



Trade Negotiations Insights

From Doha to Cotonou

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Questions Raised by the Proposed EC Negotiating Mandate

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On 9 April 2002, the European Commission adopted proposed Directives for the negotiations of economic partnership agreements (EPAs) with ACP countries and regions.¹ The 'negotiating mandate', submitted to the European Council, provides the framework within which the Commission will be allowed by the European Union (EU) member states to conduct negotiations with the ACP on new trading arrangements, as foreseen in the Cotonou Agreement.

The EC mandate outlines the EU objectives for the negotiations. It also delineates the room for maneuver of the Commission during the negotiations. To a large extent, the negotiation process and outcomes will depend on the flexibility the mandate provides to the Commission to accommodate ACP concerns and interests.

The proposed EC mandate confirms the position adopted by the Commission on the general format and content of negotiations on EPAs with the ACP. In essence, the mandate reaffirms the overarching objective of development of the ACP economies. In this context, *EPAs must constitute an instrument for development*. They will be based on the principles of fully WTO-compatible reciprocal free trade agreements with ACP regions, providing for differential and asymmetric treatment. The agreements should also include trade-related issues (investment, competition policy, environment, sanitary and phytosanitary measures, etc.) as well as other appropriate ACP flanking policies and EU support measures.

Yet, the proposed mandate raises several questions and concerns, of a general as well as of a more specific nature.

Development Objective

The proposed EC mandate stresses the importance of development. However, it is unclear *to which extent development concerns will be fully taken into account in the trade negotiations*. In other words, is it automatically assumed that trade is good for development, or will specific measures also be included in the agreements to ensure sustainable development in the ACP countries?

For instance, the explanatory memorandum of the proposed mandate indicates that '[i]n order to maximise the benefits of EPAs, it is therefore essential that EPA negotiations and implementation be

accompanied by appropriate flanking policies of the ACP and that appropriate EU support measures are included in regular [European Development Fund] EDF financing' (section 2.2, p.4).

The concrete implications are unclear. *Will the adoption of appropriate ACP policies be included in the scope of the negotiations?* And if so, to what extent will this be supported by the EU, and how? *Will new funding opportunities be included into the regular EDF financing, in which case negotiations will be on trade and aid?* Or will the current EDF financing envelope be re-allocated to meet EPAs requirements (to the potential detriment of previously other funded activities), as suggested by the reference to 'regular EDF financing'?

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If the potential benefits of EPAs are to be realised, a systematic and coherent approach to this central policy issue is crucial. *Is the Commission in the process of establishing parallel programmes of support designed to address the supply side constraints confronting the ACP so as to enable them to exploit the new trade preferences granted?*

WTO Compatibility

With the parallel ongoing Doha Round of the World Trade Organization (WTO), WTO-compatibility is a moving target. Uncertainty relates to, among others:

- The revision of GATT Art.XXIV on regional agreement (important for the product coverage, transition periods and possible asymmetry and differential treatment of EPAs);
- review of special and differential treatment provisions;
- negotiations on agriculture (and their potential impact on the CAP and on the Commodity Protocols);
- negotiations on services;
- progress on trade-related issues (investment, competition, environment, sanitary and phytosanitary – SPS – measures, procurement, etc.) and their relevance for developing countries; and
- technical assistance measures.

How does the Commission intend to coordinate the negotiations on EPAs and at the WTO? What implications will Doha have on the content and timing of EPA negotiations?

Market Access Principles

The Commission (Mr. Pascal Lamy, DG Trade Commissioner) had initially considered the possibility of granting duty free access to the Community market to all products originating in the ACP countries, thus extending the 'Everything But Arms' (EBA) initiative (currently reserved to all least-developed countries – LDCs) to all ACP countries.

However, the proposed EC mandate falls short of making such an explicit commitment and now simply states that 'the Community should further improve current access to its market for products originating in the ACP countries.'

Does this mean that ACP non-LDCs could have an access to the Community market less favourable than the one enjoyed by ACP LDCs (which will benefit from free access to the EC market to be complete by 2008 under EBA)? If so, how would the cohesion of the ACP Group and regions be maintained? How could this be compatible with regional EPAs?

The Case of ACP LDCs

With the Everything But Arms initiative for LDCs, *what is the interest for ACP LDCs to join an economic partnership agreement?* In particular, would the potential benefits of reciprocal market access, the trade-related elements of an EPA and the reduction of EU technical barriers to trade (beyond WTO commitments) outweigh the adjustment and implementation costs associated with entering a reciprocal EPA for least-developed ACP countries? *How does the proposed EC mandate provide for the inclusion of appropriate support to ACP LDCs (a key interest for them)?*

With the Everything But Arms initiative for LDCs, what is the interest for ACP LDCs to join an economic partnership agreement?

Alternatives to EPAs

Article 37.6 of the Cotonou Agreement mentions that '[i]n 2004, the Community will assess the situation of the non-LDCs which, after consultations with the Community decide that they are not in a position to enter into economic partnership agreements and *will examine all alternative possibilities*, in order to provide these countries with a new framework for trade which is equivalent to their existing situation and in conformity with WTO rules.'

The proposed EC mandate is silent on a possible alternative trade framework should some ACP countries not be in a position to enter EPAs. *What would then be the Commission mandate to negotiate such alternative trade framework?*

Format of the Negotiations

The proposed directives for the negotiations of EPAs indicate that '[e]ffective negotiations will *start on a regional level in January 2003 at the latest*' (Section 10).

