

Critical issues in the EPA negotiations

An EU CSO discussion paper¹, August 2009

The European Union has been negotiating Economic Partnership Agreements with the ACP countries since 27 September 2002. EPAs are meant to be “instruments for development” furthering poverty reduction, sustainable development, regional integration and integration into the world economy. Nevertheless, the negotiations have been fraught with disagreements and difficulties and, except in the case of the Caribbean, they did not come to a conclusion at the foreseen end date of 31 December 2007. Instead, a series of interim agreements on the liberalisation of trade in goods were initialled with individual or small groups of ACP countries, creating rifts in the ACP regions.

Almost 2 years past the 2007 deadline, the EPA negotiations are still far from over. The “interim” arrangements imposed at the time by the EU did not solve the key issues of contention but, on the contrary, further complicated the negotiations. The previous European Parliament has called for - and the EU Council and Commission have promised - more flexibility in their approach. However, the flexibility shown in some cases has been inadequate and in other spheres has yet to materialise.

This discussion paper highlights 4 key issues, in relation to which the undersigned CSOs believe the EU needs to change its approach:

- 1. The development dimension***
- 2. Market access in goods or the issue of tariff elimination***
- 3. The non-goods issues***
- 4. Contentious Issues: revising the interim agreements***

We hope that this paper will encourage decision makers in the EU member states and the EU institutions to continue to question the EU negotiating stance and to make sure that the new trade relations with the ACP countries respect the principles of partnership, ownership and respect for the ACP needs, constraints and political choices.²

Since the 31 December 2007 deadline lapsed, the EPA negotiations between the EU and the ACP countries have been running in ‘extra time’ for almost 2 years. Yet the score has not changed much. Since the end of 2007 there is still only one region that has concluded a full regional EPA and only one additional country, Zambia, has initialled an interim EPA (IEPA). Forty ACP countries, out of the 76 taking part in the negotiations, have not concluded any agreement at all³.

This meagre result should not come as a surprise. The reports of the official review of the negotiations in 2006-2007 highlighted the weak institutional capacities and unpreparedness of the ACP countries and regions in the face of the complexity of the negotiations and indicated that the 2007 deadline was impossible to attain⁴. The West-African region made a fairly good estimate at that time when it said that it needed at least three more years to conclude⁵.

The passing of the deadline has not solved the difficulties and divergences that have existed throughout the negotiations. In fact, the series of bilateral or sub-regional interim EPAs initialled at the end of 2007 made things worse. Since then the negotiations have run on three tracks: 1) the EU continues to insist on “full EPAs”, 2) meanwhile, ACP countries are seeking to revise a number of contentious issues in the hastily concluded IEPAs and 3) ACP countries are at the same time trying to come to regional agreements to repair the cracks in the regions that the IEPA approach has caused and to build the regional integration that – all parties agree – is indispensable for the development of these countries.

¹ For an introduction to EPAs see Traidcraft e.a., *Economic Partnership Agreements, What MEPs need to know*. August 2009

² Cotonou Agreement, art.34.1; “...with due regard for their political choices and development priorities”; art. 35.3: “... take account of the different needs and levels of development of the ACP countries and regions”

³ For an overview see note 1 or EU Commission, DG Trade, *Update on Economic Partnership Agreements*, 23 March 2009, http://trade.ec.europa.eu/doclib/docs/2009/march/tradoc_142689.pdf.

⁴ For an overview of the review reports see ECDPM. *Overview of Article 37(4) Reviews of the EPA Negotiations* (ECDPM Discussion Paper 81). Maastricht, 2007.

⁵ CEDAO-UEMOA, *Rapport sur la revue des négociations de l'accord de partenariat économique (APE) UE – Afrique de l'Ouest au titre de l'article 37.4 de l'accord de Cotonou. Proposition de l'Afrique de l'Ouest*, November 2006.

“Full EPAs” not only deal with the liberalisation of trade in goods but add substantial commitments on non-goods issues like services, intellectual property rights (IPR) and the so-called Singapore Issues (investment, competition, government procurement and trade facilitation). The “full EPA” concept is based on the EU negotiating mandate only and goes far beyond what is required by the WTO or by the Cotonou Agreement⁶.

