment destination
  - (C) Ensure access by ESA to resources available under EIB Investment Facility and CDE for the benefit of the region;
  - (d) Developing a programme to improve the overall financial environment of the ESA region in terms of:
    - (i) diversification of financial instruments,
    - (ii) encouraging strategic alliances including public-private partnerships, Build-Operate-Transfer and Build-Operate-Own activities between ESA and EU investors
- (a) Establishment of financial instruments adapted to SMEs
- (b) Support industry specific frameworks for emerging sectors
- (c) Establishment of risk insurance fund

#### Article 74 Investment finance

1. Cooperation shall provide long-term financial resources, including risk capital, to assist in promoting growth in the private sector and help to mobilise domestic and foreign capital for this purpose. To this end, the Community shall provide, in particular:
  - a) grants for financial and technical assistance to support policy reforms and advocacy, human resource development, institutional capacity-building or other forms of institutional support related to a specific investment, measures to increase the competitiveness of enterprises and to strengthen

the capacities of the private financial and non-financial intermediaries, investment facilitation and promotion and competitiveness enhancement activities;

- b) support towards (advisory and consultative services to assist in) creating a responsive investment climate and information base to guide and encourage the flow of capital.
- c) The ESA and EU shall develop special instruments to development finance institutions for the setting up of dedicated investment funds for the exclusive purpose of providing development financing and assistance to investors in ESA.
- d) Enhance access to the Investment Facility through:
  - (i) setting up EIB threshold for lending that takes into account development requirement realities of the ESA member States
  - (ii) the EIB should endeavour to facilitate the creation of guarantee and investment funds to ensure Investment Facility resources are availed to SMEs in ESA member States
  - (iii) the EIB should carry out as much consultation as possible with ESA Member States in designing rules governing the operations of the investment facility lets regionalise EIB facilities
  - (iv) the EU should introduce concessionary loans and incentives for EU companies ready to invest in the targeted sectors identified by ESA countries

#### Article 75

#### Private Sector Development

1. The ESA and the E.U, in accordance with their laws and regulations shall set up a framework to strengthen private sector development in the ESA region through capacity building, mentoring, institutional commitment, transfer of technology and entrepreneurship development.
2. The Community shall provide the necessary financial and technical assistance for private sector and entrepreneurship development through a specific program elaborated for that purpose.
3. A business forum shall be established to provide a platform for the private sectors of both Parties to meet on a regular basis and in a structured manner with a view to developing business ties

Article 76  
Investment guarantees

1. Cooperation shall ensure the increasing availability and use of risk insurance as a risk-mitigating mechanism in order to boost investor confidence in the ESA Countries.
2. Cooperation shall offer guarantees and assist with guarantee funds covering risks for qualified investment. Specifically, cooperation shall provide support to ESA Countries for:
  - a) Reinsurance schemes to cover foreign direct investment by eligible investors; against legal uncertainties and major risks
  - b) Establishment of an appropriate legal framework for the guarantee of investments
  - c) Guarantee programmes to cover risk in the form of partial guarantees for debt financing. Both partial risk and partial credit guarantee shall be available; and
  - d) National and regional guarantee funds, involving, in particular, domestic financial institutions or investors for encouraging the development of the financial sector.
3. Cooperation shall also provide support to capacity-building, institutional support and participation in the core funding of national and/or regional initiatives to reduce the commercial risks for investors (inter alia guarantee funds, regulatory bodies, arbitration mechanisms and judiciary systems to enhance the protection of investments improving the export credit systems).
4. Cooperation shall provide such support on the basis of complementary and added value with respect to private and/or public initiatives and, whenever feasible, in partnership with private and other public organisations. The ESA and the EU shall undertake to establish ESA-EU Guarantee Agency to provide and manage investment guarantee programmes.
5. The Parties shall provide support to the ATI for the management of guarantee schemes and implementation of its programmes

Article 77  
Investment promotion and protection

1. The ESA Countries and the EU, within the scope of their respective competencies, affirm the need to promote and protect either Party's investments on their respective territories, and in this context affirm the importance of concluding, in their

mutual interest, investment promotion and protection agreements which could also provide the basis for insurance and guarantee schemes.

2. The Parties shall collaborate with a view to facilitate the conclusion of the avoidance of double taxation agreements within ESA and between ESA countries and the EU member states.

#### Article 78 Competent Authorities

1. The competent authorities of the EU and ESA countries shall be the competent authorities as defined in this Agreement. An EU/ESA Committee on trade related issues shall be established with the Sub-Committees mentioned in articles 65 to 67

2. Nothing in this Agreement shall be taken to restrict the mandate and operations of the Central Bank of an ESA country.

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## COMPETITION

As with government procurement, the SADC-EU EPA provides that negotiations on competition will be envisaged after a process of capacity building.

Also, as with investment and government procurement, the common African position is that the regional economic communities can adopt regional instruments on competition in the context of the integration process for building regional and the continental common markets.

Competition negotiations could therefore be limited to development cooperation, the main aim being to build regional and national institutions. The following text has been proposed in the ESA-EU negotiations.

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ESA-EU proposed text

### COMPETITION POLICY

#### Article 1

##### Definitions

For the purposes of this Chapter:

1. "Competition authority" means for the EC Party, the "European Commission"; and for the ESA Signatory States, National Competition Commissions.
2. "Enforcement proceeding" means a proceeding instituted by the competent competition authority of a Party against one or more undertakings with the aim of establishing and remedying anti-competitive behaviour.
3. "Competition laws" includes:
  - (a) for the EC Party, Articles 81, 82 and 86 of the Treaty establishing the European Community, and their implementing regulations or amendments;
  - (b) For ESA Signatory States, Art 55 of the COMESA Treaty and the implementing regulation and national legislations complying with the COMESA Treaty

#### Article 2 Objectives

1. The parties recognise the importance of promoting and encouraging competition by monitoring, controlling and preventing restrictive business practices and other restrictions that deter or likely to deter the efficient operation of markets, thereby enhancing equitable business growth and development.

2 In this regard, the parties, agree that the following shall be prohibited as incompatible with the proper functioning of the Agreement, in so far as they may affect trade in the EU or in the territory of any of the ESA countries:

( a ) All categories of agreements, decisions and concerted practices which have as their object or effect the prevention, restriction or distortion of competition to an appreciable extent in the EU or the territories of any of the ESA countries or in any substantial part of any of the either territories;

(b) Any abuse by one or more undertakings of a dominant position within the EU or in the territory of any of the ESA countries or in a substantial territory of either party where such abuse may or does affect trade in the EU or in the territories of any ESA Countries.

### Article 3

#### **Implementation**

1. The parties shall ensure that they have in place laws and regulations in force addressing restrictive business practices on competition practices mentioned in Article 1 within their respective national jurisdictions, and a government or statutory body designated for the implementation of such laws and regulations.
2. If, at the moment of entry into force of this agreement, either party has not yet adopted such laws and regulations at national level, nor designated a government and statutory body for their implementation, it shall do so within a period of five years.

### Article 4

#### **Scope of Application.**

1. This Agreement shall apply to economic activities whether conducted primarily by private enterprises within, or having an effect within, the EU or in the territory of any of the ESA countries which restrict competition and have an appreciable effect on trade in the EU or in the territory of any of the ESA countries. This Agreement does not apply to conduct expressly exempted by national legislation for ESA Signatory States.
2. This Agreement shall not derogate the direct enjoyment of the privileges and protections conferred by other laws protecting intellectual property, including inventions, industrial models, trade marks, patents, and copyright.

