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BIBLIOGRAPHY

- Actionaid International, December 2004, “Why EU-ACP Economic Partnership Agreements pose a threat to Africa’s development”,
www.actionaid.org.uk/doc/lib/57_1_trade_traps.pdf.
- Arlene Alpha, Benoit Faucheux, Vincent Fautrel, Benedicte Hermelin, December 2005, “WTO and EPA negotiations: For an enhanced coordination of ACP positions on agriculture”, ECDPM Discussion paper No. 70, www.ecdpm.org.
- Arlène Alpha, Benoît Facheux, Vincent Fautrel, Bénédicte Hermelin, November-December 2005, “The WTO and EPA Negotiations on Agriculture: for Enhanced Coordination of ACP Positions”, Trade Negotiations Insights, Vol. 4 No. 6, www.ictsd.org/tni.
- San Bilal and Francesco Rampa, November-December 2005, “The Development Dimension of EPAs and International Aid for Trade”, Trade Negotiations Insights, Vol. 4 No. 6, www.ictsd.org/tni.
- San Bilal and Francesco Rampa, January-February 2006, “Reviewing EPA negotiations and alternative scenarios”, Trade Negotiations Insights, Vol. 5 No. 1, www.ictsd.org/tni.
- San Bilal and Francesco Rampa, February 2006, “Alternative (to) EPAs: Possible scenarios for the future ACP trade relations with the EU”, ECDPM Policy Management Report 11, Maastricht: European Centre for Development Policy Management, www.ecdpm.org/pmr11.
- Bond, “Economic Partnership Agreements”, www.bond.co.uk.
- Jerome Boulle, 1996, “An overview of the EU-ACP-Cooperation in the Indian Ocean”, Bonn: Friedrich-Ebert-Stiftung, Working Papers on EU Development Policy No. 5.

- Matthias Busse, Harald Großmann, 2004, “Assessing the Impact of ACP/EU Economic Partnership Agreement on West African countries”, HWWA Discussion Paper 294, www.hwwa.de/Forschung/Publicationen/Discussion_Paper/2004/294.pdf.
- Dominique David, September 2000, “40 years of Europe – ACP relationship”, *the Courier ACP-EU*, www.europe.eu.int/comm/development/body/publications/courier/courier-acp/.
- Department for International Development (DFID), March 2005, “Economic Partnership Agreements: making EPAs deliver for development”, A position paper published by the UK Government, www.dti.gov.uk/ewt/epas.pdf
- Ron Dorman, “European Union and the Third World; part 2, Setting up the Lomé Convention”, www.poptel.org.uk/against-eurofederalism/lome2.html.
- EUROPA Rapid Press Release, 28th of September 2005, “Economic Partnership Agreements: EU and Caribbean Region launch third phase of negotiations”, <http://europe.eu.int/rapid>.
- European Union, “From Lomé I to IV bis”, http://europa.eu.int/comm/development/body/cotonou/lome_history.
- European Union, “ACP: Lomé Convention”, <http://homepages.uel.ac.uk/ben2417s/EUAid3.htm>.
- European Union, February 2003, “User’s Guide to the European Union’s Scheme of Generalized Tariff Preferences”, www.file:///F:/EUROPA%20-20TRADE%20ISSUES.htm.

- European Union, 1996, „Green Paper on relations between the European Union and the ACP countries on the eve of the 21st century – challenges and options for a new partnership”, http://europa.eu.int/comm/development/body/publications/1-ert/lv1_en.pdf#zoom=100.
- Gerrit Faber, June 2004, “The Lomé Convention and the causes of economic growth”, www.agromaontpellier.fr/sustra/research-themes/eu-governance/papers/Faber/pdf.
- Roman Grynberg, 1998, “The WTO incompatibility of the Lomé Convention trade provisions”, <http://ncdsnet.anu.edu.au/online/online.htm>.
- Lawrence E. Hinkle and Richard S. Newfarmer, 7 January 2005, “Risks and Rewards of Regional Trading Arrangements in Africa: Economic Partnership Agreements (EPAs) Between the EU and SSA”.
- L. Hinkle and M. Schiff, 2004, “Economic Partnership Agreements between Sub-Saharan Africa and the EU: a development perspective”, *World Economy*, Vol. 27, Issue 9.
- Jurgen Huber, 2000, “The Past, Present und future ACP-EC trade regime and the WTO”, *European Journal of International Law (EJIL)*, Vol. 11 No. 2, 427-438.
- ICTSD, September-October 2005, “WTO Negotiations in the Lead-Up to Hong Kong: ACP Priorities & Challenges”, *Trade Negotiations Insights*, Vol. 4 No. 5, www.ictsd.org/tni.
- Melissa Julian, September-October 2005, EPA Negotiations Update, ECDPM, *Trade Negotiations Insights*, Vol. 4 No. 5, www.ictsd.org/tni.
- Melissa Julian, November-December 2005, EPA Negotiations Update, ECDPM, *Trade Negotiations Insights*, Vol. 4 No. 6, www.ictsd.org/tni.

- Melissa Julian, January-February 2006, EPA Negotiations Update, ECDPM, Trade Negotiations Insights, Vol. 5, No. 1, www.ictsd.org/tni.
- Stephen Karingi, Rémi Lang, Nassim Oulmane, Romain Perez, Mustapha Sadni and Hakim Ben Hammouda, United Nations Economic Commission for Africa (UNECA), September-October 2005, „The Economic and Welfare Impacts of the EU-Africa Economic Partnership Agreements“, Trade Negotiations Insights, Vol. 4 No. 5, www.ictsd.org/tni.
- Kenneth Karl, November-December 2002, “Economic Partnership Agreements – hopes, fears and challenges”, *the Courier ACP-EU*, No. 195, p. 21 f.
- A. Koning, 1994, “Challenges to ACP Trade with Europe after the Uruguay Round”, (Policy Management Brief No. 1), Maastricht: ECDPM, www.ecdpm.org.
- Jean Monnet European Centre of Excellence, University of Leeds, UK, “Bibliography: EU-ACP/developing world/poverty”, www.leeds.ac.uk/jmce/index.htm.
- B. Onguglo, T. Ito, 2005, “In Defense of the ACP Submission on Special and Differential Treatment in GATT Article XXIV”, (ECDPM Discussion Paper 67), Maastricht: ECDPM, www.ecdpm.org.
- Oxfam, “Six Reasons to Oppose EPAs in their Current Form”, www.oxfam.org.uk.
- Eliza Patterson, February 2001, “The US-EU Banana Dispute”, ASIL Insights.
- Press Release, 28th of April 2005, “European Commission regrets attack on EU sugar regime, but will abide by WTO Appellate Body ruling”, www.sugartrades.co.uk/press_release_euwtoab.pdf.

