

## Some Implications of Brexit for UK - African Relations

### Brexit related Challenges

- The immediate post referendum challenge is to contain the consequences of **uncertainty**: about the UK-EU relationship, developments in financial markets, and with respect to formal trade relations between the United Kingdom and its many trading partners, including Africa.
- This is a difficult and multifaceted task for which strong political leadership and clearly stated objectives are necessary. Even if a definite decision to withdraw from Europe is announced soon, it will take a long time for the practicalities of the divorce to be worked out. There should, in the meantime, be a basic plan about future relations with Africa.
- Africa's challenge is to respond through constructive engagement about its present and future relationship with the UK (and the EU) and how to ensure that the consequences of Brexit will not derail its own regional and global integration and economic development plans.
- Existing market access arrangements for goods from Africa in terms of pre-Brexit agreements, including those soon to be implemented<sup>1</sup>, should go ahead.
- If the latter requires special mechanisms or interim steps, they should be adopted. All relevant parties should work together in order to prevent the disruption of mutual trade.

### Context and Responses

When Her Majesty's Government (HMG) designs its responses to the recent referendum result and how to prioritize matters, the implications of Brexit for relations with Africa merit the necessary attention. Future UK-Africa relations need a sound platform to ensure stability, predictability, and to serve as a basis for conducting commercial transactions. The UK-African dimension is an important element of the UK's new foreign relations and goes beyond trade and commerce; to include security and immigration aspects too.

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<sup>1</sup> The SADC EPA has to be implemented from the beginning of October 2016.

The issues to be addressed are inter-related and involve many technical questions. New trade arrangements with African nations will e.g. have to be WTO compatible; while Free Trade Agreements (FTAs) require their own customs administration, rules of origin and measures to prevent trade deflection. FTAs also contain regional MFN clauses; in order to accommodate other trade agreements and future trade liberalization schemes with third parties.<sup>2</sup> Choices regarding the benefits/costs of bilateral versus regional trade agreements will have to be made. New inter-governmental institutions may become necessary.

Additional factors need to be considered; that time is of the essence<sup>3</sup> and that all affected parties (including African Governments) should become involved in the efforts to re-establish new and long-term bilateral and regional relationships. The challenges ahead require new national policy responses but also mutuality. Lasting structures and arrangements capable of promoting the interests of all the parties involved cannot come about through unilateral action.

The interests of investors and the private sector are also at stake. Major investment and other company decisions are in limbo pending some indication as to the direction that the negotiations on which the UK must now embark, may take.

### **Practical and legal Consequences of Brexit**

Negotiations in terms of Article 50 of the Lisbon Treaty will be primarily about the withdrawal process but should not be conducted without proper consideration of the content of future UK-ACP relations.

Exit from the EU poses several simultaneous challenges. The costs involved in undoing well integrated integration arrangements (with ramifications over a wide spectrum<sup>4</sup>) must be contained; while essential aspects of existing arrangements will

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<sup>2</sup> The SADC EPA contains a regional MFN provision. It was one of the most difficult aspects to agree on during the 10 years of negotiations required to conclude this agreement. Its implementation starts in October 2016. Ratification on the African side is well advanced.

<sup>3</sup> The implementation of the SADC EPA starts in October 2016. The opportunities will not be lost on other international actors; the first visit by an Indian Prime Minister to South Africa (Mozambique was also included) in a decade years took place during the week of 4 July 2016. Eight memoranda of understanding were signed.

<sup>4</sup> British companies trading in the EU will need approval from the new UK competition authority and the European Commission, risking different rulings. Britain will have a free hand to aid national industries but it will not be able to oppose subsidies granted by EU governments. WTO disputes may follow; including in disciplines such as standards, SPS measures, geographical indications and intellectual property.

have to be renegotiated. More than only direct UK-EU relations will now need new foundations. The UK has for decades interacted with third parties (including African, Caribbean and Pacific (ACP) countries) and the WTO community as an EU member and through the services provided by the Commission.