3. The participation of the ESA countries shall be subject to the provisions of the National laws and regulations and the COMESA Regional Competition Regulations and Rules.

#### Article 5

##### **Obligations of Parties**

1. The parties are encouraged to take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Agreement or resulting from action taken by the (joint council) under this Agreement.
2. The parties may, but shall not be obliged to, implement in their domestic laws more extensive provisions against restrictive business practices than is required by this Agreement, provided that such provisions do not contravene the provisions of this Agreement. The parties shall be free to determine the appropriate method of implementing the provisions of this Agreement within their national legal system and practice as long as such method of implementation enhances the efficient and effective attainment of the objectives of this Agreement. .

#### Article 6

##### **Public enterprises and enterprises entrusted with special or exclusive rights including designated monopolies**

1. Nothing in this Agreement prevents the Parties from designating or maintaining public enterprises entrusted with special or exclusive rights, including designated monopolies according to their respective laws.
2. With regard to public enterprises and enterprises to which special or exclusive rights have been granted, the Parties shall ensure that, following the date of the entry into force of this Agreement, there is neither enacted nor maintained any measure distorting trade in goods or services between the Parties to an extent contrary to the Parties interest, and that such enterprises shall be subject to the rules of competition in so far as the application of such rules does not obstruct the performance, in law or in fact or the particular tasks assigned to them.
3. By derogation from Article 6(2), the Parties agree that where enterprises in the Signatory ESA States are subject to specific sectoral rules as mandated by their respective regulatory frameworks, such enterprises or specific products of strategic importance that are subject to special treatment shall not be bound or governed by the provisions of this Article.
4. Without prejudice to paragraph 3 above, the Parties may progressively adjust, without prejudice to their obligations under the WTO Agreement, any State monopolies of a commercial nature or character, so as to ensure that, by the end of the fifth year following the entry into force of this Agreement, no discrimination regarding the

conditions under which goods and services are sold or purchased exists between nationals of the Member States of the European Communities and those of the ESA States, unless such discrimination is inherent in the existence of the monopoly in question.

5. The Joint ESA - EC Committee shall be informed about the enactment of sectoral rules provided for in paragraph 3 and the measures adopted to implement paragraph 4.

## Article 7

### **Exchange of Information and Cooperation**

1. 1. The parties agree to promote cooperation and coordination regarding the application of their competition laws in their respective territories and to provide mutual assistance in any fields of competition they consider necessary.
2. The parties shall consult on the written request of a party, to consider matters regarding the operation, implementation, application of this chapter and to review the parties' measures to prescribe anticompetitive activities and the effectiveness of enforcement actions. Each party shall designate one or more officials, including an official from each competition authority, to be responsible for ensuring that consultations, when required, occur in a timely manner.
3. Each Party shall, at the request of any other country party to this agreement, enter into consultations with a view to eliminating practices referred to in Article 1. The party addressed shall accord full consideration to such a request and shall cooperate through the supply of publicly available non-confidential information of relevance to the matter in question. The Party addressed shall also provide other information available to the requesting Party, subject to its domestic law and to the conclusion of satisfactory agreement concerning the safeguarding of its confidentiality by the requesting Party. All exchange of information shall be subject to the standards of confidentiality applicable in each Party.
4. The EC and ESA parties shall cooperate with the view to ensure that the ESA party meets the standards of confidentiality of data and information exchanged between the Parties.
5. Such a request shall not prejudice any action under the requesting Party's competition laws that may be deemed necessary and shall not in any way encumber the party's decision-making powers or its independence.

## Article 8

### **Technical Assistance and Capacity Building.**

1. The Parties agree on the importance of technical assistance and capacity-building to facilitate the implementation of the commitments and achieve the objectives of this Chapter and in particular to ensure effective and sound competition policies.
2. The technical assistance and capacity building programs shall pay systematic attention to institutional aspects and in this context shall support the efforts of each of the ESA

countries to develop and strengthen structures, institutions and procedures that help to enhance the effective enforcement of the competition in each of the ESA Countries. In this context, the EU shall:

- (a) Accept and recognise the low level of development of the ESA countries in competition matters. To this end, the EU countries shall commit adequate technical, financial and material resources to the ESA countries to enable them to implement this process of technical assistance cooperation and to implement their obligations and commitments. Such resources should be provided by the EU States on a sufficiently predicable and sustainable basis;
- (b) Provide technical assistance cooperation aimed at assisting each of the ESA Countries in the development and strengthening of national competition authorities. The activities to be covered should be diverse in scope and nature, and shall include technical assistance and capacity building development, staff training and exchanges, holding of joint training and capacity building programmes;
- (c) Facilitate and assist in the setting up of competition authorities in ESA Countries that have no such institutions, assist in the enactment of the competition law, and the review of such laws aimed at making them effective;
- (d) Facilitate and develop competition advocacy programmes involving the sensitisation of policy makers, parliamentarians, the judiciary, the business community, and the general public about the role of competition laws and;
- (e) Facilitate the establishment of a mechanism to enable each ESA Country to take the necessary steps to adopt, strengthen and implement the necessary competition and consumer protection laws in their respective countries.

3. The (joint council) with a view to improving the effectiveness of the on-going cooperation, shall establish a mechanism to undertake a joint review of the effectiveness of the technical assistance program after the Agreement comes into force. The purpose of such a review shall be to determine the benefits accruing to each of the ESA countries under this Agreement and the level of commitment by the EU countries in the provision of technical, financial, and capacity building assistance to each of the ESA countries. Such a review shall include a mutually agreed program of action between the parties on how to improve the implementation and enforcement of the competition law in their respective territories.

4. Any ESA country may opt to suspend the operation of this Chapter in its country provided it is able to demonstrate in good faith to the (joint council) that its level of development in competition law is still low and that it is not yet benefiting adequately from this process of technical assistance cooperation.

5. The technical assistance and capacity building programs shall be pursued through integrated strategies that incorporate economic, social, cultural, environmental and institutional elements that must be locally owned. In this context and within the framework of development policies and reforms pursued by the ESA countries; the EU-ESA cooperation framework and orientation shall take into account of each of the

ESA country's different levels of development as well as the economic needs of each ESA country and the difficulties faced in meeting their obligations in this Agreement.

6 The Parties agree to cooperate, including by facilitating support, in the following areas:

- (a) the efficient functioning of the ESA Signatory States' Competition Authorities;
  - (b) assistance in drafting guidelines, manuals and, where necessary, legislation;
  - (c) the provision of independent experts; and
  - (d) the provision of training for key personnel involved in the implementation of and enforcement of competition policy.
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## INTELLECTUAL PROPERTY

Developing countries, in many cases led by Africa, for instance on issues of access to medicine and flexibility, have secured some major improvements to the TRIPS Agreement. The Doha Declaration on the Public Health of November 2001, the August 2003 Decision on Countries with Inadequate Manufacturing Capacity in the Pharmaceuticals Sector and the subsequent amendment of Article 31 of the TRIPS Agreement at the December 2005 Hong Kong Ministerial Conference, have been milestones in this regard. These gains for the whole world should be respected and affirmed in the EPAs.

