

Trade, Development and regional integration in Africa: EPA's contribution to regional (dis)integration in decision-making in Sub-Saharan Africa Public Sphere

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I: Introduction

Trade liberalisation and openness, as linchpins for development have been flagships of conventional economic policy advices to most African countries over the last few decades. In the late eighties and early nineties, decision-making on liberalisation in African public sphere were overshadowed by IMF/World Bank failed Structural Adjustment Programme (SAP). There has been a gradual paradigm shift and African countries nowadays tend to rely mostly on the prescriptions of the World Trade Organisation and related regional trade regimes for liberalisations. About half of world trade nowadays occur under preferential tariff rates. Among other reasons for this worrying fragmentation of international trade rules is the belief that regional trade agreements are easy to negotiate and perhaps offer the possibility of permeating areas that multilateral trade negotiations cannot. While some of the fragmented trade regimes have been enlarged to include new partners, others are in the process of metamorphosis from non-reciprocal trade regimes to reciprocal trade regimes. This is the case with the African, Caribbean and Pacific Group of States (ACP) and European Union (EU) trade relationship established under the 2000 Cotonou Partnership Agreement (CPA) that superseded the original 1975 Lomé Convention.

The CPA calls for the new trading regime to be supportive to current regional integration processes within Africa and should be placed in the context of the overall development objectives of ACP countries. As witnessed in the Agreements initialled by thirty-five ACP countries by year-end 2007, the European Commission has relied on GATT Article XXIV to justify its claim for reciprocity in the impending trade regime (popularly known as the Economic Partnership Agreement-EPA). Consequently, if development concerns can be factored into EPA, what would be an acceptable threshold for such RTAs to conform with GATT Article XXIV requirements of 'substantially all trade' and 'reasonable period of time'?

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Although by the end of December 2007, when the Cotonou waiver was supposed to expire, about thirty-five of the seventy-seven ACP countries had initialled interim or full² goods-only EPAs, they largely disagree with any form of FTA with the EU made on the basis of an inflexible interpretation of GATT Article XXIV. Inevitably, the prevailing view in ACP countries is that a FTA between the EU and the ACP countries must be a development instrument and supportive to their regional integration initiatives. In view of the fact that thus far, interim EPAs, contain no clear details in terms of the commitments given by the parties, the possibility remains that agreement on EPAs will not be reached by the end of 2008 as some of the initialled agreements claim.³ In this situation of uncertainty, individual exporters from the ACP countries are likely to be more concerned about the long-term delivery terms of the contracts they may be entering into now. Assuming that on the basis of the initialled interim goods-only agreements between the EC and a cluster of ACP countries, the rights and obligations under the CPA are still valid, ACP non-LDCs will be expected to continue to benefit from the Cotonou preferences until such time as an agreeable EPA is put in place. Consequently, the question left to be answered is whether in case of any dispute arising from a non-compliance with a provision of the CPA, the EC will be absolved of its legal obligation under the Cotonou Agreement to continue to give Cotonou-equivalent preferences to these countries. This paper discusses the idea of development and WTO compatibility in the context of the current EPA negotiations. The paper also examine why and how EPA should have been a building block to the multiple regional integration processes in Africa. In view of the flawed dispute settlement provisions under the CPA, the paper further tries to answer the question of whether the CPA contains rights and obligations that need protection by individual EU member courts and may necessarily be enforced before the ECJ. The paper ends with some thoughts on post-EPAs adjustment programme and how EPAs will impact decision-making in Africa's public sphere.

II: The Permissibility of Regional Trade Agreements under the GATT/WTO Rules

² The Caribbean is the only region that initialled a full EPA with the EU by 31 December 2007.

³ The application of the SADC EPAs by the EU was scheduled for 1 January 2008 and 1 June 2008 for the SADC EPA States. See statement of the Chief Negotiators On the initialling of the Economic Partnership Between the SADC EPA Group of States on the one hand and the European Union on the other hand, Brussels, November 2007.

The clustering of states by a common bond of policy has occurred for many years,⁴ although the current fragmentation of international trade rules has generated a lot of concern about the effectiveness of multilateralism.⁵ Regionalism allows like-minded states or states with similar concerns, such as security or trade, to align themselves with each other. Yet, whenever multilateral trade negotiations move toward reducing most-favoured nations (MFN) tariffs, countries benefiting from trade preferences are concerned about the impacts of such reductions on their trade preferences. The principles and rules pertaining to Free Trade Agreements (FTAs) and Preferential Trade Agreements (PTAs) laid down by the WTO and binding upon its current 151 Members are therefore very relevant in light of the increasing number and complexity of worldwide preferential agreements. On the basis of the General Agreements on Tariffs and Trade (GATT) 1994 and General Agreements on Trade in Services (GATS), these principles shape the conditions, requirements and limitations of such agreements.⁶ For the purpose of the creation of trade, the requirements and limitations of GATT/WTO rules on Regional Trade Agreements (RTA) seek to establish a balance between multilateralism and regionalism.

GATT Article I (MFN) is regarded as a cornerstone of the multilateral trading system as it obliges all the 151 WTO Members to treat each other equally.⁷ However, in the field of goods, GATT Article XXIV establishes an exception to this obligation for the purpose of creating Custom Unions and FTAs. While Custom Unions such as the Southern Africa Custom Union (SACU),⁸ East Africa Community (EAC),⁹ the European Union (EU), and the Cooperation Council of the Arab States of the Gulf (GCC) are structures establishing common external tariffs and trade policies toward third countries, FTAs such as the Economic Community of Central African States (ECCAS),¹⁰ the Southern African Development

⁴ Article 21 of the Covenant of the League of Nations provided that '[n]othing in this Covenant shall be deemed to affect the validity of international engagements such as treaties of arbitration or regional understanding like the Monroe doctrine for the maintenance of peace'. The corollary of this provision is Article 52(1) of the UN Charter, which encourages regionalism among members of the UN.

⁵ For an extensive discussion on RTAs and the puzzles surrounding their formation and existence, see Lorand Bartels & Federico Ortino, *Regional Trade Agreements and the WTO Legal System*, Oxford (2006); and Roberto Fiorentino et al., 'The Changing Landscape of Regional Trade Agreements: An Update of WTO', Discussion Paper (2006).

⁶ Similarly, in the context of the Agreement on Trade Related Intellectual Property Rights (TRIPs), Members may also deviate from the MFN rule to the extent that the conditions laid down under TRIPs Article 4 are met.

⁷ GATT Article III also requires similar obligations from the perspective of an individual WTO member's treatment of products within its territory.

⁸ See <http://www.dfa.gov.za/foreign/Multilateral/africa/sacu.htm>.

⁹ See http://www.eac.int/EAC_customs_U.htm.

¹⁰ See http://www.iss.co.za/AF/RegOrg/unity_to_union/eccas.html.

Community (SADC)¹¹ and the North America Free Trade Area (NAFTA) establish free trade among members.¹² The deviation from Article XXIV is conditioned to the meeting of the requirements laid down in paragraphs 5 and 8 of Article XXIV regarding trade coverage, length of time for internal liberalisation within the regional arrangement and the level of trade liberalisation maintained with third countries.¹³

The requirements of trade coverage as provided for under GATT Article XXIV(8) for the purpose of compatibility with WTO rules on FTAs¹⁴ and CUs¹⁵ need to cover substantially all the trade in products originating within members of the RTAs. There is at present no provision in the GATT/WTO Agreement defining ‘substantially all trade’. An agreed understanding of the meaning of this term has so far eluded the GATT/WTO membership.