Plainly, the intent of the Commission is to get a clear indication from the ACP countries as to the regional configuration for the negotiations (which were due by December 2001) and start substantive negotiations on EPAs as quickly as possible.

This approach, however, may not be compatible with the emerging consensus among the ACP which suggest a different structure, which envisages conducting the negotiations in two stages.

During the first phase, starting in September 2002, the Commission would negotiate with the entire ACP Group not only on the format, structure and principles for the negotiations, but also on issues of common interests to all ACP countries (scope for differential treatment, LDC status, WTO-compatibility, rules of origin, general framework for trade in service, etc.). Negotiations would be conducted at a disaggregated ACP level only at a later stage. Following this approach, it is clear that the January 2003 strict deadline imposed by the Commission would be inappropriate.

In this context, *how would the Commission accommodate the ACP concerns, should the ACP Group formally decide to adopt this two-*

stage approach? Can the mandate be rephrased to provide for some flexibility? Can negotiations be conducted in parallel at the regional and all ACP levels? What will happen if the ACP Group is not in a position to identify appropriate regional groupings by January 2003 (as the configuration should be linked to the content of the negotiations and therefore the progress made at all-ACP level negotiations)?

Market Access Issues

Commodity protocols: *What is the future of the Commodity Protocols?* Art. 36.4 of the Cotonou Agreement states that 'the Parties reaffirm the importance of the commodity protocols, attached to Annex V of this Agreement. They agree on the need to review them in the context of the new trading arrangements, in particular as regards their compatibility with WTO rules, *with a view to safeguarding the benefits derived therefrom*, bearing in mind the special legal status of the Sugar Protocol.'

How can this legal requirement be integrated into the EC mandate, which suggests tariff dismantling and trade liberalisation (section 3.2. of the proposed directives)? *How could the benefits of the sugar protocol be maintained in a liberalised context?* In other words, what is the meaning of 'the sugar protocol will be reviewed in this context', as indicated in the proposed directives?

Differentiated timetable: Why is the timetable for the abolishment of quantitative restrictions ('on entry into force of EPAs', section 3.3. of the proposed EC mandate) different from the one for tariff dismantling (section 3.2) which provides for a transitional period? What can justify this special timeframe for quantitative restrictions?

Antidumping: The proposed EC mandate states that for antidumping, 'the Community shall have special regard to the particular economic and social situation of the ACP countries concerned' (section 3.3.). What will this mean? *Would it not be simpler and more favourable for the ACP countries to have a provision restricting or abolishing the use of antidumping measures*, which can serve as very restrictive barriers to trade? ACP exporters, with limited capacity, will never be able to survive potential harassment by European import-competing producers who would choose to have regular recourse to antidumping procedures.

Rules of Origin

The EC mandate also mentions that '[n]egotiations shall be based on the rules of origin and methods of administrative co-operation as defined in Protocol No 1 of Annex V to the Cotonou Agreement' (section 3.4).

The rules of origin of the Cotonou Agreement are rather complex, and different from those of the generalised system of preferences (GSP) and EBA. To be able to take advantage of a liberalised EU market, the ACP countries need simple rules of origin that can easily be administered.²

Does the mandate imply that rules of origin for EPAs should be similar to those currently prevailing under the Cotonou Agreement? If so, would this be compatible with the pledge of the Commission in the Explanatory memorandum that 'EPAs should also aim at simplifying the requirements and procedures related to imports and exports' (section 3, p.4)?

Will rules of origin be identical for all EPAs? This would be consistent with the principle stated in the Explanatory memorandum (section 1) 'whereby existing EPAs should be extended and merged in accordance with the progress in regional integration within the ACP'.

Trade Facilitation

Section 3.5 of the proposed EC mandate indicates that 'Negotiations shall aim at simplifying all requirements and procedures related to imports and exports, [...] drawing on the highest international standards [...]'. One may doubt the capacity of developing and least developed countries to apply the highest international standards.

Trade in Services

The Commission proposes a progressive, reciprocal and asymmetrical liberalisation of trade in services. However, it does not specify the negotiating method. *Will the negotiations be based on a 'positive list' approach*, as followed at the WTO for the General Agreement on Trade in Services (GATS), which provides for a step-by-step negotiation of market access commitments to foreign suppliers. And more generally, *what are the outcomes of benefit to the ACP that could be achieved under an EPA that could not be achieved under GATS?*

Other Issues of Concern to the ACP

Finally, the proposed EC mandate remains vague or fails to address several issues of potential concerns to the ACP. A major issue concerns the potential impact of a reform on the Common Agricultural Policy (CAP) on the content of EPAs, knowing that agricultural trade is of vital importance for the ACP countries. Apart from an explicit reference (section 3.2 of the draft negotiating directives) to a case-by-case examination of 'the potential impact of export refund mechanisms on the process of trade liberalisation', the CAP agenda is virtually absent of the proposed mandate.

Another aspect overlooked by the Commission is the impact of EPAs on fiscal revenues, and the potential need of adjustment measures for fiscal policies in the ACP. The debate on support measures to tackle supply-side constraints in the ACP is also likely to generate pressures on the Commission to revise the EDF programming.

Adopting Negotiating Mandates

It remains to be seen how the above issues will be addressed in the negotiating mandate that will be adopted by the EU member states. Clarification and greater flexibility will probably be the two elements that the ACP countries will be seeking.