1. The development dimension

The EC argues that only a full EPA will be an effective development instrument. Liberalisation of trade in goods, services, investment and government procurement, together with disciplines on competition and IPR, will give access to quality goods, inputs and services, create export opportunities and attract investment that will improve essential infrastructure and competitiveness and bring economic growth.

There is nothing, however, in the conventional economic theory that *guarantees* such outcomes⁷, especially in poorer less-developed economies, or in the face of the multiple food, climate, financial and economic crises. However, while the benefits are far from guaranteed, under EPAs ACP tariffs will be eliminated according to a strict schedule, protective measures will be lifted, and policy space to support local producers will be reduced. At the same time, EPAs will oblige ACP governments to undertake significant reforms and to design and create new policies and institutions, which will have significant costs attached. According to some estimates, such compliance costs would amount to at least €9bn for all ACP countries.⁸ In addition to these costs, during the first stage of liberalisation alone, African countries are expected to lose \$359m per year due to tariff elimination.⁹

Therefore, ACP countries are concerned that while their weak economies will be unable to face increased competition at home and abroad, EPA obligations will also place a heavy strain on government budgets.

The EU has little to offer to address these concerns. On the one hand it continues to insist that ACP countries make decisions now that will lock in vast policy reforms for the next 15 to 25 years. On the other hand, it is neither able to prove that these reforms will bring development, nor willing to guarantee that EPA costs will be met with additional finance. The EU resisted ACP requests for EPAs to contain development cooperation provisions for four long years (from the start of the negotiations until November 2006) and since then has only accepted non-committal language. Beyond the regular funds foreseen for the ACP countries by the Cotonou Agreement via the European Development Fund (EDF), there are no real guarantees for additional finance, not even under the so-called Aid for Trade promise of 2 billion Euros per year by 2010 by the European member states and the European Communities¹⁰.

For many ACP countries this is a crucial element. In early July 2009 the Eastern African Community postponed the signature of the IEPA because “*the EC has consistently been non-committal and non-responsive on economic and development issues*” and “*given the sensitivity and impact the EPA is likely to have on the EAC Partner States economies it will be difficult to effect the ratification of the [IEPA] through the National legislatures without in-built economic and development safety nets to support the required economic adjustments*”¹¹. The West-African region has worked out an EPA-related development programme (PAPED) which they have costed at 9.5 billion Euros over a period of 5 years¹². A similar Central African plan would cost 12.4 billion Euros¹³. Funding to cover EPA costs must be additional to the EDF, in order for it not to be just a re-packing of existing funds which would take resources away from other important development programmes. The Commission

⁶ European Research Office, *The ACP and the EU negotiating mandates. A comparison and commentary*, 9 July 2002

⁷ See M.Cruz, *Can Free Trade Guarantee Gains from Trade?* UNU WIDER Research Paper No. 2008/97 or B.Gavin, *The EU-ACP Economic Partnership Agreements: What Impact on Development?* Dublin, Trinity College, International Institute of Integration Studies (IIIS), 2007.

⁸ C. Milner, *An assessment of the overall implementation and adjustment costs for the ACP countries of EPAs with the EU*, in R.Grynberg and A. Clarke, *The European Development Fund and Economic Partnership Agreements*, Commonwealth Secretariat, 2006

⁹ S.Bilal and C. Stevens, (Eds.), *The Interim Economic Partnership Agreements between the EU and African States: Contents, challenges and prospects*, (Policy Management Report 17). Maastricht, ECDPM-ODI, 2009.

¹⁰ See note 7. According to the European Commission’s *Aid for Trade monitoring report 2009* (COM 2009/160 final, p.30), EU AfT commitments to the ACP have even fallen from 2,975 million Euros in 2005 to 2,097 million Euros in 2007. The share of AfT for the ACP in the overall EU AfT has fallen from 50% to 36% over the same period.

¹¹ *EAC-EC-EPA Ministerial Preparatory Meeting (Ministers for Trade Session), Report of the meeting* (EAC/SR/37/2009), 3 July 2009.

¹² This figure has been criticized as insufficient as it would not include all EPA related costs. ICTSD-ECDPM, *EPA Update*, Trade Negotiations Insights, Vol. 8, No 1, February 2009 and No 2, March 2009

¹³ *Négociation de l’Accord de Partenariat Economique Afrique Centrale-Communauté Européenne, Réunion des Experts, Relevé des conclusions*. Libreville, les 5, 6, 9, et 10 février 2009.

argues that it cannot meet these financial demands, tends to question their necessity and seems intent that ACP countries should accept “full EPAs” without them.