- Quaker Council for European Affairs, QCEA Short Report, May 1999, “Renegotiation of the Lome Convention”, www.qcea.org.
- Severine M. Rugumamu, 1999, “EU-ACP Partnership: an appraisal”.
- Maurice Schiff and L. Alan Winters, June 2002, “Regionalism and development: the implications of World Bank research for ACP and Latin American countries”, *Journal of World Trade*, Vol. 36, issue 3, p. 479 f.
- The Secretariat of the African, Caribbean and Pacific Group of States, “The ACP Group”, www.acpsec.org/en/epa/index.htm/treaties.htm.
- Christopher Stevens, July-August 2005, “The GSP: a solution to the problem of Cotonou and EPAs?”, *Trade Negotiations Insights*, Vol. 4 No. 4, www.ictsd.org/tni.
- Liz Stuart, March-April 2005, “Why the European Commission is wrong about EPAs”, *Trade Negotiations Insights*, Vol. 4, No. 2, www.ictsd.org/tni.
- S. Szepesi, 2004, “Coercion or Engagement? Economics and Institutions in ACP-EU Trade Negotiations”, (ECDPM Discussion Paper 56), Maastricht: ECDPM, www.ecdpm.org.
- WTO, Dispute DS27, www.wto.org.

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I. Introduction

The relationship between the European Community and the former European colonies – African, Caribbean and Pacific (ACP) countries - has been quite complex. The cooperation between them dates back to the origins of the Community¹. The Treaty of Rome signed on the 25th of March 1957 made provisions for the association of the OCTs (overseas countries and territories), i. e. French colonies, with the European Community². The first EDF (Development Fund for Overseas Countries and Territories) was set up at this stage to administer aid to the OCT's countries³. By 1960, the majority of the OCTs had gained their independence and in 1964 the Yaoundé Convention was signed⁴. In 1975, the Georgetown Agreement was signed creating an organization of African, Caribbean and Pacific Group of States (ACP countries)⁵.

Since 1975, the Lomé Conventions' policies formed the relationship between the European Union and the increasing number of the ACP-countries, nowadays 79. The Lomé Convention has been described as the most extensive collective agreement on co-operation between the northern and southern countries⁶. However, despite the great appraisal of them by the European Union, in 2000 the era of the Lomé Conventions came to an end and was replaced by the Cotonou Agreement which represents an interim agreement that will be replaced by the Economic Partnership Agreements by 2008.

At the core of the Lomé Conventions were non-reciprocal trade preferences in favor of the ACP-countries. However, this policy has been abandoned, and further relations

¹ EU,1996, "Green Paper on relations between the European union and the ACP countries on the eve of the 21st century – challenges and options for a new partnership", http://europa.eu.int/comm/development/body/publications/l-vert/lv1_en.pdf#zoom=100.

² Dominique David, September 2000, "40 years of Europe – ACP relationship" in *the CourierACP-EU*, www.europe.eu.int/comm/development/body/publications/courier/courier-acp.

³ David, see footnote 2.

⁴ David, see footnote 2.

⁵ The Secretariat of the African, Caribbean and Pacific Group of States (ACP Secretariat), "The ACP Group", www.acpsec.org/en/epa/index.htm/treaties.htm.

⁶ Jerome Bouille, 1996, "An overview of the EU-ACP-Cooperation in the Indian Ocean", Bonn: Friedrich-Ebert-Stiftung, Working Papers on EU Development Policy No. 5.

between the ACP-countries and the European Union will be based on reciprocal commitments. This seems to be a peculiar development if one recalls that ACP-countries are developing countries and more than the half of them (41 countries) are at least-developed-countries (LDCs). Thus, the question arises how could such a gigantic economic power as the European Union expect the LDCs to shape their further mutual trade relations on a reciprocal basis and what are the reasons? What are alternatives for ACP countries in case they are not willing to accept the EPAs? Do they have any choice and a decisive power to influence the current development in their trade relations, or are they in a resigned position to accept anything which the EU dictates them?

This paper aims to examine and evaluate the relationship between the EU and ACP countries from the Lomé Conventions to the current Cotonou Agreement, and, in particular, the new Economic Partnership Agreements which will affect the ACP countries by far more than the European Union.

This paper is structured as following: At first, a short overview about the development of the trade relations between the European Community and later on the European Union and the ACP-countries will be shown. Further on, the main reasons for the changed development policy will be shown as well as the success of the Lomé era will be evaluated. In the fourth and fifth part the current situation of the trade negotiations, i. e. trade relations under the Cotonou Agreement, and the future Economic Partnership Agreements as well as their expected impact on the ACPs seen from the different perspectives – views and expectations expressed by the European Union on the one hand, and by the Non-Governmental-Organizations (NGOs) and the ACP countries on the other hand - will be examined and evaluated as far as possible at the moment.

II. Overview

1. Yaoundé and Arusha Conventions

The predecessors of the Lomé Conventions were the two Yaoundé Conventions signed in the capital of Cameroon (1st of June 1964 to 1st of June 1969 and 1st of January 1971 to 31st of January 1975) and the Arusha Convention (1st of January 1971 to January 1975)⁷.

The Yaoundé Conventions covered 18 AASMs (Associated African States and Madagascar)⁸. They created an association between the former French colonies and the EEC⁹. Yaoundé contained no fundamental changes of access to the traditional markets for the French colonies, i. e. it was based on reciprocity, and thus, the trade access privileges were in effect a continuation of ‘existing legislation’¹⁰.

The Conventions allowed the Yaoundé countries to export the small amount of industrial goods they manufactured, usually duty free, into the Community but with much less preference for exports of agricultural products¹¹. To have allowed agricultural products in on a large scale would have undermined the Common Agricultural Policy (CAP) of high food prices for the protection of EEC farmers¹². In return for this EEC’s preferential treatment for limited industrial exports to the Community the AASM countries were required to accept comparable exports from the Community countries¹³.

⁷ EU, “ACP: Lomé Convention”, <http://homepages.uel.ac.uk/ben2417s/EUAid3.htm>.

⁸ David, see footnote 2.

⁹ David, see footnote 2.

¹⁰ Roman Grynberg, 1998, “The WTO incompatibility of the Lomé Convention trade provisions”, <http://ncdsnet.anu.edu.au/online/online.htm>.

¹¹ Ron Dorman, “European Union and the Third World; part 2, Setting up the Lomé Convention”, www.poptel.org.uk/against-eurofederalism/lome2.html

¹² Dorman, see footnote 11.

¹³ Dorman, see footnote 11.