At the same time, the ACP Group also has to internally agree on a general structure and mandate for the EPA negotiations. This will not be an easy task. To facilitate matters, the ACP initial mandate could take a very general format, setting the principles for the negotiations and leaving many negotiating arrangements for an ulterior stage.

The ultimate content of the ACP and EU mandates – and hence the prospects for constructive negotiations – will depend on the willingness by all parties to seriously address trade and development issues in the EPA negotiations.

ENDNOTES

¹ Commission of the European Communities, 'Recommendation for a Council Decision authorising the Commission to negotiate Economic Partnership Agreements with the ACP countries and regions', SEC (2002) 351 final, 9 April 2002. http://europa.eu.int/comm/trade/bilateral/acp/nsp_acp.htm

² In a recent study by CEPS on the protective effects of restrictive rules of origin adopted in EU trade agreements, Paul Brenton and Miriam Manchin argue that previous preferential trade schemes have been ineffective in delivering improved access to the EU market mainly because of restrictive regulations, in particular rules of origin. Brenton, Paul and Miriam Manchin, 'Making EU Trade Agreement Work: The role of rules of origin', CEPS Working Document No.183, March 2002. <http://www.ceps.be/Pubs/2002/WD183.PDF>

EU/ACP Negotiations and the Agriculture Negotiations Under the WTO Doha Mandate

ICTSD

ACP countries are facing two sets of closely interlinked negotiations in the field of agriculture: negotiations under the WTO umbrella and those between the ACP countries and the EU under the Cotonou Agreement. Given that 36% of ACP exports to the EU are agricultural products, these negotiations will be of great importance to most ACP countries. As negotiations progress in the WTO, it appears that the Doha mandate could play an important role in reforming the EU's Common Agricultural Policy (CAP). It will thus affect the value of existing ACP trade preferences and improve the "competitiveness" of EU agricultural and processed agricultural exports which could be to the detriment of some ACP agricultural and agro-processing industries.

Beyond the reform of the CAP, the WTO negotiations, to be concluded in 2005, are likely to provide the starting point for further trade liberalisation in the context of Economic Partnership Agreements (EPA) between the ACP and the EU, including with respect to the level of export subsidies and domestic support and the preferential margin the EU will be able to grant to ACP agricultural exports as well as special and differential treatment of developing and least developed countries.

As we move towards the definition of modalities for WTO negotiations the present article looks at different strategic options, ACP countries might wish to consider and their potential consequences for future negotiations under the Cotonou Agreement.

The Doha Mandate

At the fourth WTO Ministerial Conference held in Doha from 9-14 November, Members committed themselves, 'without prejudging the outcome of the negotiations,' to 'comprehensive negotiations aimed at: substantial improvements in market access; reductions of, with a view to phasing out, all forms of export subsidies; and substantial reductions in trade-distorting domestic support.'¹ The work programme states: 'special and differential treatment for developing countries shall be an integral part of all elements of the negotiations under this programme' and 'non-trade concerns will be taken into account in these negotiations'. In addition, and this can be considered *the* added value of the new negotiation mandate vis-à-vis the previous built-in negotiations under Article 20 of the Agreement on Agriculture, Members submitted themselves to a tight negotiation time-frame² and included the Agriculture negotiations in the single undertaking.

First, Members are to agree by 31 March 2003 on 'modalities for further commitments'. Second, based on these negotiation outlines, Members must submit their comprehensive draft Schedules before the fifth WTO Ministerial to be held in September 2003 in Cancun, Mexico. Finally, the subsequent agriculture negotiations on rules and disciplines and related legal texts are to be concluded before 1 January 2005.

Negotiation Modalities

On 26 March, the WTO Committee on Agriculture (CoA) agreed on a 12-month work programme for establishing the so-called modalities for negotiating new commitments.³ This work programme deals with one of the most critical phases in the agriculture talks as the modalities would set targets – including numerical targets – as well as rules-based elements for achieving the objectives set out in the Doha Declaration. This 'modalities' stage will therefore set the tone of the negotiations' final outcome, as the modalities will be used by Members for making their initial offers to negotiate their specific commitments. According to this work programme, Members will address each 'pillar' of the Agreement on Agriculture (AoA) separately and in sequence:

- Export subsidies, competition and restrictions on 17-19 June;
- Market access on 2-3 September; and
- Domestic support on 23-25 September.

The views of the Members currently seem to favour the inclusion of discussions on special and differential treatment under each of the three pillars, as appropriate. Following a wrap-up meeting scheduled for 18-20 November, Members envisage having a draft overview paper on the various modalities options ready for circulation by 18 December 2002. In the follow-up process, the first draft modalities are scheduled for circulation prior to the end-February 2003 meeting, which would then be finalised at the last seven-day session of the modalities phase on 25-31 March 2003.

Proposals on Modalities

The European Union:⁴ On tariff reduction, the EU advocates the reduction formula used during the Uruguay Round – i.e. a linear tariff cut starting from bound rates⁵ with 36 percent average reduction and a minimum cut per product of 15 percent. The Special Agricultural Safeguard (SSG) should be maintained. The EU further proposes that the ‘box’ structure of the AoA (amber, blue and green) be kept in place with additional focus on production-decoupled support. Concerning export competition, the EU proposes to include all forms of export support in-

cluding export credits and food aid in the negotiations. The EU stresses that certain positive externalities (non-trade concerns) could not be de-linked from agricultural production. In order to provide developing countries with special and differential treatment (S&D), the EU suggests providing them with enhanced flexibility regarding green box measures and *de minimis* support.