Those ongoing EU trade negotiations (with e.g. the USA under the Transatlantic Partnership, the EPAs, and new ones mooted in respect of China and others) will now exclude the UK. HMG will eventually have to secure separate deals with such parties; complete with offers for tariff liberalization, services schedules, rules of origin, standards etc.

A new policy framework for UK-ACP relations is required to replace trade and development arrangements presently governed by EU agreements. The UK's deals could end up being similar to those which the EU has now, but this is not a certainty. It may want to promote its own special interests and respond differently to contemporary global challenges.

It should not be assumed that the EPA framework is still the optimal foundation for ACP-UK relations. The 2030 Agenda for Sustainable Development, major changes in global trade, and disappointment about the post Cotonou results pose the need for a critical analysis of EU development policies and how to design better arrangements.<sup>5</sup> More attention to tailor made agreements with smaller configurations might be called for. There is an opportunity now for the UK to investigate these issues and to contemplate more appropriate outcomes and a new foundation for its own initiatives.

African governments may also emphasize the unique historical ties with the UK. Aid for trade considerations will figure prominently. The 2018 Commonwealth Heads of Government Meeting will be in the UK. The UK may face demands that the special relationship with former colonies be protected.

There is a certain urgency now but new agreements will have to be properly prepared. Sufficient time should be allowed to conclude negotiations and for new agreements to enter into force; they will have to be ratified in terms on national

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<sup>5</sup> See in this regard a recent ECDPM report: *The future of ACP-EU relations: What role for the African Union?*, 8 July 2016 [https://docs.google.com/viewerng/viewer?url=http://ecdpm.org/wp-content/uploads/Bulletin-Fridays-Commission-December-2015.pdf&hl=en\\_US](https://docs.google.com/viewerng/viewer?url=http://ecdpm.org/wp-content/uploads/Bulletin-Fridays-Commission-December-2015.pdf&hl=en_US)

constitutional requirements. Their implementation will require domestication of international instruments to the extent necessary,<sup>6</sup> or the adoption of national laws and regulations. Brexit will have several implications for national governance in the UK.

Most trade agreements involving African states lack proper implementation assistance and a clear plan for post ratification action. This particular aspect could become a more prominent feature of a new generation of agreements with and among African states. Trade facilitation, regulatory bodies (e.g. for service providers) agencies to oversee the enforcement of standards, trade remedy procedures and investigators, enabling legislation and proper training are examples of present deficiencies.

The withdrawal agreement under Article 50 of the Lisbon Treaty should allow the space to pursue new post exit goals and a comprehensive UK-Africa strategy. This makes the sequencing of diplomatic initiatives quite important. Article 50 of the Lisbon Treaty mentions a two year period (from the moment of notification of a withdrawal decision) but vital decisions should be taken soon in order to ensure continuation in trade in the interim, securing investments already made, to prevent legal uncertainty, and to allow for uninterrupted interaction with third parties. The latter should include African Governments, African Regional Economic Communities (RECs) and the African Union (AU). Interim arrangements could be required and dedicated technical and diplomatic staff might have to be deployed.

It is also important to note that two separate sets of negotiations with the EU seem to be required before a comprehensive new EU-UK framework will be in place. Withdrawal under Article 50 of the Lisbon Treaty is the first aspect; to be followed by the *“future relationship with the Union. That agreement shall be negotiated in accordance with Article 218(3) of the Treaty on the Functioning of the European Union”*.<sup>7</sup> These negotiations will obviously not be conducted as separate deals but it is necessary to recognise the different aspects which will have to be addressed and how they will impact on future UK-Africa relationships.

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<sup>6</sup> EU law is, for large parts, directly applicable in the member states. This will not apply to new trade agreements. Constitutional requirements regarding the incorporation of treaties will have to be respected.