The Arusha Convention governed trade links with four African States – Kenya, Uganda, Tanzania and Nigeria¹⁴.

2. Lomé-Convention I to IV

2.1 Lomé I

The Lomé Convention I replaced these previous agreements made by the original six EC members with former colonies.

Protocol 22 to the Acts of Accession of the UK, Ireland and Denmark offered 20 Commonwealth countries in Africa, the Caribbean and the Pacific the possibility of negotiating with the Community the other organization of their future relations¹⁵. Other African States that were not member of the Commonwealth or ASMM were also given the same option¹⁶. This led to the First Lomé Convention which was signed on the 28th of February 1975 between 9 European countries and 46 ACP countries and came into force on the 1st of April 1976¹⁷.

At a political level, it was proclaimed that each State has the right to determine its own policies; at a commercial level, non-reciprocal preferences were set up regarding ACP exports to the EEC¹⁸. Thus, for non-agricultural products the general rule was that products originating in ACP countries could be imported into the Community free of customs duties and charges having equivalent effect¹⁹.

¹⁴ EU, see footnote 7.

¹⁵ EU, see footnote 7.

¹⁶ EU, see footnote 7.

¹⁷ ACP Secretariat, see footnote 5.

¹⁸ David, see footnote 2.

¹⁹ Jurgen Huber, 2000, "The Past, Present und future ACP-EC trade regime and the WTO", EJIL, Vol. 11 No. 2, 428.

Furthermore, it introduced the STABEX system in order to compensate ACP countries for the shortfall in export earning due to fluctuation in the prices or supply of commodities²⁰. The scheme was based upon the restitution, in part, for changes in output and export prices but only for those exports going to Europe²¹.

Finally, Commodity Protocols favoring ACP exports were created in sectors such as sugar, beef and veal, and bananas²².

2.2 Lomé II

The Lomé Convention II was signed on the 31st of October 1979 for a period of five years with 58 ACP countries and came into force on the 1st of January 1981²³. This Convention was, in global terms, a continuation of the previous one²⁴. The new innovation was the SYSMIN system in order to help the mining industry of those ACP countries strongly dependent on it²⁵. This was a mechanism of the same type as STABEX but relating to mining-product resources²⁶.

2.3 Lomé III

Lomé III was signed in December 1984 for a period of five years between 10 European countries and 65 ACP countries and entered into force on the 1st of May 1986²⁷. It shifted the main attention from the promotion of

²⁰ David, see footnote 2.

²¹ Grynberg, p. 23, see footnote 10.

²² David, see footnote 2.

²³ EU, 'From Lomé I to IV bis', http://europa.eu.int/comm/development/body/cotonou/lome_history/.

²⁴ David, see footnote 2.

²⁵ EU, see footnote 23.

²⁶ David, see footnote 2.

²⁷ EU, see footnote 7.

industrial development to self-reliant development on the basis of self-sufficiency and food security²⁸.

2.4 Lomé IV

The Lomé Convention IV was signed on the 15th of December 1989 for a period of 10 years between 12 European states and 68 ACP countries and came into force on the 1st of March 1990, revised in 1995 and expired on the 29th of February 2000²⁹. The review in 1995 led to the signatory of 70 ACP countries and 15 European states³⁰.

The Lomé IV, just as the earlier Lomé Conventions, established unilateral preferences in favor of the ACP states while EC products did not enjoy any preferential access to the ACP markets³¹. The same Article contained a non-discrimination clause according to which the EC was not allowed to discriminate between ACP states in the field of trade³². A political innovation was the introducing of Human Rights clause³³. Furthermore, the emphasis was given also to the democracy and good governance, the position of women, environmental protection, decentralized cooperation, economic diversification and the private sector³⁴. These principles were essential for the cooperation between the EU and ACP-countries and thus, measures for the suspension of aid in the case of violation of these principles were introduced³⁵.

²⁸ EU, see footnote 7.

²⁹ Huber, p. 427, see footnote 19.

³⁰ ACP Secretariat, see footnote 5.

³¹ Huber, p. 429, see footnote 19.

³² Huber, p. 429, see footnote 19.

³³ David, see footnote 2.

³⁴ Jean Monnet European Centre of Excellence, University of Leeds, UK, "Bibliography:EU-ACP/developing world/poverty", www.leeds.ac.uk/jmce/index.htm.

³⁵ ACP Secretariat, see footnote 5.

3. The evaluation of the success of the Lomé era

The Lomé non-reciprocal system of trade preferences was supposed to increase ACP competitiveness and promote the diversification of those countries' economies through privileged access for the majority of their products to the European market³⁶. After many years' experience of this system, the results have unfortunately not lived up to expectations set in this system in 1975³⁷. Only a handful of ACP countries – 10 at the most – have had the know-how or have been able to profit from these advantages³⁸.

As seen in the table 1, ACP countries' share of EU imports has declined consistently³⁹:

Table 1	ACP countries' share of EU imports in % (1976-94)				
1976	1980	1985	1990	1992	1994
6.7	7.2	6.7	4.7	3.7	2.8

Since 1994, there has been no increase of the ACP countries' share in the EU imports⁴⁰. Although they are at the top of the pyramid of advantages offered by the EU to its development partners, paradoxically, the ACP countries are bottom of the list when it comes to exports to European markets⁴¹. Furthermore, a significant part of ACP exports to the EU, approximately 60 per cent, consists of only nine products⁴². Already regarded as minimal, the ACP countries' share in world trade fell from 3.4 per cent in the beginning of the 1970s to 1.1 per cent

³⁶ Kenneth Karl, November-December 2002, "Economic Partnership Agreements – hopes, fears and challenges", *the Courier ACP-EU*, No. 195, p. 21 f.

³⁷ Karl, p. 21, see footnote 36.

³⁸ Karl, p. 21, see footnote 36.

³⁹ Grynberg, p. 4, see footnote 10.

⁴⁰ Karl, p. 21, see footnote 36.

⁴¹ Karl, p. 21, see footnote 36.

⁴² Karl, p. 21, see footnote 36.

today although the ACP group has been significantly enlarged over the same period of time⁴³.