The Cairns Group:⁷ On market access, the Cairns Group of agriculture exporting countries proposes to significantly reduce – starting from the final bound rates – all agricultural tariffs to maximum levels, thereby eliminating tariff peaks, tariff escalation and dispersion. The special agricultural safeguard (SSG) should only be maintained for developing countries, which should further be provided improved market access to developed country markets. Regarding domestic support, trade and production-distorting support should be reduced and disparities between developed and developing country levels of overall support be balanced. The blue box, which exempts direct payments under production-limiting programmes from reduction commitments, should be eliminated. In terms of export competition, the Group calls for the elimination and prohibition of all forms of export subsidies. Additionally, Cairns demands an initial down payment regarding all three pillars, i.e. market access, domestic support and export competition.

Like-minded Group (‘Development Box’):⁸ Regarding tariffs, developing countries should be allowed to indicate the list of agriculture crops that would be subject to reduction commitments (‘positive list’ approach) so as to enable them to exempt basic ‘food security crops’ (FSCs) from reduction and other commitments; as an S&D measure, they should also be able to maintain appropriate levels of tariff bindings to protect their farmers. Furthermore, they should be allowed to re-negotiate tariff bindings with regard to FSCs. Developed countries, on the other hand, should provide quota- and tariff-free access to products from low-income or resource-poor (LI/RP) farmers in developing countries. On domestic support, AoA Article 6.2 should be expanded and the green box be revised for the benefit of LI/RP farmers. In addition, an ‘appropriate’ safeguard mechanism should allow developing countries to respond to import surges in food security crops. ‘Dumping’ should be generally prohibited and developing countries should be allowed to take ‘appropriate border measures’ in the event that the dumping of farm products impedes food security. Furthermore, ‘certain penalty measures’ should be triggered where subsidised production harms domestic production in developing countries or displaces their non-subsidised exports in third markets.

Africa Group:⁹ On market access, the Africa Group calls for credits for autonomous liberalisation, the reduction of tariff peaks and escalation as well as preferences for exports from least-developed countries (LDCs). Generally, tariff reductions should be based on final bound rates. The SSG should be reviewed and – as an S&D measure – an appropriate safeguard mechanism developed for developing countries. Furthermore, developed country supports should be reduced and the green box revised. Non-exempt, as well as *de minimis*, support should be made more flexible for developing countries. Export subsidies should be eliminated and other export competition mechanisms disciplined while taking into account the needs of LDCs and net food-importing developing countries (NFIDCs). Furthermore, S&D should be expanded to benefit developing countries’ non-trade concerns.

Small Island Developing States (SIDS):¹⁰ In order to offset eroding trade preferences, non-reciprocal preferential access provided to SIDS should be improved and bound under the AoA, including duty-free access and a special safeguard provision. SIDS that undertook autonomous liberalisation should be exempted from further commitments on both protection and support and/or should be allowed to increase farm support levels. They should be given flexibilities in using the green box in case of natural disasters together with related export subsidisation. More generally, SIDS’ obligations should be waived in the event of natural disasters. Finally, SIDS require specific flexibilities to address their non-trade concerns.¹¹

Key Features of the Different Modalities Options

Regarding market access, a further use of the Uruguay Round formula would have little effect on tariff peaks and trade flows in general due to the gap between bound and applied rates. The impacts of the UR formula would be accentuated, however, if used on applied rates. The biggest effects would result from the application of the so-called harmonising or ‘Swiss’ formula, which would cut very high tariffs proportionately more than lower ones. On the other hand, the application of the Swiss formula would cut tariffs in many ACP countries unless they would be allowed certain exceptions under S&D treatment.

On domestic support, it should be noted that the applied level of support is often far below the bound commitment levels. As a result, the reduction of the level of protection in developed countries would be effective only if actual domestic support as notified to the Committee on Agriculture is reduced. Reductions along the UR formula, i.e. based on the aggregate measurement of support (AMS), would not be significantly restrictive for all countries. It would allow countries to make heavier cuts in some ‘unimportant’ product sectors with little or no reduction in sensitive sectors. An easier and probably more effective approach could be to base the reduction of AMS on a fixed percentage in total value of production (as proposed by e.g. the US and India). The greatest effects appear to result from reducing the total agricultural support by collapsing support under all three boxes into one single category (as suggested by, for instance, the Like-minded Group).

With respect to export subsidies, ACP countries should keep in mind that their removal may hurt the net food importers. While the increase in international prices as a result of the removal or reduction of export subsidies may not be very significant, the short-term costs of higher world prices may still be substantial for many of the low-income countries, irrespective of the long-term advantages for food exporters. This said, it appears that only a high reduction rate (at least 30 percent) would reduce the notified export subsidies and not only the bound ones.⁶ In addition, to be efficient, future reduction commitments should be product-specific to avoid the flexibility to shift from one product to another.

What options for ACP?

Against this background, ACP countries might wish to follow different strategies, depending on their particular interests. One option would be to join the groups demanding for a significant reduction of market protection and support measures – such as the Cairns Group of agriculture exporting countries – so as to increase momentum for effective CAP reform. However, some ACP countries have also benefited from the CAP through allocated quotas and guaranteed prices under the commodity protocols. These countries might not necessarily want to firmly encourage reforms of the CAP. ACP countries further need to be clear that certain demands commonly brought forward by a wide range of developing and least-developed countries such as the elimination of tariff peaks and escalation, the abolition of the Special Agricultural Safeguard (SSG) for developed countries as well as phasing out export subsidisation could be counterproductive in some cases as commodity exports from highly competitive countries could potentially wipe out ACP products from the European market.