Attempts to elaborate stringent rules on intellectual property that take away the rights and flexibilities now agreed in the multilateral trade system should therefore be considered inappropriate. In EPAs, provisions on intellectual property could therefore concern development cooperation while re-affirming the rights and flexibilities in the TRIPS Agreement, as well as the Convention on Biological Diversity and the International Treaty on Plant Genetic Resources of the FAO.

The following text proposed in the ESA-EU negotiations could be useful on cooperation.

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ESA-EU proposed text

### INTELLECTUAL PROPERTY RIGHTS

#### Article 64 Scope and Coverage

1. For the purpose of this Title, intellectual property covers copyright and related rights; industrial property rights; plant breeders rights; rights to traditional knowledge, folklore and genetic resources; and other rights recognised under the TRIPS Agreement and CBD and the International Agreement on Plant Genetic Resources

#### Article 65 Objectives

The objectives of cooperation in intellectual property rights shall be:

1. To ensure availability of legal, institutional and human resource capacities and policy frameworks for the protection of intellectual property rights whilst respecting and safeguarding public policies of ESA countries

2. Ensuring the economic development and social expansion of an ESA Country economy is not hampered by a restricted application of international and bilateral obligations in the area of intellectual property rights,
3. Ensuring the implementation of the flexibilities as are provided under the TRIPS Agreement and CBD and the International Agreement on Plant Genetic Resources
4. To facilitate technology transfer amongst the parties and especially to the ESA countries
5. To ensure adequate and effective protection of genetic resources, traditional knowledge and folklore of ESA countries, [creative and artistic arts] and prevent bio-piracy
6. To ensure that the legitimate interests of the ESA countries are safeguarded
7. To provide for enhanced incentives for the development and research into new technologies especially in pharmaceutical products, including the production of generic medicine.
8. To ensure that claims of ownership of seeds and plant products cannot be transferred onto similar natural resources endemic to the ESA region
9. To provide support for the development and research to identify geographical indications on products of ESA countries. In the case of livestock this will include the Breed Characterisation Inventory
10. To grant legal protection to geographical indications identifying products of ESA countries in both the Community and among ESA countries

#### Article 66

#### Areas of Cooperation

1. The Parties shall strengthen their cooperation in all areas of intellectual property, including in the following areas:
  - a) Promotion of innovation, diversification, modernisation, development and product and process quality in businesses
  - b) Promotion of creativity and design, particularly in micro, small and medium enterprises, and exchanges between networks of design centres located in ESA and EU states
  - c) Science and technology capacity building in ESA states
  - d) the availability of legal, institutional and policy frameworks necessary for the implementation of the TRIPS Agreement whilst respecting the flexibilities therein, and the CBD and the International Agreement on Plant Genetic Resources

- e) the establishment and reinforcement, including training of personnel, of national and regional intellectual property offices dealing in intellectual property matters
  - f) Appropriate measures for the effective protection of ESA countries genetic resources, folklore and traditional knowledge and against bio piracy;
  - g) Work on the development of internationally agreed sui generis models for the protection of traditional knowledge and sustainable use of biological diversity and to promote wider application of genetic resources, traditional knowledge and folklore with the involvement and approval of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilisation of such knowledge, innovations and practices.
  - g) prevention of abuse of intellectual property rights by their holders
  - h) Creation of awareness on IPR through an information exchange system with the aim to update each other on IPR development on time
2. EU shall support ESA countries to enable them benefit from the relevant provisions of the WTO Agreement on TRIPs and the in-built flexibilities especially with regard to public health, including access to pharmaceutical products at a reasonable price;
  3. EU shall support ESA countries to enact appropriate laws, formulate policies and develop infrastructure for local production of pharmaceutical products, transfer of technology and the attraction of investment in their pharmaceutical sectors;
  4. The EU shall provide incentives to enterprises and institutions in its territory for the purpose of promoting and encouraging technology transfer to ESA countries in order to enable them create a sound and viable technological base.

#### Article 67 Implementation

1. The implementation of this Title shall be reviewed after 5 years as from the date of signing this agreement. Such review may also include any relevant new developments that might warrant modification or amendment of this Title
2. In order to facilitate the implementation of this Title, EU shall provide, on request and mutually agreed terms and conditions, technical and financial assistance in favour of ESA countries.

## Article 68

### Institutional Arrangements

1. For the purpose of this Title the ESA-EU Committee on IPRs shall be established.
2. The IPR Committee shall be composed of technical representatives of all Parties and shall report to the joint ESA-EU Committee on Trade Cooperation.

## GENERAL EXCEPTIONS

The EPAs have more or less same provisions on general, security and taxation exceptions.

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Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between the Parties where like conditions prevail, or a disguised restriction [on international trade] [on trade in goods, services or establishment,] nothing in this Agreement shall be construed to prevent the adoption or enforcement by the EC Party, the (ACP states collectively or individually) of measures which:

- (a) are necessary to protect public security and public morals<sup>19</sup> or to maintain public order;
- [(b) are necessary to protect human, animal or plant life or health] (**note:** this exception can be omitted, in light of the SPS provisions elsewhere in the agreement);
- (c) are necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement including those relating to:
  - (i) the prevention of deceptive and fraudulent practices or to deal with the effects of a default on contracts;
  - (ii) the protection of the privacy of individuals in relation to the processing and dissemination of personal data and the protection of confidentiality of individual records and accounts;
  - (iii) safety;
  - (iv) customs enforcement, or
  - (v) protection of intellectual property rights;
- (d) relate to the importation or exportation of gold or silver;
- (e) are necessary to the protection of national treasures of artistic, historic or archaeological value;
- (f) relate to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption of goods, domestic supply or consumption of services and on domestic investors;
- (g) relate to the products of prison labour; or
- (h) are inconsistent with ... National Treatment, provided that the difference in treatment is aimed at ensuring the effective or equitable imposition or collection of direct

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<sup>19</sup> The Parties agree that, in accordance with Chapter 5 of Title IV, measures necessary to combat child labour shall be deemed to be included within the meaning of measures necessary to protect public morals or measures necessary for the protection of health.

taxes in respect of economic activities, investors or service suppliers of the EC Party or (an ACP state).

#### SECURITY EXCEPTION

Nothing in this Agreement shall be construed:

- (a) to require the EC Party or (a signatory ACP state) to furnish any information the disclosure of which it considers contrary to its essential security interests;
- (b) to prevent the EC Party or (a signatory ACP state) from taking any action which it considers necessary for the protection of its essential security interests;
  - (i) relating to fissionable and fusionable materials or the materials from which they are derived;
  - (ii) relating to economic activities carried out directly or indirectly for the purpose of supplying or provisioning a military establishment;
  - (iii) connected with the production of or trade in arms, munitions and war materials;
  - (iv) relating to government procurement indispensable for national security or for national defence purposes; or
  - (v) taken in time of war or other emergency in international relations; or
- (c) to prevent the EC Party or (a signatory ACP state) from taking any action in pursuance of its international obligations under the United Nations Charter for the maintenance of international peace and security.

#### TAXATION EXCEPTION

1. Nothing in this Agreement or in any arrangement adopted under this Agreement shall be construed to prevent the EC Party or (a signatory ACP state) from distinguishing, in the application of the relevant provisions of their fiscal legislation, between taxpayers who are not in the same situation, in particular with regard to their place of residence or with regard to the place where their capital is invested.

