The New Resource Grab: How EU Trade Policy on Raw Materials is Undermining Development

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Cover photo: Silos and equipment for processing raw quinoa at Anapqui's processing plant in Challapata, Bolivia. Photographer: Carlos Garcia Granthon.

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Summary

The European Union is making a big push to help its companies and investors access raw materials in developing countries. One element of this is a new strategy promoted in Brussels – the Raw Materials Initiative - to enable European companies to access key minerals on which the EU economy is argued to depend for its future competitiveness. Another element is the negotiation of free trade agreements with groups of developing countries, which require them to remove trade barriers and agree to new rules on investment. EU policy is being largely driven by European businesses to secure greater access to cheap raw materials.

This report shows that EU trade policies are already having severe adverse impacts on developing countries and that these will become worse if the current EU proposals succeed. In particular, developing countries will be further constrained in their ability to promote effective development policies. Furthermore, the already prevalent negative environmental and human rights impacts of European companies are likely to increase. At worst, the EU's strategy looks like a traditional grab for raw materials, part of a new scramble for Africa and beyond that will lock developing countries into a vicious circle of poverty.

Two EU policies are of special concern in this report:

- The first is the EU's attempt to secure developing countries' agreement to ban or curb the use of export taxes which many developing countries levy on raw materials exports to help develop their local industry, raise revenue or protect the environment.
- The second is the EU's attempt to negotiate new rules on investment that will give European companies unprecedented access to developing country raw materials on the same or even better terms as local businesses. While many developing countries need to attract more foreign investment, this EU push will make it more difficult for their governments to regulate investment to promote local development.

This report argues that current EU trade policy on raw materials is a distraction from what should be the major goals: first, to reduce Europe's own over-consumption of the world's resources; second, to help create a more equitable global system to manage and utilise the world's natural resources in a sustainable way.

The Raw Materials Initiative

The Raw Materials Initiative, launched in 2008 by the European Commission, stressed the EU's dependence on 'strategically important raw materials' such as 'high-tech' metals like cobalt, platinum, rare earths and titanium as well as other raw materials, such as wood, chemicals, hides and skins. The key problem with securing access to these materials was said to be the 'proliferation of government measures that distort international trade in raw materials', notably export taxes and 'restrictive investment rules'. The main countries applying these restrictive measures were identified as the emerging countries of China, Russia, Ukraine, Argentina, South Africa and India. But other developing countries, notably in resource-rich Africa and South America, were also on the EU target list.

The EU is promoting the Raw Materials Initiative despite recognising that export restrictions are part of some countries' development strategies. Among several other dangers of the initiative, a major concern is that it could increase the unfolding global competition for resources and contribute to resource conflicts. The Initiative is also likely to hinder developing countries' economic prospects by reinforcing their dependence on unprocessed raw material exports.

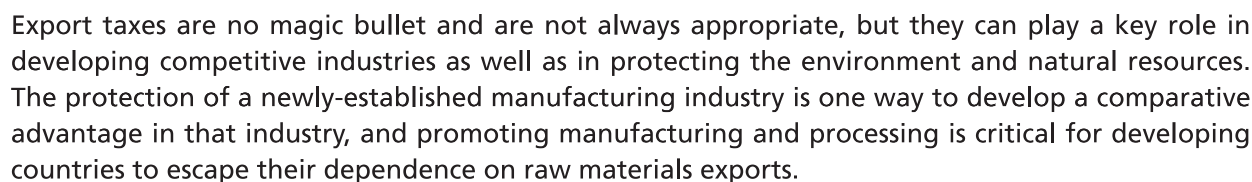
The Raw Materials Initiative is likely to reinforce Europe's own dependence on raw materials. Although the initiative addresses recycling, pushing for ever-greater access to the world's raw materials is a distraction from reducing Europe's existing consumption of them. The average European already consumes three times as many resources as the average Asian and more than four times as much as the average African. At the same time, Europe is now more dependent on imported resources than any other region in the world.

The EU's quest for raw materials is also evident in the range of free trade agreements being negotiated with various developing countries and groupings, notably with the poorest countries in the African, Caribbean and Pacific group - the so-called Economic Partnership Agreements (EPAs). Under EPAs, the EU is seeking to sign comprehensive agreements ('full EPAs') that cover not only commitments to liberalise trade in goods but also in investment, services, competition policy and intellectual property. The 'full EPA' concept emanates solely from Brussels; the EU is seeking liberalisation commitments from developing countries that go well beyond what they have agreed to in multilateral fora such as the World Trade Organisation (WTO).

Drum and worker at Leather Development Centre, Nairobi: part of the process of producing leather from raw hides and skins. Photographer: Mark Curtis.

Export taxes

EU strategy on export taxes and investment liberalisation is being pursued in the face of widespread opposition from developing countries. Export taxes are one of the most contentious issues in the majority of the EU's negotiations on Free Trade Agreements as well as in every one of the negotiations with the six EPA groups that have not yet agreed an EPA. Current draft (or 'interim') EPAs not yet agreed by developing countries but being pushed by the EU place major restrictions on developing countries' ability to promote export taxes. Countries would only be allowed to introduce new export taxes 'temporarily', often only after securing the agreement of the EU, and even then on only a 'limited' number of goods, sometimes after 'justifying' why they are needed. Thus developing countries, including the poorest countries, are being pressed to remove the ability to use a potentially key development policy beyond what has been agreed in the WTO.



Export taxes are no magic bullet and are not always appropriate, but they can play a key role in developing competitive industries as well as in protecting the environment and natural resources. The protection of a newly-established manufacturing industry is one way to develop a comparative advantage in that industry, and promoting manufacturing and processing is critical for developing countries to escape their dependence on raw materials exports.

New research undertaken for this report in Kenya – where the government levies a 40 per cent export duty on raw hides and skins in order to develop the leather processing industry – shows how successful export taxes can be. Research findings indicate that Kenya's export tax has helped create seven thousand new jobs, increased incomes for another 40,000 people and boosted earnings from the sector by over €8 million, with the potential for much more. Despite these successes, the EU is still calling for restrictions on the use of export taxes in Kenya, as elsewhere. The leather sector in Kenya shows how a developing country can achieve benefits for its people by defying the EU's ideological commitment to 'free trade'.

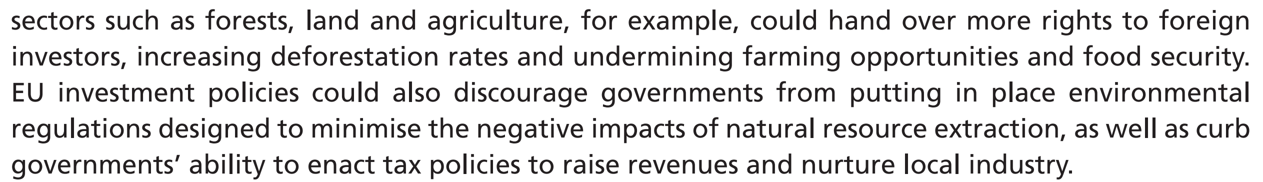
Investment

Foreign investment can bring jobs and capital, can transfer knowledge and skills and can boost related local industries. But it can also bring human rights abuses, sweat-shop labour, and environmental pollution, and it can undermine local producers of the same goods. In raw materials sectors like mining, oil and gas, foreign investment has an extremely poor record – it regularly involves special tax deals that provide the government with low revenues while transferring little or no technology and employing few locals, sometimes with displacement of communities. For these reasons, governments and parliaments must retain the right to regulate investment, both to discriminate in favour of investors that support the country's development and ensure that there are obligations and duties on all investors, including foreign, so that labour, environmental, human rights and other standards are respected. Unfortunately, these factors are largely absent from the EU's investment agenda.

Most successful developed and developing countries have restricted foreign investment to promote industrialisation. Policies have included selective capital controls, differential taxation, performance requirements linked to exports and local purchases (local content requirements), ownership ceilings, employment requirements and limits on foreign ownership. Yet the EU, by contrast, is pushing for comprehensive investment liberalisation along with 'maximum protection for EU investors'. With the passing of the Lisbon Treaty, investment policy has become an area of community competence, meaning that the policy will henceforth be led by the Commission rather than member states. The EU is now making a big new push on investment, promoting three main policies:

- 'National treatment' – whereby foreign investors will be accorded the same rights as domestic investors. This will curb developing countries' ability to give preferential treatment to domestic investors, such as small or infant enterprises, or their ability to ban or restrict foreign investment in certain sectors or provide favourable treatment to regional investors to help foster regional integration.
- 'Investor protection' – which establishes minimum standards of treatment of investors, often backed by the threat of international arbitration. This amounts to giving more rights to investors than to host governments or to the communities affected.
- The free flow of capital movements between countries – which secures the right of investors to repatriate profits and restricts the ability of developing countries to impose controls on capital movements. This will restrict the ability of governments to prevent capital outflows or support the balance of payments; controls that can be important in protecting economies against speculative capital movements and financial crises.

The EU's push on investment, as on export taxes, comes in the face of mounting opposition from many developing countries, which have long made clear that they are opposed to negotiating investment agreements both in the WTO and in EPAs. Indeed, EU goals amount to a policy of hindering development prospects in developing countries. Future investment liberalisation in



sectors such as forests, land and agriculture, for example, could hand over more rights to foreign investors, increasing deforestation rates and undermining farming opportunities and food security. EU investment policies could also discourage governments from putting in place environmental regulations designed to minimise the negative impacts of natural resource extraction, as well as curb governments' ability to enact tax policies to raise revenues and nurture local industry.

Investments by EU-based companies can be positive, but there are also many well-documented case studies highlighting EU companies violating environmental, human rights and labour standards in their overseas operations. UK companies, for example, are accused of contributing to labour rights violations of flower workers in Kenya, to low wages and denial of freedom of expression of garment workers in Bangladesh, to health and environmental pollution due to gas flaring in Nigeria and to environmental and human rights abuses against indigenous people as a result of bauxite mining in India. Instead of addressing the conditions which have led to these violations, EU investment policy aims to secure even greater rights for EU companies. The EU wants governments to sign legal, binding agreements on investment while at the same time promoting merely voluntary commitments – rather than obligations – by companies to meet global standards.

Recommendations

- On the Raw Materials Initiative, the EU should promote the equitable use of the world's limited natural resources and sustainable development for all.
- On export restrictions, the EU should support developing countries to diversify their economies, reduce export dependency on raw materials, increase local value addition and protect exhaustible natural resources.
- On investment, EU investment policy should change to ensure that governments are better able to regulate investments and companies to promote the public, developmental interest. Investment agreements must better balance investors' rights with their duties and should foster positive investor behaviour to promote long-term sustainable development.

Introduction

The European Union is making a big push to help its companies and investors access raw materials* in developing countries. One element of this is a new strategy promoted in Brussels – the Raw Materials Initiative – to enable European companies to access key minerals on which the EU economy is argued to depend for its future competitiveness. Another element is the EU's negotiation of free trade agreements with groups of developing countries, which require them to remove trade barriers and agree to new rules on investment in return for aid and continued trade access to the EU market.

The EU argues that its strategy to liberalise trade and investment with developing countries also promotes its development and poverty reduction objectives, and EU policies usually allow the poorest countries to apply certain safeguards and transition periods. However, this report shows that current EU policies are already having severe adverse impacts on developing countries and that these will likely become worse if current EU proposals succeed. In particular, developing countries will be further restricted in their ability to promote effective development policies now and in the future, and the negative environmental and human rights impacts of European companies will likely increase. At worst, the EU's strategy looks like a traditional grab for raw materials, part of a new scramble for Africa and beyond that will lock developing countries into a vicious circle of poverty.

This report identifies two EU policies of special concern:

- The first is the EU's attempt to secure developing countries' agreement to ban or curb the use of export restrictions, notably export taxes, which many developing countries levy on exports of raw materials to help develop their local industry, raise revenue to support public services or protect the environment.
- The second is the EU's attempt to negotiate new rules on investment that will give European companies unprecedented access to developing country markets, notably natural resources, on the same or even better terms as local businesses, and restrict developing countries ability to manage investment for poverty reduction purposes.

These EU policies will prevent poorer countries using key tools to develop their economies – many of which tools have been used successfully by developed countries in the past. Most developing countries are rich in raw materials and the appropriate use of these resources can provide a pathway out of poverty and an alternative to dependence on aid. EU policy-makers' strategy is also a distraction from what should be their major goals: first, to reduce Europe's own over-consumption of the world's resources, and second, to help create a more equitable global system to manage and utilise such resources in a sustainable way.

View near A Ka Da A Chi Village,Vietnam. Photographer: Richard Else.

* We use the terms 'raw materials' and 'natural resources' interchangeably. These are materials that come from nature, including oil, gas, minerals, metals, fish, wood and land.

