LEGAL ISSUES IN INTERNATIONAL AGRICULTURAL TRADE:

WTO COMPATIBILITY AND NEGOTIATIONS ON ECONOMIC PARTNERSHIP AGREEMENTS BETWEEN THE EUROPEAN UNION AND THE AFRICAN, CARRIBBEAN AND PACIFIC STATES

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1. INTRODUCTION

The trade relations between the EU as a bloc on the one hand and the ACP countries as a bloc on the other, have for the last three decades been based on a series of "bilateral" treaties designed to provide non-reciprocal preferential terms of access for the products of the latter to the markets of the former – from Lomé I (1975-80), to Lomé II (1980-85), to Lomé III (1985-90), to Lomé IV (1990-1995, later revised and extended to stay until 2000, known as Lome IV *bis*), and finally to Cotonou (2000 to 2008).[1] It is interesting to observe at the outset that prior to Lomé 'a number of ACP countries had granted reverse preferences to the EEC'.[2] The Lomé process was therefore not just about creation of preferential market access for the products of ACP countries to the EC; it was also about dismantling those pre-Lomé reverse preferences for EC products to access ACP markets, thereby establishing non-reciprocity as the core principle of the Lomé *acquis* on trade matters. This is set to change now in several important ways and the seed of that change has already been planted in the Cotonou Agreement itself. Indeed, reintroduction of reverse preferences – also called reciprocity – will be a fundamental feature of the Economic Partnership Agreements (EPAs) that are being negotiated at this moment under the Cotonou agenda.

1.1 The Cotonou Agenda

Cotonou is not just an agreement on trade and development relations between the EU and the ACP countries; it is also an agenda for trade negotiations towards the creation of what are called Economic Partnership Agreements (EPAs). One of the many innovations of the Cotonou Agreement is its vision of future trade relations between these two blocs. In a complete departure from decades of unilateral and non-reciprocal preferential terms of access for ACP products into the EU market, embodied in time-limited treaties and accommodated by the multilateral trading system through a series of time-limited waivers, Cotonou set an ambitious agenda for the negotiation of EPAs the hallmark of which will be a return to the traditional principle of reciprocity. The negotiation process was formally launched in September 2002 as required by the Cotonou Agreement and is set to be concluded by the end of 2007 with the creation of EPAs as of 1st January 2008.[3]

Cotonou sets out the basic principles and objectives of the EPAs and prescribes detailed modalities for their implementation. The overall objectives of economic and trade cooperation under the Cotonou agreement include fostering the smooth and gradual integration of the ACP States into the world economy, eradication of poverty and promotion of sustainable development. The establishment of EPAs has been identified as the route towards achieving those objectives. The EPAs are intended to be instruments for development, support ACP regional integration initiatives, improve ACP preferential market access into the EC, be compatible with WTO rules, and provide special and differential treatment to all ACP states, and in particular to the LDCs and vulnerable small, landlocked and island countries.[4] We shall see later on, however, that some of these specific objectives and principles could be in tension with one another.

1.1.1 Nature of EPAs

Although they are not defined anywhere in the Cotonou Agreement, EPAs are a new form of trading arrangement between the EU on the one hand and individual ACP countries or sub-regional groupings on the other. The EPAs will be different from all previous forms of arrangements between the EU and ACP countries in terms, inter alia, of the identity and configuration of the ACP-side of the partnership (individual ACP countries and/or sub-regions as opposed to the totality of ACP countries as a bloc), the substantive content and object of the agreements (more or less reciprocal trade liberalization compatible with WTO parameters as opposed to unilateral preferences thus far legitimized under a waiver), and duration (permanent free trade arrangements phased in over an agreed transition period as opposed to previous time-limited unilateral concessions). Some of these will be briefly discussed further below.

[1] The special economic arrangements between many of the ACP countries and the EC go further back in time than the 1974 Lomé I agreement, and the association agreements in the form of Yaoundé I (1963-69) and Yaoundé II (1969-75) are particularly notable.

[2] See *GATT Analytical Index* (1995), p. 826.

[3] See Article 37:1; Art. 37 sets out detailed procedures for different phases of the negotiations together with their respective deadlines.

[4] See *First Joint Report*, para. 4(b).

1.1.1.1 Identity and Configuration of Parties to EPAs

All prior trading arrangements since Lomé I in 1975 were negotiated between the EC as a bloc and the ACP countries as a bloc and the resulting EC import regime applied equally to all ACP countries, with an exception for LDCs which was introduced later in the process. For purposes of the discussion here we will exclude the LDCs, as they are treated separately under Cotonou as well as the WTO, and ask the following question about the remaining group: who are going to be the parties on the ACP side of the EPAs – the totality of ACP countries just like before? Individual ACP countries? Or ACP sub-regional RTAs (e.g. SADC, ECOWAS, etc.)? While this question is crucial, it is also among the least understood.

Article 37.5 of the Cotonou Agreement is the most relevant provision on this issue: "Negotiations of the economic partnership agreements will be undertaken with ACP countries which consider themselves in a position to do so, at the level they consider appropriate and in accordance with the procedures agreed by the ACP Group, taking into account regional integration process within the ACP." This in effect excludes the possibility of a single EPA that will be negotiated and accepted ACP-wide; rather, the EPAs will be negotiated and concluded between the EU on the one hand and each ACP country or groups of countries in a sub-region on the other. Apart from that, Cotonou does not set any limits on the level of aggregation of ACP countries, short of their totality, in the negotiation and execution of the EPAs, leaving the definition of geographical regions to the ACP states themselves. At another point, the Cotonou Agreement adds that, "to the maximum extent possible, regional integration programmes should correspond to programmes of existing regional organisations with a mandate for economic integration."[5]

The negotiation process so far also confirms this to be the case. Right at the opening session of the EPA negotiations in September 2002, an agreement was reached to have a first phase in negotiations at an all-ACP-EC level addressing horizontal issues of interest to all parties and then move to a second phase which would be "*at the level of ACP countries and regions*, and would address specific commitments."[6] Furthermore, since the launch of the second phase in October 2003, five regions (Central Africa, West Africa, Eastern and Southern Africa, the Caribbean and the Southern African Development Community) have already commenced negotiations while the Pacific region is expected to start in September 2004. From this, one may conclude that a single EPA between all the ACP countries on the one hand and the EU on the other is no longer an option. Indeed, the EU Commission (draft) mandate to negotiate EPAs specifically provides that the object of the negotiations is to establish EPAs "with ACP *sub-groups* defined in accordance with the provisions of Article 37(5) of the Cotonou Agreement".[7] Finally, speaking at the opening session of the SADC-EU negotiations towards EPAs in Windhoek, Namibia on 8th July 2004, EU development commissioner Poul Nielson confirmed that "[n]egotiating at the regional level, rather than with all ACP, is an essential feature of this approach."[8]

This means that the whole process envisages any number of ACP countries –short of their totality – as partners of the EU in as many future EPAs. Except in the one scenario where the EU could be negotiating EPAs with individual ACP countries, the negotiation of EPAs will therefore be done between two RTAs – the EU (which could be taken as a customs union for purposes of GATT Art. XXIV, see *infra* for a discussion) and ACP sub-regional RTAs or their intermediate versions. This is also what was envisaged by the Cotonou Agreement, which provides that "Economic and trade cooperation shall build on regional integration initiatives of ACP States, bearing in mind that regional integration is a key instrument for the integration of ACP countries into the world economy."[9] The first Joint Report of the all-ACP-EC Phase of the EPA negotiations goes even further and provides that "EPAs' first emphasis should be to consolidate ACP markets, before fostering trade integration with the EC."[10] The EPA negotiations cannot thus be seen merely as an EU-ACP affair; they are also an intra-ACP matter. This gives rise to a host of complex legal and practical issues.

The most important issue relates to the status of these ACP sub-regional RTAs under

[5] Article 7 of Annex IV to the Cotonou Agreement.

[6] *Joint Report,* para. 1.
[7] Council of the EU, doc. 9930/02, 12 June 2002, p.4.
[8] See Speech/04/355 at http://europa.eu.int
[9] Art. 35:2 on Principles.
[10] Joint Report, para. 4(b)(ii)

international law: are they mere facilitators of negotiations or autonomous institutions with power to conclude treaties on behalf of their respective members? The answer to this depends on a number of factors, including the nature of these ACP sub-regional RTAs, the terms of the treaties by which they are created, the mandate entrusted to them, and whether they will have independent legal personality of their own. In WTO terms, for any such ACP sub-regional RTAs to sign on behalf of their constituent members any future trade agreements with the EU, they themselves must be customs unions in the sense of GATT Article XXIV with all its implications in terms of the *internal* and *external* trade regimes of such customs unions. But, being an Article XXIV customs union alone will not be enough. As the *Turkey Textiles* panel observed, "unless a customs union is provided with distinct rights and obligations (and therefore some WTO legal personality, such as the European Communities) each party to the customs union remains accountable for measures it adopts for application on its specific territory."[11]

This implies that in order for the EU to conclude EPAs with ACP sub-regional RTAs as such, those sub-regional RTAs will need to evolve into full-fledged customs unions by the end of 2007, at the latest, in the sense of GATT Article XXIV and that those customs unions must be endowed with rights and obligations distinct from their constituent members and some form of WTO legal personality. Confirming this view, the draft negotiating guidelines prepared by the Eastern and Southern African (ESA) region provides as follows: "Configurations of EPAs will be clear by the end of 2007 and if at this time an ESA country is party of a customs union it will sign an EPA as a customs union. Otherwise it will sign an EPA as a country. It cannot sign an EPA as part of a regional organisation unless the regional organisation is a customs union."[12] As the preceding argument suggests, this policy statement from the ESA negotiating guidelines is a result of need rather than choice. Indeed, it still needs to go further and say that that CU must also have legal personality independently of the constituent members.

One may then wonder whether or not the existing sub-regional RTAs could metamorphose into CUs within the period up to 2008. That is a possibility; indeed one may even mention such RTAs as SACU and CARICOM as already existing CUs, while COMESA is scheduled to become a CU by December 2004.[13] However, whether many of these sub-regional RTAs will evolve into full-fledged customs unions in terms of GATT Article XXIV by 2007 is far from certain. Nearly all ACP sub-regional RTAs, including COMESA, CEMAC, WAEMU, and EAC, were created taking advantage of the more lenient provisions of the Enabling clause on south-south preferences rather than under GATT Article XXIV. As such many of these RTAs might find it difficult to satisfy even the relatively less onerous (compared to customs unions) demands set by Article XXIV for FTAs.[14] This means that the likelihood of seeing EPAs between the EU and sub-regional ACP RTAs is far from certain, thus perhaps leaving only one option for many of these sub-regions – the conclusion of EPAs between the EU and individual ACP countries. Given that no ACP country seems to have taken a decision as yet to negotiate as an individual country while most ACP countries are already taking part in EPA negotiations through their sub-regional RTAs, the preceding suggestion might sound rather unrealistic. However, it is also worth noting that the fact that the ACP countries are negotiating as members of a sub-regional RTA does not necessarily imply a decision to conclude EPAs at such a level.

