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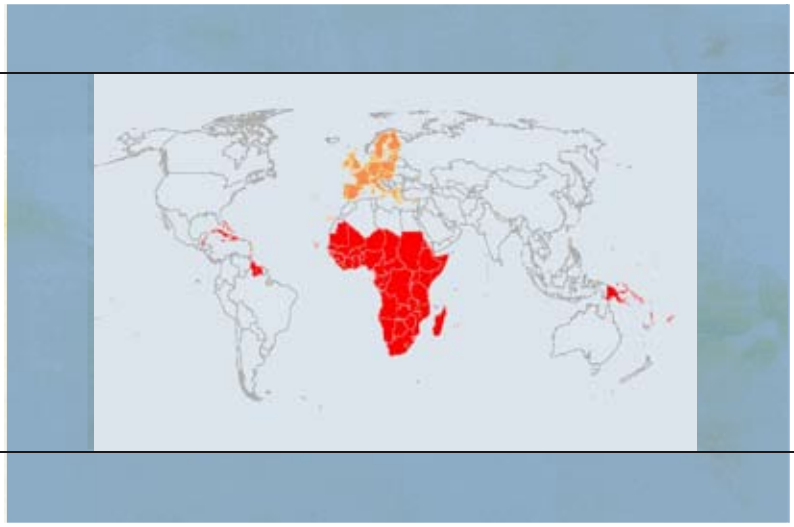
The agricultural dimension of the ACP-EU Economic Partnership Agreements



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The agricultural dimension of the ACP-EU Economic Partnership Agreements

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Commodities and Trade Division

FOOD AND AGRICULTURE ORGANIZATION OF THE UNITED NATIONS
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Contents

List of tables

List of figures

Foreword

Overview

The African, Caribbean and Pacific (ACP) countries are facing several major sets of closely interlinked forces that are likely to have significant impacts on the development of their agriculture (including fisheries) sectors and their food security situations. The possible conclusion and outcome of both the negotiations for Economic Partnership Agreements (EPAs) under the Cotonou Agreement (with the European Union (EU)) and the World Trade Organization (WTO) Doha Round pose serious concerns on the future of their agricultural trade and development. Furthermore, the ongoing Common Agricultural Policy (CAP) reform which will determine the nature of EU agriculture over the next few years, and the process of EU enlargement have also created additional challenges for ACP States as to how to address these multi-faceted forces so as to reap the maximum benefits for their mostly agrarian economies.

This study is one of the outputs of a programme of assistance provided by FAO to the ACP Secretariat and member states in preparing for the detailed phase of negotiations on Economic Partnership Agreements (EPAs) with the EU. It provides an introduction to some of the most critical aspects of the agriculture and fisheries negotiations including feasible approaches and options for the ACP to ensure that their agricultural and fisheries sectors reap maximum and sustained benefits with a view toward enhancing their food security situation.

The report consists of seven chapters. The first chapter presents an introduction to the ACP, its negotiating groups and the importance of the agricultural sector. It emphasises the dependency on primary exports with low income elasticity and high price volatility, high production variability and relatively low yields. It identifies the major issues that would need to be addressed to ensure that as global agriculture markets become further integrated, ACP agriculture does not become uncompetitive and marginalized. It also provides a summary on the status of EPA negotiations.

Chapter 2 examines issues of compatibility between the EPAs and the WTO, including the implications for ACP-EU trade relations. It presents detailed assessments of the options for the EPAs, the requirements and implications for the ACP of the "substantially all of the trade" clause in GATT Article XXIV, the pros and cons under the WTO legal system of having EPAs as custom unions or free trade areas, the link with the Enabling Clause, issues related to asymmetry, reciprocity and the transition period. It also assesses the possible impacts on specific products and the future of the commodity protocols for ACP agriculture under the EPAs. In Annex 2.1 to Chapter 2, the existing framework of legal instruments that regulate Intellectual Property Rights (IPRs) relating to agriculture of relevance to the EPAs is presented. Finally, options are suggested for ACP negotiators drawing on lessons from previous agreements negotiated by the EU and the positions taken in the Doha Round.

Chapter 3 examines the potential role of EPAs in supporting food security in ACP states. It assesses the current dynamic of ACP–EU trade, the effects that the preferences have had on the value chains associated with ACP exports and the extent to which this relationship may change in the coming years as a result of "preference erosion". It also examines challenges and options for the ACP in meeting new and emerging EU Sanitary and Phytosanitary Standards (SPS). In this way it complements the parallel chapters on the effects of the CAP reform and EU enlargement on the ACP, the WTO interface with the ACP–EU relationship and on the challenges facing the ACP in the effective management of their fisheries resources. Finally it presents options for the ACP drawing on lessons from the EU-South Africa Trade and Development Cooperation Agreement (TDCA) and the EU-Chile trade agreement.

Chapter 4 describes the background to the recent CAP reforms and the implications that these reforms will have for ACP states. These reforms are relevant to the EPA negotiations because they affect the value of the preferential access, which the ACP states are trying to safeguard through EPA agreements. Also, drawing on results from impact analysis, it examines the commodity sectors that are likely to be affected by the CAP and the implications for the relevant ACP states.

In Chapter 5 the issue of EU enlargement and how this process is likely to impact on ACP agriculture is evaluated. The chapter provides an assessment of possible agricultural trade policy and other changes that are likely from the recent accession of the ten new member states to the EU. It

examines the channels and mechanisms by which third countries, including ACP countries, might be affected by these changes, focusing mainly on their trade flows.

Chapter 6 focuses on the fisheries sector. It examines challenges and options to the ACP in both the WTO fisheries negotiations and the Fisheries Partnership Agreement between the ACP and EU.

The final chapter (Chapter 7) evaluates the shortcomings in the EC's negotiating objectives as set out in its mandate and assesses the implication for ACP agriculture using an illustrative scenario based on the assumption that its terms are no more onerous than is the South Africa–EU TDCA. It further extends and assesses options of how issues in the WTO relevant to food security could be made more development friendly. Finally, it examines the issue of resource mobilization for agriculture and rural development in the ACP countries along with estimates of the amount of funds required to enhance agricultural productivity and food security in ACP states.

Summary of findings

The main findings and conclusions of the study are the following:

a) Current agriculture and livestock policy and strategies should be better integrated and reflected in the ongoing EPA Negotiations and by ACP countries in their other negotiating arenas, especially in the WTO Doha Round. It is essential to ensure that all these negotiations conclude agreements that further national objectives related to the agricultural sector.

b) ACP preferences will continue to be eroded - by WTO liberalization, Everything-but-Arms (EBA), CAP Reform, EU enlargement and EU Regional Trade Agreements (RTAs). However, beneficial preference opportunities still exist and ACP countries should negotiate with the goal of strengthening these, using them effectively and making them permanent in the context of EPAs.

c) The structure and patterns of trade are changing rapidly, influenced heavily by private sector investment and standards. ACP countries need to prepare at the national level to accommodate and adjust to these changes in order to expand their own trade. These regulations (SPS) and other private standards (traceability) point to the need for promotion of strategic alliances between firms of all sizes and increased cross border integration in order to be competitive and sell in premium markets.

d) Adjustment assistance is an accepted dimension of the ongoing negotiations and should be pursued by ACP countries jointly and in the context of specific products. Preference erosion will be different for different commodities, for instance, beef may be less negatively affected than rice.

e) An assessment of the impact of CAP reform on product markets indicates that sugar and rice will be by far the most negatively affected: *sugar* because of the significant price reduction (approximately 33 percent) and a sharp fall in production induced by a quota reduction; *rice* because of a 50 percent cut in the support price. One way of offering compensation on rice would be to remove the remaining (35 percent) duty on TRQ amounts and expand the size of the quota. On sugar, the accompanying measures, including both trade and development measures, should be fully agreed before completion of EPA negotiations, including how Least Development Countries' (LDC) EU EBA commitments will be accommodated.

f) The immediate impact of EU enlargement on ACP agricultural trade will be limited. Both changes in the basis of quota allocations and removal of the production incentive of coupled payments lead to this conclusion. However, ACP countries need to project how future production growth in each country can affect its market opportunities and negotiate access and assistance that will maintain stable conditions while facilitating change in their own countries.

g) Fish trade preferences are also being eroded but the major obstacles for ACP countries are the relatively more stringent food safety and quality requirements that their exports face. This underlines the need for continuous capacity-building and institutional strengthening in ACP countries in the area of fisheries production and marketing management. Assistance from, and cooperation with importing countries and international organizations will be needed.

h) ACP Small Island Developing States (SIDs) dependent on fish exports should consider placing greater emphasis on fresh and frozen products, where the market is growing, and away from the stagnant and/or falling demand for canned and cured products.

i) A waiver through Article IX of the WTO Agreement would not meet the Cotonou commitment "to conclude new WTO-compatible trading agreements." Also, extending the Generalized System

of Preferences (GSP) would not be an acceptable option because an extension to all other developing countries would automatically erode any benefit of preferences under an EPA framework. One option might be to try to define the uniqueness of the ACP relationship (history with the EU) and qualify the EPA under the current GSP as a programme only for the ACP.

j) Attaining WTO compatibility for EPAs seems most likely by amending Article XXIV, through introducing a Special and Differential Treatment (SDT) exception. This is being pursued in the WTO by both the ACP and EU, arguing that the Doha commitment should "take into account the development aspects of regional trade agreements". This would allow the asymmetry needed in an EU/ACP regional trade agreement. The ACP and the EU are a formidable block in the WTO and they should find greater commonality in their positions and pursue them jointly in the WTO before the completion of the Doha round to enable the compatibility of EPAs with WTO regulations.

k) The EU will require some liberalization by the ACP under EPAs. Therefore, a similar process as is being engaged in for Special Products in WTO framework should be completed for the EPA agreement. This should be detailed by tariff lines for each country in the regional grouping and treatment phased appropriately.

l) CAP reform will further diminish the value of preferences, and also reduce revenue to EU farmers. In the Cotonou Agreement the EU commits to maintain benefits enjoyed by ACP states relative to third countries. While EU farmer compensation is clear, this is far from the case with ACP producers. This commitment should be fulfilled as a part of the EPA negotiations.

m) Regional and sub-regional cooperation should also be encouraged in the field of fisheries management and in monitoring, control and surveillance. This element will take on a larger role in the future as funds paid by the EU for access to ACP fishing grounds will be increasingly directly allocated, at least in part, for this purpose in the Fishery Partnership Agreements (FPAs).

n) ACP coastal countries should assess and accordingly develop its capabilities in critical areas such as: research paying due attention to broader environmental concern, fishery monitoring, control and surveillance capacities, and management policies that include effective participation of stakeholders.

THE ACP STATES BY REGION AND ECONOMIC CLASSIFICATION

Least Developed Countries (LDCs)				**Non-LDCs**		
Africa (34)		**Caribbean (1)**	**Pacific (5)**	**Africa (15)**	**Caribbean (15)**	**Pacific (9)**
Angola	Liberia	Haiti	Kiribati	Botswana	Antigua and Barbuda	Fiji
Benin	Madagascar		Samoa**	Cameroon	Bahamas*	Papua New Guinea
Burkina Faso	Malawi		Solomon Islands**	Congo	Barbados	Tonga
Burundi	Mali		Tuvalu*	Côte d'Ivoire	Belize	+Marshall Islands*
Cape Verde*	Mauritania		Vanuatu**	Gabon	Cuba***	+Cook Islands*
Central African Republic	Mozambique			Ghana	Dominica	+FS of Micronesia*
Chad	Niger			Kenya	Dominican Republic	+Nauru*
Comoros*	Rwanda			Mauritius	Grenada	+Niue*
Democratic Republic of the Congo	Sao Tome and Principe**			Namibia	Guyana	+Palau*
Djibouti	Senegal			Nigeria	Jamaica	
Equatorial Guinea*	Sierra Leone			Seychelles**	Saint Kitts and Nevis	
Eritrea*	Somalia*			South Africa***	Saint Lucia	
Ethiopia**	Sudan**			Swaziland	Saint Vincent and the Grenadines	
Gambia	Togo			Zimbabwe	Suriname	
Guinea	Uganda				Trinidad and Tobago	
Guinea-Bissau	United Republic of Tanzania					
Lesotho	Zambia					

* Not a WTO member

** Observer status at WTO. Observers must start accession negotiations within five years of becoming observers.

*** Cuba is a Member of the ACP group but not part of the Cotonou Agreement

**** South Africa is formally joined the ACP group in April 1998. It dose not benefit from Lomé trade preferences. It has concluded a separate FTA with the EU. Under the WTO it is considered as a developed country.

\+ Joined the ACP group in June 2000.

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Abbreviations and acronyms

ACP	African, Caribbean and Pacific
AoA	Agreement on Agriculture
AP	Appellant Body
CAP	Common Agricultural Policy
CAR	Central African Republic
CARICOM	Caribbean Community and Common Market
CARIFORUM	Caribbean ACP States
CEC	Commission of the European Community
CEEC	Central and Eastern European country
CEMAC	Economic and Monetary Community of Central Africa
CET	Common external tariff
CN	Combined Nomenclature
COMESA	Common Market of Eastern and Southern Africa
COMEXT	Eurostat's Commerce extérieur intra- and extra-EU trade database
CRNM	Caribbean Regional Negotiating Machinery
CRTA	Committee on Regional Trade Agreements (WTO)
CU	Customs union
EAC	East African Community
EBA	Everything but Arms
EC	European Community
ECOWAS	Economic Community of West African States
EEC	European Economic Community
EEZ	Exclusive Economic Zone
EFTA	European Free Trade Association
EPA	Economic Partnership Agreement
ESA	Eastern and Southern Africa
EU	European Union
FAPRI	Food and Agricultural Policy Research Institute
FEOGA	European Agricultural Guidance and Guarantee Fund
FMD	Foot-and-mouth disease
FP	Financial perspective
FPA	Fishery Partnership Agreements
FTA	Free Trade Agreement
FTA	Free Trade Area
GATT	General Agreement on Tariffs and Trade
GATS	General Agreement on Trade in Services
GNI	Gross national income
GSP	Generalized System of Preferences
HS	Harmonized System
IDS	Institute of Development Studies
LDC	Least developed country
MFN	Most favoured nation
MRL	Minimum residue level
MTR	Mid-term review
NIS	Newly independent states

OECD	Organisation for Economic Co-operation and Development
Pacific Forum	Pacific ACP States
PSE	Producer subsidy equivalent
RoW	Rest of world
RTA	Regional Trade Agreement
SACU	Southern African Customs Union
SADC	Southern African Development Community
SDT	Special and differential treatment
SIDS	Small Island Developing States
SMP	Skim milk powder
SP	Special Product
SPS	Sanitary and phytosanitary standards
TBT	Technical barriers to trade
TDCA	South Africa Trade, Development and Co-operation Agreement
TRAINS	Trade Analysis and Information System
TRIPS	Trade-Related Aspects of Intellectual Property Rights
TQ	Tariff quota
UNCTAD	United Nations Conference on Trade and Development
US	United States of America
WAEMU	Western African Economic and Monetary Union
WTO	World Trade Organization

Chapter 1
Introduction

The Cotonou Agreement of June 2000 between the African Caribbean and Pacific (ACP) States and the European Union (EU) included a comprehensive framework for establishing the future of ACP-EU relations in the post Uruguay Round Period. The primary focus of this agreement is economic development, regional integration, poverty reduction and the smooth and gradual transition of the ACP into the global economy. To achieve these objectives, the Agreement provides for an approach for concluding of new World Trade Organization (WTO) compatible trading arrangements between the ACP States and the EU. This is to be accomplished through the conclusion of Economic Partnership Agreements (EPAs) to be negotiated during the period starting from September 2002 to December 2007. The ACP States are Negotiating EPAs as regional groups as follows: CEMAC (Economic and Monetary Community of Central Africa; ECOWAS (Economic Community of West Africa States; ESA (Eastern and Southern Africa); SADC (Southern Africa Development Community); CARIFORUM (Caribbean Forum); and the Pacific Forum. Table 1.1 presents a summary profile of each of these groups.

The basic arguments concerning the pros and cons of EPAs are over seven years old. They date back to the EU's proposal made at the outset of negotiations for a successor to Lomé IV that the trade regime be revised. The European Commission's arguments for and against such a change were set out in a Green Paper to which the ACP (as well as civil society and research organizations) subsequently responded (EC, 1997). On the positive side, the EC's arguments included the points that a new trade regime should do more to foster the integration of ACP states into the world economy and should be more easily defensible in the WTO. On the negative side, the ACP states were concerned that the new arrangements would reduce the benefits enjoyed by them under Cotonou and earlier Agreements.

It was not possible to agree on such a new trade regime from the outset of the Cotonou Agreement. Instead, Cotonou extends the Lomé trade regime, but with the proviso that negotiations must commence in 2004 for a successor regime that will come into effect in 2007. It is the scope of this post-2007 trade agreement that is the subject of the negotiations that began formally in September 2002.