If ACP countries wish to avoid a complete and immediate exposure of their agricultural sector to competition from the EU, and therefore limit the level of reciprocity they will be required to provide to the EU under the EPA, they could consider opting for strengthening the special and differential treatment provisions in the WTO. In this respect, they might want to negotiate certain exclusions for key agricultural products, consider transition measures as well as creating effective and targeted border protection tools enabling ACP countries to safeguard their agricultural sector from cheap and subsidised EU products. To this end, the ACP Group may wish to associate with those developing countries that support the idea of inscribing a ‘Development Box’ in the (AoA).

Conclusion

Bearing in mind that, to a large extent, the future of ACP-EU trade relations will be shaped by the outcome of the Doha Round, ACP countries should develop an overall trade strategy covering both negotiation tracks. In doing so, the ACP should approach the negotiations on an issue-by-issue-basis and assess the benefits and constraints of future modifications of the WTO agriculture trade system in relation to the future Cotonou negotiations, as well as their own agriculture trade agenda. Furthermore, ACP countries could take a sequenced approach towards the ACP-EU negotiations, which would duly take account of the agreed work programme for the agriculture negotiations underway at the WTO.

ENDNOTES

¹ Paragraph 13 of the Ministerial Declaration (WT/MIN (01)/DEC/W/1).

² Paragraphs 14 and 45 of the Ministerial Declaration.

³ Attachment to Chair’s report (TN/AG/1) on the 26 March special session.

⁴ Negotiating proposal G/AG/NG/W/90.

⁵ In contrast, in the draft negotiation mandate the EU refers to ‘MFN duties effectively applied in the ACP countries on the day the signature of the EPAs’.

⁶ See I. Mamaty: *African Countries and the Agreement On Agriculture: What Scope for Sustainable Development?* ICTSD, 2002.

⁷ Argentina, Australia, Bolivia, Brazil, Canada, Chile, Colombia, Costa Rica, Fiji, Guatemala, Indonesia, Malaysia, New Zealand, Paraguay, Philippines, South Africa, Thailand, Uruguay. Negotiating proposals G/AG/NG/W/11, 35, 54, 93.

⁸ Informal non-paper Cuba, Dominican Republic, El Salvador, Honduras, Kenya, Nigeria, Pakistan, Sri Lanka and Zimbabwe: The Development Box, 1 Feb. 2002. See also non-paper by the African Group and other countries on Special and Differential Treatment, 1 Feb. 2002.

⁹ Comprising all African WTO Members; proposal G/AG/NG/W/142.

¹⁰ Barbados, Cuba, Dominica, Jamaica, Mauritius, St. Kitts and Nevis, St. Lucia, St. Vincent and the Grenadines, Trinidad and Tobago.

¹¹ Non-paper by Dominica, Fiji, Jamaica, Madagascar, Mauritius, Papua New Guinea, St. Lucia, St. Vincent and the Grenadines, Trinidad and Tobago: Small Island Developing States, 1 February 2002.

Special and Differential Treatment in WTO Rules in the Context of the EU/ACP Economic Partnership Agreements

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The Partnership Agreement (PA) signed between the 77 ACP States and the 15 EU States in Cotonou, Benin, in June 2000 is one of the most important development cooperation contracts between a group of developing countries and a group of developed countries. It builds upon the ‘acquis’ of the past four Lomé Conventions, and provides a framework for economic and trade co-operation. A central tenet of the new PA is to ensure that the new trade agreement is in full conformity with WTO provisions, including special and differential treatment (SDT) for ACP States (Article 34, PA). This article addresses the WTO compatibility of the Economic Partnerships Agreements (EPAs), which will probably replace the system of non-reciprocal trade preferences, bearing in mind that the modalities for the EPAs will be defined through consultations and negotiations.

EPAs, Flexibility and SDT

During a preparatory period starting in September 2002 and lasting until December 2007, the ACP States and the EU will negotiate and conclude EPAs that should enter into force from January 2008. The EPAs will be comprehensive in scope encompassing trade in goods (Articles 37 and 38, PA), trade in services and the building of services supply capacity (Articles 41 and 42, PA), as well as trade-related areas (Articles 44-52, PA). The negotiations on EPAs will be undertaken by ACP States that consider themselves in a position to do so, at a level they consider appropriate (Article 37:5, PA). The EPAs shall aim at establishing timetables for progressively removing barriers to trade between the concerned ACP States and the EU, *in full conformity with relevant WTO provisions*.

The emphasis on WTO-compatible EPAs and the increasing emergence of North-South reciprocal trade agreements, against the backdrop of a strengthening of the multilateral trading system under the WTO is a recent phenomena that has yet to be adequately assessed and examined in terms of WTO jurisprudence. At this point in time, the relevant WTO provisions to which the conformity test can be applied include GATT 1994 Article XXIV; Part IV of GATT 1994; the Enabling Clause and Article V of the General Agreement on Trade in Services (GATS).

