The trade escape

WTO rules and alternatives to free trade
Economic Partnership Agreements

Les règles de l'OMC et des alternatives aux accords de partenariat économique

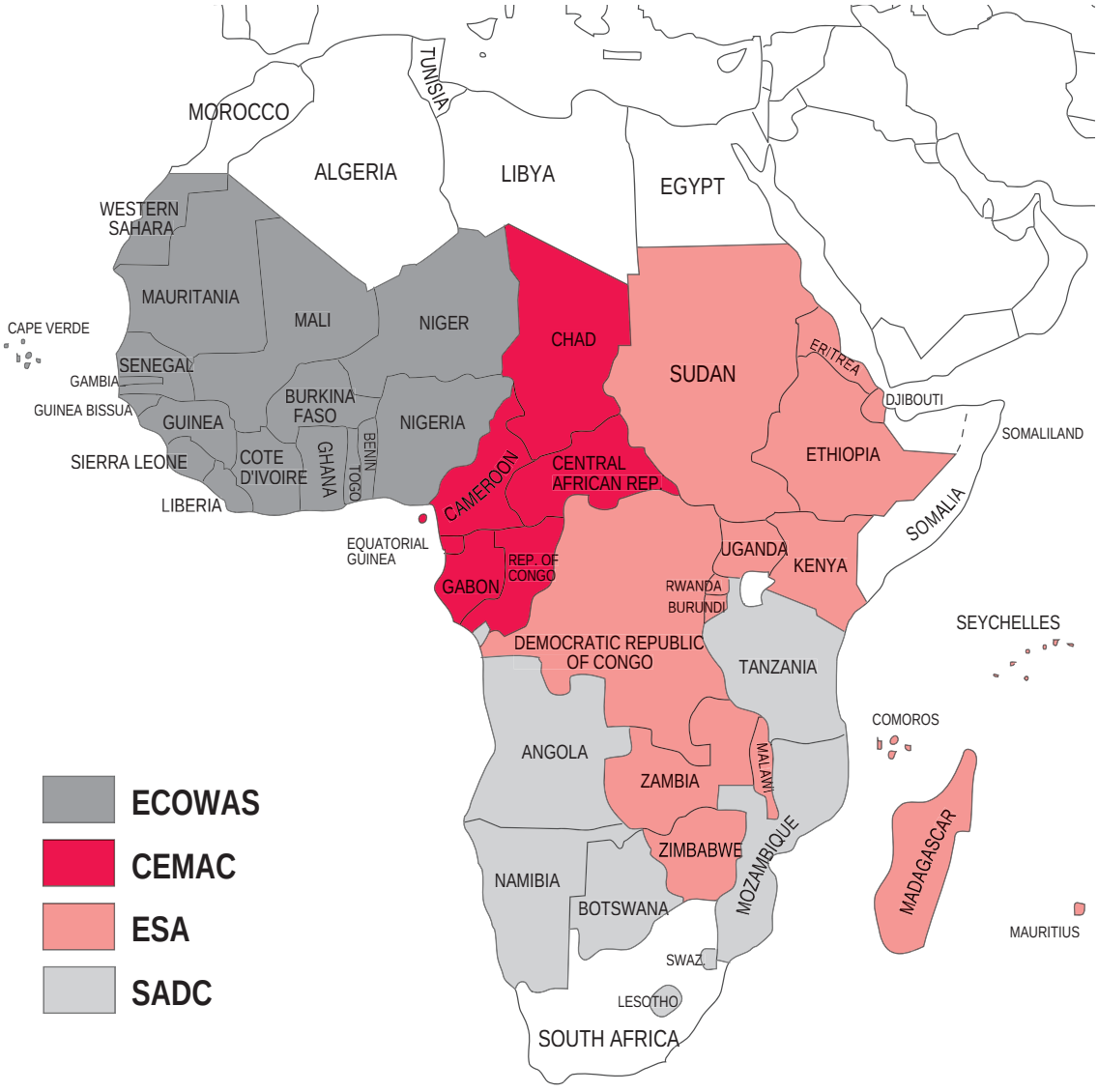
actionaid
international

Contents

Acronyms and abbreviations

ACP	Africa, Caribbean and Pacific group of countries
APEC	Asian-Pacific Economic Co-operation
BLNS	Botswana, Lesotho, Namibia, Swaziland
CEMAC	Central African Economic and Monetary Community
COMESA	Common Market for Eastern and Southern Africa
CPA	Cotonou Partnership Agreement
DDA	Doha Development Agenda
DFID	Department for International Development (UK)
DTI	Department for Trade and Industry (UK)
EBA	Everything But Arms initiative
EC	European Commission
ECOWAS	Economic Community of West African States
EPA	Economic Partnership Agreement
ESA	Eastern and Southern Africa
EU	European Union
FTA	Free Trade Agreement
GATS	General Agreement on Trade in Services
GSP	Generalised System of Preferences
LDC	Least Developed Country
MFN	Most-Favoured Nation
RTA	Regional Trade Agreement
SACU	Southern African Customs Union
SADC	Southern African Development Community
SDT	Special and Differential Treatment
TDCA	Trade, Development and Co-operation Agreement (EU-South Africa)
WTO	World Trade Organization

EPA countries in Africa, the Caribbean and Pacific



Southern African Development Community (SADC)

Angola, Botswana, Lesotho, Mozambique, Namibia, Swaziland, Tanzania

Central Africa (CEMAC)

Cameroon, Central African Republic, Chad, Congo (Republic of), Equatorial Guinea, Gabon, Sao Tome and Principe

West Africa (ECOWAS)

Benin, Burkina Faso, Cape Verde, The Gambia, Ghana, Guinea, Guinea-Bissau, Côte d'Ivoire, Liberia, Mali, Mauritania, Niger, Nigeria, Senegal, Sierra Leone, Togo

Eastern and Southern Africa (ESA)

Burundi, Comoros, Congo (Democratic Republic of), Djibouti, Eritrea, Ethiopia, Kenya, Malawi, Mauritius, Madagascar, Rwanda, Seychelles, Sudan, Uganda, Zambia, Zimbabwe

Caribbean

Antigua and Barbuda, The Bahamas, Barbados, Belize, Dominica, Dominican Republic, Grenada, Guyana, Haiti, Jamaica, St Kitts and Nevis, St Lucia, St Vincent and the Grenadines, Surinam, Trinidad and Tobago

Pacific

Cook Islands, Federated States of Micronesia, Fiji, Kiribati, Republic of the Marshall Islands, Nauru, Niue, Palau, Papua New Guinea, Samoa, Solomon Islands, Tonga, Tuvalu, Vanuatu

EPA actors

European Union side

European Commission

The Directorate-General for Trade negotiates on behalf of the European Union with a set of negotiating directives (a negotiating mandate) agreed by the EU member states.

EU member states

Give a set of negotiating directives (a negotiating mandate) to the European Commission.

European Parliament

MEPs may have a yes/no vote on the final trade and development agreement.

Africa, Caribbean and Pacific (ACP) side

Regional secretariats

Negotiate with the European Commission on behalf of the ACP member states.

ACP member states

Give a set of negotiating directives (negotiating mandate) to their respective regional secretariat.

EU-ACP

Joint Parliamentary Assembly

MEPs and a range of ACP representatives including MPs and government officials meet on a regular basis for discussion.

Executive summary

The free trade Economic Partnership Agreements (EPAs) proposed by the European Union would have a devastating effect on African, Caribbean and Pacific (ACP) countries if they go ahead as planned. New and unfair rules would require developing countries to cut their tariffs on up to 90% of imports from the EU. Jobs would be lost and livelihoods would be wrecked. European corporations would be empowered and ACP governments impeded. The most unequal trade negotiations in history could produce the most disastrous results for development.

Yet there are real alternatives to this outcome.

Both the EU and the ACP must now stop negotiating free trade Economic Partnership Agreements.

Proposed Economic Partnership Agreements must then be radically reformed so that the European Union makes no liberalisation requirements of ACP countries. ACP countries would continue to enjoy preferential access to the European market while maintaining the right to protect their industries from unfair competition. ACP countries would also be able to decide to unilaterally cut tariffs in a strategic and targeted way if they considered it in their developmental interests to do so. Radically reformed EPAs require changes to the European Commission's negotiating mandate and WTO rules on regional trade agreements.

There are also alternatives outside the EPA framework. Here, the European Union is in breach of its treaty obligations to the ACP, an opinion backed by legal advice from a lawyer from Matrix Chambers. Under the Cotonou Partnership Agreement – the treaty setting out the relationship between the EU and ACP for the next generation – the non least-developed ACP countries have the right to choose an alternative trade deal should they wish. By proclaiming possible alternatives as second best, the European Commission is prejudging what these alternatives might be, thereby violating international and European Community law.

One possible alternative outside the EPA framework is the EU's Generalised System of Preferences. This offers ACP countries certain advantages because it makes no liberalisation requirements of them, but under current plans it would effectively exclude some current ACP products from the European market.

Gideon Mendel/Corbis/ActionAid

A second option is the EU's Everything But Arms scheme, currently available only to the very poorest countries in the world. This would need to be extended to all low-income countries with similar development needs. Its 'rules of origin' requirements would need to be improved and it would need to become a contractual rather than a unilateral preference scheme.

African, Caribbean and Pacific countries must be able to choose between at least two good alternatives: a radically reformed Economic Partnership Agreement and a pro-development alternative.

EU, African, Caribbean and Pacific policy-makers must make the changes necessary to make this a reality.