Many reasons for such a contra productive development are well known by now:

1. First, the preferential margin – the difference between the normal, or most favored nation (MFN) tariffs and the (mostly zero) tariffs on ACP exports – kept falling as a result of global trade liberalization in GATT/WTO rounds⁴⁴. These days, the ACP countries' preferential margin stands at barely two per cent⁴⁵.
2. Second, a growing number of countries was receiving preferential treatment, sometimes more favorably than the Lomé preferences (e. g., the candidate EU member states or signature of FTAs with other trading partners respectively), or in some cases less favorably (e. g., the Generalized System of Preferences – GSP – and the preferences for the Mediterranean countries): this increased competition among exporters from different preference-receiving countries⁴⁶.
3. Third, and perhaps most importantly, the composition of ACP exports was such that only a relatively small share actually qualified for preferential treatment (38 per cent in 1977, and 35 per cent 10 years later)⁴⁷. The explanation for this is that the ACP group exported many commodities on which a zero tariff was levied, whatever their origin⁴⁸. Although some ACP countries started to export new products that effectively received preferences,

⁴³ Arlene Alpha, Benoit Fauchaux, Vincent Fautrel, Benedicte Hermelin, December 2005, “WTO and EPA negotiations: For an enhanced coordination of ACP positions on agriculture”, ECDPM Discussion paper No. 70, www.ecdpm.org; Karl, p. 21, see footnote 36.

⁴⁴ Gerrit Faber, June 2004, “The Lomé Convention and the causes of economic growth”, www.agro-maontpellier.fr/sustra/research-themes/eu-governance/papers/Faber/pdf.

⁴⁵ Karl, p. 21, see footnote 36.

⁴⁶ Faber, see footnote 44; Severine M. Rugumamu, 1999, “EU-ACP Partnership: an appraisal”.

⁴⁷ Faber, see footnote 44.

⁴⁸ Faber, see footnote 44.

the quantities were too small to show up in the ACP market shares in the EU⁴⁹.

4. Fourth, the rigidity of some of the rules, particularly the rules of origin, have made it difficult to derive maximum benefit from the preferences and fostered dependency on traditional agricultural products⁵⁰. In particular, the New Generalized System of Preferences (GSP) put in place in July 2005 led to further erosion of the ACP preferences⁵¹. The new GSP provides for a general system, a special system (GSP +) and the Everything But Arms Initiative (EBA)⁵²:

- The general system provides for a suspension of customs duties for “non-sensitive” products and a reduction of customs duties of 3.5 % or 20 % for sensitive products.
- The special system (GSP +) provides for a suspension of customs duties for almost all products, sensitive and non-sensitive products alike to countries which adopted sustainable development and good governance measures, i. e. human rights, workers rights, the environment and principles of good governance.
- The EBA Initiative, entered into force in March 2001, grants duty-free access for all LDCs exports, without any quantitative restrictions, to the European market, except for arms and munitions. Thus, the advantages from which only ACP countries benefited in terms of access to the European market had been extended to non-ACP LDCs, and as a consequence for the LDC ACP countries was a further erosion of preferences in comparison to the non-ACP LDCs.

⁴⁹ Faber, see footnote 44.

⁵⁰ Quaker Council for European Affairs, QCEA Short Report, May 1999, “Renegotiation of the Lomé Convention”, p. 12, www.qcea.org.

⁵¹ Alpha and others, p. 21, see footnote 43.

⁵² Alpha and others, p. 21, see footnote 43.

Moreover, the rules of origin do not allow the ACP exporters to cumulate inputs from non-ACP or non-EU sources, although it would be often more efficient to obtain inputs automatically from cheaper or nearer sources⁵³. They therefore, affect the competitiveness of ACP exports and often appear to be a disincentive for investment and diversification⁵⁴.

5. Fifth, the Common Agricultural Policy (CAP) reform, decided in June 2003, led to further erosion of the ACP preferences⁵⁵:

The CAP reform introduced a single payment per farm. The intention was to reduce the domestic prices of EU agricultural products, without threatening agricultural income. For the ACP countries the CAP had several negative consequences⁵⁶:

- a reduction in the domestic European prices on which ACP countries could rely in the framework of the sugar and bovine meat product protocols, and therefore a reduction in their export revenues;
- an additional erosion of the preferential margins granted to the ACP countries in relation to the non-ACP countries. As indicated above, by reducing the guaranteed prices, the EU has less need of high customs duties to protect its market. It is therefore more willing to reduce its customs duties. A direct consequence of this reduction of European customs duties is an erosion of the preferential margins of the ACP countries;
- an increased competition from EU imports on ACP markets given the reduction of European prices to the world levels.

⁵³ A. Koning, 1994, "Challenges to ACP Trade with Europe after the Uruguay Round", (Policy Management Brief No. 1), Maastricht: ECDPM, www.ecdpm.org.

⁵⁴ Koning, see footnote 53.

⁵⁵ Alpha and others, p. 17, see footnote 43.

⁵⁶ Alpha and others, p. 17, see footnote 43.

6. Furthermore, the structural problems inherent in the ACP economies which limit their competitiveness, the lack of investment and under-industrialization, combined with economic difficulties arising out of the international environment are further factors that led to the failure of the old system⁵⁷.

Conclusively, it should be stated that twenty-five years of cooperation have demonstrated that, albeit enabling developing countries to survive, aid cannot create development⁵⁸.

III. The WTO-Compatibility of the Lomé Conventions

EU's legal argument for its changed development policies towards ACP countries was the need to ensure the WTO compatibility of the future ACP-EU trade relations⁵⁹. Since 1976, the question of the compatibility of the Lomé Conventions with the GATT, and later with the WTO-regime had always been an acute problem which emerged every five years in relation to the renewal of the Lomé regime.

The main concerns were firstly, the trade preferences in the form of tariff rates that differed not only from the MFN rates that were available to GATT contracting parties but subsequently differed from the Generalized System of Preferences (GSP) rates that were available to other non-ACP developing countries and secondly, the trade preferences under the Commodity Protocols, i. e. the allocation of tariff quotas and import licenses⁶⁰.

⁵⁷ Karl, p. 21, see footnote 36.

⁵⁸ ACP Secretariat, see footnote 5.

⁵⁹ Among others, f. i. Huber, p. 430, see footnote 19.

⁶⁰ Grynberg, p. 5, see footnote 10.

1. Tariff rates

1.1 Most-Favored-Nation Principle – Article I (1) GATT

The trade preferences offered by the EU to the ACP countries violated the MFN-Principle under Article I (1) GATT which prohibits discrimination amongst trading nations.

Article I (1) GATT states:

“With respect to customs duties and charges of any kind imposed on or in connection with importation or exportation or imposed on the international transfer of payments for imports or exports, and with respect to the method of levying such duties and charges, and with respect to all rules and formalities in connection with importation and exportation, and with respect to all matters referred to in paragraphs 2 and 4 of Article III, any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties”.*

According to the MFN-principle therefore, the European Union was obliged to grant equal tariff rates for the like products to any contracting country. However, the tariff rates granted to the ACP-countries differed significantly from the MFN rates granted to the non-ACP-countries. This represented a violation of the MFN-principle.

1.2 Generalized system of preferences: a permanent waiver

The EU's trade preferences towards ACP countries could not be justified under the GSP-system either.

