

## **Main Issues in Africa-EU EPA Negotiation**

### **- Background to EPA Negotiations**

There are three main clusters of issues of contention in Africa-EU EPA negotiations at this stage in the negotiations, revolving around trade in goods, the approach to trade in services and trade related areas and the so-called development dimension. However before considering each of these it is necessary to review briefly the nature of the EPA negotiations and their origins.

While the EPA negotiations at the ACP level were launched in September 2002 and with various ACP regions between September 2003 and July 2004, the roots of EPAs can be traced back to 1995<sup>1</sup>. The first document of note in this regard was the EC Communication entitled "Free Trade Areas: An Appraisal". In this document the EC was frank about the underlying benefits of its proposed free trade area policy. It was stated quite clearly:

*FTAs are economically beneficial, especially where they help the EU to bolster its presence in the faster growing economies of the world, which is our overriding interest....*

*More recently, this direct economic justification has also been supplemented by strategic considerations regarding the need to reinforce our presence in particular markets and to attenuate the potential threat of others establishing privileged relations with countries which are economically important to the EU...*

*..the level of tariffs in many of our partner countries, particularly newly industrialised and developing countries remains high. Tariff averages of 30-40% are not uncommon... 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.<sup>2</sup>*

This was not an isolated instance of the identification of Europe's economic interests in concluding free-trade area agreements with developing countries. The February 1996 Commission staff paper "Towards a free-trade area between the European Union and South Africa: an assessment" stated quite clearly:

*...the European Union has much to gain from an FTA with South Africa. The further opening up of the South African market in the context of such an agreement will create competitive advantages for EU exporters compared to exporters from the USA, Japan and other suppliers of South Africa. The price the EU would have to pay for such an improved position in terms of loss of customs revenues is relatively low, due to the high level of existing duty-free access for*

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<sup>1</sup> Indeed in an African context they can be traced back still further to 1993 when the then apartheid government in South Africa sought to negotiate a free trade area agreement with the EU, as a means of constraining the policy options of a future ANC government. At this time in informal discussions with the UK government it was acknowledged that such an agreement would have implications for the EU's future trade relations with the whole of the Southern African region.

<sup>2</sup> 'Free-trade areas: an appraisal', Commission of the European Communities, Communication from the Commission, SEC(95)322 final p. 6.

*South African imports and the relatively modest average level of the remaining tariffs at the EU side.<sup>3</sup>*

As early as November 1996 this free trade agreement policy was explicitly being elaborated with reference to future trade relations with the ACP group. The Commission “Green paper on relations between the European Union and the ACP Countries on the eve of the 21<sup>st</sup> century” set out 4 options for future trade relations, two of which: the *uniform reciprocity* option and *differentiated reciprocity* option looked towards the conclusion of free trade area agreements with ACP countries. Even at this early point of 1996 “*the adoption of an agreement on the promotion of foreign investment<sup>4</sup>*” was seen as being an integral part of any EPA, which would be concluded with “*different groups of countries<sup>5</sup>*” at the sub-regional level, since this would “*significantly streamline negotiations<sup>6</sup>*”. In 1995 it had even been believed that if a free trade area agreement could be negotiated with newly democratic South Africa by March 1996, then the basis would be laid for the rolling out of reciprocal preferential trade arrangements with the whole of Southern Africa in direct succession to the Lome Convention. However, the South Africa-EU negotiations did not evolve in line with EC expectations and it was to be a further four years before these negotiations were concluded. This effectively closed off the option of an immediate move from non-reciprocal Lome trade preferences to reciprocal trade preferences under comprehensive trade, development and cooperation agreements.

It should be noted that while the EC’s free trade agreement policy was from an early stage seen to apply to ACP countries, once the broad parameters of this policy had been adopted by the EU Council of Ministers, the rhetoric around EU free-trade area agreements began to change, with the EC’s own economic interests and policy agenda being downplayed. In its place a quite different justification was advanced, with the emphasis being placed on supposed benefits which ACP countries, including those in Africa, would gain from EPAs: support for regional integration; investment promotion; enhanced competitiveness; improved and assured market access.

This was particularly the case from 1998 onwards when the Lome renegotiations were launched. By this time the EC approach had formally coalesced around the idea of region to region reciprocal preferential trade arrangements as the successor to the non-reciprocal Lome Convention. ACP government however were far from enthusiastic for such a radical change and in the course of the Lome renegotiations ACP leaders succeeded in securing an extension of non-reciprocal trade preferences for a further 8 years, alongside a commitment to the initiation in 2002 of negotiations on the establishment of WTO compatible trading arrangements from January 1<sup>st</sup> 2008 onwards. For the EC these were always seen as essentially free trade area agreements.

For the ACP however the emphasis was placed on agreements compatible with the WTO rules which would then be in force, with the expectation being that WTO rules would be modified to establish rules appropriate to trading arrangements between geographically non-

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<sup>3</sup> ‘Towards a free-trade area between the European Union and South Africa: an assessment’, Commission Staff Working Paper, 7 February 1996

<sup>4</sup> Green paper on relations between the European Union and the ACP countries on the eve of the 21st century”, DG VIII, Study Group – Partnership 2000, Brussels, 14 November 1996, p. xiv.

<sup>5</sup> Green paper on relations between the European Union and the ACP countries on the eve of the 21st century”, DG VIII, Study Group – Partnership 2000, Brussels, 14 November 1996, p. xiii.

<sup>6</sup> Green paper on relations between the European Union and the ACP countries on the eve of the 21st century”, DG VIII, Study Group – Partnership 2000, Brussels, 14 November 1996, p. xiv.

continuous regions consisting of groupings of countries at very different levels of economic development.

For the EC it was always envisaged that these negotiations would take place at a regional level, while the ACP sought to exclude any explicit reference to regional economic partnership agreement (REPAs) from the actual provisions of the Cotonou Agreement. ACP negotiators also successfully sought to include a series of opt out clauses from the various commitments on EPAs the EC was seeking.