Given that the future EPAs will involve a group of developed countries (the EU) and initially focus on the mutual reduction of tariffs on trade in goods – thus implying reciprocity in the granting of trade preferences and possibly the formation of free trade areas (FTAs) – the most relevant WTO provision to be invoked by the parties is GATT Article XXIV. The key conditions of GATT Article XXIV are paragraphs

- 8(a) and (b) on the elimination of duties and other restrictive regulations of commerce on ‘substantially all trade’, and in the case of customs union, substantially the same duties and other regulations of commerce applied to third countries;
- 5(a) and (b) stipulating that trade barriers applied by the constituting parties against third countries should not be raised;
- 5(c) allowing a reasonable transition period and this was clarified by the 1994 Understanding on the interpretation of GATT Article XXIV to the effect that the period is a maximum of 10 years for interim agreements unless exceptionally extended; and
- 7 on the notification to GATT/WTO and examination of the agreements.¹

In contrast, the Enabling Clause in paragraph 2(c) provides for the formation of RTAs among developing countries on the condition that the parties notify the GATT/WTO and provide adequate opportunity for con-

sultation with any Member that could be adversely affected. These conditions are much less stringent than those of GATT Article XXIV.

Notwithstanding compliance with the somewhat inadequate prevailing WTO provisions, the EPAs shall 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 the timetable for dismantling tariffs* (Article 37:7, PA). Also, EU liberalization shall build on and improve current ACP market access conditions.

The emphasis on flexibility and special and differential treatment in the EPAs for ACP States is justified on the grounds that full reciprocity and liberalization of trade is likely to pose greater adjustment costs on the part of ACP States for example in establishing alternative sources of fiscal revenue to deal with the dismantling of tariffs, developing measures to deal with uncompetitive industries and improve their competitiveness *vis-à-vis* European products and industries, or support their adaptation or formation of new industries to exploit the wider EU market. Indeed the PA (Article 37:7) recognizes that the EPA negotiations shall take into account the capacity of ACP States to adapt and adjust their economies to the liberalization process. Furthermore, flexibility in the application of EPAs could be sought in the treatment of possible non-tariff barriers, in particular the contingency protection measures such as anti-dumping and countervailing duties or safeguards, as well as the preferential rules of origin that would underpin the FTAs. The PA provides for the EU to review its rules of origin pertaining to preferential treatment to ACP products to improve market access conditions.

Another reason for flexibility and SDT in EPAs is the possibility of region-to-region EPAs i.e., a regional economic partnership agreement (REPA) between a regional group of ACP States, such as UEMOA (West Africa Monetary and Economic Union) and the EU. The conformity of the UEMOA-EU REPA to GATT Article XXIV might prove contestable (unless full liberalization in keeping with GATT Article XXIV is pursued) given that UEMOA has been formed and accepted by the WTO membership under Enabling Clause conditions and is thus likely to be a 'GATT Article XXIV-minus' agreement while the EU is a GATT Article XXIV agreement. This possibility raises the need for SDT for ACP States that form, via their economic grouping, an EPA with the EU.

What Are the Relevant WTO Rules for EPAs?

The question is how EPAs fit into existing WTO rules on regional trade agreements, and if not, how such WTO rules could be modified to benefit ACP States parties to an EPA or for that matter any mixed North-South RTA. The ACP States, as well as the EU, recognize the need for such a case. The PA itself (Article 37:7) provides that the parties shall co-operate in the WTO in defending the EPAs, in particular with respect to the degree of flexibility accorded. The Third ACP Trade Ministers' Meeting in December 2000 reiterated the need for flexibility in the new trading arrangements and for this flexibility to be reflected in the relevant WTO rules. The trade ministers also directed the ACP Group to seek to 'modify' the WTO provisions to cater for the flexibility required by ACP States.²

One issue is that the ACP States and EU need to pre-empt possible future legal challenges against flexibility measures introduced within EPAs. It is possible that given the present implicit flexibility in GATT Article XXIV, future EPAs might be covered under the prevailing WTO provisions without any reform. The difficulty with this view is that a reliance on implicit flexibility faces the uncertainty as to whether an ACP State (or EU) in the case of a dispute can invoke GATT Article XXIV, as presently crafted, as a defence against an MFN violation

complaint by third parties. Thus, reaching some formal understanding on the type and degree of flexibility and SDT permissible under GATT Article XXIV would serve to clarify and enhance the legal security.

Second, there is a more universal, systemic consideration in respect of the relevance, equity and overall coherence of the WTO legal architecture in dealing with mixed North-South RTAs. GATT Article XXIV was designed in the 1940s to deal with RTAs among developed countries. It is thus less relevant in catering for mixed RTAs, such as future EPAs, between highly developed countries (the EU) and developing countries (the ACP States), several of which are characterized by small and vulnerable economies. There is no explicit SDT in GATT Article XXIV for developing countries in the context of mixed RTAs, although SDT is becoming more and more a fundamental principle of the WTO. Neither is there a provision in the Enabling Clause for mixed RTAs. In contrast, SDT for developing countries is clearly recognized and locked into GATS Article V agreements.

How to Introduce Greater Flexibility to WTO Rules on RTAs?

Reforms could be introduced in the context of the negotiations launched at Doha on WTO rules governing RTAs³ in 'clarifying and improving disciplines and procedures under the existing WTO provisions applying to regional trade agreements,' and which would take into account 'the development aspects of regional trade agreements' (paragraph 29, Doha Ministerial Declaration). Moreover, the SDT dimension of RTAs can be linked to the Doha negotiations on generic SDT provisions 'with a view to strengthening them and making them more precise, effective and operational' (paragraph 44, Doha Ministerial Declaration). In considering possible options, it is important for ACP States to sequence negotiations under the Doha agenda and the PA built-in agenda on trade, so as to elaborate options in both fora that promote ACP objectives in a systematic, coherent and mutually reinforcing manner. The EPAs would have to conform to these rules.