In sum, Cotonou is vague at best on the issue. While it specifically mentions the possibility of sub-regional RTAs and individual countries becoming parties to the EPAs, it does not say anything about the ACP in its totality being a party to the EPAs. However, it declares a commitment to build EPAs on existing regional integration initiatives of the ACP countries. Indeed, reference to the EPAs is consistently expressed in the plural, effectively excluding the possibility of a single EPA between the EU on the one hand and the ACP as a bloc on the other. Nor does Cotonou tell us much as to how ACP sub-regional RTAs could be parties to EPAs. The official line, as well as the consensus approach in the literature, seems to be to assume that EPAs will be concluded between the EU on the one hand and ACP sub-regional RTAs on the other and EPAs between the EU and individual countries will be more of the exception. It appears, however, that this may not be what we will see by 2008 and probably the vice versa will be the case –

[11] *Turkey Textiles* panel report, para. 9.40, footnote 272
[12] See ESA-EPA Draft Negotiating Guidelines, Draft Revision 2.0 – Dec. 2003, para 4.
[13] See http://www.comesa.int
[14] See WTO doc. WT/REG/W/44, 7 February 2002.

i.e. we may generally see EPAs between the EU and individual ACP countries while EPAs with sub-regional RTAs could be the exception. Moreover, regardless of whether EPAs are signed by individual ACP countries or sub-regional RTAs, it is clear that the EPAs will mark a departure from the tradition of treating all ACP countries as a bloc.

1.1.1.2 Object and Scope of the EPAs and the Role of the WTO

One of the most fundamental objectives of the ongoing negotiations between the EU and ACP countries/sub-regions is to create EPAs that are compatible with WTO rules on RTAs, which generally requires reciprocal trade liberalization. This declared commitment to WTO compatibility appears to be the result of a combination of factors: (1) all members of the EU as well as nearly three-quarters of the ACP countries are already members of the WTO and bound by its system of rules; (2) the experience of the past in terms of waivers for arrangements incompatible with those rules has been neither easy nor pleasant; and (3) it appears that the trend in north-south trade relations is turning away from unilateral concessions legitimised through waivers into reciprocal arrangements concluded in accordance with WTO rules. If successful, this commitment to WTO compatibility will mean that any future trading arrangements between the EU and the ACP will exist without any need for a waiver from WTO obligations.

Satisfying the legal requirements of the WTO on RTAs will be a huge challenge for several reasons, which will be discussed after a highlight of those WTO legal standards against which future EPAs will be judged. The relevant WTO legal standards are contained in GATT Articles I (on most favoured nation treatment) and XXIV (on regional trade agreements), the 1979 Enabling Clause, and to a more limited extent, Article V of the GATS. There are also some useful panel and AB reports which could shed some light into these often obscure provisions. The legal standards contained in these provisions are among the most complex and contentious so much so that one may even question whether a commitment to compliance means anything at all practical terms.

2. EPAs & THE WTO LAW ON REGIONAL TRADE AGREEMENTS

2.1 Background

From the perspective of WTO law, the issue of regional trading arrangements is primarily an issue of principle. Having laid its foundations on the principle of non-discrimination, the trading system treats all sorts of favouritism between countries with suspicion. The first paragraph of GATT's very first provision declares that "*any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties*." This give-the-best-to-everyone principle – called the most favoured nation (MFN) treatment clause – forms the foundation stone of the trading system.

At the same time, however, we also know that almost every WTO member today belongs to one or more RTAs, which by definition means that almost every country gives (and receives) preferential terms of access over what it gives (and receives) at MFN level. The number of such preferential arrangements has grown rapidly over the past few years, but it is not a new phenomenon at all. It is interesting to note here that Kenneth Dam opened his 1963 article on RTAs with the following observation: "The last dozen years have seen a proliferation of customs unions and free trade areas of unforeseen proportions."[15] This is an observation that would be even truer today.[16] The question will then be the following: if the principle of non-discrimination is such a core principle of the trading system how can we explain the fact that we live in a world of ever

[15] "Regional Economic Arrangements and the GATT: The Legacy of a Misconception", *University of Chicago Law Review*, vol. 30, No. 4, summer 1963, P. 615.

[16] As of 5 December 2003, 273 RTAs have been notified to the GATT/WTO. Of these, 227 agreements were notified under GATT Article XXIV, of which 143 are still in force today; 19 agreements were notified under the Enabling Clause; and 27 under GATS Article V. See WTO doc. WT/REG/13, 5 December 2003, para. 4. Of these, 107 were notified between 1948 and end-1994, while the remaining 166 were notified between 1995 and end 2003.

proliferating RTAs which are inherently discriminatory?

In legal terms, the answer is to be found principally in GATT Article XXIV, supplemented by the so-called Enabling Clause of 1979 for developing countries, and GATS Article V for RTAs in the area of services, this time called Economic Integration Agreements (EIAs). The legal landscape created by the interaction of all these principles and exceptions as applied over the years will be discussed in some detail here.

2.2 GATT Article XXIV

The most important rules of the WTO system on RTAs are contained in GATT Article XXIV. For a system that professes to be founded on the principle of non-discrimination, it is interesting to note that GATT Article XXIV:4, the provision which "sets forth the overriding and pervasive purpose for Article XXIV"[17], starts by recognizing "the desirability of increasing freedom of trade by the development, through voluntary agreements, of closer integration between the economies of the countries parties to such agreements." It then goes further and stipulates that "the purpose of a customs union or of a free-trade area should be to facilitate trade between the constituent territories and not to raise barriers to the trade of other contracting parties with such territories." This purposive paragraph is followed by detailed operative provisions which set forth the substantive and procedural conditions that must be satisfied before a discriminatory RTA could be justified under the exceptions of Article XXIV. However, the meaning of Article XXIV has proved to be so contentious and its practical administration so difficult that only in one of the over 350 RTAs notified so far to GATT/WTO were members able to reach a clear-cut decision on their compatibility with the rules.[18] The following discussion only summarizes the legal issues that will have an impact on the negotiation and outcome of the EPAs.

Article XXIV distinguishes essentially between two forms of RTAs – free trade areas (FTAs) and customs unions (CUs) or interim agreements leading to the formation of either of these two. The main difference between these two forms of RTAs relates essentially to the depth of integration attained or contemplated among their respective members. Interim agreements in both cases are required to include "a plan and schedule" for the formation of the intended RTAs "within a reasonable length of time". The "reasonable length of time" for interim agreements leading to the formation of customs unions has been defined to mean a period not exceeding 10 years unless justified by exceptional circumstances.[19] No such definition was provided for interim agreements leading to the formation of FTAs. We shall see later on that the EPAs will first come in the form of interim agreements leading to the formation of FTAs (rather than CUs) and the length of the transition period permissible under Article XXIV will be important. However, even if EPAs will only aspire to be FTAs and not CUs, we shall also see that the law relating to customs unions will play a role in the process because, as argued earlier, ACP sub-regions can conclude EPAs with the EU only if they constitute themselves as CUs in the first place. The substantive requirements of both FTAs as well as CUs are found in paragraphs 5 and 8 of Article XXIV.

2.2.1 CUs v. FTAs: where will the EPAs fall?

Article XXIV, paragraph 8 is the definitional provision for both CUs and FTAs while paragraph 5 provides for the minimum substantive conditions that should be met by CUs and FTAs relating to internal trade amongst their constituent members and external trade with third parties.

2.2.1.1 Customs Unions Definition

According to Article XXIV:8(a), a customs union is defined to mean "the substitution of a single customs territory for two or more customs territories."[20] A customs union is therefore a union of two or more customs territories with important implications for the flow of trade within that union (internal trade) as well as between the union and other countries (external trade) – for each of which detailed requirements are listed. The requirements for CUs are found in paragraph 8(a)(i) on internal trade, and paragraphs 8(a)(ii) and 5(a) on external trade.

[17] AB in *Turkey Textiles*, Para. 57

[18] That single exception relates to the 1994 customs union between the Czech and Slovak republics.

[19] See Uruguay Round Understanding on GATT Article XXIV, para 3.

[20] Paragraph 2 of Article XXIV defines a customs territory to mean "any territory with respect to which separate tariffs or other regulations of commerce are maintained for a substantial part of the trade of such territory with other territories."

Requirements on Internal Trade

Regarding *internal* trade within customs unions, sub-paragraph 8(a)(i) provides that "duties and other restrictive regulations of commerce (except, where necessary, those permitted under Articles XI, XII, XIII, XIV, XV and XX) are eliminated with respect to substantially all the trade between the constituent territories of the union or at least with respect to substantially all the trade in products originating in such territories". Four things are worth noting here: (1) the rule relates to "duties" as well as "other restrictive regulations of commerce" applying to trade between the members; (2) the requirement is to eliminate, and not just reduce, these duties and other restrictive regulations of commerce; (3) the requirement to eliminate applies to substantially all, and not to all, the trade; and (4) this requirement to eliminate internal trade restrictions is subject to exceptions allowed under specified provisions. Although all of these elements are important, the concept of "substantially all the trade" is the most controversial and the most relevant particularly to the identity of each of the intending parties to the EPAs. The same requirement also exists for FTAs, and the discussion below applies to both forms of RTAs.

In broad terms, the requirement to liberalize "substantially all the trade" between the constituent members of a CU is something that naturally flows from the object and purpose of RTAs as stated under paragraph 4 of Article XXIV: the desire to facilitate trade through voluntary closer economic integration between countries without adversely affecting the trade interests of others. However, the practical question of how much trade is "substantially all the trade" has proven to be a difficult one for trade diplomats and lawyers over the years. At least two major approaches – quantitative (a certain percentage of actual or potential trade) and qualitative (going beyond percentages so as to look at whether any major sector is excluded, etc.) or a combination of them have been suggested so far. There is no consistent practice either on the matter. The EC has played a major role in the development of the law in this area, as in many others. When the EEC Treaty was brought before a GATT committee for the consistency with Article XXIV of its provisions on the association of overseas territories, the Community argued that "a free trade area should be considered as having been achieved for substantially all the trade when the volume of liberalized trade reached 80 per cent of total trade."[21] However, many other members rejected this approach of fixing a percentage figure as inappropriate, preferring instead a case-by-case approach which considers every case on its merits. Although the EC grew more and more sympathetic to this argument over time,[22] it still maintains its quantitative approach to the definition. Following its use of a 90 percent threshold in its Trade, Development and Cooperation Agreement (TDCA) with South Africa – made up of commitments to liberalize about 94 per cent of EU imports from South Africa and about 86 per cent of South African imports from the EU over a 12 year transition period – the EU is currently presenting this 90 per cent threshold as "the WTO criterion" of the "substantially all trade" requirement.