1. The Raw Materials Initiative and Free Trade Agreements

1.1 The Raw Materials Initiative

> ***'I will raise the question of raw materials in every meeting I have with every trade minister from every country that restricts European imports.' Then EU Trade Commissioner, Peter Mandelson, September 2008*** [1]

In 2008 the European Commission launched a major new strategy, the Raw Materials Initiative.[2] It consisted of three pillars: securing access to raw materials on world markets, fostering the supply of raw materials from European sources and reducing the EU's own consumption of primary raw materials. The major point was that the EU is 'highly dependent on imports of strategically important raw materials' and that 'securing reliable and undistorted access to raw materials is increasingly becoming an important factor for the EU's competitiveness'. Of particular concern was the EU's dependence on imports of 'high-tech' metals such as cobalt, platinum, rare earths and titanium – inputs required for new environmental and renewable energy technologies, for example. However, other raw materials, such as wood, chemicals, hides and skins, were also deemed important. The Commission notes that the EU's import dependency rate for minerals ranges from 48 per cent for copper ore, 64 per cent for bauxite to 100 per cent for materials such as cobalt, platinum, titanium and vanadium.[3]

The Commission identified the key problem with securing access to these materials as the 'proliferation of government measures that distort international trade in raw materials', notably export taxes and quotas, subsidies, price-fixing and 'restrictive investment rules'. The strategy document identified over 450 export restrictions on more than 400 different raw materials, such as metals, wood, chemicals, hides and skins. 'If Europe does not act, European industry is put at a competitive disadvantage', the media release accompanying the strategy read.[4] The key countries applying restrictive measures were identified as the emerging countries of China, Russia, Ukraine, Argentina, South Africa and India. But the initiative also makes clear that 'many important raw materials are located in developing countries in Africa'.[5]

The Raw Materials strategy document contains one massive admission. Although it notes the need for coherence with development policy, it also states that export restrictions are part of countries' development strategies: 'Many emerging economies are pursuing industrial strategies aimed at protecting their resource base to generate advantages for their downstream industries.'[6] Despite this, 'the Commission will reinforce its work towards achieving stronger disciplines on export restrictions and improved regulation against subsidies at WTO level', and 'work towards the elimination of trade distorting measures taken by third countries in all areas relevant to raw materials'. And on investment policy, the EU aims at 'establishing a level playing field between companies and countries wanting to access raw materials'.[7]

Since the Initiative was published, a number of Commission plans and progress reports have reinforced the same messages. By June 2010, the Commission's Ad Hoc Working Group on Raw Materials was identifying 41 minerals and metals of importance to the EU, of which 14[*] were regarded as 'critical' since a high share of world production comes from a small number of countries, mainly China, Russia, the Democratic Republic of Congo (DRC) and Brazil.[8]

The European Council has explicitly called on the Commission and member states to use their aid programmes to secure access to raw materials. The May 2009 Council meeting, for example, concluded that, to promote the 'raw materials diplomacy', the EU should not only raise the issue in all appropriate fora but also 'give adequate consideration to the opportunities provided by projects undertaken in the context of development cooperation', adding that 'the specific situation of poor developing countries has to be taken into consideration'.[9]

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* The 14 critical minerals are: antinomy, beryllium, cobalt, fluorspar, gallium, germanium, graphite, indium, magnesium, niobium, platinum group metals, rare earths, tantalum and tungsten.

The Raw Materials Initiative flows from the EC's Global Europe strategy, originally outlined in 2006 and which is now being reviewed.[10] The strategy marks a clear shift away from multilateral trade talks towards new bilateral free trade agreements. These agreements should 'go beyond' those made in the World Trade Organisation (WTO) 'by tackling issues which are not yet ready for multilateral discussion and by preparing the ground for the next level of multilateral liberalisation'. 'Unless justified for security or environmental reasons, restrictions on access to resources should be removed', including 'all forms of duties, taxes, charges and restrictions on exports'. Global Europe also calls for the EC to push globally for 'stronger rules' on investment and for 'far-reaching liberalisation of services and investment' as well as public procurement, services and intellectual property. At the same time, Global Europe noted that, in considering new free trade agreements, development policies would be taken into account.

Box 1: Business behind the Raw Materials Initiative

The EU's push to open world markets is driven by a long-term agenda of big business. 'It is clear that there is a strong desire from business for more active participation in barrier removal', the Commission has stated. Indeed, it notes that 'we will rely on EU business to provide much of the information on the barriers which affect their trade or investment with third countries'.[11]

The mining and extractive industry seems to have been very influential in shaping the Raw Materials Initiative. As early as 2003, Eurometaux – the EU industry association representing metals producers – developed a 'two-year advocacy plan for awareness and alliance building at EU and national level on distortions in access to raw materials'. This was followed in 2005 by submissions for the WTO negotiations on new disciplines on export taxes. From then on, Eurometaux entered into a 'focused interaction with DG Trade and DG Enterprise' on the issue of export restrictions and other trade distortions.[12] In 2006, Business Europe, the main business federation in Europe, tabled a position paper on the need for an 'EU strategy to secure access to industrial raw materials'.[13]

Eurometaux stated in its contribution to the consultation on the Raw Materials Initiative: 'There will be no future for the EU economy and no capacity to finance other major EU policy objectives if one cannot guarantee a secure and competitive access to the raw materials needed by the EU manufacturing industry.'[14]

Business Europe has since welcomed the Raw Materials Initiative and consistently implores the Commission to pursue a 'resolute strategy' and 'tough line' for the EU to 'counter government intervention and open the global market for raw materials'.[15] Tellingly, Business Europe has stated that, although it does not contest the right of developing countries to decide on the exploitation of their natural resources:

> ***'We cannot accept government intervention to manipulate the price of raw materials for industrial development purposes. Therefore, Business Europe objects to any policy that leads to price manipulation or that significantly distorts the global industrial market.'***[16]

China is of particular concern to European business. Business Europe notes that 'China's rush for raw materials in Africa raises concern among many stakeholders, including industry. Our key concern is that Chinese companies are not constrained by financial considerations because they are operating on raw material markets with the backing of state subsidies. We see a clear pattern in Chinese actions to gain control over raw material markets in what seems to be part of a targeted industrial policy, forcing downstream users to invest in China. We will push the EU to use all instruments at its disposal to resist this policy.'[17]

1.2 Problems with the Raw Materials Initiative

As well as undermining many governments' 'industrial strategies', as noted above, there are other major dangers in the initiative.

First, it appears as essentially a strategy to grab other countries' resources and may increase global competition for resources and contribute to conflict. Western powers have for centuries viewed developing countries as suppliers of cheap raw materials. The new factor is, however, the emergence of competitors. During the past decade China, India and other emerging economies have entered traditional European and US preserves and are vying for control over these resources. Africa has long been plagued by resource wars over diamonds, timber and oil, in countries such as Sierra Leone, Liberia, Angola, Nigeria and Sudan. The UK Ministry of Defence states that the shift in global power from the US/Europe to Asia, together with the challenges of climate change, resource scarcity and population growth, are 'likely to result in a period of instability in international relations, accompanied by the possibility of intense competition between major powers'. The 'greatest likelihood of confrontation' between these powers lies in contested regions with significant resource potential, such as parts of Africa, the Indian Ocean region, the Asian meridian and the Arctic.[18]

Second, the Initiative is likely to hinder developing countries' economic prospects by reinforcing their dependence on unprocessed raw material exports. These are already associated with low or volatile prices, corruption and the resource curse. Developing countries need to diversify away from producing raw materials and one way to do this is to produce more processed or manufactured goods. Only a handful of developing countries, mainly in East and South East Asia, have successfully diversified into manufacturing. Foreign investment is already highly concentrated in raw material sectors, a trend which will likely be reinforced by the Raw Materials Initiative.

Third, the strategy reinforces Europe's own dependence on raw materials. Although the strategy mentions the importance of recycling, pushing for ever-greater access to the world's raw materials is a distraction from reducing Europe's existing consumption of them. Europe is already an 'over-consumer': the average European consumes three times as many resources as the average Asian and more than four times as much as the average African.[19] At the same time, Europe is now more dependent on imported resources than any other region in the world, yet the EU still does not even measure its own resource use.[20]

Although 'resource intensity' (the amount of raw materials needed to produce growth) is declining globally, the absolute amount of natural resources extracted every year is increasing due to economic growth – the world extracts around 50 per cent more natural resources now than in 1980.[21] These activities often contribute to environmental problems such as pollution, water shortages or the destruction of fertile land and often involve human rights violations, poor working conditions and low wages. Our climate is changing and many of our natural resources are finite, while stocks of forests and fish, for example, are rapidly being depleted. Moving to sustainable models of resource usage as a central aspect of broader sustainable development is an urgent task. The first priority is for the EU to reduce its consumption of resources and move towards a low-resource economic model.

Box 2: Importance of raw materials to the EU and developing countries

The global trade in raw materials is huge. World exports of natural resources were around US$ 3.7 trillion in 2008, amounting to nearly a quarter of world trade.[22] Europe is the world's biggest single market for natural resources, importing 23 per cent of the world total.[23] In 2008, the EU-27 imported €114 billion worth of non-energy mineral and chemical products. Around 70 per cent of imports into the EU are not finished consumer products but raw or intermediate goods heading for the transformation industries.[24]

Developing countries, by contrast, are essentially raw material producers. Over 100 of them rely on primary commodities for 50 per cent or more of their exports – 46 of them, mainly in Africa, rely on just one commodity.[25] Countries in Africa, the Middle East and the Commonwealth of Independent States depend on average on raw materials for more than 70 per cent of their exports.[26]

1.3 Problems with Free Trade Agreements

The EU is currently negotiating a range of Free Trade Agreements with countries and groupings such as Korea, India, Central America, Andean countries, Mercosur, ASEAN, Euromed, Libya, Ukraine and Canada. With the poorest countries, such as those in the African, Caribbean and Pacific (ACP) group, the EU is negotiating Economic Partnership Agreements (EPAs) with seven country groupings. Under EPAs, for which negotiations began in 2002, the EU is seeking to sign comprehensive agreements ('full EPAs') that cover not only commitments to liberalise trade in goods but also in services, investment, competition policy and intellectual property. The 'full EPA' concept emanates solely from Brussels and is not mandated by multilateral commitments in the WTO. As of October 2010, only one comprehensive agreement EPA has been signed – with Caribbean states in CARIFORUM. The original end-2007 deadline for concluding EPAs has not been met but a limited number of countries have initialled or signed 'interim' EPAs with the EU.

There are major problems with EPAs and other Free Trade Agreements, which have long been articulated by developing country governments as well as NGOs, academics and some international organisations, notably the UN Economic Commission for Africa (UNECA). Three major problems are:

- The requirement on developing countries to liberalise at least 80 per cent of their trade with the EU within 15 years may result in job losses in manufacturing and undermine food security as domestic producers fail to compete with imports.[27] Although some safeguards (with limited scope) are built in, the extent of tariff liberalisation has been the major reason that the ACP states, particularly Least Developed Countries, have not so far signed EPAs.[28]
- The EU is seeking liberalisation commitments from developing countries that go well beyond what they have agreed to in the WTO. EU Trade Commissioner Karel de Gucht has said: 'It is fair to say that Europe is at the vanguard in trade liberalisation that goes much beyond what is possible in the WTO framework.'[29] The inclusion of issues in the EPAs negotiations such as services and the so-called Singapore issues – investment, government procurement, competition policy and trade facilitation – will result in deep liberalisation primarily benefiting foreign investors. Developing countries have repeatedly rejected discussing the Singapore issues in the WTO and most remain opposed to including these in EPAs.
- EU negotiators have sometimes resorted to exerting undue pressure on developing countries to in effect force through their agenda.[30] Alternative policy suggestions from developing countries have been regularly dismissed and requests to examine alternatives to EPAs have not been taken seriously despite the EU's legal obligation to provide such Cotonou-equivalent alternatives under Article 37.6 of the Cotonou Agreement.[31] Ecuador's President Correa has called the negotiations with the EU 'biased' while Bolivia's President Evo Morales withdrew his country from talks over the EU's stance on intellectual property and the privatisation of services.[32]

Ablassé Ouédraogo, a former Deputy Director-General of the WTO, recently wrote:

> ***'After seven years of fruitless discussions, Europe is now attempting to impose the [EPA] agreements by force rather than dialogue. If the agreements were finalized in their present form, they would deny ACP countries the essential political instruments necessary for their development. The result would be a total contradiction with the initial objectives, compromising regional integration, exacerbating poverty and preventing countries from diversifying production and freeing themselves from dependence on a few basic commodities.'***[33]

The FREBRA woodcarving workshop in Nairobi, Kenya.

2. Restricting Development: The Issue Of Export Taxes

Trade Ministers of the Least Developed Countries called for an agreement at the WTO 'not to impose any disciplines on export taxes, as these are legitimate tools for development', Dar Es Salaam in October 2009.[34]

Many developing countries levy taxes or other restrictions on their raw materials exports in order to raise government revenue, develop local processing industries or to protect the environment. But the ability to apply such taxes is now under threat from the EU, which, depending on the negotiation, is either seeking to ban their use or else to curb developing countries' ability to introduce new export taxes or increase existing ones. EU policy is being driven by its push to secure greater access to cheap raw materials.

2.1 Export restrictions and their use

Export restrictions take various forms, including export taxes, export bans and regulated exports. Export taxes can be imposed as a percentage of the value of the export or, in a progressive way, raised when the price of the product is high and lowered when it is low. All types of export tax have the effect of reducing the volume of exports. Export bans, entailing an absolute restriction on exports, have been frequently imposed on live fishery products and animals. Regulated exports include quotas and licensing requirements. Crucially, export taxes are fully permitted under the WTO multilateral trade agreements, unlike export bans which, with some exceptions, are generally prohibited.