2. Nothing in this Agreement or in any arrangement adopted under this Agreement shall be construed to prevent the adoption or enforcement of any measure aimed at preventing the avoidance or evasion of taxes pursuant to

the tax provisions of agreements to avoid double taxation or other tax arrangements or domestic fiscal legislation.

3. Nothing in this Agreement shall affect the rights and obligations of the EC Party or (a signatory ACP state) under any tax convention. In the event of any inconsistency between this Agreement and any such convention, that convention shall prevail to the extent of the inconsistency.

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## **INSTITUTIONAL PROVISIONS**

While a proliferation of institutions has been considered a bad thing, certain important institutions can be useful addressing challenges likely to arise from EPAs.

The Cariforum-EU EPA provides for various institutions.

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Cariforum-EU EPA

### **Article 1**

#### **Joint CARIFORUM-EC Council**

1. A Joint CARIFORUM-EC Council is hereby established, which shall supervise the implementation of this Agreement. The Joint CARIFORUM-EC Council shall meet at ministerial level at regular intervals, not exceeding a period of two years, and extraordinarily whenever circumstances so require, if the Parties so agree.
2. Without prejudice to the functions of the Council of Ministers as defined in article 15 of the Cotonou Agreement, the Joint CARIFORUM-EC Council shall generally be responsible for the operation and implementation of this Agreement and shall monitor the fulfilment of its objectives. It shall also examine any major issue arising within the framework of this Agreement, as well as any other bilateral, multilateral or international question of common interest and affecting trade between the Parties.
3. The Joint CARIFORUM-EC Council shall also examine proposals and recommendations from the Parties for the review of this Agreement.

### **Article 2**

#### **Composition and rules of procedures**

1. The Joint CARIFORUM-EC Council shall be composed, on the one hand, of the members of the Council of the European Union and members of the European Commission, and, on the other hand, of the representatives of the Governments of the Signatory CARIFORUM States.
2. The CARIFORUM States shall mandate one of their representatives to act on their behalf on all matters under this Agreement for which they have agreed to act collectively.
3. The Joint CARIFORUM-EC Council shall establish its own rules of procedure.

4. The Joint CARIFORUM-EC Council shall be chaired in turn by a Member of the European Commission and by a CARIFORUM representative, in accordance with the provisions laid down in its rules of procedure. The Joint CARIFORUM-EC Council shall provide periodic reports on the operation of this Agreement to the Council of Ministers established in accordance with Article 15 of the Cotonou Agreement.

5. Members of the Joint CARIFORUM-EC Council may arrange to be represented, in accordance with the conditions laid down in its rules of procedure.

### Article 3

#### **Decision-making powers and procedures**

1. In order to attain the objectives of this Agreement, the Joint CARIFORUM-EC Council shall have the power to take decisions in respect of all matters covered by the Agreement.

2. The decisions taken shall be binding on the Parties and the Signatory CARIFORUM States, which shall take all the measures necessary to implement them in accordance with each Party's and Signatory CARIFORUM State's internal rules.

3. The Joint CARIFORUM-EC Council may also make appropriate recommendations.

4. For the matters for which Signatory CARIFORUM States agree to act collectively the Joint CARIFORUM-EC Council shall adopt decisions and recommendations by mutual agreement between the Parties. For the matters for which Signatory CARIFORUM States have not agreed to act collectively, adoption of any decision shall require the agreement of the Signatory CARIFORUM State or States concerned.

### Article 4

#### **CARIFORUM-EC Trade and Development Committee**

1. The Joint CARIFORUM-EC Council shall be assisted in the performance of its duties by a CARIFORUM-EC Trade and Development Committee composed of representatives of the Parties, normally at senior officials level. The CARIFORUM States shall mandate one of their representatives to act on their behalf on all matters under this Agreement for which they have agreed to act collectively. Any Party or Signatory CARIFORUM State may bring to the attention of the Committee any issue related to the application of the Agreement or the attainment of its objectives.

2. The Joint CARIFORUM-EC Council shall establish the rules of procedure of the CARIFORUM-EC Trade and Development Committee. The CARIFORUM-EC Trade and Development Committee shall be chaired alternately by a representative of each of

the Parties for a period of one year. It shall report annually to the Joint CARIFORUM-EC Council.

3. The CARIFORUM-EC Trade and Development Committee shall have, in particular, the following functions:

(a) In the area of trade:

- (1) to supervise and be responsible for the implementation and proper application of the provisions of the Agreement and to discuss and recommend cooperation priorities in this regard;
- (2) to oversee the further elaboration of the provisions of this Agreement and evaluate the results obtained in its application;
- (3) to undertake action to avoid disputes and to resolve disputes that may arise regarding the interpretation or application of the Agreement, in accordance with the provisions of Part III;
- (4) to assist the Joint CARIFORUM-EC Council in the performance of its functions;
- (5) to monitor the development of regional integration and of economic and trade relations between the Parties;
- (6) to monitor and assess the impact of the implementation of this Agreement on the sustainable development of the Parties;
- (7) to discuss and undertake actions that may facilitate trade, investment and business opportunities between the Parties; and
- (8) to discuss any matters pertaining to this Agreement and any issue liable to affect the attainment of its objectives.

(b) In the area of development:

- (1) to assist the Joint CARIFORUM-EC Council in the performance of its functions regarding development cooperation related matters falling under this Agreement;
- (2) to monitor the implementation of the cooperation provisions laid down in this Agreement and to coordinate such action with third party donors;
- (3) to make recommendations on trade-related cooperation between the Parties;
- (4) to keep under periodic review the cooperation priorities set out in this Agreement, and to make recommendations on the inclusion of new priorities, as appropriate; and
- (5) to review and discuss cooperation issues pertaining to regional integration and implementation of this Agreement.

4. In the performance of its functions, the CARIFORUM-EC Trade and Development Committee may:

- (a) set up and oversee any special committees or bodies to deal with matters falling within its competence, and determine their composition and duties, and their rules of procedure;
- (b) meet at any time agreed by the Parties;

(c) consider any issues under this Agreement and take appropriate action in the exercise of its functions; and

(d) take decisions or make recommendations in the cases provided for in this Agreement or where such implementing power has been delegated to it by the Joint CARIFORUM-EC Council. In such cases the Committee shall take decisions or make recommendations in accordance with the conditions laid down in Article 3(4).

5. The CARIFORUM-EC Trade and Development Committee shall generally meet once a year for an overall review of the implementation of this Agreement, on a date and with an agenda agreed in advance by the Parties, in the EC Party one year and in a CARIFORUM State the next. The Committee shall hold specific working sessions to perform the functions provided for in paragraph 3(a) and (b).

## Article 5

### **CARIFORUM-EC Parliamentary Committee**

1. A CARIFORUM-EC Parliamentary Committee is hereby established. It shall be a forum for members of the European Parliament and the CARIFORUM States legislatures to meet and exchange views. It shall meet at intervals which it shall itself determine. It shall cooperate with the Joint Parliamentary Assembly provided for in Article 15 of the Cotonou Agreement.

2. The CARIFORUM-EC Parliamentary Committee shall consist of members of the European Parliament, on the one hand, and of members CARIFORUM States legislatures, on the other. Representatives of the Parties may attend the meetings of the CARIFORUM-EC Parliamentary Committee.

3. The CARIFORUM-EC Parliamentary Committee shall establish its rules of procedure and inform the Joint CARIFORUM-EC Council thereof.