Thus the formal provisions of the Cotonou Agreement state that EPAs will be negotiated with those:

***“...ACP countries which consider themselves in a position to do so, at the level they consider appropriate and in accordance with the procedures agreed by the ACP Group, taking into account regional integration process within the ACP’.”***

In this context it was agreed that:

***“The Parties will regularly review the progress of the preparations and negotiations and, will in 2006 carry out a formal and comprehensive review of the arrangements planned for all countries<sup>8</sup>”,***

It was further more stipulated that for ACP countries where governments determined that they are not in a position to enter into Economic Partnership Agreements examination would be made of :

***“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<sup>9</sup>”.***

However it should be borne in mind that no provision has been made in the EU negotiating instructions to the EC for the elaboration of alternative trade arrangements. This area of the mutual commitments entered into under the Cotonou Agreement has been severely neglected, with Commissioner Mandelson, at the PES October 19<sup>th</sup> 2006 Conference on EPAs, acknowledging the theoretical existence of alternatives to EPAs, but asserting he did not believe that ***“there is any remotely realistic alternative to EPAs that have the same content and potential<sup>10</sup>”***. This is leaving ACP governments with a narrowing range of options as the EPA negotiations approach their January 1<sup>st</sup> 2008 deadline. Indeed, in this context the debate is increasingly focussing on **“alternative EPAs”** rather than **“alternatives to EPAs”**. This provides the background to the current contentious issues in EPA negotiations.

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<sup>7</sup> Part 3, Title II, Chapter 2, Article 37.5. Cotonou Agreement.

<sup>8</sup> Part 3, Title II, Chapter 2, Article 37.4. Cotonou Agreement

<sup>9</sup> Part 3, Title II, Chapter 2, Article 37.6. Cotonou Agreement

<sup>10</sup> Speech Trade Commissioner Mandelson to PSE organised seminar on EPAs (SPEECH/06/612-19/10/2006) <http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/06/612&format=HTML&aged=0&language=EN&guiLanguage=en>

## - **The Trade in Goods Dimensions**

In broad terms the debate on the provisions of an EPA dealing with trade in goods revolve around four main issues:

- the sequencing of regional market creation and consolidation with the process of regional market opening;
- the extent of product coverage to be included in tariff elimination commitments by African countries;
- the length of the transition period during which tariffs should be eliminated in the agreed areas;
- the treatment of sensitive products, where special arrangements are required;

These four issues however are closely inter-connected and are of course intimately tied to the financial aspects of the so called development dimension of EPAs (see later section).

Clearly the economic adjustment challenges facing African economies as a result of EPAs will vary considerably depending on the extent of tariff elimination they are expected to undertake and the length of the transition period over which they are expected to undertake this process of tariff elimination. This issue of the extent and timeframe for tariff elimination is also seen as critical to ensuring the proper sequencing of **regional market integration and consolidation** and **regional market opening** towards duty free trade with the EU. This can best be illustrated with reference to the Eastern and Southern Africa configuration's early draft proposals for an EPA with the EU.

## - **The ESA Approach**

These proposals sought to give concrete expression to the concept of "EPA-light", which was seen to be the key to the proper sequencing of **regional market integration and consolidation** and **regional market opening**. The "EPA-Light" concept took as its starting point the objective of securing a WTO compatible basis for ACP trade preferences. It does not buy into the EC case for the growth and development promoting effects of extensive liberalisation per se, recognising first the need to build up the regions capacity to compete by addressing a variety of supply side constraints. It recognises however that at an appropriate juncture market opening can and will play a vital role. From this starting point it seeks to address the issue: **what minimal level of reciprocal trade liberalisation is necessary to secure WTO acceptance of a future framework for ACP-EU trade relations which maintains and enhances traditional ACP trade preferences, whilst retaining the economic policy space for the creation and consolidation of functioning regional markets which promote increased investment in the production locally of goods and services for national, regional and international markets?**

This concept or variations thereof gave rise to initial ESA proposals which envisaged limiting the extent of tariff elimination by ESA countries to 60% of current imports from the EU, while securing full duty and quota free access to the EU market for ESA exports (100% current exports to the EU)<sup>11</sup>. In a context where 12 of the 16 ESA members are least

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<sup>11</sup> 100% duty free access for ESA exports to the EU was felt to be wholly consistent with the EC October 2003 proposal to the Article 133 Committee to the effect that upon the entry into force of an EPA signatory ACP countries should all be granted "EBA equivalent access" to the EU market.

developed countries, it was felt that since this would cover 80% of all trade it should satisfy WTO criteria for “substantially all trade”. ESA also proposed extending the timeframe for tariff elimination over 35 years, with this consisting of a 10 year moratorium on tariff elimination for ESA countries and 25 year phase down period. This 35 year timeframe it was felt would provide sufficient space for the development and consolidation of functioning regional markets, prior to the opening of the regional market to duty free trade with the EU, thereby giving practical expression to the shared commitment to giving primacy to regional market integration and consolidation within the broader EPA process..

At this time little consideration was given to the treatment of sensitive products, other than through their complete exclusion from the process of tariff elimination, since it was felt that limiting the product coverage on the ESA side to 60% and allowing a total of 35 years for tariff phase downs, alongside the provision of EPA related adjustment support from the EU, would be sufficient to accommodate all regional sensitivities.

However, the EC has proved unwilling to consider a moratorium and such an extended timeframe for tariff elimination across all products (a 25 year timeframe for tariff elimination could only be considered for the most sensitive products) and is pressing the ESA countries to abandon the demand for a moratorium on tariff phase downs and to reduce the number of products excluded from tariff elimination commitments. This EC resistance has led to a revision of the ESA proposals with revised drafts proposing only a 25 year transition period and the launching of an intensive process of internal consultations to trim down the number of product exclusions.

Against this background consideration is now being given to greater use of special arrangements to deal with sensitive products. This currently focuses on two main areas:

- products which are revenue sensitive;
- products which are sensitive because of the impact of CAP instruments on production decisions and trade outcomes.