<sup>7</sup> Article 50 of the Lisbon Treaty is discussed below.

The UK will have to adopt WTO compatible policies for developing countries and LDCs. That will need to be cleared by WTO members. It is not possible to predict the format and content of such accommodations because the EU withdrawal agreement will impact on and determine the nature of new arrangements.

Brexit will unravel important benefits of deep regional integration with the EU, the most integrated market in the world. The costs are not, in all respects, immediately obvious. This factor requires sound legal frameworks capable of allowing adjustment and dispute settlement if required. There will be consequences as private companies factor the changed landscape into their own decisions. It is said that new opportunities (e.g. to conclude bilateral trade deals) will arise; but only in terms of sound and comprehensive policy frameworks.

Many commentators have pointed out that the least disruptive outcome would be for the UK to secure an EEA (European Economic Area – like Norway) type arrangement with the EU; retaining many of the present EU benefits. If this happens it should be easier to ensure continuity with respect to post-Cotonou relations with the ACP countries. However, this type of UK-EU arrangement will have to be “paid” for, in terms of budget contributions, recognition of EU law and standards, and the free movement of persons. If, on the other hand, an FTA between the EU and the UK is agreed, the relationship will be more “distant” and be akin to e.g. the EU-Canada trade deal concluded recently.<sup>8</sup> A standard FTA for trade in goods with the EU (and other third parties) will require WTO compatibility, tariff schedules and rules of origin. Border controls and measures to prevent trade deviation will have to be imposed. Separate deals for trade in services and trade-related matters will become necessary.

An FTA type EU-UK relationship will also mean that all those trade agreements concluded by the EU while the UK was a member will eventually cease to apply to Britain. Trade with e.g. Canada will require a new deal or will take place under MFN rules. The SADC EPA (discussed below) falls in the same category.

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<sup>8</sup> The negotiations for the Comprehensive Economic and Trade Agreement (CETA) were completed in August 2014.

## Article 50 of the Lisbon Treaty

Article 50 of the Lisbon Treaty provides as follows:

- 1. Any Member State may decide to withdraw from the Union in accordance with its own constitutional requirements.*
- 2. A Member State which decides to withdraw shall notify the European Council of its intention. In the light of the guidelines provided by the European Council, the Union shall negotiate and conclude an agreement with that State, setting out the arrangements for its withdrawal, taking account of the framework for its future relationship with the Union. That agreement shall be negotiated in accordance with Article 218(3) of the Treaty on the Functioning of the European Union. It shall be concluded on behalf of the Union by the Council, acting by a qualified majority, after obtaining the consent of the European Parliament.*
- 3. The Treaties shall cease to apply to the State in question from the date of entry into force of the withdrawal agreement or, failing that, two years after the notification referred to in paragraph 2, unless the European Council, in agreement with the Member State concerned, unanimously decides to extend this period.*
- 4. For the purposes of paragraphs 2 and 3, the member of the European Council or of the Council representing the withdrawing Member State shall not participate in the discussions of the European Council or Council or in decisions concerning it. A qualified majority shall be defined in accordance with Article 238(3)(b) of the Treaty on the Functioning of the European Union.*
- 5. If a State which has withdrawn from the Union asks to rejoin, its request shall be subject to the procedure referred to in Article 49.<sup>9</sup>*

The two year period signifies the final end of the marriage; unless there is a unanimous decision to extend it. Such an important decision may well require national ratification in some of the EU member states. And the countdown has to be triggered by a formal UK request to withdraw. Postponement till some convenient

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<sup>9</sup> It provides: *The conditions of admission and the adjustments to the Treaties on which the Union is founded, which such admission entails, shall be the subject of an agreement between the Member States and the applicant State.*

time will presumably be a consideration but the costs of uncertainty in the markets will limit the time available before the withdrawal notification is announced.

