

ROPPA
Meeting to ponder the protection measures required
for West Africa's agricultural development
Ouagadougou, Burkina Faso, 8-9 February 2009

Reflexions on the safeguard measures that ECOWAS could adopt
Jacques Berthelot, Solidarité,
February 7, 2009

Introduction: the new context in which the negotiations on the
Common external tariff (CET) and the EPA are occurring

ECOWAS' basic objective is to build its regional market and we are at the stage when the creation of a fifth tariff band at 35% has been adopted for the Common external tariff (CET), and when the selection of the "sensitive products" (EPA-SPs) which would not be liberalized vis-à-vis EU exports in the regional EPA is almost completed. On the other hand nothing has been decided yet for the safeguard measures (SMs) which would reinforce the CET, not only in the EPA but more largely on imports coming from other countries than the EU. Even if Ivory Coast and Ghana have already completed their lists of SPs and the SMs foreseen in their "stepping stone" interim EPAs signed the 28 November 2008 by Ivory Coast and which is yet to be signed by Ghana.

The prospective on the SMs to be adopted by ECOWAS as a complement to the CET is indissociable from the "special safeguard mechanism" (SSM) negotiated at the WTO and, all the same, the prospective on the EPA-SPs is indissociable from the SPs negotiated in the Doha Round at the WTO (WTO-SPs) and from the "special products" for agriculture (SPAs) also negotiated there.

Let us remember that the SPs and SPAs concern the possibility to limit the reductions of the bound tariffs to which ECOWAS would be subject in the EPA as in the Doha Round. The SMs on the other hand concern the additional tariffs that ECOWAS could trigger in case of a surge in the imported volume of specific products or of a significant fall in their import price.

The present reflection focuses on agricultural products, knowing that agriculture – which contributes to 2/3 of employment and 1/3 of GDP – will necessarily be the basis of ECOWAS' overall development as it has been for all countries with agricultural endowments.

ECOWAS' basic objective is to promote an increased regional integration through efficient and flexible measures protecting the regional market – CET + SPs + SMs – so as to guarantee to producers, particularly farmers, remunerative prices which would encourage them to produce more without penalizing consumers. But the gap in productivity between the regional and imported products is so large – and it has infinitely more chance to widen rather than to shrink in the 12 to 15 years available in the EPA to dismantle 80% of the tariffs on imports coming from the EU – that ECOWAS should not hesitate to take innovative protection measures, even if they were perceived as contradicting the present WTO rules.

ECOWAS should feel all the more free vis-à-vis the so-called WTO's constraints that, facing the worldwide recession, the developed and emerging countries did not hesitate to infringe on a huge scale those WTO rules through subsidizing at more than \$3000 billion their financial institutions and weakened firms, among which the car industry, without forgetting agriculture, in violation of many WTO Agreements: GATT, GATS, Antidumping Agreement, Agreement on Subsidies and Countervailing Measures, Agreement on Agriculture (AoA). Not to mention the permanent violations by the EU and the US of the AoA and the case-law of the WTO Appellate Body's rulings through their huge domestic subsidies to their agricultural exports and their under-notification to the WTO. Those colossal subsidies granted by the richest countries to their firms affected by the worldwide recession are

already a clear evidence that the competitiveness gap will continue to widen with the firms of ACP countries, particularly of ECOWAS.

Yet ECOWAS' socio-economic position is infinitely more tragic and structural than that of the developed countries which, if they are clearly facing a profound crisis, will be able to overcome it over few years because they avail of powerful defensive means and safety nets to protect their more fragile populations. The more so as ECOWAS must face the additional challenges of a demographic explosion – its population will skyrocket from 288 million in 2008 to 616 million in 2050 – and of a much more detrimental climate change.

Facing the ever increasing and unpredictable volatility, upward and downward, of world agricultural prices – brought about by the deregulation of the developed countries' agricultural policies, the IMF, the World Bank and the WTO, intensified by the agrofuels boom and financial speculation –, ECOWAS' farmers, who account for two thirds of the consumers, do not avail of the minimal visibility in the mid term necessary to invest so as to increase production and reduce unit production costs. At the same time credit agencies cannot provide them the necessary loans given the uncertainty about their profitability in the medium run or already during a marketing year.

We have to admit that the protection measures presently foreseen by ECOWAS do not match those challenges, whether it be the CET – including with its fifth band at 35% – or its SPs and SMs. These instruments, even combined, cannot guarantee to producers a sufficient stability of domestic agricultural prices over time at a remunerative level. Thus the world price of wheat (Soft Red Winter FOB Gulf of Mexico) has jumped by 178% from January 2006 (143 \$/t) to March 2008 (397 \$/t) before falling by 57% (172 \$/t) up to the 5 December 2008. In the meantime the euro has risen from \$1.2103 in January 2006 to \$1.5527 in March 2008 – an appreciation of 28.3% – and even to \$1.5770 in July 2008 – before falling by 18% at \$1.2732 in November 2008 and still at \$1.2818 the 4 February 2009. The euro, hence the CFA franc, has even appreciated by 76% against the dollar between 2001 (\$0.8956) and July 2008 and by 43% between 2001 and the 4 February 2009.

