



Crossing development red lines?:

Toward a technical analysis of implications of EC proposals for EPA provisions

Summary report of a roundtable discussion, 13 September 2007, Brussels

There is potential for EPAs to bring real benefits to the development prospects of the ACP, but much work remains to be done and a more open-minded approach is needed. This was the main conclusion of a roundtable between development academics and professionals and ACP and EU member state officials to discuss draft EPA texts as proposed by the EC¹.

The first part of this brief draws on experts' technical analysis to give guidance on the necessary shifts in approach to the negotiating process. The second part highlights some of the key issues in each area of the talks that need attention to achieve the best outcome for poor producers and traders in ACP countries.

The need to align EPAs and national development strategies

In many of the areas under negotiation, there is either controversial evidence or a lack of evidence supporting assumptions on their development impacts.

For example, Government procurement is an important economic area for ACP countries, accounting for a significant share of their GDP. Getting policies on government procurement right is important to getting value for money on government spending, improving government accountability on spending and combating corruption and for creating opportunities, directly and indirectly, for local firms. Yet there is little evidence or experience on what kind of government procurement regime will give the best results for development, and the issue remains controversial.

In the area of investment, the standard focus on attracting foreign investors and assuming subsequent benefits was brought into question. EPAs could more usefully support countries in their right to select and manage foreign investment in order to maximise its benefits and minimize its costs, for example by introducing a greater balance of rights and obligations of the home state, host state and investor than currently contained in outmoded terms of Bilateral Investment Treaties.

With the jury still out, it is all the more important that ACP priorities set the direction of EPA commitments. Many ACP countries have not yet defined their priorities or strategies for integrating EPAs into their development plans.

This strongly suggests that now is not the time to sign deals that could determine large areas of spending to support or implement commitments.

It would be equally unwise to lock-in commitments which are irrevocable and whose impacts are unknown.

¹ *This briefing is based on an expert session held in Brussels on 13 September 2007 involving the following organisations: Aprodev, Christian Aid, CIEL, ECDPM, IARC (University of Manchester), ICTSD, Oxfam, SouthCentre, and UNCTAD. It reflects the findings of experts who presented at that meeting, although not necessarily the formal positions of their organisations.*

Speakers warned of the risk involved in signing up to costly deals when development assistance is still not assured and only a “best endeavour” commitment.

Speakers reminded negotiators that there is no WTO compulsion to negotiate on issues other than goods market access; this makes the imperative for a positive development contribution in other areas even stronger.

Negotiating processes need to shift to reflect these realities, or the prospect of EPAs that deliver the development ambitions of the Cotonou Agreement becomes increasingly remote:

- National and regional ownership of EPAs must be improved so that countries can assess whether their content reflects ACP priorities as outlined in endogenous development strategies.
- ACP states and regions are justified in seeking solutions to the restrictions of tight negotiating deadlines, for example by extending negotiating timeframes or reaching only interim agreements.
- Greater public scrutiny and technical assessment of EPA texts from a development perspective is essential.

The Devil is in the detail: Key observations from experts on specific EPA chapters

Speakers highlighted controversial assumptions behind EPA drafts proposed by the EC, specific provisions that risked undermining development strategies and opportunities to introduce development-friendly provisions that are currently being missed. Main points are summarized below.

Development issues:

- Countries should include a development chapter that makes explicit the link between trade commitments and development objectives
- Development objectives could be agreed as part of negotiations and should extend beyond growth and more FDI, to goals of social equity and cohesion, technological progress, and sustainable management of resources.
- These objectives should apply to all aspects of negotiations and consider a combination of three elements: market access, policy space (flexibilities) and development assistance.
- There should also be a shift to a twin-track monitoring mechanism that would assess not only compliance in implementation but also progress in achieving those objectives.

Intellectual Property:

- As there is no legal compulsion to negotiate beyond cooperation, countries should be clear that there is a positive balance sheet for development before agreeing an IP chapter in EPAs
- Agreeing WTO+ commitments could undermine regional strategies, since the same terms would have to be offered to other members under MFN terms.
- There are positive measures that would increase ACP benefits from IP that are absent from EPAs – or even undermined, for example the right to include in licensing contracts requirements for transfer of technology or joint ventures. This could also include measures to prevent biopiracy and misappropriation of traditional knowledge by EU companies.
- ACP countries need real assistance with technology transfer and the building of an appropriate technological base through access to EU research funding and partnerships. The EPAs should operationalize the EU's commitments on technology transfer.
- The EU's Enforcement proposal is entirely inappropriate and it imposes EU level standards on developing countries. It could result in the anti-competitive blocking of generics at the border without full proof of violations
- Technological Protection Mechanisms and Digital Rights management impose restrictions on the use of limitations and exceptions for the public interest, especially for educational institutions and for libraries as well as long distance education
- Requiring accession to the International Convention for the Protection of New Varieties of Plants – UPOV (Act of 1991) limits traditional farmers rights to save, re-use and re-sell the seeds from the products of their land and could therefore impact on food security.