Requirements on External Trade

Regarding the *external* trade of members of customs unions with non-members, sub-paragraph 8(a)(ii) provides that "substantially the same duties and other regulations of commerce are applied by each of the members of the union to the trade of territories not included in the union." A logical follow-up to the definition of a customs union as "the substitution of a single customs territory for two or more customs territories" would normally be a requirement to adopt a single trade regime vis-à-vis all third countries. However, by requiring only "substantially the same" – and not "the same" – duties and other regulations of commerce to be applied by members of a customs union to the trade of non-members, sub-paragraph 8(a)(ii) has made it clear that the formation of a customs union does not necessarily mean the total "disappearance" of the constituent members as independent players in international trade regulation. Indeed, precisely because of this flexibility afforded by Article XXIV on the external trade regime of a customs union, the *Turkey Textiles* panel went as far as concluding that "as a general rule, a situation where constituent members have 'comparable' trade regulations

[21] See *GATT Analytical Index* (1995), p. 824.

[22] For example, during GATT Working Party meetings that considered the accession of Portugal to the EEC, the Community was quoted as saying that "no exact definition of the expression [substantially all the trade] existed and that the precise figures would vary from case to case according to several factors. At any rate, percentages were established as a general indicator of the trade covered by the Agreement and were not to be regarded as a conclusive factor." See *GATT Analytical Index* (1995), p. 824.

having similar effects with respect to the trade with third countries, would generally meet the qualitative dimension of the requirements of sub-paragraph 8(a)(ii)."[23] This was later found by the AB to have been too low a standard to satisfy the requirements of sub-paragraph 8(a)(ii), which, the AB said, "requires the constituent members of a customs union to adopt 'substantially the same' trade regulations. In our view, 'comparable trade regulations having similar effects' do not meet this standard. A higher degree of 'sameness' is required by the terms of sub-paragraph 8(a)(ii)."[24] It is notable that the AB left intact the panel's interpretation that "sub-paragraph 8(a)(ii) allows Members to form a customs union, as in this case, where one constituent member is entitled to impose quantitative restrictions under a special transitional regime and the other constituent member is not."[25]

Sub-paragraph (ii) on the external trade regime of customs unions, unlike sub-paragraph (i) on internal trade, does not explicitly permit the maintenance of quantitative restrictions. The *Turkey Textiles* panel observed that "the plain meaning of the wording used in these two sub-paragraphs[26] implies a difference in approach between efforts at internal trade liberalization among constituent members of a customs union where the maintenance of some quantitative restrictions (as restrictive regulations of commerce) is explicitly permitted (see paragraph 8(a)(i)), and their respective external policies with third countries where paragraph 8(a)(ii) contains no specific authorization relating to the maintenance of quantitative restrictions."[27] One should not however read too much into this difference. The absence of specific authorization relating to quantitative restrictions in the *external* trade regime of customs unions appears to be because it is too obvious to mention, while it is not so obvious in respect of the *internal* trade regime applying within customs unions due to their indeterminate position between a single customs territory and a collection of independent political and economic entities. The sort of restrictions authorised under sub-paragraph (i) are restrictions that are normally available to all member countries in their relations with other WTO member countries. Needless to say, joining or forming a customs union cannot imply for countries obligations towards non-CU members that would be more onerous than what would be required of them as individual members of the multilateral trading system.

The implication of the AB interpretation of the requirements on the external trade regime of CUs, together with the explicit authorization of quantitative restrictions on internal trade under sub-paragraph 8(a)(i), is that (1) ACP countries can establish customs unions amongst themselves at the sub-regional level while each of them still maintains otherwise legitimate quantitative or other trade restrictions on some of their internal as well as external trade; and (2) some ACP countries members of such customs unions will still have the right to maintain such restrictions on selected third countries while the other members of the customs unions may not necessarily have such restrictions against any third countries. A familiar example here is the pre-1993 banana import regime applying in EEC member countries, which ranged from the tariff-free import system in Germany to the tariff-only import restrictions in the Benelux to the various quantitative restrictions in France and the UK to the complete ban on importation in Spain. A more recent and relevant example would be the new Italian labelling law (July 2003) "requiring that milk production facilities indicate on the label the location of the farm where the milk originated."[28] No such requirements exist under EU law or in other EU countries; and yet, no one seriously claims that the EC does not satisfy the requirements of a CU merely because its members did not have a common external trade regime for bananas or lack common rules on the traceability of dairy products.[29]

However, any such restrictions need in all cases to be permissible under WTO law. The notorious cases on *Bananas*, although involving alleged FTAs rather than CUs, are a good example here. In *Bananas I* the EEC argued – unsuccessfully – that the many restrictive measures on the importation of bananas, including the total ban maintained by Spain, were permitted under GATT Article XXIV. The EEC specifically argued that "Article XXIV:5 contained an exception not only to

[23] See *Turkey Textiles* panel report, para. 9.151.
[24] See *Turkey Textiles* AB report, para. 50.
[25] See *Turkey Textiles* panel report, para. 9.151.
[26] of Article XXIV:8(a)(i) and (ii).
[27] See *Turkey Textiles* panel report, para. 9.150.
[28] See O'Connor & Co., The EC Traceability and Equivalence Rules in Light of the SPS Agreement: A Review of the Main Legal Issues",(December 2003), *http://agritrade.cta.int/Agritrade_Report_O%27Connor.pdf* P. 9.
[29] See the *Bananas* I & II cases challenging the EEC's successive banana import regimes of 1992 and 1993 respectively, also discussed *infra*.

Article I but also to Article Xl (and, accordingly, to Article XIII)", and applied to its relationships with the ACP countries, which it said were "free trade area[s] between the EEC and each of the ACP countries" in the sense of Article XXIV:5.[30] According to this argument, therefore, Article XXIV would justify not only discrimination in violation of the MFN principle of Article I but also a quantitative restriction in violation of Article XI. The panel rejected this EC argument as follows: "The Panel noted that Article XXIV:5 to 8 permitted the contracting parties to deviate from their obligations under other provisions of the General Agreement for the purpose of forming a customs union or free-trade area, or adopting an interim agreement leading to the formation of a customs union or free-trade area, but not for any other purpose. Article XXIV:5 to 8 therefore did not provide contracting parties with a justification for restrictive import measures as such; it merely provided them - within the limits set out in this provision - with a justification for not applying to imports originating in such a union or area the restrictive import measures that they were permitted to impose under other provisions of the General Agreement. The Panel therefore considered that the import restrictions on bananas could not be justified by Article XXIV."[31]

More recently, the *Turkey Textiles* dispute was also essentially about a Turkish defence that the quantitative restrictions it imposed on a range of textile products coming from India in violation of GATT Article XI were justified under Article XXIV of GATT "as these measures were adopted pursuant to (and on the occasion of the formation of) its customs union with the European Communities."[32] The panel, just like the *Bananas I* panel discussed earlier, rejected this Turkish argument and observed: "even on the occasion of the formation of a customs union, Members cannot impose otherwise incompatible quantitative restrictions". According to this panel, "the wording of Article XXIV does not authorize a departure from the obligations contained in Articles XI and XIII of GATT…."[33] The AB, while affirming the ultimate conclusion of the panel in this respect, took a different view. According to the AB, the chapeau of paragraph 5 of Article XXIV is the key provision for resolving the issue and that this chapeau "makes it clear that Article XXIV may, under certain conditions, justify the adoption of a measure which is inconsistent with certain other GATT provisions, and may be invoked as a possible 'defence' to a finding of inconsistency." The AB further argued this could happen if two cumulative conditions were met: "First, the party claiming the benefit of this defence must demonstrate that the measure at issue is introduced upon the formation of a customs union that fully meets the requirements of sub-paragraphs 8(a) and 5(a) of Article XXIV. And, second, that party must demonstrate that the formation of that customs union would be prevented if it were not allowed to introduce the measure at issue." However, the AB found out that the second of these conditions was not met in the case before it: "We agree with the Panel that had Turkey not adopted the same quantitative restrictions that are applied by the European Communities, this would not have prevented Turkey and the European Communities from meeting the requirements of sub-paragraph 8(a)(i) of Article XXIV, and consequently from forming a customs union." It however cautioned that "we make no finding on the issue of whether quantitative restrictions found to be inconsistent with Article XI and Article XIII of the GATT 1994 will *ever* be justified by Article XXIV. We find only that the quantitative restrictions at issue in the appeal in this case were not so justified."[34]

In sum, although the discussion in this section has been about CUs, it is also possible to draw conclusions of a broader reach: the provisions of GATT Article XXIV should be interpreted to mean that member countries are allowed to violate other provisions to the extent necessary for them to be parties to RTAs that satisfy the requirements set by Article XXIV itself. GATT Article I is so far the only provision the violation of which has been found to be necessary for the creation of RTAs. However, although it is difficult to imagine what other GATT provisions would pass this necessity test for the creation of RTAs, the AB has opted to leave the door open on this issue. This also means, for example, that the justifiability under Article XXIV of otherwise WTO-incompatible non-tariff barriers that may be introduced against third country imports by ACP countries on the occasion of the formation of EPAs will remain an open question.

Finally, while paragraph 8(a) provides the definitional elements of a customs union,

[30] See *Bananas I*, paras. 222 and 246
[31] See *Bananas I*, para. 358
[32] See *Turkey Textiles* panel report, para. 9.26.
[33] *Turkey Textiles* panel report, paras. 9.188-89.
[34] See *Turkey Textiles* AB report, paras. 42-65.

paragraph 5(a) goes a step further and sets important additional conditions on the external trade regime of the union: "the duties and other regulations of commerce imposed at the institution of any such union or interim agreement in respect of trade with contracting parties not parties to such union or agreement shall not on the whole be higher or more restrictive than the general incidence of the duties and regulations of commerce applicable in the constituent territories prior to the formation of such union or the adoption of such interim agreement, as the case may be". Four points are worth noting here: (1) the creation of a customs union may not be used as an opportunity to roll back prior liberalisation measures of the constituent members vis-à-vis non-members; (2) the comparison is between the new single common external trade regime and the many individual external trade regimes of the constituent members vis-à-vis third countries previously; (3) this comparison is not item-by-item, but general; and (4) there is a distinction between duties and other regulations of commerce in that the new duties are not to be higher (quantitative) while other regulations are not to be more restrictive (qualitative). The implications of these requirements for EPAs will be discussed later on.

