

Offering a Realistic Alternative:

*The EU's obligation to provide alternatives to the
Economic Partnership Agreements*



A Unique Negotiating Position

The Pacific members of the African, Caribbean and Pacific (ACP) group of countries are currently negotiating with the European Union (EU) to establish a framework for the two groups' economic relationship with the expiry of the Lomé and Cotonou agreements.¹ In the past, these agreements have given the Pacific preferential access for their goods to the EU market on a non-reciprocal basis. The current negotiations are aimed at creating an Economic Partnership Agreement (EPA) that will include a reciprocal trading arrangement, whereby the Pacific will be required to open their economies to "substantially all" trade from the EU.

The circumstances under which the Pacific is negotiating are unique for two reasons. Firstly, the Pacific ACP will be under intense pressure to extend any concessions that they grant to the EU to the region's major trading partners, Australia and New Zealand, in the forthcoming negotiations mandated by the Pacific Agreement on Closer Economic Relations (PACER). Secondly, the Pacific ACP already has tariff-free access for its products to the European market, but this special access is due to end on 1 January 2008 when the World Trade Organisation (WTO) waiver that allows it, expires. Usually, when two groups are negotiating a trade agreement, either side may opt to pull out of the negotiations if the deal fails to be as attractive as the status quo. Why would any country voluntarily sign a deal that left them worse off? Because of the end of the WTO waiver (and the EU's position that it cannot be renewed) the EPA negotiations are being conducted without this fallback option; from 2008 the status quo will no longer exist. The Cotonou Agreement, however, which sets out the framework for the EPA negotiations, provides a remedy to this problem in Article 37.6:

"In 2004, the [European] Community will assess the situation of the non-LDC [Least Developed Country] which, after consultations with the Community decide that they are not in a position to enter into economic partnership agreements and will examine all alternative possibilities, in order to provide these countries with a new framework for trade which is *equivalent to their existing* situation and in conformity with WTO rules."²

All agree that the 2004 deadline can be ignored, and when asked by the United Kingdom's International Development Committee in February 2005 whether the promise to consider alternatives still stood, EU Trade Commissioner Peter Mandelson replied "It does still stand".³ He then went on to say that the alternative would be the General System of Preferences (GSP), and that 'the alternative is... second best' as it lacks any developmental dimension.⁴

A legal opinion from Matrix Chambers lawyer Kate Cook argues that

"an attitude which appears to prejudge the examination called for in Article 37.6 violates the terms of Article 37.6 because it is likely to undermine the prospects of finding appropriate alternative possibilities. This publicly expressed attitude on the part of the Commission may even deter some non- LDCs [Least Developed Countries] from pursuing the possibility of an alternative when they might otherwise have sought to do so within the terms of Article 37.6. This approach of

the Commission in my view violates the principle of effectiveness which is a feature of both international and Community law.”⁵

GSP & EBA

The EU’s GSP and Everything But Arms (EBA) schemes are the alternatives to an EPA envisioned by Commissioner Mandelson.⁶ These schemes rely on the WTO’s ‘enabling clause’ which states that “contracting parties may accord differential and more favourable treatment to developing countries without according such treatment to other contracting parties”.⁷ In 2004 the WTO Appellate Body ruled that different preferences could be given to various countries provided that the difference responds “to a widely recognized ‘development, financial [or] trade need’”.⁸ The EU’s GSP is open to developing countries and covers a large, but not complete, list of products, while the EBA is only open to LDCs, and covers all products except arms.

A Department of International Development-commissioned report by Stevens and Kennan concluded that 75% of ACP exports would be able to enter the EU tariff-free under either Most Favoured Nation status (MFN) or the GSP.⁹ However, the GSP as it stands, does have several drawbacks: it does not cover all products exported from the ACPs; it is a positive list, so any products not on the list are automatically excluded, possibly hindering ACP ability to develop new exports; it has more restrictive Rules of Origin (ROO); and it is unilateral, so it can be altered by the EU at any time. The EBA scheme, which is being touted as the fallback option for LDC countries unwilling or unable to enter into an EPA more closely resembles current ACP preferences but is only open to LDCs. Like the GSP, it also has a more restrictive ROO. Neither the GSP nor the EBA schemes, as they currently stand, would ‘provide these [ACP] countries with a new framework for trade which is equivalent to their existing situation’, as the Cotonou agreement requires.

Commissioner Mandelson argues that an EPA is the best option for the ACP, but by presenting the current GSP and EBA as the “second best” alternatives, he is both prejudging their value, and also failing to adhere to the legally binding requirements of Cotonou Article 37.6 calling for “a framework for trade which is equivalent to their existing situation and in conformity with WTO rules.” It is therefore incumbent on the EU to make these alternatives at least as attractive as the status quo. How could this be achieved?