The main objective behind the provision on the two year period is to set out “*the arrangements for [the] **withdrawal**, taking account of the framework for its future relationship with the Union*”. The future relationship between the EU and the UK shall be negotiated in accordance with Article 218(3) of the Treaty on the Functioning of the European Union.<sup>10</sup>

During this negotiation process, EU laws will still apply to the UK and it will continue to participate in other EU business but will **not** participate in internal EU discussions or decisions on its own withdrawal. Article 50 notes that “*the member of the European Council or of the Council representing the withdrawing Member State shall not participate in the discussions of the European Council or Council or in decisions concerning it*”.

Are there any examples of special deals with other non EU states which the UK might follow? Switzerland signed a free-trade agreement with the then European Economic Community in 1972, which entered into force in 1973. Switzerland is a member of the European Free Trade Association (EFTA), and then took part in negotiating the European Economic Area (EEA) agreement with the EU. However, a Swiss referendum rejected EEA membership. Switzerland and the EU then negotiated a bilateral relationship outside the EEA. These negotiations resulted in a total of ten treaties, negotiated in two phases. They make a large share of EU law applicable to Switzerland.

There is however, an important difference between the present UK withdrawal and the Swiss position; Switzerland was never a member of the EU and did not negotiate an exit deal. The UK’s withdrawal arrangements as well as its future relationship with the EU have to be hammered out.

Will these “withdrawal arrangements” include matters such as the interim implementation of the SADC EPA agreement, which has just been signed, and the

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<sup>10</sup> It provides that the European Commission shall submit recommendations to the EU Council, which shall adopt a decision authorising the opening of negotiations and, depending on the subject of the agreement envisaged, nominating the Union negotiator or the head of the Union's negotiating team.

Generalised Scheme of Preferences (GSP)<sup>11</sup> and GSP+? Article 50 does not define the scope and content of the withdrawal arrangements but in principle all relevant aspects and legal questions need to be addressed. The implementation of the EPAs and other formal arrangements with ACP countries should ideally be decided as part of the Article 50 package. There should be legal certainty for all (including investors and private firms); till new agreements are in place.

### **Future UK-African Relations**

An ODI report predicts that Brexit will have the following implications for developing countries generally:

- *Different countries will be affected in different ways, in the short-term and in the long-term, depending on how the UK exits. There are mostly negative effects for developing countries, but there may also be opportunities.*
- *The pathways of impact are through trade, financial markets and investment, growth, aid and development finance, migration and remittances, and global collaboration.*
- *In the short-term, the threat of Brexit led to currency and stock market fluctuations, which have not spared emerging markets and poorer countries.*
- *We estimate that the 10% devaluation of the pound in the first week post-Brexit, coupled with lower GDP in the UK (estimated at 3%), will lead to lower exports by developing countries (\$500 million in least developed countries).*
- *The devaluation will also reduce the value of aid by roughly \$1.9 billion. The combined cost (through aid, trade and remittances) of the devaluation for developing countries is expected to be \$3.8 billion. If the pound continues to fall, the effects could increase.*
- *The long-term effects will depend on UK trade deals, EU trade deals (with the UK no longer influencing them), the way aid and other development finance will be maintained and allocated, the way in which global collaborations is affected, the way financial markets react, and the way immigration and remittances are maintained. This will be a long process.*

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<sup>11</sup> The EU's "Generalised Scheme of Preferences" (GSP) allows developing countries to pay less or no duties on their exports to the EU.

- *The opportunities of Brexit for developing countries rely on specific commodity price changes (e.g. gold exporters gain), changes in distribution of aid, cheaper imports from the UK, and the ability to gain from new trade deals, including through targeted Aid for Trade.*
- *Greater policy consideration is needed on what the UK alone can and should offer to developing countries on trade.*<sup>12</sup>

Brexit will not leave UK-African relations untouched. The new scheme which the UK, an important African trading partner and a major donor, has to develop also offers opportunities to cement old ties and to forge new relationships. This could be assisted by factors such as Commonwealth membership, the fact that the legal systems of several African nations are based on the Common Law, and that national administrations have followed British examples.