2.2.1.2 Free Trade Areas

Definition and Requirements on Internal Trade

Article XXIV:8, sub-paragraph (b), defines a free trade area as "a group of two or more customs territories in which the duties and other restrictive regulations of commerce (except, where necessary, those permitted under Articles XI, XII, XIII, XIV, XV and XX) are eliminated on substantially all the trade between the constituent territories in products originating in such territories." A free trade area is therefore an arrangement between countries which seeks to create conditions for the free(r) flow of trade amongst themselves while preserving the independent customs territories of the constituent parties and with no need for harmonizing their respective foreign trade regimes vis-à-vis non-FTA countries. Most of the observations made earlier about the definitional elements of a CU could also be made about this definition of FTAs and the comparison of FTAs and CUs in the next sub-section will develop this further. It is worth pointing out nonetheless at this stage that while customs unions are defined in terms of their internal and external trade dimensions, the parallel provision defining FTAs does not say anything as regards the type of measures to be applied by members of FTAs vis-à-vis non-members.

There is also a small difference between these two definitions in respect of their product coverage for internal purposes. While sub-Article 8:(a)(i) on customs unions requires elimination of duties and other restrictive regulations of commerce "with respect to substantially all the trade between the constituent territories of the union or at least with respect to substantially all the trade in products originating in such territories", sub-Article 8(b) on FTAs requires elimination of duties and other restrictive regulations of commerce "on substantially all the trade between the constituent territories in products originating in such territories." The elimination of duties and other restrictive regulations of commerce on products originating within members of RTAs is a minimum requirement for customs unions (the preference being to extend such treatment to all products traded between those countries regardless of the origin of the goods) while this is all that is required for FTAs. The legal effect in both cases remains the same; but, though hortatory, the wider reach of customs unions has some symbolic value. It also means that while determination of origin could be merely optional in the case of customs unions, it is almost always mandatory for FTAs (unless of course an FTA also opts to go for elimination of barriers on all goods coming from or through other members regardless of their true origin – an unlikely scenario in practice).

Requirements on External Trade

The absence of reference to the external trade dimension of FTAs in the definition does not however mean there are no requirements for FTAs in this respect; only that they are found in paragraph 5 rather than the definition provision of paragraph 8. Paragraph 8(b) provides the definitional elements of an FTA in terms only of *internal* trade, but paragraph 5(b) goes a step further and sets important conditions relating to the *external* trade regime of the FTA: "with respect to a free-trade area, or an interim agreement leading to the formation of a free-trade area, the duties and other regulations of commerce maintained in each of the constituent territories and applicable at the formation of such free-trade area or the adoption of such interim agreement to the trade of contracting parties not included in such area or not parties to such agreement

shall not be higher or more restrictive than the corresponding duties and other regulations of commerce existing in the same constituent territories prior to the formation of the free-trade area, or interim agreement as the case may be." The language of this paragraph is similar to that of paragraph 8(a) on the *external* trade regime of customs unions; but there are also important differences.

Firstly, the objective in both cases is fairly clear: the principal purpose of sub-paragraphs 5(a) and (b) is to make sure that the pre-RTA level of openness to third country imports in each of the members of the new RTA would remain not adversely affected by the formation of the RTA. The impact of RTAs on third parties varies depending, at least in part, on the type of RTA created, i.e. whether it is a customs union or a free trade area. In the case of a customs union, the national tariffs and other trade regulations are generally replaced by a common external tariff and a common system of "other external regulations of commerce", while in the case of a free trade area, the distinct national trade regimes remain intact. Consequently, the assessment of whether the formation of an RTA has adversely affected the trade interests of non-members is more complicated in a CU than in an FTA. As FTAs are not required to harmonize their external trade regimes – and indeed no new customs territory is created by an FTA – the comparison here is between the external trade regime of each member of the FTA applying to third countries post-FTA and that same country's external trade regime pre-FTA. Put differently, every third country can assess whether it has been adversely affected by merely comparing the duties and other regulations of commerce facing its goods in every FTA member country post-FTA vis-à-vis that which prevailed in each of those same countries pre-FTA. The comparison simply is between one country's external trade regimes at two different points in time. In the case of a customs union, however, the comparison is not just between trade regimes at two different times but also between two different entities – the pre-CU individual national trade regimes against the aggregate post-CU, CU-wide, trade regimes.

As such, while the requirement in the case of customs unions is for the new trade regime not to be "on the whole" higher or more restrictive than "the general incidence" of such duties and regulations of commerce pre-CU, the requirement in the case of FTAs is for the new regimes not to be "higher or more restrictive" than the "corresponding" duties and other regulations of commerce pre-FTA. The better precision in language in respect of FTAs compared to CUs is a result of the fact that in the latter case a completely new external trade regime effectively replaces the multiplicity of prior national external trade regimes, making direct comparison impossible.

There are also important differences under Article XXIV:5 with respect to tariffs and other trade regulations for CUs on the one hand and for FTAs on the other.[35] In the case of a CU, the comparison is between "the duties and other regulations of commerce *imposed*" at its institution and "the general incidence of the duties and regulations of commerce *applicable* in the constituent territories prior to the formation of such union". In the case of an FTA, this comparison is between "the duties and other regulations of commerce *maintained* in each of the constituent territories and applicable" at its formation and "the corresponding duties and other regulations of commerce *existing* in the same constituent territories prior to the formation." (Italics added) The significance of these differences in wording had been debated for long. Thanks to the Uruguay Round Understanding on Article XXIV, we now know that the duties and charges to be taken into consideration in the evaluation process for customs unions "shall be the *applied rates of duty*."[36] This is preceded by the following: "The evaluation under paragraph 5(a) of Article XXIV of the general incidence of the duties and other regulations of commerce applicable before and after the formation of a customs union shall in respect of duties and charges be based upon an overall assessment of weighted average tariff rates and of customs duties collected." This therefore shows that the applied duty is used on both sides of the comparison.

Importantly for our purposes here, no such interpretation was adopted with respect to the parallel provision of Article XXIV:5(b) on FTAs. The implication of this could be debated and one might still argue whether the comparison under Article XXIV:5(b) should be with the applied duty or the bound duty. However, the fact that these two provisions were couched in different wording from the outset and an explicit understanding has interpreted sub-Article 5(a) on CUs to mean applied duties while leaving it untouched in respect of sub-Article 5(b) on FTAs should provide sufficient grounds to conclude that the duties for

[35] For more on this, see WTO/REG/W/16, p. 3.
[36] See para. 2 of the Understanding, italics added.

purposes of FTAs should be bound duties in cases where there is a difference between applied and bound duties.

One may wonder how or why this could be important for the EPA negotiations. It has been suggested earlier (and will be developed further *infra*) that EPAs between the EU and sub-regional ACP RTAs or individual ACP countries can only be FTAs and not CUs. When we talk about EPAs therefore, we are talking about the formation of FTAs, and indeed interim agreements leading to the formation of FTAs in the long run. We also know that most ACP countries maintain very high bound duties particularly on agricultural products while their applied duties are often much lower.[37] If the comparison of the external impact of the EPAs were to be assessed on the basis of the pre-EPA applied duties, as would be the case for a CU, the EPAs would necessarily have to result in very low MFN duties for these countries. If, on the other hand, the threshold is going to be the pre-EPA bound rates, then the ACP countries could still maintain high MFN duties on third countries regardless of how far they go in terms of the internal trade within the EPAs. Indeed there have been cases where the formation of FTAs has resulted in applied tariff increases on goods coming from third countries.[38] That EPAs are going to be FTAs and not CUs will thus mean that the degree of restrictiveness of the post-FTA external trade regime of the ACP countries will be compared against the pre-FTA external trade regime of those countries as contained in their schedules of bindings rather than their applied duties.

However, this will be the case only if EPAs are concluded between the EU on the one hand and each ACP country on the other. As we saw earlier, to the extent ACP countries conclude EPAs as sub-regional RTAs rather than as individual countries, they will have to constitute themselves as CUs in the first place. The question regarding the degree of restrictiveness of the external trade regime of these new CUs vis-à-vis goods coming from third countries will thus be assessed on the basis of the pre-CU applied duties of the constituent members as required under GATT Article XXIV:5(a). This will mean that, first, ACP countries signing an EPA as members of a sub-regional CU will have to set up a system of common external tariffs that is no more restrictive than their applied tariffs that prevailed prior to the formation of the relevant CU; and, second, when they sign the EPA – which is an FTA – with the EU, their external trade regime should not be more restrictive than their pre-EPA bound tariff levels as required under GATT Article XXIV:5(b). The effect is clear – the pre-CU applied tariffs of the ACP countries will become the bound tariffs of the CUs both before and after the conclusion of the EPAs. ACP countries signing EPAs as sub-regional CUs will thus automatically lose the flexibility to move between high bound tariffs and low applied rates, while this same option will be available for ACP countries signing EPAs as individual countries. Needless to say, this has a potential to be another disincentive against ACP countries forming sub-regional CUs and signing EPAs as through such CUs.

2.2.1.3 Where will the EPAs Fall: FTAs or CUs?

As noted at the beginning, the Cotonou Agreement does not say much about the nature of EPAs. Apart from the commitment to create EPAs that are fully compatible with the WTO, it does not tell us whether they achieve that compatibility as FTAs or CUs or in any other form. Despite this, I have suggested earlier that EPAs can only take the form of FTAs – and indeed interim agreements leading to the formation of FTAs – and not CUs, nor any third option.[39] The reasons could be summarised as follows:

Firstly, we have seen that the basic difference between FTAs and CUs is one of depth of

[37] Just to have a few examples showing the scale of bound duties: Schedule CXIX of Mozambique for agricultural market access which binds its customs duties at 100%, and under 'other duties and charges' provides the following: maritime transportation tax 100%, port tax 100%, and other 100%; Schedule XLIII of Nigeria provides for a ceiling binding for all agricultural products of 150% and "other charges" of 80%; Schedule LXVI of Jamaica binds duties for nearly all agricultural products at 80% and other charges of 80%; and Schedule CXXIV of Tanzania puts a ceiling binding of 150% for all agricultural products. However, we also know that the applied tariffs in these and other ACP countries are significantly lower than these bound rates. Information on national bindings for all WTO member countries is available at http://www.wto.org/english/tratop_e/schedules_e/goods_schedules_e.htm

[38] See WTO/REG/W/16, p.2, also referring to WTO/REG4/M/12.