Providing a Realistic Alternative

The crux of the problem for the EU is how to extend preferences to ACP countries in a way that is both WTO-compatible, and that also excludes the largest developing countries such as Brazil, China and India in sectors where they are already competitive. Stevens and Kennan note that a WTO Appellate Body ruling “has confirmed that differentiation within the GSP is possible provided that it is related to objective and internationally accepted differences in circumstance.”¹⁰ The European Commission itself has suggested that the GSP should be

“targeted on the developing countries that most need it, such as the LDCs and the most vulnerable developing countries (small economies, land-locked countries, small island states, and low-income countries)”.¹¹

All the ACP states in the Pacific are recognized by the United Nations as Small Island Developing States (SIDS), have small and vulnerable economies, and are low income, factors that would appear to make it relatively straightforward for the EU to target them in a revised GSP.

One problem that remains is that both the GSP and EBA schemes have more restrictive ROO, but these could be improved to make them at least as attractive to ACP countries as the Cotonou agreement, which itself has been criticised for its restrictive ROO. A final downside is the unilateral nature of the GSP and EBA, which reduces certainty for ACP countries and their potential investors. Former WTO Director General Renato Ruggiero, however, has suggested this problem could be overcome by the EU binding its concessions under the WTO.¹²

Conclusion

With the current collapse of the global Doha negotiations in the WTO, it's important to investigate all options for trade agreements that meet the development needs of SIDS in the Pacific. However, the EU is putting the Pacific ACP countries in an unfair negotiating position by attempting to close off alternatives to the EPA. The Cotonou Agreement's article 37.6 is a legally binding one that states that the EU will provide the ACP with alternative arrangements at least equivalent to the existing situation. The EU argues that this alternative is the GSP and EBA, but neither of these currently fulfils the EU's obligation under Cotonou. By presenting the ACP with the unreformed GSP and EBA as the “second best” option, the EU is unfairly attempting to steer ACP countries towards the EU's preferred EPA. Despite this, the ACP group should only agree to an EPA if they genuinely believe that this course is likely to be more beneficial than the status quo. When making this decision the Pacific ACP countries also have to consider the fact that concessions made through the EPA will be amplified when extended to Australia and New Zealand under PACER, whereas this would not be the case for a GSP-based alternative. If the EU fails to make the EPA worthwhile for the Pacific ACP, then they are obliged to provide an option at least as good as the current arrangement. Reform of the GSP, and/or reform and expansion of the EBA, is one way that this could be achieved.

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For a comprehensive look at alternatives to the proposed EPA see:

Bilal, Sanoussi and Francesco Rampa, “Alternative (to) EPAs: Possible Scenarios for the Future ACP Trade Relations with the EU, (Policy Management Report 11)”, European Centre for Development Policy Management, 2006, available at www.oxfam.org.nz

“What We Do: Resources and Publications”.

Endnotes

¹ The Pacific ACP countries are: Cook Islands, Fiji, Kiribati, Marshall Islands, Federated States of Micronesia, Nauru, Niue, Palau, Papua New Guinea, Samoa, Solomon Islands, Tonga, Tuvalu and Vanuatu.

² Cotonou Partnership Agreement 2000, Article 37.6. Emphasis added.

³ International Development Committee “Fair Trade? The European Union’s Trade Agreements with African, Caribbean and Pacific Countries”, 2005, Ev18. Available at <http://www.publications.parliament.uk/pa/cm200405/cmselect/cmintdev/68/68.pdf#search=%22%22Fair%20trade%3F%20The%20European%20Union%E2%80%99s%20trade%20agreements%20with%20African%2C%20Caribbean%20and%20Pacific%20countries.%22%22>

⁴ *ibid.*

⁵ Legal advice prepared for ActionAid by Kate Cook of Matrix Chambers, 23 June 2005 cited in ActionAid International (Tom Sharman) “The Trade Escape: WTO rules and alternatives to free trade Economic Partnership Agreements”, Johannesburg, undated, pp.21-2.

⁶ It should be noted that these are not the only possible alternatives. For a comprehensive review of options see Bilal, Sanoussi and Francesco Rampa, *Alternative (to) EPAs: Possible Scenarios for the Future ACP Trade Relations with the EU, (Policy Management Report 11)* European Centre for Development Policy Management, 2006. Available from

http://www.ecdpm.org/Web_ECDPM/Web/Content/Navigation.nsf/index2?readform&http://www.ecdpm.org/Web_ECDPM/Web/Content/Content.nsf/0/EF21975BAC4DEAADC1257115004CD88A?Opendocument

⁷ Enabling Clause, p191, paragraph 1.

⁸ WTO 2004 paragraph 164. ‘European Communities – conditions for the granting of tariff preferences to developing countries. ARB-2004-1/17. Arbitration under Article 21.3(c) of the Understanding on Rules and Procedures Governing the Settlement of Disputes’, WT/DS246/14, 20 September, Geneva: World Trade Organization. Available at <http://docsonline.wto.org>

⁹ Stevens, C and Kennan, J *GSP Reform: a longer-term strategy (with special reference to the ACP)*, Report prepared for the Department of International Development, IDS, February 2005, p.vi.

¹⁰ *ibid.*, p.v.

¹¹ *ibid.*, p.5.

¹² Bilal and Rampa, *Alternative (to) EPAs: Possible Scenarios for the Future ACP Trade Relations with the EU*, p.89.