Governments have been using export taxes to raise government revenue and finance industrial development for centuries. They were used, for example, to develop the European wool processing industry and by British colonies, which often sent raw materials duty-free only to other British-controlled territories.[35] The use of export taxes remains very common today: the WTO notes that around one third of all export taxes are levied on natural resource sectors and that 11 per cent of world trade in natural resources is covered by export taxes; 15-25 per cent of world trade in fish and forestry, and 5-10 per cent of world trade in fuels and mining, are covered by export taxes.[36]

A recent study by the US government's International Trade Commission found that of 131 countries analysed, 72 imposed export taxes – eight were high-income countries, 38 were middle-income and 26 were low-income. Of the 72 countries, 32 imposed them on raw materials, mainly on sugar, coffee, cocoa, forestry products, fishery products, mineral and metals, and leather, hides and skins.[37]

Workers at a private leather factory in Nairobi, Kenya. Photographer: Mark Curtis.

Table 1: Examples of the use of export taxes: select countries

Country	Export taxes
Botswana	Levy imposed per head of cattle exported. Exports of unprocessed, semi-precious stones are prohibited. Exports of livestock, wild animals and rough diamonds require a permit.
Brazil	Export taxes are on levied on leather and skins (to all markets) and cigars and arms (to some markets). Exports of certain types of wood require authorisation along with other goods for safety and environmental reasons.
Ghana	Export taxes are levied on cocoa and hydrocarbons. Exports of round or unprocessed logs, raw rattan cane and bamboo, and parrots are prohibited. Export permits or certificates are required for a number of products.
India	Export taxes are levied on raw hides and skins and on leather exports (at up to 60 per cent of export value) and on some steel products and basmati rice.
Mozambique	Imposes an export tax of 18-22 per cent on raw cashews. Although no other specific export tax is applied, certain items, which are almost entirely exported, are subject to charges, e.g. cotton, fishery products, forestry products and mining products. A royalty applies to exports of unprocessed precious tropical wood, with a 25 per cent reduction applying if processed. There are prohibitions on exports of flora and fauna and exports of unprocessed wood, reserved to local processors, but not on exports of unprocessed precious tropical wood species, such as ebony and rosewood.
Namibia	Export taxes include 10 per cent on unprocessed diamonds, cattle sheep and goats per head, 60 per cent on raw hides & skins and 15 per cent on pickled hides & skins. A range of exports require permits.
Niger	3 per cent tax levied on most exports except minerals. Export of seed cotton is banned. Exports of cattle and hides and skins must be approved.
Pakistan	Export taxes of 20 per cent are applied to raw hides and skins and finished leather.
South Africa	Export taxes are imposed on unpolished diamonds, citrus fruit and wine.
Zambia	Export taxes are levied on copper concentrates, cotton seed and scrap metal. Export prohibitions apply to certain types of logs and, in drought years, grains. Certain goods, such as fertilisers, live animals, gemstones, and firearms, require special export permits.

Sources: WTO, Trade Policy Reviews: Botswana, November 2009, pp.91-2; Brazil, March 2009, pp. 59-60; El Salvador, February 2010, p.42; Ghana, January 2008, pp.33-4; India, April 2007, p.61; Malawi, June 2010, p.28; Mozambique, April 2009; p.41; Namibia, November 2009, pp.229-30; Niger, November 2009, pp. 85-6; South Africa, November 2009, p.316; Zambia, July 2009, pp.40-41. EU Market Access database (http://madb.europa.eu) for India and Pakistan.

2.2 The development benefits of export taxes

'In the context of the WTO, it is generally accepted that among export restrictions, export taxes are the least damaging export control measure compared with other forms of control. Export taxes generate income for the government, are transparent, and are simpler to administer.' Study by US government's International Trade Commission.[38]

Exports taxes can be useful in promoting development in several ways:

Raising government revenue

For some developing countries export taxes are an important source of income, as outlined in table 2, although data for most countries is hard to come by. Especially for the Least Developed Countries, export taxes are easier to administer and collect than more complicated forms of taxation such as income tax or land tax.[39]

Table 2: Revenue from export taxes: select countries

Country	Revenue
Brazil	R$42 million (US$25.3 million) in 2006 and R$60.5 million (US$36.4 million) in 2007
Dominican Republic	In 2004 a tax of 5 per cent was imposed on gross revenue earned from exports of all goods and services. The tax remained in force for 6 months; it generated RD$1.224 billion (US$31 million)
Ghana	Income from export taxes on cocoa totalled GC 616 billion (US$65 million) in 2005/06. The share of export taxes in total government revenue decreased from 11.4 per cent in 1998 to 2.3 per cent in 2005
Guyana	US$9.3 million (average per year from 2003-2008)
Solomon Islands	18 per cent of total customs and inland revenue (2003-2007)

Sources: WTO, Trade Policy Reviews: Brazil, March 2009, pp. 59-60; Dominican Republic, November 2008, pp.50-1; Ghana, January 2008, pp.33-4; Guyana, July 2009, p.39; Solomon Islands, May 2009, p.34.

Developing 'infant industries' and processing

More important, however, is the use that export taxes can have in developing processing or downstream industries. Export taxes have the effect of reducing the domestic price of industrial inputs, providing an economic incentive to establish domestic processing industries that can generate new exports, create new jobs and provide new sources of government revenue.[40] A report for the WTO notes that 'export taxes can be justified on the basis of the so-called infant industry argument' since 'the processing industry will benefit from lower prices of inputs, gain competitiveness in the international market and expand'.[41] In Botswana, for example – the African country where mining has contributed most to development – the government prohibits exports of unprocessed, semi-precious stones to ensure processing.[42] In South Africa, an export tax is imposed on unpolished diamonds to develop the local economy, promote skills and create employment.[43]

Temporary protection of a newly-established manufacturing industry is one way to develop a comparative advantage in that industry, and export taxes on primary commodities work as an indirect subsidy to higher value-added manufacturing or processing industries.[44] Promoting manufacturing and processing is critical for developing countries to escape their dependence on raw materials exports. Primary commodity producers lag behind exporters of manufacturing products and are locked into a production structure that entails lower growth rates. Yet few developing countries have managed to escape this dependence. For example, while producing 70 per cent of the world's cocoa, African countries process only 15 per cent of it – Europe and the US account for 52 per cent.[45] In Africa, South Africa is one of the few African countries that has a wide variety of value-added products, such as fridges, fruit juices and wines. Dependence on primary commodity exports is closely related to poverty and high indebtedness – heavily indebted poor countries (HIPC), for example, rely on primary commodities for 83 per cent of their exports.[46]

Environmental protection

Environmental protection is one of the most frequently cited policy objectives of export restrictions. Mining or processing procedures can be highly energy consuming or polluting, and export taxes can be applied to reduce production.[47] Especially in countries with deficient governance structures at the local level, export bans and export taxes are often the only regulatory instrument and policy tool available to prevent the unfettered outflow of natural resources. Restrictions on exports can useful, and are sometimes necessary, to halt deforestation and the export of logs and wood; several countries apply such restrictions for these purposes. In 2010, for example, the Mozambique parliament looked set to pass a bill imposing a 20 per cent export tax on unprocessed wood in order to increase wood processing; the context is one of recent major increases in the export of logs leading to deforestation in the country. Revenue from the export tax would be used for reforestation and improved inspection, according to the government.[48]

Stabilising commodity prices

Countries producing commodities are dependent on often very volatile world prices for their income. Governments can sometimes influence the world price of commodities like coffee, cocoa and sugar by using export restrictions in combination with other policy tools to stabilise, or raise, world prices to increase export earnings and government revenues.[49]

Terms of trade benefits for large countries

The economic literature notes that if a 'large' country – one that controls a large share of trade in the commodity – imposes a tax or ban on exports, the effect will be to lower the domestic price of the taxed good, increase the international price and reduce the volume of trade. Thus the terms of trade of the exporting country will improve and there could be gains in overall national welfare. However, if the country imposing the tax is 'small' – representing a small share of world supply, as is the position for most of the poorest developing countries – reductions in its exports will not affect the world price, and thus it will not see improvement in its terms of trade. However, if a group of small countries were to collude together, and affect the international market for a commodity, the use of export taxes might also produce gains in their terms of trade.[50]

Box 3: Benefits to Argentina

At an OECD conference on raw materials in October 2009, the government of Argentina – a major user of export taxes – explained their benefits:

> *'Three policy objectives of the Argentine export tax were explained in relation to its economic crisis in 2002. Fiscal consolidation is the first objective. In 2001-2002, Argentina experienced one of the most severe economic crises and significant devaluation of its currency. Export taxes were applied when collection of more traditional income and value added taxes dropped significantly due to the recession. Another objective for implementing export taxes in 2002, particularly in the case of agricultural products, was to moderate the impact of devaluation on domestic food prices and their impact on real wages and poverty. Export taxes also contribute to a fairer income distribution by reducing windfall gains of exporters.*
>
> *'The Argentine government also maintains differential export tax rates, taxing primary products at higher rates than processed items, to compensate domestic downstream producers for tariff escalations. Export taxes on unprocessed commodities, by reducing their domestic price, favour the development of the local processing industry. The use of export taxes was suggested as the second best policy choice considering the difficulty to persuade other countries to reduce tariff escalation, which is the first best option.'*[51]

Export taxes can also be seen as a response to developed countries' policies of tariff escalation – where import taxes rise the more an imported good has been processed. Tariff escalation discourages diversification in developing countries, reinforcing reliance on primary commodities. In this situation, the best all-round solution may well be the removal of tariff escalation, but, as a report for the WTO argues, 'export taxes are a second-best policy'.[52]

No magic bullet: The need for consistency with sustainable development

It is not that export taxes are a magic bullet for promoting development. They can, for example, have negative as well as positive environmental impacts and encourage a model of economic development that is unsustainable and destructive. Export taxes that lower the domestic price of raw materials, such as logs or minerals, can either encourage greater use of the materials since they are cheaper or else discourage production since profit will be lower. The impact can also be negative if the export tax spurs the development of, say, wood processing to the point that this contributes to the depletion of forests.[53] To conserve natural resources and protect the environment, export restrictions should reduce production levels, but this is not always the case and, sometimes, production levels are maintained rather than reduced.[54] Thus this report does not argue for a blanket commitment to the use of export taxes in industrial policy, nor suggest that developing countries should pursue a policy of domestic over-exploitation of their natural resources in the pursuit of a traditional, industrial model of development. The use of export taxes needs to be consistent with promoting sustainable development.

Export taxes can also encourage corrupt and rent-seeking behaviour in some countries, when imposed on certain companies and sectors favoured by some politicians. In addition, the producers of the raw materials can lose out in an export tax policy. An export tax lowers the price of the commodity on domestic markets and in effect subsidises the domestic processors that use the commodity as a raw input. Thus the benefits to the processing industry will be costs (loss of income) to the primary producers of the raw material, who will lose out from the reduced price, except if they are compensated by other government policies – therefore income inequality can be increased.[55] The overall effect of the export tax on poor people depends on how well processing industries do compared to losses for primary producers, and how well the government spends the fiscal revenue generated by the tax.

Finally, export taxes alone are also unlikely to be sufficient to promote greater processing and diversification; it depends on how their use combines with other government policies. Yet the essential point is that, since they can be useful, developing country governments must retain a right to use them. Box 4 highlights two examples of exports taxes have been successfully used.

Rice fields in Cambodia. Photographer: Richard Else.

Box 4: Country benefits of export taxes

Developing Kenya's leather industry

Kenya produces over 2 million hides (mainly cattle) and around 4 million skins (goats and sheep), but until recently, value addition in the livestock sector has been minimal, and most of Kenya's exports have been unprocessed, raw hides and skins. Before 1990, the Kenyan tanning industry thrived, with 19 tanneries directly employing 4,000 people. This changed after the liberalisation of the market, involving cuts in trade tariffs on imported leather and footwear, which provoked a surge in cheap imports. Tens of thousands of jobs were lost in the tanneries while the government lost revenues of Shs 1.14 billion (US$15.2 million) a year.[56]

The government's current strategy to develop the leather industry springs from its Vision 2030 programme which promotes industrialisation and value addition in key sectors. In June 2006, the government raised the export tax payable on exports of raw hides and skins to 20 per cent and the following June doubled it to 40 per cent, with the aim of encouraging the leather processing industry.[57] Research shows that these taxes have brought a number of major benefits:

- They have drastically reduced the exports of raw hides and skins and boosted leather processing. According to the government, nearly 98 per cent of skins produced in the country are now semi-processed to wet blue* or finished leather compared to 56 per cent in 2004, while 96 per cent of hides are processed to wet blue.[58] Production of raw hides and skins has declined by a factor of six from 2003 to 2007 while production of finished leather has increased over four-fold during the same period: in 2007, Kenya produced 20,000 metric tonnes of leather compared to around 5,000 in 2003 and 10,000 in 2005.[59]
- Total earnings from the leather industry, according to government figures, have risen from Shs 3.15 billion in 2005 to Shs 4.02 billion in 2008 – a rise of Shs 870 million (€8.2 million), or 21 per cent.[60]
- The number of tanneries has risen from 9 in 2005 to 12 in 2008, with operating capacity improving from around 30 per cent in 2003/04 to around 70 per cent in 2007/08.[61] The number of cottage industries – which provide employment to thousands of small-scale workers and produce leather goods or footwear – has risen from 17 in 2005 to 24 in 2008.[62]

Our estimate based on research in Kenya is that around 1,000 direct jobs and 6,000 indirect jobs have been created since the introduction of the export duty; in addition there have been increased incomes for perhaps 40,000 workers in peripheral industries who benefit from the boost to the leather sector. A rough estimate is that the boost to incomes for those directly and indirectly employed in the leather sector is around Shs 195 million a month, amounting to Shs 2.34 billion (€22 million) a year.