TABLE 1.1: ACP GROUPS NEGOTIATING EPAs

Africa Group					
CEMAC	**ECOWAS**	**ESA[7]**	**SADC**	**CARIFORUM**	**Pacific Forum**
Cameroon[2]	Benin[1,2]	Burundi[1,5]	Angola[1,4]	Antigua and Barbuda[2,6]	Cook Islands[3,4,6]
Central African Republic[1,2,5]	Burkina Faso[1,2,5]	Comoros[1,3,6]	Botswana[2,4,5]	Bahamas[2,3,6]	Fiji[4,6]
Chad[1,5]	Côte dÍvoire[2]	Djibouti[1]	Lesotho[1,2,4,5]	Barbados[2,6]	Kiribati[1,3,4,6]
Republic of the Congo[2]	Guinea-Bissau[1,2,5]	Eritrea[1,3]	Mozambique[1,4]	Belize[2,6]	Marshall Islands [3,4,6]
Democratic Republic of the Congo[1]	Mali[1,2,5]	Ethiopia[1,3,5]	Namibia[4]	Dominica[2,6]	Federated States of Micronesia[3,4,6]
Gabon[2]	Niger[1,2,5]	Kenya[8]	United Republic of Tanzania[1,8]	Dominican Republic[4,6]	Nauru[3,4,6]
Equatorial Guinea[1,2,3]	Senegal[1,2]	Madagascar[1]	Swaziland[2,4,5]	Granada[2,6]	Niue[3,4,6]
Sao Tome and Principe[1,3,4,6]	Togo[1,2]	Malawi[1,5]		Guyana[2,6]	Palau[3,4,6]
	Cape Verde[1,3,4,6]	Mauritius[6]		Haiti[1,2,6]	Papua New Guinea[4,6]
	Gambia[1,4]	Rwanda[1,5]		Jamaica[2,6]	Samoa[1,3,4,6]
	Ghana[4]	Seychelles[3,6]		Saint Kitts and Nevis[2,6]	Solomon Islands[1,4,6]
	Guinea[1,4]	Sudan[3]		Saint Lucia[2,6]	Tonga[4,6]
	Liberia[1,3,4]	Uganda[1,5,8]		Saint Vincent and the Grenadines[2,6]	Tuvalu[1,3,4,6]
	Nigeria[4]	Zambia[1,5]		Suriname[2,6]	Vanuatu[1,3,4,6]
	Sierra Leone[1,4]	Zimbabwe[5]		Trinidad and Tobago[2,6]	

[1] Least Developed Country
[2] Has a common external tariff (Customs Union) with other members of group
[3] Not a WTO Member/in the WTO accession process
[4] Not a member of the Customs Union but has Preferential/Free Trade Agreement with other members of group
[5] Land-locked country
[6] Small Island Developing State
[7] Group does not represent a Regional Economic Community
[8] Belongs to a Customs Union with countries of other negotiating group

TABLE 1.2: ECONOMIC PROFILE OF ACP COUNTRIES

	Developing countries	ACP	ACP-A	ACP-C	ACP-P
Land area (2001) (1000 ha)	7 603 818	2 474 889	2 362 585	59 070	53 234
Total population (2002) (million)	4 900	727	684	35	8
Total population average annual growth rate (1990-2002) (%)	1.7	1.8	1.9	1.1	2.1
GDP per capita (1999-2001) (constant 1995 US$)	1 226	613	568	1 722	1 192
GDP per capita average annual growth rate (1990-2001) (%)	1.5	-0.2	-0.3	0.9	0.8
Agricultural GDP average annual growth rate (1990-2001) (%)	2.3	2.6	2.7	2.7	0.7
Trade/GDP (2001) (%)	52	54	55	46	82
Sectoral breakdown of economy (2001) (% of GDP)					
Agriculture	12.7	16.8	18.1	8.5	25.1
Industry	37.0	29.7	28.9	33.3	40.8
Manufacturing	23.5	13.5	13.6	12.8	7.7
Services	50.3	53.6	53.0	58.2	34.1

Note: ACP-A, ACP-C and ACP-P refer to the ACP countries in Africa, the Caribbean and the Pacific, respectively.
Sources: FAO and World Bank.

The ACP country group is demographically, geophysically and economically diverse. The total ACP country population, 727 million people, represents 15 percent of the total population of developing countries, with 94 percent living in Africa, close to 5 percent in the Caribbean and just over 1 percent in the Pacific countries.

Basic economic indicators vary significantly among the ACP countries, with per capita GDP ranging from more than US$9 000 in some Caribbean countries to less than US$100 in the poorest African countries. In the 1990s (1990-2001), the ACP countries averaged significantly lower rates of per capita GDP growth than the developing countries as a whole.

With regard to productive sectors, the ACP countries rely more on agriculture for income and employment generation than the overall group of developing countries, although this does not apply uniformly to all subgroups, the Caribbean countries being the exception. Large diversity exists among individual countries in the group. However, many of the industries or services are tightly linked to agriculture in numerous countries in the region. It is estimated that in most sub-Saharan Africa countries processing of agricultural products accounts for two-thirds of manufacturing value-added.

1.1 The importance of agriculture in the ACP countries

Agriculture's role in promoting economic growth and alleviating hunger and poverty in most ACP countries is underscored by its importance in GDP, employment and trade, as illustrated in Figures 1.1(A) to 1.1(C). With the exception of the Caribbean subgroup, agriculture's share in the GDP of ACP countries is higher than in developing countries as a whole and, although its role in employment generation has declined, agriculture still accounts for more than 60 percent of total employment in ACP countries compared to around 55 percent in developing countries as a whole. Agriculture also accounts for a larger portion of total trade for the ACP countries than for the developing countries as a group.

The agricultural sector's relatively weak performance in the ACP countries is illustrated by Figure 1.2, which shows per capita food production over the last four decades for the developing countries as a whole as well as for the ACP countries in Africa, the Caribbean and the Pacific. While the developing countries have seen sustained increases in per capita food production throughout the period, in the ACP country group, food production on average, has not kept up with population growth. This is in stark contrast with the need to produce more food to cover a large part of the dietary needs of each ACP subregion both at present and in the future.

FIGURE 1.1(A): SHARE IN GDP

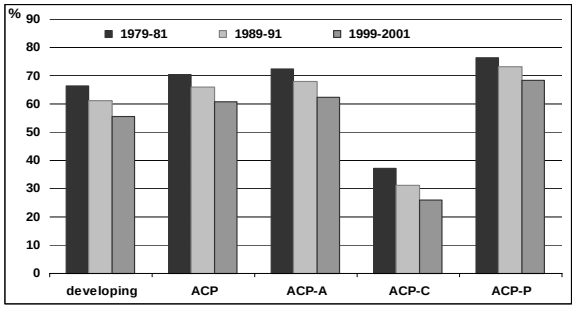


FIGURE 1.1(B): SHARE IN EMPLOYMENT

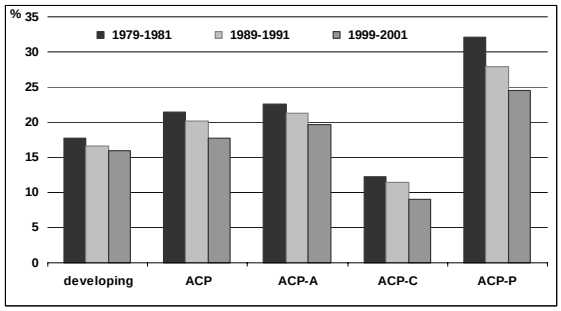


FIGURE 1.1(C): SHARE IN TRADE

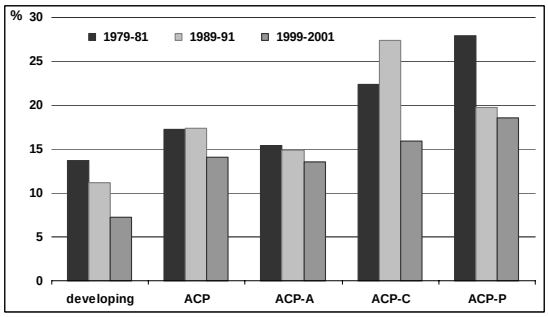


FIGURE 1.2: PER CAPITA FOOD PRODUCTION IN DEVELOPING AND ACP COUNTRIES (INDEX: 1989-91=100)

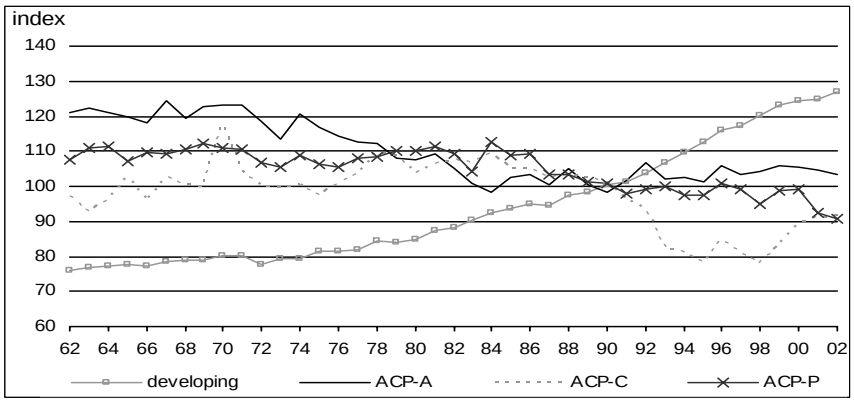


TABLE 1.3: AGRICULTURAL INDICATORS FOR ACP COUNTRIES

	Developing countries	ACP	ACP-A	ACP-C	ACP-P
Proportion of arable land irrigated (2001) (%)	11.0	4.9	4.2	22.7	0.5
Average added value in agriculture per worker (US$) (2001)	767	347	314	1 711	574
Per capita cereal production (2002) (kg/year)	242.3	129.3	132.9	81.5	23.6
Cereal yield (2003) (kg/ha)	2 837	1 137	1 123	2 101	2 082
Fertilizer use (2001) (kg/ha)	110.0	14.8	12.9	58.8	56.8

Data available only for Fiji, Papua New Guinea and Samoa.
Note: ACP-A, ACP-C and ACP-P refer to the ACP countries in Africa, the Caribbean and the Pacific, respectively.
Source: FAO and World Bank.

Although agricultural conditions vary widely across ACP countries, many share worrisome characteristics and trends such as high production variability, relatively low yields, and dependency on primary exports with low income elasticity and high price volatility. This means that as global agriculture markets become further integrated, the ACP group's agriculture risks becoming uncompetitive and marginalized.

Table 1.3 presents a range of agricultural indicators highlighting how the ACP countries, on average (but with exceptions), fall below other developing country regions in the proportion of area irrigated, value added per worker, fertilizer levels and productivity. Agriculture's relatively weak performance is symptomatic of inadequate investments in human capital, agricultural infrastructure, research and extension networks. However, read differently, the table also underlines the potential which ACP countries have for developing their agriculture even in the context of existing technologies.

1.2 Issues for agricultural development in the African ACP countries

More than 90 percent of the ACP country population lives in Sub-Saharan Africa (SSA) where there is significant agricultural development potential. SSA has about 198 million hectares of arable land; some still unexplored or only partially used – which translates into 0.24 hectares of arable land per capita. This compares favourably with the corresponding figures for all regions except Latin America and the Caribbean. The region also experiences recurrent droughts and floods, yet withdraws only 1.6 percent of its available water, compared with 14 percent in Asia. About 4 percent of its arable land and land under permanent crops is irrigated, compared with 11 percent in Latin America and Caribbean, 33 percent in Asia and 11 percent for the developing countries as a whole.

Soils in sub-Saharan Africa tend to be highly weathered by relatively high rainfall and temperatures and are poor in nutrients. In western and central Africa, about 50 percent of farmlands suffer soil erosion and up to 80 percent of rangelands are degraded. With barely 4 percent irrigated land, there is an immediate need for a comprehensive water management programme to increase water use and improve the efficiency of water harvesting and conservation systems. Drawing on experiences of other regional programmes, it would generate substantial and sustainable increases in farm production as well as reduce vulnerability to future crises.

Countries that were formerly self-sufficient in, or exporters of, food have become net food importers. At the same time, they have become heavily dependent on one or two commodities for a large share of their export earnings (Box 1.1). A lack of modern inputs, high yielding crop varieties, vaccines and animal feed, and technology and facilities for post-harvest storage, processing and packaging has meant poor agricultural growth, the consequences of which are especially dire in the face of the food needs of the region's growing population.

For agricultural growth to occur there must be a system for taking goods from field to market, starting first and foremost with a well functioning rural road system. Africa's rural infrastructure is grossly insufficient its road system today compares unfavourably with that of India in 1950 in terms of kilometres of roads for every thousand square kilometres, adjusted for population density. Its rail freight is under 2 percent of the world total, its marine freight capacity is 11 percent and its air freight is less than 1 percent. Due to inadequate infrastructure, transport and insurance represent more than 25 percent of the value of exports in a third of the African ACP countries.

Africa also has difficulties accessing international markets for its agricultural products, because it lacks adequate mechanisms for ensuring sanitary, phytosanitary and quality standards.[1] Access could be increased if domestic markets were better regulated and standards of product safety and quality observed.

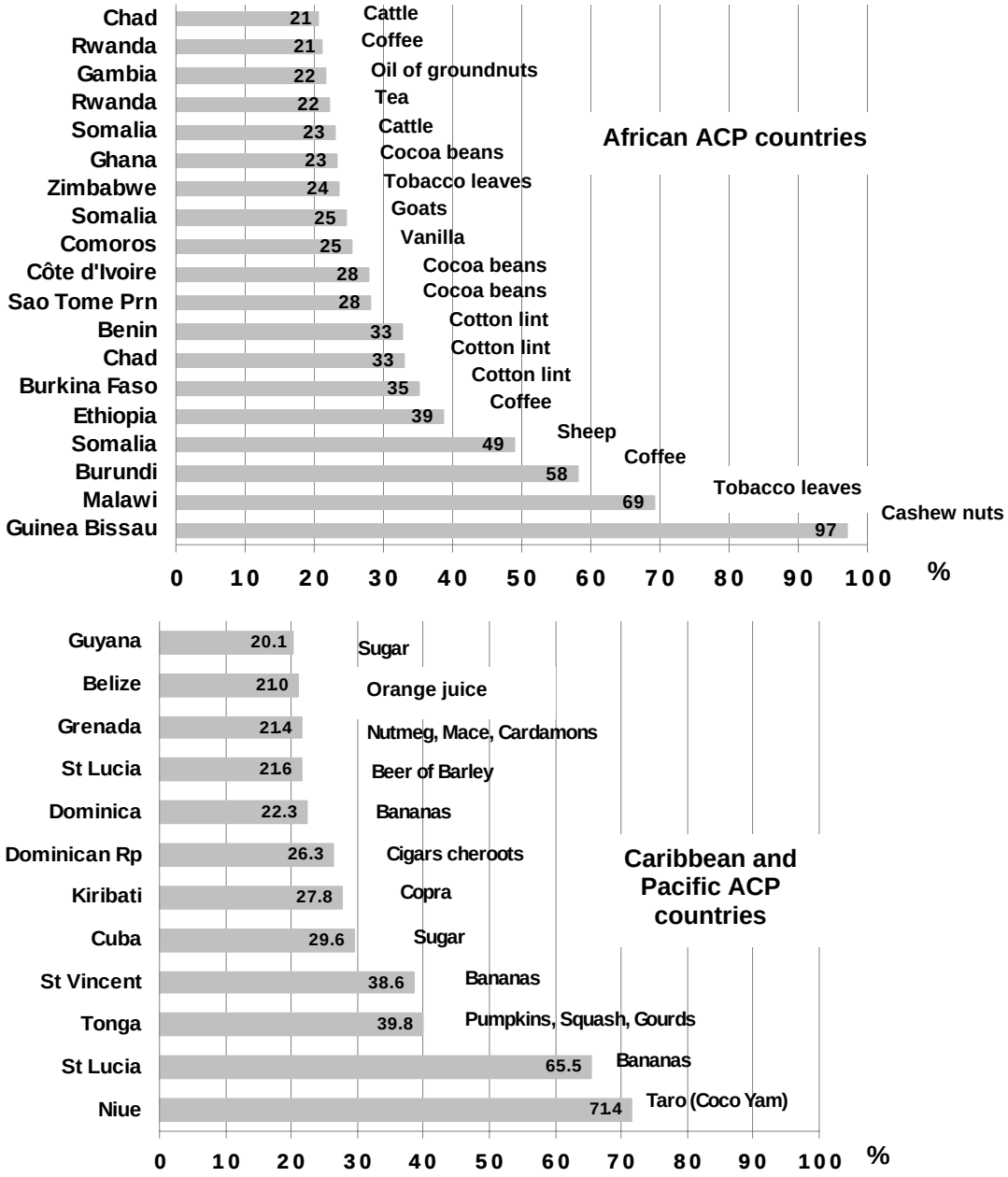
Despite their complexity, challenges facing agriculture in Africa are not insurmountable. The problems can be overcome if political will can be found and if resource mobilization for the sector is stepped up (see next section). There are already encouraging signs that the importance of agriculture in the region is being increasingly recognized.

[1] This is not the sole reason for Africa's failure to benefit from international trade. This failure is also due to the effects of subsidies of US$1 billion a day; tariffs of 60 percent on raw materials and more that 100 percent on processed agricultural products; and technical barriers to trade imposed by developed countries.

BOX 1.1: DEPENDENCE ON SINGLE COMMODITY EXPORTS IN ACP COUNTRIES

High dependency on exports of one or a few agricultural commodities is a problem for many ACP countries. It makes their overall income, investment, employment and growth highly vulnerable to market fluctuations for these commodities. For these countries, diversification of the export base is a priority. The graphic below shows the ACP countries which rely on one agricultural commodity for more than 20 percent of their export earnings.

ACP countries relying on one agricultural commodity for more than 20 percent of their export earnings



Source: FAO

1.3 Issues for agricultural development in Caribbean and Pacific small island developing states (SIDS)

Small island developing states (SIDS) have very diverse economic profiles and levels of development. Table 1.4 categorizes SIDS into three groups by per capita income. A key issue facing SIDS is their degree of reliance on food imports compared to their local production. Cereal consumption covered by imports is around 80 percent on average for SIDS, with a higher dependency on imports in the richer group.

Exports from SIDS have benefited from EU/ACP agricultural trade protocols, which compensated them at higher levels than the world market. These protocols helped to maintain sugar and banana exports in many SIDS and their benefits are being eroded. However, under the EPAs the future of these protocols is being renegotiated. The economic, social and environmental impacts of this change will depend on the ability of producers to diversify production and gain competitiveness.

The rural economy of SIDS is dominated by a small number of commodities, such as sugar, copra and banana (Box 1.1). For example, around half of the countries of Group 1 are relying heavily on copra and banana exports. Two-thirds of the countries in Group 2 rely on sugar. In Group 3, only very few countries rely on a particular agricultural commodity for exports. SIDS has emphasized, as a priority, the promotion of local food supply and the expansion and diversification of their agriculture. Fruits and vegetables are a favoured area for diversification, in part to meet a growing demand for fresh products arising from tourism. About half of SIDS give priority to the development of traditional food crops to improve nutrition.

Some of the special challenges facing agriculture in the ACP SIDS are:

- Adapting to the new trade environment: SIDS' economies rely heavily upon agriculture, forestry and/or fisheries exports but they face challenges in the emerging global trade environment. Although the international trading system has not provided SIDS with any particular consideration as a group, they receive some form of preferential access to developed-country markets as beneficiaries of other agreements.
- *Food supply, nutrition and diversification:* Nutrition-related health problems and food-import dependency are growing concerns in many SIDS. When tourism is the dominant economic activity, 50 to 95 percent of foods and beverages are imported. In order to face the challenges of agricultural competitiveness and self-reliance, SIDS are seeking opportunities to diversify their agricultural systems.
- *Preserving marine resources:* While SIDS' land resources are limited, they govern large tracts of ocean. Capture fisheries have had upward trends but resource depletion and stagnant prices for some important species (such as tuna) threaten returns for both food and national income. The concepts of long-term sustainability and responsible fisheries should underpin development and management in SIDS.
- *Land, forests and mitigation of natural hazards:* Demands on forest and other coastal resources are endangering the ecosystems of SIDS, which are of major economic significance for settlement, subsistence and commercial agriculture and tourism. In addition, climate variability and change (including sea level rise) and vulnerability to natural disasters are of particular concern to SIDS.