As a consequence, the only sources of interpretation we can rely on to ascertain the meaning of ‘substantially all trade’ is the DSB jurisprudence and existing common practice. In this regard, in drawing attention to the problem in the *Turkey-Textile* case, the AB stated that, ‘neither the GATT CONTRACTING PARTIES nor the WTO Members have ever reached an agreement on the interpretation of the term “substantially” in this provision. It is clear, though, that “substantially all trade” is not the same as all the trade, and also that “substantially all trade” is something considerably more than merely some of the trade. ... Thus we agree with the Panel that the terms of sub-paragraph 8(a)(i) offers “some flexibility”

¹¹ SADC’s 14 members are Angola, Botswana, the Democratic Republic of Congo, Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, South Africa, Swaziland, United Republic of Tanzania, Zambia and Zimbabwe. As the name suggests, SADC portrays itself as more of a development regional institution than just an FTA. Article 5 of the SADC Treaty set the following as its objectives: achieve development and economic growth, alleviate poverty, enhance the standard and quality of life of the people of Southern Africa and support the socially disadvantaged through regional integration; evolve common political values, systems and institutions; promote and defend peace and security; promote self-sustaining development on the basis of collective self-reliance, and the interdependence of Member States; achieve complementarities between national and regional strategies and programmes; promote and maximise productive employment and utilisation of resources of the Region; achieve sustainable utilisation of natural resources and effective protection of the environment; strengthen and consolidate the longstanding historical, social and cultural affinities and links among the people of the Region. See Treaty of SADC at http://www.sadc.int/english/documents/legal/treaties/amended_declaration_and_treaty_of_sadc.php.

¹² Under the Agreement on Technical Barriers to Trade (TBT) and the Agreement on Sanitary and Phytosanitary Measures (SPS), WTO Members are also encouraged to enter into bilateral mutual recognition preferential agreements (TBT Article 6(3) which must be in conformity with paragraph 1 of the same provisions, and SPS Article 4.2 respectively).

¹³ Consequently, according to the AB report in the *Turkey – Textile*, paras. 5 and 8 are the operative paragraphs under GATT Article XXIV.

¹⁴ See GATT Article XXIX(8)(b) for the definition of Free Trade Area used here simultaneously with Regional Trade Agreement (RTA).

¹⁵ For a definition of Custom Union, see GATT Article XXIV(8)(a).

to the constituent members of a customs union when liberalizing their internal trade in accordance with this subparagraph.’¹⁶

GATT Article XXIV(8)(a)(i) is seen as establishing a standard for the internal trade between constituent members to fulfil the requirements of a ‘customs union’. And the constituent members of a custom union are required to apply a common external trade regime relating to both duties and other regulation of commerce.

So far, the ruling of the AB in the *Turkey-Textiles* clarifies Article XXIV(8)(a)(i) dealing with custom union and not Article XXIV(8)(b) on FTAs. But, since the phrase ‘substantially all trade’ has a similar function in both subparagraphs and the relevant difference between Custom Unions and Free Trade Areas in this connection is only on the origin of covered goods, it may be assumed that the AB interpretation could be applicable *mutatis mutandis* to Article XXIV(8)(a) and Article XXIV(8)(b). Regarding the views of Members, in the examination of the Treaty of Rome, the six member states opined that the test for ‘substantially all trade’ would be satisfied if 80% of the volume of trade between the parties were liberalised. But in the EU-South Africa Trade and Development Cooperation Agreement (TDCA), the threshold seems to be slightly different. The EU gives 95% of South African exports improved access to its markets, while South Africa does so for 86% of EU exports. For its part, the United States argued in the *Line Pipe* case that since NAFTA covered 97% of the trade between the parties, it was in conformity with the provisions of Article XXIV(8)(17).

A) The Quantitative and the Qualitative Approach Interpretation

The question that usually arises when examining the requirements of Article XXIV(8) is whether a regional trade agreement may decide to consider ‘substantial coverage’ as only a qualitative requirement while ignoring it as a quantitative requirement. These two approaches are not mutually exclusive and there is generally no consensus on either.¹⁸ With regard to the

¹⁶ Appellate Body Report, *Turkey – Restrictions on Imports of Textile and Clothing Products*, WT/DS34/AB/R, para. 48. See further the communication of Botswana on behalf of the ACP Group to the Negotiating Group on Rules at document TN/RL/W/155 dated 28 April 2004. See also a similar proposal by China at document TN/RL/W/185, dated 22 July 2005.

¹⁷ Appellate Body Report, *United States - Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea*, WT/DS202/AB/R, adopted 8 March 2002.

¹⁸ At least in the domain of services, there is no such problem of definitions. For instance, footnote 1 to GATS Article V is to the effect that ‘[t]his condition is understood in terms of number of sectors, volume of trade

quantitative approach, WTO Members engaging in FTAs sometimes argue that to the extent that the lion's share of the overall trade is covered it may be justified to exclude an entire goods sector. Arguments in support of a quantitative approach seem to suggest a definition that will incorporate a statistical benchmark, such as a certain percentage of the trade between the contracting parties to demonstrate that the coverage of the RTA in question fulfils the requirement. The percentages that have been commonly suggested in this context range from 80% to 90%.

Conversely, Members in favour of the qualitative approach interpret 'substantially all trade' to mean that no major sector of intra-RTA trade should be excluded from liberalisation.¹⁹ The difficulty with this approach might stem from the definition of 'sector'.²⁰ The question may arise as to whether the inclusion of a minute component of a major sector will be able to fulfil the requirement of the qualitative approach. In an attempt to clear up ambiguities and shed more light on the interpretation of Article XXIV, in 1994 WTO Members adopted an 'Understanding on the Interpretation of Article XXIV'. The preamble of the 1994 Understanding recognises that the 'contribution of custom unions and free trade areas' to the 'expansion of world trade that may be made by closer integration' is 'diminished if any major sector of trade is excluded'. Despite this wording, the Understanding does little to settle the controversies over the interpretation of 'substantially all trade'. Yet, the requirement is relevant in circumventing selectivity and limitations to goods of a particular interest.

While the quantitative approach has some positive aspects, it also has some conspicuous drawbacks. It can permit parties to an agreement to exclude so-called sensitive sectors such as agriculture and textiles and clothing.²¹ To reduce the selectivity associated with the quantitative approach, Australia made a proposal to the WTO Committee on Regional Trade Agreement in 2002 that the threshold figure should be 95% of all the six-digit tariff lines

affected and modes of supply. In order to meet this condition, agreements should not provide for the a priori exclusion of any mode of supply.'

¹⁹ The objective of the qualitative approach is to prevent the exclusion of an RTA from the liberalisation of any sector which, prior to the formation of the RTA, contained restrictive trade policies. See Compendium of Issues Related to Regional Trade Agreements, Background Note by the WTO Secretariat, TN/RL/W/8/Rev.1 (1 August 2002). This is also reflected in the preamble to the Understanding on the Interpretation of GATT 1994 Article XXIV.

²⁰ In the context of GATS, 'sectoral commitments' may be understood as entries covering specific service sectors or sub-sectors in WTO Members' specific Schedule of Commitments under GATS; e.g. life insurance and accountancy.

²¹ Comments by New Zealand over the exclusion of agriculture from the free trade agreement between Singapore and Japan,

listed in the harmonised system. Australia argued that the main advantages of its proposal were that: (i) it would obviate the need to establish the extent to which trade in a given product may have been affected by other measures in place; (ii) it was unlikely that this approach would permit the carving-out of any major sector because of the strong possibility that the permitted exemptions would have to be spread out over a range of potentially sensitive sectors; and (iii) the suggested approach was easily verifiable without requiring complex econometric studies.²²

In addition to the general request on a concrete definition of RTAs that covers all sectors, some suggestions have been put forward to resolve the differing views arising from the quantitative and qualitative approach debates. In this regard, the product coverage of RTAs should be characterised not only in the light of trade flows, but also in terms of a certain percentage of tariff lines.²³ Similarly, as a modification of the quantitative approach, the calculation of the percentage of trade between member states could be carried out under RTA rules of origin or exploring some clarifications of the concept of ‘substantially all trade’ on the basis of footnote 1 of GATS Article V.²⁴

Clearly, some benchmarks are relevant for considering these different approaches. In *Turkey – Restrictions on Imports of Textile and Clothing Products*,²⁵ in agreeing with the views of the Panel on this issue, the Appellate Body stated that ‘[t]he ordinary meaning of the term “substantially” in the context of subparagraph 8(a) appears to provide for both qualitative and quantitative components. The expression “substantially the same duties and other regulations of commerce as applied by each of the Members of the [customs] union” would appear to encompass both quantitative and qualitative elements, the quantitative aspect more emphasized in relation to duties.’²⁶ To this extent, the AB’s view in the *Turkey-Textile* case does not only provide a relevant precedent for future cases, but would certainly influence future interpretations of CUs, especially those relating to goods or falling within the ambit of GATT Article XXIV.