The potential for growth in Kenya's leather industry is considerable. The government estimates that value addition could more than double earnings to Shs 9 billion.[63] For export taxes to be effective in developing the leather industry over the medium term, they have to be part of an overall strategy, used in combination with other policies. Positively, the government has drafted a five year Strategic Plan for the leather sector and in May 2010 set up a Leather Development Council, comprising the industry's various stakeholders in a form of public-private partnership, to oversee strategy towards the sector.

But Kenya's broader use of export taxes is under threat. The EU's Interim EPA signed with the East Africa EPA grouping** is the subject of ongoing discussions and has so far failed to resolve contentious issues such as export taxes. The EU is seeking an agreement that would allow East

* Wet blue is tanned leather that has been converted from hides or skins by the application of tanning agents; crust leather is re-tanned leather that has been further treated with tanning agents; finished leather has been subjected to further processing to affect the softness, colour, appearance or permeability.

** Comprising Kenya, Uganda, Tanzania, Burundi and Rwanda.

African states to introduce new export taxes only with the EU's 'authorisation', and only then for a limited period.

Mongolian export taxes to develop textile industries

Mongolia imposes export duties on raw materials but as a condition of joining the WTO it undertook to phase out and eliminate its export duty on raw cashmere within 10 years of accession. However, in January 2007 Mongolia filed a 'Request for a Waiver', asking the WTO Council to postpone implementing this commitment for five years. The reason was that Mongolia regarded the export duty on raw cashmere as critical for its economic development. In its request, Mongolia stated:

> ***'Export taxes are not prohibited under WTO Agreements. They are well-known policy instruments which can effectively provide incentives for the local processing of raw materials. They may assist in adding value to exports, bringing greater export earnings and increasing the diversification of exports, thereby contributing to an overall reduction of the economic vulnerability that affects the Mongolian economy. Finally, the application of export taxes on raw cashmere also serves environmental objectives as it contributes to the regulation of goat herds and is part of governmental efforts to fight environmental damages and desertification.'***

Export taxes in Mongolia are applied not only on raw cashmere, but also on camel wool, goat skins and logs. In 2005, the textile industry contributed 4.5 per cent to gross industrial output. Exports of cashmere products alone accounted for 9 per cent of Mongolia's exports, making it the country's third largest export. Despite the success of textiles, however, the sector still faces problems and a large number of textile and cashmere processing firms have collapsed, partly due to heightened global competition for raw materials. According to the Mongolian government, 'increased exports of raw wool, cashmere, leather, hides and skins have resulted in the lack of necessary raw materials and a further plunge in the utilization capacity of livestock-based processing industries. About 60 per cent of companies went out of business due to the outflow of raw materials compared to 2003'.

The government is, however, hopeful that if the export tax is maintained then the cashmere industry will significantly contribute to economic growth and the employment of herders and manufacturers. It argues that 'the continuation of the application of export taxes to exports of raw cashmere is fundamentally important to sustain the industry in this difficult period' and that 'their elimination at this juncture would add a further burden to local processing firms'. Six months after Mongolia filed for the waiver, the WTO General Council granted its request and gave the country an additional five years, until January 2012, to eliminate its export taxes on raw cashmere.[64]

Potential for export taxes in 'hoodia' production

In future, export taxes may prove a useful tool in developing the value chains associated with products based on traditional knowledge. A concrete example in southern Africa is 'hoodia', an appetite suppressant traditionally used by the San people while hunting. Its modern use is as a slimming aid and the real commercial value lies not in the root itself but in the value-added products that derive from the root - a 100 gram pack of 'hoodia' and rooibos blended tea retails at €6, equivalent to €60,000 per tonne. One potentially lucrative option for Southern African countries is to apply export taxes on 'hoodia' to stimulate value-added production, with export licenses only being issued on the basis of a progressively increasing percentage of local value-added processing.[65]

2.3 What the EU wants

'The goal of the EU's trade policy is, and will remain, an open global market completely free of all distortions on trade in energy and raw materials.. Then EU Trade Commissioner, Peter Mandelson, October 2008 [66]

The basic EU position is that export restrictions and taxes must be eliminated. The Commission states that 'our aims are generally to secure non-discriminatory access to key inputs for the EU economy' and that 'one particular problem' is export duties.[67] It argues that export taxes are counter-productive and that ACP countries should do everything possible to maximise their exports.[68]

The EU is fully aware of the developmental uses of export restrictions. A December 2007 paper by the Commission notes: 'Most countries, to date, have imposed trade restrictions on commodities or other less-processed products. This is logical since the measures such as export taxes usually are intended to promote higher value-added activities [sic].'[69] Importantly, EU policy does allow for exceptions for developing countries to apply export restrictions. The Commission states:

'Under certain circumstances, restrictions to the supply of raw materials may be justified: situations may arise where export restrictions are important to support, for example, development objectives, protection of the environment or the sustainable exploitation of natural resources… For the agreed measures to bear the expected positive effects, they need to be framed on the basis of clear rules and objectives. Any measure must be applied in a non-discriminatory manner (ie, the EU should not suffer any penalization beyond that imposed on other operators) and not be unnecessarily burdensome or trade restrictive (ie, be proportionate to their objective)…DG Trade has been working to further clarify the various possible grounds for exceptions that it may contemplate in its bilateral agreements. By their nature these deliberations need to be formulated with due respect of the negotiating process and to date have been essentially made on an ad hoc basis in the context of specific negotiations or existing agreements.'[70]

'The commitment to removing trade barriers like export taxes must be a cornerstone of EU trade policy… One of my tasks as EU Trade Commissioner is to help entrench and extend those opportunities and I agree we should use all tools – including trade agreements … to further break down barriers to effective trade…. There are, of course, some exceptions. The world's poorest countries need to protect infant industries and it is only right that both multilateral and EU trade regimes give those industries the space and time to grow. So we will continue to look at the role of export taxes on a case-by-case basis, in order to make sure that, at the same time as promoting openness in the world economy, we are underpinning long-term economic development in the poorest countries'.

Baroness Catherine Ashton, then EU Trade Commissioner, February 2009 [71]

As we will see later in this chapter, however, the EU is seeking either to ban the use of export taxes or to impose major restrictions on developing countries' ability to introduce new export taxes. Moreover, the EU has explicitly stated that it will take countervailing action against their use. The Commission has warned that:

'The EU should ensure that any distortion in the cost of raw materials resulting from export restrictions, dual pricing practices or mechanisms with a similar economic effect in operation in the exporting country, are addressed and offset in the context of Trade

Defence Instruments (TDI) investigations. Even if tackling the effects rather than the source of problems constitutes a "second best" solution, TDI can prove an effective tool for implementing the Trade raw materials strategy'.[72]

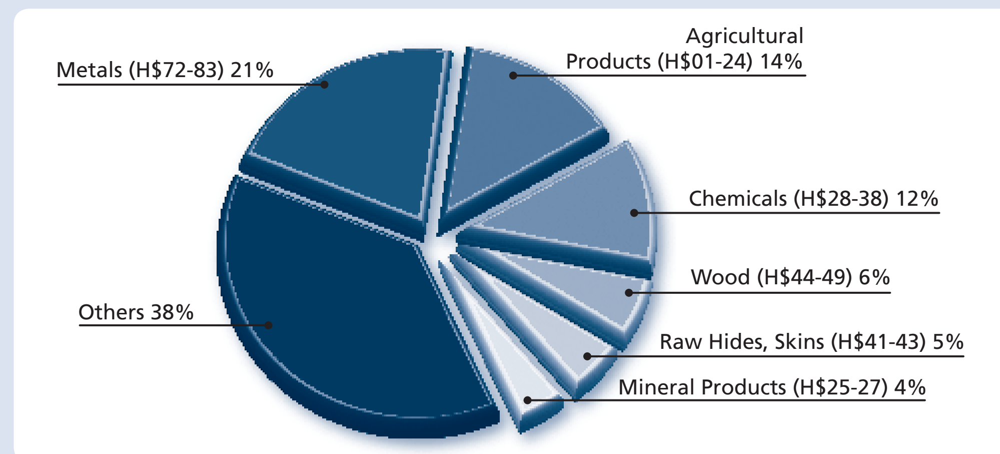
This means that the EU might use 'anti-dumping' and safeguard policies to protect the European market from imports subject to developing country export restrictions.

Box 5: The EU's targets on export restrictions

The Commission's working document that accompanied the release of the Raw Materials Initiative in 2008 included a list of 15 materials, mainly minerals, on which countries were placing export restrictions. The offending countries were led by China and included Russia, India, Ukraine and Argentina while four countries were pinpointed as placing export restrictions on raw hides and skins – Argentina, India, Brazil and Pakistan.[73]

In 2007, the Commission began to compile an inventory of export restrictions applied to raw materials. By the end of 2009, it identified 19 countries* applying 1,233 such measures. Some are among the poorest in the world, such as Sierra Leone, Togo and Tanzania. Of those measures, 84 per cent were export taxes and most were applied by Argentina, Ukraine, China and Russia. The sectors on which export taxes were most commonly applied were metals and agricultural products followed by chemicals, wood, and raw hides and skins.[74]

Table 3: The Commission's inventory of export restrictions



Source: EC, DG Trade, Raw Materials Policy, 2009 Annual Report, p.10

EU strategy is not simply about securing 'fair' and equal access to the world's raw materials, but securing them at cheap prices for EU companies. The Commission states that export restrictions can put EU companies out of business if they are unable to access inputs. But another problem is that:

'Export taxes can lead to increased input costs, with a negative effect on the competitiveness of EU companies. At the same time the domestic industry of the country applying export restrictions will benefit from lower input prices, thus artificially boosting its own competitiveness and further lowering that of EU-based companies.'[75]

The key problem is therefore 'cheaper access to such inputs' by the EU's competitors.[76] Business Europe also states: 'Prices have not only increased due to market forces: An increasing number of countries restrict the export of raw materials by means of export taxes or other measures.'[77]

* The 19 were Algeria, Argentina, Bangladesh, Brazil, China, Egypt, India, Indonesia, Kazakhstan, Morocco, Nigeria, Pakistan, Russia, Sierra Leone, South Africa, Tanzania, Thailand, Togo and Ukraine.

Box 6: Business behind EU policy on export taxes

Export restrictions have been the number one trade distorting measure attacked by EU industry in the debate about access to raw materials. Before the adoption of the Raw Materials Initiative in 2008, Business Europe advocated that the Commission 'should pro-actively pursue the removal of export taxes and other forms of trade or investment restrictions imposed by foreign governments'.[78] It told the Commission that it should 'actively counter export restrictions by recourse to the WTO dispute settlement system, using trade defence instruments to counter distorting practices and reforming the Trade Barriers Regulation.[79]

EU business' major concern has been Chinese export restrictions, but other countries are also targets, such as India's ban on raw cotton exports[80], Pakistan's 15 per cent export duty on cotton yarn[81], Malaysia's export restrictions on palm oil[82], and Morocco's export ban on hides and skins.[83]

2.4 EU pressure at the WTO and in Free Trade Agreements

Pressure at the WTO

The EU has long been pushing at the WTO for an agreement to remove or 'bind' export restrictions on raw materials.[84] In 2006, the EU proposed that WTO members agree to the prohibition of export taxes with some limited exceptions for developing countries and Least Developed Countries (LDCs):

- Developing countries would only be able to retain export taxes of a maximum percentage (to be agreed) on a limited number of tariff lines.
- LDCs would have to bind (ie, set at a certain rate) their existing export taxes and list a maximum percentage export tax to be applied on a set of products in the future.[85]

In January 2008 the EU submitted a slightly revised proposal to the WTO:

- WTO members would be able to apply export taxes under 'exceptional circumstances' and notify the WTO when they were introduced. However, countries would have to 'bind the export taxes at a level to be negotiated'.
- LDCs would be able to 'maintain these export taxes unbound'.
- Paragraph 6 countries[*] would be able to 'maintain these export taxes unbound for a certain number of tariff lines (the number is to be negotiated) in reflection of their specific developmental interests and concerns'.[86]

Although, as noted, export taxes are not prohibited under WTO rules, the EU is one of the actors pushing for prospective new WTO members to eliminate export duties as a price of accession. The Commission states that it is using 'the opportunity of WTO accessions' to include export duties in discussions with candidate countries such as Algeria, Azerbaijan, Belarus, Kazakhstan and Russia.[87] The WTO's recent accession agreements with China, Ukraine and Vietnam have all required the elimination of at least some export duties.[88]

In June 2009 the EU and US filed a complaint at the WTO accusing China of violating its WTO commitments by imposing export restrictions on nine key raw materials, and thus unfairly favouring its steel and chemical industries. In September 2009, the Chinese media announced that China would start applying quotas on exports of rare earths and other metals of which it is the world's major (or only) supplier, citing environmental reasons.[89]

* These are 13 developing countries designated as such in the WTO negotiations on market access for non-agricultural goods.