Sommaire

Les accords de partenariat économique de libre-échange proposés par l'Union européenne auraient un effet dévastateur sur les pays d'Afrique, des Caraïbes et du Pacifique s'ils étaient mis en œuvre comme prévu. De nouvelles règles inéquitables exigeraient de ces pays en développement qu'ils réduisent leurs tarifs sur jusqu'à 90% de leurs importations en provenance de l'UE. Des emplois seraient perdus et des moyens de subsistance annihilés. Les corporations européennes seraient renforcées, alors que les gouvernements des pays ACP seraient entravés. Ces négociations commerciales, les plus inégales de l'Histoire, pourraient avoir des conséquences des plus catastrophiques sur le développement.

Et pourtant, d'autres possibilités bien réelles existent.

L'UE et les ACP doivent arrêter dès maintenant de négocier des accords de partenariat économique.

Ensuite, il faudrait radicalement réformer les accords de partenariat économique proposés pour que l'Union européenne n'ait aucune exigence en termes de libéralisation à l'égard des pays ACP. Les pays ACP continueraient à bénéficier d'un accès préférentiel au marché européen tout en gardant le droit de protéger leurs industries d'une concurrence déloyale. Les pays ACP seraient également en mesure de décider unilatéralement de réduire les tarifs de manière stratégique et ciblée s'ils considéraient que leurs intérêts en termes de développement le requéraient. Des APE complètement réformés nécessitent des changements au niveau du mandat de négociation de la Commission européenne et des règles de l'OMC concernant les accords commerciaux régionaux.

D'autres possibilités existent également en dehors du cadre des APE. Ici, l'Union européenne viole ses obligations stipulées dans des traités cosignés par les pays ACP, un avis soutenu par un conseiller juridique de Matrix Chambers. En effet, selon l'Accord de partenariat de Cotonou, c'est-à-dire le traité établissant les relations entre l'UE et les ACP au cours de la prochaine génération, les pays ACP qui ne sont pas les moins développés ont le droit de choisir un accord commercial alternatif si tel est leur souhait. En déclarant que les alternatives possibles constituent un second choix, la Commission européenne a des a priori quant à ces alternatives et viole de ce fait le droit international et le droit de la Communauté européenne.

Une possibilité hors du cadre des APE est le système généralisé de préférences de l'UE, qui offre aux pays ACP certains avantage puisqu'il n'a à leur égard aucune exigence en termes de libéralisation, mais dans la perspective actuelle, il exclurait totalement certains produits ACP actuels du marché européen.

Une seconde possibilité est l'Initiative "Tous sauf les armes", qui n'est actuellement disponible qu'aux pays les plus pauvres du monde. Il conviendrait d'étendre cette initiative à tous les pays à bas revenus ayant des besoins développementaux similaires. Ses exigences en termes de "règles d'origine" devraient être améliorées, et ce programme devrait reposer sur des bases contractuelles plutôt que sur un programme de préférences unilatéral.

Les pays d'Afrique, des Caraïbes et du Pacifique doivent avoir la possibilité de choisir entre au moins deux possibilités intéressantes: un accord de partenariat économique radicalement réformé et une alternative pro-développement.

Les décideurs politiques de l'UE ainsi que de l'Afrique, des Caraïbes et du Pacifique doivent opérer les changements nécessaires pour que ces possibilités deviennent une réalité.

1. Introduction

Problem solved?

On 22 March 2005 the British government announced a new policy on Economic Partnership Agreements – proposed new trade deals between the European Union and the African, Caribbean and Pacific group of countries.[1] The new policy was a response to a determined campaign by non-governmental organisations (NGOs) in the UK, acting as part of a broader 'Stop EPA' coalition, which is supported by more than 120 groups in Europe, Africa, the Caribbean and Pacific. The Stop EPA campaign rejects "Economic Partnership Agreements as currently envisaged" – narrow free trade agreements that seek to force open the markets of ACP countries to European goods and services.

The British government's new policy was a step towards meeting NGO demands and was recognised as such.[2] On the three central questions the British government's answer was more progressive than current EU policy. It made a firm commitment to reject the controversial 'Singapore Issues' – agreements on investment, competition policy and government procurement that would further empower multinational companies and further impede ACP governments.

On the question of opening up markets the British government went further than the European Commission by doubling the transition period for liberalisation from 10 to 20 years. Yet it missed the point. This is not a question of timing but a question of power. ActionAid believes that ACP governments must have the right to decide what to liberalise, if anything, and when, without the restriction or imposition of an arbitrary timeframe for liberalisation.

But the British government took us no further on the question of alternatives. In practice their position means that an ACP country would have to first reject an EPA before any work begins on what the alternative might be, a ridiculous precondition. Instead, ActionAid believes that ACP countries must have a real choice between signing an EPA and a pro-development alternative.

Yet none of this has made any difference to the actual negotiations because the British government has put no effort into changing minds in Europe and changing the instructions given to the European negotiators. The official document in which the policy was announced has no legal weight and the document that does matter – the EU's negotiating directives – remains untouched. A 'step in the right direction' is nowhere near enough when you have a ladder to climb.

This report sets out what EU policy-makers, in member states and in the Commission, and their African, Caribbean and Pacific counterparts must do to stop free trade Economic Partnership Agreements and start proper discussions on a trade deal that works for development, not against it.

[1] *DTI/DFID (2005) Economic Partnership Agreements: Making EPAs deliver for development. http://www.dti.gov.uk/ewt/epas.pdf*

[2] *ActionAid (2005) 'Hewitt pushed on Africa trade rethink'. http://www.actionaid.org.uk/1565/press_release.html*

Extracts from the British government's new EPA policy[3]

On the 'Singapore Issues'

"Investment, competition and government procurement should be removed from the negotiations, unless specifically requested by an ACP regional negotiating group."

ActionAid response: great – now push for the EU as a whole to adopt this position.

On market opening

"EPAs must ensure that ACP regional groups have maximum flexibility over their own market opening. The EU should therefore offer all ACP regional groups a period of 20 years or more for market opening, on an unconditional basis. Each regional group should be offered this full period."

ActionAid response: this is a step in the right direction. Previously the British government had agreed with the European Commission that the time period must be ten years. But the government needs to go further and allow ACP governments to decide their own pace without an external and arbitrary time limit placed upon them.

On alternatives

"The Commission should be ready to provide an alternative to an EPA at the request of any ACP country. Any alternative offered should provide no worse market access to the EU than is currently enjoyed under Cotonou preferences."

ActionAid response: this represents no change from their previously stated position. ActionAid believes that ACP countries must have a real choice between an EPA and a pro-development alternative up-front. They should not have to reject an EPA first in order to find out what the alternative might be.

Trade traps reloaded

ActionAid set out the case against proposed Economic Partnership Agreements in *Trade traps*, our first report on the issue.[4] This report sets out possible alternatives to free trade EPAs. These include radically reformed EPAs and pro-development alternatives.

The case against free trade EPAs remains compelling. Jobs and livelihoods in African, Caribbean and Pacific (ACP) countries are threatened by the EU's insistence that those countries eliminate their tariffs on European imports to an arbitrary timescale. ACP government revenues and public services are put at risk by tariff cuts because they are heavily dependent on taxes on international trade and lack viable alternative forms of taxation. The 'Singapore Issues' – agreements on investment, government procurement and competition policy – seek to enshrine greater rights for European corporations and further impede the ability of ACP governments to regulate them effectively. Furthermore, ACP countries have already rejected such agreements in World Trade Organization (WTO) talks.[4] The

[3] *DTI/DFID (2005)*

[4] *ActionAid (2004) Trade traps: why EU-ACP Economic Partnership Agreements pose a threat to Africa's development. http://www.actionaid.org.uk/wps/content/documents/trade_traps_16122004_19388.pdf*

[5] *Investment, government procurement and competition policy were formally withdrawn from the Doha Development Agenda on 6 July 2004. The 4th Singapore Issue, trade facilitation, remains part of the DDA*

prospects for African regional integration are damaged by a process that seeks to break up existing regional groupings and focus on a narrow trade liberalisation agenda to the exclusion of wider political concerns. The EPA negotiation process is deeply flawed by the imbalance in political power and negotiating capacity between unequal partners. Overall, democracy is weakened by an approach that seeks to prevent African, Caribbean and Pacific governments from choosing their own development strategies.

Past examples of disastrous trade liberisation[6]

"In the first phase of liberalising – you have seen that also in the former eastern European countries – you very often have social catastrophes." **EU Development Commissioner Louis Michel**[7]

- **Cote d'Ivoire's** chemical, textile, footwear and automobile assembly industries collapsed after tariffs were cut by 40% in 1986, leading to massive job losses.
- **Senegal** lost one-third of manufacturing jobs between 1985 and 1990 after a trade liberalisation programme reduced tariffs from 165% to 90%.
- **Ghana** lost 50,000 manufacturing jobs between 1987 and 1993 after liberalising consumer imports.
- **Kenya's** beverage, textile, sugar, cement, tobacco, leather and glass sectors have struggled to survive competition from imports since a major trade liberalisation programme was initiated in 1993 in line with an IMF/World Bank structural adjustment programme. Growth in industrial output fell by 2.6% between 1993 and 1997.

A brief history of EU-ACP trade agreements[8]

Between 1975 and 2000 trade between the EU and ACP countries was governed by the Lomé conventions that granted ACP countries better access to the European market than other developing countries. (The preferences remain in place until 31 December 2007 under a WTO waiver when they must either be replaced by another trade agreement or be extended by another waiver).

The preferences granted to ACP countries under these conventions were non-reciprocal: ACP countries did not have to extend similar or other preferences to the EU in return. This was based on the recognition that, because of the vast differences in economic development between the EU and ACP countries, any fair trade arrangement between them had to treat ACP countries differently.