TABLE 1.4: INDICATORS FOR SMALL ISLAND DEVELOPING STATES (SIDS)

	Agriculture in GDP %	Active population in agriculture %	Cereal dependency ratio %	Fruit-vegetable self-sufficiency ratio %
Group 1: below US$2 000/cap	29.2	62.5	63	107
Group 2: from US$2 000 to 9 000	8.5	20.8	89	94
Group 3: over US$9 000	3.2	6.4	95	55
Total	9.0	36.2	83	85

Source: FAO and World Bank

1.4 Status of the EPA Negotiations

Under four successive Lomé Conventions, ACP exports have benefited from non-reciprocal preferential access to the EU - and this is now under threat. In recent years, ACP preferences have been eroded as Most Favoured Nation (MFN) tariffs for other trading partners of the EU have been reduced. At the same time, food safety concerns in the EU have led to very strict food safety regulations which are proving very costly for ACP exporters. The WTO Doha Development Round, involving ACP countries as well, has reached a critical stage and although the WTO has granted the EU a waiver to maintain the non-reciprocal ACP preferences until December 2007, the scope of these preferences in the interim period up to the expiry of the waiver at the start of 2008 and beyond is of great concern to the ACP as they embark on these various negotiations. Furthermore, there are ongoing regional integration programmes in many parts of the ACP group, and free trade agreements are being negotiated by other Organisation for Economic Co-operation and Development (OECD) countries with groups within the ACP and their competitors elsewhere.

Submerged in the EPA and WTO negotiations, is the ongoing process of EU enlargement and reform of its Common Agricultural Policy (CAP) which involves moving away from a system of price support to that of direct aid to EU farmers. This reform is having two important effects on ACP countries which have traditionally enjoyed significant preferential access to the EU market; (i) it is reducing the value of preferential access to the EU market, by reducing the prices of EU agricultural products; (ii) it is making EU agricultural and value added food product exports more price competitive on domestic and overseas markets, thereby displacing ACP agricultural industry.

Furthermore, at the beginning of this decade, after several years of international debate about the magnitude and effects of subsidies in the fisheries sector, a consensus had emerged about the need to impose some discipline on their use. This consensus was recorded in the agreement reached in the Doha WTO Ministerial meeting. In the ongoing WTO discussions the special situation of developing countries is increasingly recognized. Nevertheless, ACP countries need to actively consider the role that subsidies have and might have in their own fishery sectors, in order to defend their interests in any future WTO agreement aiming to discipline the use of subsidies in the sector.

Given their already weak economies, the ACP countries are facing several major sets of closely interlinked forces that are likely to have significant impact on the development of their agriculture sectors and food security situation. If sound and proper positions are not in place during these negotiations, they are likely to be further weakened once the full effects of all the various forces are in place. It is therefore critical that the positions on all of these negotiations need to be coherent with each other and all need to be rooted in the overall economic and development strategy of the countries concerned.

After some years of initial preparation and talks on broad principles, the EPA negotiations are finally addressing concrete issues. Negotiations have been launched formally with the six ACP regional groupings but the pace and progress varies among them. Table 1.5 presents a broad timeline for the EPA Negotiations.

As the table shows, a process of substantive negotiations have been agreed to by the ACP and the EU to follow in four phases within the timeline based on priorities of the ACP negotiating region:

- *First Phase:* Establishing priorities (concerns and interest) of the EPA Negotiations for each ACP group and the EU;
- *Second Phase*: Convergence on strategic approaches to ACP regional integration – the objective during this phase of the negotiations is to establish a common understanding on the priorities for supporting regional integration and the targets to be attained by 1 January, 2008 and beyond;
- *Third Phase*: The objective of this phase is to consolidate the discussions and channel the points of common understanding into elements of a draft EPA.
- *Fourth Phase*: Finalization – negotiations during this final phase should concentrate on consolidating the results of the negotiations and complete the EPA negotiations by the end of 2007.

TABLE 1.5: TIMETABLE OF ACP-EU TRADE NEGOTIATIONS

Date	Negotiations	Trade Regime
2000 – to September 2002	Preparation of modalities for negotiations. EU granted waiver by WTO to maintain Lomé trade preferences until December 2007.	Maintenance with ACP countries, except South Africa, of non-reciprocal tariff preferences in force at present, i.e. the Lomé regime.
September 2002 to December 2007	EU to negotiate "economic partnership agreements" (free trade agreements) with ACP countries, by regional groups, or country by country	
2004 - 2005	EU and ACP countries to study "all possible alternatives" for non-LDC countries which "decide (….) that they are not able" to sign free trade agreements. EU to revise its GSP	
2006	EU and ACP countries to analyse agreements foreseen "to ensure that the calendar foreseen permits the adequate preparation of negotiations.	
December 2007	Conclusion of EPA Negotiations	
From 1st January 2008 until 2018-2020	Application (transitions period) of new Economic Partnership Agreements (EPAs).	End of the "all ACP" Lomé regime. ACP signatories of EPAs to progressively open their markets to EU products. LDCs which have chosen not to conclude EPAs to retain their non-reciprocal tariff preferences? Non-LDCs which have chosen not to conclude EPAs to benefit from new regime (still to be defined)

As of February 2006, negotiations are now in the third phase for three ACP regions – CEMAC, ECOWAS CARIFORUM. The other regions (ESA, SADC, Pacific) are somewhere between the first and second phase. It is worth noting the Pacific region has requested clarification from the EU on the legal status of development annexes to the EPA and the development support mechanisms, whether EBA market access will be granted to non-LDC EPA countries, alternatives to EPA and flexibility to address their specific needs.

In general, the negotiations so far have focused on the following issues:

- The progress and prospects of regional integration processes in all areas;
- Progress towards structural reforms in such key areas as public financial management, regulating and facilitating investment and the creation of new businesses, the working of judicial systems, education and vocational training, as well as training and education;
- Potential adjustment costs, such as the loss of tax revenue through lower customs duties; the scope for minimising those costs by continuing to protect sensitive products from liberalization, the phasing-in of changes, and the implementation of customs and tax reforms;
- Difficulties facing agricultural producers in rice, sugar and bananas, the related restructuring processes, and opportunities to secure future market access in a WTO-compatible EPA;
- Other vulnerable sectors, the sectors with the greatest competitive potential and the policies needed to back up the requisite changes;
- Trade policies' compliance with WTO rules, making the most of the flexibility built in for regional trade agreements, and the progress of the Doha Development Agenda's multilateral negotiations on issues such as agricultural support, market access and trade facilitation.

Chapter 2
EPAs and WTO compatibility: implications for ACP-EU trade relations

Introduction

For the last three decades, the trade relations between the EU as a bloc on the one hand, and the ACP countries as a bloc on the other, have been based on a series of "bilateral" treaties designed to provide non-reciprocal preferential terms of access for the products of the ACP to the markets of the EU – from Lomé I (1975-1980), to Lomé II (1980-1985), to Lomé III (1985-1990), to Lomé IV (1990-1995, later revised and extended to last until 2000, known as Lomé IV bis), and finally to Cotonou (2000 to 2020).[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 the creation of preferential market access for the products of ACP countries to the EC, but also about dismantling those pre-Lomé reverse preferences for EC products to access ACP markets, thereby establishing non-reciprocity as the core and distinctive principle of the *Lomé acquis* on trade matters.

This is set to change again in several important ways. The non-reciprocal EU preferences to the ACP countries have been generally challenged in the WTO framework and the EU is seeking to maintain its trade relations with the ACP and at the same time make these relations WTO compatible. Within the Cotonou Agreement it is intended that this will be achieved mainly through the negotiation of Economic Partnership Agreements (EPAs). The reintroduction of reverse preferences – also called "reciprocity" – is a fundamental feature of the (EPAs) that are to be negotiated by 2008.

The main purpose of this chapter is addressing the question related to the how ACP-EU trade relations can comply with WTO rules. Two WTO rules are most critical in this regard; Article XXIV of GATT 1994 on regional trade agreements and the Enabling Clause on special trading arrangements involving developing countries, and an examination of these for the establishment of EPAs form the core of this chapter. The first section of the chapter begins with an overview of the objectives and nature of EPAs as laid out in the Cotonou agreement. The second section addresses the legal issues related to establishing WTO compatible EPAs. The third section focuses on a series of conventions, treaties, protocols that are components of the governance of agriculture trade and as such are important to formation and operation of EPAs that regulate EU-ACP trade relations. The fourth section presents a summary of the main issues.

2.1 The Cotonou agenda, nature and object of EPAs

Cotonou is an agreement on trade and development relations between the EU and the ACP countries, and importantly an agenda for trade negotiations towards the creation of EPAs. One of the many innovations of the Cotonou Agreement is its vision of future trade relations between these two blocs. In a departure from decades of unilateral and non-reciprocal preferential terms of access for ACP products into the EU market, embodied in different treaties, protocols and conventions and accommodated by the multilateral trading system (more recently through a series of time-limited waivers), Cotonou set an ambitious agenda for the negotiation of EPAs. The hallmarks of which are to ensure that the trading relations between the EU and ACP are WTO compatible and thereby 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 1 January 2008.[3]

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

[1] The special economic arrangements between many of the ACP countries and the EC, which pre-date 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 WTO, *GATT Analytical Index: Guide to GATT Law and Practice* (updated 6th ed., Geneva, 1995, hereafter *GATT Analytical Index*) p. 826.

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

poverty and promotion of sustainable development. The establishment of EPAs has been identified as the route towards achieving those objectives.

The nature of EPAs

The Cotonou agreement sets out the basic principles and objectives of the EPAs and prescribes detailed modalities for their implementation. 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 SDT to all ACP states, and in particular to the LDCs and vulnerable small, landlocked and island countries.[4] Although they are not defined anywhere in the Cotonou Agreement, EPAs are to be 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 of, inter alia: 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 are briefly discussed further below.

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,[5] 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 and ECOWAS)? The question is crucial, yet 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 implies that a single EPA would not be negotiated ACP-wide; rather, that 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. The Cotonou agreement does not set any limits on the level of aggregation of ACP countries, 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 organizations with a mandate for economic integration."[6]

The negotiation process is currently proceeding by sub-region. 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."[7] Furthermore, since the launch of the second phase in October 2003, negotiations in all six regions (Central Africa, West Africa, eastern and southern Africa, the Caribbean, the Southern African Development Community and the Pacific) have already commenced. 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

[4] See *ACP-EC EPA negotiations: Joint Report on the all-ACP–EC phase of EPA negotiations* (ACP/00/118/03 Rev.1, ACP-EC/NG/NP/43, hereafter *First Joint Report*) Brussels, 2 October 2003, para. 4(b).
[5] Yet, bear in mind that LDCs belong within all the sub-regional and regional groupings and have obligations therein that generally make them equal partners.
[6] Article 7 of Annex IV to the Cotonou Agreement.
[7] See *First Joint Report*, para. 1.

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".[8] Finally, speaking at the opening session of the SADC-EU negotiations towards EPAs in Windhoek, Namibia on 8 July 2004, the then EU Development Commissioner, Poul Nielson, confirmed that "negotiating at the regional level, rather than with all ACP, is an essential feature of this approach".[9]

This means that the whole process envisages any number of ACP countries 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 (CU) for purposes of GATT Art. XXIV 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."[10] The first Joint Report of the all-ACP-EC Phase of the EPA negotiations goes even further and provides that the "EPA's first emphasis should be to consolidate ACP markets, before fostering trade integration with the EC."[11] 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 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. Box 2.1 presents an overview of WTO Regional Trade Agreement rules that are elaborated more fully later in this chapter.

In WTO terms, for any 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 (CUs) in the sense of GATT Article XXIV with all its implications in terms of the internal and external trade regimes of such CUs. But being an Article XXIV CU 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."[12]

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 CUs by the end of 2007 at the latest, in the sense of GATT Article XXIV, and that those CUs 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 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 organization unless the regional organization is a customs union."[13] 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 state that that CU must also have legal personality independently of the constituent members.

[8] See Council of the European Union, *(Draft) Directives for the Negotiations of Economic Partnership Agreements with ACP Countries and Regions* (Annex I to Doc. 9930/02, 12 June 2002, hereafter *draft EU Commission negotiation mandate*), p.4.
[9] See full speech, Speech/04/355 at www.europa.eu.int.
[10] Art. 35:2 of the Cotonou Agreement on Principles.
[11] See *First Joint Report*, para. 4(b)(ii).
[12] *Turkey – Restrictions on Imports of Textile and Clothing Products* (WT/DS34/R, adopted on 19 November 1999), hereafter *Turkey Textiles Panel Report*, para. 9.40, footnote 272.
[13] See *Eastern and Southern African Negotiating Guidelines for Phase II Economic Partnership Agreement with the European Union* (Draft Revision 2.0, 1 Dec. 2003, hereafter *ESA draft EPA negotiating guidelines*), para 4.

BOX 2.1 RTAS, EPAS AND WTO COMPATIBILITY – ARTICLE XXIV AND THE ENABLING CLAUSE

In Article 36 of the Cotonou Agreement the parties to the agreement concurred to conclude new World Trade Organization (WTO) compatible trading arrangements, removing progressively barriers to trade between them. In Article 37, it is agreed that economic partnership arrangements (EPAs), including the new trading arrangements, shall enter into force by 1 January, 2008.

Two WTO rules are most relevant to ensuring the compatibility of the new trading arrangements. Firstly, that on regional trade agreements(RTAs), Article XXIV of GATT 1994 and secondly, that on special trading arrangements involving developing countries, the Enabling Clause. Given that the specific application of these rules is subject to interpretation there is legal uncertainty that clouds the conclusion of WTO compatible trading arrangements. Beyond compliance with the rules as they are currently, there is the possibility of revising them in the context of WTO negotiations to ensure compatibility, and further that the rules may also change after the EPAs are agreed, potentially raising new issues related to compatibility.

GATT Article XXIV contains the most important rules of the WTO system on Regional Trading Arrangements (RTAs). It recognizes voluntary agreements, such as customs unions (CUs) or free-trade areas (FTAs) that should "facilitate trade between the constituent territories and not to raise barriers to the trade of other contracting parties with such territories". In both forms of RTAs the expectation is to eliminate restrictions on "substantially all the trade" between the constituent territories.

The main difference between a CU and an FTA is that in the case of the former 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. In the case of an FTA the distinct national trade regimes remain in tact. The rules of origin on products in the context of CU are less definitive than in FTAs. In an FTA, elimination of duties and other restrictive regulations of commerce is required is on substantially all the trade in products originating in the FTA. In a CU, elimination of duties and other restrictive regulations of commerce is required on "substantially all the trade in products ... or at least with respect to substantially all the trade in products originating in such territories". In the latter case determination of origin is relatively more optional.

If EPAs are concluded under Article XXIV the only option seems to be FTAs as it is unlikely that ACP countries would introduce roughly the same external trade regime as the EU, as would be required under a CU. However, as shown in this chapter meeting GATT rules remains elusive.

The Enabling Clause, officially known as the *Decision on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries*,[14] is the other important source of law relating to RTAs, involving particularly developing countries. The Enabling Clause constitutes an exception from GATT Art. I in three senses since it authorizes: (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. Given that the Enabling Clause authorizes only South-South RTAs, there is no room for North-South RTAs, such as the future EPAs, to be justified under it. Developed countries have failed, on several occasions, to defend discriminatory preferences accorded to developing countries on the basis of paragraph 2(c) of the Enabling Clause.

Establishing compatibility of EPAs with WTO rules is a formidable task. Only for one of 270 RTAs notified to GATT have members agreed its compatibility with WTO rules.

One may then wonder whether or not the existing sub-regional RTAs could metamorphose into CUs with a legal personality independent of the constituent members within the period up to 2008. It is a possibility: Caribbean Community and Common Market (CARICOM) and the Economic and Monetary Community of Central Africa (CEMAC) already exist as CUs, while and the Economic Community of West Africa States (ECOWAS) is scheduled to become CU before 2008. However, whether many of these sub-regional RTAs will evolve into full-fledged CUs in terms of GATT Article XXIV by 2008 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. Accordingly, many of these RTAs might find it difficult to satisfy even the relatively less onerous (compared to CUs) demands set by Article XXIV for FTAs.[15]

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

[14] GATT doc. L/4903, 28 November 1979.

[15] See WTO Committee on Regional Trade Agreements. *Basic Information on Regional Trade Agreements: Agreements Notified to the GATT/WTO and in Force as of 31 January 2002 – Note by the Secretariat* (WT/REG/W/44, 7 February 2002).

a decision as yet to negotiate as an individual country, most ACP countries (except Somalia) are already taking part in EPA negotiations through their sub-regional RTAs, the preceding suggestion might sound rather unrealistic. It is also worth noting, however, 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, the Cotonou Agreement is vague at best on this 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. The official line, as well as the consensus approach in the literature seems to assume that EPAs will be concluded between the EU on the one hand, and ACP sub-regional RTAs on the other, and that EPAs between the EU and individual countries will be more of the exception. It appears, however, that this may not occur by 2008 and probably the opposite will be the case – 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.

Object of the EPAs

One of the most fundamental objectives of the ongoing negotiations between the EU and ACP countries/subregions 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: (i) 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; (ii) the experience of the past in terms of waivers for arrangements incompatible with those rules has been neither easy nor pleasant; and (iii) it appears that the trend in North-South trade relations is turning away from unilateral concessions legitimized 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.

2.2 EPAs and WTO law on RTAs – FTA or CUs

Achieving the objective of satisfying the legal requirements of the WTO on RTAs through EPAs will be a major challenge for several reasons. These will be discussed after highlighting the WTO legal standards against which future EPAs will be judged. The relevant WTO legal standards are contained in GATT Articles I (on MFN treatment) and XXIV (on RTAs), the 1979 Enabling Clause, and to a more limited extent, Article V of the GATS. There are also some useful Panel and AB reports that could elucidate these often obscure provisions. The legal standards contained in these provisions are among the most complex and contentious, so much so that it becomes questionable whether a commitment to compliance means anything at all in practical terms.