Pressure in negotiations on Free Trade Agreements

The use of export taxes has already been banned (with few exceptions*) in the Free Trade Agreement between the EU and Colombia and Peru in mid-2010 and in the only full EPA signed so far, with CARIFORUM. In the trade negotiations with India, which applies export restrictions on a number of raw materials, the EU has also been pushing for agreement to curb the use of export taxes.[90] In most of the EU's other ongoing negotiations on Free Trade Agreements export taxes are a contentious, outstanding issue. European Commission documents make clear that export taxes are one of the most contentious issues in every one of the EU's negotiations with the six EPA groups that have not yet agreed an EPA.[91]

In the interim EPAs – whose export tax clauses are outlined in Annex I – the EU is seeking to place major restrictions on developing countries' ability to introduce new export taxes. Typically, countries would only be allowed to introduce such taxes 'temporarily', often only after securing the agreement of the EU, and even then on only a 'limited' number of goods, sometimes after 'justifying' why they are needed; the ability to increase existing taxes on raw materials will also be restricted in some cases. A study for the European Centre for Development Policy Management concludes that 'the terms of many of the exceptions to the general rule prohibiting export taxes may make the exceptions difficult to apply in practice, particularly where clauses give an effective veto to the EC party'. Legal uncertainty over what constitutes an export tax and burdensome administrative processes would also significantly reduce the value of any exceptions.[92]

Cameroon's interim EPA is remarkable in that customs duties on exports can only be imposed in the event of a 'serious public finance problem' or the need for environmental protection. The agreement explicitly states that export charges cannot be levied for 'indirect protection of domestic products' or for fiscal purposes.[93]

Particularly concerning is that many of the countries affected by EPAs are LDCs. Four out of the five members of the EAC group are LDCs, as are five of the eight countries in the Central Africa group and 11 of the 15 members of the West African group. Thus the poorest countries are being asked to remove the ability to promote a potentially key development policy beyond what has been agreed in the WTO.

Friends of the Earth points out that under EPAs there is a possibility of an almost pan-African prohibition of the use of log export restrictions in the long term.[94] While Cameroon's interim EPA includes a chapter on illegal logging, it seems the country could have to remove a range of log export restrictions intended to ensure value-added processing and prevent the export of certain species, which will hardly act as a discouragement to illegal logging. Although Ghana's interim EPA appears to have escaped a ban on log export restrictions, Cote D'Ivoire's interim EPA agrees to remove them.[95]

* The exceptions are those 'involving restrictions on exports of domestic materials necessary to ensure essential quantities of such materials to a domestic processing industry during periods when the domestic price of such materials is held below the world price as part of a governmental stabilization plan; Provided that such restrictions shall not operate to increase the exports of or the protection afforded to such domestic industry, and shall not depart from the provisions of this Agreement relating to non-discrimination', (Article 107 of EU-Colombia/Peru Free Trade Agreement).

Box 7: Infant industry protection as an alternative?

If developing countries are denied full use of export taxes to develop new competitive industries, an alternative might be to protect infant industries by raising trade tariffs on imports of competing products. But here the EU is insisting on equally onerous restrictions. Although the interim EPAs typically contain clauses allowing ACP states to promote infant industry protection policies, they are within very narrow time and policy limits.

ACP states would be allowed to increase tariffs only in response to a significant surge in EU imports causing or threatening to cause serious injury to an infant industry that has already been established – thus countries would not have the right to impose trade tariffs beyond the agreed rate to support an infant industry from scratch, therefore limiting the government's ability to pursue a comparative advantage in a particular new industry. Also, the safeguard can only be applied as long as the disturbance persists and within a time span limited to eight years from signing the agreement (for all regions except the Pacific). Further, the provisions on infant industry protection completely expire after 15 or 20 years.[96]

In these negotiations, developing countries have consistently called for the right to maintain the option to apply export taxes. For example, Mary Nagu, Tanzania's Minister of Industry, Trade and Marketing, has said that the current clauses in the interim EPA with East Africa limit the policy space to take remedial measures for their economic benefit.[97] Similarly, in June 2010, East African ambassadors to the WTO demanded the right to retain the option of using export taxes and called for the deletion of the article in the draft EPA restricting them.[98]

The UN Economic Commission for Africa has produced a draft 'African Template' for the EPAs, which calls for the 'elimination of the prohibition of export taxes, or at least provision for a transition period and inclusion of an annex of exceptions'. It argues that governments should retain the right to use export taxes and trade restrictions for six purposes:

- To foster the development of domestic industries.
- To relieve critical shortages of foodstuffs or other essential products.
- To maintain currency value stability when the increase in the world price of an export commodity creates the risk of a currency value surge.
- In pursuance of obligations under any inter-governmental commodity agreement.
- For environmental protection.
- Restrictions necessary to the application of standards or regulations for the grading or marketing of commodities in international trade, and for fiscal purposes.[99]

A European Parliament Resolution of May 2008 called on the Commission to pursue the elimination of trade distorting measures on raw materials 'while fully respecting restrictions based on developmental grounds for least developed countries'.[100]

Box 8: Using the GSP discussions?

There are concerns that the European Commission may be interested in reducing trade preferences granted under its Generalised System of Preferences (GSP) for those countries that use export taxes. This system, now being reviewed, gives developing countries reduced or duty-free access to the EU. The Commission has, for example, coyly called for the 'full coherence' of all EU trade instruments to support the raw materials strategy, including 'the preferential access to the EU market granted unilaterally' under the GSP.[101] The German government has recently told the EU's Trade Policy Committee that it 'believes that the EU's interests in terms of raw materials should also be taken into account during the upcoming GSP reform – as long as poorer and poorest developing countries are not adversely affected'.[102] Business Europe has been more explicit, calling on the Commission to consider suspending preferences for a product when 'market distorting' policies such as export restrictions are operated by that country in that product's value chain.[103]

Stephen Kiriko of the Leather Development Centre, Nairobi, inspects a piece of recently-produced leather. Photographer: Mark Curtis.

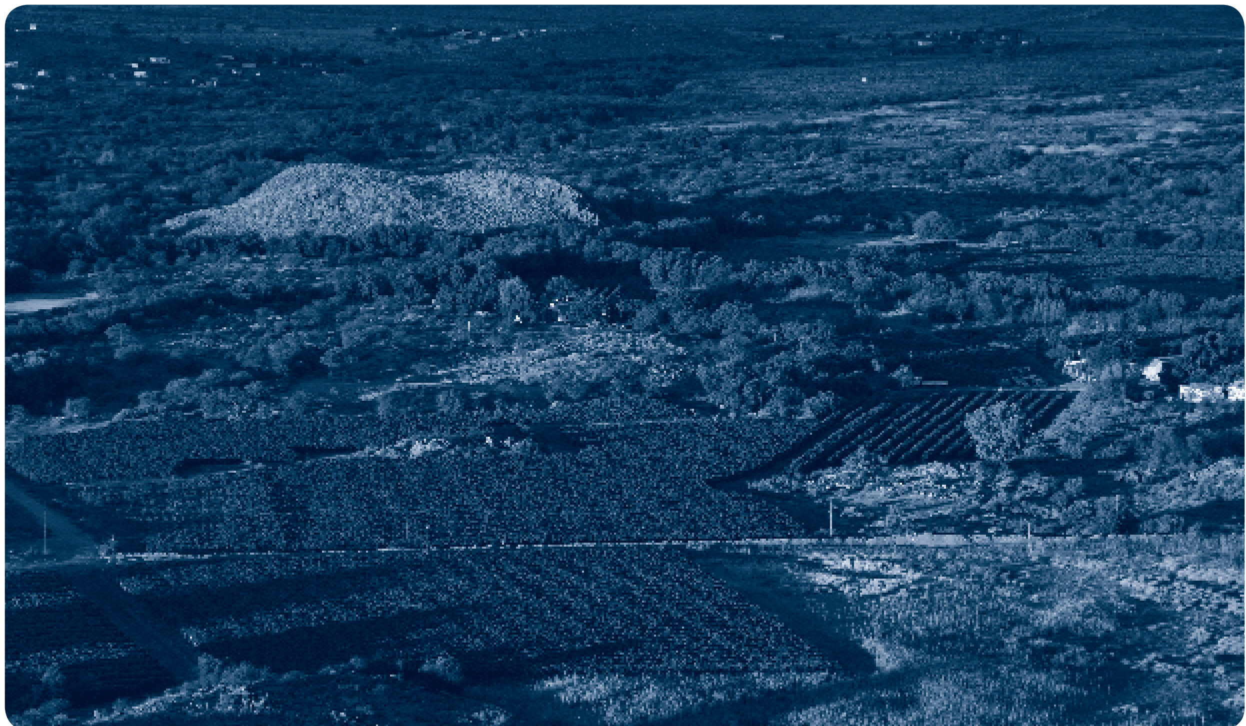
3. Investment for Development or EU Companies?

As well restricting the use of export taxes, the EU is seeking to create new international investment rules to give its companies even more powers and largely unrestricted access to the world's raw materials. While developing countries need to attract greater foreign investment, this EU push will likely make it more difficult for governments to regulate investment to promote development, and is likely to allow human rights, environmental and labour rights abuses by EU companies to continue.

3.1 Investment and development

Foreign investment can bring jobs and capital, can transfer knowledge and skills, and can boost related local industries. But it can also bring sweat-shop labour, environmental pollution, human rights abuses and can crowd out domestic investment, as well as undermine local producers of the same goods. In raw materials sectors like mining, oil and gas, foreign investment has an extremely poor record – it regularly involves special tax deals that provide the government with low revenues while transferring little or no technology and employing few locals, along with displacement of communities and human rights abuses. Much 'investment' means buying into or taking over local companies ('brownfield' investment) rather than new, 'greenfield' investment in enterprises – nearly a quarter of all 'investment' in Africa in 2008, for example, was in the form of mergers and acquisitions.[104] Thus foreign investment can mean destroying local firms and, over the long term, may limit the prospects of economic development.[105] Furthermore, host governments can find themselves locked into investment agreements which limit their ability to regulate in favour of social development objectives. For example, when foreign capital is invested in essential services, and when unaffordable user-charges are being introduced, governments can find it difficult to impose conditions that ensure access to these services by poor people.

For these reasons, governments and parliaments must retain the right to regulate investment, both to discriminate in favour of investors that support the country's development and to ensure that there are obligations and duties on all investors, including foreign, so that labour, environmental, human rights and other standards are respected. Unfortunately, these policies are largely absent from the EU's investment agenda and may indeed be prohibited by the investment liberalisation demanded by the EU in the negotiations on Free Trade Agreements.



Local Landscape, South Africa.

Box 9: The limits of foreign direct investment (FDI)

Although investment can be a powerful contributor to development, there are two major limits:

First, investment rarely occurs in sectors likely to benefit the poor the most. The UN Conference on Trade and Development (UNCTAD) states in its World Investment Report for 2009: 'As in the past, African host governments failed to attract or induce much investment in the activities that are crucial for development. In general, downstream activities and diversification efforts related to inflows in the primary sector remain marginal. A major policy challenge for these countries is to reverse this trend.'[106] Rather, most investment in Africa is in the extractives sector where, as noted above, it can bring pollution or human rights abuses. In Africa, FDI has often been in enclaves of export-oriented primary production using much imported technology and with limited linkages to the rest of the economy.[107]

Second, most fundamentally, foreign investment often plays a limited role in promoting economic growth. According to UNCTAD, 'there is little evidence to suggest that FDI in Africa (or elsewhere in the developing world) plays a leading or catalytic role in the growth process'.[108] While there is a positive correlation between FDI and growth in Africa, it is a 'very weak association', partly because there are weak linkages between FDI and domestic investment. There is also a positive but again weak relation between the share of FDI in GDP and the share of gross fixed capital formation.[109] Rather, evidence suggests that foreign investment follows rather than causes economic growth.[110]

There are a further two myths about investment, on which EU policy appears to be largely based:

First is the idea that countries' economies need to be completely liberalised to attract investment. Yet attracting foreign investment does not necessarily require the most open, liberalised foreign investment regime. Some countries with relatively restrictive investment regimes, such as China and Malaysia, have been among the largest recipients of FDI.[111] Africa is in many respects highly liberalised when it comes to investment, having established more export processing zones than any other region except Asia – yet it still accounts for only around 5 per cent of world investment flows. Other factors, such as well-developed infrastructure, a sizeable domestic market or strong growth in domestic industries can be more important in attracting investment than offering TNCs fiscal or other incentives.[112] The key to ensuring that FDI promotes development is not openness per se but strategy – having a plan as to how FDI can fit into the development agenda to bring faster and more sustained growth and technological change.[113]

Second is the myth that formal investment agreements are needed to attract investment. Yet the evidence suggests that these are not the answer. Reports by the World Bank and UNCTAD show that there is little evidence that Bilateral Investment Treaties (BITs) stimulate investment flows.[114] Indeed, Africa, which has signed a massive 715 BITs with other countries, amounting to more than a quarter of the world total, has attracted relatively little investment.[115] By contrast, Brazil, which receives considerable foreign investment, has only signed a small number of BITs in the 1990s, none of which have come into force.[116]