ACP countries on the other hand have tried to link liberalisation commitments to EU aid delivery and benchmarking, arguing that each step of the liberalisation and reform schedule can only be undertaken when certain results or benchmarks are reached and the promised aid is delivered. The EU has resisted such conditional liberalisation, claiming that this would not be WTO-compatible or would not provide sufficient certainty to businesses – however, this leaves the risks entirely with ACP governments and – worse still – the populations of these countries which are among the poorest in the world¹⁴.

This discussion is also an important reminder that the overall objectives of the EPAs have never been specified in concrete, operational terms. What is “sustainable development”? What does “integration into the world economy” mean? What measure of “poverty reduction” is pursued? What results should EPAs bring in the next five, ten, fifteen years? When the development objectives are not specified, it is impossible to determine what sequencing needs to be followed and, therefore, when will one be able to say that the EPAs are on the right track?

The EU has been so focused on achieving its negotiating objectives – i.e. to secure liberalisation of goods and the wide range of trade-related issues already outlined – that it hardly appears to have considered these questions. On the contrary, the EU has also tried to ensure that the EPAs conform as closely as possible to the EU’s standard approach to trade as defined in 2006 in its strategy document “Global Europe, competing in the world”. This is evident in the EPA negotiations in two ways. First, Global Europe is based on EU concerns about its market share in the world, its access to energy resources and raw materials, and the increasing competition with emerging countries such as Brazil, Russia, India and China (the BRICs). Even if the EU denies that it has any offensive interests in the EPA negotiations, the EPAs do give the EU preferential access to ACP markets over its competitors, and the EU is trying to use EPAs to ban ACP export restrictions on raw materials and to obtain access to land, mining and drilling. Second, the EU Commission and member states appear concerned that the EPAs will set precedents that other trade partners could claim as well: if ACP countries do not agree to negotiations on services, other trade partners may also exclude services negotiations from the free trade agreements (FTAs) they are negotiating with the EU; if the ACP countries reject TRIPS+ rules, others may too; if the coverage of the tariff elimination is too low, other countries may follow the example. In other words, the fuller the EPAs, the easier it will be for the EU to obtain the objectives of Global Europe in its other FTA negotiations; even if this means that the ACP countries do not get the flexibilities that they need.

2. Eliminating import tariffs: coverage, time frame and alternatives

Coverage and timeframe

The only WTO-compatible ways to give trade preferences to a country or group of countries without having to ask for an exemption or “waiver” are to either (a) offer such preferences in a non discriminatory way to all developing countries or all least developed countries (LDCs) or (b) negotiate a free trade agreement (FTA) based on art.24 of the GATT agreement. Art.24 stipulates that trade barriers must be removed on “substantially all trade” and “within a reasonable period of time” which can only be exceeded in exceptional circumstances. In contrast to most WTO provisions, art.24 does not foresee “Special and Differential Treatment” for developing countries. But, as “substantially all” and “exceptional circumstances” are not defined, there is considerable leeway in the coverage of an FTA and the transition period that is used to reach that coverage.

However, in the EPA negotiations the EU has unilaterally fixed the coverage at a minimum of 80% tariff elimination and the transition period to obtain this at a maximum of 15 years, for all ACP regions and countries without taking into account their “*different needs and levels of development*” as required by the Cotonou Agreement (art.35.3).

All those countries that initialled IEPAs, under enormous pressure, at the end of 2007 have indeed complied with the EU’s demanded levels of coverage and timeframes; some have even offered more. However, in the ongoing negotiations many ACP countries, especially the LDCs, have argued that the EU is expecting too much and have questioned this demand, pointing out that it is not a WTO requirement but merely an EU interpretation of the WTO rules¹⁵.

West Africa has taken a long time to carefully formulate a tariff elimination offer in the EPA negotiations. It has developed a methodology to identify sensitive products and to arrive at national and regional lists of sensitive products. It has organised many consultations with stakeholders and has incorporated into its negotiation process the West African Network of Peasant and Agriculture Producer Organizations (ROPPA), which

¹⁴ West Africa-European Community, *EPA Negotiations, Technical meeting, Joint report*. Brussels, 20-23 April 2009..