4. The CARIFORUM-EC Parliamentary Committee shall be chaired in turn by a representative of the European Parliament and a representative of a CARIFORUM State legislature, in accordance with the provisions to be laid down in its rules of procedure.

5. The CARIFORUM-EC Parliamentary Committee may request of the Joint CARIFORUM-EC Council relevant information regarding the implementation of this Agreement, and the Joint CARIFORUM-EC Council shall supply the Committee with the requested information.

6. The CARIFORUM-EC Parliamentary Committee shall be informed of the decisions and recommendations of the Joint CARIFORUM-EC Council.

7. The CARIFORUM-EC Parliamentary Committee may make recommendations to the Joint CARIFORUM-EC Council and the CARIFORUM-EC Trade and Development Committee.

## Article 6

### **CARIFORUM-EC Consultative Committee**

1. A CARIFORUM-EC Consultative Committee is hereby established with the task of assisting the Joint CARIFORUM-EC Council to promote dialogue and cooperation between representatives of organisations of civil society, including the academic community, and social and economic partners. Such dialogue and cooperation shall encompass all economic, social and environmental aspects of the relations between the EC Party and CARIFORUM States, as they arise in the context of the implementation of this Agreement.
  2. Participation in the CARIFORUM-EC Consultative Committee shall be decided by the Joint CARIFORUM-EC Council, with a view to ensuring a broad representation of all interested parties.
  3. The CARIFORUM-EC Consultative Committee shall carry out its activities on the basis of consultation by the Joint CARIFORUM-EC Council or on its own initiative and make recommendations to the Joint CARIFORUM-EC Council. Representatives of the Parties shall attend the meetings of the CARIFORUM-EC Consultative Committee.
  4. The CARIFORUM-EC Consultative Committee shall adopt its rules of procedure in accord with the Joint CARIFORUM-EC Council.
  5. The CARIFORUM-EC Consultative Committee may make recommendations to the Joint CARIFORUM-EC Council and the CARIFORUM-EC Trade and Development Committee.
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## DISPUTE SETTLEMENT

While the Cariforum, Pacific and SADC EPAs have quite detailed dispute settlement provisions, the others contain comparably limited provisions.

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### SADC-EU EPA

#### DISPUTE AVOIDANCE AND SETTLEMENT

##### Article 68

##### Objective

The objective of this Part is to avoid or settle any dispute between the parties.

##### Article 69

##### Scope

This Part shall apply to any dispute concerning the interpretation and application of this Agreement except as otherwise expressly provided for in this agreement.

#### Chapter I

##### Consultations and mediation

##### Article 70

##### Consultations

1. The Parties shall endeavour to resolve any dispute referred to in Article 69 by entering into consultations in good faith with the aim of reaching an amicable solution.
2. A Party shall seek consultations by means of a written request to the other Party, copied to the Trade and Development Committee, identifying the measure at issue and the provisions of this Agreement with which it considers the measure not to be in conformity.
3. Consultations shall be held within 40 days of the date of the receipt of the request. The consultations shall be deemed concluded within 60 days of the date of the receipt of the request, unless both Parties agree to continue consultations. All information disclosed during the consultations shall remain confidential.
4. Consultations on matters of urgency, including those regarding perishable or seasonal goods shall be held within 15 days of the date of the receipt of the request, and shall be deemed concluded within 30 days of the date of the receipt of the request.
5. If consultations are not held within the timeframes laid down in paragraph 3 or in paragraph 4 respectively, or if consultations have been concluded and no mutually agreed solution has been reached, the complaining Party may request the establishment of an arbitration panel in accordance with Article 73.

## Article 71

### Mediation

1. If consultations fail to produce a mutually agreed solution, the Parties may, by agreement, seek recourse to a mediator. Unless the Parties agree otherwise, the terms of reference for the mediation shall be the matter referred to in the request for consultations.
2. The mediator's opinion may include a recommendation on how to resolve the dispute consistent with the provisions referred of this Agreement. The mediator's opinion is non-binding.
3. The proceedings involving mediation, in particular all information disclosed and positions taken by the Parties during these proceedings shall remain confidential.

## Chapter II

### Dispute settlement procedures

#### Section 1 – Arbitration Procedure

### Article 72

#### Initiation of the arbitration procedure

1. Where the Parties have failed to resolve the dispute by recourse to consultations as provided for in Article 70, or by recourse to mediation as provided for in Article 71, the complaining Party may request the establishment of an arbitration panel.
2. The request for the establishment of an arbitration panel shall be made in writing to the Party complained against and the Trade and Development Committee. The complaining Party shall identify in its request the specific measures at issue, and it shall explain how such measure constitutes a breach of the provisions of this Agreement.

## Article 73

### Establishment of the arbitration panel

1. An arbitration panel shall be composed of three arbitrators.
2. Each party to the dispute shall appoint one arbitrator within 10 days of the date of the receipt of the request for the establishment of an arbitration panel. The two arbitrators shall appoint a third arbitrator, who shall be the chairperson of the arbitration panel within 20 days of the receipt of the request for the establishment of a panel. The Chairperson shall not be a national of the Parties nor permanently reside in the territory of the Parties.
3. If all three arbitrators are not appointed within 20 days, or if, within 10 days of the appointment of the third arbitrator either Party submits a reasoned written objection to the arbitrators chosen to the Trade and Development Committee, either Party may request the chairperson of the Trade and Development Committee, or her or his delegate, to select all three members by lot from the list established under Article 87, one among the individuals proposed by the

complaining Party, one among the individuals proposed by the Party complained against and one among the individuals selected by the Parties to act as chairperson. Where the Parties agree on one or more of the members of the arbitration panel, any remaining members shall be selected by the same procedure.

4. The chairperson of the Trade and Development Committee, or her or his delegate, shall select the arbitrators within five days of the request referred to in paragraph 3 by either Party and in the presence of a representative of each Party.
5. The date of establishment of the arbitration panel shall be the date on which the three arbitrators are finally selected.

#### Article 74

##### Interim panel report

The arbitration panel shall notify to the Parties an interim report containing both the descriptive section and its findings and conclusions, as a general rule not later than 120 days from the date of establishment of the arbitration panel. In cases of urgency the time limit shall be reduced to 60 days. Any Party may submit written comments to the arbitration panel on precise aspects of its interim report within 15 days of the notification of the report.

#### Article 75

##### Arbitration panel ruling

1. The arbitration panel shall notify its ruling to the Parties and to the Trade and Development Committee within 150 days from the date of the establishment of the arbitration panel. Where it considers that this deadline cannot be met, the chairperson of the arbitration panel must notify the Parties and the Trade and Development Committee in writing, stating the reasons for the delay and the date on which the panel plans to conclude its work. Under no circumstances should the ruling be notified later than 180 days from the date of the establishment of the arbitration panel.
2. In cases of urgency, including those involving perishable and seasonal goods, the arbitration panel shall make every effort to notify its ruling within 90 days from the date its establishment. The arbitration panel may give a preliminary ruling within 10 days of its establishment on whether it deems the case to be urgent.
3. Either party may request the arbitration panel to provide a recommendation as to how the Party complained against, or as the case may be, the relevant SADC EPA State, could bring itself into compliance.

#### Section 2 – Compliance

##### Article 76

##### Compliance with the arbitration panel ruling

The Party complained against, or as the case may be, the relevant SADC EPA State, shall take any measure necessary to comply with the arbitration panel ruling and the Parties shall seek to agree on the period of time to comply with the ruling.