Especially to promote development in raw materials sectors, Foreign Direct Investment (FDI) needs to be managed. Most successful developed and developing countries have over previous decades restricted foreign investment to promote industrialisation. Policies have included selective capital controls, differential taxation, barriers to hostile takeovers, performance requirements linked to exports and local purchases (local content requirements), ownership ceilings, employment requirements and limits on foreign ownership. UNCTAD has called for developing countries to be able to use these policies to ensure FDI helps promote industrial policy. It notes that 'depending on its situation, a country may wish to limit or even exclude FDI if it is likely to threaten infant firms or distort the policy support extended by the government to help them reach scale and technological levels needed to make them competitive. At other times it may be advisable to have an open door policy…' [117]

Academics have long argued that East Asia's successful industrialisation from the 1950s to the 1970s involved a mix of protection and liberalisation. At times, Japan, South Korea and Taiwan – the latter two states whose level of development was akin to Africa in the 1950s – practised 'draconian import controls' and 'discouragement of foreign investment'.[118] Extensive controls on foreign investment involved terms of ownership, performance requirements, joint ventures, the screening of FDI and requirements to transfer technology.[119] The same applies to developed countries, including the EU. The World Bank's Chief Economist, Justin Yifu Lin, has recently written:

> ***'Contrary to the conventional wisdom that often attributes the industrial successes of Western economies to laissez-faire and free market policies, the historical evidence shows that the use of industrial, trade and technology policies was the main ingredient to their successful structural transformations. This intervention ranged from the frequent use of import duties or even import bans for infant industry protection to industrial promotion through monopoly grants and cheap supplies from government factories, various subsidies, public-private partnerships and direct state investment, especially in Britain and in the US.'***[120]

One positive example of regulated investment in raw materials is Botswana where in the 1970s the government renegotiated contracts with foreign mining companies, contrary to the prescriptions of the World Bank which argued that this would drive away foreign investors. The government took a 50 per cent stake in Debswana, the country's largest diamond company, and ploughed back the revenues from it into public investment. The strategy contributed to Botswana becoming one of the most prosperous countries in Africa.[121]

Regulation is not an automatic panacea. Investment regulations practised by some developing country governments are often characterised by weak institutional capacity and accountability and reporting, and pervasive political interference. Restrictive or managed investment policies do not always benefit poor people; it depends on the quality of the decisions and, often, the nature of the government promoting the policies. But this is not a convincing argument for the EU restricting the right of developing countries to manage investment for development.

3.2 What the EU wants

In both the WTO and negotiations on Free Trade Agreements, the EU is pushing developing countries to agree to a range of commitments to liberalise their investment policies. Overall, the EU has said that it is seeking 'legal certainty and maximum protection for EU investors'.[122] The EU is promoting three main policies:

- 'National treatment', whereby foreign investors will be accorded the same rights as domestic investors.
- 'Investor protection', which establishes minimum standards of treatment of investors and is often backed by the threat of international arbitration.
- The free flow of capital movements between countries, which secures the right of investors to repatriate profits and restricts the ability of developing countries to impose controls on capital movements.

There are major dangers in these three policies:

- 'National treatment' will curb developing countries' ability to give preferential treatment to domestic investors, such as small or infant enterprises, or their ability to ban foreign investment in certain sectors or provide favourable treatment to regional investors to help foster regional integration. Moreover, giving 'equal treatment' to foreign investors often in practice means giving them greater influence and rights than domestic investors, given their larger size and power.
- 'Investor protection' often amounts to giving more rights to investors than host governments or the communities affected (see Box 10).

- The free flow of capital will restrict the ability of governments to prevent capital outflows or support the balance of payments – controls that can be important in protecting economies against speculative capital movements and financial crises.[123]

Box 10: BITs Bite

> ***'If you're from a developing country, try to make sure that your government doesn't sign a bilateral investment treaty.' Joseph Stiglitz, former World Bank Chief Economist*** [124]

'National treatment' rules are typically found in Bilateral Investment Treaties (BITs), which establish the terms and conditions for private investment by companies from one state (or a group of states) in another. If the terms of the BIT are not honoured by the host government, companies can bypass domestic legal systems and enforce their investment rights by resorting to international arbitration panels. The panels, which are meant to provide a neutral process for arbitrating between the investor and the host state, are often characterised by lack of transparency, unfair process and a greater concern for commercial law than the public interest.[125] Since many developing countries do not have the capacity to comply with international legal rulings, BITs serve as a deterrent to governments adopting measures that may discriminate against foreign investors.

Transnational Corporations are increasingly taking governments to these panels. By the end of 2008, there were 317 cases of such investor-state disputes, 92 per cent of which were brought by companies from developed countries.[126] In early 2010, there were 32 pending cases at the largest (and probably most transparent) international arbitration panel – the International Centre for Settlement of Investment Disputes (ICSID) – relating to mining, oil and gas. The majority of the cases are targeted at governments in Latin America. There are 12 pending cases on oil (out of the 32) compared to only seven filed during the entire two decades of the 1980s and 1990s.[127]

The governments of Bolivia, Venezuela and Nicaragua have withdrawn from ICSID. Ecuador has denounced ICSID and announced its intention to withdraw. Bolivian officials said that ICSID operated behind closed doors and gave too much power to transnational corporations whereas Bolivia's Constitution requires that all companies operating in the country should be subject to its domestic laws.[128] Some corporations have been trying to challenge the Evo Morales government's nationalisation of several oil and gas operations in Bolivia. In May 2010, for example, the Anglo-Argentinian energy firm, Pan American Energy – which is part-owned by BP – initiated arbitration at ICSID over the nationalisation of a subsidiary company, Chaco Petroleum, in 2009.[129]

The EU has made clear that its new investment policy will retain individual BITs and will not replace them, while it wants to include national treatment clauses in Free Trade Agreements.[130] Thus developing countries are being pushed to promote far-reaching liberalisation under Free Trade Agreements that could then be enforced under BITs.

From December 2009, the Lisbon Treaty made investment policy an area of community competence, meaning that the policy will be led by the Commission rather than member states. In July 2010 the EU took a major step towards developing a comprehensive European investment policy by issuing a draft regulation aiming at creating a 'level playing field' for EU investors around the world. The Commission states:

> ***'A comprehensive investment policy should not only enable the execution by enterprises of an investment but should also enable and protect all operations of that investment post-establishment. Therefore, the EU comprehensive investment policy will seek to integrate investment liberalisation and investment protection'.***

It also stated that negotiations with non-EU countries towards this end will 'enlarge'; 'by negotiating as a block, the EU will have a better leverage than individual member states'. The Commission further notes that its new investment policy must be consistent with its policies on protection of the environment and development, among others.[131] Yet the signs are not good, given what the EU is pushing for in the EPA and other negotiations on Free Trade Agreements.

Box 11: Business behind the EU's investment policy

European business associations have long campaigned for investment liberalisation and protection abroad. In the 1990s, groups including the International Chamber of Commerce and the European Roundtable of Industrialists campaigned to adopt the aborted Multilateral Agreement on Investment (MAI) in the OECD, for example. After the collapse of the MAI talks, European industry pushed hard for an investment agreement in the WTO and, more recently, for investment provisions in bilateral and regional free trade agreements.[132]

Business Europe notes that 'the ability to invest freely in third country markets has become more important as supply chains become increasingly globalised. Establishing a physical presence in a foreign country helps EU companies take advantage of new business opportunities and makes the flow of trade more predictable. Consequently, access to markets and the protection of investment are crucial for European companies' competitiveness.'[133] What EU industry associations want is virtually identical to what the Commission is also pushing for – the removal of conditions and regulations for foreign investment, equal treatment of all foreign and domestic companies (according to the principles of 'non-discrimination') and unlimited repatriation of profits from foreign subsidiaries.[134] According to Business Europe, 'EU investment policy should aim to preserve and further promote an open and predictable investment environment by guaranteeing legal certainty and the best possible protection for European investments... The most important goal for the EU should now be to push access for and protection of its own investments abroad'.[135]

Tractor in field in Malawi where Fairtrade sugar cane is produced. Photographer: Richard Else.

3.3 Opposition from developing countries

> ***'The opposition of the developing countries to the introduction of a multilateral investment agreement is based on the concern that such an agreement would significantly reduce their options to design specific investment policies geared to their development objectives, including selecting and setting conditions for foreign investment by means of entry requirements, equity structure and performance, for example with regard to technology transfer, and regulating the transfer of funds relating to foreign investment.' UNCTAD***[136]

Many developing countries have long made clear that they are opposed to negotiating investment agreements both in the WTO and in other Free Trade Agreements with the EU. Negotiations on investment at the WTO have been consistently rejected by developing countries as a group at various Ministerial meetings since Doha in 2001. In 2005, the African Union Conference of Trade Ministers declared that 'investment, competition policy and transparency in government procurement should remain outside the ambit' of EPAs.[137] The following year, the SADC states stated they had 'limited institutional and negotiating capacity which would be severely strained' if investment and other 'new' issues were negotiated.[138] In 2009, the West Africa EPA grouping proposed postponing negotiations on services for three years and to limit the texts on other non-goods issues to cooperation provisions.[139]

In March 2009, then EU Trade Commissioner Catherine Ashton said that 'Singapore issues are only negotiated if wanted and welcomed', yet the reality of the negotiations does not bear this out as the EU continues to push for 'full EPAs'.[140] At other times, the EU has stated that since investment is largely off the agenda at the WTO, it 'will continue to pursue discussions on investment and competition in other international fora', including EPAs.[141] The Commission responded to SADC's 2006 statement, noted above, stating that this 'is not an acceptable option' and that if investment and other issues were not addressed 'then the EC would find it difficult to improve SADC access to its market'.[142] At times the EU has threatened to reduce aid to EPA groups if they sign agreements on goods-only.[143]

Developing country opposition to new investment rules springs from their lack of negotiating and implementation capacity and concerns about rules-based agreements, preferring technical assistance and capacity building to promote investment. Various African and other ACP proposals have been made to this effect, notably on the need for regional harmonisation of investment rules – but without binding bilateral agreements with the EU. ACP countries have also proposed building in to any agreements various safeguards, such as exemptions from providing national treatment to Small and Medium-sized Enterprises, providing more flexibilities for LDCs, calling for progressive liberalisation only over a period of time or excluding some sensitive sectors from liberalisation.

These proposals have essentially been ignored or dismissed by the Commission which has long insisted on far-reaching, binding agreements in the context of EPAs.[144] Only recently has the EU begun to accept the possibility of less than full EPAs equipped with a 'rendezvous clause' to discuss issues at a later stage. But instead of postponing discussions for, say, three years, as proposed by West Africa, the EU insisted on trying to conclude a regional goods EPA in October 2009 and starting with non-goods issues immediately afterwards in January 2010.[145]

Box 12: EU agreements on investment - The CARIFORUM and Colombia/ Peru precedents

The CARIFORUM group has been the main exception in embracing the idea of a 'full EPA' from the beginning. The recent Free Trade Agreement with Colombia and Peru, meanwhile, also contains new rules on investment.

Pirates in the Caribbean?

The EPA agreement with CARIFORUM provides an indication of the kind of investment commitments from developing countries that the EU was seeking even before the Lisbon Treaty gave it new powers. We can thus expect EU demands on investment to be even more far-reaching in future.

Certain safeguards are built in to the EPA with CARIFORUM. For example, states must ensure that 'investors act in accordance with core labour standards' as required by the International Labour Organisation. The agreement does not contain the means for investors to take claims for breach of treaty to international arbitration, a deviation from a key EU policy likely to be central in the future.[146] The Commission also argues that the opening to foreign investment is asymmetric, requiring much greater liberalisation commitments by the EU, and that the agreement does not curtail the Caribbean countries from regulating investment.[147] However, these safeguards are significantly outweighed by governments having given up many of their rights to limit or regulate foreign investment. The EPA commits states to accord foreign investors 'no less favourable treatment' than domestic investors. There is a long list of other problems:

- Many governments have agreed in the sectors they will liberalise to no longer limit the participation of foreign firms or the percentage of foreign shareholding, or apply performance requirements such as requiring EU companies to employ local staff or enter into joint ventures. In mining, although nearly all states reserve the right to screen foreign investment, once foreign companies have entered they will be subject to few measures.
- On land ownership, although some Caribbean states will continue to place restrictions on some foreign investment, the EPA specifies the regulations that European companies have to comply with. Thus it may be very difficult for a future government to change the rules to provide more protection of local land ownership.
- Companies are required to consult local communities only 'where appropriate' and when so doing does not impair the benefits the investor expects from an EPA commitment.
- Although there are provisions to ensure that companies abide by some standards – labour, environmental and health and safety – there are no provisions for others, such as human rights or the rights of indigenous people.
- The EPA restricts the right of governments to regulate the movement of capital, which guarantees the right of investors to repatriate all profits and the proceeds from liquidating investments; it could also enable them to asset strip an investment rather than reinvest in the business. Only in 'exceptional circumstances' where capital movements threaten to cause 'serious' financial difficulties can a government restrict capital movements, and then only when they are 'strictly necessary' and for a maximum of six months (Article 124). This EPA commitment goes well beyond IMF obligations, making Caribbean states more vulnerable to financial crises.[148]

The overall thrust of the EPA is to secure the rights of foreign investors, with few obligations placed on them. The EPA states that governments have retained 'the right to regulate'; however, it constrains their choices as to how to regulate. Furthermore, the EPA states that although new regulations can be introduced, these must meet 'legitimate policy objectives', without defining legitimate, meaning that there is a risk that the EU might challenge them (Article 60).