²² See Negotiating Group on Rules, submission by Australia on Regional Trade Agreement, TN/RL/W/15, 9 July 2002.

²³ Negotiating Group on Rules, Compendium of Issues Related to Regional Trade Agreements, TN/RL/W/8/Rev.1, para. 69.

²⁴ With reference to substantial coverage of RTAs on services, footnote 1 of GATS provides the following clarifications: ‘This condition is understood in terms of number of sectors, volumes of trade affected and modes of supply. In order to meet this condition, agreements should not provide for the a priori exclusion of any mode of supply.’ World Trade Organization Legal Texts, the Results of the Uruguay Round of Multilateral Trade Negotiations, p. 289.

²⁵ WT/DS34/AB/R, adopted 19 November 1999.

²⁶ AB report *Turkey-Textile* case, para. 49 and panel report para. 9.148

In view of the analysis set out above, one may reasonably question the necessity of subparagraph 8(a) of GATT Article XXIV. A possible explanation would be that these provisions were originally aimed at delineating the extent to which certain products may be omitted from the coverage of a FTA or CU. By implication, a comprehensive approach is required and there is no room for pick-and-choose or *à la carte* policies. Similarly, limited liberalisation is excluded and discrimination is acceptable only to the extent that it is extensive in sectoral coverage.²⁷

The WTO rules also require constituent members of RTAs to eliminate all tariffs and quantitative restrictions within the RTA. Such elimination should be completed within a reasonable length of time. So far, a time frame of ten to twelve years has been considered as reasonable transitional period for the abolition of such internal trade restrictions.²⁸ However, it is important to note that there may be scope for flexibility when it comes to North-South non-reciprocal trade arrangements. For instance, the foregoing requirement may not apply when it comes to RTAs entered into in the context of the WTO Enabling Clause.²⁹ Although the wording of paragraph 2(c) of the Enabling Clause is not very precise on this issue, it seems to allow a more gradual elimination of tariffs than would be in the context of Article XXIV:8 which calls for the drastic elimination of all tariffs on substantially all trade between constituent members of RTAs.

III Prospects and Challenges of Regional Integration in Africa

As mentioned above, there are diverse reasons for the existence of regional clustering. Regional Trade Agreements (RTA will be used here simultaneously with regional integration) maybe formed because of the need of economic and political integration, national

²⁷ This view is echoed in the Chairman's report for Hong Kong Ministerial delineating the views of Members regarding the Substantially all Trade (SAT) debates and the length of time liberalisation should take place in an RTA. See Report by the Chairman to the Trade Negotiating Committee (TNC), TN/RL/15 (dated, 30 November 2005).

²⁸ This is the case with the current EPA negotiations between the European Commission and the four groups of African members of the ACP, where the EC is currently pushing for a FTA with a transitional period of ten to twelve years for implementations. For analyses on RTAs and compatibility with WTO rules, see Gabrielle Marceau and Cornelis Reiman, 'When and How is a Regional Trade Agreement Compatible with the WTO?', *Legal Issues of Economic Integration*, Vol. 28 issue 3, pp. 297-336 (2001); James Mathis, 'WTO, Turkey – Restrictions on Imports of Textiles and Clothing Products', *Legal Issues of Economic Integration*, Vol. 27, Issue 1, (2000) .

²⁹ For the sake of clarity, this is the decision of the Contracting Parties adopted at the end of the Tokyo Round in 1979 which allows for deviation from the MFN rule in favour of imports from developing countries. The 1979 decision entitled 'The Differential and More Favourable Treatment Reciprocity and Fuller Participation of Developing Countries', allows intra-developing countries preferential trade arrangements and North-South preferential trade agreements in favour of the developing countries.

security and foreign policy as well as members willingness to have access to greater external markets.³⁰ The problems of regional integration have long been recognised in Africa's political circles. Many decades ago, Nkrumah forcefully stated the case for regional integration in Africa. Over the last half century, there has been the development of over ten different regional trade blocs in Africa. Most African countries belong to at least three or more separate regional integration agreements.³¹ Yet, there has been very limited progress towards meaningful trade enhancement.³²

While different integration mechanism have been successfully launched by other regions to improve their economic welfare, Africa lags behind with regards to economic growth and general living standards. In spite of the existence of a whole range of regional arrangements and a plethora of policy plans regional integration is yet to be a feature of Africa political economies. The Lagos Plan of Action and the Final Act of Lagos were adopted almost three decades ago setting out the vision for an integrated Africa by the beginning of the third millennium. The Lagos Plan envisaged that, via regional economic communities, the challenges of Africa's poverty and underdevelopment would be overcome. Some of the milestones of the Plan included the strengthening of existing regional economic institutions, creation of new ones, tariffs stabilisation and harmonisation of tariffs system across the different regional economic communities. Among the new initiatives is the New Economic Partnership for Africa's Development (NEPAD).³³

³⁰ See Bernard Hoekman and Michael Kostetecki, *The Political Economy of the World Trading System – From GATT to WTO*, Oxford University Press, (1995), chapter 9. It is important to note that in the absence of a fast-track multilateral process, RTAs may arguably be a useful linchpin for trade liberalisation.

³¹ Some of the regional integration processes include; the Economic Community of West African States with involving sixteen West African States (ECOWAS), West African Economic and Monetary Union (WAEMU/UEMOA) made up of seven countries, Economic and Monetary Community of Central African (with the French acronym CEMAC) states made up of six centre African states, Common Market for Eastern and Southern African States, (COMESA) involving twenty-one states, the East African Community (EAC), involving five members, Southern Africa Custom Union (SACU), involving five members and the Southern African Development Community (SADC) involving fourteen active and non-active members. Others with less significant role include the Arab Maghreb Union (UMA), the Economic Community of the Great Lakes Countries (CEPGL), Indian Ocean Commission (IOC), Intergovernmental Agency on Development (IGAD) etc.

³² Although author like Venter et al, attribute lack of this progress to political turmoil in most of the African countries, I rather see political turmoil as only a minimal part of the problem. See Venter Dani and Ernst Neuland, *NEPAD and the African Renaissance*, Johannesburg, (2005) at pp. 178-181.

³³ A considerable number of literatures exist on the NEPAD initiative. Some of these literature include Celliers J. *Peace and Security through Good Governance: a Guide to NEPAD's African Peer Review Mechanism*, Institute for Security Studies Occasional Paper 70, Pretoria (2003), Venter et al, *ibid*, Argo, EF. *Forging New Partnerships: NEPAD SMMs and the Challenge of Globalisation*, Pretoria (2005), Institute for Business Innovation

Among the features of the discourse on regional integration in Africa are the absence of political constituencies in the business and labour movements that push for regional integration, lack of focused regional integration and overlapping memberships. With regard to the former, at the domestic constituency, there has not been any real debate on the national costs to benefit integration. At best, it is often some pan-Africa sentiments that provide a modicum of ideological support nationally to intra-Africa rapprochement. Regarding the problem of overlapping membership, apart from the vision of the African Union to achieve common markets among its members, one can hardly find a coordinated plan to harmonise the existing numerous regional integration agreements spread around the continent. Such plan may make sense, as the pursuit of further integration by sub-group would eventually be absorbed by a larger group. Yet, the intricacies of the current situation do not make such a scenario easy unless there were to be major rationalization of the existing agreements. The issue of rationalisation and overlapping memberships will be taken up in the subsequent section.

However, it is very clear that what African leaders have not achieved domestically through sound economic development policies would be difficult to achieve regionally. If the first attempts by the post-colonial African leaders had been unsuccessful, we may rationally start questioning the reasons for the current optimism that characterises the present proponents of Africa's integration. The fact that this very question is a good basis for reengaging African leaders in a new strategic partnership among themselves, means that Africa's vision for regionalism must be a fallback of an encompassing and frank debates in their different domestic constituencies.