From the perspective of WTO law, the issue of regional trading arrangements is primarily one 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", i.e. the most favoured nation (MFN) treatment clause, is the cornerstone of the trading system.

At the same time, however, it is now known 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 the MFN level. The number of such preferential arrangements has grown rapidly over the past few years, but it is not a new phenomenon. 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"(Dam 1963, p. 615). 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-proliferating RTAs that 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.

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 that set forth the substantive and procedural conditions that must be satisfied before a discriminatory RTA could be justified under the exceptions of Article XXIV. The meaning of Article XXIV has proved to be so contentious and its practical administration so difficult, however, that only in one of the over 270 RTAs notified so far to GATT/WTO were members able to reach a clear-cut decision on their compatibility with the rules. (The single exception relates to the 1994 CU between the Czech and Slovak Republics.) 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 – FTAs and 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 FTAs and CUs has been defined to mean a period not exceeding ten years unless justified by exceptional circumstances.[18]

As discussed later, 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 only aspire to be FTAs and not CUs, the law relating to CUs will play a role in the process because, as argued earlier, ACP subregions can conclude EPAs(as subregions) 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.

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 among their constituent members and external trade with third parties.

[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 Committee on Regional Trade Agreements, *Report (2003) of the Committee on Regional Trade Agreements to the General Council* (WT/REG/13, 5 December 2003), para. 4. Of these, 107 were notified between 1948 and the end of 1994, while the remaining 166 were notified between 1995 and the end of 2003.

[17] See *Turkey Textiles, AB report*, para. 57.

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

Customs Unions (CUs)

Definition

According to Article XXIV: 8(a), a customs union (CU) is defined as "the substitution of a single customs territory for two or more customs territories."[19] A CU 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.

Requirements on internal trade

Regarding *internal* trade within CUs, 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 but not all of 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 have been suggested so far – quantitative (a certain percentage of actual or potential trade) and qualitative (for example, going beyond percentages to look at whether any major sector is excluded), or a combination of both. There is no consistent practice 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 percent of total trade."[20]

However, many other members rejected this approach of fixing a percentage figure as inappropriate, preferring instead a case-by-case approach that considers every case on its own merits. Although the EC grew more and more sympathetic to this argument over time,[21] it still maintains its quantitative approach to the definition. Following its use of a 90 percent threshold in its TDCA with South Africa – made up of commitments to liberalize around 94 percent of EU imports from South Africa and around 86 percent of South African imports from the EU over a 12-year transition period – the EU is currently presenting this 90 percent threshold as "the WTO criterion" of the "substantially all trade" requirement.

[19] 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."

[20] See *GATT Analytical Index*, p. 824.

[21] 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* (idem).

Requirements on external trade

Regarding the *external* trade of members of CUs 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 CU 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 CU to the trade of non-members, sub-paragraph 8(a)(ii) has made it clear that the formation of a CU 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 CU, the *Turkey Textiles* panel went as far as concluding that "as a general rule, a situation where constituent members have "comparable" trade regulations 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) (Turkey Textiles, Panel Report, para 9.151)." 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 it stated "requires the constituent members of a CU to adopt "substantially the same" trade regulations. It is generally agreed that "comparable trade regulations having similar effects" do not meet this standard.

The Turkey Textiles AB report has particular implications on the 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). These are that (1) ACP countries can establish CUs among 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 CUs will still have the right to maintain such restrictions on selected third countries while the other members of the CU may not necessarily have such restrictions against any third countries.

The pre-1993 banana import regime applying in EEC member countries is instructive in this regard. It 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 United Kingdom, 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" (O'Connor 2003, p. 9). 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 do not have a common external trade regime for bananas or lack common rules on the traceability of dairy products.[22]

Nevertheless, in all cases any such restrictions need 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 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 (Bananas I, paras. 222 and 246). 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*

[22] See *EEC - Member States' Import Regimes for Bananas: Report of the Panel* (DS32/R, 3 June 1993, not adopted, hereafter *Bananas I*) and *EEC - Import Regime for Bananas: Report of the Panel*, (DS38/R, 11 February 1994, not adopted, hereafter *Bananas II*), cases challenging the EEC's successive banana import regimes of 1992 and 1993 respectively, also discussed *infra*.

> *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 (idem., para.358).*

In summary, while the discussion in this section focused mainly on 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 whose violation 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 CU, 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 CU may not be used as an opportunity to roll back prior liberalization 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; (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.

Free Trade Areas (FTAs)

Definition and requirements on internal trade

Article XXIV:8, sub-paragraph (b) defines a free trade area (FTA) 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."*

An FTA is therefore an arrangement between countries that seek to create conditions for the free(r) flow of trade among 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 on the definitional elements of a CU could also apply to 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 at this stage, nonetheless, that while CUs are defined in terms of their internal and external trade dimensions, the parallel provision defining FTAs does not say anything regarding 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 CUs 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." A minimum requirement for CUs is the elimination of duties and other restrictive regulations of commerce on products originating within members of RTAs – 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 the wider reach of CUs has some symbolic value albeit hortatory. It also means that while determination of origin could be merely optional in the case of CUs, it is almost always mandatory for FTAs (unless of course an FTA also opts 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 mean there are no requirements for FTAs in this respect, however, 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 CUs; but there are also important differences. First, 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 continue not to be 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 CU or an FTA. In the case of a CU, 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 an FTA, 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. In other words, 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 CU, 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 wide trade regimes.

Accordingly, while the requirement in the case of CUs 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 greater 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.[23] 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 long debated. Due to the Uruguay Round Understanding on Article XXIV, it is now known that the duties and charges to be taken into consideration in the evaluation process for CUs "shall be the *applied rates of duty*."[24] 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 purposes of FTAs should be bound duties in cases where these are different from the applied rates.

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.

In speaking about EPAs therefore, one refers to 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.[25] 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. 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.

Nonetheless, 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 seen above, insofar as 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

[23] For more on this, see WTO Committee on Regional Trade Agreements, *Annotated Checklist of Systemic Issues: Note by the Secretariat*, (WTO/REG/W/16, 26 May 1997), p. 3.
[24] See para. 2 of the Understanding (italics added).
[25] A few examples showing the scale of bound duties: Schedule CXIX of Mozambique for agricultural market access which binds its customs duties at 100 percent, and under "other duties and charges" provides the following: maritime transportation tax at 100 percent, port tax at 100 percent, and other (sic) at 100 percent; Schedule XLIII of Nigeria provides for a ceiling binding for all agricultural products at 150 percent and "other charges" at 80 percent; Schedule LXVI of Jamaica binds duties for nearly all agricultural products at 80 percent and other charges at 80 percent; and Schedule CXXIV of Tanzania puts a ceiling binding of 150 percent 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 www.wto.org/english/tratop_e/schedules_e/goods_schedules_e.htm

pre-CU applied duties of the constituent members as required under GATT Article XXIV: 5(a). This will mean that (i) ACP countries signing an EPA as members of a sub-regional CU will have to set up a system of common external tariffs, which is no more restrictive than their applied tariffs that prevailed prior to the formation of the relevant CU; and (ii) 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. This has a potential to be another disincentive against ACP countries forming sub-regional CUs and signing EPAs, for example, through such CUs.

EPAs as FTAs not CUs

As noted earlier, the Cotonou Agreement does not delve into the nature of EPAs. Apart from the commitment to create EPAs that are fully compatible with the WTO, there is no mention as to whether they achieve that compatibility as FTAs or CUs or in any other form. Despite this, as suggested earlier, EPAs can only take the form of FTAs – and indeed interim agreements leading to the formation of FTAs – and not CUs or any third option.

The reasons could be summarized as follows:

- First, we have seen that the basic difference between FTAs and CUs is one of depth of integration – CUs being so-called "advanced FTAs". 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 CUs with other countries, the formation of EPAs as CUs will automatically mean that the ACP countries will have to introduce roughly the same external trade regime as the EU – virtually adopting the EU external trade regime as did Turkey, for example when it concluded its CU with the EC in 1995. One can naturally expect at the most a higher degree of flexibility allowed to the ACP countries in such cases. Accordingly, 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.…"[26] This confirms that the vision is to create interim agreements leading to FTAs (note the words "*directed at*") and not CUs or any third option.

2.3 The Enabling Clause, RTAs and EPAs

Officially known as the *Decision on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries*,[27] 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 since it authorizes: (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 of interest here.

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." Similarly, paragraph 3(a) of the

[26] See draft *EU Commission negotiating mandate*, para 3.1 on *Objectives*.
[27] GATT doc. L/4903, 28 November 1979.

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, that trade creation, as opposed to trade diversion, has to be the object of RTAs.

However, the commonalities 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 among 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. Given the limited scope and ambition implicit in its wording, however, 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 the constituent territories in products originating in such territories.*

Three things are immediately apparent from this juxtaposition. First, while Article XXIV speaks 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 authorizes 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.[28]

Secondly, as regards tariffs, while Article XXIV speaks 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 speaks 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 speaks 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 among themselves (e.g. COMESA and SADC) 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).

[28] See, *inter alia*, the following cases: *EC Bananas* I and II, and *European Community - Tariff Treatment on Imports of Citrus Products from Certain Countries in the Mediterranean Region, Report of the Panel,* (*GATT doc. L/5776*, 7 February 1985, not adopted, hereafter "EC *Mediterranean Citrus"*).

EPAs and the Enabling Clause

The Enabling Clause provides for the possibility of developing countries forming regional or global preferential arrangements among 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. To reiterate, 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, by definition this 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 discussed here. They have to be concluded in compliance with GATT Article XXIV. As discussed below, however, the ACP Group of countries within the WTO are proposing changes to GATT Article XXIV as part of the Doha negotiations, so that 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 only requests 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 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 liberalization vis-à-vis the Community."[29]

Two problems emerge from this. First, 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 among themselves, but also with all other countries of the world. Secondly, even assuming that ACP countries members of an EPA agree to automatically extend their commitments with the EU to their sub-regional neighbours, 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 create difficulties for ACP sub-regional RTA 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.

2.4 EPAs as WTO-compatible FTAs and the principle of SDT

The preceding analysis has shown that as long as both the EU and the ACP are committed to negotiating 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 SDT for the benefit of the ACP countries. Box 2.2 provides an overview of the issues related to SDT and WTO compatible EPAs elaborated in more detail below.

[29] See draft EU Commission mandate, 12 June 2002, Annex I, p. 7.

Reciprocity versus 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 (First) 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 (First Joint Report, para 6)." On that basis, ACP countries expect the principle of SDT to be reflected in the EPAs in terms of (1) the length of transition period and timetable for tariff dismantlement, and (2) product coverage.

BOX 2.2: REVISION OF GATT/WTO RULES: SDT IN FTAS FOR EPA COMPATIBILITY

Two of the major concerns that ACP countries have with WTO rules as they negotiate ending non-reciprocal preferences and establishing WTO compatible FTAs (EPAs) are a) the extent to which trade needs to be reciprocal and b) the transition period for implementation of the agreement.

Under GATT Article XXIV, in an FTA, customs duties and other restrictive trade rules must be eliminated for "substantially all trade". While precedent exists suggesting that 90 percent of trade could be acceptable as "substantially all trade", it would still require ACP countries to open at least 80 percent of their market if the EU opened its market 100%. Several ACP countries seek to limit this degree of reciprocity in the EPA context through ensuring realization of commitments to SDT in the WTO rules.

Similarly, there is an interest in extending the time allowed to establish an FTA. Under current WTO rules the "reasonable length of time" generally permitted should not exceed ten years, although a longer period could be authorized "only in exceptional cases". While many FTAs have adopted longer implementation periods, and there have been no challenges, the fact remains that there has been no change in WTO rules.

In April 2004, the ACP Group of States, bearing in mind their ongoing negotiations towards WTO compatible economic partnership agreements with the EU under the Cotonou Partnership Agreement, submitted (TN/RL/W/155) a rationale and proposals to the WTO Negotiating Group on Rules, suggesting recognition of SDT principles, and therefore that GATT Article XXIV, the rules on RTAs, be modified to explicitly provide the necessary differential and more favourable treatment to developing countries that are party to RTAs with developed countries.

The ACP Group's submission called for developmental needs to be taken into consideration in reviewing GATT rules related to RTAs, for compatibility to be determined by the Committee on Regional Trade Agreements and for S&D treatment for developing countries to 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.

Specifically on "substantially all the trade":

Appropriate flexibilities are proposed - on duties and measurement of trade and product coverage, allowing asymmetric lower levels for developing countries, and flexible interpretation on "other restrictive regulations of commerce", allowing contingency protection measures including safeguards and other non-tariff measures (e.g. rules of origin) on intra regional trade.

Specifically on "reasonable period of time":

A longer time period that is consistent with the trade, development and financial situation of developing countries is proposed – it should not be less than 18 years and the circumstances under which a period can be extended should be clarified.

In May 2005, the EC, in its own submission (TN/TL/W179) on Regional Trade Agreements to the WTO made explicit reference to the above ACP proposal and called for similar changes in GATT Article XXIV on RTAs to allow greater flexibility in North-South RTAs. It is anticipated that a change of rules to allow EPAs is more likely through modification of Article XXIV, which justifies RTAs, than through changes in the Enabling Clause as this would too greatly erode basic WTO MFN principles. There remains the issue related to the timing of conclusion of EPAs or the Doha Round and which WTO rules would apply to EPAs.

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,[30] it is not possible at this stage to determine 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, Egypt, Jordan, Lebanon, Morocco and Tunisia)."[31] 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, but 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 ten 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 on 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 ten years for the EU and 12 years for South Africa.[32] 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 April 2004 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."[33] 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.

First, 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 2000.[34] The same Agreement requires that EPAs should be concluded by the end of 2007 so they would enter into force by 1 January 2008.[35] This

[30] Article 37:7 of the Cotonou Agreement 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."
[31] See *EC Mediterranean Citrus*, para. 2.10.
[32] See WTO *Committee on Regional Trade Agreements, Coverage, Liberalization Process and Transitional Provisions in Regional Trade Agreements. Background Survey by the Secretariat*, (WT/REG/W/46, 5 April 2002) Annex 1, p. 22; and Annex 5, p. 36.
[33] See WTO Negotiating Group on Rules, *Submission on Regional Trade Agreements: Paper by the ACP Group of States* (TN/RL/W/155, 28 April 2004) para. 10(ii).
[34] See Article 95:1 of the Cotonou Agreement: "This Agreement is hereby concluded for a period of twenty years, commencing on 1 March 2000."
[35] See Article 37:1 of the Cotonou Agreement.

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 went into force 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.

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 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 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 percent of EU industrial imports from Tunisia duty-free, 5 percent of agricultural imports at MFN duty rates, 24 percent at reduced duty rates, and 71 percent duty-free. On the other hand, 99 percent of industrial imports from the EU would enter Tunisia duty-free, 1 percent at MFN duty level; 62 percent of agricultural imports from the EU at MFN rates, 38 percent at reduced duties while none is allowed duty-free.[36]

More recently, the EU–South Africa TDCA defines "substantially all the trade" to mean at least 90 percent of all the trade between the two entities. As noted earlier, this 90 percent threshold is made up of commitments to liberalize around 94 percent by value of EU imports from South Africa and around 86 percent by value of South African imports from the EU. Many argue that 90 percent is too high, while still others think it is too low. Nonetheless, the EU is currently presenting this 90 percent threshold as "the WTO criterion" for the "substantially all the trade" requirement. As discussed in the argument earlier on the length of transition period, this indicates that the EU is likely to stick to its own tradition and insist on a 90 percent standard. No agreement was reached during the all-ACP-EU phase of the negotiations on this issue and it still remains open, presumably due to an ACP objection. The likelihood is that this threshold will be negotiated at the regional level. While there is nothing wrong in this, the ACP fear, with good reason, that negotiations with the EU at the 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 blueprint to which everybody else must subscribe. Only time will tell whether this is a well-founded concern.

If assuming a 90 percent threshold for the purposes of discussion here, a commitment to this effect could be arrived at in several ways – such as equal 90 percent 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 percent of ACP products enter the EU free of duties, and the negotiations in this respect will be largely on 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 percent overall margin, the ACP countries could still negotiate for application of the asymmetry principle to their benefit in two senses: (1) the 90 percent threshold could be achieved by a liberalization of just 80 percent on their part and 100 percent on the part of the EU, or any combination of figures between those two; and (2) the 20 percent 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.

[36] See WTO/REG/W/46, *supra* n. 45, Annex 1, p. 22.

EPAs and SDT: the way forward

As demonstrated above, neither GATT Article XXIV nor the Enabling Clause has any room for a meaningful application of the principle of SDT 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. It will be argued that Article V of the GATS provides an existing model for any such amendment. Further, this is the line currently being pursued by the ACP Group within the WTO.

2.5 EPAs and other agriculture negotiation related issues

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 excluded the sector from intra-RTA liberalization completely (e.g. the Stockholm Treaty which set up the European Free Trade Association (EFTA) (Dam,1963, p. 654). As a WTO Secretariat survey observed, the strategy used for granting concessions on industrial and agricultural products is different for many agreements. 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.[37] 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.[38]

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" (Dam, p. 654).

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."(idem) It is in response to such concerns 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: first, 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 could create additional market access only in the agricultural sector. 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 SPS

[37] See WT/REGW/46, *supra* n. 45, para. 44, pp. 12-13.
[38] See idem, para. 46, p.14.

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.

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 other products (beef/veal and sugar under the protocols). 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 that EPA negotiations divert from their primary focus on dismantling ACP trade barriers to EU products, improved ACP agricultural market access will become the priority. Indeed, that is precisely what they mean when the ACP propose the extension of the EBA initiative to all ACP countries under the EPAs.

The experience so far, however, is not very 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 percent for Syria and 68 percent for Morocco, while the comparable figures for industrial products stand at 100 percent for all countries except South Africa.[39] 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 difficult challenge 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.

EPAs and health and technical standards

Much 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 due to the Uruguay Round Agriculture Agreement. But this 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 *Lomé acquis*. Rather, it is the EU's highly technical SPS that cause the real problem. The primary objective of these measures generally is the protection of human, animal and plant health and safety. 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 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. As seen from experience and several WTO cases, such as the famous *Beef Hormones* dispute between the United States and Canada, on the one hand, and the EU, on the other,[40] this is a very complex area that requires enormous investment in scientific and technological infrastructure – often in rare supply in most ACP countries.