Before going deeper into the issue of the SMs, we must consider in depth the issue of the CET and its fifth band and also the liberalization margin that the WTO can impose to ECOWAS in the EPA.

I – The CET and the 5th band at 35%

A reflection on the CET leads to underline four requirements: that ECOWAS should get common bound tariffs, that the applied tariffs should not be stabilized in specific bands, that variable levies should be used and that a large number of *ad valorem* agricultural tariffs should be replaced by specific tariffs.

1) Applied and bound tariffs

a) The debates on the ECOWAS' CET as on the WAEMU's CET have been centred on their applied tariffs only, forgetting the fundamental issue of their bound tariffs, which are necessary if ECOWAS is to implement a common trade policy. The fact that most RTAs (regional trade agreements) do not avail of bound tariffs is not a reason not to get them in ECOWAS if its objective is to reach the stage of an actual economic and monetary union with a common trade policy where the ECOWAS Commission would negotiate on behalf of all its Member States, as the EU is doing. Indeed the lack of bound tariffs weakens much ECOWAS' negotiating power at the WTO as in the EPA with the EU.

b) Yet the reduction of agricultural and non agricultural tariffs negotiated in the Doha Round revolves about the bound tariffs and not about the applied tariffs (paragraph 59 of the Revised draft on agriculture modalities of 6 December 2008 and paragraph 6 of the third revision of the Draft modalities for non agricultural market access of 6 December 2008). Given the large disparity in the national agricultural bound tariffs of its Member States – from around 30% for Ivory Coast to 230%

for Nigeria, taking into account the "other duties and charges" (ODCs) –, ECOWAS ignores the level of its agricultural bound CET (and even less of its non agricultural bound CET) and could not carry any weight in the WTO debates on market access.

c) On the other hand it is tragic that the EPAs concern only the reduction of applied tariffs. That is explicit in the "stepping stone" interim EPAs signed by Ivory Coast or to be signed by Ghana. Paragraph 1 of article 15 in the two EPA texts states: "*No new customs duties on imports shall be introduced in trade between the Parties*". The worst, this paragraph adds: "*Nor shall those currently applied in trade between the Parties be increased from the date of entry into force of this Agreement*". And, if paragraph 2 admits that these tariffs would nevertheless be modified when ECOWAS CET will be finalized provided this occurs before end 2011, higher tariffs could concern only some tariff lines (TLs) because the overall TLs concerning imports from EU could not exceed those already agreed in annex 2 of the EPAs. In other worlds these EPAs do not let any possibility to increase the applied tariffs up to the bound tariffs of these countries, a fortiori taking into account the "other duties and charges" (ODCs). This implies that ECOWAS could not bind its CET and change its applied tariffs within the limits of its bound tariffs. This is intolerable politically and also legally as contrary to the basic WTO rule that Members' commitments concern their bound tariffs and not their applied tariffs.

d) Besides the fact to avail of a bound CET would minimize much the need of SMs, always difficult to mobilize and very limited in duration. FAO underlines that one of the reasons why 16 of the 22 DCs which were allowed to use the Special Safeguard for agriculture (SSG) established by article 5 of the AoA did not eventually use it was that "*The bound tariffs were high enough to allow increases in applied tariffs to offset depressed import prices and surges. Many countries followed this approach, in particular during 1998-2000, when world market prices of several basic foods declined sharply*"¹.

e) In order for ECOWAS to get a bound CET and to negotiate on behalf on its 15 Member States at the WTO and in bilateral agreements, it must become a WTO Member on its own, and therefore it must follow the lengthy accession procedure, which lasts generally at least 4 to 5 years². However the comatose Doha Round, which could persist few years, is favourable to auditing that request as WTO Members would not have much to negotiate. The more so as the management of the worldwide recession in which all countries will be sunk and for which the developed countries will continue to infringe many WTO rules will not induce them to demand from ECOWAS a scrupulous compliance with minor WTO rules, knowing that ECOWAS assemble the poorest WTO Member countries.

It is only when the ECOWAS 15 Member States would have agreed on their bound and applied CET that ECOWAS will be able to negotiate its candidacy as a full WTO Member.

f) One could object that ECOWAS should negotiate at the WTO not an average bound agricultural CET but a bound agricultural tariff for each tariff line (TL). No: since all ECOWAS States, and most DCs, have bound a single average agricultural tariff for most of or all their agricultural TLs (some were bound before their independence), ECOWAS' tariffs can only be bound in the same manner. The more so as the fact to have bound an average agricultural tariff did not brought them benefits only as they have been deprived from the AoA Special Safeguard (SSG) that was enjoyed practically only by the developed countries. Knowing that this SSG is much more efficient and easier to trigger than the general Safeguard of the WTO Agreement on Safeguards.

g) Paragraph 5 of the GATT article XXIV on the conditions to create a customs union shows how to define the average agriculture binding rate weighted by the share of each Member State's in the total

¹ FAO, *A special safeguard mechanism for developing countries*, <ftp://ftp.fao.org/docrep/fao/008/j5425e/j5425e01.pdf>

² Peter John Williams, *A handbook on Accession to the WTO*, WTO, 2007.