With the expiry of the Lomé preferences, the EU and ACP countries signed a cooperation accord known as the Cotonou Partnership Agreement (CPA) in 2000, which provides for the negotiation and establishment of new trade agreements between the EU and ACP by 1 January 2008.

6 *Buffie, E (2001) Trade Policy in Developing Countries, CUP, Cambridge*

7 *International Development Committee (2005) Fair trade? The European Union's trade agreements with African, Caribbean and Pacific countries, Ev 29*

8 *ActionAid (2004) Trade traps, p.4*

EPA critics

EPAs have attracted the attention of important actors in both the North and South. Representatives of both Europe and Africa have laid down an important challenge to EU and ACP policy-makers to change their approach to the EPA negotiations.

The Commission for Africa

> "Ours is the first official report to call for lasting and deep-seated trade justice that would mean not only that Europe and the richest countries be honest and address the scale and waste of agricultural protectionism, but we tackle unfair rules of origin, **the much-criticised Economic Partnership Agreements,** and we address the infrastructure needs that are necessary to build the capacity of African countries to trade."
> **Gordon Brown, UK Chancellor of the Exchequer and member of the Commission for Africa**[9]

The Commission for Africa report provided a marked change in tone to previous UK and EU statements on trade and development and matched it with some positive recommendations for rich countries to take forward. It contained two crucial statements:

- "Development must be the priority in all trade agreements, with liberalisation not forced on Africa."[10]
- "Attempts to dictate policies, as we have argued throughout, are not only unacceptable as behaviour towards a partner and sovereign nation; they are also likely to be ineffective in generating real commitment and reform, let alone deliver the right solutions."[11]

ActionAid agrees with both. Rich countries must first 'do no harm' in their dealings with Africa. They must change their anti-development policies and stop forcing African countries to open their markets. It is for the people of Africa to decide on the kind of trade deal that they want.

Parliamentarians

> "We share the belief that fair trade can be a vital force in the fight against global poverty. We are unconvinced, however, that the current Economic Partnership Agreement (EPA) negotiations will produce such an outcome."
> **International Development Committee report**[12]

Parliamentarians in both the North and South have recently taken a greater interest in the EPA negotiations. On 6 April 2005 the UK International Development Committee of MPs published the results of its inquiry into the negotiations, raising important concerns. The MPs also picked up the European Commission and the British government on their weakest flank – the refusal to offer ACP countries a meaningful choice of trade deal:

> "We are concerned that in presenting the alternatives as a second-best option, with no developmental component, the Commission is going against the spirit of what was agreed in Cotonou. It places the ACP in the position of having no real choice, and reinforces their unequal position in the negotiating process. Development should be integral to any trade options presented to the ACP, even when they are not the first choice of the EU. The UK government should continue to work to ensure this is the case."[13]

ActionAid is also concerned. ACP countries must have a real choice of trade deal.

African voices

> "We fear that our economies will not be able to withstand the pressures associated with liberalization."
> **Festus Mogae, President of Botswana**[14]

[9] *At the launch of the Commission for Africa report, 11 March 2005*
[10] *Our Common Interest: report of the Commission for Africa, 2005, p255, Summary*
[11] *Our Common Interest p259, para 12*
[12] *International Development Committee (2005) p3*
[13] *International Development Committee (2005) p14*
[14] *Mogae, F (2004) Speech by Festus Mogae, President of Botswana in address to the Joint ACP-EU Ministers meeting in Gaborone on 6 May 2004*

The President of Botswana expressed his fears about EPAs more than a year ago. But more recently, Kenyan trade minister, Dr Mukhisa Kituyi, articulated his concerns about the direction of the negotiations:

> "The premise on which we started negotiations on EPAs was that when the Cotonou Agreement expired no country would be worse off than under Cotonou. But that was the beginning of the problem because the very notion of reciprocity, which is baked into this negotiation, goes way beyond what was provided for under Cotonou."
> **Dr Mukhisa Kituyi, Kenyan trade minister**[15]

African governments have begun to reflect the concerns of African civil society groups who have led the opposition to free trade EPAs from the outset. Kenya-based EcoNews summarises this position succinctly:

> "Trade cooperation arrangements between the EU and ACP countries must be based on the principle of non-reciprocity and must ensure special and differential treatment for all ACP countries."
> **Statement by EcoNews Africa**[16]

ActionAid agrees with the African voices that have been critical of the EPA process. There is deep disquiet over the way in which the EU is proceeding with the EPA negotiations.

The European Commission: no room for manoeuvre?

The biggest disappointment to date in 2005 has been the lack of substantive movement by the European Commission. Indeed, the Commission's approach to trade and development seems to have changed little in ten years. In 1995 the Commission was explicit about the EU's offensive interests on market access for its goods:

> "Multilateral tariff negotiations have done much to reduce the levels of tariffs world wide. Nevertheless, the level of tariffs in many of our partner countries, particularly the newly industrialised and developing countries, remains high. Tariff averages of 30-40% are not uncommon (EU trade weighted tariff average for all products 4.6%, UNCTAD calculation). It, therefore, can seem **obviously in our interest to persuade such countries to enter into FTAs with the Union, enabling us to encourage both tariff elimination and deregulation."**[17]

It was also explicit about the reasons it wanted to pursue the Singapore Issues:

> "FTAs should include provisions for forms of economic co-operation, in the sphere of investment regulation, standards and certification, industry dialogue, administrative practices and so on, if the Union's relations with third countries or regions are to be reinforced in the most effective manner. **Failure** on our part to engage in this type of wider economic co-operation **may well result in important economic regions developing a regulatory framework which will potentially hurt the Union's interests.** The example of APEC illustrates this point particularly well. If the countries of East Asia were, as a result of regulatory co-operation within APEC, to align their regulatory systems practices to those of the United States, this would place the EU at a competitive disadvantage, at least to the extent that a large and dynamic part of the world economy developed as a result a system which diverged significantly from that of the Union. Tariff-free trade and trade facilitation are therefore two complementary tools of export enhancement."[18]

Since the arrival of Peter Mandelson as the European Commissioner for Trade the rhetoric has certainly

---

15 *Interview with Paul Mason of BBC's Newsnight programme at Traidcraft conference, Monday 27 June 2005*

16 *EcoNews Africa: EPAs - threats to development in Africa, 23 June 2005*

17 *European Commission (1995) Free trade areas: an appraisal, p8, paragraph 58Available at www.epawatch.net Note: the EU tariff average hides the tariff peaks and escalations that help exclude processed developing country products from the European market*

18 *European Commission (1995) p9, paragraph 7*

changed but the substance remains the same. The Singapore Issues are now presented very differently:

> "Investment, public procurement, trade facilitation and competition policy are essential parts of successful economic governance. They are inherently good for development because they provide the stable and predictable framework and climate for investment to grow."[19]

ActionAid believes that international agreements on investment, public procurement, trade facilitation and competition policy are not "inherently good for development". On the contrary such agreements made on the basis of non-discrimination – making no distinction between an African farmer and a European corporation – would prevent ACP governments from ensuring that foreign investment is socially responsible and targeted at reducing poverty rather than increasing profits.

Peter Mandelson's negotiators maintain that they are endorsed and constrained by the negotiating directives given to them by EU member states in 2002. These provide for both reciprocal trade liberalisation and the inclusion of the Singapore Issues.

The importance that the Commission attaches to these directives (or 'mandate') was brought into sharp focus by a letter from the lead trade official which was leaked to *The Guardian* newspaper.[20] The letter described the UK statement on EPAs as "a major and unwelcome shift in the UK position".[21] It went on to say that:

> "Some recommendations move well away from agreed EU positions set out in the Cotonou agreement and negotiating directives [EC mandate]. Others are not compatible with WTO agreements."[22]

The letter also outlined a clear Commission strategy to press the UK to fall back into line:

> "Peter Mandelson is taking up our concerns and will press for a revised UK line, noting that their statement is contrary to the agreed EU position and harmful for our common objective of promoting development through trade."[23]

This neatly illustrates that the Commission is an actor in its own right and shows how it acts to safeguard its authority over EU trade policy and negotiations. Whilst it is true to say that the EU member states gave the Commission a mandate to negotiate free trade EPAs, it is also true to say that the mandate can be changed at any time. Both sides can initiate this change: Peter Mandelson can request a new mandate from the EU member states at any time; the member states can change the Commission's negotiating mandate at any time. It is clear that both have a responsibility to do so urgently.

19 *Mandelson, P (19 April 2005) Speech to ACP-EU Joint Parliamentary Assembly, p4*
20 *Published in The Guardian, 19 May 2005. http://www.guardian.co.uk/guardianpolitics/story/0,,1487141,00.html*
21 *Carl, P (11 April 2005) 'Recent UK statements on EPAs'. Available at:= www.epawatch.net*
22 *Carl, P (2005)*
23 *Carl, P (2005)*

Stop EPA campaign timeline

www.stopepa.org

www.epawatch.net

April 2004
Stop EPA campaign founded jointly by EU and ACP civil society groups in response to African Trade Network call for a 'No to EPA' campaign

October 2004
15-17 October: ActionAid helps public launch of the Stop EPA campaign in Europe at the European Social Forum in London

December 2004
10-14 December: Public launch of the Stop EPA campaign in Africa at the Africa Social Forum

17 December: ActionAid's 1st EPA report launched: *Trade traps*: *why EU-ACP Economic Partnership Agreements pose a threat to Africa's development*

March 2005
11 March: Commission for Africa report launched

22 March: British government announces new EPA policy

23 March-present: British government goes back to business as usual?

But the Stop EPA campaign continues…

2. Radically reformed Economic Partnership Agreements

There is no good reason why Economic Partnership Agreements have to be reciprocal free trade deals. In addition to the argument that free trade is good for development, the European Commission argues EPAs must be free trade deals in order to conform with WTO rules. Yet these rules are a moving target and are currently subject to negotiation through the Doha Round. Moreover, the Cotonou Partnership Agreement, the treaty that sets out the relationship between the European Union and the ACP for a generation, implies that WTO rules will need to be changed:

> "Negotiations shall take account of the level of development and the socio-economic impact of trade measures on ACP countries, and their capacity to adapt and adjust their economies to the liberalisation process. Negotiations will therefore be as flexible as possible… while remaining in conformity with **WTO rules then prevailing.**"[24]

Furthermore it explicitly states that:

> "The parties shall closely cooperate in the WTO with a view to **defending the arrangements reached,** in particular with regard to the degree of flexibility available."[25]

This points clearly to the need to change WTO rules on Regional Trade Agreements that prevent pro-development Economic Partnership Agreements from being WTO-compatible.