#### - **Special Arrangements For Sensitive Products**

The issue of government revenue losses arising from the full implementation of EPAs is of great concern to all ACP countries which depend heavily on import revenues and have a strong import orientation towards the EU. This is particularly the case for least developed countries in Eastern and Southern Africa. **Concern about the long term revenue implications of eliminating tariffs on products which contribute significantly to government revenues is having a profound effect on the level of reciprocity which ESA LDCs are willing to accept within the overall regional tariff elimination offer to be made to the EU.** This is leading to an extensive list of exclusions of tariff lines from the regional tariff elimination offer. As a result, this is greatly reducing the volume of trade covered by the likely ESA tariff offer, leading some to question whether such an EPA would meet the WTO “substantially all trade” requirement.

Against this background one option for addressing this problem is to draw up a list of “revenue sensitive” products **on which a tariff elimination offer is made, as an integral part of the EPA agreement, but where implementation of the tariff phase down schedule is only activated once successful programmes of revenue diversification have been implemented.**

A similar special arrangements could be envisaged for sensitive food and agricultural products, benefiting from EU export refunds and other forms of export support. On these agricultural and value added food products **a schedule of tariff elimination commitments would be included in the EPA agreement, but the implementation of this schedule of tariff reduction commitments would only begin after the abolition of EU export refunds and the removal by the EU of other forms of public support having an equivalent effect.**

This would provide ACP countries with at least an extra five year breathing space (assuming the EU lives up to its Doha commitment to ending export subsidies by 2013) and could serve to provide an adequate time frame for the nurturing of regional food processing industries if coupled with the “back-loading” of tariff elimination offers in these sensitive areas.

This approach is not as radical as it at first appears. There is a precedent for this kind of “linkage”. This precedent lies in the EU tariff elimination commitments on fisheries products contained in the EU-South Africa TDCA. Under these provisions whereas a time frame for the elimination of tariffs on EU imports of fisheries products from South Africa is set out in the agreement, a proviso is included which stipulates that **these provisions only enter into effect upon the conclusion of a South Africa-EU fisheries access agreement.** The principle of linking the implementation of a specified schedule of tariff elimination commitments to the adoption of measures in a related area, with the agreed tariff elimination commitments not entering into effect until these related measures have been introduced and implemented, is thus an established part of EU negotiating practice under free trade area negotiations.

A further tool which could be included in any EPA to deal with sensitive agricultural and food products would be the establishment of lists of products on which the ESA region retains the right to impose safeguard duties, should a threat of market disruption emerge. To be effective such provisions would need to include mechanisms for the monitoring of trade flows in designated sensitive products and would need to allow for the speedy deployment of pre-emptive safeguard measures should a threat of market disruption emerge. Such provisions would also need to allow neighbouring countries to invoke such safeguard arrangements should a threat to intra-regional trade emerge from increases in EU exports of the designated products.

#### - State of Play

The ESA approach most clearly reflects the principal issues faced in negotiations around trade in goods across Africa-EU EPA negotiations, outside of the SADC configuration<sup>12</sup>. The EC current response consists of trying to limit product exclusions and the length of the transition period, in the believe that liberalisation ultimately will deliver better long term development gains by facilitating the more efficient use of economic resources (the EC is of course willing

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<sup>12</sup> The SADC configuration faces particular problems arising from the existence of the Southern African Customs Union (which includes South Africa, Botswana, Lesotho, Namibia and Swaziland) and the conclusion in 1999 of the EU- South Africa Trade, Development and Cooperation Agreement (TDCA), which de facto created a free trade area with the EU which applied to the whole territory of the SACU, including the ACP members, Botswana, Lesotho, Namibia and Swaziland. There is now growing acceptance that the other SADC configuration members, Mozambique, Angola and Tanzania, all of which are classified as least developed countries, will either join another EPA configuration (e.g. Tanzania moving over to the ESA configuration) or revert to the full duty free quota free access granted to the EU market under the EBA initiative in favour of all least developed countries.

to allow a more extensive time frame for implementation for exceptionally sensitive products). The EC however is not currently open to the inclusion of “conditional tariff elimination offers”, despite resorting to such tools in an earlier agreement with South Africa. This leaves the issue of the sequencing of regional market integration and consolidation with the process of opening up the regional markets to duty free access to goods from the EU, largely as a residual issue, rather than a central concern, with the EC strongly of the view that “open regionalism” offers the best means of promoting necessary policy reforms and subsequently attracting foreign investment.

This dimension is closely related to the EU position on the treatment of trade related areas and trade in services under EPAs.

#### - **Trade Related Areas and Trade in Services**

The emphasis on “behind borders” issues which are given such prominence in the new EC trade strategy, have long been seen by the EC as an integral part of EPA negotiations. Indeed the 2002 EC negotiating directive for the EPA negotiations called for:

*“a progressive and reciprocal liberalisation of trade in services aiming at assuring a comparable level of market access opportunities, consistent with the relevant WTO rules... taking into account the level of development of the ACP economies concerned<sup>13</sup>”.*

The latter provision implied that any process of reciprocal liberalisation would be progressive and asymmetrical and allow flexibility to accommodate the different levels of development of ACP economies. However, this may simply have been an extension of a common EC rhetorical ploy, with the extent of flexibilities never clearly elaborated and the spectre of WTO compatibility being routinely shaken out of the cupboard to frighten those wandering away from the EC’s favoured line.

On trade related areas the negotiating directive reaffirmed the ECs commitment to include competition policy; protection of intellectual property rights; standardisation and certification; sanitary and phytosanitary measures; trade and environment; trade, labour standards, investment; public procurement, and data protection in the negotiations.

The ACP for its part highlighted how trade related areas such as competition policy, intellectual property rights, standardisation and certification and SPS measures should be addressed under the negotiations. However the emphasis was somewhat different. The emphasis was in line with existing Cotonou commitments on cooperation and dialogue in these areas, **not** on the conclusion of binding agreements, an element which is seen by the EC as critical in getting the “**right policy framework**” in place, with a credibility which then attracts foreign investment.

This fundamental difference in emphasis is a constant source of ambiguity, uncertainty and tension in EPA negotiations around these issues. It is likely to be exacerbated by the new trade strategy emphasis on these issues.