In order to incorporate flexibility and SDT within the scope of WTO rules, three modalities pertaining to trade in goods are conceivable, namely (i) through reforming the Enabling Clause; (ii) through reforming Part IV of GATT 1994; and (iii) through reforming GATT Article XXIV. These are the relevant WTO provisions disciplining RTAs.

- The Enabling Clause option would involve extending the scope of the clause to encompass mixed, North-South RTAs such as EPAs. This would ensure that the maximum flexibility enjoyed by developing countries under this clause in the formation of RTAs among themselves would also apply to RTAs they formed with developed countries. It would also in effect exclude the future EPAs from the purview of GATT Article XXIV and its tougher terms (as compared to the Enabling Clause). In this respect, paragraph 2(c) of the Enabling Clause dealing with RTAs can be targeted for review and modification.

A serious shortfall with this option, however, is that the legal validity of the Enabling Clause in general, and its coverage of agreements formed among developing countries in particular, is increasingly being subjected to pressure from some WTO Members.⁴ For example, Australia has proposed that RTAs formed pursuant to the Enabling Clause should be brought under the disciplines of GATT 1994 XXIV and the purview of the WTO Committee on Regional Trade Agreements. In the light of these attacks, there is the danger that an opening of negotiations on the reform of the Enabling Clause may lead to a weakening of the clause. This is not in the general interest of developing countries as they need to retain the current legal validity of the Enabling Clause for receiving unilateral preferences under the GSP and for maintaining the SDT provided to RTAs formed among developing countries.

Reform of GATT Article XXIV appears as the most viable option for introducing more flexibility to WTO rules on regional trade agreements.

• Amending Part IV of GATT to be applicable to mixed RTAs is useful in the context of the broader review by the WTO under the Doha agenda of generic special and differential treatment provisions to make them operational and effective. Part IV of GATT could be amended to render it explicitly legally binding and applicable to mixed, North-South RTAs. This reform would be directed at ensuring that the concept of non-reciprocity by developed countries in their relations with developing countries becomes enforceable, and is rendered applicable to negotiations in the regional context, for example for the EPA negotiations. The amendments can be focused on GATT Article XXXVI:8 on non-reciprocity including the footnote which could be modified to be applicable to regional trade agreements negotiated outside of GATT/WTO framework but in pursuance of WTO-compatible RTAs. A key difficulty with this option is that it would also authorize unilateral preferences to be provided under mixed-RTAs (developed contracting parties do not expect reciprocity ... to the trade of less developed contracting parties). This option may be a preferred outcome for ACP States, as it provides a remarkable degree of flexibility to mixed RTA members. However it is likely to encounter stiff resistance from other WTO Members and thus cannot be considered as realistic and workable basis for negotiations on the reform of WTO rules.

Introducing flexibility in Article XXIV could be done in three ways: (i) a special case for ACP-EU; (ii) generic provisions on SDT (iii) review of specific provisions of the Article

• Reform of the GATT 1994 Article XXIV to allow for flexibility appears a more sound and viable option. A modification of GATT Article XXIV could be done either through an amendment of the Article itself, or through a reinterpretation by way of the revision of the interpretative notes contained in Understanding on the Interpretation of Article XXIV of the GATT 1994. There is a practical difficulty in formally reopening, renegotiating and amending GATT 1994 Article XXIV itself, as it needs a consensus by the Ministerial Conference.⁵

The adoption of a new interpretation through a revision of the 1994 Understanding, which may be agreed by three-fourths majority,⁶ may be a more feasible option.⁷ Such an approach is also more realistic because the wording of GATT Article XXIV is open enough to allow for various interpretations, providing space for certain flexibility to be incorporated depending on the way they are interpreted. Nonetheless, to the extent that the negotiations under the Doha agenda form a 'single undertaking' which needs a consensus by the Ministerial Conference, there is little difference between the two approaches.

Introducing flexibility as a form of SDT within GATT Article XXIV could be done in three different ways: (i) a special case for ACP-EU relations in GATT Article XXIV; (ii) generic provisions on SDT within GATT Article XXIV in favour of developing countries; and (iii) review of specific provisions in GATT Article XXIV. Option (i) would seek provisions for special derogation only for ACP-EU relations only in line with Article XXIV:11 on special arrangement between India and Pakistan. However, an exception is open to criticism as ACP-EU relations cannot be the only exception. Other 'mixed' RTAs may arise such as from the Free Trade Agreement of the Americas.

Option (ii) could consist in inserting a generic paragraph in GATT Article XXIV or the 1994 Understanding stating that the flexibility is to be provided for developing countries in terms of the key requirements stipulated in GATT Article XXIV:5 and 8.⁸ The flexibility would seek longer transitional periods, product and trade coverage that allows developing countries to retain sensitive sectors of key importance to their economies, and tariff reduction approaches that allow developing countries to pursue a slower pace of liberalization.

Option (iii) is an alternative to option (ii); it consists in revising and modifying specific provisions on the key requirements of GATT Article XXIV, particularly XXIV:5(c) and XXIV:8, so as to allow differentia-

tion for developing countries. The distinction between the latter two approaches is rather arbitrary and depends on actual negotiations.

The aim of these changes is to allow flexible interpretation of the key requirements of GATT Article XXIV for developing countries in the form of SDT, while clarifying and improving general disciplines applicable to all WTO Members.