[39] Although without much supporting argument, similar views have been expressed by Jurgen Huber (2000), EJIL, p. 427; B. Onguglo and T. Ito, July 2003. *How to Make EPAs WTO Compatible? Reforming the Rules on Regional Trade Agreements*. ECDPM Discussion Paper No.40, para. 29 ff. www.ecdpm.org

integration – CUs being advanced FTAs so to speak. Given the huge economic and developmental gulf between the EU and the ACP countries and the condition of non-reciprocal market access that has prevailed between these two blocs so far, any EPAs between the EU and any ACP region/country can only start with an FTA. Considering GATT Article XXIV and the tradition of the EU in the creation of customs unions with other countries, the formation of EPAs as CUs will automatically mean that the ACP countries will have to introduce more or less the same external trade regime as the EU – virtually adopting the EU external trade regime just like e.g. what Turkey did when it concluded its CU with the EC in 1995. One can of course expect a higher degree of flexibility allowed the ACP countries in such cases, but that is as far as it could go. As such, a CU does not seem to be an option in this case.

Secondly, and more authoritatively, the EU Commission negotiating mandate specifically provides that "EPAs shall be directed at establishing free trade areas between the parties ...."[40] This confirms that the vision is to create interim agreements leading to FTAs (note the words "directed at") and not CUs, nor any third option.

2.3 The Enabling Clause and Regional Integration

2.3.1 Background

Officially known as the *Decision on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries* (28 November 1979, L/4903), the Enabling Clause is the other important source of law relating to RTAs involving particularly developing countries. In general, the Enabling Clause constitutes an exception from GATT Art. I in three senses: it authorises (a) developed country tariff preferences for goods of developing country origin on GSP terms (generalized, non-reciprocal and non-discriminatory); (b) special treatment for LDCs, and (c) south-south preferences as an exception from both Articles I and XXIV. The relationship between the Enabling Clause and GATT Articles I and XXIV is what interests us here.

2.3.2 RTAs and the Enabling Clause

Whether under Article XXIV or the Enabling Clause, preferences under regional trade arrangements are permitted as an exception from the cardinal MFN principle of non-discrimination on condition that they are used only to open trade among participating countries and not to raise barriers against trade from non-participants. To that end, Article XXIV:4 provides that "the purpose of a customs union or of a free-trade area should be to facilitate trade between the constituent territories and not to raise barriers to the trade of other contracting parties with such territories." Likewise, paragraph 3(a) of the Enabling Clause provides that any preferential or more favourable treatment under the Enabling Clause "shall be designed to facilitate and promote the trade of developing countries and not to raise barriers to or create undue difficulties for the trade of any other contracting parties."

Although the wording in these two provisions is slightly different, the objective remains the same – trade creation, as opposed to trade diversion, has to be the object of RTAs. However, the commonalties end here. Significant differences exist between GATT Article XXIV and the Enabling Clause on regional integration. Indeed, if GATT Article XXIV is an exception from the MFN principle of Article I, Paragraph 2(c) of the Enabling Clause on south-south preferential agreements is an exception from Article XXIV.

According to paragraph 2(c), developing countries could enter into regional or global arrangements amongst themselves "for the mutual reduction or elimination of tariffs and, in accordance with criteria or conditions which may be prescribed by the CONTRACTING PARTIES, for the mutual reduction or elimination of non-tariff measures, on products imported from one another". Unlike under GATT Article XXIV, no specific name is given to such a south-south preferential trade arrangement – it is neither an FTA nor a CU. However, given the limited scope and ambition implicit in its wording, it is closer to an FTA than to a CU. The corresponding provision of Article XXIV:8(b) on FTAs provides that "A free-trade area shall be understood to mean a group of two or more customs territories in which the duties and other restrictive regulations of commerce (except, where necessary, those permitted under Articles XI, XII, XIII, XIV, XV and XX) are eliminated on substantially all the trade between

[40] EU Commission negotiating mandate, para 3.1 on Objectives.

the constituent territories in products originating in such territories."

Three things are immediately apparent from this juxtaposition. Firstly, while Article XXIV talks about the formation of an FTA between any two or more customs territories, paragraph 2(c) of the Enabling Clause is limited to the formation of unnamed "regional or global arrangements" among only developing countries. The relevance of this distinction to the EPA negotiations is apparent since EPAs are to be concluded between a developed customs territory – the EU – on the one hand and developing ACP countries and/or sub-regions on the other. Because the Enabling Clause authorises only south-south RTAs, there is no room for north-south RTAs, such as the future EPAs, to be justified under it. Indeed, developed countries, particularly the EC, have tried – and failed – on several occasions to defend discriminatory preferences accorded to developing countries on the basis of paragraph 2(c) of the Enabling Clause.[41] Secondly, as regards tariffs, while Article XXIV talks in terms of elimination of duties (with some exceptions) on "substantially all the trade" in goods originating from such territories, paragraph 2(c) of the Enabling Clause allows either reduction or elimination of tariffs and does not specify any quantitative or qualitative standard on the amount of trade to be covered. Finally, in respect of non-tariff barriers, while GATT Article XXIV talks in terms of the elimination of what it calls "other restrictive regulations of commerce", a concept that is understood to mean non-tariff barriers, on substantially all the trade between the constituent territories in products originating in such territories, paragraph 2(c) of the Enabling Clause talks once again about either reduction or elimination of non-tariff measures on any amount of trade between them and "in accordance with criteria or conditions which may be prescribed". No such criteria have yet been prescribed either by the GATT Contracting Parties or any WTO organ. The importance of these distinctions on the scope of liberalization to take place in respect of tariffs and non-tariff barriers between FTAs under GATT Article XXIV and those under the Enabling Clause is once again obvious – while developing countries could introduce preferential arrangements amongst themselves (e.g. COMESA, SADC, etc.) without necessarily eliminating duties or other restrictions on any significant portion of their trade, this would not be permissible in situations where some or all the members of the RTA are developed countries (as is the case with the future EPAs).

2.3.3 EPAs and the Enabling Clause

The Enabling Clause provides for the possibility of developing countries forming regional or global preferential arrangements amongst themselves without satisfying the requirements of Article XXIV on FTAs and CUs. Because several intra-ACP RTAs have been created under the Enabling Clause without satisfying the requirements of GATT Article XXIV, the EPA process in a way brings face-to-face two different categories of countries that have been pursuing the same goal of establishing closer regional integration for decades in accordance with two completely distinct parameters. As reiterated, Cotonou obliges the parties to the EPA negotiations to conclude only WTO-compatible FTAs. Given that the EPAs are being negotiated between the developed EU and the developing ACPs, this, by definition, means FTAs as envisaged under GATT Article XXIV. The option available for south-south cooperation in the form of RTAs under the Enabling Clause is simply not available for RTAs between developed and developing countries such as the EPAs we are talking about here. They have to be concluded in compliance with GATT Article XXIV. We shall see later on, however, that the ACP Group of countries within the WTO are proposing changes to GATT Article XXIV as part of the Doha negotiations so options similar to those provided by the Enabling Clause would be extended to north-south FTAs. It is interesting to observe at the same time that the EU's proposal on the same issue asks only for clarifications to Article XXIV and falls short of demanding the introduction of preferential treatment to developing country partners to north-south RTAs.

Until the desired changes are introduced to the relevant GATT provisions, however, the new EPAs will be judged only in accordance with the standards set by the current version of GATT Article XXIV. This has the potential to cause complicated legal issues in which an EPA has to comply with one legal standard (GATT Article XXIV) while its constituent elements are subject to two different and incompatible legal standards (GATT Article XXIV and the Enabling Clause). At its most extreme, this could result in a situation where trade between the EU and an ACP sub-regional partner would be freer than internal trade at the level of the ACP sub-region party

[41] See, inter alia, the following cases: *EC Bananas* I and II, and EC *Mediterranean Citrus*

to the EPA. In other words, ACP countries may have more obligations to open their markets for European goods than those coming from across their immediate borders. In apparent anticipation and fear of this possibility, the EU Commission mandate specifically provides that "the ACP countries shall undertake, at least, to extend automatically the treatment granted to the Community to all other parties to the EPA concerned, preferably ahead of trade liberalisation vis-à-vis the Community." (Commission draft mandate, 12 June 2002, Annex I, p. 7). Two problems follow from this. Firstly, the ACP countries will have to give up their rights under the Enabling Clause to form sub-regional RTAs without being required to satisfy any minimum liberalization requirements. This will radically transform not just the relations of the ACP countries with the EU and amongst themselves, but also with all other countries of the world. Secondly, even assuming that ACP countries members of an EPA agree to automatically extend to their sub-regional neighbours their commitments with the EU, the depth of integration at the ACP level will still be the same as that to be reached for an EPA with the EU, which as argued earlier is akin to an FTA rather than a CU. This will put the ACP sub-regional RTA in a difficulty at the WTO as it is required to satisfy the requirements of a CU before its members could conclude an EPA as a group rather than as individual countries.

3. EPAs AS WTO-COMPATIBLE FTAs & THE PRINCIPLE OF SPECIAL & DIFFERENTIAL TREATMENT

3.1 Background

The preceding analysis has shown that in as long as both the EU and the ACP are committed to negotiate WTO-compatible EPAs, the current state of WTO law demands that EPAs satisfy the requirements of GATT Article XXIV on FTAs. This will initially take the form of interim agreements leading to the formation of FTAs as envisaged under GATT Article XXIV:5, in which case the parties are required to "include a plan and schedule for the formation of … such a free-trade area within a reasonable length of time." (Art. XXIV:5(c)) The Cotonou agreement and subsequent negotiating documents promise that the EPAs will become WTO-compatible RTAs while still maintaining special and differential treatment for the benefit of the ACP countries. This creates tension between the commitment to reciprocity implicit in the commitment to WTO compatibility, on the one hand, and the desire for asymmetry on the other.

3.2 Reciprocity v. the Desire for Asymmetry

The principle of asymmetry in this context implies giving ACP countries more rights than corresponding obligations undertaken by them. Article 37.7 of the Cotonou Agreement provides that negotiations will be "as flexible as possible in establishing the duration of a sufficient transitional period, the final product coverage, taking into account sensitive sectors, and the degree of asymmetry in terms of timetable for tariff dismantlement, while remaining in conformity with WTO rules then prevailing." The 2003 joint report of the all-ACP-EU phase of the EPA negotiations further confirmed that "flexibility would be provided in the EPAs, and asymmetry in favour of the ACP would be granted both in terms of product coverage and transition periods."[42] On that basis, ACP countries expect the principle of special and differential treatment to be reflected in the EPAs in terms of (1) the length of transition period and timetable for tariff dismantlement, and (2) product coverage.