IV. Existing Frameworks for Trade between the African ACP States and the European Union

For the African countries in general, and the LDCs among them in particular,³⁴ it is not only the commitments enshrined in the WTO treaty system that determine their trade relations with

³⁴ Under the UN classifications, there are currently 48 LDCs. The African LDCs are: Sudan, Mauritania, Mali, Burkina Faso, Niger, Chad, Cape Verde, Gambia, Guinea-Bissau, Guinea, Sierra Leone, Liberia, Togo, Benin, Central African Republic, Equatorial Guinea, Sao Tomé and Príncipe, Democratic Republic of Congo, Rwanda, Burundi, Angola, Ethiopia, Eritrea, Djibouti, Somalia, Uganda, Tanzania, Mozambique, Madagascar, Comoros, Zambia, Malawi, Lesotho.

the developed countries. While under certain conditions the WTO permits its Members to engage in preferential trade agreements, since the 1970s most industrialized countries – by way of the Generalized System of Preferences (GSP) – have accorded discriminatory market access to products originating in developing countries. Under the European Communities GSP scheme,³⁵ ‘non-sensitive’ products benefit from duty-free treatment while sensitive products are granted a 3.5% reduction on the normal tariff duty rate.³⁶ To the extent that developing countries can demonstrate that they have complied with specific environmental and labour standards, they may also apply for additional preferences for sensitive products. As opposed to the Cotonou preferences (which are discussed below), the EC standard GSP is available to all developing countries. It provides a number of products with preferential access to the EU market but its coverage is significantly lower than those under the trade provisions of the Cotonou Partnership Agreement (CPA). In addition to trade preferences under the GSP scheme, the European Communities in 2002 introduced the ‘Everything But Arms’ (EBA) initiative for all LDCs.³⁷

Furthermore, there is the Trade and Development Cooperation Agreement (TDCA) between the EU and South Africa entered into in 1999,³⁸ and the CPA signed in 2000 to supersede the original Lomé Convention. Thus, in the context of the 48 Members of the African, Caribbean and Pacific Group of States, there are currently four separate frameworks guiding their EU trade relations. Among these frameworks, the Cotonou Agreement is the principal one, as it provides extensive trade preferences to African countries on a non-reciprocal basis. With the exception of the EU-South Africa Trade and Development Agreement (TDCA), the common thread running through all these frameworks is the idea of non-reciprocal trade preferences and quota free market access. However, for the purpose of this paper, only the Cotonou trade arrangement will be discussed.

A. The Cotonou Preferences

³⁵ EC Regulation No. 2501/2001, currently in force through the amendment by Council Regulation (EC), No. 815/2003.

³⁶ Article 7 of the GSP Regulation. Of course, there is also the 2005 EU labour and environmental arrangements (popularly known as EU GSP +) where, among other things, potential beneficiaries are required to ratify some human rights and good governance conventions. On the legality of EU GSP +, see Lorand Bartels, ‘The WTO Legality of the EU’s GSP+ Arrangement’, *Journal of International Economic Law* (2007), Vol. 10, No. 4, pp. 869-886.

³⁷ Regulation 416/2001 of 26 February 2001, Official Journal No. L 60 of 1.3.2001.

³⁸ Official Journal of the European Union, No. L 311 of 4.12.1999.

In the groundbreaking *Turkey-Textiles* case, the Appellate Body reminded WTO Members that unless otherwise proven, RTAs and preferences accompanying them are incompatible with WTO rules. Implicitly, GATT Article XXIV is inoperative as a discipline, meaning that WTO Members may only invoke it in the context of dispute settlement when their existing trade measures or agreements are inconsistent with the GATT/WTO core MFN principle or any other GATT Article. Despite this, clustering of states by common bonds of policy has occurred for many years,³⁹ although the current fragmentation of international trade rules has generated a great deal of concern as to the effectiveness of multilateralism.⁴⁰

Regionalism allows like-minded states or states with similar concerns, such as security or trade, to align themselves with each other. By the same token, the idea of entering into a free trade agreement between the EU and the ACP countries – as is currently being negotiated in the context of Economic Partnership Agreement – to supersede the non-reciprocal trade preferences that the EU has been granting the ACP countries for the past thirty years has been widely questioned.⁴¹ Although it may be important to discuss the history of the Lomé/Cotonou preferences, this paper will not cover this historical dimension since a great deal has already been written about it.⁴²

The exact nature of the link between trade and development is a subject of continuous debate. It is hard to refute the argument that international trade can be a powerful engine for a country socio-economic development.⁴³ This is widely observed in the current EC/ACP EPAs

³⁹ Article 21 of the Covenant of the League of Nations stated that '[n]othing in this Covenant shall be deemed to affect the validity of international engagements such as treaties of arbitration or regional understanding like the Monroe doctrine for the maintenance of peace'. The corollary of this provision is Article 52(1) of the UN Charter, which encourages regionalism among members of the UN.

⁴⁰ For an extensive discussion on RTAs and the complexities surrounding their formation and existence, see Lorand Bartels & Federico Ortino, *Regional Trade Agreements and the WTO Legal System* (Oxford, 2006); and Roberto Fiorentino et al., 'The Changing Landscape of Regional Trade Agreements: An Update of WTO', Discussion Paper (2006).

⁴¹ In this regard, see Romain Perez, 'Are the Economic Partnership Agreements a First-best Optimum for the African Caribbean Pacific Countries?', *Journal of World Trade (JWT)*, Vol. 40, No. 6, pp. 999-1019 (2006) and a response to this article by Louise Curran, *JWT*, Vol. 41, Issue 1, pp. 234-244 (2007). For policy perspectives, see the TWN Africa and Oxfam International publication, 'A Matter of Political Will: How the European Union Can Maintain Market Access for African Caribbean and Pacific Countries in the Absence of Economic Partnership Agreements', April 2007.

⁴² In this regard, see B. Martenczuc, 'From Lomé to Cotonou: The ACP-EC Partnership Agreement in a Legal Perspective', (2000) 5 *EFAR*, pp. 461-487; Abou Abass, 'The Cotonou Trade Regime and the WTO Law', *ELJ*, Vol. 10, No. 4, July 2004, pp. 439-462; Romain Perez, 'Are the Economic Partnership Agreements a First-best Optimum for the African Caribbean Pacific Countries?', *Journal of World Trade (JWT)*, Vol. 40, No. 6, pp. 999-1019 (2006) and a response to this Article by Louise Curran, *JWT*, Vol. 41, Issue 1, pp. 234-244 (2007) etc.

⁴³ See Jeffrey Sachs, *The End of Poverty: How can we Make it Happen in our Lifetime* (London, 2005); Jagdish Bhagwati, *In Defence of Globalization* (Oxford, 2004).

negotiations where the European Commission negotiating on behalf of the EU Member States continuously take the view that by liberalising their markets and boosting economic reforms in ACP countries, EPAs will foster development in African countries.⁴⁴ In order to realise this objective, the EC considers Aid for Trade as an important component of its dialogue with the African countries.⁴⁵ It is with this in mind that the Commission has pointed out that ‘...trade will be at the service of development, leaving a high degree of flexibility to take account of the development challenges in Africa’.⁴⁶

One of the main external reasons for replacing the Lomé preferences with the CPA and then EPAs is the ruling of the WTO Dispute Settlement Body (DSB) in the *EC-Bananas III* dispute where elements of the Lomé preferences were declared incompatible with EC commitments under the WTO Agreement as they provided discriminatory preferences to ACP countries. This represents a major overhaul and shift in the ACP/EC development cooperation as it introduces the idea of reciprocity in a trade relationship that has existed for the last thirty years on a non-reciprocal basis.⁴⁷ At the same time, what is legally puzzling in the context of the current negotiation is that while EPAs will be WTO-compatible, they should be development oriented. And in the worse case scenario where the negotiations on such development-friendly EPAs fail to produce results,⁴⁸ the EU must provide alternative trade arrangements for the non-LDCs ACP countries ‘which is equivalent to their existing situation and in conformity with WTO rules’.⁴⁹

In a press release by the EU Council on 20 November 2007, the Council reaffirmed the development dimension of EPAs by stating as follows: ‘[t]he Council confirms its commitment to the ongoing negotiations on the Economic Partnership Agreements (EPAs), as

⁴⁴ This view may also be seen in the light of Article 178 of the Treaty Establishing the European Community which states that ‘[t]he Community shall take account of the objectives referred to in Article 177 in the policies that it implements which are likely to affect developing countries’. This was also echoed by the Directorate General for Development in ‘EC Report on Millennium Development Goals 2000-2004’, 5 (2005).