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<sup>13</sup> EC negotiating directive for EPA negotiations.

The extent of this basic division in Africa-EU EPA negotiations is illustrated by developments in the SADC-EU EPA negotiations following the Hong Kong WTO Ministerial. In early February 2006 Commissioner Mandelson visited Southern Africa and after “excellent” exchanges with the South African government addressed the South Africa Institute for International Affairs. Here he spoke of the need to “*lock together consistently*”<sup>14</sup> the SADC EPA negotiations and the TDCA review and for South Africa to play a larger role in the SADC Configuration EPA negotiations. In this context he spoke of how “*the TDCA review should aim to create new market access, new business. New growth*”<sup>15</sup>. He spoke of how this required “*a step change into services, investment and procurement - the hardwiring of dynamic modern economies*”<sup>16</sup> and a greater focus on “*technical barriers to trade, customs, trade facilitation and competition*”<sup>17</sup>. This statement represented a clear call to place these issues at the centre of both the TDCA review and the SADC EPA negotiations.

South Africa responded to this invitation to play a larger role by leading the public presentation of the “SADC Framework for the EPA negotiations”. However this document while recognising the importance of these issues to economic governance once again rejected the idea of concluding binding agreements in these areas. It noted how “*there is no compulsion to negotiate the so called new generation trade issues under the EPA to met the requirement of WTO compatability*”, since “*neither the Cotonou Agreement nor the TDCA contain any obligations in these areas*”<sup>18</sup>. It noted how “*some new generation trade issues are currently under negotiations in the WTO (services, IP and environment), while others have been excluded (investment, competition, procurement, labour*”<sup>19</sup>). It noted how “*SADC EPA Member States have limited institutional and negotiating capacity*” in these areas, while “*new generation trade issues would pose serious policy challenges as SADC has no common policies in these areas.*”<sup>20</sup> It was argued that “*negotiating these subjects under such conditions runs the risk of delivering unbalanced outcomes that may be prejudicial to national development objectives and to prospects for deeper integration in SADC*”<sup>21</sup>. Specifically it expressed concern that “*outcomes could result in obligations that go beyond those agreed in the WTO (WTO+) and introduce into the bilateral context, issues that contributed to the failures in Cancun (investment, competition and government procurement) and of Settle (labour and environment)*”<sup>22</sup>.

This highlights the fundamental divergence, for it is precisely the WTO+ outcome which the EC now wishes to secure through bilateral FTA negotiations, so as to provide the platform for the re-launching of these issues within the WTO.

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<sup>14</sup> See Speech by Commissioner Mandelson, Pretoria, South Africa, 10 February 2006 at <http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/06/81&format=HTML&aged=1&language=EN&guiLanguage=en>

<sup>15</sup> See Speech by Commissioner Mandelson, Pretoria, South Africa, 10 February 2006 at <http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/06/81&format=HTML&aged=1&language=EN&guiLanguage=en>

<sup>16</sup> See Speech by Commissioner Mandelson, Pretoria, South Africa, 10 February 2006 at <http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/06/81&format=HTML&aged=1&language=EN&guiLanguage=en>

<sup>17</sup> See Speech by Commissioner Mandelson, Pretoria, South Africa, 10 February 2006 at <http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/06/81&format=HTML&aged=1&language=EN&guiLanguage=en>

<sup>18</sup> “A Framework for the EPA Negotiations Between SADC and the EU”, March 2006.

<sup>19</sup> “A Framework for the EPA Negotiations Between SADC and the EU”, March 2006.

<sup>20</sup> “A Framework for the EPA Negotiations Between SADC and the EU”, March 2006.

<sup>21</sup> “A Framework for the EPA Negotiations Between SADC and the EU”, March 2006.

<sup>22</sup> “A Framework for the EPA Negotiations Between SADC and the EU”, March 2006.

### Cotonou Commitments on Trade Related Areas and Services

The provisions of the Cotonou Agreement on trade in services re-affirm the commitments entered into under the General Agreement on Trade in Services (GATS) and commits the EU and the ACP to liberalising services in accordance with the provisions of the GATS “*under the economic partnership agreements*”<sup>23</sup>. The Cotonou Agreement also commits the EU to assisting ACP countries in developing their **service sectors**, particularly: tourism; financial services; telecommunications; culture; construction and related engineering services.

On **trade related areas**, the EU commits itself to assisting ACP countries in strengthening their regulatory frameworks with regard to: competition policy; intellectual property rights; standardisation and certification; sanitary and phytosanitary standards; trade and environmental issues; labour standards; consumer policy.

The provisions on **competition policy** embody a recognition of the importance of competition policy and a commitment to implementing national and regional rules and policies to control and prohibit “*agreements between undertakings, decisions by associations of undertakings and concerted practices between undertakings which have as their object or effect the prevention, restriction or distortion of competition*”<sup>24</sup> and prevent abuse of a dominant market position. A commitment is also made to co-operate in formulating competition policies and drafting competition legislation.

The provisions on **intellectual property rights** recognise the importance of affording protection to intellectual property and “*other rights covered by TRIPS including protection of geographical indications*”<sup>25</sup>. The importance of adhering to the WTO TRIPS agreement and Convention on Biological Diversity and acceding to all relevant international conventions is emphasised. A commitment to looking at the conclusion of agreements on the protection of trademarks and geographical indications is included in the Cotonou Agreement provisions on intellectual property rights, as is a commitment to strengthening co-operation in intellectual property<sup>26</sup>.

The provisions on **standards and certification** embody commitments on closer co-operation aimed at establishing “*compatible systems*”. A provision is also made on consideration to be given to negotiating mutual recognition agreements<sup>27</sup>. The provisions on **sanitary and phytosanitary measures** recognises the right to protect human, animal and plant health through such measures so long as the measures taken are not discriminatory and are not a form of disguised trade restriction. The commitments made under the WTO SPS agreement are reaffirmed and a commitment is made to stronger co-ordination and consultation<sup>28</sup>.