¹⁵ ICTSD-ECDPM, *EPA Update*, Trade Negotiations Insights, Trade Negotiations Insights, Vol. 8, No 2, March 2009;

represents some 345 million small-holder farmers. The region has also carefully prepared the introduction of a Common External Tariff (CET), expanding and adapting the CET of the West African Economic and Monetary Union (Waemu-Uemoa) to the whole of ECOWAS. Based on these preparations and considering that 13 out of the 16 West African countries are LDCs, the region has offered a tariff reduction of 60% over a timeframe of 25 years¹⁶.

At the same time, the region has consulted WTO experts, to assess the WTO compatibility of this offer, who have concluded that it is as valid as the standard set by the EU¹⁷. The EU, however, insists that WTO compatibility is not the only issue and that a more “ambitious” liberalisation commitment is better for West-Africa’s development. But is this for the EU to judge?

Alternatives

While discussions about coverage and timeframe of tariff liberalisation are ongoing, in the meantime it remains possible to consider non-reciprocal alternatives. The WTO condemned the EU banana import regime, but never the ACP preferences as a whole, nor did it mandate that they should end by 31 December 2007. It was the EU that decided to end the waiver-based preferential system and to negotiate a GATT art.24-based reciprocal free trade regime with the ACP countries instead. Since then the EU has found that the EPAs have not solved the dispute with non-ACP banana exporting countries and that it will have to come to a separate banana arrangement in the WTO (within the framework of the Doha Round or outside it)¹⁸.

Meanwhile, rich countries have continued to use non-reciprocal waiver-based preferential regimes. In the past year the WTO has granted waivers for the US preferences for the Caribbean, for Africa (AGOA) and for the Andean countries; and for the *new* EU preferences for *Moldova*¹⁹. Hence waiver-based preferences remain possible.

Since the start of the EPA negotiations several crises for which the policies of the rich countries are largely responsible are increasing poverty, hunger and misery in Africa and the Pacific: climate change, the food crisis, and the financial and economic crisis. In view of this multiple-crisis situation; the fact that most African and Pacific countries are LDCs or small island states; and the ongoing banana and tropical fruits negotiations within the WTO, a WTO waiver for new EU duty-free quota-free preferential regimes for Sub-Saharan Africa and the Pacific is not at all impossible. It would allow these regions to concentrate on tackling the crises and to continue their regional integration efforts on their own pace.

Alternatively, the EU could adapt its generalised system of preferences (GSP) for developing countries to accommodate the interests of ACP countries that are not LDCs and therefore have no duty- and quota-free market access to the EU under the “Everything but Arms” (EBA) scheme. To ensure that no ACP country is left worse off if they choose not to pursue a free trade agreement, Europe could enhance its “GSP Plus” scheme to make it equivalent to the Cotonou arrangements. Or it could simply merge the EBA and GSP Plus schemes to give both LDCs and ‘economically vulnerable’ countries duty-free, quota-free access to its markets. Many products could be incorporated into Europe’s preferential schemes without a problem. However, such a move would entail severe preference erosion for a few products. To ensure that vulnerable producers are not left worse off, mitigating steps would need to be taken to support export diversification and/or to provide a long-term guarantee that the EU would purchase a minimum quantity of these products at a fair price. To provide businesses certainty, Europe could remove the discretionary aspects of its schemes and bind them in the WTO so that they become permanent arrangements²⁰.

3. The non-goods issues

The WTO concerns with the Lomé/Cotonou preferences have only been in relation to trade in goods. While the WTO did not even order the EU to negotiate a reciprocal goods agreement, it certainly never required that the EPAs contain liberalisation or disciplines on non-goods issues; nor does the Cotonou Agreement, which focuses on capacity building and economic cooperation in these areas.

¹⁶ West Africa-European Community, *EPA Negotiations, Technical meeting, Joint report*. Dakar 16-19 February 2009. Joint report.

¹⁷ Diouf, El Hadji A. *Article XXIV of GATT and the EPA: Legal Arguments to support West Africa’s Market Access Offer*. Dakar, ENDA Third World, 2009

¹⁸ A.Giovanni, *How would a WTO agreement on bananas affect exporting and importing countries?* ICTSD Issues paper No.21, June 2009.