⁴⁵ See Council of the European Union, ‘Towards an EU Aid for Trade Strategy – the Commission’s Contribution’, SEC (2007) 414, COM (2007) 163 final, April (2007).

⁴⁶ CEC, ‘Speeding up Progress Towards the Millennium Development Goals: The European Union’s Contribution’, COM (2005) 132 final, Brussels (IV), Annex II, 22 (2005).

⁴⁷ For some earlier thoughts on the legal basis of EPAs, see B. Martenczuc, ‘From Lomé to Cotonou: The ACP-EC Partnership Agreement in a Legal Perspective’, (2000) 5 EFAR pp. 461-487 and Abou Abass, ‘The Cotonou Trade Regime and the WTO Law’, ELJ, Vol. 10, No. 4, July 2004, pp. 439-462.

⁴⁸ The originally agreed deadline was January 2008. This did not happen, but a number of ACP countries entered into interim goods-only agreement with the Commission.

⁴⁹ Article 37(6) of the CPA. This was reiterated by the Council of the European Union in a press release on the current state of affairs with regard to negotiation of the EPAs. See ‘Council Conclusions on the Economic Partnership Agreement’, 2831st External Relations Council meeting, Brussels, 19-20 November 2007, obtainable at http://www.consilium.europa.eu/uedocs/cms_Data/docs/pressdata/en/gena/97189.pdf.

expressed in its Conclusions on EPAs of April 2006 and May 2007 and reiterates its position of EPAs as being development instruments. EPAs are going to be WTO- compatible agreements, supporting regional integration and promoting the gradual integration of the ACP economies into the rules-based world trading system. This will thereby foster their sustainable development and contribute to the overall effort to eradicate poverty and to enhance the living conditions in the ACP countries.⁵⁰

Truly, in this context one may argue that despite the difficulties encountered by both the ACP countries and the EC in the negotiations toward the conclusion of EPAs, the EC is legally obliged under the Cotonou Agreement to continue to provide Cotonou preferences – or equivalent – to the ACP countries. This is the case notwithstanding the fact that the EC implementing Regulation does not clearly specify what would be an effective fallback if the transitional period ends without an EPA being reached.⁵¹ In order to avoid the impasse involved in achieving development-friendly EPAs (or, in other words, Cotonou equivalent EPAs) and making sure that such FTAs fulfil the requirement of GATT Article XXIV,⁵² the Commission may jointly with the ACP countries request an extension of the Cotonou waiver from the WTO,⁵³ and thereafter take relevant action under its own power pending appropriate regulations from the Council to extend the negotiation period.⁵⁴

In theory, one would say that it is not impossible to request a waiver from the WTO if the negotiations are not concluded within the agreed timeframe. This is not totally incompatible with the spirit of the Cotonou provisions on trade, as it is clear from these provisions that the ACP countries would decide the pace of the negotiations.⁵⁵ This view contradicts the Commission's current position, as it continues to claim that the chances for extending the

⁵⁰ Ibid. para. 1.

⁵¹ See Council Regulation (EC) No 2286/2002 of 10 December 2002 on the arrangements applicable to agricultural products and goods resulting from the processing of agricultural products originating in the African, Caribbean and Pacific States (ACP States).

⁵² The difficulties of streamlining development in an EPA can be inferred from the concerns expressed by the ACP negotiators. For instance, in 2006, one of the chief negotiators declared that '[i]n our view, there is a definite contradiction between the narrow focus on trade liberalisation and the EU's arguments that EPAs are instruments for development rather than to force open regional markets. One of our concerns is that EPAs must not become instruments of oppression.' Billie Miller, Chair of the ACP Ministerial Trade Committee and Minister of Foreign Affairs and Foreign Trade of Barbados, Vienna, June 2006.

⁵³ The assumption here is to the extent that the current initialled EPAs do not lead to comprehensive development-friendly EPAs in 2008.

⁵⁴ See Article 300 of the EC Treaty and the chapeau of Article 9(d) of the proposed New EC Reform Treaty at Draft Treaty Amending the Treaty on the European Union and The Treaty Establishing the European Community, Brussels, 23 July 2007 (30.07).

⁵⁵ CPA Article 37(4)-(6).

current waiver or requesting a new one are minimal and, if it were possible, the political costs would be too high.⁵⁶ At the same time, depending on the period of time such extension is possible, the legal uncertainty concerning EPAs which are by nature development-friendly and conform with the current WTO rules would remain unresolved.⁵⁷

B. GATT Article XXIV and Mainstreaming Development in EPAs

As seen above, GATT Article XXIV allows WTO Members to engage in discriminatory regionalism to the extent that those RTAs, among other things, fulfil the basic requirements of (a) covering substantially all the trade in goods among the constituent Members of the RTAs;⁵⁸ (b) not introducing higher duties or other trade-distorting measures in respect of trade with third countries, excepting those that were in place before the formation of the FTA; and (c) such FTAs should enter into force within a reasonable period of time.⁵⁹ From a legal perspective, a GSP-based trade agreement will move EU-ACP trade relations out of the free trade domain into the area covered by the Enabling Clause and they would effectively not be required to conform with the three requirements noted above. While FTAs create a wider trading area by removing obstacles to competition, agreements in the context of the Enabling Clause are subject to internal barriers established to confer privileges on underdeveloped members of the agreements. Thus, since the EU-ACP trade relationship seems to have been originally conceived on the basis of transposing elements of the Lomé/Cotonou preferences into EPAs, differentiation in the sense of Special and Differential Treatments (S&D) constitutes a fundamental aspect of the negotiations with regard to EPAs as required by Article 34(4) of the CPA.⁶⁰ CPA Article 35(1) further calls for the contracting parties to such negotiations to pay particular attention ‘...to trade development measures as a means of enhancing ACP States’ competitiveness’ and in this regard, the Community shall support appropriate development strategies within the ACP States.

⁵⁶ See http://ec.europa.eu/trade/issues/bilateral/regions/acp/memo010307_en.htm. Pursuant to WTO Charter Article IX (on the WTO decision-making process), a waiver application may be accepted by two-thirds majority votes in the absence of a clear consensus from the Membership.

⁵⁷ Unless a miracle occurs and the Doha Development Round proceeds faster and WTO members adopt the kind of proposals tabled by the ACP countries to the CRTA.

⁵⁸ The only exceptions are those under GATT Articles XI, XII, XIII, XIV, XV and XX.

⁵⁹ GATT Article XXIV(5)(b) and 8(b).

⁶⁰ Pursuant to CPA Article 34(4), ‘[e]conomic and trade co-operation shall be implemented in full conformity with the provisions of the WTO, including special and differential treatment, taking into account the Parties’ mutual interests and their respective levels of development’.