In 1964, the first United Nations Conference on Trade and Development (UNSTAD) started to look into ways and means of granting special trade preferences to developing countries⁶¹. In 1968 it recommended the creation of a “Generalized System Tariff of Preferences” under which industrialized countries would grant autonomous trade preferences to all developing countries⁶². In order to implement the system, a waiver from Article 1 of the GATT was required⁶³. This waiver was granted on the 28th of November 1971, when GATT Contracting Parties adopted the so-called “**enabling clause**”⁶⁴. The “enabling clause” states:

*“1. Notwithstanding the provisions of Article I of the General Agreement, contracting parties may accord differential and more favourable treatment to developing countries, without according such treatment to other contracting parties.
[...]”*

The enabling clause was adopted originally for a period of ten years, and renewed in 1979, for an indefinite period of time⁶⁵. According to the clause, preferential treatment under the GSP has to be non-discriminatory, non-reciprocal and autonomous⁶⁶. While discrimination in favor of developing countries is allowed, there should be no discrimination between them, except for the benefit of least developed countries (LDCs); moreover, preferences cannot be negotiated, nor can they be granted in the

⁶¹ European Union, February 2003, ‘User’s Guide to the European Union’s Scheme of Generalized Tariff Preferences’, www.file:///F:/EUOPA%20-%20TRADE%20ISSUES.htm.

⁶² ‘User’s Guide’, see footnote 61.

⁶³ ‘User’s Guide’, see footnote 61.

⁶⁴ ‘User’s Guide’, see footnote 61.

⁶⁵ ‘User’s Guide’, see footnote 61.

⁶⁶ ‘User’s Guide’, see footnote 61.

framework of an agreement under which beneficiary countries make mutual concessions⁶⁷.

Although the European Union's development trade preferences under the Lomé regime were granted towards developing countries these policies still could not be justified under the permanent waiver. This is because in granting special preferences to the ACP countries under the Lomé regime the European Union discriminated against other developing countries which were non-ACP countries, as these trade tariffs were more preferential than those granted under the GSP. However, under the enabling clause the discrimination amongst the developing countries is prohibited.

1.3 Special waiver

Another way to legitimize the trade policies under the Lomé was the possibility to obtain a special waiver from the GATT obligations.

Article XXV (5) GATT contains a special waiver. It states that:

“In exceptional circumstances not elsewhere provided for in this Agreement [GATT], the CONTRACTING PARTIES may waive an obligation imposed upon a contracting party by this Agreement; Provided that any such decision shall be approved by a two-thirds majority of the votes cast and that such majority shall comprise more than half of the contracting parties [...].”

However, until 1994 a waiver under Article XXV (5) GATT was not requested by the European Community (EC) and therefore, was not

⁶⁷ 'User's Guide', see footnote 61.

granted⁶⁸. The First Lomé Convention was then examined by a GATT working party in 1976 about its compatibility with the GATT-principles⁶⁹. The EC alleged that the Lomé preferences towards ACP countries were GATT compatible⁷⁰. Therefore, obtaining a special waiver was not necessary. The EC based its argumentation on Article XXIV in connection with Part IV, in particular Article XXXVI (8) GATT⁷¹.

Article XXIV GATT allows building of free trade areas and customs unions. It states in its paragraph 5 that

“[...] the provisions of this Agreement [GATT] shall not prevent, as between the territories of contracting parties, the formation of a customs union or of a free-trade area [...],

and further in its paragraph 8 that

“(b) A free-trade area shall be understood to mean a group of two or more customs territories in which the duties and other restrictive regulations of commerce [...] are eliminated on substantially all the trade between the constituent territories in products originating in such territories [...]

(c) any interim agreement shall include a plan and schedule for the formation of such a customs union or of such a free-trade area within a reasonable length of time.”

Part IV of the GATT was introduced in 1966 and provides specific provisions for developing countries⁷². It declares that the contracting

⁶⁸ Huber, p. 429, see footnote 19.

⁶⁹ Huber, p. 429, see footnote 19.

⁷⁰ Huber, p. 429, see footnote 19.

⁷¹ Huber, p. 429, see footnote 19.

⁷² Huber, p. 429, see footnote 19.

parties recognize the need to treat developing countries more favorable in order to promote economical growth and development in these countries⁷³.

In particular, article XXXVI (8) states that:

“The developed contracting parties do not expect reciprocity for commitments made by them in trade negotiations to reduce or remove tariffs and other barriers to the trade of less-developed contracting parties.”*

The EC argued therefore, that the Community had liberalized for its part ‘*substantially all the trade*’, as required by Article XXIV GATT, whilst as far as the ACP states were concerned, Part IV of GATT, and especially Article XXXVI (8) GATT had to be considered in conjunction and together with Article XXIV⁷⁴, i. e. the ACP countries were not required to liberalize their trade as reciprocity was not expected.

At the end of its examination the GATT working party was not able to reach a conclusion as to the compatibility of Lomé I with the GATT provisions and it could note only that the parties to the Convention were prepared to supply information on a periodic basis and to notify any changes to the Lomé Convention⁷⁵.

2. The Commodity Protocols

Apart of the duty free access of non-sensitive products to the European market the EU granted the ACP countries preferences for sensitive products under the Commodity Protocols, such as Beef and Veal, Rum, Banana and Sugar

⁷³ Part IV of the GATT 1947 provisions.

⁷⁴ Huber, p. 429, see footnote 19.

⁷⁵ Huber, p. 429, see footnote 19.

Protocols⁷⁶. In particular, the European trading regime under the Banana and Sugar Protocols had been challenged by several countries at the WTO Dispute Settlement Body due to their incompatibility with the GATT, or WTO provisions respectively.

The Dispute Settlement Body's (DSB) decision in the Banana Dispute contributed considerably to the changes and the current development in the European policies towards ACP countries. The decision in the Sugar Dispute⁷⁷ however, did not play any significant role in the current development in the EU-ACP relations. Following, the legal challenges of the EU's banana regime brought in action by Latin American countries and the US will be examined closely.

2.1 The Banana Dispute I⁷⁸

The Banana Dispute firstly arose between five Latin-American banana-producing countries (Colombia, Costa Rica, Guatemala, Nicaragua, and Venezuela) and the European Union in June 1993. These countries initiated GATT dispute settlement proceedings due to the European new banana regime, which was established and came into force on the 1st of July 1993. The EU's banana regime has resulted in three disputes at the GATT and subsequently the WTO as well as in the European Court of Justice⁷⁹. Thus far three WTO Panels had been established to investigate the EU banana regime⁸⁰.