¹⁹ WTO Council for Trade in Goods, 24 March 2009 (US), 14 April 2008 (EU).

²⁰ Oxfam International – TWN Africa, *A matter of political will. How the European Union can maintain market access for African, Caribbean and Pacific countries in the absence of Economic Partnership Agreements*, April 2007.

The ACP countries have been reluctant to negotiate services, intellectual property rights and Singapore Issues because of their potential disadvantages, their complexity, the uncertainty about their implications and the lack of capacity to identify offensive and defensive interests in these areas. For the same reasons developing countries worked for the removal of the Singapore Issues from the Doha Round of negotiations at the WTO. Many ACP countries prefer to deal with these issues on an autonomous basis first, at national or regional level. This is also the spirit of the Cotonou Agreement which explicitly states that services liberalisation *can* be negotiated when ACP countries “*have acquired some experience in applying Most Favoured Nation (MFN) treatment under GATS*” (art.41.4).

The pressure to negotiate liberalisation and disciplines in non-goods issues therefore come from the EU EPA negotiating mandate only and this pressure has been the subject of much criticism. The EU Council therefore has stated that it would prefer to see non-goods issues included in the EPAs but also that it “*fully respects the right of all ACP States and regions to determine the best policies for their development*” (Conclusions of 15 May 2007, §7 or of 19-20 November §6). On 23 March 2009 EU Trade Commissioner Catherine Ashton said in the European Parliament: “*the Singapore Issues are only included if wanted and welcomed*”.

Some ACP governments have indeed embraced the idea of “full EPAs” - the Caribbean governments, for instance, did so from the beginning - but most have been reluctant and are still reviewing their options on several issues, especially on investment, government procurement and IPR. SADC for instance communicated to the EU Commission on 7 March 2006 that it did not wish to take commitments on the non-goods issues in the EPAs. West Africa has made proposals to postpone negotiations on services for another three years, to limit the text on intellectual property rights to the TRIPS provisions and to limit the texts on the other non-goods issues to cooperation provisions²¹.

The Pacific island states were initially quite interested in services, but seeing that the EU had little to offer in Mode IV (export of services via the temporary movement of service providers), the Pacific region decided to stop further discussion on services. Because of its weak services industry, Mode IV is the only way that the Pacific can possibly develop any meaningful services export to the EU. In April 2008 the region also made it clear that it was prepared to conclude an EPA that would include goods, competition policy, environment and social aspects (provided that these issues are not subjected to the EPA dispute settlement provisions); but that it did not wish to negotiate services, or binding rules on intellectual property, government procurement and data protection. This was repeated in June 2009 when the region proposed to put these issues in a rendezvous clause to revisit them at a later stage²².

Despite ACP reluctance and rejection the EU has continued to insist on the inclusion of the non-goods issues, causing new rifts in the regions by trying to move with the willing like Botswana, Lesotho, Swaziland and Mozambique in SADC or talking to individual Pacific island states. Only recently has the EU begun to accept the possibility of a “less than full EPA” equipped with a rendezvous clause to discuss issues at a later stage. But instead of postponing such discussion by three years as West Africa has asked, the EU has insisted on concluding a regional goods EPA in October 2009 and starting with the non-goods issues immediately afterwards in January 2010²³. Despite the fine rhetoric, the pressure has never stopped. If the Cotonou Agreement underlines the need to respect the policy choices of the ACP countries, why then is it so difficult to indeed accept their choices? It is difficult to understand this EU push for services, IPR and Singapore Issues unless one indeed sees EPAs as an important part of the EU’s Global Europe strategy.

4. Contentious issues: revising the interim agreements

The inclusion of non-goods issues also plays a role in the discussion on the so-called ‘contentious issues’ in the IEPAs and the signing of these agreements. Even before the end of 2007, the ACP Council of Ministers called for a revision of several provisions in the hastily drafted and concluded IEPAs (such as the interpretation of Substantially all Trade, the MFN clause, the treatment of export taxes, quantitative restrictions, the standstill clause, rules of origin and bilateral safeguards)²⁴. The EU has always rejected the possibility of amending the

²¹ ICTSD-ECDPM, *EPA Update*, Trade Negotiations Insights, Vol. 5. No.2, March-April 2006; West Africa-European Community, *EPA Negotiations, Technical meeting, Joint report*. Brussels, 20-23 April 2009.