B.1 Development as a Yardstick for Understanding the Cotonou Agreement

The issue of how the conditions ‘text, context and objects and purposes’ set out in Article 31 of the Vienna Convention (VC) should be approached when trying to make sense of international trade rules has arisen on a number of occasions in the WTO.⁶¹ If development *par excellence* as an object can be employed as a *modus operandi* for understanding the mindset of the EU and the ACP countries at the time of drafting the CPA, the development dimension, as an objective, must be clearly factored into the EPAs at the moment of drafting and institutionalised in every stages of implementation of the FTA. Pursuant to the CPA, ‘[t]he Parties shall closely cooperate and collaborate in the WTO with a view to defining the arrangements reached, in particular with regard to the degree of flexibility available’.⁶² And during the Doha Ministerial Conference, WTO Members agreed to negotiations aimed at clarifying and improving disciplines and procedures under the existing WTO provisions applicable to regional trade agreements. Members further agreed that development should be one of the driving objectives of the negotiations on WTO rules relating to regional trade agreements.⁶³

Surely, at the time of concluding the CPA, the contracting parties must have been convinced that by the end of 2007, the WTO Doha Development negotiations would be completed so that GATT Article XXIV would provide for possibilities of some sort of S&D treatments in favour of constituent members of the RTA. They were clearly wrong in this regard. When the Doha Development Round was launched in 2001, the non-LDC ACP countries, in particular, welcomed it with enthusiasm. The Round was to be completed by the beginning of 2005, leaving enough time for the expiration of the Cotonou WTO Waiver. At the early stage of the negotiations, the ACP group jointly supported a proposal calling for **the negotiations on** WTO rules on RTAs to explicitly provide the necessary S&D to developing countries party to RTAs with developed countries.⁶⁴ With the slow pace of the Doha development **negotiations**, the EC for its part sponsored a somewhat half-hearted proposal to the Negotiating Group on Rules, stating that ‘flexibilities [are] already provided for within the existing framework of WTO rules’ and that the current negotiations should ‘involve further

⁶¹ See AB reports, *US – Shrimp*, para. 114; *EC – Chicken Classification*, para. 176; *Japan – Taxes on Alcoholic Beverages* pp. 11-12, etc.

⁶² CPA Article 37(8).

⁶³ See paragraph 29 of the Doha Ministerial Declaration.

⁶⁴ This was followed by another proposal by the ACP in 2004 on the same issue. See WTO TN/RL/W/155.

consideration of the relationship between GATT Article XXIV and the Enabling Clause, as well as an examination of the extent to which WTO rules already take into account discrepancies in development levels between RTA parties'.⁶⁵ The EC and the ACP views have failed to move forward as the negotiations on RTAs have so far concentrated on procedural rather than substantive issues.⁶⁶

Currently, some WTO Members are of the view that consistent with GATT Article XXIV, there is very little room, if any, for inserting discriminatory S&D in RTAs entered into between developed and developing WTO Members. This is undoubtedly bad news for the ACP countries, especially the non-LDCs among them. In this regard, if EPAs are to be consistent with the development objective of the CPA, they must contain provisions clearly allocating preferential treatments to the ACP countries. However, the views of the EC as expressed in the paragraph above are very much consistent with its earlier submission before the GATT panel in the *EEC-Bananas II* dispute.⁶⁷ The EEC earlier in this case argued that the Lomé Convention, which provided discriminatory market access preferential treatment in respect of ACP bananas, undoubtedly created a FTA between the EEC and the ACP countries.⁶⁸ According to the EEC, such preferences were in conformity with the criteria and conditions laid down in Article XXIV(5)(b) and XXIV(8)(b), read together with Part IV of GATT. Thus, GATT Article XXIV(5)(b) and XXIV(8)(b) permitted the establishment of FTAs between the EC and the ACP countries without full reciprocity.⁶⁹ Similarly, in the *European Community – Export Subsidies on Sugar*,⁷⁰ the EC argued before the panel that the complainants' challenge of the EC re-export of subsidised ACP/India-equivalent sugar was wrong and tantamount to challenging the commitments of WTO Members agreed upon during the Uruguay Round of multilateral trade negotiations (MTNs).⁷¹ Neither the panel nor the AB (though they did not expressly state that this was the case) found this argument a justification for the EC's WTO-inconsistent measures at issue.

⁶⁵ Cotonou Article 39(2) calls for both parties to closely cooperate in the WTO to further their mutual interests.

⁶⁶ See Decision of the WTO General Council of 14 December 2006 on Transparency Mechanism in RTAs, WT/L/671 and WTO Secretariat Background Notes on Issues related to RTAs, TN/RL/W/8/Rev. 1.

⁶⁷ Report of the Panel, *EEC – Import Regime for Bananas*, (DS38/R), 11 February 1994.

⁶⁸ *Ibid* at para. 37.

⁶⁹ *Ibid* at para. 39, p. 14.

⁷⁰ See documents WT/DS265/21, WT/DS266/21 and WT/DS283/2 of 11 July 2003.

⁷¹ See statement by the European Commission: 'WTO challenge against EU sugar will hurt developing countries', in document DN/IP/03/993 (Brussels, 10 July 2003).

If differentiating between ACP countries constitutes⁷² an essential element of EPAs, the EC's arguments in the *Bananas II* case would probably still be relevant in the impending EPAs. Such differentiations in this context would be limited to ACP countries and apply to landlocked countries, LDCs, and low-income developing members of the ACP group. Despite the non-adoption of the panel reports in the *EEC-Bananas II* case, the panel rejected the EEC's arguments. The panel findings stated that '...a legal justification for the tariff preference accorded to the EEC to imports of bananas originating in the ACP countries could not emerge from an application of Article XXIV to the type of agreement described by the EEC in the Panel's **proceedings**'.⁷³ In somewhat suggesting the possibility of intra-ACP differentiation in EPAs, CPA calls for the contracting parties to take into account the development needs of the ACP⁷³ countries, especially those affected by the WTO provisions on S&D treatments. Such S&D would also include the kind of preferences provided for under GATT Article XVIII:B which provides special treatment to the developing countries as covered by the Enabling Clause⁷⁴ of the WTO.

However, assuming that '...[Article XXIV is to be normally read in conjunction with Part IV of the General Agreement] the authorization of special and differential treatments had been suggested during the negotiations of Part IV', but was paralysed at the time of drafting the final text.⁷⁵ In this regard, if preferences are to be accorded to ACP countries under a FTA like EPAs, Article XXIV(5)(b) of GATT covers only the formation of FTAs between WTO Members.⁷⁶ Currently, not all ACP countries are WTO Members. Consequently, in the present state of affairs, the text of Article XXIV(5) makes it clear that, in the absence of a waiver, the conclusion of FTAs with non-GATT/WTO Members may not justify infringement of the MFN rights of other WTO Members.⁷⁷

⁷² See Francis Matambalya and Susanna Wolf, 'The Cotonou Agreement and the Challenges of Making the New EU-ACP Trade Regime WTO Compatible', JWT, Vol. 35, Issue 1 (2001) at pp. 123-144.

⁷³ CPA Article 34(4).

⁷⁴ GATT CONTRACTING PARTIES decision of 28 November 1979 (L/4903), officially known as Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries.

⁷⁵ Panel reports, *EEC-Bananas II*, para.162 at p. 50. This therefore put into question the very purpose of Part IV of the General Agreement. However, it is also important to note the statement of the panel ---if non-reciprocal Article XXIV preferences were allowed in the reading of Part IV, the very objective of the Enabling Clause will be questioned.

⁷⁶ '[A]s between the territories of contracting parties' per the wording of Article XXIV(5)(b).

⁷⁷ In this regard, see panel reports in *Bananas II*, para. 163, p. 51.

While Part IV of GATT provides for situations where developing countries may place development at the heart of their trade policy formulations, Part IV per se may not be invoked as a justification for actions which would be inconsistent with their obligations under GATT Part II.⁷⁸ Therefore, the question as to whether EPAs may move to a different territory in terms of the S&D that it provides to the non-LDC members of the ACP remains open. In other words, the idea of employing a variable geometric approach in EPAs clearly remains uncertain. However, viewed from the perspective outlined above, the issue is no longer of specific S&D to a set of ACP countries, but rather to developing countries members of the WTO.⁷⁹ As opposed to the non-reciprocal preferential treatments under the CPA, EPA preferences will become less internal as they may be available to all developing countries if provided. Although intra-regional differentiation is a vital element of the negotiation of EPAs, in the absence of the necessary progress in the WTO Doha negotiations, such differentiation can only occur if the trade provisions of the CPA are interpreted in the context of their negotiating history and the circumstances of the conclusions.⁸⁰

B.2 Contesting EPAs Failure in the Context of CPA Article 98 Dispute Settlement Procedure

Effective and unambiguous dispute settlement provisions is one of the elements that determine the credibility of any international agreement. Interpretation in the process of Dispute Settlement may also highlights how development concerns were factored into a specific international treaty at the time of negotiations and drafting of the agreement in question.⁸¹ Although we are not suggesting that a state would disregard its international commitments on the basis that no court exists to rule on its actions, an inter-state dispute settlement structure can be an effective means of independent control that effectively limits the conduct of the entities subject to law.⁸² A trade agreement which brings into being an

⁷⁸ The GATT panel had stated in another case that even the *travaux préparatoires* of Part IV of GATT clearly show that the Contracting Parties had not intended that Part IV be a separate exception to the General Agreement. See panel report in *Norway – Restrictions on imports of textiles products*, BISD 27S/119, pp. 125-126, para. 15, adopted on 18 June 1980.