We do not know how Brexit and post Brexit deals are officially perceived in Africa. There is generally a ‘wait and see’ approach but also signs of uneasiness. Tanzania has just announced that it will no longer ratify the EAC EPA. The true reasons may involve protectionist concerns about the effects on domestic producers and traders (which is a well-known issue) but the announcement did refer to new facts being caused by Brexit.

The one specific aspect which London should emphasize in assuaging African fears is the elimination of uncertainty about preferential access for African goods to UK markets. How can this be done? There can be general guiding principles on how future UK-African relations are officially viewed (an official statement and policy initiative could be a useful starting point) but for the most part there will have to be specific responses. A one size fits all promise will be vague and without focussed action. The SADC EPA serves as an example - to emphasize the specifics of a particular relationship and to design a strategy for the parties involved.<sup>13</sup>

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<sup>12</sup>*Brexit and Development: How will developing countries be affected?* ODI Briefing, July 2016.

<sup>13</sup> The African members of the SADC EPA are Botswana, Lesotho, Namibia, South Africa, Swaziland (the members of the Southern /African Customs Union) and Mozambique.

## Implications for the SADC EPA

Trade between the EU and SACU as well as between the UK and SACU has always been important.<sup>14</sup> In certain areas (e.g. the export of table grapes, beef and wine) there are special and longstanding market arrangements which benefit SACU. There are also important investment linkages.<sup>15</sup>

The SADC EPA, which took about ten years to negotiate, is officially known as “*The Economic Partnership Agreement between the European Union and its Member States, of the one Part, and the SADC EPA States, of the other Part*”. It is a comprehensive trade in goods agreement and holds the promise of further negotiations to include trade in services and trade related matters. The EU wants the EPAs to be rules-based and comprehensive partnership agreements which should cover all trade and trade-related matters. As it now stands future trade between the African SADC EPA members (primarily SACU) with the 28 EU member states will be conducted in terms of this agreement.

Technically the SADC EPA is an FTA (about trade in goods) and is governed by Article XXIV GATT. Once in force it will finally replace the TDCA (Trade, Development and Cooperation Agreement), the bilateral trade agreement between the EU and South Africa, which applies since 2000.<sup>16</sup> The SADC EPA was signed on 10 June 2016 and will formally enter into force once all parties have deposited their

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<sup>14</sup> The majority of the UK’s trade with Africa is in goods; which accounted for 68.3% of total trade between the 2 regions in 2014, with the remainder accounted for by services. South Africa has traditionally been the UK’s largest export and import market in Africa. The UK ran a trade in goods and services deficit with South Africa in all periods between 2004 and 2010, which averaged £1.2 billion. However, following an increase in UK service exports in 2011, the UK began recording a trade surplus, which stood at £0.6 billion in 2014. National Statistics. <https://www.ons.gov.uk/economy/nationalaccounts/balanceofpayments/articles/theukstradeandinvestmentrelationshipwithafrica/2016>. See also <http://www.tralac.org/publications/article/9026-south-africa-s-recent-trade-performance.html#downloads>; for more details on South Africa and SACU’s trade relationship with the EU, and the UK.

<sup>15</sup> In 2014, the value of the UK’s stock of foreign direct investment in Africa was £42.5 billion. UK investments in Africa more than doubled between 2005 and 2014 from £20.8 billion to £42.5 billion. South Africa was the largest recipient of UK FDI in Africa, accounting for 29.8% of total UK FDI in the continent in 2014. Office for National Statistics. <https://www.ons.gov.uk/economy/nationalaccounts/balanceofpayments/articles/theukstradeandinvestmentrelationshipwithafrica/2016>

<sup>16</sup> Article 111 of the SADC EPA provides that “*the relationship between this Agreement and 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 (TDCA) shall be governed by the provisions of Protocol 4 of this Agreement.*”

instruments of ratification.<sup>17</sup> The implementation of the agreement has been announced to be from October 2016.