No need for the Singapore Issues

Neither of the radically reformed EPA options below includes the controversial and unwanted Singapore Issues. There is no WTO requirement for regional trade agreements to include these – they are on the table purely at the insistence of the EU. Rules on investment, competition policy and government procurement should not be decided on the basis of non-discrimination and bound in agreements with the EU, but designed by ACP countries with appropriate national and regional considerations in mind. African representatives have said this many times, notably at the African Union conference of trade ministers on 5-9 June 2005:

> "We reaffirm the position of African countries that, except for trade facilitation, the other three Singapore Issues of investment, competition policy and transparency in government procurement should remain outside the ambit of the WTO Doha Work Programme / EPA negotiations."[26]

Kenyan trade minister Dr Mukhisa Kituyi also outlined African thinking on these issues:

> "I think regional initiatives are good for Africa; even liberalising trade between our countries; even transparency in procurement – that's also good for Africa. But when you externalise it: 'transparency, procurement rules, competition law' – then you are smuggling the so-called 'new issues' of the WTO agenda – which have been abandoned in Geneva – back onto the agenda via Brussels."
> **Dr Mukhisa Kituyi, Kenyan trade minister**[27]

The Commission for Africa accepted this position in March 2005:

> "While FTAs [Free Trade Agreements] may provide benefits, it is important that they do not railroad developing-country governments into undertaking commitments that go beyond existing multilateral agreements."[28]

Radical reforms?

There are many ways in which proposed Economic Partnership Agreements could be radically reformed. This is not supposed to be an exhaustive list but a consideration of two prominent options: a single ACP country-EU EPA and a non-reciprocal EPA.

---

24 *Article 37.7 of the Cotonou Partnership Agreement 2000*
25 *Article 37.8 of the Cotonou Partnership Agreement 2000*
26 *African Union (5-9 June 2005) Ministerial declaration on EPA negotiations*
27 *Interview with Paul Mason of BBC's Newsnight programme at Traidcraft conference, Monday 27 June 2005*
28 *Our Common Interest p287, para 110*

a. A single ACP country-EU Economic Partnership Agreement

Current plans envisage six regional EPAs – four for Africa, and one each for the Caribbean and the Pacific.[29] However, as *Trade traps* argued, the configuration of the regional groupings has caused significant strain on the ACP and has threatened existing regional projects. Furthermore, current plans mean any decision to protect a particular sector of the economy from full-scale liberalisation must be taken at the regional level. This is problematic given the different levels of development within the ACP (ie the differences between Least Developed Countries (LDCs) and others), and the different sectors in which their economies are involved. Set against this is the problem of diminished negotiating strength by 'going it alone' against a powerful European Commission negotiating for a bloc of 25 developed countries.

Regional integration problems

At first glance it appears that all regional integration problems could be solved by each country abandoning their regional groupings and negotiating an individual trade deal with the EU. Individual deals would allow existing African regional integration projects to proceed without external interference. For example, the 'multi-speed, variable geometry' approach – regional integration at different speeds for different sub-groups of countries – adopted by COMESA could continue.

However, while on paper a single ACP country-EU EPA appears to solve regional integration problems, in practice these will remain, albeit in a less obvious form. In any trade deal with an African country the EU will want to ensure that others do not benefit via the back door. For example, a deal with Kenya would have implications for Uganda and vice versa. The EU would not want to have a situation in which goods from Uganda cross into Kenya, are re-branded as Kenyan and then are exported to Europe under a Kenya-EU deal. Such problems are not merely hypothetical: the BLNS countries (Botswana, Lesotho, Namibia and Swaziland) find themselves in a similar situation today. They are in a long-standing customs union with South Africa (SACU) and therefore goods from the EU find their way into their markets, but they are also negotiating an EPA as part of the SADC group. The point is that whatever may look neat on paper does not stand up to the complex realities of regional processes on the ground.

'National' protection

Whilst regional integration problems are not easily solved by this kind of EPA there are economic advantages in having one. Current WTO rules on regional trade agreements mean that the parties must eliminate tariffs on "substantially all the trade". The European Commission's preferred interpretation of "substantially" is 90%. This would leave ACP countries able to protect up to 10% of their goods from tariff elimination. If this is done regionally, as currently proposed, then many countries stand to lose out. What would happen if Mozambique wanted to protect its wheat processing industry but Tanzania wanted to protect its sugar industry? What would happen if Senegal and Ghana wanted to protect their tomato processing industries but Mali didn't? With decisions on what industries to protect taken nationally rather than regionally there is a greater chance that economic interests will be safeguarded.[30]

Going it alone?

The most powerful case against an individual EPA is the diminished negotiating clout that ACP countries would have dealing alone with the EU. The European Commission has already succeeded in dividing the ACP group into regional sub-groups ahead of any all-ACP agreement on parameters for the regional negotiating stage. A further weakening of the ACP by abandoning regional groupings risks an even worse deal for ACP countries than the one currently under negotiation.

[29] *A list of EPA countries and their groupings is shown in the inside front cover*

[30] *These examples are drawn from: Christian Aid (April 2005), For richer or poorer: transforming economic partnership agreements between Europe and Africa. http://www.christianaid.org.uk/indepth/505epas/epas.pdf*

A good practical example is the South African experience in negotiating its Trade, Development and Co-operation Agreement – a free trade agreement with the EU – in 1999. Originally South Africa had wanted to join the Lomé preference scheme that other ACP countries used but was rebuffed by the EU who argued that it was too developed to join. Instead it had to negotiate its own trade deal with the EU. Even though South Africa had many able trade negotiators and a status as a regional power, the EU managed to avoid commitments to open its market to almost 40% of South Africa's agricultural exports.[31] Given that agriculture is a key South African interest (and a key interest for most ACP countries) this does not bode well for countries in a weaker position. A single ACP country-EU EPA would isolate ACP countries from one another while the EU remains united.

b. A non-reciprocal Economic Partnership Agreement

A single ACP country-EU EPA as outlined above would not depart from the Free Trade Agreement concept. But a non-reciprocal EPA would require a complete change in approach from the EU and changes to current WTO rules on regional trade agreements.

Non-reciprocity Vs 'less than full reciprocity' or asymmetry?

Some actors have attempted to blur the lines between non-reciprocity and asymmetry but there is a very clear difference between the two. 'Non-reciprocity' means that ACP countries are not required to cut tariffs on any of their goods as a result of a trade deal with the EU. They may of course decide that it is in their own developmental interests to unilaterally cut tariffs in a strategic and targeted way but this would be their own decision without external interference. 'Asymmetry' means that ACP countries would be required to cut fewer tariffs over a longer time period. For example, the 'asymmetrical' EU-South Africa trade deal requires the EU to liberalise 94% of its trade with South Africa over 10 years and allows South Africa to liberalise 86% of its trade over 12 years. This precedent shows that asymmetry is an approach that seeks to tinker around the edges, to make small changes to what is essentially an unreconstructed free trade agreement.

Putting it into practice: changing the European Commission's mandate and WTO rules

EU member states set parameters for the EPA negotiations when they gave a mandate to the European Commission in 2002.[32] This explicitly called for "special reference" to be made "to achieve progressive and reciprocal liberalisation of trade in goods and services". Furthermore it requested the European Commission to press for agreements on the Singapore Issues. Concerning investment it calls for "a regulatory framework which shall enhance and stimulate mutually beneficial sustainable investment between them. This framework will be based on principles of non-discrimination". On government procurement it says: "EPAs will aim to ensure full transparency in procurement rules and methods at all government levels. In addition the parties will seek progressive liberalisation of their procurement markets on the basis of the principle of non-discrimination."

The EC's mandate goes beyond what ACP countries agreed to in the Cotonou Partnership Agreement. But worse than that the negotiators are interpreting it in a particularly extreme way whilst being careful to refer back to it as the source of their authority. ActionAid therefore believes that it is essential that EU member states make substantive changes to the instructions they give to the European Commission's negotiating team.

[31] *38% of South Africa's agricultural exports were excluded from the EU-South Africa TDCA. See http://www.igd.org.za/pub/g-dialogue/Special_feature/trade.html*

[32] *European Commission's negotiating directives (mandate). Available at www.epawatch.net*

However, it will not simply be a case of changing the European Commission's negotiating mandate if non-reciprocal EPAs are to be WTO-compatible and therefore not vulnerable to legal challenges. WTO rules concerning regional trade agreements will need to be changed. Both the EU and ACP countries should work together to ensure that this happens.