The provisions of **trade and environment** reaffirm the commitment to promoting the development of international trade in ways that are sustainable and in accordance with international conventions. The provisions however recognise that the ACP may have special requirements, which need to be taken into account in designing and implementing measures. A commitment to strengthening co-operation is also included in these provisions<sup>29</sup>.

The provisions on **trade and labour standards** reaffirm the commitment to internationally recognised core labour standards. A commitment to enhanced co-operation is also contained in these provisions<sup>30</sup>. The provisions on **consumer policy and protection of consumer health** commit the EU and the ACP to closer co-operation in a multiplicity of areas specified in the text<sup>31</sup>.

Overall these commitments are now being interpreted by the European Commission as providing the basis for negotiation of a comprehensive set of agreements on trade related areas, including the liberalisation of public procurement, which is not mentioned in the Cotonou Agreement.

“*The Cotonou Agreement: A User’s Guide*”, Commonwealth Secretariat, 2004 pp 179-181.

<sup>23</sup> Part 3, Title II, Chapter 4, Article 41.4, Cotonou Agreement.

<sup>24</sup> Part 3, Title II, Chapter 5, Article 45.2, Cotonou Agreement.

<sup>25</sup> Part 3, Title II, Chapter 5, Article 46.1, Cotonou Agreement.

<sup>26</sup> See Part 3, Title II, Chapter 5, Article 46, Cotonou Agreement.

<sup>27</sup> See Part 3, Title II, Chapter 5, Article 47, Cotonou Agreement.

<sup>28</sup> See Part 3, Title II, Chapter 5, Article 48, Cotonou Agreement.

<sup>29</sup> See Part 3, Title II, Chapter 5, Article 49, Cotonou Agreement.

<sup>30</sup> See Part 3, Title II, Chapter 5, Article 50, Cotonou Agreement.

<sup>31</sup> See Part 3, Title II, Chapter 5, Article 51, Cotonou Agreement.

Against the background of this wider policy agenda, local concerns over the national ability to engage on these issues are likely to get short shrift from the Commission. This is the case even where a commitment is made to *“engage these issues in an appropriate framework ... (focussing) .... on technical exchange and cooperation where the EU could assist in the development of SADC institutional, policy and legislative infrastructure”*<sup>32</sup>. However it was clearly stated *“such cooperation arrangements would not extend to negotiations nor involve any substantive obligations”*<sup>33</sup>.

While Commissioner Mandelson insists *“there is no question of forcing the ACP to accept rules they don’t want”*<sup>34</sup>, he has however expressed his disappointment at the lack of willingness of the SADC to “talk about these issues”. This somewhat misrepresents the SADC position, they are not adverse to talking to the EC on these issues. Indeed the SADC wants to intensify dialogue and cooperation with the EU in these areas. However the focus is on building national and regional policies, regulatory frameworks and institutions first, not on negotiating binding commitments in trade related areas and services liberalisation with what is still the regions main international trading partner. Yet this latter dimension is seen by the Commission as vital. Nominally its importance stems from its impact on investment flows, since it provides assurances on the permanence of policy reforms introduced in these areas. However, it would appear to have far more to do with the EUs own jobs and growth strategy (as the new trade strategy paper so clearly articulates) than the needs of African countries at this stage

Against this background it should be borne in mind that the EC is thus not “forcing” ACP countries into accepting binding rules in trade related areas and services liberalisation, it is merely insisting that such rules are a critical part of the “right policy framework” required to attract investment and promote growth and development. Of course as the Commissioner has pointed out there can be *“no blank cheques ...for adjustment purposes or capacity building when the foundations for these things are not yet being laid”*<sup>35</sup>. There is thus no compulsion on African countries to negotiate binding agreements in trade related areas and trade in services, only African countries can expect little substantial additional support for EPA related adjustment purposes, if these “foundations” have not been laid. From the EC’s perspective what is the value of additional development aid if the “right policy framework” is not in place? The problem arises of course when there is a fundamental disagreement over what is the “right policy framework” and groupings of developing and least developed countries are still collectively trying to define the “right policy framework” in a manner consistent with their varies levels of development and the physical and institutional constraints they face.

This is the context in which the EC’s insistence that *“the EU is only interested in deep free trade agreements across the full range of sectors”* needs to be seen. SADC’s pragmatic

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<sup>32</sup> “A Framework for the EPA Negotiations Between SADC and the EU”, March 2006.

<sup>33</sup> “A Framework for the EPA Negotiations Between SADC and the EU”, March 2006.

<sup>34</sup> Speech Trade Commissioner Mandelson to PSE organised seminar on EPAs (SPEECH/06/612-19/10/2006) <http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/06/612&format=HTML&aged=0&language=EN&guiLanguage=en>

<sup>35</sup> Speech Trade Commissioner Mandelson to PSE organised seminar on EPAs (SPEECH/06/612-19/10/2006) <http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/06/612&format=HTML&aged=0&language=EN&guiLanguage=en>

approach of cooperation and dialogue on building national and regional policies, regulatory frameworks and institutional capacities first, is unlikely to receive a sympathetic response from the EC unless EU member states consolidate their support behind the UK governments' position that no obligations be placed on "*ACP countries to negotiate rules on investment, competition and government procurement, unless they specifically request it*"<sup>36</sup>.

- **Development Dimension of EPAs**

There are four distinct aspects of the development dimension of EPAs:

- the basic structure and content of an EPA which has a profound impact on the scale of the adjustment challenge faced (the extent of product coverage; the time frame for the elimination of tariffs; the special treatment to be accorded sensitive product areas; how to deal with trade related areas and trade in services);
- the programmes of support required to assist African governments in implementing the commitments made under EPAs;
- the development programmes to be set in place to address supply side constraints on competitive production (e.g. infrastructure and energy constraints);
- the financial mechanisms to be set in place to address specific EPA related adjustment costs.