ECOWAS agricultural imports. Based on FAO data for 2005 this gives an average bound agricultural CET of 143%, taking into account the "other duties and charges" (ODCs). Indeed the Understanding on the interpretation of article II:1(b) of the GATT of 1994 states that *"The date as of which "other duties or charges" are bound, for the purposes of Article II, shall be 15 April 1994. It will be open to any Member to challenge the existence of an "other duty or charge" ... for a period of three years after the date of entry into force of the WTO Agreement"*³. As it does not seem to have been any challenge during these three years the agricultural bound tariff is therefore of 180% and that of Nigeria of 230%. These ODCs are written on the files of bound tariffs per WTO Member⁴. However it is a pity to see that the WTO is cheating in not mentioning the ODCs in the tariff profiles of all Members it has published in 2008 on its web site⁵. It should have added at least the ODCs in a separate column if it did not want to aggregate them with the bound tariffs themselves. This would have given an average basic agricultural bound tariff of 73.4% plus an average bound agricultural ODC of 58.1%, the sum being a little lower (131.5%) because Ghana did not bind any agricultural ODC.

Table 1 – Bound agricultural tariff of ECOWAS States and ECOWAS weighted average bound agricultural tariff in 2005

	Bound tariff	ODCs	Total bound	Agri. Imports in 2005 (M\$)	% of ECOWAS ag. imports	Average weighted agri. tariff
	1	2	3	4	5	6=3 x 5
Benin	60%	19%	79%	262	3,90%	295
Burkina Faso	100%	50%	150%	258	3,84%	551
Cape Verde*						
Ivory Coast	15%	#15% (0%-30%)	#30%	672	9,99%	287
The Gambia	110%	10%	110%	168	2,50%	263
Ghana	99%	-	99%	1052	15,65%	1482
Guinea	40%	23%	63%	276	4,10%	248
Guinea Bissau	40%	25%	65%	47	0,70%	44
Liberia*						
Mali	60%	50%	110%	225	3,35%	352
Niger	50%	50%	100%	258	3,84%	367
Nigeria	150%	80%	230%	2436	36,23%	7972
Senegal	30%	150%	180%	881	13,10%	2257
Sierra Leone	40%	20%	60%	104	1,55%	89
Togo	80%	4%	84%	85	1,26%	102
Total, average	73.4%			6724	100%	143.09%

Sources: WTO and FAOSTAT *Cape Verde has only become a Member in January 2008 and Liberia has hardly begun its access procedure.

2) One should not try to immobilize the applied tariffs in bands

The debates within ECOWAS have focused on the creation of a fifth band with the implicit idea that all products, particularly agricultural ones, should be classified once and for all in one of the 5 bands, and the reclassification process of tariff lines (TLs) for the "B type exceptions" has proceeded from the same idea. In fact it is essential to have a CET flexible enough to adjust frequently the level of the applied tariffs to the variable competitiveness of the different products. Indeed a tariff of 35%, or even of 50%, will be unable to ensure a minimal protection in some periods when the appreciation of the CFA franc and of the other regional currencies vis-à-vis the dollar will combine with the collapse of the world agricultural prices mostly traded in dollars. Thus the CILSS' Network of Prevention of Food Crises underlined in May 2008 : *"The remaining concern is to know if measures or mechanisms are also contemplated to face a possible collapse of prices in the years to come. Such a situation of «non remunerative prices» for producers could jeopardize food security and the livelihood of family farmers, who provide the bulk of food in the region"*⁶.

³ http://www.wto.org/french/docs_f/legal_f/07-2-1-b_f.htm

⁴ http://www.wto.org/english/tratop_e/schedules_e/goods_schedules_table_e.htm

⁵ http://www.wto.org/english/res_e/booksp_e/tariff_profiles08_e.pdf

⁶ http://www.food-security.net/medias/File/NISA_20_Mai_2008_Final_FR.pdf

3) ECOWAS should use variable levies on a large scale

a) If ECOWAS is the most under-developed region in the world it is also because it has the lowest average rate of agricultural import protection: 13% against 16% pour the least developed countries (LDCs) and 20% for DCs.

b) However it would not be enough to raise agricultural tariffs because an efficient protection against the high volatility of world agricultural prices is precisely the good reason to use variable levies (VLs) for the country using them since *ad valorem* tariffs cannot ensure a sufficient protection when world agricultural prices are very low. Thus R. Sharma from FAO underlines that *"agricultural sectors do require some safeguards as agricultural commodity markets are by nature volatile. As an example, the world market price of raw sugar fell from 12.3 US cents per pound in December 1997 to 7.2 US cents per pound in September 1998. This would have required a tariff rate of 70 percent if a country wished to stabilize the domestic market price at the level of December 1997 if the initial tariff was zero (or a tariff of 105 percent if the initial tariff was already 20 percent)"*⁷.