Indeed the Marrakesh Agreement establishing the WTO recognised that trade rules should serve development outcomes:

> "relations in the field of trade and economic endeavour should be conducted with a view to raising standards of living, ensuring full employment…"[33]

Current WTO rules on regional trade agreements: Article XXIV

Article XXIV of the General Agreement on Tariffs and Trade sets out WTO rules on regional trade agreements. These rules allow countries to derogate from the Most-Favoured Nation or non-discrimination principle that underpins the WTO. This states that whatever deal a country offers to another country they must offer to all of the WTO. Countries can exempt themselves from this provided they set up a customs union or free trade area under Article XXIV. There are three key parts to Article XXIV:

1. Rule 5(c): "any interim agreement shall include a plan and schedule for the formation of such a customs union or of such a free trade are within a reasonable length of time".
2. The 'Understanding on the Interpretation of Article XXIV': "the reasonable length of time referred to in paragraph 5(c) of Article XXIV should exceed 10 years only in exceptional cases. In cases where Members party to an interim agreement believe that 10 years would be insufficient they shall provide a full explanation to the Council for Trade in Goods of the need for a longer period".
3. Rule 8(b): "A free trade area shall be understood to mean a group of two or more customs territories in which the duties and other restrictive regulations of commerce (except, where necessary, those permitted under Articles XI, XII, XIV, XV and XX) are eliminated on substantially all the trade between the constituent territories in products originating in such territories."

The European Commission interprets the above clauses to mean that 90% of the trade between the EU and ACP must be liberalised over a period of 10-12 years, an interpretation first used during the EU-South Africa negotiations in 1999.

[33] *Agreement Establishing the World Trade Organization http://www.wto.org/english/docs_e/legal_e/04-wto_e.htm*

Possible changes to Article XXIV

There are essentially two ways to change Article XXIV to allow for non-reciprocal EPAs. ActionAid remains strongly opposed to the General Agreement on Trade in Services (GATS) at the WTO but one possible change to Article XXIV would be to introduce a paragraph similar to Article V:3 of the GATS. This could be done either within the provisions on Article XXIV itself or in the 'Understanding on the Interpretation of Article XXIV'. GATS Article V:3 states:

> "Where developing countries are parties to an agreement flexibility shall be provided regarding the conditions in accordance with the level of development of the countries concerned, both overall and in individual sectors and subsectors."

An alternative would be to secure a specific exemption to the provisions of Article XXIV only for the EU-ACP agreement in the same manner that provides for the India-Pakistan exception. The India-Pakistan exception states:

> "Measures adopted by India and Pakistan in order to carry out definitive trade arrangements between them, once they had been agreed upon, might depart from particular provisions of this Agreement, but these measures would in general be consistent with the objectives of the Agreement."

Timescale and political will

Making changes to Article XXIV requires a two-thirds decision at a Ministerial Conference.[34] The next WTO ministerial conference is in Hong Kong in December 2005. An alternative would be to propose changes within the 'Understanding on Article XXIV'. This would require a three-fourths majority at a meeting of the WTO General Council.[35]

There is recognition that the current provisions of Article XXIV are unsatisfactory. The rules on regional trade agreements were drawn up in 1947 when there were very few North-South trade agreements. The Ministerial Declaration that launched the current Doha round of WTO negotiations makes specific reference to the need to improve WTO rules relating to regional trade agreements. Paragraph 29 states:

> "We also agree to negotiations aimed at clarifying and improving disciplines and procedures under the existing WTO provisions applying to regional trade agreements. The negotiations shall take into account the developmental aspects of regional trade agreements."[36]

Paragraph 44 states:

> "We reaffirm that provisions for special and differential treatment are an integral part of the WTO Agreements. We note the concerns expressed regarding their operation in addressing specific constraints faced by developing countries, particularly least-developed countries. In that connection, we also note that some Members have proposed a Framework Agreement on Special and Differential Treatment (WT/GC/W/442). We therefore agree that all special and differential treatment provisions shall be reviewed with a view to strengthening them and making them more precise, effective and operational. In this connection, we endorse the work programme on special and differential treatment set out in the Decision on Implementation-Related Issues and Concerns."[37]

Read together they provide a good framework for WTO members to revisit the rules on regional trade agreements to make development-friendly North-South trade deals possible.

[34] *Article X of the Marrakesh Agreement establishing the WTO*
[35] *Article IX:2 of the Marrakesh Agreement establishing the WTO*
[36] *WTO Ministerial Declaration adopted on 14 November 2001 (WTO/MIN(01)/DEC/1)*
[37] *WTO Ministerial Declaration adopted on 14 November 2001 (WTO/MIN(01)/DEC/1)*

African representatives have consistently called for new rules on regional trade agreements so that they are no longer narrow Free Trade Agreements. The ministerial declaration from the African Union's conference of trade ministers in June 2005 stated:

> "We reiterate that Article XXIV of GATT needs to be appropriately amended to allow for necessary special and differential treatment."[38]

The Commission for Africa agrees with the general direction:

> "A review of Article XXIV of the General Agreement on Tariffs and Trade in order to reduce the requirements for reciprocity and increase focus on development priorities may be useful."[39]

Some reform of Article XXIV is also supported by the British government:

> "In addition, the EU should propose within the WTO that Article XXIV of the General Agreement on Tariffs and Trade, **should be reviewed as suggested by the Commission for Africa**, in order to reduce the requirements for reciprocity and increase the focus on development priorities."[40]

EU Trade Commissioner Peter Mandelson also sees problems with the current rules but he is merely concerned that they provide for more flexibility – essentially to enable asymmetrical reciprocity in North-South trade agreements. This means that developing countries would have more time to liberalise slightly

Stuart Freedman/ActionAid

38 *African Union (5-9 June 2005)*
39 *Our Common Interest p298-9*
40 *DTI/DFID (2005)*

fewer sectors – a tinkering measure that does little to address the problems associated with trade liberalisation for developing countries:

> "One of the rule changes that I want to promote in the WTO is a more flexible interpretation and application of Article XXIV in order to accommodate the sort of progressive, step-by-step market opening that is envisaged in these agreements."[41]

ActionAid believes that tinkering is not good enough. Radical changes are necessary to enable ACP countries to decide what to liberalise, if anything, and when, without reference to an external and arbitrary time period.

So where are the blockages to reform? Officials within the European Commission itself have been less than enthusiastic about changes to rules on regional trade agreements. In his leaked letter DG Trade Director-General Peter Carl says that:

> "we are not in a position to consider options that are incompatible with WTO rules, which all WTO Members including the EU and the ACP have agreed on, and which are there for a purpose".[42]

Furthermore he adds:

> "In the ongoing DDA [Doha Development Agenda] negotiations on WTO rules for RTAs [regional trade arrangements], the EC has consistently pursued clarification of existing flexibilities for developing countries under present rules. This includes the possibility for longer transition periods and less than full reciprocal commitments for developing countries in RTAs with developed countries. **The EC already allows such flexibilities in its RTAs with developing partners."**[43]

We have already seen that 'such flexibilities' are fairly minimal in practice as shown by the EU-South Africa trade deal which gives South Africa just two more years than the EU to liberalise just 8% less of its trade.[44] And if the EC already allows what it considers sufficient flexibility then where is the incentive for it to push for rule changes?

Australia, Japan and Hong Kong have recently been pushing for even tighter rules on regional trade agreements. In 2002 Australia submitted a proposal that would have prevented RTAs from excluding large sectors of trade.[45] Australia's motive for this is to gain greater market access for its agricultural products through its RTA with the United States.[46] Although Australia did not put a figure on 'substantially all the trade' in 2002 in 1998 it suggested 95%.[47] Japan and Hong Kong also pressed for a stricter interpretation of 'substantial' with the benchmark for intra-RTA trade set at 95% with greater sectoral coverage.[48] Furthermore, Japan, Korea, Hong Kong, Australia, New Zealand, India and Pakistan are in favour of retroactive application should the rules change.[49] This means that pre-existing regional trade agreements would have to be re-negotiated to meet the new rules.

There is a tight timescale for action if non-reciprocal EPAs are to become a reality. The EU and ACP must use the WTO ministerial conference in December 2005 to push for pro-development reforms of Article XXIV so that there is still time to change the design of EPAs before negotiations are too far advanced. EU member states must issue fresh instructions to the European Commission's negotiating team: reciprocal trade liberalisation and negotiations on the Singapore Issues must be withdrawn from the EPA negotiating mandate.