To date the European Commission has demonstrated only a partial grasp of the **structure and content** dimension of EPAs, assuming that since liberalisation is good for growth, the more liberalisation ACP countries can be encouraged to undertake the better. However, this ignores the transitional costs which can arise, transitional costs which can be so high as to negate any long term benefits. Clearly the longer the timeframe for the introduction of change the easier it is to manage the transitional process of adjustment. The EC's insensitivity on this point is somewhat surprising, since managing the transition where policy reforms are being implemented is an area in which internally the EC has devoted considerable attention and even greater financial resources. This is particularly the case in the agricultural sector. Here extensive programmes of public financed support (currently totalling €5 billion per annum) are deployed to establish the preconditions for liberalisation to take place, in ways which minimise the adjustment costs for farmers and food processors within the EU, when that liberalisation eventually takes place.

The most recent example of this is the support to be extended to internal sugar sector restructuring. Here some €8 billion has been committed to a multi-annual programme of adjustment, with the timeframe for adjustment having been extended from 2 years to 4 years to make the process more manageable. In this context one might have expected a certain sensitivity to the adjustment challenges faced under an EPA, particularly in countries whose human resource base for the management of economic change has been ravaged by the impact of the HIV/AIDS pandemic.

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<sup>36</sup> For a summary of the broad thrust of this letter see press reporting the Financial Times 16<sup>th</sup> October 2006 <http://www.ft.com/cms/s/224da378-5cb3-11db-9e7e-0000779e2340.html>

Against this background if EPAs are to become tools for economic transformation in Africa then the EC and EU member states will need to pay far greater attention to the **structure and content of EPAs** necessary to minimise transitional costs to ACP countries and maximise the long term benefits of EPAs. Unfortunately, outside of the October 2006 letter from UK Ministers to Commissioners Michel and Mandelson calling for ACP countries to be allowed “*as much time as they reasonably need to open their own markets, while providing effective safeguards to prevent unfair competition from subsidised European products undermining African products on their own doorstep*”, there is little evidence that EU member states are taking up this challenge.

The European Commission is doing somewhat better in the area of support for the implementation of EPA related commitments. Regional Indicative Programmes (RIP) are increasingly being orientated towards extending support in this area, with under the 10<sup>th</sup> EDF RIP funding being substantially expanded. This being said there are still major problems of implementation faced. The SADC “*Regional Integration and Trade Focal Area of the RIP*”<sup>37</sup> is a case in point. Under this €50 million programme up to 2004 no financing decisions had been taken. Only in early 2005 was a financing proposal concluded for the establishment of a €7.5 million “**Economic Partnership Agreement Support Facility**”.

This project was seen as “*a central element*”<sup>38</sup> in supporting the negotiation and implementation of new trading arrangements under EPAs. The objective of the project was stated as being to:

- strengthen the capacity of the SADC Secretariat and of SADC EPA member states to participate more effectively in the EPA negotiations;
- design and implement trade and development policies under the EPA and other trade arrangements.

From the EC perspective “*building institutional capacity*”<sup>39</sup> was seen as “*a critical factor*”<sup>40</sup> in the “*sustainability of trade liberalisation efforts*”<sup>41</sup>. The main emphasis is placed on ensuring the “*consensus among member states needed to effectively implement policies*”. Against this background the EC is extending considerable support to these kind of activities where regional organisations are receptive to accepting such support.

The need for development programmes to be set in place to address **supply side constraints on competitive production** in ACP countries is now recognised in the EU. The EC has begun to move on this issue, setting in place a range of “horizontal envelopes” which can be seen to be relevant to addressing some of the supply side constraints on competitiveness<sup>42</sup>. These EPA related horizontal envelopes are financed from EDF resources and have resulted in over €1 billion being deployed through such instruments since 2000, more than the level of EDF funding deployed through regional indicative programmes (RIPs) under the 9<sup>th</sup> EDF.

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<sup>37</sup> See the EC/SADC Annual Operational Review for 2003 which can be found at: [http://www.delbwa.cec.eu.int/en/eu\\_and\\_sadc/aor.htm](http://www.delbwa.cec.eu.int/en/eu_and_sadc/aor.htm)

<sup>38</sup> See Financing Proposal No. 9 ACP SAD 6, AIDCO/7443/05-EN.

<sup>39</sup> *ibid*

<sup>40</sup> *ibid*

<sup>41</sup> *ibid*

<sup>42</sup> The Water Facility, Private Sector Enabling Environment Facility, Micro-Finance Framework Programme, the Energy Facility; Infrastructure Facility, can all be interpreted as addressing EPA related needs.

Indeed in total all such “horizontal envelopes” since 2000 have been allocated more than 3 times the level of funding made available through RIPs. These horizontal facilities are accounting for a growing percentage of EDF spending.

While all these initiatives have been jointly approved by the ACP-EU Council of Ministers, their establishment reflects a strong EC preference for deploying money in support of addressing supply side constraints and economic adjustment needs through “horizontal envelopes” and not regionally managed indicative programmes. Why this is so can be seen if one considers the management of these facilities. Actions financed under these instruments are subject to “calls for projects”. This leaves the final power over decision making over which projects are financed firmly in the hands of the European Commission and takes it out of the context of the national and regional programming dialogue. This potentially provides enormous scope for the EC to determine spending priorities for support aimed at addressing supply side constraints, rather than such decisions being in the hands of African government or regional bodies in Africa.

#### EDF Horizontal Envelope Financing Since 2000

- \* major debt relief initiatives (HIPC) (€460 million);
- \* the Global Fund for HIV/AIDS, Malaria and TB (€432.5 million);
- \* the Africa Security Facility (€250 million);
- \* the Water Facility (€247 million – with a further allocation of €250 million pending);
- \* Private Sector Enabling Environment Facility (€20.0 million)
- \* Micro-Finance Framework Programme (€15 million)
- \* Malaria Vaccine Trials (€7 million);
- \* The Energy Facility (€ 250million);
- \* Infrastructure Facility (€60 million in grants €260 million in loans)

With regard to **EPA related adjustment costs** the EC has yet to get to grips with this issue. Indeed the European Commission is largely in denial as to the existence of these costs, seeing them as purely transitional with the unleashing of market forces eventually more than compensating for any transitional cost. It has however acknowledged that in particular cases certain types of transitional assistance will be needed. However Commissioner Mandelson has made it clear there can be no blank cheque, particularly when the proper foundations for benefiting from EPAs have not been laid. For Commissioner Mandelson “*development aid ... is a means to an end – it’s a way of translating policy reform into practice*”<sup>43</sup>, with the adoption of the “*right policy framework*”<sup>44</sup> being the critical consideration. A policy framework which includes binding agreements on investment protection, competition policy, public procurement, good governance, indeed, all those “behind border” issues which are being given increasing prominence within the EC’s “new” trade strategy.