How will Brexit impact on the fortunes of this agreement and what should SACU strive for? The best scenario for SACU would be if the UK ratifies and starts implementing the SADC EPA while it is still an EU member. It is technically possible because the UK has not yet given notice of its intention to activate Article 50 of the Lisbon Treaty. Up till the final moment when it does withdraw the UK remains part of the EU and is bound by EU law. Even if London does formally notify the EU of its intention to withdraw, it will take a considerable period of time before exit officially happens.

Under the scenario suggested here SACU trade with the UK (and the EU) will not be disrupted and there will be time to start working on a separate UK-SACU trade agreement and to provide for transitional arrangements if necessary. For Mozambique too there can be the same approach and a separate agreement with the UK later. It can be prepared in the interim; before the UK finally leaves the EU.

After the UK has left the EU trade between SACU and an EU of 27 members should continue as agreed in the SADC EPA. What cannot be predicted with any degree of certainty now is what the effect of the UK withdrawal arrangements will be on EU–UK trade with respect to goods imported from SACU members. The answer depends on the nature of the future trade relationship between Brussels and London.

Would London find this idea politically acceptable? We do not know – the idea has not been mooted. HMG may not consider this particular issue as one of its urgent priorities, but is vital for SACU. It could also send a signal that the UK is concerned about its relationships with African nations. The EU would not want this EPA to flounder and would therefore presumably also support an outcome which will restore stability in important trade relations.

Could the TDCA be revived? This seems unlikely. The UK would not conclude a separate deal with South Africa only, SACU's integrity as a customs union must be

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<sup>17</sup>. The South African and Namibian Parliaments have already approved the SADC EPA, while Botswana has ratified it.

protected. Whatever agreements the UK concludes with the SADC EPA members states should be harmonized with its future EU trade relations. The EU has worked hard to conclude the SADC EPA; which South Africa has signed and which offers improved benefits.

Some of the provisions in the text of the SADC EPA which may impact on the scenario sketched her, can be mentioned:

- Articles 100 and 101 provide for a “Joint Council” which shall oversee and administer the implementation of this Agreement. It could become involved in the technical discussions regarding Brexit and continuation.
- Article 114 provides that the EC Party or an SADC EPA State may give written notice of its intention to denounce this Agreement. Denunciation shall take effect six months after the notification. The withdrawal agreement negotiated under Article 50 of the Lisbon treaty should explain how the UK, an individual EU member withdraws from the SADC EPA.
- The definition of the SADC EPA Parties is complicated and needs to be studied in order to determine the nature of the Parties’ responsibilities<sup>18</sup> and how to implement interim arrangements, should they become necessary for access to the UK market before the withdrawal is finalized.

## **Conclusion**

It will take a considerable period of time before the UK exit deal will be finalized and a comprehensive and predictable new arrangement between the UK and Africa will be in place. This is not ideal. Interim measures to cope with disruption caused by Brexit and delays in the entry into force of agreements (some of which will have to be negotiated de novo) should be part of the official post Brexit strategy. The EU should support this objective.

The SADC EPA has to be implemented soon and the EU internal legal arrangements for doing so should not be suspended. This requires expeditious action to ensure that the SADC EPA will be implemented as foreseen; Brexit is not a fact yet and this

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<sup>18</sup> Article 104 SADC EPA.

EU arrangement will continue as binding EU law. Such a strategy, in addition to being legally possible, will also provide time to start working on a SACU–UK trade agreement.

SACU should take its own initiatives to prevent post Brexit disruptions and loss of market access. It should do so rather soon and preferably as part of a joint UK initiative.

The SADC EPA is also a case study. The same objective (to prevent disruption of trade and market access) should, *mutatis mutandis*, guide discussions with other African trading partners and regional arrangements.