⁷⁹ This is in line with CPA Article 34(4) which calls for EPAs to be in conformity with the WTO rules including the WTO provisions on Special and differential treatments.

⁸⁰ This is not repugnant to Article 32 of the Vienna Convention.

⁸¹ See Qureshi (2006) 'Interpreting WTO Agreements: Problems and Perspectives' for development dimensions in the interpretations of international treaties.

⁸² We cannot dismiss the fact, as Koskenniemi has argued, that international treaties are unable to fulfil any function unless they have a degree of autonomy from states' behaviours, will and interests. See Martti

effective dispute resolution organ demonstrates the willingness and good faith of the parties to such agreement to enforce it. Dispute settlement provisions *a priori* either deter parties from violating the agreement or prevent the parties from engaging in unilateral countermeasures once it has perceived violations.⁸³ This is of greatest significance when the parties to such agreement are very much unequal in terms of their relative economic strength. The WTO's DSU and, to some extent, the dispute settlement provisions under NAFTA provide clear examples of such structures. Consequently, in the context of the WTO, it has been asserted: “A careful reading of the accumulated jurisprudence of the [dispute settlement] system thus far reveals that the interests and perception of developing countries have not been adequately taken into account. The panel and the Appellate Body have displayed an excessively sanitized concern with legalisms, often to the detriment of the evolution of a development-friendly jurisprudence”.⁸⁴

In the context of the CPA, the only recourse available where any of the parties to the agreement fails to respect its obligations are the provisions of Article 98 of the CPA Agreement. While under public international law, parties to a treaty have a choice of means to peacefully settle their international dispute,⁸⁵ a quasi-adjudicative or legal process provides a degree of assurance on the binding and definitive nature of the decision.⁸⁶ Under the CPA, disputes arising from a violation of the agreement may be referred first to the Council of Ministers, secondly to the Committee of Ambassadors, and in the worse case scenario to the Permanent Court of Arbitration.⁸⁷ In the latter case, unless otherwise decided, the arbitration procedure shall be those laid down in the ‘optional arbitration regulation of the Permanent Court of Arbitration for International Organisations and States’.⁸⁸

Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (Cambridge, 2005), pp. 19-20. See also Markus Burgstaller, *Theories of Compliance with International Law* (Leiden, 2005).

⁸³ Of course, such dispute settlement provisions need to be introduced in such a way that the penalties for violating the agreement outweigh the possible benefits of doing so.

⁸⁴ See the communication of Zambia on behalf of the LDC Group to the DSB in document TN/DS/W/17, (dated 9 October 2002)

⁸⁵ See United Nations Charter, Article 33, para. 1.

⁸⁶ For dispute settlement in public international law, see J. G. Merrills, *International Dispute Settlement* (Cambridge University Press, 1998), pp. 1-169; and in the context of international economic law, see Yen Kong Ngangjoh H., *WTO Dispute Settlement System and the Issue of Compliance: Perspectives in Remedies Against Non-Compliance* (Helsinki, 2006).

⁸⁷ CPA Article 98(2)(a).

⁸⁸ CPA Article 98(2)(c). For more on the rules on arbitration by International Organisations and States, see the internet site of the Permanent Court of Arbitration at the Hague at http://www.pca-cpa.org/showpage.asp?pag_id=1061.

To a large extent, the effectiveness of a dispute settlement organ is determined by the architecture of the very dispute settlement mechanism. Given the vague wording of the CPA, most ACP countries may not even be willing to go through the onerous arbitration process at the PCA at The Hague. Even if they were to pursue such a process, compliance proceedings are not considered by the provisions of Article 98 of the CPA. The Agreement only mentions, and does not clearly specify, what measures must be taken to comply with the rulings of the arbitral proceedings or with the decisions of the Council of Ministers and the Committee of Ambassadors. Nonetheless, arbitration procedure, which Article 98 of the CPA clearly envisages as a method of last resort, allows the respondent party to delay the appointment of arbitrators. Even if the parties manage to agree on the appointment of the three arbitrators on time, the decision of the arbitration is supposed to be binding on both parties. At the same time, no compliance timeframe is given and there are no provisions on reporting on compliance to the member states as exists under some trade regimes.⁸⁹

V Considering Disputes under the CPA before the European Courts

In view of the fact that thus far only interim EPAs, which contain no clear details in terms of the commitments given by the parties, have been agreed between some of the ACP countries and the EC, the possibility remains that agreement on EPAs will not be reached by the end of 2008 as some of the initialled agreements claim.⁹⁰ In this situation of uncertainty, individual exporters from the ACP countries are likely to be more concerned about the long-term delivery terms of the contracts they may be entering into now. Assuming that on the basis of the initialled interim goods-only agreements between the EC and a cluster of ACP countries, the rights and obligations under the CPA are still valid, ACP non-LDCs will be expected to continue to benefit from the Cotonou preferences until such time as an agreeable EPA is put in place. Consequently, the EC will not be absolved of its legal obligation under the Cotonou Agreement to continue to give Cotonou-equivalent preferences to these countries. At the same time, it is worth pointing out that save for cases in which there is a denunciation of the CPA by one of the parties, the obligations under the Cotonou Agreement remain valid until 2020.

⁸⁹ See in this case DSU Article 21(6) on surveillance of implementation of the rulings of the DSB.

⁹⁰ The application of the SADC EPAs by the EU was scheduled for 1 January 2008 and 1 June 2008 for the SADC EPA States. See statement of the Chief Negotiators On the initialling of the Economic Partnership Between the SADC EPA Group of States on the one hand and the European Union on the other hand, Brussels, November 2007.

As seen above, in the absence of the onerous Article 98 provisions, the CPA does not provide any comprehensive guidelines for settling disputes arising from the agreement. Therefore, a critical issue for individual exporters/importers within the EU would be whether the CPA creates rights and obligations that can be enforced through national courts. In other words, is the principle of ‘direct effect’⁹¹ in Community law applicable in relation to the CPA? This issue begs another question as to the position of the CPA within the Community legal system.

Pursuant to the EC Treaty,⁹² international agreements ‘shall be binding on the institutions of the Community and on the Member States’. Thus, international treaties concluded by the Community may be regarded as forming an integral part of Community law.⁹³ However, the principle of ‘direct effect’ will only apply to the extent that the piece of legislation⁹⁴ or provisions of the EC law in question (1) has an addressee; and (2) that the condition is clear, unconditional and precise. As the former is neither necessary nor sufficient to invoke direct effect, the fulfilment of the latter will suffice for the applicability of direct effect.⁹⁵ This therefore means that even if the CPA is considered as an enforceable piece of legislation within the Community, individual rights emanating from it must be clear, unconditional and precise.

Let us now return to the issue of whether the CPA *par excellence* confers rights on Community citizens which the national courts are obliged under EC law to uphold. Pursuant to Article 20(3)(d) of Council Regulation (EEC) No 2913/92, ‘[t]he Customs Tariff of the European Communities shall comprise among other things... preferential tariff measures contained in agreement which the Community has concluded with certain countries or groups

⁹¹ The principle of ‘direct effect’ in Community law relates to the rights of an individual. Pursuant to the direct effect principle, the citizens of the Union can rely on the provisions of EC law as being directly effective before the national courts.

⁹² Article 300(7) of the Treaty Establishing the European Community.

⁹³ This was clarified by the European Court of Justice as early as 1974 in the case of *Haegeman v Belgium*, ECJ, 181/73 ECR 449, at 472.