## Article 77

### The reasonable period of time for compliance

1. No later than 30 days after the notification of the arbitration panel ruling to the Parties, the Party complained against shall notify the complaining Party and the Trade and Development Committee of the reasonable period of time it will require to bring itself into compliance with the ruling of the arbitration panel.
2. Upon notification by the Party complained against, the Parties shall seek to agree on such a reasonable period of time. If there is disagreement between the Parties on the reasonable period of time to comply with the arbitration panel ruling, the complaining Party shall, within 30 days of the notification made under paragraph 1, request the arbitration panel in writing to determine the length of the reasonable period of time. Such request shall be notified simultaneously to the other Party and to the Trade and Development Committee. The arbitration panel shall notify its ruling to the Parties and to the Trade and Development Committee within 30 days from the date of the receipt of the request.
3. The arbitration panel will, in determining the length of the reasonable period of time, take into consideration the length of time that it will normally take the Party complained against, or as the case may be, the relevant SADC EPA State, to adopt comparable legislative or administrative measures to those identified by the Party complained against, or as the case may be, the relevant SADC EPA State, as being necessary to ensure compliance. The arbitration panel shall also take into consideration capacity constraints and the different level of development which may affect the adoption of the necessary measures.
4. In the event of the original arbitration panel, or some of its members, being unable to reconvene, the procedures set out in Article 6 shall apply. The time limit for notifying the ruling shall be 45 days from the date of the receipt of the request referred to in paragraph 2.
5. The reasonable period of time may be extended by agreement of the parties to the dispute.

## Article 78

### Review of any measure taken to comply with the arbitration panel ruling

1. The Party complained against shall notify the other Party and the Trade and Development Committee before the end of the reasonable period of time of any measure that it has taken to comply with the arbitration panel ruling.
2. In the event that there is disagreement between the Parties concerning the compatibility of any measure notified under paragraph 1, with the provisions of this Agreement, the complaining Party may request in writing the arbitration panel to rule on the matter. Such request shall identify the specific measure at issue and it shall explain how such measure is incompatible with the provisions of this Agreement. The arbitration panel shall notify its ruling within 90 days of the date of the receipt of the request. In cases of urgency, including those involving perishable and seasonal goods, the arbitration panel shall notify its ruling within 45 days of the date of the receipt of the request.

3. In the event of the original arbitration panel, or some of its members, being unable to reconvene, the procedures set out in Article 73 shall apply. The time limit for notifying the ruling shall be 105 days from the date of the receipt of the request referred to in paragraph 2.

#### Article 79

##### Temporary remedies in case of non-compliance

12. 1. If the Party complained against fails to notify any measure taken to comply with the arbitration panel ruling before the expiry of the reasonable period of time, or if the arbitration panel rules that the measure notified under Article 78 paragraph 1 is not compatible with the provisions of this Agreement, the Party complained against or, as the case may be, the relevant SADC EPA State shall, if so requested by the complaining Party, present an offer for compensation. Such compensation may include or consist of financial compensation although nothing in this Agreement shall oblige the Party complained against, or as the case may be, the relevant SADC EPA State, to offer such financial compensation.
2. If no agreement on compensation is reached within 30 days of the end of the reasonable period of time or of the arbitration panel's ruling under Article 78 that a measure taken to comply is not compatible with this Agreement, the complaining Party shall be entitled, upon notification to the other Party, to adopt appropriate measures. Such measures may be adopted either by the complaining Party, or as the case may be, the relevant SADC EPA State.
3. In adopting such measures the complaining Party or as the case may be, the relevant SADC EPA State, shall seek to select measures proportionate to the violation which least affect the attainment of the objectives of this Agreement and shall take into consideration their impact on the economy of the Party complained against and on the individual SADC EPA States.
4. In the event that the EC Party fails to notify any measure taken to comply with the arbitration panel ruling by the expiry of the reasonable period of time at the latest, or if the arbitration panel rules that the measure notified under Article 11 paragraph 1 is not compatible with that Party's obligations under this Agreement, and the complaining Party asserts that adopting appropriate measures would result in significant damage to its economy, the EC Party shall consider providing financial compensation.
5. The EC Party shall exercise due restraint in asking for compensation or adopting appropriate measures pursuant to paragraphs 1 or 2 of this Article.
6. Compensation or appropriate measures shall be temporary and shall be applied only until any measure found to violate the provisions of this Agreement has been withdrawn or amended so as to bring it into conformity with those provisions or until the Parties have agreed to settle the dispute.

#### Article 80

##### Review of any measure taken to comply after the adoption of appropriate measures

1. The Party complained against shall notify the other Party and the Trade and Development Committee of any measure it has taken to comply with the ruling of the arbitration panel and of its request for an end to application of appropriate measures by the complaining Party or as the case may be, the relevant SADC EPA State.
2. If the Parties do not reach an agreement on the compatibility of the notified measure with the provisions of this Agreement within 30 days of the date of notification, the complaining Party shall request in writing the arbitration panel to rule on the matter. Such request shall be notified to the other Party and to the Committee. The arbitration panel ruling shall be notified to the Parties and to the Committee within 45 days of the date of the receipt of the request. If the arbitration panel rules that any measure taken to comply is not in conformity with the provisions of this Agreement, the arbitration panel will determine whether the complaining Party or as the case may be, the relevant SADC EPA State, can continue to apply appropriate measures. If the arbitration panel rules that any measure taken to comply is in conformity with the provisions of this Agreement, the appropriate measures shall be terminated.
3. In the event of the original arbitration panel, or some of its members, being unable to reconvene, the procedures laid down in Article 73 shall apply. The period for notifying the ruling shall be 60 days from the date of the receipt of the request referred to in paragraph 2.

### Section 3 – Common Provisions

#### Article 81 Mutually agreed solution

The Parties may reach a mutually agreed solution to a dispute under this Chapter at any time. They shall notify the Trade and Development Committee of any such solution. Upon adoption of the mutually agreed solution, the dispute settlement procedure shall be terminated.

#### Article 82 Rules of Procedure and Code of Conduct

1. The Parties shall agree on Rules of Procedure and a Code of Conduct by 1 July 2008 which shall be adopted by the Council. The Rules of Procedure shall address the issue of opening arbitration panel hearings to the public.
2. Any meeting of the arbitration panel shall be open to the public in accordance with the Rules of Procedure, unless the arbitration panel decides otherwise on its own motion or at the request of the Parties. The arbitration panel shall meet in closed session when the submissions or arguments of a Party contain confidential information.

#### Article 83 Information and technical advice

At the request of a Party, or upon its own initiative, the arbitration panel may obtain information from any source, including the Parties involved in the dispute, it deems appropriate for the arbitration panel proceeding. The arbitration panel shall also have the right to seek the opinion of relevant experts as it deems appropriate. Interested entities are authorised to submit amicus curiae briefs to the arbitration panels in accordance with the Rules of Procedure. Any information obtained in this manner must be disclosed to the Parties to the dispute and submitted for their comments.