c) Indeed the variable levy (VL) is the only efficient protection measure to ensure the competitiveness of ECOWAS agricultural products through the guarantee to producers of a stable price in regional currencies over time. The VL has been the basic tool of the EU dazzling agricultural development since the birth of the CAP (common agricultural policy) in 1962. And, although the AoA has condemned the VLs since the WTO in 1995, the EU has continued to use them under another name for cereals and fresh fruits and vegetables. Indeed no WTO Member has realized that the EU has bound them in its Schedules sent to the WTO in 1994, as testified by Elamin : *"Although no longer permitted, some cases of more complex import arrangements continue to exist. Two notable examples are the "entry price" system applied by the EU on fruit and vegetables. The import regime is complex as it is based on minimum import prices and seasonal tariffs. The developing countries are increasingly becoming competitive in these products and so the regime is seen by many as a source of disguised protection. In some cases, e.g. cucumber and tomatoes, market access terms are said to have worsened following the adoption of the entry price system. Similarly, the cereal import regime of the EU continues to have features similar to the previous variable levy regime. Under this system, import duties on cereals are calculated on the basis of reference import prices and domestic support levels, subject to a maximum rate agreed to in the UR"*⁸. This has also been acknowledged by Chile in its the price-bands system case against Argentina: *"Chile explains that Members accepted the system of the European Communities which clearly continues to levy duties that vary with the difference between European Communities and world prices"*⁹.

The VL was the duty charged by the EU and equal to the gap between the threshold (entrance) price and the most favorable CIF price observed each day in Rotterdam, a simpler option using the CIF price of each cargo. The threshold price was the minimal price at which the imported agricultural products were allowed to enter on the domestic market, this price being derived from the indicative price decided each marketing year by the EU Council of Agricultural Ministers to ensure normal incomes to reasonably efficient farms in the production area with the highest deficit (Duisbourg in Germany for cereals). The difference between the threshold and indicative prices corresponded to the marketing margin and the transport costs between the port (Rotterdam) and that deficit area.

⁷ R. Sharma, *Safeguard Measures*, in FAO, Multilateral trade negotiations on agriculture. A resource manual, 2000 (<http://www.fao.org/DOCREP/003/X7353E/X7353e06.htm>)

⁸ N. Hag Elamin, *Market Access I: Tariffs and Other Access Terms*, in FAO, Multilateral trade negotiations on agriculture. A resource manual, 2000. (<http://www.fao.org/DOCREP/003/X7353E/X7353e04.htm>).

⁹ Paragraph 4.55 of the Panel report of 3 May 2002 on Chile, Price Band System and Safeguard Measures Relating to Certain Agricultural Products.

d) WTO's arguments against the VLs do not stand up to analysis

The WTO (Article 4 of the AoA) has forbidden the VLs with a double argument: they are increasing the fluctuations in world agricultural prices and are less transparent than tariffs for importers and exporters.

1- On the first argument Hakan Nordström¹⁰ has shown that the impact of VLs on the world prices volatility is all the more high that the country using them is a "large country", that its share of world production and imports is high, which was the case of the EU which was and remains the first worldwide importer of agricultural products and is at between the 1st and the 4th rank for the worldwide production of most basic food products. On the other hand the share of West Africa (WA) – ECOWAS plus Mauritania – in the world agricultural production and imports is insignificant: its was in 2005, in relation to the world production, of 0.3% for milk, 0.9% for all meats, 1.3% for rice, 2% for all cereals, hardly of 3.5% for oilseeds. On imports its share was of 1.1% for all agricultural products of which 1.2% for oilseeds, 1.8% for dairy produce, but of 4% for cereals (of which 15% for rice) and 5% for sugar. Therefore the recourse to VLs by ECOWAS could not destabilize the world prices, except a little for rice if we stress its share in world imports but not if we stress its share in world production, the indicator preferred by economists.

2- On the second argument, it is not because the VL is equivalent to a tariff the rate of which varies with each import that it is less transparent and quantifiable: each exporter knows perfectly well in advance that, during a given marketing year, the threshold price on the market of the country with VLs will be fixed as it was the case in the EU. He could calculate the VL given the CIF price in Rotterdam that all exporters knew because it was the reference price from which he could fix its own CIF price. For ECOWAS it would be even easier because the PV would be the gap between the threshold price and its own CIF price. Besides the VL is more interesting than an ad valorem tariff for the exporter because it is lower when the world price is high and because its amount fluctuates less. While a higher world price implies a higher duty for an ad valorem tariff, it implies a lower one for a VL: its is a contracyclical duty.

If WAEMU and ECOWAS countries had had VLs, they would not have had to eliminate or reduce their agricultural tariffs during the last period 2007-08 of exploding import prices: the VLs would have shrunk or disappeared. Conversely they would not have had any political difficulty to reintroduce tariffs with the following drop in import prices because the VLs would have risen automatically. Since the EU threshold prices were stable during each marketing year (ou several marketing years), one cannot say that they changed "*automatically and continuously*" as this has been reproached to the EU in the Argentina-Chile panel on the prices-bands system: it did not change more that the duty collected for a fixed ad valorem tariff which applies to a CIF price changing every day. In each case there is a fixed item – the tariff rate or the threshold price – and the same item varying every day: the CIF price.

e) It is all the more inconsistent to forbid the VLs at the import level that the WTO authorises many types of VLs which do not confess their actual nature

1- The WTO does not forbid the discretionary adjustments of tariffs according to changing world prices as long as their applied level remains below their bound level and India has thus modified frequently its applied tariffs.