The EPA goes beyond countries' liberalisation commitments in the WTO in two main ways – by covering investments in both services and non-services and by covering the post-establishment as well as the establishment phase of such investments. Thus the EU has successfully used the EPA process as a way of securing binding rules that were rejected by developing countries as a whole at the WTO.

Colombia and Peru

The Free Trade Agreement with Colombia and Peru grants EU investors 'national treatment' in certain sectors that the governments have agreed to liberalise. In these sectors governments are banned from imposing limitations on, for example, the percentage shareholding of foreign capital or from establishing requirements to undertake joint ventures (Article 113). Also, all parties are bound to promote the 'free movement of capital' with exceptions only when 'payments and capital movements, cause, or threaten to cause, serious difficulties for the operation of exchange rate policy or monetary policy'; at this point Colombia and Peru can take safeguard measures with regard to capital movements 'for a period not exceeding one year'. The agreement specifies that: 'Under no circumstance the measures may be used [sic] as a tool for commercial protection or for the purpose of protecting a particular industry' (Articles 163 and 164). The agreement also provides for the resort to arbitration panels if either side believes the other is not meeting its investment commitments.[149]

The agreement commits Colombia and Peru to 'the promotion and effective implementation in their laws and practice of internationally recognised core labour standards as contained in the fundamental ILO Conventions', including freedom of association, recognition of the right to collective bargaining, the elimination of forced labour, and the elimination of discrimination in respect of employment and occupation (Article 268). However, this clause is simply not credible. Colombia has long had national legislation promoting many such labour rights but has completely failed to do so. Rather, Colombia is one of Latin America's worst human rights violators and the most dangerous place in the world for trade unions; thousands of union leaders and activists have been killed in the past decade, many, it is believed, with the complicity of the authorities. In the last full year of negotiations leading to the Free Trade Agreement (2009), there were 500 attacks on trade unionists, resulting in 48 of them being murdered. The Colombian regime places strict limitations on the right to strike, imposes severe obstacles to collective bargaining and regularly violates the right to freedom of association. Significantly, due to this repression, only two per cent of Colombian workers are covered by collective bargaining agreements.[150] The Free Trade Agreement is likely to do little to promote labour rights but rather maintain a shocking disregard for them.

3.4 Hindering development of raw materials sectors

Developing countries already have only limited ability to promote some of the investment policies that have been successfully used in the past. The WTO's existing investment agreement, the Agreement on Trade Related Investment Measures (TRIMS) for example, bans the use of 'local content' policies, where governments would require companies to use or purchase domestic products. But EU goals under Free Trade Agreements go much further, and amount to a policy of hindering development prospects in developing countries. This is especially the case for raw materials, on which many developing countries depend for revenues and on which diversification and processing strategies need to be based. Several concerns stand out:

Investment liberalisation in sectors such as forests, land and agriculture, which are explicitly mentioned in the EPA with CARIFORUM, could hand over more rights to foreign investors, increasing deforestation rates and undermining farming and food security.

European and Asian investors in biofuels are already grabbing large chunks of land in East and West Africa, sometimes undermining the prospects for local food production and displacing communities.[151] EU companies have already acquired or requested at least five million hectares of land in developing countries to produce industrial biofuels – an area greater than the size of Denmark.[152] If these leases are enforced by investment rules in Free Trade Agreements, this would undermine governments' ability to regulate that investment, or reverse it in future. There are also widespread concerns that the EU-India Free Trade Agreement, if it grants EU investors unrestricted access to Indian land, could lead to substantial changes in land use, with more plantations turned into real estate and subsistence land agriculture transformed into corporate-owned farms.[153]

The ability of governments to promote land reform might be restricted.

Reforms that redistribute land to landless or near-landless people can play a key role in reducing poverty. In the Philippines, however, a series of high-profile land deals have clashed with long-standing demands for agrarian reform and land redistribution. A land reform bill going through parliament has worried Saudi investors seeking to acquire thousands of hectares of land while the EU has reportedly pressured the Filipino government to remove its ban on foreign ownership of land through WTO provisions.[154] In Paraguay, where landlessness is a major problem for many of the rural poor, recent land reforms allow one group of indigenous people – the Sawhoyomaxa community in Chaco region – access to land, and provide for expropriations while compensating landowners. Yet in the case of German landowners this expropriation has not so far been possible because the German government has warned Paraguay that such expropriation would violate the BIT between Germany and Paraguay which protects German investors. Since then Paraguay's government and parliament has been wary of enforcing the expropriations for fear of being hauled by Germany before an international arbitration panel. [155]

EU investment policies could discourage governments from putting in place environmental regulations designed to minimise the negative impacts of natural resource extraction.

There are several recent cases showing how companies may resort to arbitration to challenge government environmental regulations. In April 2009, for example, the Swedish energy utility, Vattenfall, brought the German government to international arbitration at the International Centre for Settlement of Investment Disputes. The case concerned environmental restrictions imposed on a €2.6 billion coal fired power plant under construction on the banks of the River Elbe. Vattenfall sought €1.4 billion in damages for delays and restrictions imposed on the project. Water regulations imposed by the City of Hamburg, which it argued were necessary under European law, were said by the company to render the plant impractical and uneconomic. Vattenfall and Germany agreed to end the arbitration in August 2010 after the City of Hamburg agreed to authorise the building of a new hybrid cooling tower. The concern remains that this case could act as a precedent for companies resorting to arbitration not just in Germany but anywhere that a state takes measures necessary to implement global standards.[156]

Similarly, in early 2010 the Canadian mining company, Blackfire, was reportedly threatening to sue the state government of Chiapas in Mexico for closing its barite mine on environmental grounds. The company was reported to be seeking US$800 million in compensation under investor protection clauses in the North American Free Trade Agreement.[157] The case offers a precedent for what might happen under the EU's Free Trade Agreements.

The ability of governments to enact tax policies to raise government revenues and nurture local industry would be restricted.

The scope for taxing foreign investors more than, or differently to, domestic enterprises, which are usually much smaller and less resourced, would effectively disappear under 'national treatment' rules. In addition, government attempts to renegotiate old contracts with investors to raise royalty payments, for example – as some African governments have recently attempted with mining companies

– could lead to company threats of international tribunals, as investors could challenge new policies for undermining fiscal agreements made at the time of the investment. In Zambia, for example, recent mining agreements that offer companies major tax breaks stipulate that the companies can take the government to international arbitration if the tax exemptions are withdrawn; this is exactly what one Canadian company, First Quantum, threatened to do in 2008 after the Zambian parliament passed amendments to the income tax law overturning the tax provisions in the company's mining agreement.[158]

Companies in the extractives and other sectors will not be required to promote several key policies that can support local development.

Mining companies, which often contribute little to local development, can contribute more if they source goods and services locally, employ nationals as much as possible, and promote training programmes for local staff. But companies usually need to be obliged to do these things as part of national mining regulation, otherwise they rarely happen sufficiently. These kinds of policies are largely off the EU's agenda.

3.5 Problems with EU companies

EU investment policies are already having severe negative impacts on many people around the world; the investment proposals emanating from Brussels will likely make matters even worse. There are many well-documented case studies accusing EU companies of violating environmental, human rights and labour standards in their overseas operations.[159] A recent UK report, for example, accuses UK investors of contributing to the labour rights violations of flower workers in Kenya, to low wages and denial of freedom of expression of garment workers in Bangladesh, to health and environmental pollution due to gas flaring in Nigeria and to environmental and human rights abuses against indigenous people as a result of bauxite mining in India.[160] Mining and oil companies have long been accused of various environmental, human rights and labour violations on all continents.[161] Several agribusiness corporations are now involved in 'land grabbing' and displacement of communities in the new rush to grow palm oil or ethanol.[162] In three Peoples' Tribunals between 2006 and 2010, allegations of violating human rights, environmental and labour standards have been made against 48 Transnational Corporations (TNCs) in 12 sectors operating in Latin America and the Caribbean.[163]

Brickworks north of Dhaka, Bangladesh. Photographer: Richard Else.

Box 13: Community struggles against foreign companies

Gas Flaring in Nigeria

Communities in Nigeria's oil-rich Niger Delta region have long struggled against the activities of foreign and local oil companies, notably Shell. The practice of gas flaring – the process of burning off surplus vapours from a well – is one of the companies' highly controversial activities, due to its environmental impacts on local communities and emission of greenhouse gases. Yet despite Nigeria's formal legal protections, gas flaring by Shell and other companies has continued. It has been reported that local people exposed to gas flaring suffer from respiratory problems such as asthma and bronchitis along with other ailments such as cancer, leading to premature death. Pollution from the flaring is also widely claimed to damage crop production and thus food security.[164]

Bauxite Mining in India

Thousands of tribal people in the Indian state of Orissa have long campaigned against plans by the UK-listed company, Vedanta, to extract bauxite from a mine in an area of protected forest along with nearby refineries and smelters. From the outset the project has been mired in controversy and accusations of human rights violations. To make way for the refinery, villages have been razed and 100 tribal families removed from their homes. There are concerns that once bauxite mining begins, there will be adverse impacts on local health, the environment and food production, especially from the company's toxic waste management at the refinery, which produces up to three million tonnes of caustic soda waste each year.[165]

It is not just companies from the 'usual suspect' countries such as the UK, France or Belgium that are the problem. Several Swedish companies have been documented as violating standards overseas, notably labour rights[166], showing that even Swedish laws – probably the tightest regulatory standards in the EU – are insufficient to ensure that companies behave responsibly abroad. Recent research also shows that many companies from Norway – long regarded as an ethical leader –appear to be violating these standards.[167]

Further problems are caused by the lack of adequate regulation of financial flows. Almost 85 per cent of portfolio investment in sub-Saharan Africa arrives there after passing through – on paper at least – one or more secrecy jurisdictions, such as tax havens. In Kenya, for example, the two main sources of portfolio investment are Luxembourg and Mauritius. This means that it is almost impossible for tax authorities to know where the investment is coming from.[168]

Despite this long list of company abuses, especially in the raw materials sectors, EU investment policy aims to secure even greater rights for its investors. It wants governments to sign legal, binding agreements on investment while at the same time promoting merely voluntary commitments by companies to meet global standards, rejecting further legal, binding obligations on them. The world is full of voluntary codes of conduct and guidelines to supposedly ensure that companies abide by environmental, human rights and labour standards. These include the OECD Guidelines for Multinational Enterprises, the Equator Principles, the Extractive Industries Transparency Initiative and the UN's Global Compact. These schemes have probably improved some corporate behaviour, but certainly nowhere near sufficiently. These schemes all lack teeth, suffering from, among other things, a lack of enforcement provisions when companies actually violate global standards.

The EU's support for corporate voluntarism stands in direct contrast to recent work at the United Nations by John Ruggie, the UN Special Representative on the rights and responsibility of transnational corporations. According to Ruggie, international law 'firmly establishes that states have a duty to protect against non-state human rights abuses within their jurisdiction, and that this duty extends to protection against abuses by business entities'.[169] Ruggie's April 2008 report to the UN Human Rights Council notes

that this is a time of 'escalating charges of corporate-related human rights abuses…signalling that not all is well'.[170] He states that 'the legal framework regulating transnational corporations operates much as it did long before the recent wave of globalization' and that overall, governments are 'failing to provide adequate guidance for, or regulation of, the human rights impact of corporate activities'.[171]

Box 14: Low standards

The most widely-accepted framework among international project financiers for managing the social and environmental risks of projects in the developing world are the Performance Standards of the International Finance Corporation (IFC), the arm of the World Bank that finances private sector investment in developing countries. Over 60 leading international institutions have committed to adhere to these standards while over 30 export credit agencies now benchmark projects against them.[172] The standards cover issues including labour conditions, pollution prevention, land acquisition and involuntary resettlement, biodiversity conservation and sustainable natural resource management, and protection for indigenous peoples. But they suffer from a range of problems:

- The IFC only 'seeks to ensure' compliance with the standards, and does not operate a veto over financing of projects that do not conform to the standards.
- In investment projects likely to have 'significant' adverse impacts on local communities, the IFC is required to assure itself that the project has 'broad community support' (BCS). However, this assurance is based on the investor's own social and environmental assessment. BCS is also a vague notion; the investor is not required to secure the full consent of the affected community but rather to ensure 'free, prior and informed consultation'. BCS is not even required for projects likely to have less than a 'significant' impact on communities.
- Neither do the standards require clients to adhere to international human rights conventions or to uphold fundamental rights such as the rights to food, health or housing.[173]

There are two big gaps in current EU policy towards companies and investment that are allowing corporate abuses to continue:

- There is a lack of compliance and enforcement mechanisms when companies violate labour, environmental or human rights standards. Currently, the EU legal framework makes it rare for EU companies to be held liable for violations of human rights, environmental, labour or other standards committed abroad by their foreign subsidiaries. Most EU member states do not have specific laws or regulations adjudicating corporate human rights abuses abroad.[174] Furthermore, the issue of a 'corporate veil' – where parent companies claim they are a distinct legal personality to their subsidiaries or similar – means that parent companies can often escape responsibility.[175]
- There are few obligations on EU firms to influence the operations of other companies that are not formally part of the company group but which are economically dependent on them, such as joint ventures and supplier relationships. Companies are not required, for example, to ensure that management systems are in place to investigate the risks of violations of human rights, environmental and other standards and take all reasonable steps to prevent or mitigate them.