[39] See WT/REG/W/46, *supra* n. 45, Annex 2, p. 24.

[40] See *EC Measures Concerning Meat and Meat Products (Hormones)*, Complaint by the United States (WT/DS26/*/USA) and Canada (WT/DS48/*/CAN), 16 January 1998.

Developing countries campaigned for and won preferential treatment in terms of lower or zero tariffs and other non-tariff barriers for their products. 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. Ultimately, 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 states:

> *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 stated in this regard 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 (Turkey Textiles, AB Report, para. 57).*

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 the EPAs to introduce "preferential treatment" in the application of EU SPS. This is because, by definition, an SPS 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 from others in similar circumstances (e.g. geographically), then the need for such a 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 of risk in goods coming from any two countries.

Bearing this in mind, there is room to incorporate other forms of "preferences" in the EPAs, such as targeted assistance or organizing pre-shipment inspection facilities at the exit points in the ACP countries (e.g. at the airports or seaports). The ACP countries recognize that lack of scientific and technical know-how is the single most important obstacle standing against their agricultural exports to the EU. 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.

EPAs and commodity protocols

Commodity protocols are one of the unique features of EU-ACP cooperation in trade matters. Historically applying to four products – banana, rum, sugar, and beef/veal – the protocols have been annexed to the Lomé Conventions, and provided duty-free access to fixed quantities of the products under a TQ scheme (except on beef/veal), and in some cases provided further access to guaranteed minimum prices (beef and sugar) similar to those applying to similar 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 both the

banana and sugar regime, 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 there from, 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 both the banana and sugar regimes have been found to be in violation of WTO requirements, thereby setting a dangerous precedent for similar measures under the other protocols. Secondly, 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 the argument above that those ACP sub-regional RTAs will have to be CUs before signing an EPA as RTAs, the dismantling of internal borders that 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, but also creates another disincentive against closer integration of ACP countries at the sub-regional level, thereby impeding progress on the road towards establishing the EPAs.

2.6 Reconciling EPAs with SDT under the WTO – The way forward

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 breach the Cotonou commitment "to conclude new WTO-compatible trading arrangements" (see Cotonou Art. 36:1). 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.

Extending the GSP

The effect on the ACP of extending preferential access to all other developing countries under the GSP system would not be the same as under the current system. An extension to all other developing countries will automatically erode preferences.

The potential extent of this erosion can be tempered, however, by the new Appellant Body (AB) ruling in the EU GSP case. This in effect allows the EU to differentiate among developing countries on objective and open-ended grounds. Paragraph 3(c) of the Enabling Clause provides that SDT 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 (*EU GSP, *AB Report,* April 2004, para. 162*).*

The AB then concluded:

> *(T)he 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 (*ibid., para. 173*).*

At its most unusual extreme, one might wonder whether the special relationship between these two blocs over three decades, which is to end because of a WTO-compliance requirement, has created special "development, financial and trade needs". Such needs have to be responded to positively as required by paragraph 3(c) of the Enabling Clause – even though the demise of Cotonou arises from direct and indirect pressure through the WTO legal system, such as the banana and sugar disputes. Another, and perhaps a more feasible way to use the AB ruling to strike a balance between WTO conformity and preference erosion would be to use economic factors, such as gross domestic product (GDP) and vulnerability, as conditions on which 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. It would also risk re-igniting old divisions within the ACP itself based on each country's position on any such economic scale. As such, the GSP option does not seem to be very attractive in practice.

Revision of Article XXIV

In principle it would be possible to amend GATT Article XXIV to allow for non-reciprocal preferential arrangements over a given portion of the trade between members of RTAs. This could be done, for example, by inserting an SDT exception. One may wonder whether this would fall foul of the Cotonou commitment to conclude a 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 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 question is whether this is achievable within the WTO.

The EU and the ACP seem to be pursuing this option with some degree of coordination in the context of the ongoing Doha Round. Article 37:8 of the Cotonou Agreement provides 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." Further, when the Doha Development Agenda 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 RTAs.
- Most importantly, the Declaration stressed that the negotiations on RTAs "shall take into account the developmental aspects of regional trade agreements." (See WTO Ministerial Declaration adopted on 14 November 2001 (WT/MIN(01)/DEC/1, 20 November 2001, para. 29.)

The first Joint ACP/EU 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 (Joint Report, para. 4(a) (iv), p. 3).*

In their 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."[41] Acknowledging that the current version of GATT Article XXIV does not have room for SDT for North-South RTAs, the ACP Group has proposed to insert the following text in GATT Article XXIV: "members agree that SDT treatment for developing countries be formally and explicitly made available to developing countries in meeting criteria set out in paragraphs 5 to 8 of

[41] See ACP Group proposal, TN/RL/W/155, *supra* n. 46, para. 4.

GATT Article XXIV in the context of regional agreements entered into between developing and developed countries. (idem, para 10).” This in effect is a proposal to allow a certain degree of asymmetry in the 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.”[42] 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 harmonization 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 (*idem, p. 3*).*

In May 2005, the EC, in its second submission (TN/RL/W/179) refers specifically to the ACP Group proposal mentioned earlier and addresses key issues at the heart of their concerns regarding the establishment of WTO compatible EPAs, specifically coverage and transition periods, and possible SDT provisions essential to ensuring that GATT Article XXIV allows the needed flexibility.[43] Under section 5 on developmental aspects they call for fair and equitable treatment between different forms of RTAs to which developing countries are parties:

> *Existing rules fail to create fair and equitable treatment between different types of RTAs based on their developmental impacts and promotion of developing countries' participation in world trade. For example, while preferential tariff and partial liberalization agreements among developing countries fall under the Enabling Clause, ambitious and full-fledged RTAs, such as Free Trade Agreements between developed and developing countries are subject to the stricter requirements of GATT Article XXIV. Yet, North-South RTAs can have at least as high a developmental impact as any of those falling under the Enabling Clause, and it is difficult to see why the substantive requirements should be radically different.*

Further, they call on the Doha Round negotiations on RTAs to clarify the flexibilities already provided within the existing WTO rules on RTAs, in order to give greater security to developing country parties to RTAs to ensure that the rules facilitate the necessary adjustments. The submission indicates that:

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[42] 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.

[43] *See Negotiating Group on Rules, Submission on Regional Trade Agreements by the European Communities* (TN/RL/W/179, 12 May, 2005), p. 4 and 5.

> *The European Communities are prepared to explore various ways of achieving this aim, including the extent to which flexibilities might be appropriate with respect to, inter alia, the length of the transitional period, the level of final coverage and the degree of asymmetry for both under GATT Article XXIV. More specifically, the European Communities are open to consider separate and differentiated, i.e. lower, thresholds for developing countries and least developed countries, as proposed in the submission by the ACP-countries (TN/RL/W/155). Moreover, longer transition periods might be necessary to facilitate market building and consolidation through gradual openness to trade in weak and vulnerable developing countries, taking into account their specific needs and constraints. The European Communities would thus like to confirm in the negotiations these specific justifications for developing country parties to RTAs to depart, where necessary, from the general rule of ten years maximum.*

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. 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 (see Chapter 3).

Lessons from GATT / WTO practice

Finally, it is worth reiterating the above point that both the EC and the ACP countries have argued on several occasions that the non-reciprocal Lomé agreements themselves were in full compliance with these same GATT/WTO rules. As the Turkey Textiles Panel 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 been inconclusive (*Turkey Textiles Panel Report, para. 9.107*).*

Nevertheless, 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.

Summary

This chapter has shown that the commitment to establish WTO-compatible EPAs is an extremely difficult and uncertain undertaking. There is a great risk that it can be achieved only at the cost of the ACP countries sacrificing several of their rights to SDT within the WTO. Of the apparent actions that might be taken to enable this commitment to be met only a modification of Article XXIV seems a possible option. Neither a waiver or under the GSP system could be considered a possibility. While it is not necessarily a negative thing for ACP countries to support the EU position in the Doha Round, this should nonetheless be informed by an accurate evaluation of their own domestic and regional priorities.

Furthermore, it is obviously difficult to ascertain the outcomes of these issues in the actual EPA negotiations except to state that much will depend on the skilfulness of the negotiators themselves and how attuned they are to their relevance. The bottom line should be that there ought to be consistency with positions taken regarding issues like IPRs in the Doha Round negotiations and that negotiators have a comprehensive focus of the international legal instruments of relevance and their provisions. In the area of GIs, the EU is likely to use the EPA negotiations to establish precedents and support for its positions at the WTO, and which it has employed previously, such as in its agreement with South Africa. It is well to remember that the agreement with South Africa goes beyond the existing TRIPs disciplines in recognizing the exclusive rights that EU producers have over certain GIs of immense economic benefit. Annex 2.1 below addresses these issues.

Annex 2.1
EPAs and the regime of Intellectual Property Rights over plant genetic resources

Intellectual Property Rights (IPRs) are a means of protecting and rewarding innovation. They include patents, trademarks, industrial designs and geographical indications (GIs). The core of the problem with IPRs lies in the balancing of private and public interests, for example, allowing an investor to recoup the costs of their research and the resulting product, but at the same time, safeguarding the interests of the public from exploitation motivated purely by profit. To a large extent, this is an issue that has divided developing from developed countries, a scenario that is repeatedly witnessed in debates at the WTO's Council on Trade Related Aspects of Intellectual Property Rights, the World Intellectual Property Organization (WIPO) and other competent fora. Without doubt, it continues to be an issue in the ongoing negotiations on EPAs between the EU and ACP countries. Although it is not explicitly on the agenda for negotiations by the EU, some regions, such as ESA, have included certain IPRs-related issues such as technology transfer in their negotiating mandate. Without question, the issue is bound to come up in the negotiations, whether in the form of enhanced IPRs protection (as it has in FTA negotiations by the EU with South Africa in the case of the protection of the names of certain wines and spirits), or in the form of new and improved regimes for the protection of plant varieties (as is required by Article 27.3(b) of the *Agreement on Trade-Related Aspects of Intellectual Property Rights* (TRIPS), to whose implementation both the ACP and the EU have committed themselves in the *Cotonou Agreement*).

The aim of this section is twofold: (i) to present an overview of the existing framework of international legal instruments that regulate IPRs (particularly those relating to agriculture) and concepts of which EPA negotiators may wish to take note of or borrow from; and (ii) to explain the IPRs-related issues of relevance to the EPA negotiations by drawing lessons from previous agreements negotiated by the EU and the positions taken in the Doha Round. While inconclusive, this chapter will highlight the points of concern for EPA negotiators from the ACP region: (i) that IPRs are an issue of immense economic value and therefore of central interest to the EU; (ii) that despite their precise mention in the EU's negotiating mandate, they should nevertheless prepare themselves to respond to demands relating particularly to enhanced IPRs protection (the so-called "TRIPs-plus" demands); and (iii) that what they agree to in the negotiations regarding technology transfer, the protection of plant varieties and on other IPRs-related issues, will have an important impact on their quest for economic development, the improvement of agricultural productivity and food security.

The international framework for the protection of IPRs

The TRIPs Agreement

TRIPs is a product of the Uruguay Round. It entered into force in 1995, as part of the WTO single undertaking. Its main objective is to protect and enforce IPRs and to ensure that they contribute to the promotion of technological information and transfer. Of particular relevance in the context of plant genetic resources is Article 27.3(b) of the *TRIPs Agreement*, which makes it mandatory for WTO members to provide for the protection of plant varieties through patents, an effective *sui generis* system, or a combination thereof. This *sui generis* option provides valuable policy space for developing countries to draft national legislation that accords with their national agricultural development priorities and at the same time meets their WTO commitments.

This provision is problematic owing to difficulties in the interpretation of the precise meaning of "plant varieties". Developed countries have sought a broader meaning to widen the range of protection for biotechnological products, while developing countries generally relying on a traditional agricultural sector have sought a narrower interpretation of the term in order to allow for an unrestricted availability of plant species. The difficulty with the implementation of this provision lies in the absence of a mutually agreeable definition of "plant variety" among WTO members and the inconclusiveness of the ongoing discussions on the issue. Another issue of relevance in the *TRIPs Agreement* is Article 66.2 on technology transfer which requires developed countries to "provide incentives to enterprises and institutions in their territories for the purpose of promoting and

encouraging technology transfer to least-developed country members in order to enable them to create a sound and viable technological base." Article 46 of the *Cotonou Agreement* binds the parties to adhere to the TRIPs Agreement (especially, in this case, Article 66.2) and to deepen their cooperation in IPRs in general.

The UPOV Convention

The International Union for the Protection of New Varieties of Plants (UPOV) is an intergovernmental organization established in 1961 to coordinate the implementation of plant breeders' rights. The *UPOV Convention* came into force in 1961. It was revised in 1972, 1978 and 1991. The 1991 *UPOV Convention* entered into force in April 1998. The 1978 version, to which a few developing countries are members, is closed to further signatories. It is generally held that the 1991 version is stricter in its recognition of breeders' rights as opposed to the so-called "farmers' privilege" that was implicitly allowed in the 1978 version, and has proven less attractive to developing countries.

With regard to UPOV, the main controversial issue relating to rural agriculture lies in arriving at an acceptable definition of the scope of the "private and non-commercial" exception under Article 15 of the 1991 UPOV Convention. This provides that a "breeder's right shall not extend to acts done privately and for non-commercial purposes." The question is whether the exchange of seeds or propagating material from a protected variety (i.e. a variety for which a breeder's right has been granted) and without the right holder's consent is lawful in view of certain uses of the exchanged material.

It is noteworthy that Article 14 of the *UPOV Convention* gives an overview of acts that are deemed to be within the rights of a breeder. It is also necessary at this point to remember that a "breeder's right" in this context is a form of a *sui generis* system of protection for plant varieties in terms of Article 27 (3) (b). Article 15 of the 1991 *UPOV Convention* provides several exceptions including acts done privately and for non-commercial purposes at subsection (1)(i), acts done for experimental purposes and acts done for the purpose of breeding other varieties. Given the limited scope of seed exchanges by small-scale farmers in a certain territorial ambit such as a rural community, one might consider that these acts are both of a private nature confined within that ambit, and for non-commercial purposes, especially given the economic conditions of the farmers.

Not all ACP countries have legislation in place to protect plant varieties. As stated above, TRIPs requires all WTO members to come up with a regime for plant variety protection. Article 27.3(b) gives three options: patents, a *sui generis* system, or some combination of the two. The UPOV system has been characterized as a *sui generis* system, in the meaning of Article 27.3(b), and is heavily portrayed as the ideal way of complying with this TRIPs commitment. It is probable that ACP countries that do not already have a plant variety protection regime in place could be compelled to draft domestic IPRs legislation that mirrors UPOV, especially bearing in mind that in Article 46(6), EU assistance could include the "preparation of laws and regulations for the protection and enforcement of intellectual property rights."

The International Treaty on Plant Genetic Resources for Food and Agriculture

The International Treaty on Plant Genetic Resources for Food and Agriculture (the "Treaty") is a relatively new feature in the international legal landscape, having come into force in June 2004, with unique provisions and thereby potential implementation challenges. The negotiations on the Treaty were arduous and lengthy. By Resolution 3/2001, the Treaty was finally adopted on November 3, 2001 by the FAO Conference at its 31st Session after a seven-year negotiating process.

The Treaty has a broad sweep and covers "plant genetic resources for food and agriculture". It provides a framework through which plant genetic resources could be both conserved and used in a sustainable manner. One of its most innovative and novel provisions is on farmers' rights. It is the first binding international Treaty to recognize such rights and therefore constitutes a major step in their actual implementation. At Article 9.1, the Treaty recognizes:

> *"the enormous contribution that local and indigenous communities and farmers of all regions of the world, particularly those in centres of origin and crop diversity have made and will continue to make for the conservation and development of plant genetic resources which constitute the basis of food and agriculture production throughout the world." In effect therefore, the Treaty puts traditional farmers' rights on an equal footing*

with modern breeders' rights. Quite importantly however, the subsequent provision vests the responsibility for realizing farmers' rights in national governments and suggests that the framework for the protection and promotion of such rights could be in any appropriate form "subject to … (a country's) national legislation."

The Contracting Parties are therefore at liberty to design legislative and implementation mechanisms that accord farmers the protection of relevant traditional knowledge, their right to equitably participate in benefit-sharing of plant genetic resources, and their right to participate in national decision-making on the utilization and conservation of plant genetic resources. Subject to national law, the Treaty grants farmers extensive rights to "save, use, exchange and sell farm-saved seed/propagating material." The reference to "national governments" and "subject to national legislation" and "subject to national law" in Article 9 of the Treaty should underline the primacy of implementing the commitments of the Contracting Parties by formulating appropriate laws at the national level.

In Articles 10 through 13, the Treaty also provides for a Multilateral System of Facilitated Access and Benefit Sharing, commonly known as "the Multilateral System". It was designed to obviate the need for bilateral arrangements between countries on issues of access to plant genetic resources. The Multilateral System is a core feature of the Treaty and deserving of particular mention because it has important implementation challenges of its own. The Treaty does not deviate from the accepted principles of international law on the sovereign rights of states, and therefore recognizes, "the sovereign rights of states over their own plant genetic resources for food and agriculture, including the authority to determine their access to those resources rests with national governments and is subject to national legislation (Article 10)." The Multilateral System facilitates access of plant genetic resources for food and agriculture, and the fair and equitable sharing of the benefits of utilizing these resources in a manner that is complementary and mutually reinforcing.

The list of crops subject to the Multilateral System is spelled out at Annex I to the Treaty and includes 35 food crops and 29 forages. Access to the listed crops is subject to certain conditions as listed in Article 12.3 of the Treaty. During the negotiations, one of the most contentious of these conditions was that concerning IPRs over genetic resources. The provision in the Treaty now reads: "Recipients shall not claim any intellectual property or other rights that limit the facilitated access to the plant genetic resources for food and agriculture, or their genetic parts or components, in the form received from the multilateral system." As with many provisions in international treaty law, this phrase is subject to various, even conflicting interpretations. One may correctly say that the provision means that no intellectual property rights of any sort can be claimed since such rights per se will limit access. On focusing on the phrase "that limit the facilitated access", however, another interpretation may be that intellectual property rights could be obtained provided that such rights do not limit facilitated access as envisaged in the Treaty. There is also bound to be controversy over the precise meaning and scope of the "in the form received" phraseology in the same Article 12.3(d). Clearing up these and numerous other ambiguities in treaty interpretation is part of the mandate of the Governing Body, and it is likely to be a very involved task.