2- The AoA article 12 and the GATT article XI authorise VLs on exports when the world prices exceed the domestic prices. If the fact that many DCs have taxed their cereals exports during the

¹⁰ Hakan Nordström, *Do variable levies beggar thy neighbour?* European Journal of political economy, Vol. 17 (2001) 403-420.

recent explosion in world prices to give priority to the food security of their own citizens has been highly criticized, this taxation was perfectly legal for the WTO.

3- The subsidies to the agricultural exported products are negative VLs: it is inconsistent to condemn the VLs and to authorize at the same time – within the limits of the ceilings decided in the Uruguay Round – export subsidies which represent also the gap between the domestic and world prices, therefore are negative VLs! There is no logical reason for WTO to forbid only a part of VLs – those with a positive sign – when it does not forbid those with a negative sign represented by subsidies to the exported products, which encompass domestic subsidies as well as formal export refunds. Indeed the increased substitution of export refunds by domestic subsidies which benefit also to the exported products does not change anything to the dumping level, particularly for the EU: despite the progressive reduction of export refunds, the percentage of domestic subsidies on total subsidies to exports has been on average from 1995 to 2001 of 78% for cereals, 75% for poultry meat, 62% for pig meat, 52% for bovine meat and 38% for dairy produce. And the formal export subsidies to cotton that the US has been obliged to eliminate in August 2006 following their condemnation at the WTO have represented in 2005 only 7.1% of their total subsidies to the exported cotton.

4- Domestic subsidies are disguised VLs by their import-substitution effect: having compensated the drop in domestic agricultural prices, rendered closer to world prices, the EU and US massive subsidies have had the same import reduction effect than VLs.

5- The WTO does not forbid to subsidize imports in period of world prices explosion, which contributes to increase them more. That is what some DCs have done in the recent period, among which Senegal for rice. Now these import subsidies are also negative VLs.

6- The EU has defended the VLs in the Argentina-Chile panel on prices bands – it was the least it could do since it continues to use them under another name – and FAO also, both of them as long as they remain lower than the bound tariffs.

4) ECOWAS should convert a good part of its agricultural *ad valorem* tariffs in specific tariffs

Without VLs for all agricultural products, ECOWAS should transform the other agricultural tariff lines (TLs) in *specific* tariffs (x FCFA or nairas per tonne or unit) or *complex* tariffs (specific duty + *ad valorem* duty or the larger of both as many developed countries are doing) because it is presently using only *ad valorem* TLs. Because specific or complex tariffs have a contra-cyclic effect by limiting the impact of the fluctuations of world prices as their amount is fixed, the developed countries are using them extensively: the percentage of non *ad valorem* agricultural TLs is of 45.8% in the EU, 42.5% in the US, 30.1% in Canada, 18.4% in Japan, and goes up to 68.1% in Norway and 89% in Switzerland. Besides the percentage of the EU non *ad valorem* TLs is the more high the more the products are in bands with the highest tariffs: 99 over 100 lines in the band over 90%, 113 over 115 lines in the band from 60 to 90%, 227 over 274 lines in the band from 30 to 60% but only 509 over 1288 lines in the band from 0 to 30%. On the other hand there are only two DCs which are using specific tariffs largely: Malaysia (26.2% of TLs) and Thailand (43.8% of TLs).

It is therefore very worrying that the Doha Round Revised Draft on modalities for agriculture of 6 December 2008 is proposing, in the name of "tariffs simplification", to convert all of them into *ad valorem* tariffs and that "No tariff shall be bound in a form more complex than the current binding" (paragraph 103). The only concessions to DCs is that they "shall have an additional two years to achieve this outcome, if applicable" and that the LDCs would not be obliged to modify them, but will not be allowed to implement them if they did not have them already. What is depressing is that such "simplification" has not been asked by the developed countries – as they are using extensively non *ad valorem* tariffs – but by the G-20, which give the priority to the offensive interests of some of its large net agricultural exporters (not even Thailand and Malaysia which are using a lot of non *ad valorem* tariffs but mainly of Brazil and Argentina) over the defensive interests of the large majority of DCs

which need to protect their small farmers efficiently¹¹. As this simplification is not requested by the developed countries, it should be possible to make sense the minority of G-20 countries which want to impose it. At most we could accept to suppress the complex tariffs which are clearly little transparent but not the specific tariffs which are an efficient instrument to mitigate the transmission of the volatile world prices in dollars on the domestic prices in national currencies.

II – The constraints to open the West African market in the EPA, the safeguard measures and the sensitive products

1) The presence of 12 LDCs in West Africa does not force it to open its market to 80% of EU exports

In its Decision "Everything But Arms" of March 2001, the EU has committed itself to import duty free and quota free all LDCs' exports (but arms), from which it results that the 12 LDCs of West Africa (11 from ECOWAS plus Mauritania) are not obliged to reduce their tariffs on imports coming from the EU. All the same, the WTO admits that the LDCs will not be obliged to reduce their bound tariffs (and the more so their applied tariffs) in the Doha Round – see paragraph 151 of the Revised Draft on modalities for agriculture of 6 December 2008 and paragraph 14 of the Revised Draft on non agricultural products market access of 6 December 2008 also –, in the same manner that they were not obliged to reduce them in the Uruguay Round.