---

41 *International Development Committee (2005) p8 and Ev16*

42 *Carl, P (2005)*

43 *Carl, P (2005)*

44 *The EU-South Africa Trade, Development and Co-operation Agreement requires South Africa to liberalise 86% of its trade with the EU over 12 years; the EU is to liberalise 94% of its trade over 10 years.*

45 *Submission on regional trade agreements by Australia, Negotiating Group on Rules, WTO TN/RL/W/15, July 9 2002*

46 *DTI officials have made this argument in meetings with NGOs*

47 *WTO members have implicitly used this figure as a measure based on existing trade aggregated across all tariff lines within the CRTA while supporting their own conformity of FTAs with the SAT requirement. Australia however first initiated this figure of 95%. Communication from Australia-Addendum, Australia, WT/REG/W/22/Add.1, January 24 1998, Paragraphs 9-10.*

48 *WTO countries wrestle with Rules on Regional Agreements, **Inside US Trade**, October 19 2001*

49 *But most WTO members are not. They are a minority. For further details see 'WTO Countries wrestle with Rules on Regional Agreements', Inside US Trade, October 19 2001*

3. Alternatives to Economic Partnership Agreements

There are also possibilities for trade deals between the EU and ACP outside the EPA framework. The Cotonou Partnership Agreement makes an explicit provision for these:

> "In 2004, the Community will assess the situation of the non-LDC 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."[50]

All parties to the negotiations have accepted that the 2004 deadline is no longer applicable to this clause. Former EU Trade Commissioner Pascal Lamy made it clear that he was very open to looking at this at any time, perhaps in the context of the comprehensive review of the Cotonou Partnership Agreement in 2006. Peter Mandelson was asked about this in his evidence to the UK International Development Committee of MPs:

> Q60 Quentin Davies MP: "Commissioner, the ACP countries were originally promised by the Commission that if they did not want to sign up to an Economic Partnership Agreement, they could have an alternative, which would provide no worse market access for them to the EU market. Does that promise still stand?"
>
> Mr Mandelson: "It does still stand."[51]

However, his further comments were more troubling. When asked to expand on what the alternative might be he said:

> "The **alternative is the GSP,** the Generalised System of Preferences… But the alternative is, as I say, **second best.** It is either an EBA arrangement, which is simply a market access arrangement, with no developmental content or dimension, or it is a Generalised System of Preferences, which, likewise, is a market access, a unilateral – unilateral by Europe, I might say – system of preferences to gain market access, again, without any developmental dimension or content. That is why in my view, ACP countries opted for the more ambitious and more sophisticated model because of its developmental nature."[52]

There are two problems with this position. First, it is not for Peter Mandelson to make pronouncements on what the alternatives to EPAs are. The Cotonou Partnership Agreement makes it clear that the EU must first "examine all alternative possibilities" to an EPA before plumping for one option. Since this has not been done it is premature for Peter Mandelson to decide that the alternative is the GSP.

Second, there is a big difference between ACP countries choosing to negotiate and choosing to sign a final agreement.

Yet worse than this are the remarks by Peter Mandelson's top trade official in the leaked letter published in *The Guardian*. In it Peter Carl argues that the UK statement on EPAs:

> "could well make progress with EPA negotiations more difficult by reinforcing the views of the more sceptical ACP states and **raising the prospect of alternatives that are, in reality, impractical".**[53]

This stance puts the EU in breach of its treaty obligations to provide ACP countries with meaningful choices. ActionAid's view is supported by a lawyer at Matrix Chambers:

> "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 from pursuing the possibility of an alternative

50 *Article 37.6 of the Cotonou Partnership Agreement 2000*
51 *International Development Committee (2005) Ev 18*
52 *International Development Committee (2005) Ev18*
53 *Carl, P (2005)*

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."[54]

The International Development Committee also supports ActionAid's views:

"We challenge the UK government to ensure that it uses its Presidency of the EU to turn these negotiations around, to dispel our disquiet, and to guarantee that the poorest countries have **real choices** to enable them to use trade for their own development."[55]

Why no waiver?

The current trade agreement between the EU and ACP – the Lomé/Cotonou preference scheme – is due to expire in 2007. WTO members granted a waiver in 2000 to allow it to continue, even though it breaks some WTO rules.

Some ACP decision-makers think that a new waiver to maintain the current Lomé/Cotonou preference scheme is the best alternative to an EPA. ActionAid believes that the possibility of a waiver should not be ruled out but this should be seen as a last resort. A radically reformed EPA or a pro-development alternative are more viable long-term solutions.

So what might these alternatives be?

While it is not ActionAid's intention to provide an exhaustive list, two different trade schemes have been increasingly discussed by commentators as viable options for the ACP: the EU's Generalised System of Preferences and the EU's Everything But Arms scheme. Both rely on a WTO rule known as the 'Enabling Clause'.

The Enabling Clause

The 1979 GATT 'Decision on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries', commonly known as the 'Enabling Clause' sets out the rules on two types of non-reciprocal trade preferences:

1. Generalised trade preferences extended by a developed country to developing countries such as the EU's Generalised System of Preferences and the Everything But Arms initiative.
2. Regional/global agreements entered into among developing countries or South-South trade agreements such as Mercosur.

The rules state that: "contracting parties may accord differential and more favourable treatment to developing countries without according such treatment to other contracting parties".[57]

The WTO Appellate Body ruled in 2004 that different preferences may be given to different developing countries provided that the difference responds "to a widely recognized 'development, financial [or] trade need'".[58]

54 *Legal advice prepared for ActionAid by Kate Cook of Matrix Chambers, 23 June 2005.*

55 *International Development Committee (2005) p3*

56 *Technically the Everything But Arms scheme is part of the EU's Generalised System of Preferences but for clarity the two are discussed separately.*

57 *Enabling Clause, p191, paragraph 1*

58 *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)*

a. Generalised System of Preferences (excluding EBA)

The EU's Generalised System of Preferences gives developing countries preferential access to the European market in conformity with WTO rules.[59] Currently ACP countries use the Lomé/Cotonou preference scheme rather than the GSP but some analysts see a revised GSP as a possible post-Cotonou trade regime.[60]

Key features

The GSP is a non-reciprocal market access scheme open to all developing countries that meet certain criteria. It is a unilateral, non-contractual and non-reciprocal scheme that the EU designs and offers to developing countries on its own terms. Not all products from developing countries are covered.

GSP Vs Lomé/Cotonou

DFID-commissioned research into the GSP argues that:

> "The end of the Cotonou Agreement would leave unchanged the tariff treatment of some 75% of ACP exports because they are in items that either enter duty free under the MFN or would do so under the Standard GSP".[61]

In principle no ACP state is excluded from joining the GSP provided it meets the governance criteria set out by the EU. These include ratification of a series of conventions covering issues such as human rights and nuclear non-proliferation.[62] But leaving aside the EU's questionable governance agenda there are a number of disadvantages to ACP countries doing so.

1 The GSP does not cover all products of interest to ACP countries

"Kenya, for example, would pay tariffs of up to 10.1% on its sales of fresh/chilled peas if they were imported into the EU under the GSP but it does not do so because they are imported instead under the Cotonou Agreement and enter duty free."[63]

2 The GSP does not provide for future ACP development

"One of the attractions of the Cotonou Agreement is that it is largely a 'negative list' preference agreement. Except in the case of items covered by the Common Agricultural Policy (CAP) it offers duty-free access for all ACP products that meet the rules of origin. This means that if an ACP country develops a new line of export it can be certain (so long as the item is not covered by the CAP) that it will enjoy duty-free access to the EU. The GSP, by contrast, is a positive list: it specifies precisely which products are covered, and any item that is not mentioned is excluded."[64]

3 The new GSP scheme (GSP+) may not be WTO-compatible

The EU's requirement that developing countries ratify non-trade conventions if they want to benefit from the new GSP scheme means that the scheme is open to legal challenge at the WTO. As the DFID-commissioned study argues: "The WTO compatibility of GSP+ is by no means certain."[65]

4 The GSP is non-contractual

The EU can amend or suspend the GSP scheme at any time without reference to its beneficiaries – developing countries.

[59] *The Enabling Clause of the GATT 1979*
[60] *Stevens, C and Kennan, J (February 2005) GSP Reform: a longer-term strategy (with special reference to the ACP), Report prepared for the Department of International Development, IDS*
[61] *Stevens, C and Kennan, J (2005) vi*
[62] *Stevens, C and Kennan, J (2005) p22*
[63] *Stevens, C and Kennan, J (2005) p3*
[64] *Stevens, C and Kennan, J (2005) p16*
[65] *Stevens, C and Kennan, J (2005) vii*

Stuart Freedman/ActionAid

The GSP and Free Trade Agreements

The European Commission intends to remove the GSP option for countries with bilateral or regional trade agreements with the EU. Once they have been fully implemented these FTAs would grant developing countries better access to the European market but during the implementation period the GSP may be more favourable:

> "This is the case, for example with the Trade, Development and Co-operation Agreement (TDCA) with South Africa. South African exports of roasted groundnuts to the EU under the TDCA enter duty free, whereas the GSP rate is 7.2%; some South African car bumpers, on the other hand, currently pay a tariff of 2.2% under the TDCA even though the GSP rate is zero."[66]

While the GSP has clear advantages over unreformed EPAs it currently falls short of the long-term trade deal with the EU that ACP countries need. While it is non-reciprocal it is also non-contractual and excludes a range of products that are of interest to the ACP both now and in the future. For the GSP to be a good alternative to a free trade EPA the EU would need to increase the number of ACP products covered and discard the non-trade conventions that make the scheme open to challenge at the WTO.

b. Expansion and improvement of 'Everything But Arms'

Whilst the 'Everything But Arms' scheme (EBA) technically falls under the GSP it is generally considered separately by analysts. Like the general GSP scheme it has the disadvantage of being non-contractual but has many additional features that have the making of a proper alternative to free trade Economic Partnership Agreements.

EBA is currently only available to Least Developed Countries (49 worldwide with 34 in sub-Saharan Africa). In principle it allows LDCs non-reciprocal market access to the EU for all products with the sole exclusion of arms. Certain sensitive products are to be phased in over the next few years but by 2009, LDCs should have duty and tariff-free access for everything but arms.

Former EU Trade Commissioner and current WTO director-general, Pascal Lamy, makes the case for the EBA scheme:

> "What is the result after 3 years? EBA preferential imports into the EU have steadily increased. Clothing and textile products represent the lion's share of this total and have also increased (83% of total EBA imports into the EU in 2003; 79% in 2002). EBA is of particular importance for the LDCs which are not signatories to the Cotonou Agreement. The 6 biggest EBA beneficiaries were non-ACP countries including Bangladesh, Cambodia, Laos PDR, Nepal, Yemen & Maldives (who are now graduating in fact from LDC status in part as a result of this)."[67]

[66] *Stevens, C and Kennan, J (2005) p9*

[67] *Lamy, P (19 November 2004) Trade policy in the Prodi Commission 1999-2004: an assessment, p19*

For EBA to be a viable alternative to EPAs it would need to be improved and extended to all low-income countries with similar development needs. This could be done without changes to WTO rules. The challenge is to design a scheme that would be available to all such countries whilst excluding the larger and more successful developing countries (such as Brazil and China) in sectors where they are already competitive.