3.2.1 Asymmetry and the Transition Period: "reasonable length of time"

While it is certain that EPAs will be phased in over an agreed period of time,[43] we cannot say at this stage whether they will be presented to the WTO as FTAs or as interim agreements leading to the formation of FTAs. EU experience in this respect is also rather mixed. For example, the 1982 *Mediterranean Citrus* case under the GATT shows that the specific treaties at issue in that case were presented to the GATT by the EC and its partners "as interim agreements leading to the formation of a customs union under Article XXIV (Cyprus, Malta and Turkey), as interim agreements leading to the formation of a free-trade area under Article XXIV (Israel and Spain), or as agreements comprising a free-trade area obligation on the part of the EC under Article XXIV but no reciprocal commitments by the other parties consonant with Part IV (Algeria,

[42] See *First Joint Report*, para 6.

[43] Article 37:7 provides that EPA negotiations "shall aim notably at establishing the timetable for the progressive removal of barriers to trade between the Parties, in accordance with the relevant WTO rules."

Egypt, Jordan, Lebanon, Morocco and Tunisia)."[44] It is thus impossible to tell whether the EPAs will be presented as interim agreements or as full-fledged FTAs. It looks fairly certain, however, that there will be a transition period of some sort – not only is it promised by Cotonou and taken for granted by the negotiators, this has also been the dominant practice in the negotiation of RTAs worldwide regardless of whether they are interim agreements. Indeed, GATT/WTO history shows that although most RTAs are implemented in stages, i.e. over a certain length of transition period, "very few have expressly been notified as 'interim agreements'."

In the event that EPAs are presented as interim agreements leading to the formation of FTAs, they will need to be accompanied with "a plan and schedule for the formation of … a free-trade area within a reasonable length of time." According to the 1994 Understanding on the interpretation of GATT Article XXIV, the term 'reasonable length of time' should generally mean a maximum of 10 years and any period longer than that will be allowed only in "exceptional cases" and upon full explanation. The requirement for a "plan and schedule" is then intended to provide detailed information about the different stages through which tariffs and other restrictions would be dismantled so as to establish a full-fledged FTA at the end of a given transition period.

Application of the asymmetry principle to the length of transition period would come in the form of EPA obligations taking longer phase in periods for the ACP countries while giving effect to them either immediately or after a shorter phase in period for the EU. The experience so far also confirms this approach. In the EU-South Africa TDCA, for example, the general transition period was 10 years for the EU and 12 years for South Africa.[45] The ACP countries are already making an effort in the Doha negotiations at the WTO to inject further flexibility into the definition of "reasonable length of time" provided by the Uruguay Round Understanding. The latest submission by the ACP Group of States within the WTO argues that the maximum length of the transition period "should be determined in such a manner that is consistent with the trade, development and financial situation of developing countries, but in any case not less than 18 years."[46] While suggesting a 'not-less-than' methodology for a maximum permissible period might sound unusual, it probably indicates the high degree of importance the ACP Group attaches to the matter. However, there are at least two reasons to expect that the EU will press for a 12-year maximum.

Firstly, there is already a recent 'precedent' in the form of the TDCA which, although often publicly rejected by both the EU and the ACP as an inappropriate model, will be invoked by the EU to press its case in that direction. The EU has also agreed a 12 year transition period in its 2000 agreement with Morocco. Secondly, a look at the final provisions of the Cotonou Agreement reveals that it is an agreement concluded for a 20-year period, starting from the year 2000.[47] The same Agreement requires that EPAs should be concluded by end of 2007 so they would enter into force by 1st January 2008.[48] This leaves only 12 years between the entry into force of the EPAs and the end date of the Cotonou Agreement. These dates could not have been fixed with so much detail without good reason. It is also notable that the TDCA with South Africa entered into force on 1 January 2000 while the Cotonou Agreement started its life a month later. It thus appears probable that the EU will resist any ACP proposal, whether at the WTO or in the EPA negotiations, for a transition period longer than 12 years.

3.2.2 Asymmetry and Product Coverage: "substantially all the trade"

More important than the length of transition period for the ACP countries in respect of EPAs is that of product coverage. On the face of it, Article XXIV:8(b) on the internal liberalization aspect of FTAs requires that duties and other restrictive regulations of commerce be eliminated on "substantially all the trade" between the constituent territories in products originating in such territories. This concept limits the scope of applicability of the asymmetry principle but it is also one of the most contentious concepts in GATT/WTO law.

In practice, and particularly in cases of RTAs negotiated between developed and developing countries, asymmetries have traditionally been reflected in the form of shallower liberalization

[44] See *Mediterranean Citrus,* para. 2.10.
[45] See WTO/REG/W/46, Annex 1, p. 22; and Annex 5, p. 36
[46] See TN/RL/W/155, 28 April 2004, para. 10(ii)
[47] See Article 95:1 of the Cotonou Agreement: "This Agreement is hereby concluded for a period of twenty years, commencing on 1 March 2000."
[48] See Art. 37:1 of the Cotonou Agreement

in terms of product coverage and level of reduction/elimination of trade barriers by developing than by developed countries. For example, the 1997 agreement between the EU and Tunisia resulted in 100 per cent of EU industrial imports from Tunisia duty free, 5 % of agricultural imports at MFN duty rates, 24 % at reduced duty rates, and 71 % duty free. On the other hand, 99 per cent of industrial imports from the EU would enter Tunisia duty free, 1 per cent at MFN duty level; 62 per cent of agricultural imports from the EU at MFN rates, 38 per cent at reduced duties while none is allowed duty free.[49]

More recently, the EU – South Africa TDCA defines "substantially all the trade" to mean at least 90% of all the trade between two entities. As noted earlier, this 90 percent threshold is made up of commitments to liberalize about 94 per cent by value of EU imports from South Africa and about 86 per cent by value of South African imports from the EU. Needless to say, many argue that 90% is too high, while still others think it is too low. Nonetheless, the EU is currently presenting this 90 per cent threshold as "the WTO criterion" for the "substantially all the trade" requirement. This indicates that, just like the argument earlier about the length of transition period, the EU is likely to stick to its own tradition and insist on a 90 per cent standard. No agreement was reached during the all-ACP-EU phase of the negotiations on this issue and still remains open, presumably due to an ACP objection. The likelihood is that this threshold will be negotiated at regional level. While there is nothing wrong in this, the ACP fear, with good reason, that negotiations with the EU at regional or country level only further diminish their bargaining power and that the EU might proceed with a "willing" region or country, rubberstamp its desired terms of arrangement and stick to them as a sort of blue print to which everybody else must subscribe. Only time will tell whether this is a well-founded concern.

Be that as it may, assuming a 90 per cent threshold is accepted just for purposes of discussion here, a commitment to this effect could be arrived at in several ways – such as equal 90 per cent liberalization on each side or a lower level on one side compensated for by a higher commitment from the other side. In the present context, it is already a fact that well over 90 per cent of ACP products enter the EU free of duties, and the negotiations in this respect will be largely about the percentage of EU trade that should get free access to the ACP partners in an EPA. Accordingly, while the EU and the ACP regions and/or countries will have the flexibility to incorporate asymmetry only in respect of the 10 per cent overall margin, the ACP countries could still negotiate for application of the asymmetry principle to their benefit in two senses: (1) the 90 per cent threshold could be achieved by a liberalization of just 80 per cent on their part and 100 per cent on the part of the EU or any combination of figures between those two; and (2) the 20 per cent or so margin that is left for them could be used to restrict the importation of EU goods of utmost sensitivity to ACP domestic economies. It is submitted, however, that given EU sensitivity particularly in the agricultural sector, this could turn out to be more of a wish list rather than a realistic expectation.

3.3 EPAs and S&D: the Way Forward

The discussion in this section has demonstrated that neither GATT Article XXIV nor the Enabling Clause has any room for a meaningful application of the principle of special and differential treatment in the context of EPAs. Some of the possible approaches suggested above are drawn from state practice over the past decades rather than any clear legal authority. Now that the dispute settlement system has an unquestioned power to rule on the legality of any measures introduced in the context of RTAs, any of these practical arrangements are in principle vulnerable to challenge. The only way to achieve EPAs that are both WTO compatible and asymmetrical in favour of the ACP countries or regions parties to those EPAs may thus be through a modification of the rules of GATT Article XXIV and the Enabling Clause. We will argue that Article V of the GATS provides an existing model for any such amendment. We shall also see that this is the line currently being pursued by the ACP Group within the WTO.

[49] See WTO/REG/W/46, Annex 1, p. 22

4. EPAs & AGRICULTURE

4.1 General

Just as under the multilateral trading system of the WTO, agriculture is also an exception under the RTAs. Most FTAs and CUs since the early days treated agriculture as an exception – either subjecting it to a special regime within the RTAs (e.g. the Treaty of Rome that set up the EEC) or even excluding the sector from intra-RTA liberalization completely (e.g. the Stockholm Treaty which set up EFTA).[50] As a WTO Secretariat survey observed, for many agreements, the strategy used for granting concessions on industrial and agricultural products is different. For industrial products, most, if not all, RTA parties grant concessions on the basis of a negative list, i.e. they start out with the goal of full product coverage and remove or give extended transition periods to their most sensitive products. In contrast, many countries use a positive list approach to grant concessions in agriculture, i.e. concessions are granted only on certain traded products, excluding the rest.[51] The study concluded that the product coverage of agriculture is considerably less than that of industrial products, both in terms of import share and duty-free tariff lines. Indeed, traditionally, RTAs were primarily concerned with free trade in industrial products and it is only the modern RTAs that include agricultural concessions. Even then, only a small minority of RTAs offer duty-free treatment on both industrial and agricultural goods, while the majority offer duty-free (or near duty-free) treatment on industrial goods and duty reductions on selected agricultural goods.[52]

Whenever agriculture is excluded from the intra-FTA liberalization process completely – but also when it is subjected to a lower level of liberalization – the question has always been whether any such FTA satisfies the GATT Article XXIV:8(b) requirement that "duties and other restrictive regulations of commerce" be eliminated on "substantially all the trade between the constituent territories in products originating in such territories." This was exactly the question that was presented to the EFTA countries when they submitted the Stockholm Convention to GATT in 1960. The EFTA members argued that "substantially all" trade did not mean "all" trade and "if one examined the statistics, it appeared that ninety per cent of all trade would be freed from restrictions."[53] Those on the opposite side replied that "whatever the statistics might reveal, the exclusion of an entire sector, particularly one as important as agriculture, indicated that the elimination of restrictions had not been extended to 'substantially all' trade."[54] It is in response to such developments that the qualitative approach to the question of "substantially all trade" was developed. According to this approach, no matter what the percentage level of trade liberalized between any two or more countries members of an RTA, they will not be considered to have liberalized "substantially all the trade" as long as an entire sector such as agriculture is excluded from liberalization.