According to Article 12.4, facilitated access of plant genetic resources shall be provided on the basis of a standard Material Transfer Agreement (MTA) to be adopted by the Governing Body. The task of developing the standard MTA has commenced. In the first meeting of the Commission on Genetic Resources for Food and Agriculture (CGRFA), acting as Interim Committee for the Treaty, held on 9-11 October 2002, a regionally balanced Inter-governmental Expert Group was established to develop the standard draft MTA. At the same meeting, the terms of reference for this Expert Group were negotiated. The next meeting for of the Interim Committee is slated for late next year, and it is hoped that that meeting will follow up on the work of the Expert Group. Although the Treaty does not provide guidance on the exact content of an MTA or the formula for benefit sharing, it is expected that the main provisions of the MTAs will devote attention to IPRs and benefit sharing.

The provisions on benefit sharing at Article 13 also have a novel feature at subsection (d) concerning the sharing of monetary and other benefits of commercialization. According to this provision, a recipient that commercializes a product that is a plant genetic resource as envisaged by the Treaty and that is accessed from the Multilateral System is obligated to share these profits fairly and equitably on the basis of a MTA. Such an individual is also required to pay royalties that shall be used

by the Treaty Governing Body as part of its funding strategy for benefit sharing. The provision also specifies that it is up to the Governing Body to determine the level, form and manner of payment, but that such payment shall be in line with commercial practice.

At Article 15, the Treaty provides a framework for ex situ collections of plant genetic resources held in trust by International Agricultural Research Centres (IARC), of the Consultative Group on International Agricultural Research (CGIAR), and other relevant international organizations. It invites CGIAR centres to sign agreements with the Treaty Governing Body to place their ex situ collections under the scope of the Multilateral System.

As explicitly required by Article 4 of the Treaty, "Each Contracting Party shall ensure the conformity of its laws, regulations and procedures with its obligations…." Article 6.1 also reiterates this by stating that "(t)he Contracting Parties shall develop and maintain appropriate policy and legal measures that promote the sustainable use of plant genetic resources for food and agriculture." Necessarily, therefore, implementing the Treaty at the national levels will entail reformulating national policies and laws in order to conform to the Treaty's requirements. Such legislation will need to put into effect the requirement in Article 9.2 on farmers' rights. The FAO has been providing legal advice to countries that wish to draft such legislation.

It is well to remember that in general, international law requires full compliance with negotiated Treaty obligations, save for provisions to the contrary, in the Treaty itself. Since the Treaty does not have any such provisions, compliance is expected from Contracting Parties. The first meeting of the Interim Committee discussed the Treaty's draft compliance procedures. Together with the more intractable issue of addressing situations of non-compliance, this will also be on the agenda of the first Governing Body meeting as required by the Treaty's Article 21. The use of "shall" in Article 21 means that the adoption of compliance procedures at the first meeting of the Governing Body is a mandatory requirement. The challenge on Contracting Parties is therefore to prepare themselves for compliance with their Treaty commitments. This essentially translates into pressure on the need to develop the capacity to meet their obligations and utilize their rights under the Treaty. For developing countries, and countries with economies in transition, this is a particularly onerous task.

Article 21 provides some guidance on what the procedures and mechanisms of non-compliance should be. It states that such procedures and mechanisms "shall include monitoring, and offering advice or legal assistance, when needed, in particular to developing countries and countries with economies in transition." Article 21 is not an entirely unique provision in recent international treaty law, as it has featured in various formulations in some recent international treaties. However, it is particularly important that it anticipate and provide assistance to developing countries and countries with economies in transition. Since the main objective of the procedures is to promote compliance and to address the difficulties of Contracting Parties, it also requires that such procedures be "cooperative and effective", suggesting an emphasis on the need to resolve situations of non-compliance in an amicable way, and possibly, with preference being given to dialogue. The reference to "legal advice or legal assistance, when needed" is, however, novel in contemporary international treaty law. The Governing Body will be expected to formulate modalities on how and by whom such legal assistance and advice will be made available, but the objective of this assistance is clearly to be the resolution of compliance difficulties. The use of the phrase "shall include monitoring…" in this Article should mean that the list of compliance procedures given is not meant to be exhaustive.

The coming into force of the *International Treaty on Plant Genetic Resources for Food and Agriculture* has inspired countries to prepare laws to protect plant varieties and farmers rights. This inspiration comes from the fact that under patents, farmers would be prohibited from using seeds from patented varieties without the consent of the patent holder. As seeds saved by farmers and exchanged among them can account for up to 80-90 percent of the total seed requirements in developing countries, a patent system would severely constrain subsistence farming and food security, hence the need for workable *sui generis* systems.

The UN Convention on Biological Diversity (UNCBD)

The UN Convention on Biological Diversity (UNCBD) was adopted at the Rio Summit in 1992 and entered into force in 1993. The UNCBD aims at the conservation of biodiversity by sustainable utilization of genetic resources, especially by the biotechnology sector, and the recovery of economic

benefits of such by its use into conservation activities, particularly in developing countries. Article 15.1 provides that: "Recognizing the sovereign rights of States over their natural resources, the authority to determine access to genetic resources rests with the national governments and is subject to national legislation." The emphasis on national sovereignty is balanced by the recognition that the conservation of biological diversity is a common concern of humankind and by the obligation of each Contracting Party "to endeavour to create conditions to facilitate access to genetic resources ... and not to impose restrictions that run counter to the objectives of the Convention" in Article 15.2.

In addition to the UNCBD, Agenda 21, a non-binding programme of action for sustainable development, was adopted at the Rio Summit. It calls on governments to foster traditional methods and the knowledge of indigenous people and their communities, to share the benefits of biological resources, including biotechnology, and to develop national strategies for the conservation of biodiversity, the sustainable use of biological resources and the safe transfer of biotechnology, particularly to developing countries.

In Article 46(2) of the Cotonou Agreement, the parties "underline the importance of adherence to the Convention on Biological Diversity" a requirement that, in view of its recognition of sovereignty over natural resources, should serve to underline any discussions on IPRs in the context of the EPAs.

EPAs and IPRs

IPRs are re-affirmed in Article 46 of the *Cotonou Agreement* and are defined to cover "patents, including patents for bio-technological inventions and plant varieties or other effective *sui generis* systems." This is in fact a more rigid conception of IPRs than that sought by WTO members in the context of the Doha Round of trade negotiations, although it was agreed to before the commencement of the Doha Round in 2001.

Despite no explicit mention of IPRs in the EU's negotiating directives, it does not preclude the EU from raising the issue during EPA negotiations. Further, as provided in Article 46(4) of the *Cotonou Agreement*, the EU and the ACP countries "may consider the conclusion of agreements aimed at protecting trademarks and geographical indications for products of particular interest of either Party." Indeed the EU will seek to "deepen" cooperation with ACP countries on IPRs and related issues through the EPAs. Article 46(6) of the *Cotonou Agreement* mandates this kind of broad cooperation in the following terms:-

> *The Parties further agree to strengthen their cooperation in this field (of IPRs). Upon request and on mutually agreed terms and conditions cooperation shall inter alia extend to the following areas: the preparation of laws and regulations for the protection and enforcement of intellectual property rights, the prevention of the abuse of such rights by right-holders and the infringement of such rights by competitors, the establishment and reinforcement of domestic and regional offices and other agencies including support for regional intellectual property organizations involved in enforcement and protection, including the training of personnel.*

Several reasons therefore justify why ACP countries should prepare themselves to offer responses to the EU on the question of IPRs, even though it has not explicitly arisen in the EU's negotiating mandate. First, as stated above, the Cotonou Agreement clearly commits both parties to deepen their commitments and cooperation in IPRs. There is no better occasion for them to do so than in the ongoing negotiations on EPAs. In anticipation, some negotiating regions, such as ESA, have already included "trade-related issues" in their negotiating mandate. According to the ESA mandate:

> *Negotiations on trade-related rules should be based on the provisions of the Cotonou Agreement (in particular Articles 44 to 52) and the need to ensure increased co-operation in these areas, enhanced capacity building and technical assistance. ESA negotiators will stress the fact that there is a need to build adequate legal and institutional capacities in the ESA region before any disciplines in these areas can be envisaged for negotiations.*

Secondly, as evident from the aggressive position taken by the EU in relation to the post-Doha discussions on extending coverage of geographical indications (GI) protection to products other than wines or spirits, the EU has particular interests in GIs, especially over certain products of interest such as wines, spirits and cheeses. If ACP countries want a sampling view of what the EU may require of GIs, they should look at the EU-South Africa Agreement on Wines and Spirits.

The Agreement provides better protection for EU appellations of origin than the protection available in the TRIPs Agreement. In the Agreement, South Africa agreed to provide exclusive protection for EU wines such as "Champagne", "Chianti", "Mosel", "Port" and "Sherry." As concerns "Port" and "Sherry", South Africa agreed also to refrain from using these terms for their own wines after transitional periods of 12 years in its domestic market, and after five years in export markets, with the commencement period for protection being 1 January 2000.

The Agreement also provides for the elimination of conflicting or misleading trademarks, especially those that may confuse buyers on the origin of wines. In the spirits sector, all European traditional names such as "Grappa" and "Ouzo" will be protected after a transitional period of five years.

Thirdly, in negotiations with the United States, developing countries have often been faced with "WTO-Plus" intellectual property demands through bilateral talks, such as in the Free Trade Area of the Americas (FTAA) and the North American Free Trade Agreement (NAFTA) negotiations. This is something ACP countries might expect from the EU, particularly in recalling the experience of South Africa in its negotiations with the EU. While Article 24(1) of the TRIPS Agreement requires WTO members to work to increase the general level of protection for GIs, it does not specify how this should be accomplished. There are significant possibilities that the EU may want to use the EPAs to accomplish this goal.

Fourthly, since most ACP countries are in the process of meeting their commitments under Article 27.3(b) of the TRIPs Agreement, it is possible that the issue may arise in the negotiations with the EU, especially since they have already committed themselves to adhere to this and other international IPR regimes (in Article 46(1), 46(2) and 46(3) of the Cotonou Agreement). This would have implications on the regime that they create for the protection of plant varieties as required by TRIPs, and whether this regime would be patent-oriented, a *sui generis* system, or some combination thereof. It may be expected, for example, that the EU will demand a proper plant breeders' rights regime in the mould of UPOV 1991 for ACP countries without one in place already.

An issue on which ACP countries, particularly the LDCs, could be demandeurs in the EPA negotiations is technology transfer. According to Article 66.2 of the TRIPs Agreement, "Developed country members shall provide incentives to enterprises and institutions in their territories for the purpose of promoting and encouraging technology transfer to least-developed country members in order to enable them to create a sound and viable technological base." This is an issue ACP countries could take up as a negotiated development supportive package in the context of the EPA negotiations, especially since both parties to the Cotonou Agreement recognize the linkages with the Doha Development Agenda. The ESA has already included it in its negotiating mandate, demanding that the parties to the EPA "negotiate a programme which will allow the transfer of science and technological information and knowledge required to enhance the trade and development capacities of ESA countries."

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Chapter 3
Food security, EPAs and lessons from relevant EU trade agreements

Introduction

The specific focus of this chapter is to pose the question of the potential role of EPAs in supporting food security in ACP states. It assesses the current dynamic of ACP–EU trade, the effects that the preferences have had on the value chains associated with ACP exports and the extent to which this relationship may change in the coming years as a result of "preference erosion". In this way it complements the parallel chapters on the effects of the CAP reform and EU enlargement on the ACP, the WTO dimension of the ACP–EU relationship and on the challenges facing the ACP in the effective management of their fisheries.

3.1 The centrality of food security

Trade is not a goal in its own right; its objective is to allow countries to enjoy a higher level of welfare than would be possible without it. Similarly, trade policy is not created in isolation. It needs to support the economic objectives of the countries concerned. In the case of the ACP–EU partnership, enhanced food security is central. This point needs to be emphasized frequently.

To reach the Millenium Development Goals (MDGs), most ACP countries will have to significantly step up efforts towards poverty and hunger reduction. A particular focus on food security in the context of poverty reduction strategies is indispensable due to the damaging consequences of hunger and malnutrition on human productivity. Indeed, recent evidence demonstrates that hunger has severe negative effects on the productivity of individuals and the growth rates of countries. FAO's work on the links between hunger and economic growth suggests that for sub-Saharan Africa, the economic and social cost of hunger in terms of lost productivity, illness and death, is high. Rough estimates show that countries in this region could have attained an average per capita GDP level of US$2 200 in 1990 if undernourishment had been eliminated starting in 1960. This should be compared to the region's average GDP per capita of only US$800 in the 1990s.

Long-term trends in food security and poverty indicators have generally been positive for the developing countries as a whole. However, improvements have been too slow and highly divergent across countries and regions. In particular, the ACP countries have not participated fully in the progress achieved. Table 3.1 presents FAO's estimates of the number and percentage of undernourished people in developing countries and ACP countries, from 1969-1971 to 1999-2001. The data include 100 developing countries, as well as 48 ACP countries out of a total of 79. Estimates cover 40 out of 48 ACP countries in Africa, but only seven out of 16 ACP countries in the Caribbean and one out of 15 in the Pacific (Papua New Guinea). However, in terms of population, the estimates cover 93 percent of the population of the ACP countries in Africa, 96 percent in the Caribbean and 66 percent in the Pacific.

For the developing countries as a whole, the last three decades have seen a decline in the percentage of the undernourished people in the population from 37 percent in 1969-71 to 17 percent according to the most recent estimates, while the total number of undernourished people fell from 958 million to 798 million. Unfortunately, the 48 ACP countries covered by the estimates have not followed a similar trend: the prevalence of undernourishment declined slightly from 34 to 32 percent of the population, while the total number of undernourished actually increased from 98 million to 208 million.

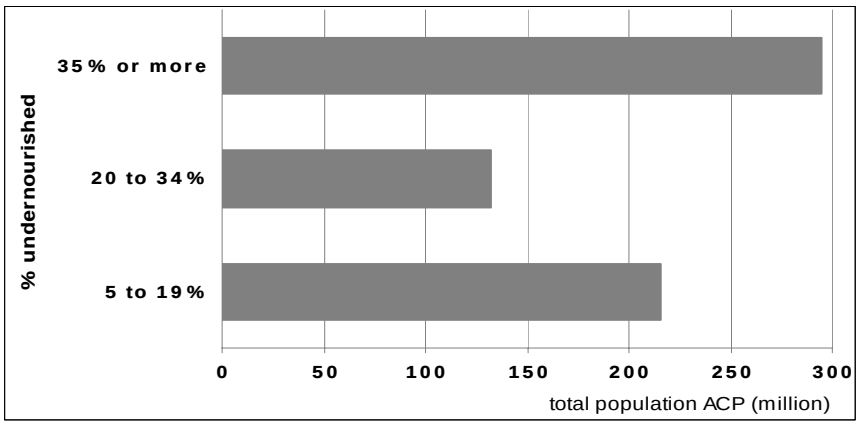
Three decades ago, the ACP countries accounted for 10 percent of the undernourished population in the developing countries; by 1999-2001 this share had increased to 26 percent. Only 13 of the ACP countries covered by the estimates saw the number of undernourished people decline from 1990-92 to 1999-2001; and only eight saw a decline in undernourishment during both the first and the second part of the decade.

TABLE 3.1: PREVALENCE OF UNDERNOURISHMENT

	Proportion of undernourished in total population (percent)				
	1969-71	1979-81	1990-92	1995-97	1999-2001
Developing countries	**37**	**28**	**20**	**18**	**17**
ACP countries	**34**	**35**	**34**	**35**	**32**
ACP countries in Africa	**35**	**36**	**35**	**35**	**33**
ACP countries in the Caribbean	**26**	**19**	**28**	**32**	**24**
ACP countries in the Pacific	**35**	**24**	**25**	**27**	**27**
	Number of people undernourished (millions)				
	1969-71	1979-81	1990-92	1995-97	1999-2001
Developing countries	**957.6**	**920.0**	**816.6**	**779.7**	**797.9**
ACP countries	**98.2**	**131.2**	**174.7**	**203.7**	**207.6**
ACP countries in Africa	**91.8**	**125.6**	**165.6**	**192.5**	**198.4**
ACP countries in the Caribbean	**5.5**	**4.9**	**8.2**	**10.0**	**7.9**
ACP countries in the Pacific	**0.9**	**0.7**	**0.9**	**1.2**	**1.3**

Note: The estimates include 100 developing countries and 48 ACP countries: 40 in Africa, 7 in the Caribbean and one in the Pacific.
Source: FAO and World Bank.

FIGURE 3.1: TOTAL POPULATION IN ACP COUNTRIES BY UNDERNOURISHMENT CATEGORY



Source: FAO

The magnitude of the undernourishment problem in the ACP countries is also illustrated in Figure 3.1, which shows how the population is distributed among countries with different prevalence of undernourishment: none of the countries has an incidence of undernourishment of less than 5 percent while the majority of the ACP country population lives in countries with at least 20 percent of the population undernourished. Close to 300 million people live in countries with an incidence of undernourishment above 35 percent.

A concern for food security should be central to any evaluation of alternative approaches to trade policy. ACP states in general depend relatively highly on trade for their food security. Their economies are relatively open. Many are reliant upon trade in agricultural products to earn export revenue and on food imports to satisfy domestic consumption. Some states rely on trade for both agricultural exports and imports.

The EU is the ACP's main trade partner for both agricultural and non-agricultural products. It took 31 percent of ACP export in 2003, compared with 27 percent of United States imports, and supplied 29 percent of ACP imports (DG Trade 2004). These figures, based on the total value of trade, are heavily influenced by the direction of a few high-value items (e.g. Nigeria's oil is exported mostly to the United States). If one looks at the range of products exported, the dominance of the EU as an ACP market is even more marked.

Moreover, food security is central to the livelihoods of the poor in ACP countries. It is important that the policy changes incorporated into EPAs support their livelihoods, for example, by facilitating trade from which poor people can benefit as producers or consumers. FAO has identified a range of ways in which regional integration schemes can foster pro-poor food security. These include trade

facilitation, the harmonization of national agricultural policies and support to national Special Programmes for Food Security (FAO, 2003a, p. 61).