As part of the Lomé IV under the EC's bananas regulation No. 404/93 (Banana Protocol) the European Union granted the ACP countries preferences in accessing the European market with bananas. Protocol 5 of Lomé IV stated that *'no ACP state will be placed in a less favorable*

⁷⁶ Grynberg, p. 6, see footnote 10.

⁷⁷ Press Release, 28.04.2005, "European Commission regrets attack on EU sugar regime, but will abide by WTO Appellate Body ruling", www.sugartraders.co.uk/press_release_euwtoab.pdf.

⁷⁸ Eliza Patterson, February 2001, "The US-EU Banana Dispute", ASIL Insights.

⁷⁹ Grynberg, p. 7, see footnote 10.

⁸⁰ Grynberg, p. 7, see footnote 10.

situation than in the past or present as regards exports of bananas to the EU market'. The obligations under the Single Europe Act prohibited the creation of separate markets. Prior to the creation of the single market there were multiple marketing arrangements for bananas in Europe with most European countries importing bananas, i. e. each of the 12 EU member states had its own banana import regime. Germany operated on a free market system and had no import restrictions. The other 11 members imposed a 20 % tariff, and 6 members (France, Italy, Portugal, Spain, Greece, and the UK) also applied quotas on bananas produced in Central and South America. These latter restrictions were designed to protect the EU market for bananas produced in former EU territories and in the ACP countries that entered duty free under the Lomé Convention.

In July 1993, to assure the EU's obligations in the Banana Protocol of the Lomé Convention and to assure that there was a unified European market, the EU created a system of tariff quotas⁸¹. The ACP states were granted access to the EU for some 875,000 tones of bananas duty-free. ACP imports in excess of this amount paid 750 ECUs per metric ton. Non-ACP bananas were subject to a duty of ECU 100 per metric ton on imports up to 2 million metric tons, and ECU 850 on imports above that amount. Thirty-three and a half percent of the 2 million metric tons of non-ACP bananas subject to the lower duty of ECU 100 was reserved for European marketing firms, most of which historically had marketed only ACP bananas.

The complainants argued that the new European Banana regime violated Article I (1) GATT – MFN principle, as the EU discriminated against other contracting countries in favor of ACP supply (different tariffs depending on the origin of bananas), and furthermore Article III (4) GATT – National Treatment principle, as the EU discriminated in favor of EU sources

⁸¹ Grynberg, p. 7, see footnote 10.

(reservation of 33,5 % of EU's market access for EU producers). Furthermore, building of quotas is prohibited under the Articles XI, XIII GATT – prohibition of quantitative restrictions.

Due to the first legal challenge in June 1993, in February 1994 the GATT Second Banana Panel ruled that the Lomé Convention's Banana Protocol is not GATT consistent because it favors one group of developing countries over another⁸². The Panel found that there was discrimination in favor of ACP supply and this represented a violation of Article I (1) GATT (MFN-principle), and in the case of discrimination in favor of EU sources this represented a violation of Article III (4) GATT (National Treatment)⁸³. The Panel concluded that the Banana Protocol was not a Non-tariff Measure, and hence not in violation of Article XI (1) GATT⁸⁴. The allocation of quota did not violate Article XIII as traditionally tariff quotas (as opposed to import quotas) had never been deemed to be quantitative restrictions⁸⁵.

However, as was common under the GATT system that allowed parties to a dispute to block rulings against them the panel report was not adopted (the principle of positive consensus). Rather, the EU negotiated a so-called "Framework Agreement" with Colombia, Costa Rica, Nicaragua, and Venezuela. The "Framework Agreement" increased and guaranteed the value of the export quotas of these countries, in return for their agreement to withdraw the GATT complaint and refrain from further GATT challenges until the 31st of December 2002. This agreement raised the non-ACP quota to 2.1 million tons in 1994 and 2.2 million tons in 1995; lowered the in-quota tariff on Latin American bananas by 25 % to ECU 75 per metric tons; and allocated specific export quotas to each of the four

⁸² Grynberg, p. 8, see footnote 10.

⁸³ Grynberg, p. 8, see footnote 10.

⁸⁴ Grynberg, p. 8, see footnote 10.

⁸⁵ Grynberg, p. 8, see footnote 10.

Latin American signatories. However, the EU failed to come to an acceptable agreement with Guatemala which became one of the complainants in the Third Panel.

2.2 GATT Working Party on Lomé IV

In 1993 another working party examined the compatibility of Lomé IV with the GATT provisions⁸⁶. Soon after the completion of the Second Banana Panel report, the draft report of the Working Party on Lomé IV became available⁸⁷. In the Working Party several of the Contracting Parties had argued that there was a need for a waiver under Article XXV⁸⁸. The Community and the ACP argued again that nothing in Part IV GATT prohibited a Contracting Party from invoking Article XXXVI (8) in conjunction with Article XXIV, and that since the preferences granted by the Community were non-reciprocal, they complied with Article XXXVI (8) GATT⁸⁹. For these reasons the Community did not consider that there was any necessity for requesting a waiver under Article XXV⁹⁰. However, an increasing number of members of the working party strongly rejected the EC's arguments⁹¹. They emphasized that Part IV of the GATT only endorsed treatment in favor of developing countries on a generalized basis⁹². They stressed that Lomé IV violated Most Favored Nation Treatment and that it would be only in conformity with the provisions of the GATT if the parties to Lomé IV were granted a waiver from their contractual obligations under the provisions of Article XXV GATT⁹³.

⁸⁶ Huber, p. 429, see footnote 19.

⁸⁷ Grynberg, p. 12, see footnote 10.

⁸⁸ Grynberg, p. 12, see footnote 10.

⁸⁹ Huber, p. 429, see footnote 19.

⁹⁰ Huber, p. 429, see footnote 19.

⁹¹ Huber, p. 429, see footnote 19.

⁹² Huber, p. 430, see footnote 19.

⁹³ Huber, p. 430, see footnote 19.

Although the working party did not arrive at unanimous conclusions in this respect, in October 1994 the Community and the ACP states which were parties to GATT requested a waiver under Article XXV (5) from the obligations of the EC under Article I (1) GATT, without prejudice to their position that Lomé IV was entirely compatible with their obligations under Article XXIV GATT in the light of Part IV⁹⁴. The reasons for the request of a waiver were in part the widely held view that if it were not granted the Lomé Convention would come under closer scrutiny following the entry into force of the GATT 1994 rules⁹⁵. Moreover, given the legal precedent that had been established by the Second Banana Panel Report, it was almost inevitable that other aspects of the treaty would come under closer scrutiny – following the Banana Protocol Decision the government of Brazil was considering a legal challenge to the Sugar Protocol of the Lomé Convention⁹⁶. The EU was perfectly aware that it was not required to adopt the Second Banana Panel under the GATT rules but the Commission was keenly aware that without a waiver prior to the coming into force the new WTO Understanding on Rules and Procedures Governing the Settlement of Disputes it would face similar challenges to Lomé⁹⁷. Moreover, given the failure to come to terms with Guatemala over the Banana Framework Agreement, a waiver was clearly necessary in order to avoid further complaints⁹⁸.