The differentiation debate

Developing countries have been suspicious of any attempts to differentiate them according to their level of development beyond the currently accepted two-category system of 'developing countries' and 'LDCs'. Developing countries have seen the differentiation debate as a tactic by rich countries to divide and rule and break up alliances of poor countries. Yet while developing countries are right to be suspicious there is a powerful case for objective criteria that would allow low-income developing countries to become beneficiaries of the EBA scheme.

> "Differentiation has been a source of controversy in the WTO, most recently with the dispute over the anti-narcotics tranche of the GSP brought by India. The 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."[68]

> "Importantly, the Appellate Body ruled against a claim by India that the GSP must offer 'identical' tariff preferences to all beneficiaries. It confirmed that different preferences may be given provided that the difference responds 'to a widely recognized "development, financial [or] trade need' (para164). But it also found that the justification given for the anti-narcotics regime failed to satisfy this criterion."[69]

Interestingly, the European Commission itself 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) as well as the countries that would need preferences most after the Multifibre Arrangement (MFA) textile-quota system comes to an end in December 2004."[70]

The Commission for Africa supported extending the EBA scheme to all sub-Saharan African countries:

> "Given Africa's current economic and poverty challenges, a strong case could be made for sub-Saharan African low-income countries to receive special treatment through preferences. On current trends, most people living on less than US$1 a day in 2015, will be living in sub-Saharan Africa, where they will make up over two-fifths of the population. By contrast, in South Asia, the proportion below the poverty line will be 16 per cent, and in East Asia and the Pacific only two per cent."[71]

The EU could therefore extend the Everything But Arms scheme to cover all low-income developing countries with similar development needs.

Rules of origin

However, other problems with EBA remain. 'Rules of origin' requirements – rules that specify what percentage of a good must be made in a particular country in order to enter the EU duty and quota free – are currently too restrictive for LDCs to take advantage of the scheme. The Lomé/Cotonou rules are far less onerous. A minimum requirement of a reformed EBA would be to match the rules of origin requirements under Lomé/Cotonou.

---

[68] *Stevens, C and Kennan, J (2005) v*
[69] *Stevens, C and Kennan, J (2005) p12*
[70] *Stevens, C and Kennan, J (2005) p5*
[71] *Our Common Interest (2005) p292, paragraph 124*

Global or regional cumulation?

Other suggestions concerning rules of origin have looked at regional or global cumulation. These would allow one ACP country to source components for a particular good either regionally or globally and still qualify for market access under the EBA scheme. Stevens argues for a form of regional cumulation within the revised GSP.[72] The Commission for Africa argues for global cumulation:

> "We recommend that all developed countries should allow global cumulation and specify a minimum of 10 per cent value-added in the country of origin." [73]

Whilst ActionAid believes that rules of origin requirements for EBA should be relaxed, care should be taken to make sure this is done with development goals at the forefront. The danger of having an 'anything goes' approach to rules of origin is that benefits accrue to transnational corporations rather than to poor people. If the rules require only a very small percentage of a product is processed in an EBA country there is little incentive for substantive production to be located there. This risks EBA countries being used merely as transit locations for goods that are, to all intents and purposes, made in competitive sectors in China. Whilst some new jobs and some new money may reach the EBA country, the majority of the benefits will flow to transnational corporations able to take advantage of the preferential trade deal without putting any real investment into the country that is supposed to be the beneficiary.

Contractual obligations

The final change needed for EBA to be a proper alternative to an Economic Partnership Agreement is a proper degree of legal certainty.[74] GSP schemes are unilateral trade preferences and not negotiated contractual obligations. They can therefore be modified or withdrawn at any given point in time, introducing an element of instability. For example, in April 1992, the United States terminated India's GSP privileges on US$60 million worth of pharmaceutical exports on the pretext that India did not have adequate intellectual property protection.

As the Commission for Africa argues:

> "uncertainty hinders investment. In making investment decisions, businesses are likely to look over a longer timeframe… Developed countries should overcome these problems by binding preferential tariff rates permanently at the WTO".[75]

The EU should also commit to joint decision-making on future changes to the EBA scheme.

Political will

The EU could start work on extending and improving the Everything But Arms scheme immediately so that it is ready as a viable alternative to Economic Partnership Agreements. ACP countries should not be put in a position whereby they first have to reject an EPA before the EU starts work on possible alternatives.

---

[72] *Stevens, C (2005) p29*

[73] *Our Common Interest (2005) p293, paragraph 128*

[74] *Page, S and Kleen, P (2004) Special and differential treatment of developing countries at the WTO, ODI*

[75] *Our Common Interest (2005) p294, paragraph 130*

4. Conclusion

Gideon Mendel/Corbis/ActionAid

There are viable alternatives to free trade Economic Partnership Agreements. These include both radically reformed EPAs and pro-development alternatives outside the EPA framework.

A single ACP country-EU EPA offers some advantages. It could solve some of the problems of regional integration and provide 'national' protection for poor countries' industries. However, ACP countries would lose negotiating clout with the EU if they followed this route and the reciprocity problem would remain.

A non-reciprocal EPA would allow ACP countries to continue to access the European market without any requirement to liberalise. ACP countries would also be free to decide to unilaterally cut tariffs in a strategic and targeted way if they considered it in their developmental interests to do so. A non-reciprocal EPA would require changes to the European Commission's negotiating mandate and WTO rules on regional trade agreements.

There are also alternatives outside the EPA framework. Here, the European Union is in breach of its treaty obligations to the ACP, an opinion backed by legal advice from a lawyer from Matrix Chambers. The Cotonou Partnership Agreement, the treaty setting out the relationship between the EU and ACP for the next generation, makes it clear that non-least developed ACP countries have the right to choose an alternative trade deal should they wish. By proclaiming possible alternatives as second best the European Commission is prejudging what these alternatives might be and violating international and Community law.

One possible alternative is the EU's Generalised System of Preferences. It offers some advantages to ACP countries because it is a non-reciprocal trade scheme – making no requirements for the ACP to liberalise. However, it would increase duties on some ACP products, making it more difficult for them to access the European market.

A further option is the EU's Everything But Arms scheme. But this would need to be extended to all low-income developing countries with similar development needs. Its rules of origin requirements need to be improved and it needs to become a contractual rather than a unilateral preference scheme.

4. Conclusion

Des alternatives viables aux accords de partenariat économique existent, notamment des APE radicalement réformés ainsi que des alternatives pro-développement en dehors du cadre des APE.

Un APE unique entre pays ACP et l'UE présente certains avantages. Il pourrait résoudre certains problèmes au niveau de l'intégration régionale et fournirait une protection "nationale" aux industries des pays pauvres. Néanmoins, les pays ACP perdrait en pouvoir de négociation face à l'UE s'ils suivaient cette voie, et le problème de la réciprocité subsisterait.

Un APE non-réciproque permettrait aux pays ACP de continuer à avoir accès au marché européen sans être obligé de se libéraliser. Les pays ACP seraient également libres de décider unilatéralement de réduire des tarifs de manière stratégique et ciblée s'ils considéraient que cela était dans l'intérêt de leur développement. Un APE non-réciproque appellerait des changements concernant le mandat de négociation de la Commission européenne et les règles de l'OMC sur les accords commerciaux régionaux.

D'autres possibilités existent également en dehors du cadre des APE. Ici, l'Union européenne viole ses obligations stipulées dans un traité cosigné par les pays ACP, un avis soutenu par un conseiller juridique de Matrix Chambers. En effet, selon l'Accord de partenariat de Cotonou, c'est-à-dire le traité établissant les relations entre l'UE et les ACP au cours de la prochaine génération, les pays ACP qui ne sont pas les moins développés ont clairement le droit de choisir un accord commercial alternatif si tel est leur souhait. En déclarant que les alternatives possibles constituent un second choix, la Commission européenne a des a priori quant à ces alternatives et viole de ce fait le droit international et le droit de la Communauté européenne.

Une possibilité alternative est le système généralisé de préférences de l'UE, qui offre aux pays ACP certains avantage puisqu'il constitue un programme commercial non-réciproque. En d'autres termes, il ne leur demande aucune exigence en termes de libéralisation. Néanmoins, il ferait augmenter les accises sur certains produits ACP, rendant leur accès au marché européen plus difficile.

Une autre possibilité est l'Initiative "Tous sauf les armes", mais celle-ci devrait être étendue à tous les pays à bas revenus ayant des besoins similaires au niveau du développement. Par ailleurs, ses exigences en termes de "règles d'origine" devraient être améliorées, et ce programme devrait plutôt reposer sur des bases contractuelles que sur un programme de préférences unilatéral.

5. ActionAid's recommendations

Core recommendation

The European Union and African, Caribbean and Pacific countries must stop negotiating free trade Economic Partnership Agreements.

Radically reformed Economic Partnership Agreements

ActionAid calls upon EU, African, Caribbean and Pacific policy makers to make changes in the following areas to enable non-reciprocal Economic Partnership Agreements:

European Commission's EPA negotiating mandate

European Union member states must revise the European Commission's EPA negotiating mandate to withdraw the demands for reciprocal trade liberalisation and negotiations on investment, competition policy and government procurement.