Conclusion

WTO compatibility of the future ACP-EU trade agreements is not a straightforward matter, as there are no specific rules providing for RTAs between developing and developed countries. To ensure a sound legal basis for EPAs, a range of options exists to consider reforms of WTO rules which would ensure sufficient flexibility. The ACP and EU have an interest in closely following and coordinating their efforts within the WTO negotiating fora on rules regulating RTAs.

* Bonapas Onguglo and Taisuke Ito work in the UNCTAD Secretariat. The views expressed in the article are those of the authors and should not be attributed to the UNCTAD Secretariat. This article is a synthesis of a larger paper by the authors which is forthcoming as ECDPM-ODI Discussion Paper 2. Internet: www.ecdpm.org, www.odi.org.uk.

ENDNOTES

¹ The future integration of services into EPAs will oblige the EU and ACP States to ensure conformity of the services agreements with Article V of GATS. Its requirements parallel those articulated in GATT Article XXIV namely, 'substantial sectoral coverage' with no *a priori* exclusion of any mode of supply of services and 'the absence or elimination of substantially all discrimination.' Unlike GATT Article XXIV however, GATS Article V:3(a) specifically allows flexibility for developing countries' members of economic integration agreements.

² Similar suggestions have also been made by eminent persons from the ACP Group such as Ambassador Ali S. Mchumo, former Chairman of the WTO General Council, and by other gatherings of ACP States.

³ The WTO surveillance of RTAs has increased unlike under GATT 1947.

⁴ The EU's GSP schemes has been the subject of complaints by some WTO members such as Brazil, Thailand and India.

⁵ Article X of the Marrakesh Agreement establishing the WTO.

⁶ Article IX:2 of the Marrakesh Agreement establishing the WTO.

⁷ This was indeed the approach adopted in Uruguay Round.

⁸ Some guidance on such an option can be drawn from GATS Article V.

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Calendar

WTO Events

ACP-EU Events

20-21 June	Committee on Technical Barriers to Trade
20 June	Special Session of the Committee on Agriculture
21 June	Council for Trade in Goods
25-27 June	Council for Trade-related Aspects of Intellectual Property Rights
28 June	Committee on Agriculture
28 June	Special Session of the Council for Trade-Related Aspects of Intellectual Property Rights
1 July	Committee on Trade and Development
1-2 July	Working Group on the relationship between Trade and Competition Policy
3-4 July	Committee on Customs Valuation
3-5 July	Working Group on the relationship between Trade and Investment
8-9 July	General Council
8-9 July	Negotiating Group on Rules
10 July	Negotiating Group on Rules
11-12 July	Negotiating Group on Market Access
11-12 July	Working Group on Trade, Debt and Finance
15-17 July	Council for Trade in Services
17 July	Special Session of the Committee on Trade and Development
18 July	Council for Trade in Services
18-19 July	Trade Negotiations Committee
22-23 July	Council for Trade in Goods
23-24 July	Special Session of the Council for Trade in Services
25 July	Committee on Subsidies and Countervailing Measures
25-26 July	Special Session of the Council for Trade in Services
30 July	Sub-Committee on Least-Developed Countries
31 July	General Council
2 & 3 Sept	Special Session of the Committee on Agriculture
12 & 13 Sept	Negotiating Group on Market Access

16-17 June	Senior Officials Trade and Finance
18 June	Ministerial Trade Committee
19-20 June	Joint Ministers of Trade and Finance
20 June	Joint Ministerial Trade Committee
18-19 June	Joint Session of the ACP Ministers of Trade and ACP Ministers of Finance/ Brussels (Belgium)
25-27 June	5th Session of the ACP Council of Ministers Punta Cana (Dominican Republic)
27 June	27th meeting of ACP-EU Economic and Social Interest Groups Santo Domingo, Dominican Republic
28 June	27th Session of the ACP-EC Joint Council Punta Cana (Dominican Rep)
15 July	2nd ACP Ministers of Foreign Affairs – Nadi (Fiji)
July	Special ACP Council of Ministers – Nadi (Fiji)
18 - 19 July	3rd Summit of ACP Heads of States – Nadi (Fiji)
September	EU-Africa Foreign Ministers meeting – Burkina Faso
27 September	Launching of ACP-EU Negotiations for New Economic Partnership Agreements – Brussels (to be confirmed)
November	76th Session of the ACP Council of Ministers Brussels

Contact ACP Secretariat, tel: (32 2) 743 06 00, fax: 735 55 73, e-mail: info@acpsec.org, Internet: <http://www.acpsec.org/>

Resources

EPAwatch . This website is meant as an instrument to monitor the trade negotiations between the European Union and the ACP countries with the aim of establishing Economic Partnership Agreements (EPAs). <http://www.epawatch.net/general/start.php>.

WTO Agriculture Negotiations: The Issues and Where We Are Now. By the WTO Secretariat. http://www.wto.org/english/tratop_e/agric_e/negs_bkgnd00_contents_e.htm

Agriculture in Developing Countries and the WTO: 11 Papers to Understand, Anticipate and Debate. Published by Solagral & The French Ministry of Foreign Affairs, January 2002. For further information, visit http://www.solagral.org/publications/environnement/pedago/agri_omc_2001/indexbisgb.htm

Regional Trade Agreements in the GATT/WTO: Article XXIV and the Internal Trade Requirement. By James Mathis, TMC Asser Press, 2002. Contents and Forward available at: <http://www.asserpress.nl/cata/Mathis/fra.htm>

All WTO meeting take place in Geneva. Please contact the Secretariat for confirmation of dates (also available at <http://www.ictsd.org/cal/>).