Therefore, as the EU and WTO consider that a free trade agreement in the sense of GATT article XXIV implies to eliminate tariffs on 90% of trade in both directions (imports + exports) and that the EU has admitted that ACP countries will have only to open their domestic market to 80% of its exports whereas it will open its own to 100% of ACPs' exports – which will not imply a great sacrifice because it imports already 97% of their exports duty free or at a very low duty –, we must introduce into this equation the specific tariff concessions made to LDCs by the EU and WTO.

Therefore, since the imports of the 12 West Africa (WA) LDCs account for 37.7% of total WA imports from the EU¹², the WTO requires WA to eliminate its tariffs in the EPA on EU exports only by 42.3% (80% - 37.7%). That happy conclusion does not change the necessity for ECOWAS LDCs to participate in the definition of the list of regional sensitive products and for non LDCs to maintain a sufficient protection of ECOWAS domestic market vis-à-vis the rest of the world.

However we must keep in mind that the tariff concessions which could be made by ACPs to the EU would surely be challenged by other WTO Members – including by G-20 DCs – which will demand, within the Doha Round finalisation or independently, to benefit also from an enlarged access to the ACPs' domestic markets. Thus the World Bank Representative at the EU declared the 5 October 2005 in a debate on EPAs: "*ACP countries' MFN tariffs should be reduced, otherwise there will be a traffic diversion placing the EU exporters in a monopoly position. Their MFN tariffs should be gradually reduced to 10%.*"

2) ECOWAS should not sign the EPA before the Doha Round conclusion

ECOWAS, as the other ACPs, has suffered huge pressures from the EU to sign as quickly as possible, and at most by end June 2009, the regional EPA, allegedly for not breaking the WTO law for a longer time as the free-trade process should have started in January 2008. Yet ECOWAS cannot sign an EPA which would deprive it of more favorable trade provisions which would come out of the Doha Round finalization, particularly for agricultural products. And those provisions concern not only the Special

¹¹ G-20 Submission, *Guidelines for modalities in tariff simplification*, December 17, 2007, <http://www.tradeobservatory.org/library.cfm?refID=101150>

¹² Jacques Gallezot, *Le choix régional des produits sensibles à l'APE soumis au jugement majoritaire des pays de l'Afrique de l'Ouest*, INRA & AgroParisTech, Octobre 2007.

Products for agriculture (SAPs), the WTO sensitive products (WTO-SPs) and the Special Safeguard Mechanism (SSM) for agriculture but also the reduction of agricultural subsidies – which, for the EU, will influence its dumping level – and the tariffs reduction which will erode ECOWAS' preferential access to the EU market.

The more so as, since the SAPs, the WTO SPs and the SSM will be available to all DCs WTO Members, the additional protection from which they will benefit will play *erga omnes* and could not be challenged as long as they will be in line with the criteria decided at the WTO. Therefore this additional universal protection (or this lower tariff reduction) for DCs should not be taken into account in the ECOWAS tariff reduction rate required for the EPA. Otherwise the large majority of DCs, more developed than ECOWAS Member States, would enjoy a higher protection level than ECOWAS vis-à-vis the EU exports, owing to the combined effects of the SAPs, WTO-SPs and SSM.

All this argues for not signing the EPA before concluding the Doha Round, the more so as the EU has refused to deal with agricultural subsidies in the Ivory Coast and Ghana "stepping stone" interim agreements, on the pretence that this issue was of the WTO exclusive competence. Or one should at least state explicitly in the regional EPA that all provisions which would limit the possible benefits for ECOWAS stemming from all the Doha Round agreements would be null and void, and in particular that the list of EPA-SPs, the SMs and the schedule of tariff liberalization for imports from the EU would be revised accordingly. In other words the regional EPA which would be signed in 2009 or 2010 could only be an interim EPA. However it's like trying to square the circle given the provisions included in the stepping stone interim EPAs of Ivory Coast (actually signed) and Ghana (on the verge to be signed) which have already tabled lists of SPs and schedules of tariff liberalization.

Before analyzing the issues around the SPs and SMs, let us delete another measure proposed by the GRET-IRAM report on the CET: tariff quotas (TRQs).

3) Tariff quotas are bound at the WTO and cannot be reduced without compensation

For the GRET-IRAM report, *"This instrument allows to increase the protection level provided by tariffs by limiting the imported volumes. It constitutes a structural protection in some respects more flexible than a fifth tariff band. Indeed the tariff quota level may change from one year to the other according to the level of local demand, local supply and the level of competitiveness of the local sector in relation to the competition of imported products"*.

Unfortunately, if TRQs are authorized by the WTO, they must be notified and it is impossible to reduce their level – which is bound – without negotiating compensations with the exporting countries which have benefitted or could benefit from them. Clearly that does not mean that the bound levels correspond to products eventually imported because this depends on the willingness of importers to benefit from the lower tariff – and of the administrative impediments put by the country granting them to minimize their use – but, if imports have actually exhausted the TRQs, ECOWAS cannot decide to reduce their level under the pretence that the regional production has increased.