EU Trade Commissioner, Peter Mandelson must request a new negotiating mandate immediately.

WTO rules

WTO members must reform Article XXIV of the GATT to incorporate special and differential treatment for developing country members of regional trade agreements. This means that there must be no requirement for ACP countries to liberalise anything.

Timetable for action

The British government must use its presidency of the EU in 2005 to push for changes to the European Commission's negotiating mandate to withdraw the demands for reciprocal trade liberalisation and negotiations on investment, competition policy and public procurement.

WTO members must use the Hong Kong ministerial conference in December 2005 to reform Article XXIV of the GATT to incorporate special and differential treatment for developing country members of regional trade agreements. This means that there must be no requirement for ACP countries to liberalise anything.

Alternatives to Economic Partnership Agreements

EU policy makers must immediately examine all possible alternatives to EPAs. These may include the Generalised System of Preferences and Everything But Arms scheme.

Timetable for action

The British government must use its presidency of the EU in 2005 to push for work to begin now on non-reciprocal alternatives to Economic Partnership Agreements.

Choice

African, Caribbean and Pacific countries must ultimately be able to choose between at least two good alternatives: a radically reformed Economic Partnership Agreement and a pro-development alternative.

Process issues

Parliamentary oversight

The European Parliament must have a vote on the final agreement between the EU and ACP. MEPs should launch an inquiry into Economic Partnership Agreements and the European Commission's approach as soon as possible.

African, Caribbean and Pacific parliaments must have a vote on the final agreement between the EU and ACP.

Stakeholders

All stakeholders, including farmers groups, labour unions and civil society must be allowed to play a meaningful role in the negotiations.

5. Recommandations d'ActionAid

Recommandation centrale

L'UE et les pays d'Afrique, des Caraïbes et du Pacifique doivent cesser leurs négociations au niveau des accords de partenariat économique.

Des accords de partenariat économique radicalement réformés

ActionAid encourage les décideurs politiques de l'UE et des pays d'Afrique, des Caraïbes et du Pacifique à apporter des changements dans les domaines suivants pour permettre l'existence d'accords de partenariat économique non-réciproques:

Mandat de négociation de la Commission européenne en matière d'APE

Il convient que les Etats membres de l'UE revoient le mandat de négociation de la Commission européenne en matière d'APE dans le sens d'un retrait des exigences concernant une libéralisation commerciale réciproque et des négociations sur les investissements, la politique de concurrence et les marchés publics.

Le Commissaire du Commerce de l'UE , Peter Mandelson, doit exiger un nouveau mandat de négociation immédiatement.

Règles de l'OMC

Les membres de l'OMC doivent réformer l'article XXIV du GATT afin d'y incorporer un traitement spécial et différencié pour les pays en développement qui participent à des accords commerciaux régionaux. Par conséquent, aucune exigence en matière de libéralisation de quoi que ce soit ne doit être exprimée à l'égard des pays ACP.

Calendrier d'action

Le gouvernement du Royaume-Uni doit profiter de sa présidence de l'UE en 2005 pour appeler à des changements du mandat de négociation de la Commission européenne afin de supprimer les exigences en matière de libéralisation commerciale réciproque et les négociations sur les investissements, la politique de concurrence et les marchés publics.

Les membres de l'OMC doivent mettre à profit la conférence ministérielle de décembre 2005 à Hong Kong afin de réformer l'article XXIV du GATT pour y incorporer un traitement spécial et différencié pour les pays en développement participant à des accords commerciaux régionaux. Par conséquent, aucune exigence en matière de libéralisation de quoi que ce soit ne doit être exprimée à l'encontre des pays ACP.

Alternatives aux accords de partenariat économique

Les décideurs politiques de l'UE doivent immédiatement analyser toutes les alternatives possibles aux APE, dont le système généralisé de préférences et l'Initiative "Tout sauf les armes".

Calendrier d'action

Le gouvernement du Royaume-Uni doit profiter de sa présidence de l'UE en 2005 pour encourager le commencement immédiat d'un travail au niveau des alternatives non-réciproques aux accords de partenariat économique.

Le choix

En fin de compte, les pays d'Afrique, des Caraïbes et du Pacifique doivent pouvoir choisir entre au moins deux alternatives intéressantes: un accord de partenariat économique radicalement réformé et une alternative pro-développement.

Gideon Mendel/Corbis/ActionAid

Problématiques liées au processus politique

Contrôle parlementaire

Le Parlement européen doit pouvoir voter sur l'accord final entre l'UE et les ACP. Les eurodéputés doivent faire procéder à un examen des accords de partenariat économique et de l'approche de la Commission européenne dès que possible.

Les parlements des pays d'Afrique, des Caraïbes et du Pacifique doivent pouvoir voter sur l'accord final entre l'UE et les ACP.

Parties intéressées

Toutes les parties intéressées, y compris les associations d'agriculteurs, les syndicats de travailleurs et la société civile, doivent pouvoir jouer un rôle pertinent dans les négociations.

6. References

ActionAid (2005) 'Hewitt pushed on Africa trade rethink'. http://www.actionaid.org.uk/1565/press_release.html

ActionAid (2004) *Trade traps: why EU-ACP Economic Partnership Agreements pose a threat to Africa's development.* http://www.actionaid.org.uk/wps/content/documents/trade_traps_16122004_19388.pdf

African Union (5-9 June 2005) Ministerial declaration on EPA negotiations.

Buffie, E. (2001) *Trade Policy in Developing Countries,* CUP, Cambridge.

Carl, P. (11 April 2005) 'Recent UK statements on EPAs'. Available at: www.epawatch.net

Cotonou Partnership Agreement 2000.

Christian Aid (April 2005), *For richer or poorer: transforming economic partnership agreements between Europe and Africa.* http://www.christianaid.org.uk/indepth/505epas/epas.pdf

Cook, K. (23 June 2005) Legal advice prepared for ActionAid by Kate Cook of Matrix Chambers.

DTI/DFID (2005) *Economic Partnership Agreements: Making EPAs deliver for development.* http://www.dti.gov.uk/ewt/epas.pdf

'EU move to block trade aid for poor', *The Guardian* 19 May 2005. http://www.guardian.co.uk/guardianpolitics/story/0,,1487141,00.html

EcoNews Africa: (23 June 2005) 'EPAs – threats to development in Africa'.

European Commission (1995) *Free trade areas: an appraisal.* Available at www.epawatch.net

Fernandes, D. (2005) *Compatibility and alternatives of the EC-ACP agreement within the WTO legal framework.*

Institute for Global Dialogue (1999) EU-South Africa TDCA. http://www.igd.org.za/pub/g-dialogue/Special_feature/trade.html

European Commission's negotiating directives (mandate). Available at www.epawatch.net

International Development Committee (2005) *Fair trade? The European Union's trade agreements with African, Caribbean and Pacific countries.*

Kituyi, M. (27 June 2005) Interview with Paul Mason of BBC's *Newsnight* programme at Traidcraft conference.

Lamy, P. (19 November 2004) Trade policy in the Prodi Commission 1999-2004: an assessment.

Mandelson, P. (19 April 2005) Speech to ACP-EU Joint Parliamentary Assembly.

Mogae, F. (6 May 2004) Speech by Festus Mogae, President of Botswana, in address to the Joint ACP-EU Ministers meeting in Gaberone.

Commission for Africa (2005) *Our Common Interest: report of the Commission for Africa.*

Page, S. and Kleen, P. (2004) *Special and differential treatment of developing countries at the WTO,* ODI.

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

WTO (1994) Agreement Establishing the World Trade Organization. http://www.wto.org/english/docs_e/legal_e/04-wto_e.htm

WTO (1994) Article X of the Marrakesh Agreement establishing the WTO.

WTO (1994) Article IX:2 of the Marrakesh Agreement establishing the WTO.

WTO Ministerial Declaration adopted on 14 November 2001 (WTO/MIN(01)/DEC/1)

WTO (2002) Submission on regional trade agreements by Australia, Negotiating Group on Rules, WTO TN/RL/W/15, 9 July 2002.

WTO (1998) Communication from Australia-Addendum, Australia, WT/REG/W/22/Add.1, 24 January 1998.

'WTO countries wrestle with Rules on Regional Agreements' *Inside US Trade,* 19 October, 2001.

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

WTO (1994) The Enabling Clause of the GATT 1979.

Author:

Tom Sharman

For more information contact:

tom.sharman@actionaid.org

+44 (0)20 7561 7561

Special thanks to Deepali Fernandes for legal analysis, input and comments

Thanks to those who made comments and suggestions:

Tim Rice, Sam Goddard, Patrick Watt, Christina Weller, Birgit La Cour Madsen, Liz Dodd, Ruben Alba, Cosmas Ochieng, Stephanie Ross, Aftab Alam, Angela Wauye, James Kintu, Caroline Sande-Mukulira, Steve Tibbett, Ruchi Tripathi, Brian Kagoro, Kate Cook, Mariano Iossa, Louise Hilditch, Angela Burton, Kate Farmer.

ActionAid International is a unique partnership of people who are fighting for a better world - a world without poverty.

ActionAid International
PostNet Suite #248
Private Bag X31
Saxonwold 2132
Johannesburg
South Africa

Telephone
+27 (0) 880 0008

Fax
+27 (0) 11 880 8082

Email
mail.jhb@actionaid.org

Website
www.actionaid.org

International Head Office
Johannesburg

Asia Region Office
Bangkok

Africa Region Office
Nairobi

Americas Region Office
Rio de Janeiro

Design by JF Design

Cover image: Gideon Mendel/ActionAid
P2162.07.05