This EC analysis of the limited EPA related adjustment needs stands in distinct contrast to the findings of the Commonwealth Secretariat financed analysis of EPA related adjustment

<sup>43</sup> Speech Trade Commissioner Mandelson to PSE organised seminar on EPAs (SPEECH/06/612-19/10/2006) <http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/06/612&format=HTML&aged=0&language=EN&guiLanguage=en>

<sup>44</sup> Speech Trade Commissioner Mandelson to PSE organised seminar on EPAs (SPEECH/06/612-19/10/2006) <http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/06/612&format=HTML&aged=0&language=EN&guiLanguage=en>

costs<sup>45</sup>. This study identified four distinct clusters of impacts of EPA and hence areas of EPA related adjustment support needs. These are:

- a) *fiscal adjustment;*
- b) *trade facilitation and export diversification;*
- c) *production and employment adjustment;*
- d) *skills development and productivity enhancement.*

In each of these 4 clusters it is held that **new** support programmes to assist ACP countries to respond to the economic challenges which will arise with the implementation of an EPA agreement will need to be set in place.

Two examples can illustrate this broad point. With regard to **fiscal adjustment**, new systems of taxation will need to be developed to replace any tariff revenue losses associated with the full implementation of an EPA. This is not a cost less exercise. Alternative systems of taxation will need to be designed and operationally established, new institutions and arrangements for tax collection will need to be set in place and the staff recruited and trained, with recurrent costs being built into the budgets of the departments concerned. A constant process of improving systems of collection and staff training will need to be set in place to ensure continued efficiency in revenue collection and to close loopholes in revenue collection. All of this will require financing and substantial amounts of financing, an estimated €2.4 billion over 10 years for Sub-Saharan African countries according to the Commonwealth Secretariat analysis

**Estimated EPA Related Adjustment Costs by African Region (millions €)**

Regions	Fiscal Adjustment	Trade Facilitation & Export Diversification	Production & Employment Adjustment	Skills/Prod. Enhancement	Total Adjust. Costs
CEMAC	270	257	153	200	880
ECOWAS	955	712	422	700	2,789
ESA	825	752	415	695	2,687
SADC	340	261	217	255	1,073
Total	2,390	1,982	1,207	1,850	7,429

Source: Milner (2005) "The European Development Fund and Economic Partnership Agreements", Commonwealth Secretariat, 2006.

With regard to trade facilitation, in one specific area alone, meeting EU food safety standards, in some ACP countries entirely new government departments will have to be established to guarantee food safety compliance, while in other ACP countries existing departments will need to be upgraded. Even in the EU itself, with its sophisticated government infrastructure, €250 million per annum was set aside for the upgrading of food safety enforcement capacity

<sup>45</sup> "The European Development Fund and the Adjustment to Economic Partnership Agreements", Commonwealth Secretariat (Forthcoming)

in EU member states as an integral part of the elaboration of the EU's food safety policy. Effectively meeting this food safety challenge in ACP countries is essential, for any failure in this area could lead to the closure of EU markets to food and agricultural exports from the ACP country concerned.

Here again this is not a cost less exercise. A CTA study suggests a minimum *initial* requirement across the ACP as a whole of €187 million, simply to establish the appropriate legislative and institutional framework in each ACP country. To this will need to be added the capital costs of upgrading testing facilities, the operational costs of maintaining the entire system and the private investment needs in upgrading production facilities and practices to EU levels of food safety. To date the only EC response has been to establish a €30 million facility to support food safety capacity building in developing countries, which will come on stream in 2007. This is likely to be limited to financing diagnostic studies and limited training programmes, rather than the provision of financial support to concrete programmes of institutional capacity building for food safety compliance.

Similar needs arise in the areas of *production and employment adjustment, skills development and productivity enhancement*. Overall, on the basis of existing World Bank supported programmes in countries of similar sizes facing similar challenges, the Commonwealth Secretariat has estimated that for the four Africa regions of the ACP, across the four clusters of areas of impact of an EPA, a minimum level of €7,429 million in financial support will be needed over the next 10 years, with it being recommended that some 60% of this support be front loaded to the first five years of implementation of an EPA (assuming a 12 year implementation period).

These needs cannot be met from existing EDF funds without diverting resources away from other agreed priority areas. In this context the need for **a dedicated EPA related adjustment facility with various windows, administered at the regional level in line with national and regional priorities is overwhelming**. While many in the EC balk at the provision of this level of funding to African countries, such support could easily be mobilised from within existing EU member states commitments to increase development assistance flows. There is however a more fundamental institutional problem facing the EU, namely the administrative capacity constraints of the European Commission services.

There is a growing appreciation amongst some EU member states that if additional funding is to be provided in support of EPA related adjustment needs in ACP countries, it cannot be provided through the European Development Fund (EDF), the traditional instrument for financing ACP-EU cooperation activities. The EDF is seen as being incapable of delivering effective and timely assistance to what are "time sensitive" adjustment processes. Indeed, the EC does not have a good record in this regard. Just how bad the EC's performance in this regard is, can be seen from the experience of EPA related adjustment support in Botswana, Lesotho, Namibia and Swaziland (BLNS), which are 6 years into the 12 implementation of a free trade area agreement with the EU, as a result of their membership of the Southern African Customs Union and the conclusion in 1999 of the EU-South Africa Trade, Development and Cooperation Agreement.