4) Sensitive products, special products and safeguard measures

Let us remember that the reduction of ECOWAS bound tariffs concern only its 4 non LDCs Member States (Cape Verde, Ghana, Ivory Coast and Nigeria) since the 12 LDCs (11 from ECOWAS + Mauritania) are exempted from reduction. On the other hand the SMs concern also the LDCs which would be equally affected by the jump in imported volumes or the fall in imported prices.

The issue of sensitive products (SPs) concerns the list of products selected on the basis of 20 criteria (of which the impact on taxes revenues) and less competitive than West Africa (WA) and ECOWAS wish to protect better in the EPA and place in the CET fifth band at 35%.

Instead of wondering, as the GRET-IRAM report has done, if the SMs proposed by ECOWAS are compatible with those negotiated at the WTO, or instead of, as ECOWAS has almost done, adopting its list of SPs, those SMs and SPs should have been proposed or adopted only to supplement the possibilities of a higher protection which will be opened to all DCs by the finalization of the Doha Round through the SAPs, the WTO-SPs and the SSM, and not to substitute them. This would have allowed ECOWAS to place in its SPs and SMs the only products (tariff lines) which would not be as much protected by the WTO instruments.

Unfortunately the EU political pressures exerted on ECOWAS to finalize the regional EPA as early as possible have forced it to elaborate its list of EPA-SPs, forgetting the additional protections it could benefit from if it had waited the Doha Round conclusion to prepare its lists of EPA-SPs and SMs. Thanks God, as long as the EPA-SPs and SMs and the CET fifth band of 35% are not formally adopted by ECOWAS' Heads of State or Ministers, they might ponder them, the more so as the worldwide recession and the comatose Doha Round are inviting them to do so.

Therefore we must assess quickly what those measures negotiated at the WTO could bring to ECOWAS so as to calibrate better the complementary measures to adopt in any event. At the same time we should be conscious that the identification of EPA-SPs and SMs would be much less crucial if ECOWAS decided to rebuild the CET on VLs and to bind it.

Let us remember that, for the WTO as for ECOWAS and the EPA, the SPs concern all products but that the SAPs concern only agricultural products. If ECOWAS would decide to wait the end of the Doha Round to contemplate the signature of an EPA, it would need to establish two lists of EPA-SPs, one for agricultural products and a second for non agricultural products.

1) All types of sensitive products: SAPs, WTO-SPs and EPA-SPs

The first thing to do is to assess to what extent the WTO "Special products" (SAPs) can cover the agricultural tariff lines (TLs) that ECOWAS judges the most sensitive. The Revised Draft on agricultural modalities of 6 December 2008 has proposed (paragraph 129) that DCs could mark out 12% of their agricultural TLs as SAPs subject to a lower tariff reduction than the normal reduction for DCs, the last one being of 2/3 of that imposed to developed countries but within bands of higher tariffs than those for developed countries. Furthermore 5% of agricultural TLs would be free from any reduction, even if the average reduction of all SAPs should be of at least 11%, which implies that the remaining 7% of SAPs TLs would be subject to a reduction of 15.6%. As the Chair of the Special Committee on agriculture, Crawford Falconer, has added that "*A number of developing country Members have expressed reservations concerning the numbers specified in this paragraph*", one can a priori estimate that these proposals are the minimum on which ECOWAS can rely. It must therefore classify its agricultural TLs by order of decreasing sensitivity, considering that the first 5% will be exempted of any reduction on account of SAPs, which will allow to exclude them from the list of EPA-SPs. Then we should evaluate to what extent which part of the remaining 7% of agricultural TLs of SAPs, if any, should be used for the EPA-SPs. Keeping in mind that the lower tariff reductions of the SAPs are erga omnes whereas the EPA-SPs are only a protection from EU exports.

As for the WTO-SPs (paragraphs 71 to 73 of the Revised Draft of agricultural modalities of 6 December 2008), DCs could use them for 5.33% of all their TLs – that is 1/3 more than the 4% of TLs proposed for developed countries –, the tariff reduction on these TLs being lower by 1/3 to 2/3 of that on the non sensitive products according to the chosen options. However the WTO-SPs imply that, in return, WTO Members grant tariff quotas (TRQs) which, for DCs, would be 2/3 of those required from developed countries. As the last ones would have to increase them by 1 to 4% of domestic consumption (according to the chosen option from 1/3 to 2/3), DCs would have to increase them from 0.67% to 2.67% but the TRQs would not concern the self-consumption by farmers of their staple food crops.

We see that the possibilities to shelter ECOWAS products from lower tariff reductions – other than the 5% of most sensitive agricultural TLs fully protected by the SAPs – require more accurate simulations to know if it is more interesting to use some or all of the 7% of agricultural TLs subject to a 15.6% reduction as SAPs or the WTO SPs rather than to put them in the EPA-SPs.

2) The safeguard measures: ECOWAS-SMs, EPA-SMs and WTO-SSM

A first thought is that the safeguard measures would never be able to replace an enough structural and flexible tariff protection. This is also acknowledged by the GRET-IRAM report on the ECOWAS CET which concludes logically that it would be necessary to mobilize permanently SMs of several types, even if a fifth band at 50% were adopted for the CET. But this is clearly impossible since all SMs are limited in their duration and require often a long process to be triggered, with the risk to come after the storm. Besides the almost permanent use of SMs would be much less transparent for importers and exporters than a better customs protection.