Investment:

- It is not clear how important more liberal rules or signing investment deals are to attracting FDI. Countries should also consider that FDI can bring costs as well as benefits, and therefore bear in mind the importance of being able to manage its impacts.
- EC drafts contain MFN requirements, with provision for discriminatory treatment to countries and regions that are not “major trading economies”. The current definition of such economies is too limiting and would mean strategic deals could not be struck with China, Brazil, India and Malaysia without offering equal terms to EU investors.
- The drafts require removal of restrictions on movement of capital and current payments, which can result in balance of payments problems, for example.
- ACP must consider existing commitments especially under Bilateral Investment Treaties with EU member states. BITs provide strong and imbalanced post-establishment rights for investors, backed up by powerful enforcement dispute settlement provisions which allow private investors to bring claims directly against host states before an international tribunal. As EC texts give market access rights, this will increase the scope of obligations vis-à-vis investors, particularly for those ACP states who already have BITs with EU member states.
- Draft EPA provisions state that investors must be offered the most favourable terms available. This means that the opportunity to use EPAs to insert a development objective and a greater balance between investor-state rights and obligations has been lost. EPAs could bring benefits if they allowed countries to introduce a greater balance between the rights and obligations of the home state, host state and investor than in currently contained in outmoded terms of BITs.

Services:

- The opportunity to use EPAs to improve service provision in key sectors such as banking, communication, energy, and transport depends on local providers’ capacity and state regulatory capacity. ACP should also consider the implications of the ownership and control of key sectors.
- Regulatory cooperation and reform should be a priority over market access, therefore, but the EC’s focus in regulation has been on alignment. This may not always result in most locally appropriate model and may effectively increase market access, as barriers to services trade are regulations.
- The proposal to merge Modes 1 (cross border supply) and 2 (consumption overseas) needs further consideration, as the same kinds of regulation do not automatically apply.
- Mode 4 is a key interest of the ACP but limited liberalisation is proposed. It is the only mode not expanded to cover non-services sectors. In Euromed countries there is a move to create new categories under mode 4 more appropriate to their patterns of supply, for example independent contractors recruited by employment agencies in EU markets.
- The EC affirms the right to regulate to achieve “legitimate” policy objectives. The usual phraseology is “national” policy objectives, yet it is unclear who determines legitimacy.
- There is no mention of safeguards for services sectors, although these are important to developing countries at the WTO. At the WTO, the EC has always opposed services safeguards until there was substantial market opening. This is the case in EPAs, yet there is still no mention of safeguards. Earlier agreements with Eastern Europe have general language on safeguards.

Government Procurement:

- The EC introduces most of the key provisions of the WTO’s plurilateral agreement on government procurement but does not include its special and differential treatment provisions. Few developing countries are signatory to the WTO deal.
- Liberalising procurement can bring benefits to the ACP increasing value for money in public spending and improving governance and combating corruption. This does not need to happen within an EPA but these could provide an impetus.
- However, some ACP states also wish to maintain the flexibility to use procurement to achieve development objectives. They fear the irreversibility of EPA commitments and their limited capacity to implement them.
- ACP are also sceptical that they will benefit from any trade-off of increased potential to export to EU markets
- ACP states could also subject market opening to conditions such as technology transfer requirements or gaining support for building supply capacity. This is currently absent from texts.
- Currently there is insufficient evidence how a deal on procurement will support ACP development strategies. The ACP need to be able to clearly define their objectives before making commitments.

Agricultural Market Access

- Given the vulnerabilities exhibited in ACP countries’ agriculture sector, the socio-economic consequences of liberalising ACP agricultural markets need to be thoroughly investigated and these

should guide the further liberalisation through review and monitoring mechanisms that should be built into an EPA.

- In addition, safeguards are needed to counter price depressions and import surges and hence contribute to ensuring food security and livelihood security.
- A dangerous innovation in EPAs is the introduction of an MFN provision in the area of market access. This means that countries cannot take into account the differing patterns of trade that they have with different trading partners. With a limited number of sensitive product exclusions available, this creates difficulties for countries in concluding future deals. ACP states should seriously consider before including such a clause.
- ACP countries lack the resources to transform their agricultural sectors but need speedy structural change to benefit from trade liberalisation and to cope with the serious problems of preference erosion. In spite of this, currently support to improve the competitiveness and productivity of the agriculture sector in ACP countries only takes the form of “best endeavour” clauses.