²² *Trade Justice Now! An update from the Pacific Network on Globalisation*, May/June 2009

²³ *Negotiations of an Economic Partnership Agreement between West Africa and the European Community. Meeting of Chief Negotiators, Conclusions*. Brussels, 17 June 2009.

²⁴ *Declaration of the ACP Council of Ministers at its 86th session expressing serious concern on the status of the negotiations of the Economic Partnership Agreements*, ACP/25/013/07. Brussels 13 December 2007.

IEPAs, but as the IEPAs are supposed to be replaced by regional (perhaps “full”) EPAs, the EU has agreed to consider revising contentious provisions only in these final EPAs²⁵.

On that basis all regions have been re-examining several issues with the EU and have indeed found new wording for certain provisions. An important step forward in that respect was achieved in the negotiations between the EU and the SADC region in Swakopmund in March 2009²⁶. The compromises found there have been taken over in other regions. The question is how these revised provisions will be carried over into a final agreement and what will happen to the interim EPAs in the mean time.

Placing the revision of disputed provisions of the IEPA in the context of the negotiations for regional EPAs obviously gives the EU leverage to bargain for the inclusion of more non-goods issues in the final agreement. Once the ACP countries have *signed* their IEPAs, the EU's bargaining power increases even more. In the meantime the ACP countries are left with unchanged IEPAs that contain inadequate safeguards or that ban certain policies (for example, export taxes) or introduce certain obligations (such as the standstill clause, which freezes tariffs at current levels).

Namibia is one country that has been insisting that certain compromises reached should indeed be included in the IEPA, or added as an annex, before it is signed. The EU has instead proposed to add a legally non-binding declaration to the signed IEPAs. For the SADC IEPA the key sentence of this declaration reads: “*The Parties will instruct their negotiators to consider these new texts as the basis for the full EPA text to be negotiated*”²⁷. By itself such an added declaration does not carry much weight vis-à-vis the hard provisions of the agreement itself. To say “*To consider as a basis for a text to be negotiated*” is a very vague and weak formulation indeed that leaves the EU all the room for manoeuvre to extract more concessions. If the negotiations for a final EPA fail and the IEPA is all that remains, the ACP countries will remain stuck with highly contentious and problematic clauses. It should not be a surprise that ACP countries conclude that they can not sign the IEPAs on this basis.

Conclusion: The way forward lies within the Cotonou Agreement not beyond

From the start of the EPA negotiations, the EU has been trying to go beyond the WTO and Cotonou requirements to obtain agreements that fit its broader trade policy objectives at the expense of its development objectives. The agreements concluded so far risk hindering, instead of fostering regional integration and sustainable development in ACP countries.

A strong turnaround in the negotiations is therefore urgently needed, rather than merely introducing hesitant flexibilities on a few issues. The EU must at a minimum respond favourably and unconditionally to ACP requests for re-negotiation of contentious issues, and refrain from pushing countries that have initialled EPAs to sign and ratify these agreements in haste and without amendments.

But, beyond this, the EU should refrain from further overloading and complicating the negotiations by demanding that ACP countries include issues and rules in the agreements that are not required for WTO compatibility, such as the MFN clause and rules on export restrictions, as well as services, intellectual property rights and the so-called 'Singapore issues'.

The EU should also respond positively to proposals for flexible market access arrangements and to requests for reliable and additional aid for regional economic development programmes.

In the case that ACP countries express that they are not ready to conclude an EPA, because they believe the agreement will not facilitate their development, the EU must fully support any request for alternative solutions that ensure that these countries are not left worse off than under the provisions of the Cotonou Agreement that were in place before the end of 2007.

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²⁵ *Mandelson rules out renegotiation of partnership accords*. European parliament press release, 18 April 2008; *Interview with Catherine Ashton in ICTSD-ECDPM, Trade Negotiations Insights*, February 2009, Vol. 7, No.11.

²⁶ ICTSD-ECDPM, *EPA Update*, Trade Negotiations Insights, Vol. 8, No 4, April 2009.

²⁷ *Final act to the interim agreement with a view to an Economic Partnership Agreement between the European Community and its Member States, of the one part, and the SADC EPA States, of the other part*. EU Council doc 14062/08 Add 12 Cor 2.