There is a rising hierarchy among the SMs, from those written in the interim EPAs to the SSG of the AoA (non available for ECOWAS), the Import Safeguard Tax (IST) contemplated by ECOWAS and the WTO-SSM.

a) The weakness of SMs in the stepping stone interim EPAs of Ivory Coast and Ghana: these SMs are much more restrictive than the Special Safeguard for agriculture of the AoA that the EU is enjoying, even if the Revised Draft has proposed to reduce it to 1% of agricultural TLs the first year of the Doha Round implementation period and to eliminate it in the 7th year. Indeed if the SSG can be triggered either by a surge in import volumes or a fall in import prices, the safeguard of the interim EPAs can only be triggered by a surge in imported volumes. Furthermore, in that case, the additional duties cannot exceed "*the applied tariff of the most favoured nation*", whereas, for the SSG used by the EU, the additional duty can go up to "*one third of the level of the ordinary customs duty in effect in the year in which the action is taken*" (AoA article 5) even if the Revised Draft adds that "*At no time during this seven year period may the total duty applicable on a tariff line exceed the pre Doha round tariff binding*" (paragraph 126).

Besides the provisions of the interim EPAs state that the SMs cannot exceed two years and at most another two years period if the reasons to trigger them persist at the end of the first two years. On the other hand FAO has shown that "*There are some cases where a SSG has been triggered for some products on an almost permanent basis, i.e. every year since 1995*"¹. The necessary possibility to trigger also in the EPA a safeguard based on falling imported prices is all the more justified that the EU has reduced much its domestic agricultural prices owing to huge domestic subsidies compensating those lower prices, a crucial issue that the EU has refused to incorporate in the EPA.

Capping the EPA-SMs to the MFN applied tariff is particularly harmful for ECOWAS because they would be much less protective than the Import Safeguard Tax (IST). Indeed not only the IST could be triggered for falling import prices as well as for rising import volumes but also "*The rate of additional duty under the IST will be either 100% of the amount of price reduction on imports, or 50% of the percentage surge in import volume, whichever is higher. This additional duty will be assessed as a percentage of the c.i.f. unit value of the imported product, alongside the relevant customs duty and other applicable fees and taxes (Statistical Fee, Community Levy, Value Added Tax, excise taxes, etc)*"¹³.

b) Comparing the IST with the WTO SSM and with the interim EPA-SMs: a large part of the limitations imputed to the SSM by the GRET-IRAM report on the ECOWAS CET is due to the fact

¹³ D. Stryker, *ECOWAS common external tariff – Accompanying measures. An Introduction*, ECOWAS, ROPPA, Séminaire sur les produits sensibles, Ouagadougou, janvier 2007.

that it was based on the WTO Revised Draft modalities for agriculture of 8 February 2008 because the Revised Draft of 10 July 2008, confirmed by the Revised Draft of 6 December 2008, have eliminate most of these limitations, even if we are dealing here with simple proposals reflecting the present state of consensus among WTO Members.

For GRET-IRAM, which alludes to the IST, "*safeguard measures triggered when prices fall suddenly and allowing thus to smooth import prices are particularly required in the case of rice*". But the IST cannot meet this requirement as it is far from being triggered automatically: the imported volume of the 6 last months must have increased by at least 50% or the import price must have dropped by at least 20% in relation to the corresponding 6 months period of the preceding year. In the mean time the conditions of the world and domestic markets may have changed largely and the IST will come after the battle or would no longer be necessary. On the other hand the SSM may be triggered if the imported volume has increased by only 10% over the 12 last months in relation to the average of the 3 preceding years or that the price has fallen by 15% over the 12 last months in relation to the average of the 3 preceding years. Apparently this duration constraint seems heavier but the "years" in the Revised Draft are not civil years but periods of 12 months or 36 months. This emerges from the wording of paragraphs 133 ("*As regards the volume-based SSM, it shall be applied on the basis of a rolling average of imports in the preceding three-year period*"), 135 ("*domestic currency has at the time of importation depreciated by at least 10 per cent over the preceding 12 months against the international currency*"), 140 ("*the three year rolling average shall be inclusive of that immediately preceding period of imports when the SSM was in place*").

In other respects the SSM can be triggered without requiring a WTO's permission: the only requirement in case of emergency is to inform it "*no later than 15 days after the implementation of such action*" (paragraph 141) even if, in non emergency cases, the DC "*shall give notice in writing, indicating the tariff lines affected by the additional SSM duty and including relevant data, to the Committee on Agriculture as far in advance as may be practicable*". On the other hand, since the IST is triggered on a national basis, a Member State needs the authorization of ECOWAS authorities: "*The ECOWAS CET Management Committee will make a finding as to whether the price trigger and/or volume triggers have been breached*". Even if "*However, each Member State reserves the right to invoke the IST provisionally pending this determination*". A fortiori the EPA-SM is even less flexible as there is the need to receive the green light from the EPA Joint Committee ACP-EU.