3.2 ACP–EU trade

The broad picture

If one looks at nominal figures for recent trade growth between the ACP and the EU the picture is quite bright (Figure 3.2). Exports increased by 67 percent and imports by 52 percent between 1995 and 2002, so that by the end of the period the ACP had a tidy merchandise trade surplus with Europe. By 2002, agriculture accounted for just under one-quarter of ACP exports to the EU but only one-eighth of its imports (see Figure 3.2)

In practice, however, when account is taken of the growth in EU trade with other regions, the ACP have been marginalized. Their share of EU imports between 1995 and 2002 fell from 3.4 to 3 percent.

An important distinction emerges between agriculture and non-agriculture when looking at the ACP's share of EU imports. The main reason that the ACP's share of total EU imports has slumped is that the non-agriculture share is tiny and has fallen badly. The share of agriculture, by contrast, is much greater and has fared better (Figure 3.4).

This re-emphasizes the point concerning food security and agriculture being central to the EPA negotiations. Whereas the ACP are marginal suppliers of the EU in manufactures, they account for a significant one-eighth of all EU imports of agricultural products.

Differential agricultural performance

One reason for the relative importance of agriculture is that the Cotonou Agreement provides preferences that are particularly commercially valuable on a number of CAP items for which trade policy is restrictive. One can divide the ACP's agricultural exports into three groups:

- traditional products, such as beverages, that are exported through a relatively undifferentiated, liberal world market;
- other traditional exports such as beef and sugar that are exported to markets heavily influenced by agricultural protectionism, notably but not exclusively in the EU;
- non-traditional products such as horticulture and flowers that are exported to markets, notably but not exclusively in the EU, that are characterized by some protectionism.

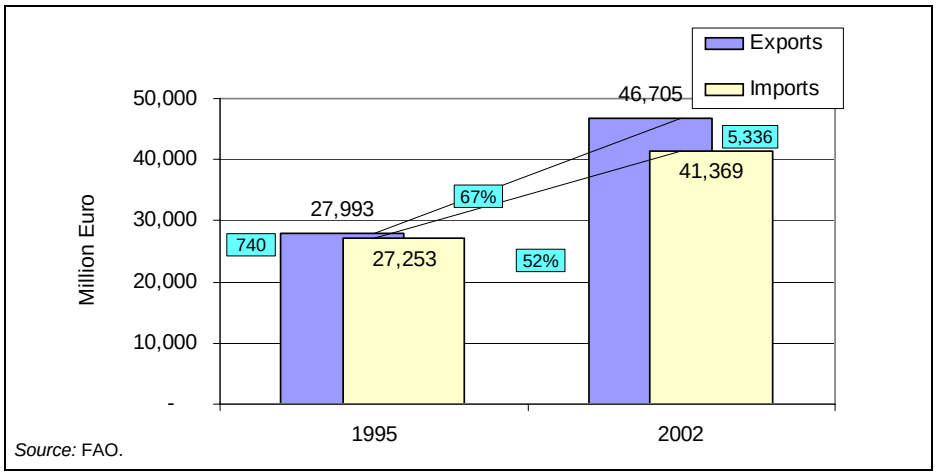
These three groups have had very different experiences on the world market. The difference is illustrated in Figures 3.4 and 5, which compare the net barter terms of trade (for sub-Saharan Africa only – not for the full ACP) for various agricultural export products and several imports. The picture painted in Figure 3.4 for the net barter terms of trade between traditional beverage exports and cereal imports is a familiar one.

Apart from a recent surge for tea, the trend over the period has been towards stability or decline. By the turn of the century a tonne of cocoa exports could fund only around two-thirds of the cereal imports that could have been purchased in 1980.

The picture for the other two categories of export is quite different (Figure 3.6). Only the pineapples and grapefruit trade have seen deterioration. Flowers and beans have both moved sharply in a favourable direction. By the turn of the century, a tonne of flower exports would buy around 25 percent more cereals than it would in 1990. For beans the improvement was one-tenth. Sugar has improved slightly, and beef has maintained its position after a mid-1990s trough.

Cotonou is crucial to this difference between the categories of product. As will be explained below, it has contributed to ACP exporters obtaining a part of the economic rent accruing as a result of CAP protectionism. The implications of this and of any change either to the CAP or to other influences on European agricultural supply and demand, such as enlargement or to the EU–ACP trading relationship; need to be taken into account in terms of their impact on food security.

FIGURE 3.2: RECENT TRADE: GROWTH



Source: FAO.

FIGURE 3.3: RECENT TRADE: SECTORAL COMPOSITION

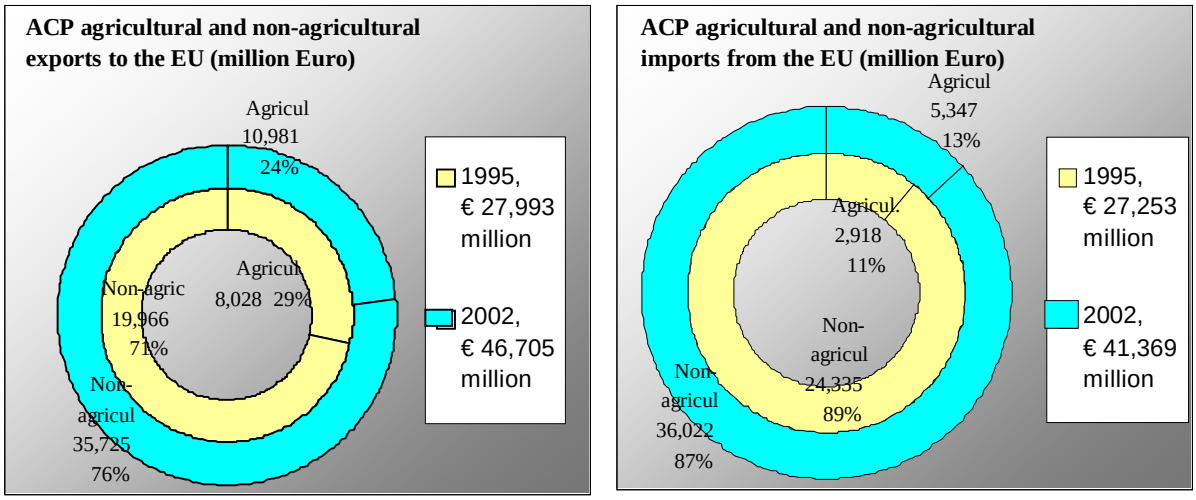
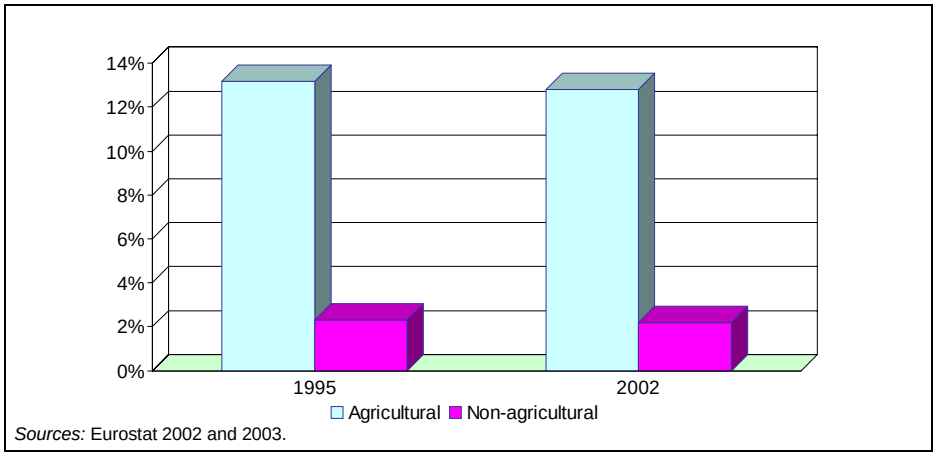
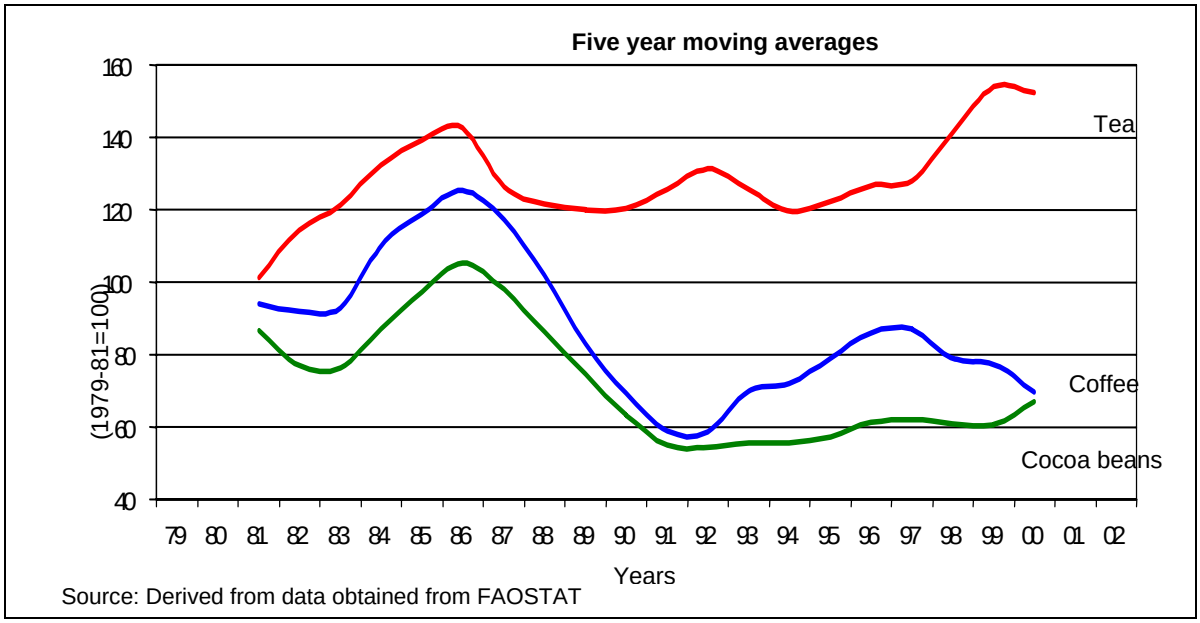


FIGURE 3.4: THE IMPORTANCE OF AGRICULTURE: SHARE OF EU IMPORTS



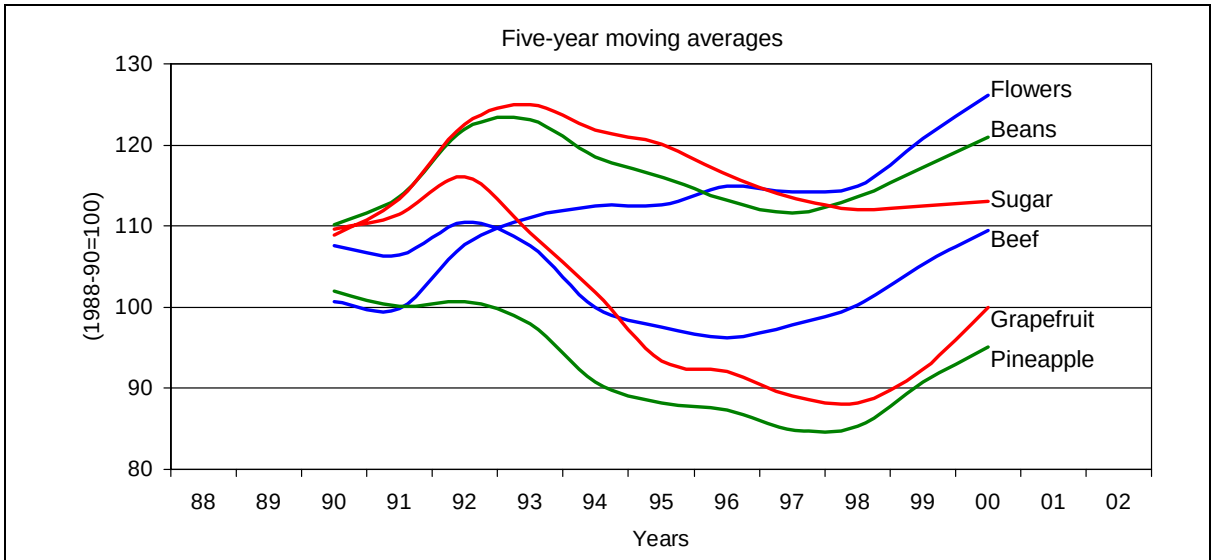
Sources: Eurostat 2002 and 2003.

FIGURE 3.5: NET BARTER TERMS OF TRADE: MOST IMPORTANT SSA EXPORTS AND CEREAL IMPORTS



Source: Derived from data obtained from FAOSTAT

FIGURE 3.6: NET BARTER TERMS OF TRADE: MOST IMPORTANT SSA EXPORTS AND CEREAL IMPORTS



Source: Derived from data obtained from FAOSTAT and Eurostat 2002 and 2003.

The link to Cotonou

To understand the economic effects of EPAs it is important to clearly understand how current trade preferences have had an economic impact on those ACP countries that have been able to take advantage of them. In most cases, the main constraint that has limited the ACP's uptake of the EU's agricultural preferences is supply capacity. This may seem surprising given the number of restrictions that apply to Cotonou's provisions for agricultural items covered by the CAP. This is not to suggest that there are no causes for ACP complaint that the letter of Cotonou fails to live up to its spirit.

Nonetheless, as explained in the next two sections, the commercial effects of a preference are not always easy to judge simply from looking at the text of the trade agreement. Trade preferences that may seem very generous on paper may turn out to be commercially worthless. Similarly, those that may seem to be hedged about with restrictions may be extremely valuable in the context of the product market concerned. The explanation for this paradox hinges upon the existence of what is termed in this chapter "trade policy rents".

How rents are created

Trade policy rents arise when a market is distorted but certain suppliers of imports receive preferential access. The purpose of the distortion is to enable domestic producers to sell goods that consumers would otherwise prefer to buy from foreign producers, whether because they are cheaper, of a preferred quality or some other reason. One way to do this is to subsidize the domestic producers, but this tends to be politically unpopular because it is visible and results either in higher taxes or lower government expenditure on other items. Another less visible and less politically costly way is to rig the domestic market so that consumers have to pay the higher prices at which domestic producers can compete. One of the fundamental mechanisms to achieve this is to impose protectionist trade barriers, which, by squeezing imports, restrict supply and maintain prices at higher levels than would otherwise apply. In some cases, these restrictions (and their price effects) are substantial. The principal intention of these distortions is normally to confer the rents on producers in the distorting state, but there is leakage – often through preferences. All of the OECD countries offer some form of preferential market access to certain developing countries.

In general terms, the protection–preference nexus makes sourcing imports from some suppliers more attractive than from others, but who gains what depends on the power distribution within a value chain. What is important is both the overall scale of the rent and the architecture of the rules that creates it.

Rents are most substantial in product markets that face such severe protectionism that it sharply restricts the possibility of importing from non-preferred sources.

This is the case, for example, with beef and sugar, for which the EU import tariffs are, respectively, 12.8 percent + €303.4/100 kg (beef) and €33.9/100 kg (sugar), equivalent to *ad valorem* tariffs of 94.5 and 116.2 percent, respectively.[1]

In the case of beef, all ACP countries are relieved entirely from the 12.8 percent *ad valorem* element, but this is of no relevance to most since they are unable to comply with regulations on foot and mouth disease (FMD). For the four southern African ACP countries that can comply (Botswana, Namibia, Swaziland and Zimbabwe), there is an extra preference, namely, that the specific duty is reduced to €24.2/100 kg.

For sugar, some ACP countries have country-specific quotas under the EU–ACP Sugar Protocol. They include the Republic of the Congo, Côte d'Ivoire, Madagascar, Malawi, Mauritius, Swaziland and Zimbabwe (as well as The United Republic of Tanzania and Uganda that do not have a surplus to export, and Kenya that has only recently resumed its exports). Under the Protocol the price received is related to the EU domestic price.

At the other end of the scale are items for which protection is so modest as to render any preferences of limited commercial value. For example, the tariff paid by non-preferred countries on exports to the EU of shelled almonds is only 3.5 percent, compared with preferential rates of 0-3.1 percent.

In the middle of the scale are commodity groups such as horticulture. EU tariffs are moderately high, for example, 12.8 percent for aubergines, so the duty-free access provided to a range of developing countries is significant. The advantage is available to many countries, and does not appear sufficiently large by itself to exclude totally non-preferred suppliers. The preference is insufficient to offset any substantial price uncompetitiveness on the part of producers or transporters, or obviously, any other failings in the fiercely rigorous supply chain required to move perishable items from a sub-Saharan African field to a European supermarket shelf within hours (Dolan *et al*., 1999).

How rents are distributed

Small rents almost certainly accrue to the importer/retailer/consumer end of the value chain. They do not influence purchasing decisions and are merely a windfall gain. Depending upon domestic market conditions, they are either retained by the importer, wholesaler or retailer or passed on to consumers. The distribution of large rents is influenced by the structure of the trade policy regime.

[1] The tariffs given are for raw cane sugar for refining (Combined Nomenclature (CN) code 17011110) and fresh or chilled boneless beef (CN 02013000). The *ad valorem* tariff equivalents were calculated using average world import unit values 1995–1997 for the Harmonized System 6-digit sub-heads into which the CN 8-digit codes fall.

In the most heavily protected sectors, preferences typically take the form of special quotas allowing some third parties to supply the high-priced market without paying the substantial import duties that either exclude other imports or drastically reduce their profitability. Sugar is the extreme example. One EU processor/distributor, Tate and Lyle, is substantially dependent on preferential sugar imports for its supplies, and in turn, is the monopsony buyer of exports to the EU under the Sugar Protocol. As a cane sugar refiner, the company needs access to imports since domestic European sugar production is beet. In addition, due to the high EU tariff, the financial viability of its operations depends on the continuation of supplies from preferred sources.

Since each beneficiary of the Sugar Protocol has a fixed quota, Tate and Lyle cannot play one off against another; if it cannot agree on a price with Mauritius, it cannot buy more from Zimbabwe, for example. Moreover, the Protocol requires the price paid to be related to the EU intervention price.

At the same time, as the owner of the main cane sugar refineries in Europe, Tate and Lyle is the only feasible purchaser of ACP exports to the EU. The alternative of exporting already refined sugar to the EU is not considered to be commercially viable on a substantial scale. The only but very partial alternative would be to sell outside the European harvesting season to EU beet refineries. But the beet and cane industries are in competition for market share.