Unlike under the GATT system the new Dispute Settlement Body (DSB) under the WTO allows for the creation of Panels and also created an Appellate Body⁹⁹. Thus, the creation of Panels could not be blocked by the contracting parties any longer¹⁰⁰. Furthermore, the decisions of the Appellate Body are fundamentally different from that of the panel under

⁹⁴ Huber, p. 430, see footnote 19.

⁹⁵ Grynberg, p. 12, see footnote 10.

⁹⁶ Grynberg, p. 12, 25, see footnote 10.

⁹⁷ Grynberg, p. 12, see footnote 10.

⁹⁸ Grynberg, p. 12, see footnote 10.

⁹⁹ Grynberg, p. 12, see footnote 10.

¹⁰⁰ Grynberg, p. 12, see footnote 10.

the GATT 1947 dispute settlement rules¹⁰¹. Article 17 (14), Annex 2 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) states:

“An Appellate Body report shall be adopted by the DSB and unconditionally accepted by the parties to the dispute unless DSB decides by consensus not to adopt the Appellate Body report within 30 days following its circulation to the Members. [...]”

Thus, under the new system rulings could not be blocked by parties to the dispute unilaterally – the principle of positive consensus did not apply any longer – but rather the principle of negative consensus applied, i. e. in order to block the ruling the consent of all contracting parties was required, which was difficult to obtain. Moreover, the power of the DSB was increased further by its power to recommend compensation in the event that recommendations of the Panel or Appellate Body are not implemented expeditiously¹⁰².

The waiver from Article I (1) GATT was granted by the decision of Contracting Parties on the 9th of December 1994 until the expiry of Lomé IV, i. e. 29 February 2000¹⁰³. The terms of the waiver stated:

“Subject to the terms and conditions set out hereunder, the provisions of paragraph 1 of Article 1 of the General Agreement shall be waived, until 29th February 2000, to the extent necessary to permit the European Communities to provide preferential treatment for products originating in ACP States as required by the relevant provisions of the Fourth Lome Convention, without being required to extend the same preferential treatment to like products of any other contracting party.”

¹⁰¹ Grynberg, p. 12, see footnote 10.

¹⁰² Article 22 (1), Annex 2 DSU.

¹⁰³ Huber, p. 430, see footnote 19.

However, the waiver was granted, and requested, only as far as the provisions of Article I (1) GATT were concerned, and not with regard to other provisions of GATT¹⁰⁴. In particular, the decision adopted by the contracting parties unanimously did not provide for the waiver from Article XI or Article XIII GATT provisions¹⁰⁵.

Thus, it was thought that by obtaining a waiver from its obligations under the Article I (1) GATT the European Union had the required legitimacy for granting non-reciprocal trade preferences to the ACP countries, in particular that the trade preferences under the Banana Protocol in favor of ACP countries were justified. However, this was not the case.

2.3 The Banana Dispute II¹⁰⁶

In 1996, the US, Ecuador, Guatemala, Honduras and Mexico jointly challenged the EU's banana regime again despite the granted waiver in violation of Articles I, II, III, X, XI, and XIII. The EU's case as presented to the Panel relied heavily on its assertion that the banana regime was a legitimate part of the Lomé Convention for which the EU had a WTO waiver; the claimant's response was that the banana regime was not covered by the Lomé Convention.

As a parallel move the European Union was threatened by the US to impose retaliatory sanctions on EU products to the value of revenue Latin American bananas would otherwise have accrued¹⁰⁷.

¹⁰⁴ Huber, p. 430, see footnote 19.

¹⁰⁵ Grynberg, p. 13, see footnote 10.

¹⁰⁶ Patterson, see footnote 78.

¹⁰⁷ QCEA Short Report, Appendix, p. 8, see footnote 50.

The WTO Panel report, issued on the 22nd of May 1997, found that the EU's banana import regime was discriminatory and as such was inconsistent with the GATT 1994, the WTO agreement on Import Licensing and the GATS. The Panel further found that the Lomé waiver waived the inconsistency with GATT Article XIII, but not inconsistencies arising from the licensing system¹⁰⁸. It came to the conclusion that the Lomé waiver should be interpreted so as to waive not only compliance with the obligations of Article I (1) GATT, but also compliance with Article XIII GATT (tariff quotas), because that would be necessary in order to give real effect to the waiver¹⁰⁹.

On the 11th of June 1997, the European Communities notified its intention to appeal certain issues of law and legal interpretations developed by the Panel¹¹⁰. The Appellate Body mostly upheld the Panel findings and furthermore, found additional violations of the GATT.

In particular, the Appellate Body disagreed with the conclusion of the Panel that the Lomé waiver covered discriminatory quotas and reversed that finding¹¹¹. According to the Appellate Body, the wording of the Lomé waiver was clear and unambiguous. It waived only the provisions of Article I (1) GATT and, although Articles I and XIII GATT were both non-discrimination provisions, their relationship was not such that a waiver from the obligations under Article I GATT implied a waiver from the obligation under Article XIII GATT¹¹².

IV. The Cotonou Agreement

¹⁰⁸ WTO, Dispute DS27, www.wto.org.

¹⁰⁹ Huber, p. 430, see footnote 19.

¹¹⁰ WTO, see footnote 108.

¹¹¹ Patterson, see footnote 78; Huber, p. 430, see footnote 19.

¹¹² Huber, p. 430, see footnote 19

Following the WTO decisions in Banana Dispute, a long-term examination was undertaken within the Community (known as Green Paper¹¹³) as to how a future trade regime with the ACP could be envisaged which would be ultimately WTO-compatible, without the necessity for requesting a waiver for an indefinite period of time¹¹⁴. Also, the failure of the Lomé Conventions to provide the ACP countries with the expected economic growth and welfare led to the re-consideration of the development policies between the EU and ACP countries¹¹⁵. Furthermore, obtaining a waiver became very costly for the EU because additional concessions had to be granted to the potential opponents of the waiver. The EU has made it very clear that the ACP no longer carry sufficient political weight in Europe that warrants putting up with this hassle any longer¹¹⁶. The essential economic justification for the Lomé Convention's trade provisions was to assure national sources of supply for European markets; however, from the European perspective there was no longer a perceived or potential commodity shortage that could not be dealt with within the context of the global market¹¹⁷.