The issue of agriculture becomes even more important in the current EPA negotiations for three main reasons: firstly, the Lomé agreements as well as Cotonou already provide duty free access to the EU market for virtually all industrial products originating from the ACP countries and, from the perspective of ACP countries, the current negotiations are largely about securing additional market access for their agricultural products. Secondly, even if the EPA negotiations result in the reduction or elimination of all tariffs on ACP agricultural exports, the probability of many ACP countries successfully exploiting any such opportunity is rather minimal due largely to poor supply capacity on their part and high sanitary and phytosanitary (SPS) standards applying in the EU. Finally, given that the commodity protocols – particularly those on beef/veal and sugar – still play a crucial role in the economies of many of the beneficiary ACP countries, any moves towards reciprocal EPAs is likely to adversely affect the interests of those countries. These will be discussed in turn.

4.2 EPA Negotiations and Market Access for ACP Agricultural Products

As noted earlier, the Lomé arrangements have always provided duty-free market access for ACP industrial products while the arrangements for agriculture have been less generous and more complicated. In the case of agriculture, there has been a combination of duty-free access for some products, less-than-MFN duties for others, and access to EU guaranteed prices for fixed quantities of few

[50] See Dam, p. 654
[51] WT/REGW/46, para. 44, pp. 12-13
[52] See WT/REGW/46, para. 46, p.14
[53] Dam, p. 654
[54] Dam, p. 654

other products (beef/veal and sugar under the protocols). As noted, the benefits of ACP agricultural exporters in many of these areas are being eroded for various reasons, including reduction and/or elimination of EU MFN tariffs at the multilateral level, and reform of EU domestic support schemes particularly in products subject to commodity protocols in the Cotonou Agreement. Consequently, to the extent the EPA negotiations go outside their primary focus on dismantling ACP trade barriers to EU products, improved ACP agricultural market access will be the priority. Indeed, that is precisely what they mean when the ACPs propose for the extension of the EBA initiative to all ACP countries under the EPAs.

However, the experience so far is not that encouraging. A WTO Secretariat study shows that of the seven EU trade agreements with developing countries included in its study (with Israel, Jordan, Syria, Algeria, Morocco, Tunisia and South Africa), the share of EU duty-free agricultural tariff lines ranges between 24 per cent for Syria and 68 per cent for Morocco, while the comparable figures for industrial products stand at 100 per cent for all countries except South Africa.[55] While it is not possible to conclude from this that the EU will treat ACP countries the same way as it has treated the economically better off countries included in this list, the notorious EU sensitivities in the area of agriculture will mean that ACP negotiators face a huge challenge in front of them in this area. Moreover, even assuming that the EU will agree to duty-free access for ACP agricultural products under EPAs, the most difficult obstacle to ACP agricultural exports comes from the high EU health and safety standards in place particularly in the agricultural sector.

4.3 EPAs and Health and Technical Standards

A lot has been said about the chronic problem of agricultural protectionism particularly in the developed world. The patently illegal quantitative restrictions on agricultural products that prevailed in the GATT era have come to an end thanks to the Uruguay Round Agriculture Agreement; but that does not mean agricultural trade is free today. It only means that those non-tariff barriers have been replaced by tariffs.

For agricultural products coming to the EU from ACP countries, tariffs are not the main problem, as the ACP countries benefit from duty-free market access for most of their products under the *Lome acquis*. Rather, it is the EU's high technical, sanitary and phytosanitary standards that cause the real problem. These measures generally have protection of human, animal and plant health and safety as their primary objective. As such, they are fully legitimate instruments under the WTO legal system.

The WTO recognizes that countries have an unquestionable right to adopt measures necessary for the protection of animal and plant health and life. However, there is also the equally legitimate fear that protection of health and life could serve as a smokescreen to cover otherwise illegal protectionist measures. To overcome this, the WTO requires that all SPS measures must be based on a risk assessment and have a scientific justification – science is thus given the role of the final arbiter to decide the genuine health measures from the trade protectionist ones. We have seen from experience and several WTO cases, such as the famous *Beef Hormones* dispute between the US and Canada on the one hand and the EU on the other, that this is a very complex area which requires enormous investment in scientific and technological infrastructure – normally in rare supply in most ACP countries.

Developing countries campaigned for, and won, preferential treatment in terms of lower or zero tariffs and other non-tariff barriers for their products; they cannot think of similar arrangements regarding sensitive health standards. Once the standards are in place, the only options are either to meet those standards and export accordingly or drop the idea of exporting altogether. At the end of the day, no consumer would buy anything agricultural that does not conform to prevailing standards. The most that has been achieved so far at the WTO level in this respect is a promise of technical assistance to those countries that do not have the necessary scientific and technical infrastructure to be able to comply with those standards.

The role of SPS issues in EPA negotiations is far from clear. What is clear is that the ACP countries can neither fear, nor expect to benefit from, any SPS regime resulting from the EPA negotiations. The moment any EPA provision imposes a more stringent requirement than what the EU applies at an MFN level, there is technically a violation of Art. XXIV:4 – a provision which was given a prominent place by the AB in Turkey Textiles. This provision

[55] See WT/REG/W/46, Annex 2, p. 24

goes: "The contracting parties recognize the desirability of increasing freedom of trade by the development, through voluntary agreements, of closer integration between the economies of the countries parties to such agreements. They also recognize that the purpose of a customs union or of a free-trade area should be to facilitate trade between the constituent territories and not to raise barriers to the trade of other contracting parties with such territories." The AB has said in this connection that "Paragraph 4 … sets forth the overriding and pervasive purpose for Article XXIV which is manifested in operative language in the specific obligations that are found elsewhere in Article XXIV. Thus, the purpose set forth in paragraph 4 informs the other relevant paragraphs of Article XXIV, including the chapeau of paragraph 5. For this reason, the chapeau of paragraph 5, and the conditions set forth therein for establishing the availability of a defence under Article XXIV, must be interpreted in the light of the purpose of customs unions set forth in paragraph 4."[56] To the extent any EPA provision provides for a higher-than-MFN SPS standard between the parties, this "overriding and purposive purpose of Article XXIV" will be missed by a wide mark and the resulting RTA cannot be considered compatible with the WTO requirements.

On the other hand, the ACP countries cannot expect 'preferential treatment' in SPS standards applied by the EU. This is because, by definition, an SPS standard has to be necessary for the protection of human, animal or plant life or health. If the EU accepts lesser standards on goods from the ACP countries than that it requires of others in similar circumstances (e.g. geographically, etc.), then the necessity of the measure will be in doubt and possibly a case could be made for arbitrary discrimination since arbitrariness here would have to be interpreted in the context of the prevalence or otherwise of risk in goods coming from any two countries.

Having said that, there are rooms to incorporate other forms of "preferences" in the EPAs, such as targeted assistance, organizing pre-shipment inspection facilities at the exit points in the ACP countries (e.g. at the air or sea ports), and so on. The ACP countries recognize that lack of scientific and technical know-how is the single most important obstacle standing against their exports. To the extent that they lack the capacity to produce exportable goods in acceptable standards and in commercial quantities, the value of any concessions in the EPA negotiations will be marginal. Developing pertinent scientific and technical capacity, through the building of appropriate institutions, will be an important step in that direction.

4.4 EPAs and the Commodity Protocols

Commodity protocols are one of the unique features of EU-ACP cooperation in trade matters. Applying historically to four products – banana, rum, sugar, and beef/veal – the protocols have been annexed to the Lomé conventions and provided duty-free (except on beef/veal) access to fixed quantities of the products under a tariff quota scheme, in some cases providing further access to guaranteed minimum prices (beef and sugar) similar to those applying to EU products. The protocols have been an important source of export revenue for many ACP countries.

However, the value of these protocols has diminished over time for many, often extraneous, reasons. The WTO system has contributed its share in two forms – the successful challenge to the banana protocol and the pending challenge to the sugar regime before the WTO's dispute settlement system, and the erosion of preferential margins with progressive reduction in MFN tariff levels. Internal CAP reform in the form of reduction of intervention prices (e.g. beef/veal) is also playing its part. Protocols 3, 4 and 5 on sugar, beef/veal and bananas respectively annexed to the Cotonou Agreement contain the remnants of these commodity-specific arrangements.

The potential impact of the EPA negotiations on these commodity protocols is as yet unclear. Nor does the Cotonou Agreement provide much guidance in this respect. Article 36:4 of the Cotonou Agreement simply reaffirms the importance of the commodity protocols and declares an agreement "on the need to review them in the context of the new trading arrangements, in particular as regards their compatibility with WTO rules, with a view to safeguarding the benefits derived therefrom, bearing in mind the special legal status of the Sugar Protocol." Compatibility of the protocols with WTO parameters thus appears to be the main objective of the EPA negotiations in this respect. This could mean significant changes to the way the protocols work.

Firstly, we know that the banana regime has been found to be in violation of WTO requirements, thereby setting dangerous

[56] *Turkey Textiles*, AB report, para. 57

precedent for similar measures under the other protocols. Secondly, the sugar regime is already under attack and the treatment of ACP sugar forms an important part of the challenge. Thirdly, if the current negotiations succeed in establishing EPAs made up of two RTAs (the EU on the one hand and ACP sub-regional RTAs on the other), the current protocol beneficiary countries will find themselves effectively swallowed up by their respective sub-regional RTAs. Considering our earlier argument that those ACP sub-regional RTAs will have to be CUs before signing an EPA as RTAs, the dismantling of internal borders which this sub-regional process will entail might mean that the country-specific benefits from the commodity protocols will be automatically available to all members of those RTAs. This not only has the potential to kill the protocols as we know them, it also creates another disincentive against closer integration of ACP countries at the sub-regional level.

5. CONCLUSION: RECONCILING EPAs WITH SPECIAL & DIFFERENTIAL TREATMENT UNDER THE WTO

This study has shown that the commitment to establish WTO-compatible EPAs can be achieved only at the cost of the ACP countries sacrificing several of their rights to special and differential treatment within the WTO. The options vary from waivers, to ACP countries accepting preferences on GSP terms, to renegotiation of GATT Article XXIV to incorporate special and differential treatment in north-south RTAs.