Consequently, a range of market and institutional factors outside the formal trade agreement can influence the distribution of the benefit from preferences. It also follows that any change to these factors can alter the distribution and possibly has a greater effect on the interests of ACP socio-economic groups than any amendment to the formal trade agreement. A completely different power relationship, for example, will evolve from the EU's "Everything but Arms" (EBA) initiative of 2001. Under this, all LDCs are able to sell unlimited quantities of any product including sugar but excluding arms to the EU. Implementation of the EBA has been partially deferred for bananas (until 2006), sugar and rice (until 2009), but in the interim the LDCs have duty-free access for an increasing quota of sugar and rice that is set at levels comfortably above past flows.

Unlike the Sugar Protocol, therefore, there are or will be no quantitative limits on the sugar that least developed African countries are able to export. But neither is there any built-in protection against the importers playing one supplier off against another and driving down the price received.

There are often measures that an ACP exporting state can use to favourably influence the distribution of rents. If market conditions allow, for example, this state can use the issuance of export licences to increase exporter bargaining power with importers. This tactic has been used to great effect by East Asian states for clothing exports under the Multi-fibre Arrangement (MFA), as well as for ACP banana exports.

3.3 The economics of EPAs

What will be in an EPA?

The basic arguments over the pros and cons of EPAs are over seven years old. They date back to the EU's proposal at the outset of negotiations for a successor to Lomé IV that the trade regime be revised. The European Commission's arguments for and against a change were set out in a Green Paper to which the ACP (and also civil society and research organizations) subsequently responded (EC, 1997). They included the points that a new regime should do more to foster the integration of ACP states into the world economy and should be more easily defensible in the WTO.

It was not possible to agree to such a new regime from the outset of the Cotonou Agreement. Instead, Cotonou extends the Lomé trade regime, but with the proviso that negotiations must commence for a successor regime that will come into effect in 2007. It is the scope of this post-2007 trade agreement that is the subject of the negotiations that began formally in September 2002.

The initial negotiating positions are set in very broad terms. The Commission obtained its draft negotiating mandate from the EU member states in June 2002 (EU Council 2002). The ACP agreed on their Guidelines for the Negotiations of Economic Partnership Agreements in July (ACP 2002). Neither document goes much beyond general principles.

EPAs will apply primarily but not only to merchandise trade. The EU also envisages a services dimension to the agreements. There will be modest, if any, improvements to ACP access to the EU market, not least because Cotonou already provides free access with only a limited number of

exceptions. The most that the ACP could negotiate would be the removal of these exceptions. By definition, therefore, the agreements will be asymmetrical in the sense that many ACP countries will change their trade policy relatively more than the EU. This does not necessarily give any indication as to whether or not they are desirable economically for either partner.

In its negotiating mandate the European Commission has indicated that it wants ACP members of EPAs to:

- remove all quantitative restrictions (QRs) and reduce tariffs on goods imports over a transition period;
- remove "charges having equivalent effect" immediately;
- negotiate provisions in other areas, such as services.

Nonetheless, the ACP states would not have to remove all tariffs on all goods – they would need only to remove "substantially all" such import taxes. Nor would implementation occur immediately, except for charges having equivalent effect, but "within a reasonable period of time".

In other words, "reciprocity" does not equal "liberalization". The effect of liberalization is to alter the pattern of consumption and the location of production as a result of changes in price.

Reciprocity may reduce consumer prices, but it will not do so if:

- there is no tariff cut (because the product is one of those that are exempt from reduction);
- the exporter charges a higher price;
- the importer absorbs the tariff cut in higher profits;
- EPAs are overtaken by events elsewhere.

The effect of trade distortions

EPAs are intended, at least by the Commission, to promote regionalism and the integration of the ACP economies into the world economy. It is therefore helpful to recall the reasons for which countries and individuals trade. The fundamental reason is to gain access to goods and services that would be more expensive or impossible to produce domestically because they are subject to economies of scale (and the markets in some countries are below the optimum level) and/or a country's resource endowments are not appropriate. In other words, the principal objective is to acquire imports – and exports are a means to this end.

In theory, countries should fund the importation of goods and services in which they have a comparative disadvantage and do so by exporting those in which they have a comparative advantage. These advantages and disadvantages arise from their relative endowments of resources, with the term "relative" meaning in comparison with other resources within the country and with the situation in all other trading countries.

This second aspect of "relative" is often overlooked. Labour, for example, may be relatively abundant in African countries compared with, for instance, infrastructure, but this relative abundance is nowhere near as marked as it is in, for instance, South Asia. Hence, African countries which might at first appear to have a comparative advantage in producing labour-intensive products may have a comparative disadvantage in comparison with South Asia.

In practice, however, some countries are not able to export some items in which they might seem to have a comparative advantage at a cost-covering price, while others are able to produce goods (for domestic consumption or export to certain markets) in which they appear to have a comparative disadvantage. This state of affairs arises because all countries distort their trade to some degree. If country X has a comparative advantage in widgets but country Y closes off its domestic market, X cannot export to Y. Indeed, if Y produces a surplus of widgets over domestic consumption and exports at a subsidized price, X may lose some of its other export markets, too. By contrast, if Z, with high costs of production, has favourable access to the market in X (with its artificially inflated prices), it may be able to export competitively even though it has a comparative disadvantage.

The reason for examining such basic points is that they have considerable relevance to the analysis of ACP–EU trade. Africa, for example, almost certainly has a comparative advantage in primary products, including agricultural goods, because it is relatively well endowed in natural resources. This underlying comparative advantage has been reinforced by policy distortions. The combination of the CAP and Cotonou preferences has created export opportunities in the EU for both competitive and less

competitive ACP exporters for some goods, such as sugar, beef and horticulture. At the same time, of course, the CAP has also created increased competition from subsidized EU exports in other markets, including those in other ACP states. The net effect has been to make ACP exporters even more dependent on the EU market than they might otherwise have been.

The potential effects of a Free Trade Agreement (FTA)

If prices fall

Although EPAs will not be simply FTAs, and will have a development dimension, some of their features (such as reciprocal liberalization between members) overlap with those of FTAs. Hence, the effects can be assumed to be in the same direction as those of an FTA until the extent of the "development features" of the EPA are known.

The key question to ask is whether the tariff reductions actually result in a lower domestic price of imports. The assumptions behind FTA theory are that it will. This is expected to produce three types of effect:

- Trade creation occurs when consumers switch from domestic production to lower cost imports as a result of the removal of the tariff;
- Trade diversion occurs when goods that were previously imported from the most efficient global source are obtained instead from the higher cost FTA member because it enjoys a tariff preference;
- There is a revenue transfer from government (from the lowering of trade taxes) to citizens (from lower prices).

Traditionally, assessments of the economic impact of FTAs have involved a calculation of the relative sizes of these effects. But all assume that import prices actually do fall and consequently, this feeds through to the prices that consumers pay.

If prices do not fall

There can be circumstances, however, in which tariff cuts do not result in lower import prices. In such a case there would be no trade creation since there would be no reason for consumers to switch their purchases from domestic goods to imports. But there could still be trade diversion, with imports being switched from lower cost sources of supply to those located in the FTA members. Further, there would still be a loss of revenue to government, but the offsetting gain would accrue not to consumers, but to elements in the supply chain.

The net effects of a regime in which consumer prices did not fall would probably be trade diversion and an adverse movement in the terms of trade of the liberalizing country, with the two effects tending to be inversely related to each other. If exporters capture all of the tariff cut and increase their prices by the full amount, the adverse terms of trade impact will be maximized. If border prices do not rise by the full amount, but oligopolistic importers capture the tariff cut, this will encourage trade diversion by giving the importers a financial incentive to purchase from sources in the other FTA members.

The impact of an EPA will be determined therefore, partly by whether and how far it results in a change in the domestic price of imports, but also by a host of other factors as well. These include global events, and in particular what is happening in other trade policy areas, the characteristics of the ACP states involved and the characteristics of the EU as a source of imports.

The net effects of an EPA will be heavily influenced by trade policy changes introduced for other reasons, such as the WTO Doha Round or autonomous decisions by ACP states, during the period between now and the end of the EPA transition period, which could be as far away as 2020. The net impact of the EPA will be modest if between now and the date on which an ACP state has to reduce its tariff barriers on imports from the EU to non-constraining levels, the state has already engaged in substantial liberalization. There will undoubtedly be adjustment costs for the formerly protected sector and gains for consumers, but these will arise from the broader liberalization rather than the EPA. If, by contrast, there has been no such liberalization, and the EU is the only source that does not face constraining import barriers, then the impact will depend substantially on the state of the domestic market and the competitiveness of the EU. If markets are sufficiently competitive, there could be a fall in the price of imports, an increase in the quantity imported, and the full range of trade creation and

diversion effects. If not, then the effects may be as described above in a situation in which import prices do not fall.

It is important to point out that until more is known about the time period over which EPA liberalization will occur, and each ACP country's commitments during this period in other fora, it is not feasible to produce a definitive assessment even of the direction of change under an EPA, let alone its scale. Still, some things are known about EPAs, and they can guide expectations on the range of possible effects.

Weighing up the costs and benefits

The strategic choice for each ACP state individually, for members of EPAs collectively, and for the entire ACP group as a whole is to determine whether or not the "costs" of an EPA exceed the "benefits" or vice versa. This cannot be done, of course, until more is known about the content of EPAs. Some scenario-building will help to identify critical features of EPAs that need to be included in order to better promote ACP interests.

It will also assist states in deciding whether they expect the EPA negotiations to turn out satisfactorily and hence, whether they need to take advantage of the Cotonou reference to "alternative arrangements" for states that do not enter EPAs.

Different players define both costs and benefits in conflicting ways. In the lexicon of trade negotiations, any reduction in import controls and taxes is seen as a "cost" and any cut in the barriers facing a country's exports is seen as a "gain". But for the liberal trade economist the picture is different. By increasing the volume of goods and services that a country's citizens can consume for a given level of exports, a reduction of import taxes is seen as economically beneficial, except in a limited number of cases where longer-term dynamic considerations make it sensible to accept variations. For the economist, trade diversion is a cost but trade creation is a gain.

One initial scenario-building task that each ACP state should perform is to focus on the implications of alternative tariff reduction formulae. As indicated above, the ACP are expected to reduce to zero only tariffs on "substantially all" trade, and to do so over a transition period that may be 12 or more years. Although the term "substantially all" has not been defined definitively, in the case of the EU–TDCA the EU stated that it considered the phrase to be fulfilled if, between them, the parties to the agreement reduce to zero tariffs on a group of products that in total accounted for 90 percent of the value of trade between them in the base year. In the TDCA, the EU went further and argued that this average 90 percent could be produced by asymmetrical reductions by the two parties: the EU is reducing to zero its tariffs on products that account for 94 percent by value of its imports from South Africa, and South Africa is doing the same on products that account for 86 percent of its imports from the EU.

If the same proportions were applied to the ACP, then countries would only need to reduce to zero their tariffs on a group of products that in the base year accounted for 86 percent of the value of their imports from the EU. If the spirit of the TDCA were applied, however, then the range of products that would need to be liberalized by the ACP would be even smaller. The EU import in excess of 98 percent of their goods from the ACP that are already duty-free. Hence, without any further liberalization by the EU, the "average of 90 percent" could be achieved by the ACP liberalizing only 82 percent of the value of their imports from Europe.

In addition, not all goods will need to be liberalized at the start. Some need not be liberalized until the end of the transition period. In the case of the TDCA, there is a 12-year transition period for South Africa. If this were applied to EPAs, then the most sensitive groups would not need to be liberalized by the ACP until 2020.

Armed with this information, tentative though it is, ACP states can calculate which products they would wish to exclude from liberalization altogether and which they would defer until the end of the transition period. This would indicate the extent to which there are likely to be either revenue or adjustment costs as a result of liberalization in the short to medium term. It would also help governments to ensure consistency with other trade negotiations, so that the same products are protected in each. For example, the list will probably overlap with that of products for special treatment by non-LDCs in the Doha negotiations.

In addition, there is a much wider range of information that needs to be gathered. In particular, in forming the ACP's strategy requires that empirical evidence be collected in three key areas:

- How valuable will ACP preferences be after 2007?
- How desirable is it that new preferences be created, and how feasible is this?
- How likely is it that EPAs will result in trade creation?

This chapter can deal with only the first of these three questions. The second question requires specific research for each EPA, and the third requires research in each ACP state. As regards question 1, the key is to understand how preference erosion may occur.

3.4 Preference erosion

As explained above, paradoxically, Cotonou agricultural preferences are most commercially valuable on the products that seem most restricted. In the case of sugar and beef, for example, ACP states (other than those least developed) are only allowed to export 1.3 million tonnes of sugar to the EU (and not unlimited quantities as would apply to all industrial products and most tropical agricultural products), while the southern African beef exporters have both a quota and pay an import duty on their sales, albeit at a reduced level). Yet, these restrictive preferences are particularly commercially valuable because they allow the favoured ACP countries to benefit from the artificially high prices created on the European market by CAP barriers.

Some ACP states, particularly those in ESA, have been substantially affected on the export front by the CAP – and almost all have been affected on the import side. Together with other protectionist OECD states, the EU has succeeded in artificially depressing world prices for some agricultural items, particularly cereals, and so reduced the cost of imports for net cereal-importing countries. The net effect of the gains for exports and imports has been to improve the agricultural terms of trade of ACP countries.

The source of erosion

How long will this continue? The answer depends partly on whether or not the trade preferences will continue to be commercially advantageous. They are advantageous in cases where EU taxes on imports from ACP states are set at a lower level than those on imports from competitors – and this difference is sufficiently substantial and sustained to induce importers either to pay higher prices for ACP exports and/or purchase larger quantities than would otherwise be the case. Anything that interrupts or interferes with this commercial link can erode the preference.

Such erosion could occur, therefore, for a whole host of reasons. Essentially, of course, a change to the text of a preference agreement could cause erosion. If EPAs are not in place by 2008 and the EU implements its stated objective of ending current access terms, there will obviously be a sharp erosion of preferences. ACP access will deteriorate to the terms of the successor regime, which could be as poor as the GSP for non-EBA states.

But change to preference agreements is not the only cause of erosion. Changes to other trade rules could have an impact. Considering the case of SPS, if EU SPS regulations on beef change in such a way that they cannot be met by Botswana or Namibia, then the commercial value of Cotonou for this product will disappear even without any change to the terms of the Beef Protocol. Less dramatically, if the SPS regulations change in such a way as to increase the costs of compliance, then the gains from trade will be reduced even though exports may continue to occur. As from 1 January 2005 the EU will have new pest inspection regulations in force on leafy agricultural product imports.

This will involve 100 percent inspection and payment of a "cost-covering" charge set at a graduated level but with a minimum fee. If these fees are more costly than for instance, those currently payable by Kenya or other eastern and southern African exporters on horticultural products, and if the increase cannot be passed on to the consumer, then the commercial value of the preference will be eroded.

Another principal avenue through which preferences can be eroded is the granting by the EU of equivalent or superior treatment to the ACP's competitors. The EU–Chile FTA and the upcoming EU–MERCOSUR agreement have the potential to significantly erode the commercial advantage that the ACP have over major competitor suppliers of agricultural goods to the European market. EBA has of

course eroded the preferences of non-least developed ACP states, as will the EU–South Africa TDCA as it moves through its transition period and starts to cover a wider range of South African exports.

Finally, changes to the domestic EU market can cause erosion. Enlargement (covered in Chapter 5) has this potential, but so do a whole range of policy-induced and autonomous changes to the European market. Consumer tastes and concerns change. Unless ACP exporters are able to match these changes, then the market for their products may diminish regardless of whether there has been any formal change to their preferential treatment or any new trade-related policies such as SPS.

Changes on all of these fronts are currently occurring – and are assessed in these chapters. Evidently, the Cotonou Agreement is under renegotiation. There are also new EU SPS requirements for beef and horticulture/floriculture, behind a flurry of recent changes affecting fresh agricultural products. The preferences of ACP countries in agricultural products are being eroded by the new agreements described above. In addition, there is the major challenge presented by the phase-out of the Multi-Fibre Agreement (MFA) at the end of this year. Although this affects clothing and textiles, there could well be knock-on effects on the agricultural sectors of major ACP clothing exporters. This applies even if the countries do not export primarily to the EU. In Lesotho, for example, clothing is now the largest employer of labour, having overtaken the government sector earlier this century, and is largely based on exports to the United States. A substantial collapse of the clothing industry as a consequence of a relocation of the global division of production following the MFA expiry would tend to have major economic effects for all sectors.

The EBA scheme

Origins

The EU Council decided in February 2001 (EC, 2001b) that full duty-free access for 49 LDCs would come into effect from 5 March 2001 for all goods except armaments, bananas, rice and sugar. For bananas, rice and sugar there is an interim regime until full liberalization occurs on:

- 1 January 2006 for bananas;
- 1 July 2009 for sugar;
- 1 September 2009 for rice.

There are two elements to the interim regime: a progressive reduction in the tariff from its present level, and a duty-free TQ for the period until there exists completely free access.

The preferential tariff reductions on any out-of-quota exports are as follows:

- sugar under HS 1701 – 20 percent reduction on 1 July 2006; 50 percent reduction on 1 July 2007; 80 percent reduction on 1 July 2008;
- rice under HS 1006 – 20 percent reduction on 1 September 2006; 50 percent reduction on 1 September 2007; 80 percent reduction on 1 September 2008.[2]

The duty-free TQs have been set in relation to precisely defined product categories. In the case of rice, the whole of the relevant Harmonized System (HS) 4-digit heading (1006) is covered by the interim regime, but for sugar the TQ applies only to Combined Nomenclature (CN) code 17011110 (raw cane sugar, for refining, excluding added flavouring or colouring).

TABLE 3.2: TARIFF QUOTAS (TQS) FOR RICE AND SUGAR

	2001	2002	2003	2004	2005	2006	2007	2008
					Year starting July [a]			
Sugar (tonnes)	74 185	85 313	98 110	112 826	129 750	149 213	171 594	197 335
					Year starting September [a]			
Rice (tonnes)	2 517	2 895	3 329	3 828	4 402	5 063	5 822	6 696

[a] The Regulation states that both the TQs and the tariff reductions will be applied on the basis of the respective marketing years.

[2] For bananas the annual reductions will be 20 percent from January 2002.