Given the progress of the EU-South Africa trade negotiations in the late 1990s the European Commission was in a position to integrate measures to address the consequences of the TDCA for the BLNS into their 8<sup>th</sup> and 9<sup>th</sup> EDF national indicative programmes.

After an impressive early start in trying to get to grips with economic adjustment needs, particularly in the sphere of fiscal adjustment, the EC's track record has proved nothing short of dismal. A review of the EC's "aid for trade" response to EPA related adjustment needs in the BLNS undertaken for the Dutch development NGO ICCO, concluded that:

*"the EC's response to date has been **piecemeal** (addressing some issues not others), **inconsistent** (issues are addressed in some countries and not others), and **not sustained** (initiatives discontinued at an early stage of the adjustment process – e.g. fiscal adjustment in Swaziland<sup>46</sup>)"* .

This review argued that

*"a far more comprehensive approach is needed given the importance of EPA related adjustments to the future the ACP-EU relationship."*

More specifically it concluded that:

- *"While a comprehensive approach to EPA related adjustment needs is required, it is apparent from the BLNS experience that this cannot be financed from existing EDF aid allocations without diverting funds away from existing mutually agreed priorities";*
- *"EU procedures are simply not responsive enough to deliver 'time sensitive' EPA related adjustment support";*
- ***EC procedures** are poorly suited to supporting private sector led production adjustment processes and "since the **production response** in ACP countries will be critical to the development impact of an EPA, this is a matter of major concern", requiring an "**entirely new instruments of support for production related EPA adjustments**";*
- there are major concerns about the **quality** of the assistance delivered through EC procedures in response to EPA related adjustment needs;
- there are *"policy ambiguities with regard to supporting directly operational programmes of EPA related adjustment measures";*
- there is an institutional impediment to the EC elaborating an effective policy response to EPA related adjustment needs arising from the dilemma it finds itself in: *"the more the EC acknowledges the EPA related adjustment challenges which ACP countries will face and hence the EPA related adjustment needs arising, the more difficult it will be to persuade ACP governments that EPAs are really in their long term development interests."*

Overall it concluded

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<sup>46</sup> Moving Beyond "Business as Usual" The BLNS Experience of EC EPA Related Adjustment Support and the "Aid for Trade" Debate, ICCO (forthcoming)

*“a way out of this dilemma urgently needs to be found if EPAs are to be turned into instruments for the structural transformation and development of ACP countries.”*

### **Meeting EPA Related Adjustment Needs**

The European Commission is seeking to argue that ACP expectations with regard to financial support for EPA related adjustments are unrealistic. However if the ACP can maintain the traditional average share of total EU member states DAC flows enjoyed since 1975, then more than sufficient financing will be available to finance **both traditional EDF activities (plus a 15% expansion) and the first stage requirements of an EPA Adjustment Facility.**

On average since 1975 the EDF has received some 8.63% of EU member states total DAC contributions. At the Gleneagles G8 meeting the EU member states committed themselves to increasing the percentage of the Gross National income (GNI) made available to finance development cooperation activities from . 0.38% of GNI to 0.39% in 2006, 0.56% in 2010 and 0.70% in 2015. If one assumes a linear growth in EU aid allocations in line with these commitments and the maintenance of a constant average share of ACP-EU cooperation programmes in this expanded level of DAC allocations, then the future allocation to ACP-EU cooperation activities would be €27,623 million for the five years form 2008-2013.

Thus by meeting its Gleneagles commitments and channelling the same proportion of EU member states DAC to ACP-EU cooperation activities as has traditionally been provided through the EDF, **the EU could fund both its traditional EDF activities (plus a 15% expansion) and the first stage requirements of an EPA Adjustment Facility.** With a 10<sup>th</sup> EDF allocation of €23.966 billion, this would require the directing of only €3.667 billion in member states expanded “aid for trade” support to ACP countries in the five years from 2008 to 2013. **This makes fulfilling ACP needs and expectations far from unrealistic, but wholly within existing EU commitments to expanding aid programmes.**

The main unrealistic element arises from the European Commission’s poor aid delivery performance in this area (between 4 to 7 years to move from concept to the commencement of implementation) and the poor quality of EC assistance extended in this area to date.

From 2013 onwards meeting ACP EPA related adjustment needs becomes even more financially feasible under the EU’s Gleneagles commitments. Using the same basis for calculation (plus contributions from new EU member states in line with their existing commitments) some **€41.22 billion** would be provided under the 11<sup>th</sup> EDF. A level of funding more than adequate to meet traditional EDF aid commitments and EPA related adjustment needs. This is particularly the case if the time period for implementation of EPAs is extended from say 10-12 years to 20-25 years, as is currently being requested by the ESA configuration, which wishes to see its regional integration process completed before implementing substantive tariff reductions vis a vis the EU.

It should be emphasised that the principal constraint on the delivery of the necessary EPA related adjustment support to ACP countries is not financial, but lies in the administrative capacity constraints of the European Commission, which as a result of its procedures is poorly placed to provide ‘time sensitive’ EPA related adjustment support, to human resource constrained and often institutionally weak African governments and regional bodies..

This analysis of the BLNS experience of “aid for trade” support in the sphere of EPA related adjustment needs, suggests a need for a fundamentally different approach by the EU to addressing this issue in the context of the negotiation and implementation of Economic Partnership Agreements. Such a fundamentally different approach would need to draw on expanded EU member states “aid for trade” programmes. There would appear to be considerable scope for such financing to meet EPA related adjustment needs given the collective commitment made by EU member states to provide annually, from 2010, €1 billion in “aid for trade” assistance to developing countries and the recent EU council conclusions

which committed member states to provide “*a substantial share*<sup>47</sup>” of these expanded programmes to ACP countries.

However, the greatest obstacle is likely to remain the institutional impediment of the EC itself which finds itself in a position whereby the more it acknowledges and seeks to address EPA related adjustment costs “*the more difficult it will be to persuade ACP governments that EPAs are really in their long term development interests*”.

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<sup>47</sup> See EU Council conclusions on aid for trade  
<http://register.consilium.europa.eu/pdf/en/06/st14/st14018.en06.pdf>