#### Article 84 Languages of the submissions

1. The written and oral submissions of the Parties shall be made in any official languages of the Parties.
2. The Parties shall endeavour to agree on a common working language for any specific proceedings under this Part. If the Parties are unable to agree on a common working language, each Party shall arrange for and bear the costs of the translation of its written submissions and interpretation at the hearings into the language chosen by the Party complained against, unless such language is an official language of that Party. The EC Party shall, when seeking to agree on a common working language, take into account the potential impact of such costs on SADC EPA States.

#### Article 85 Rules of interpretation

An arbitration panel shall settle a dispute in accordance with the provisions of this Agreement and the customary rules of interpretation of public international law, including those set out in the Vienna Convention on the Law of Treaties. The rulings of the arbitration panel cannot add to or diminish the rights and obligations provided for in this Agreement.

#### Article 86 Arbitration panel rulings

1. The arbitration panel shall make every effort to take any decision by consensus. Where, nevertheless, a decision cannot be arrived at by consensus, the matter at issue shall be decided by majority vote.
2. The ruling shall set out the findings of fact, the applicability of the relevant provisions of this Agreement and the reasoning behind any findings and conclusions that it makes. The Trade and Development Committee shall make the arbitration panel rulings publicly available unless it decides not to do so.

#### Article 87 List of arbitrators

1. The Trade and Development Committee shall, no later than three months after the provisional application of this Agreement, establish a list of 21 individuals who are willing and able to serve as arbitrators. Each of the Parties shall select eight individuals to serve as arbitrators. The Parties shall also agree on five individuals that are not nationals of either Party and who shall act as chairperson to the arbitration panel. The Committee will ensure that the list is always maintained in accordance with this Article.
2. Arbitrators shall have specialised knowledge or experience of law and international trade. They shall be independent, serve in their individual capacities and not take instructions from any organisation or government, or be affiliated with the government of any of the Parties, and shall comply with the Code of Conduct annexed to the Rules of Procedures.
3. The Committee may establish an additional list of 15 individuals having a sectoral expertise in specific matters covered by this Agreement. When recourse is made to the selection procedure of Article 73, the chairperson of the Committee may use such a sectoral list upon agreement of both Parties.

#### Article 88 Relation with WTO obligations

1. Arbitration bodies set up under this Agreement shall not arbitrate disputes on a Party's, or as the case may be, the relevant SADC EPA State's, rights and obligations under the Agreement establishing the WTO.
2. Recourse to the dispute settlement provisions of this Agreement shall be without prejudice to any action in the WTO framework, including dispute settlement action. However, where a Party, or as the case may be, the relevant SADC EPA State has, with regard to a particular measure, initiated a dispute settlement proceeding under this Agreement or under the WTO Agreement, it may not initiate a dispute settlement proceeding regarding the same measure until the first proceeding has ended. For purposes of this paragraph, dispute settlement proceedings under the WTO Agreement are deemed to be initiated by a Party's, or as the case may be, the relevant SADC EPA State's request for the establishment of a panel under Article 6 of the Understanding on Rules and Procedures Governing the Settlement of Disputes of the WTO.
3. Nothing in this Agreement shall preclude a Party or SADC EPA State from implementing the suspension of obligations authorised by the Dispute Settlement Body of the WTO.

#### Article 89 Time lines

1. All time limits laid down in this Part, including the limits for the arbitration panels to notify their rulings, shall be counted in calendar days from the day following the act or fact to which they refer.

2. Any time limit referred to in this Part may be extended by mutual agreement of the Parties.
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## FINAL PROVISIONS

Various provisions can be included under final provisions. The Cariforum-EU EPA contains a provision for a balance of payments safeguard.

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### SADC-EU EPA

#### Definition of the Parties and fulfilment of obligations

1. The Contracting Parties of this Agreement shall be South Africa, Botswana, Lesotho, Namibia, Swaziland and Mozambique hereinafter referred to, for ease of reference, as the "SADC EPA States", on the one part, and the European Community or its Member States or the European Community and its Member States, within their respective areas of competence as derived from the Treaty establishing the European Community, hereinafter referred to as the "EC Party", on the other part.
2. For the purposes of this Agreement:
  - (a) the term "Parties" shall refer to the SADC EPA States acting collectively and the EC Party. The term "Party" shall refer to the SADC EPA States acting collectively or the EC Party as the case may be.
  - (b) the term "SADC EPA states" shall refer to the EPA SADC states acting individually
3. The SADC EPA States and the EC Party shall adopt any general or specific measures required for them to fulfil their obligations under this Agreement and shall ensure that they comply with the objectives laid down in this Agreement.

**Notes:** "Least developed country" and "small island State" can also be defined (please see the Pacific-EU EPA, which lists them)

#### Exchange of information

1. In order to facilitate communication relating to the effective implementation of this Agreement the Parties shall designate a focal point for exchange of information upon entry into force of this Agreement. The designation of a focal point for exchange of information is without prejudice to the specific designation of competent authorities under specific Titles or Chapters of this Agreement.
2. On the request of the focal points for exchange of information, each Party shall indicate the office or official responsible for any matter pertaining to the implementation of this Agreement and provide the required support to facilitate communication with the requesting Party.
3. On request of the other Party, and to the extent legally possible each Party or the SADC EPA States, as the case may be, shall provide information and reply

promptly to any question from the other Party relating to an actual or proposed measure that might affect trade between the Parties.

### Transparency

1. A Party, or a SADC EPA State as the case may be, shall publish or make publicly available its laws, regulations, procedures and administrative rulings of general application as well as any other commitments under an international agreement relating to any trade matter covered by this Agreement. Any such measures adopted after the entry into force of this Agreement shall be brought to the attention of the other Party.
2. Without prejudice to specific transparency provisions in this Agreement, the information referred to under this Article shall be considered to have been brought to the attention of the other Party when the information has been made available by appropriate notification to the WTO or when the information has been made available on the official, publicly and fee-free accessible website or been made available to a focal point of the other Party. However, where the EC Party has provided such information which has not been notified to the WTO through an official, public and fee-free accessible website, a SADC EPA State, which, because of capacity constraints, has difficulties accessing such a website, may the EC Party request to provide such information to the relevant focal point.
3. Nothing in this Agreement shall require any Party to provide confidential information, the disclosure of which would impede law enforcement, or otherwise be contrary to the public interest, or which would prejudice legitimate commercial interests of particular enterprises, public or private, except to the extent that it may be necessary to be disclosed in the context of a dispute settlement proceeding under this Agreement. Where such disclosure is considered necessary by a panel established under this Agreement, the panel shall ensure that confidentiality is fully protected.

### Temporary difficulties in implementation

In the event that a Party, as a result of factors beyond its control, encounters difficulties in meeting its obligations under this Agreement, it shall immediately bring the matter to the attention of the Joint Council.

### Regional preferences

1. Nothing in this Agreement shall oblige a Party to extend to the other Party to this Agreement any more favourable treatment which is applied by a Party as part of its respective regional integration process.
2. Any more favourable treatment and advantage that may be granted under this Agreement by any SADC EPA State to the EC Party shall be enjoyed by each other SADC EPA State.