Waivers?

One route to achieve new "reciprocal" arrangements under the EPAs while still maintaining a degree of asymmetry in favour of the ACP countries would be by seeking a new waiver under Article IX of the WTO Agreement. Indeed, there are also possibilities under Article XXIV:10 for an RTA to be approved by the WTO even if it does not fully satisfy the requirements of an FTA. This will however immediately go outside the Cotonou commitment "to conclude new WTO-compatible trading arrangements".[57] This leaves only two other ways to achieve this – making any benefits available to non-ACP countries under the GSP scheme or amending GATT Article XXIV.

The GSP Option

The first possible way is by extending those preferential terms of access to all other developing countries under the GSP system. The effect will however not be the same as the previous system since this extension to all other developing countries will automatically imply a loss of competitive advantage for the ACP countries formerly benefiting from exclusive preferential terms of market access. The moment these benefits are extended to other developing countries, the special competitive advantage enjoyed by the former ACPs will be gone.

It is notable, however, that the reach of this hurdle has been tempered down by the new AB ruling in the *EU GSP* case which in effect allowed the EU to differentiate among developing countries on objective and open-ended grounds. Paragraph 3(c) of the Enabling Clause provides that special and differential treatment of developing countries by developed countries "shall … be designed and, if necessary, modified, to respond positively to the development, financial and trade needs of developing countries." Interpreting this provision, the AB ruled: "we read paragraph 3(c) as authorizing preference-granting countries to 'respond positively' to 'needs' that are *not* necessarily common or shared by all developing countries. Responding to the 'needs of developing countries' may thus entail treating different developing-country beneficiaries differently."[58] The AB then concluded: "the term 'non-discriminatory' in footnote 3 does not prohibit developed-country Members from granting different tariffs to products originating in different GSP beneficiaries, provided that such differential tariff treatment meets the remaining conditions in the Enabling Clause. In granting such differential tariff treatment, however, preference-granting countries are required, by virtue of the term 'non-discriminatory', to ensure that identical treatment is available to all similarly-situated GSP beneficiaries, that is, to all GSP beneficiaries that have the 'development, financial and trade needs' to which the treatment in question is intended to respond."[59]
At its most bizarre extreme, one might wonder whether the special relationship between these

[57] See Cotonou Art. 36:1

[58] *EU GSP,* AB Report, para. 162
[59] *EU GSP,* AB Report, para. 173.

two blocs over the past several decades which had to end due to a WTO-compliance requirement, itself a product of direct and indirect pressure from the WTO legal system as evidenced in the Bananas disputes as well as the pending Sugar case, has created special "development, financial and trade needs" which have to be responded to positively as required by paragraph 3:(c) of the Enabling Clause. Another and perhaps a more feasible way would be to use economic factors, such as GDP, as conditions on which a beneficiary status depends and to define those conditions in such a way as to include as many of the ACPs as possible while also excluding as many of the non-ACPs. While this seems to be legally permissible, it will also certainly be a difficult one to sell at the political level. Indeed it will also risk re-igniting old divisions within the ACP itself based on each country's place on any such economic scale. As such, the GSP option does not seem to be that attractive in practice.

Revision of Article XXIV as an Option

The second way to do this is to amend GATT Article XXIV such that it would allow for non-reciprocal preferential arrangements in respect of a given portion of the trade between members of RTAs, such as by way of inserting a special and differential treatment exception in that article. One may wonder whether this would not fall foul of the Cotonou commitment to conclude WTO-compatible arrangement. However, the WTO-compatibility of any EPA will be judged according to the WTO law that exists at the time the EPAs enter into force. Accordingly, any successful move to modify existing WTO law in the meantime so as to bring it closer to recognizing preferential terms of access and diminished level of reciprocity between partners to a north-south RTA will have the same effect on the WTO-compatibility of an EPA as any successful move to bring an EPA closer to full reciprocity. The only outstanding question is whether this is achievable within the WTO.

The EU and the ACP seem to be pursuing this option with some degree of co-ordination in the context of the on-going Doha round of trade negotiations. Article 37:8 of the Cotonou Agreement mandated that "The Parties shall closely cooperate and collaborate in the WTO with a view to defending the arrangements reached, in particular with regard to the degree of flexibility available." And when the Doha Development Agenda (DDA) was launched in the following year, paragraph 29 of the Doha Declaration provided for "negotiations aimed at clarifying and improving disciplines and procedures under the existing WTO provisions applying to regional trade agreements." Most importantly, the Declaration stressed that the negotiations on RTAs "shall take into account the developmental aspects of regional trade agreements."[60] Finally, the first Joint Report provided that "EPAs must be compatible with WTO rules then prevailing and will need to take account of the evolutionary nature of relevant WTO rules, in particular in the context of the Doha Development Agenda. Both sides agreed to co-operate closely in the context of the WTO with a view to defending the arrangements reached, in particular with regard to the degree of flexibility then available."[61] There is thus evidence of a good deal of public commitment by both the EU and the ACP Group to coordinate positions at the WTO. Needless to say, a joint ACP-EU bloc within the WTO has, in theory, the potential to be a formidable negotiating force representing well over one-half of the entire WTO membership. In practice, however, the positions being pursued by the EU and the ACP Group in respect of RTAs are at variance.

In a submission to the WTO Negotiating Group on Rules, the ACP Group of States within the WTO stressed the Doha commitment to "take into account the developmental aspects of regional trade agreements" and argued that "the negotiations on WTO rules on RTAs shall explicitly provide the necessary differential and more favourable [treatment] to developing countries' parties to RTAs with developed countries."[62] Acknowledging that the current version of GATT Article XXIV does not have room for special and differential treatment for north-south RTAs, the ACP Group has proposed to insert the following text in GATT Article XXIV: "Members agree that S&D treatment for developing countries be formally and explicitly made available to developing countries in meeting criteria set out in paragraphs 5 to 8 of GATT Article XXIV in the context of regional agreements entered into between developing and developed countries."[63] This in effect is a proposal to allow a certain degree of asymmetry in the

[60] See WTO Ministerial Declaration Adopted on 14 November 2001 (WT/MIN(01)/DEC/1, 20 November 2001, para 29, emphasis added

[61] Joint Report, para. 4(a)(iv), p. 3

[62] See Negotiating Group on Rules, Submission on Regional Trade Agreements, Paper by the ACP Group of States (TN/RL/W/155, 28 April 2004), para. 4

[63] See ACP Group proposal, para 10

trade relationship between developed and developing members of an RTA so that developing country members would become parties to RTAS and satisfy the requirements of GATT Article XXIV while opening their markets to a lesser degree than what would be expected of a developed country member of the same RTA. Recognition of asymmetry in the degree of intra-RTA liberalization is thus at the heart of this ACP proposal.

The EU has also made proposals on RTAs and their development dimension to the WTO Negotiating Group on Rules. While stressing the positive role of regional integration for economic development, the EU argues that "flexibilities [are] already provided for within the existing framework of WTO rules" and that the current negotiations should "involve further consideration of the relationship between GATT Article XXIV and the Enabling Clause, as well as an examination of the extent to which WTO rules already take into account discrepancies in development levels between RTA parties."[64] The EU further argued:

"The economic logic of regional integration indicates that all parties to such agreements should pursue a high level of reciprocal market opening and regulatory harmonisation or convergence while also pursuing an open approach to trade policy with third countries within the multilateral framework if they are to achieve the full potential benefits. This is as true for agreements among developing countries as it is for agreements between developing and developed countries or among developed countries alone. At the same time, it is important to recognise that the ability of many developing countries to adjust to greater competition on their domestic markets or take full advantage of additional market access opportunities can be constrained by their own individual level of development. This points to the need to examine, inter alia, the flexibilities available during the transitional or implementation period of RTAs, taking into account the needs of developing countries in a properly focused and appropriate manner so as to support their greater integration into the multilateral trading system. Aspects in respect of which such flexibilities might be appropriate include the length of the transitional period, the level of final trade coverage and the degree of asymmetry in terms of timetables for tariff reduction and elimination."[65]

At first sight, this paragraph sounds to be similar to the ACP Group proposal mentioned earlier; however, a closer reading reveals that the EU does not go as far as proposing the introduction of a special and differential treatment provision within GATT Article XXIV. Indeed, the only reference to an asymmetrical relationship relates to the "timetables for tariff reduction and elimination" and not to the level of tariff reduction and elimination itself. It is interesting to note here that this cautious use of the word "asymmetry" by the EU to refer only to the timetable for, rather than the degree of, trade liberalization finds its root in Article 37:7 of the Cotonou Agreement. This hortatory language is in line with the language of most provisions of the Cotonou Agreement on the subject of special and differential treatment, such as Articles 34:4, and 35:3. The first Joint Report also confirms this by using the term "should", rather than "shall", as follows: "special and differential treatment should be provided to all ACP States, and in particular to LDCs and vulnerable small, landlocked and island countries."[66] This indicates that the chances of inserting a special and differential treatment provision similar to that in Article V of the GATS are probably not that high.

Lessons from GATT/WTO Practice

Finally, it is worth reminding that both the EC as well as the ACP countries have argued on several occasions in the past that the non-reciprocal Lomé agreements themselves were in full compliance with these same GATT/WTO rules. The lesson from this is very simple – whatever the substantive content of the future EPAs, their compatibility with WTO law standards will always be contested by some and defended by others and most probably end up in a deadlock at the political (CRTA) level. As the Turkey Textiles panel rightly observed, "In the history of GATT, except in the case of the 1994 customs union between the Czech Republic and the Slovak Republic, the CONTRACTING PARTIES were never able to conclude whether or not a regional trade agreement was fully compatible with GATT. Today, under the WTO, Members have yet to conclude that a regional trade agreement is in full compliance with the WTO Agreement. In short, virtually all working party reports on regional trade agreements have

[64] See Negotiating Group on Rules, Submission on Regional Trade Agreements by the European Communities and their Member States (TN/RL/W/14, 9 July 2002), p. 3

[65] Id

[66] Joint Report, para. 4(a)(v), p. 3

been inconclusive."[67] Yet, to the extent that the WTO's dispute settlement system remains operational – and its competence over issues of compliance of national measures with relevant GATT rules on RTAs has been irrefutably established – the EU and the ACP countries could ignore the legal framework set by the WTO on RTAs only at their own peril.

[67] See *Turkey Textiles,* panel report, para. 9.107