Box 15: What about China?

EU policy-makers often say that Chinese and Indian companies have far lower ethical standards than EU companies, implying that there is little point in complaining about EU companies in a world of fierce global competition. It is true that some Chinese companies are even more abusive of human rights than Western firms, and that the Chinese government is often even less interested in human rights than the EU. To a certain extent, Chinese companies are simply taking advantage

of the liberal investment climate pushed on Africa by the World Bank, and EU countries, over the past two decades.[178] They are benefitting from the weak regulatory environment that EU states have been disinterested in strengthening, in part because EU companies have themselves benefitted from it.[179] If anything, therefore, EU states should have an interest in working with African governments to raise standards.

By contrast, the EU's push for greater investment liberalisation is likely to open the door even further to Chinese companies and, possibly, to greater human rights abuses. If the EU is to present itself as linking its trade and investment policies with development, distancing itself from China, this would best be done by building into investment treaties strong obligations on investors. As it stands, the EU approach contributes to a race to the bottom – ie, 'China has been granted this access to a market with no strings attached, so we should be given the same' – whereas Brussels should be working towards a race to the top, whereby investors are obliged to bring more benefits to a country.

Danish academic Peter Kragelund notes that 'if African development is indeed a priority for Western observers, they should stop pointing their fingers at Chinese TNCs and instead assist African host economies to maximise the benefits of the current upward trend in Chinese investments'. He argues that rather than placing more emphasis on liberalising African economies, Western donors should help African governments make use of the remaining policy space to leverage more benefits from all foreign investment – whether Chinese or European.[180]

To prevent company violations, greater legislation is needed in the EU alongside improved legislative processes in developing countries. In most (though not all) developing countries, there are, on paper, laws to protect people from abuses by corporations. In practice, however, people in developing countries face numerous obstacles in taking recourse to the law. Processes can be costly, slow due to weak capacity or subject to political interference. Thus legal mechanisms for redress need to be strengthened in developing countries, but a key point is that local systems are not sufficient to ensure the protection of internationally recognised human rights. For one thing, it will likely take decades for many developing countries to develop the necessary capacity to adequately provide such redress. For another, national systems of redress in developing countries would have to deal with complex, transnational systems of corporate decision-making and power.[176]

There are signs of change among some EU states. A joint statement subscribed to by the Swedish and Spanish governments after a conference on Corporate Social Responsibility, organised by the Swedish EU presidency in November 2009, stated:

> ***'Over the recent years the European Union and its member states have recognized CSR as a key element in fostering a truly sustainable economy, building on the Lisbon Strategy and on the recommendations and work of the European parliament and European Commission. Now the time is ripe to take this important work further by developing common frameworks… The responsibility is threefold: the state duty to protect – including legislation as well as implementation of human rights obligations, in particular with regard to business; the corporate responsibility to respect human rights; and the responsibility of all parties to ensure access to adequate remedies to uphold and develop such human rights'.***[177]

The last sentence was an echo of John Ruggie's call at the UN for states to ensure that companies in their jurisdiction uphold international law. So far, however, these positive noises have not translated into policy change and they remain absent from the EU's proposals on investment.

Recommendations

On the Raw Materials Initiative

The EU should promote the equitable use of the world's limited natural resources and sustainable development for all:

- The EU must reduce its consumption of resources and move towards a low-resource, sustainable economic model that promotes sharp increases in recycling and the multiple use of products.
- Instead of promoting the unilateral Raw Materials Initiative, the EU should support a transparent international process for the world community to address how to cooperate in managing raw materials in order to reduce global over-consumption and transfer knowledge on the sustainable management of resources.

On export restrictions

The EU should support developing countries to diversify their economies, reduce export dependency on raw materials, increase local value addition and protect exhaustible natural resources. Specifically, the EU should:

- Fully respect the right of developing countries to use export restrictions in the public interest.
- Stop pushing for the elimination of, or restrictions on the use of, export taxes in all fora, such as trade negotiations at the WTO, in bilateral Free Trade Agreements and EPAs and in other processes such as GSP discussions.
- Refrain from abusing Trade Defence Instruments to counter the use of export taxes.

On investment

EU investment policy should change to ensure that governments are better able to regulate investments and companies to promote the public, developmental interest. Investment agreements must better balance investors' rights with their duties and should foster positive investor behaviour to promote long-term sustainable development.

Specifically, the EU should:

- Fully respect the right of developing countries to regulate investment conditions and investors' behaviour in the public interest.
- Stop pushing to negotiate investment liberalisation rules in EPAs and other free trade agreements.
- Change its stance on 'national treatment', capital movements and investor protection to ensure governments have the ability to regulate investment and investment conditions. In particular, the EU must stop pushing for international investor-state dispute mechanisms.
- Put all EU Member States' BIT negotiations on hold while the new EU investment policy framework is being defined. The Commission must undertake an assessment of Member States BITs, including international investor-to-state arbitration, regarding their impact on governments' ability to regulate investors' behaviour and promote sustainable development.
- Build into the new investment policy a commitment to ensure that all EU investors comply with national and international standards and law on issues such as the environment, human rights and labour conditions. The EU must monitor investments by EU companies to ensure they are held accountable for meeting such standards.
- Enhance the direct liability and duty of care of EU companies.
    - EU companies should be held legally liable in their home states for violations by their subsidiaries abroad as well as for other entities they control.
    - EU companies should be obliged to establish systems to investigate risks of violations of human rights, environmental and other standards, and take all reasonable steps to prevent or mitigate them, for all companies that are not formally part of the company group but which are economically dependent on it, such as joint ventures and supplier relationships.

Annex I

Export tax clauses in EPAs

Interim EPA with **Cote D'Ivoire**, signed November 2008, approved by EP March 2009[181]	'No new customs duties on exports or charges with equivalent effect shall be introduced…. In exceptional circumstances, if the Ivorian party can justify specific needs for income, protection for infant industry or environmental protection, it may, on a temporary basis and after consulting the EC party, introduce customs duties on exports or charges with equivalent effect on a limited number of traditional goods or increase the incidence of those which already exist.' (Article 16)
Interim EPA with **Ghana**, initialled in December 2007 but not signed [182]	'No new customs duty on exports or equivalent charges shall be introduced on trade between the parties, nor those currently applied increased as from the date of entry into force of this agreement. In exceptional circumstances, if the Ghanaian party can demonstrate specific needs in terms of revenue, protection of infant industry or environmental protection, temporary customs duties on exports or equivalent charges may be introduced, and the incidence of those existing could increase, after consultation of the EC party, on a limited number of additional goods.' (Article 16)
Interim EPA with **Cameroon**, signed January 2009[183]	'No new customs duty on exports or equivalent charges shall be introduced in trade between the parties, nor shall those applied be increased as of the date of this agreement's entry into force. However, in the event of a serious public finance problem or the need for greater environmental protection, the Central Africa party may, after consultation with the EC party, introduce customs duties on exports for a limited number of additional goods.' (Article 15) 'Fees and other charges… shall be limited in amount to the approximate cost of services rendered and shall not constitute indirect protection for domestic products or taxation of imports or exports for fiscal purposes.' (Article 18)
Interim EPA with **Botswana, Lesotho, Mozambique** and **Swaziland** (part of the SADC group), signed in 2009. **Namibia** has initialled the IEPA but has not signed it.[184]	'No new customs duties on exports or charges having equivalent effect shall be introduced… In exceptional circumstances where the SADC EPA states can justify specific revenue needs, protection of infant industries or protection of the environment, these SADC EPA states may introduce, after consultation with the EC party, temporary export taxes or charges having equivalent effect on a limited number of additional products.' (Article 24)
Interim EPA with **Mauritius, Seychelles, Zimbabwe** and **Madagascar** (part of the ESA group), signed in August 2009 (**Zambia** and **Comoros** agreed but have not yet signed)[185]	'Except as otherwise provided in Annex III …, the parties shall not institute any new duties or taxes on or in connection with the exportation of goods to the other party in excess of those imposed on like products destined for internal sales. The EPA committee may examine a request from any signatory ESA state for a review of the goods listed in Annex III.' (Article 15) Nb. Annex III list no exceptions on export taxes for five states (Seychelles, Zimbabwe, Mauritius, Madagascar and Comoros) but lists 16 exceptions on tariff lines for Zambia, mainly on cotton, copper and metal waste.[186]
Interim EPA was initialled in 2007 – but has not been signed and is on hold – with the EAC group (**Kenya, Uganda, Tanzania, Burundi** and **Rwanda**)[187]	'1. The parties shall not institute any new duties or taxes in connection with the exportation of goods to the other party that are in excess of those imposed on like products destined for internal sale. 2. Notwithstanding paragraph 1, the EAC party can impose a duty or tax in connection with the exportation of goods, with the authorisation of the EPA Council, under the following circumstances: (a) to foster the development of domestic industry; or (b) to maintain currency value stability, when the increase in the world price of an export commodity creates the risk of a currency value surge. 3. Such taxes should be enforced on a limited number of products for a limited period of time, and reviewed by the EPA Council after 24 months" (Article 15)

Interim EPA with **Fiji** and **Papua New Guinea**, signed in 2009[188]	'Neither the EC party nor the Pacific states may maintain or institute any duties, taxes or other fees and charges imposed on or in connection with the exportation of goods to the other party that are in excess of those imposed on like products destined for internal sales, except: when these measures are necessary, in conjunction with domestic measures, for ensuring fiscal solvency of a Pacific state or for the protection of the environment; and in exceptional circumstances, where a Pacific state can justify specific protection to develop infant industries, that Pacific state may introduce temporary export taxes on a limited number of products detained for the EC market after mutual agreement with the EC party.' (Article 10)
EPA signed with **CARIFORUM** states in 2008 and 2009, approved by the EP in March 2009[189]	'Customs duties on exports shall not be applicable to goods originating in the CARIFORUM states and imported into the EC party and vice versa. Notwithstanding [this] the signatory CARIFORUM states included in Annex I shall eliminate the customs duties on exports set down in that Annex within three years of signature of this agreement.' (Article 14) Nb. Annex I lists export duties on eight tariff lines for Guyana (including precious stones, bauxite, cane sugar, fish and molasses) and on 16 tariff lines for Suriname (mainly wood).[190]

Annex II

Investment clauses in EPAs

Interim EPA with **Cote D'Ivoire**, signed November 2008, approved by European Parliament March 2009[191]	The parties 'shall take all necessary measures…to encourage the negotiation and earliest possible conclusion of a global EPA' covering investments, among other issues (Article 44).
Interim EPA with **Ghana**, initialled in December 2007 but not signed[192]	The parties ' will cooperate to facilitate all the necessary measures leading to the conclusion as soon as possible of a global EPA between the whole West Africa region and the EC' covering investments, among other issues (Article 44).
Interim EPA with **Cameroon**, signed January 2009[193]	The agreement constitutes a 'basis for negotiating and implementing' a 'regulatory framework' for investment among other issues (Article 3). It also states that cross-border investment flows 'cannot be restricted or prevented by one of the parties' and that the parties commit themselves to conclude negotiations aimed at 'liberalisation of flows of funds relating to "investments" known as "movement of capital relating to investments", including repatriation of investment and profits' (Article 56).
Interim EPA with **Botswana, Lesotho, Mozambique** and **Swaziland** (part of the SADC group), signed in 2009. **Namibia** has initialled the IEPA but has not signed it.[194]	'The parties agree to negotiate an Investment Chapter' (Article 67).
Interim EPA with **Mauritius, Seychelles, Zimbabwe** and **Madagascar** (part of the ESA group), signed in August 2009. (**Zambia** and **Comoros** agreed but have not yet signed.)[195]	The EPA commits the countries to negotiate an EPA covering investment, among other issues (Article 38). The 'cooperation' will cover investment and will 'develop a legal framework that promotes investment by both parties' (Article 40).
Interim EPA was initialled in 2007 – but has not been signed and is on hold – with the EAC group (**Kenya, Uganda, Tanzania, Burundi** and **Rwanda**)[196]	The parties agree to continue negotiations in a number of areas including investment (Article 37).
Interim EPA with **Fiji** and **Papua New Guinea**, signed in 2009[197]	The IEPA does not mention investment; the question whether to include investment in the discussions remains open.[198]
EPA signed with **CARIFORUM** states in 2008 and 2009, approved by the EP in March 2009[199]	The EPA includes a chapter on investment and trade in services. It commits states to accord foreign investors 'no less favourable treatment' than domestic investors (Article 67). Certain safeguards are built in: • Corruption by investors is forbidden and are held liable in case of corruption (Article 72)' • The EPA does not require the privatisation of public undertakings and states 'retain the right to regulate and to introduce new regulations to meet legitimate policy objectives' (Article 60). • States must ensure that 'investors act in accordance with core labour standards' as required by the ILO (Article 72). • States agree to ensure that FDI 'is not encouraged by lowering domestic environmental, labour or occupational health and safety legislation and standards or by relaxing core labour standards or laws aimed at protecting and promoting cultural diversity' (Article 73). • Investors are required to establish 'where appropriate' 'local community liaison processes especially in projects involving extensive natural resource-based activities, in so far that they do not nullify or impair the benefits accruing to the other party under the terms of a specific commitment' (Article 72).

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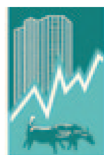

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