⁹⁴ Although the use of ‘legislation’ in international context may be questioned by critics who dispute the nature of international law as law, in ‘making treaties or adopting certain patterns of behaviour a state in fact “legislates” and not merely furthers its own national interests in individual circumstances’. See Koskenniemi at p. 145 and Burgstaller at p. 23.

⁹⁵ See Kari Joutsamo, *The Role of Preliminary Rulings in the European Communities* (Turku, 1979), p. 224; and more comprehensively, Paul Craig & Gráinne De Búrca, *EU Law, Text, Cases and Materials* (Oxford, 2003) third edition, pp. 178-227.

of countries and which provide for the preferential tariff treatment'.⁹⁶ And in view of the fact that customs duties within the Community are determined by the Union and not by individual Member States, Commission Regulation (EC) No 1549/2006 of 17 October 2006 amending Annex I to Council Regulation (EEC) No 2658/87 on the tariff and statistical nomenclature and on the Common Customs Tariff is to the effect that 'conventional duties are applicable to goods, other than those... originating in certain countries or where preferential customs duties are applicable in pursuance of agreements'.⁹⁷ Consequently, the CPA is consistent with the foregoing Regulation. In this regard, the CPA becomes a candidate for the sources of Community Law.⁹⁸ Bearing in mind that the principle of direct effect/supremacy essentially renders Community law the 'law of the land', the CPA as an international agreement concluded by the Community is 'binding on the Member States'.⁹⁹

The issue as to the nature of the ACP-EC partnership agreement within Community law has already been highlighted by the ECJ in the context of the 1963 Yaounde Convention.¹⁰⁰ In the *Bresciani* case, the Italian administration had imposed a charge for compulsory veterinary and public health inspections on raw cowhides from the Associated Territories.¹⁰¹ More importantly, the ECJ had to rule on the nature of individual rights emanating from the Yaounde Convention. Here, the Court conceded that the Yaounde Convention was not concluded with the objective of ensuring the equality of obligations that the Community assumes toward the Associated States. In spite of this clarification, the Court nevertheless, pointed out that '[the] imbalance between the obligations assumed by the Community towards the Associated States, which is inherent in the special nature of the Convention, does not prevent recognition by the Community that some of its provisions have a direct effect'.¹⁰²

⁹⁶ Council Regulation (EEC) No. 2913/92, of 12 October 1992, Establishing the Community Customs Code, obtainable at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31992R2913:EN:HTML>, last visited on 17 January 2008.

⁹⁷ See Section B on General Rules concerning duties, paras. 1 and 2, Official Journal of the European Union, 31 October 2006.

⁹⁸ EC Treaty Article 300(7).

⁹⁹ EC Treaty Article 300(7). On the issue of Community law as the 'law of the land' see the rulings of the ECJ in Case 26/62 *Van Gend & Loos v. Nederlandse Administratie der Belastingen* [1963], ECR 1; ECJ.

¹⁰⁰ The Yaounde Convention concluded on the 20 July 1963 was superseded by the first Lomé Convention (1975) and subsequently by the current Cotonou Partnership Agreement (2000).

¹⁰¹ Case 87/75, *Bresciani v. Amministrazione Italiana delle Finanze* (1976) ECR, 129.

¹⁰² See paras. 22 and 23 of the *Bresciani* case. For a short analysis of the case see Paul Craig and Gr anne de B urca (2003) at pp. 588-590.

In the light of the principle of consistent interpretation, domestic courts are supposed to interpret and apply national law in a manner consistent with EC law.¹⁰³ In the case at hand, the ECJ interpreted Article 2 of the Yaounde Convention as imposing obligations on the Community to refrain from imposing charges that may have an automatic equivalent effect. Following this line of reasoning, Article 2(1) of the Yaounde Convention conferred rights on EC citizens, and national courts are obliged to uphold these rights.¹⁰⁴ By implication, from 1970 onwards Community citizens could import goods from Associated States without having to pay charges which have effects equivalent to custom duties.

Tentative Conclusion

It is true that whatever form an eventual EPA will take, the general economic and trade framework of the FTA between the EU and the ACP countries that will emerge out of the negotiations will need to be WTO-compatible. At the same time, this by no means assumes that there is any hierarchy between the WTO treaty and an impending trade treaty between the EU and the ACP countries. To be sure, with the exception of peremptory norms or rules that have the status of *jus cogens* or obligations *erga omnes*, there is no hierarchy in international law.¹⁰⁵ However, if there were to be such hierarchy between one or two treaties and another, there would be specific provisions in the treaty in question creating such hierarchy.¹⁰⁶ In the absence of this, we can only have recourse to general principles such as the later in time rule¹⁰⁷ or the requirement that a *lex specialis* treaty takes precedence over a more general one.¹⁰⁸ However, the fundamental principle informing the interpretation of such agreement

¹⁰³ In the area of competition, despite the direct effect of EC Treaty Articles 81 and 82, and the fact that national authorities have different competition regimes, national legislation must be applied in conformity with EC law.

¹⁰⁴ Para. 26 of the report.

¹⁰⁵ This is contrary to municipal law where there is a clear hierarchy of norms between constitution, ordinances decrees etc. However, Article 53 of the Vienna Convention directs the international community to refrain from entering into treaties that conflict with *jus cogens*.

¹⁰⁶ This is the case with Article 103 of the United Nations Charter.

¹⁰⁷ Even with the later in time rule, international law as a legal system ‘...act[s] in relation to and should be interpreted against the background of other rules and principles. As a legal system, international law is not a random collection of such norms. There are meaningful relationships between them.’ See the International Law Commission on the Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, United Nations, ILC, Report on the Work of its 58th Session, (1 May to 9 June and 3 July to 11 August 2006), General Assembly Official Records, Sixty-first Session, Supplement No. 10 (A/61/10).

¹⁰⁸ The Latin maxim *lex specialis derogat legi generali*, as a technique of interpretation and conflict resolution in international law, is to the effect that whenever two or more norms deal with the same issue, the more specific one prevails. On the conflict of norms in international law, see Joost Pauwelyn, *Conflict of Norms in Public International Law: How WTO Law Relates to other Rules of International Law* (Cambridge, 2004).

would relate to the development needs of the ACP countries.¹⁰⁹ It is accordingly incompatible with the spirit of the Cotonou Agreement to assume that the failure to enter into a comprehensive EPA within the timeframe stipulated in the various initialled EPAs will absolve the EU of its obligations under the Cotonou Agreement.

VI. Conclusion

As the WTO Doha negotiations for further liberalisation and clarification of some of the ambiguous GATT/WTO provisions have failed to be reinvigorated, all eyes in the ACP countries are now on the EPA negotiations. Because of the vagueness of the GATT/WTO provision on RTAs, different interpretations have been given to GATT Article XXIV. No FTA has ever been challenged before the WTO dispute settlement on the basis of compatibility with Article XXIV. This has posed a significant challenge to EPA negotiations in respect of the extent to which development concern can be factored into an eventual EPA. The search for constraints within the WTO through the Doha negotiations to achieve this result seems very unlikely to bear fruit in the near future or before a full EPA is completed. The failure at the multilateral level shifts the burden onto the EU and the ACP countries to deal with the inherent conflict of sustainable development, regional integration and WTO compatibility in EPAs. Although this does not appear to be currently the case, one might have imagined that this issue could have been easily handled even without any progress with the Doha negotiations. This assumption gains support from the fact that WTO Members have consistently failed to check the legality of RTAs and in dispute settlement they have shied away from challenging RTAs.¹¹⁰

With regards to the question of regionalism, regional integration in Africa needs to come from concerted vision and must be supported by domestic constituencies. For this to happen, transparency and openness in the decision making process in Africa's public sphere are of the essence. Moreover, the current experience from EPA negotiations point to the fact that external actors have the power to either help or hinder the process, and African countries must be aware of the consequences of their international affairs.

¹⁰⁹ See Article 34 (4) of the CPA.

¹¹⁰ In this regard, see Petros C. Mavroidis, 'If I Don't Do it, Somebody Else Will (or Won't): Testing the Compliance of Preferential Trade Agreements with the Multilateral Rules', *Journal of World Trade* (2006), Issue 40, No. 1, 187.