#### Outermost regions of the European Community

1. Taking account of the geographical proximity of the outermost regions of the European Community and the SADC EPA States and in order to reinforce economic and social links between these regions and the SADC EPA States, the Parties shall endeavour to facilitate co-operation in all areas covered by this Agreement between the outermost regions and the SADC EPA States.
2. The objectives enunciated in paragraph 1 shall also be pursued, wherever possible, through fostering the joint participation of the SADC EPA States and the outermost regions in framework and specific programmes of the European Community in areas covered by this Agreement.
3. The EC Party shall endeavour to ensure coordination between the different financial instruments of the European Community's cohesion and development policies in order to foster cooperation between SADC EPA States and the outermost regions of the European Community in the areas covered by this Agreement.
4. Nothing in this Agreement shall prevent the EC Party from applying existing measures aimed at addressing the structural social and economic situation of the Outermost region pursuant to Article 299(2) of the Treaty establishing the European Community. This provision shall not permit the maintenance of tariffs on trade between the Parties other than those permitted pursuant to paragraph 9 of Annex 2.

#### Relation with Cotonou Agreement

With the exception of development cooperation provided for in Title II of Part III of the Cotonou Agreement, in case of any inconsistency between the provisions of this Agreement and the provisions of Title II of Part III of the Cotonou Agreement, the provisions of this Agreement shall prevail to the extent of such inconsistency.

#### Relations with the TDCA

1. With the exception of development cooperation, in case of any inconsistency between the provisions of this Agreement and the provisions of Titles II, III, IV and VIII of the TDCA, the provisions of this Agreement shall prevail to the extent of such inconsistency.

2. Any Decision adopted by the EU-SA Joint Cooperation Council, established under the Agreement on Trade Development and Cooperation between the European Community and its Member States, of the one part, and the Republic of South Africa, of the other part, shall be applicable unless explicitly repealed or amended by this Agreement, or Decisions adopted by the Joint Council established by this Agreement.
  
4. Nothing in this Agreement shall be construed so as to prevent the adoption by the EC Party or a SADC EPA State of appropriate measures pursuant to the Cotonou Agreement or the TDCA, as the case may be.

#### Relations with the WTO Agreement

The Parties agree that nothing in this Agreement requires them or the SADC EPA States to act in a manner inconsistent with their WTO obligations.

#### Entry into force

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 depository 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 depository. 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.

#### Duration

1. This Agreement shall be valid [until the year 2020] [indefinitely].

2. Notwithstanding paragraph 1, the comprehensive economic partnership agreement shall, at its entry into force, replace this agreement.

(**Note:** paragraph 2 is based on the EAC-EU EPA, article 43)

3. The EC Party or a SADC EPA State may give written notice of its intention to denounce this Agreement.
4. Denunciation shall take effect six months after the notification referred to in the previous paragraph.

#### Territorial application

This Agreement shall apply, on the one hand, to the territories in which the Treaty establishing the European Community is applied and under the conditions laid down in that Treaty, and, on the other hand, to the territories of the SADC EPA States.

#### Revision clause

1. Without prejudice to Article 67, the Parties agree to review this Agreement no later than five years after its entry into force.
2. As regards the implementation of this Agreement, either Party may make suggestions oriented towards adjusting trade related cooperation, taking into account the experience acquired during the implementation thereof.
3. The Parties agree that this Agreement may need to be reviewed in light of further developments in international economic relations and in the light of the expiration of the Cotonou Agreement.

#### Amendments

1. Any Party may submit proposals for amendments to this Agreement to the Joint Council for consideration and approval.
2. Amendments to this Agreement shall, after approval by the Joint Council, be submitted to the Parties for ratification, acceptance or approval in accordance with their respective constitutional or internal legal requirements.

#### Accession of new EU Member States

1. The Joint EPA Council shall be advised of any request made by a third State to become a member of the European Union. During the negotiations between the Union and the applicant State, the EC Party shall provide the SADC EPA States with any relevant information and they in turn shall convey their concerns to the EC Party so that it can take them fully into account. The SADC EPA States shall be notified by the EC Party of any accession to the European Union (EU).
2. Any new Member State of the EU shall accede to this Agreement from the date of its accession to the EU by means of a clause to that effect in the act of accession. If the act of accession to the Union does not provide for such automatic accession of the EU Member State to this Agreement, the EU Member State concerned shall accede by depositing an act of accession with the General Secretariat of the Council of the European Union, which shall send certified copies to the SADC EPA States.
3. The Parties shall review the effects of the accession of new EU Member States on this Agreement. The Joint EPA Council may decide on any transitional or amending measures that might be necessary.

#### Accession

1. A third state or organisation having competence for the matters covered by this Agreement, may request to accede to this Agreement. If the Joint Council agrees to consider such a request, the Parties and the state or organisation requesting to accede shall conduct negotiations on the terms of accession. The Protocol of Accession shall be approved by the Joint Council and then submitted for ratification, acceptance or approval in accordance with the Parties' respective constitutional or internal legal requirements.
2. The Parties shall review the effects of such accession on this Agreement. The Joint Council may decide on any transitional or amending measures that might be necessary.

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#### Cariforum-EU EPA

#### Balance of payments difficulties

1. Where any Signatory CARIFORUM States or the EC Party is in serious balance of payments and external financial difficulties, or under threat thereof, it may adopt or maintain restrictive measures with regard to trade in goods, services and establishment.
2. The Signatory CARIFORUM States and the EC Party shall endeavour to avoid the application of the restrictive measures referred to in paragraph 1.

3. Any restrictive measure adopted or maintained under this Article shall be non-discriminatory and of limited duration and shall not go beyond what is necessary to remedy the balance of payments and external financial situation. They shall be in accordance with the conditions established in the WTO Agreements and consistent with the Articles of Agreement of the International Monetary Fund, as applicable.

4. Any Signatory CARIFORUM States or the EC Party maintaining or having adopted restrictive measures, or any changes thereto, shall promptly notify them to the other Party and present, as soon as possible, a time schedule for their removal.

5. Consultation shall be held promptly within the CARIFORUM-EC Implementation Committee. Such consultations shall assess the balance of payments situation of the concerned Signatory CARIFORUM States or the EC Party and the restrictions adopted or maintained under this Article, taking into account, inter alia, such factors as:

- (a) the nature and extent of the balance of payments and the external financial difficulties;
- (b) the external economic and trading environment;
- (c) alternative corrective measures which may be available.

The consultations shall address the compliance of any restrictive measures with paragraphs 3 and 4. All findings of statistical and other facts presented by the International Monetary Fund relating to foreign exchange, monetary reserves and balance of payments shall be accepted and conclusions shall be based on the assessment by the Fund of the balance of payments and the external financial situation of the concerned CARIFORUM State or EC Party.

### **Collaboration in the fight against illegal financial activities**

The EC Party and the Signatory CARIFORUM States are committed to prevent and fight against illegal, fraudulent and corrupt activities, money laundering and terrorist financing and shall take the necessary legislative and administrative measures to comply with international standards, including those laid down in the United Nations Convention against Corruption, the United Nations Convention on Transnational Organised Crime and its Protocols and the United Nations Convention for the Suppression of Terrorist Financing. The EC Party and the Signatory CARIFORUM States agree to exchange information and cooperate in these areas.

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### Languages and Authentic texts

This Agreement is drawn up in duplicate in the Bulgarian, Czech, Danish, Dutch, English, Estonian, Finnish, French, German, Greek, Hungarian, Irish, Italian, Latvian, Lithuanian, Maltese, Polish, Portuguese, Romanian, Slovak, Slovenian, Spanish and Swedish languages, each of these texts being equally authentic. In the event of a

contradiction, reference shall be made to the language in which the agreement was negotiated.

### Annexes

The Annexes and Protocols to this Agreement shall form an integral part thereof.

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