The Green Paper, adopted by the European Commission on the 20th of November 1996, launched a wide-ranging debate on the future of ACP-EU relations¹¹⁸. Numerous solutions were considered. Broadly the options included¹¹⁹:

- creating a free trade area (consistent with Article XXIV (5) GATT),
- generalizing the system of Lomé trade preferences to other non-ACP countries,
- seeking a waiver (under Article XXV (5) GATT).

¹¹³ See footnote 1.

¹¹⁴ Huber, p. 430, see footnote 19.

¹¹⁵ QCEA Short Report, p. 1, see footnote 50; Actionaid international, December 2004, "Why EU-ACP Economic Partnership Agreements pose a threat to Africa's development", www.actionaid.org.uk/doc/lib/57_1_trade_traps.pdf.

¹¹⁶ Christopher Stevens, July-August 2005, "The GSP: a solution to the problem of Cotonou and EPAs?", Trade Negotiations Insights, Vol. 4 No. 4, www.ictsd.org/tni.

¹¹⁷ Grynberg, p. 3, see footnote 10.

¹¹⁸ 'Green Paper', see footnote 1.

¹¹⁹ 'Green Paper', see footnote 1; Grynberg, p. 17, see footnote 10.

The debate resulted in the conclusion of the Cotonou Agreement, and thus, in the EU's favored option of creating free trade areas with ACP countries in consistence with Article XXIV (5) GATT.

The 20-year Cotonou Agreement was concluded in June 2000 between 15 European states and 77 ACP countries¹²⁰. It provides for a shift from the system of non-reciprocal trade preferences to reciprocal Economic Partnership Agreements (EPAs)¹²¹. The Cotonou Agreement proposes that ACP countries enter into EPAs with the EU, either as regional groups (regional economic partnerships – REPAs) – the option favored by the EU – or individually¹²².

The Cotonou Agreement provides for a preparatory period from 2000 to December 2007¹²³ during which the successor regime, the so-called Partnership Agreement between the Community, its Member States and the ACP States, will be negotiated¹²⁴. The planned EPAs are to go into effecting January 2008¹²⁵, and their implementation is to be phased in gradually over the subsequent 10 to 12 year period¹²⁶.

The Cotonou Agreement maintains the non-reciprocal trade preferences in favor of the ACP countries, and therefore, a new WTO waiver was necessary¹²⁷. Such a waiver was granted the EU at the Fourth WTO Ministerial Conference in Doha¹²⁸ however, on the condition that the EU would request no more dispensation and that this second dispensation was a provisional pending total compliance by the EU-ACP trade regime with the WTO rules¹²⁹. The opponents of the waiver, such as Thailand, Indonesia and

¹²⁰ Article 36.1 Cotonou Agreement; Maurice Schiff and L. Alan Winters, June 2002, "Regionalism and development: the implications of World Bank research for ACP and Latin American countries", *Journal of World Trade*, Vol. 36, Issue 3, p. 479 f.

¹²¹ Article 36.1 Cotonou Agreement; Schiff/Winters, see footnote 120.

¹²² Schiff/Winters, see footnote 120.

¹²³ Article 37.1 Cotonou Agreement.

¹²⁴ Article 37 Cotonou Agreement; Huber, p.432, see footnote 19.

¹²⁵ Article 37.1 Cotonou Agreement.

¹²⁶ Lawrence E. Hinkle and Richard S. Newfarmer, January 7, 2005, "Risks and Rewards of Regional Trading Arrangements in Africa: Economic Partnership Agreements (EPAs) Between the EU and SSA".

¹²⁷ Huber, p. 433, see footnote 19.

¹²⁸ Karl, p. 21, see footnote 36.

¹²⁹ Apha and others, see footnote 43.

the Philippines were granted tariff-free quotas for tuna by the EU in order to secure this second waiver¹³⁰. It will expire on the 31st of December 2007¹³¹.

Under the Cotonou preferences, all imports of manufactured goods from the ACP countries enter the EU duty-free but are still restricted by what are fairly demanding rules of origin for small low income economies¹³². Many ACP agricultural products also enter the EU duty-free except for 990 tariff lines covering agricultural and processed agricultural products produced in the EU, which are granted only small tariff preferences¹³³. The most valuable preferences for Sub Saharan Africa (SSA) have been those extended to a few traditional primary exports – sugar, meat, and fish – some of which are still governed by separate Commodity Protocols¹³⁴. However, the Cotonou Agreement notes that the Commodity Protocols with the ACP countries will need to be reviewed in the context of the EPAs¹³⁵.

According to the Cotonou Agreement, in addition to market access in manufactured goods, agricultural products and services, EPAs will cover many trade-related areas, including competition policy (Art. 45), intellectual property rights (Art. 46), standardization and certification (Art. 47), sanitary and phytosanitary measures (SPS, Art. 48), trade and environmental considerations (Art. 49), trade and labor standards (Art. 50), consumer protection (Art. 51), food security (Art. 54) and investment (Art. 75)¹³⁶.

V. Economic Partnership Agreements

¹³⁰ Stevens, see footnote 116.

¹³¹ Oxfam, 2004, “Six Reasons to Oppose EPAs in their Current Form”, p. 4, www.oxfam.org.uk.

¹³² Hinkle/Newfarmer, p. 5, see footnote 126.

¹³³ Hinkle/Newfarmer, p. 6, see footnote 126.

¹³⁴ Hinkle/Newfarmer, p. 6, see footnote 126.

¹³⁵ Article 36.3 Cotonou Agreement.

¹³⁶ S. Szepesi, 2004, “Coercion or Engagement? Economics and Institutions in ACP-EU Trade Negotiations”, (ECDPM Discussion Paper 56), Maastricht: ECDPM, www.ecdpm.org.

The EPAs will provide for reciprocal liberalization of substantially all trade¹³⁷. They will constitute free trade areas in the sense of Article XXIV GATT and a waiver will no longer be needed¹³⁸.

According to the European Union the EPA process has four important objectives¹³⁹:

- (a) replacement of unilateral preferences with reciprocal free trade arrangements in order to make the EPAs WTO-compatible;
- (b) asymmetry: differentiation in the treatment of LDCs and non-LDCs;
- (c) regional integration; and
- (d) coordination of aid and trade.

(a) Reciprocal free trade arrangements and WTO compatibility:

In order to make EU-ACP trade relations compatible with WTO rules, the Cotonou Agreement provides for replacing the existing relationship of unilateral preferential access by ACP countries to EU markets with reciprocal free trade agreements between the EU and the ACP countries¹⁴⁰. That is, not only will the EU provide tariff-free access to its markets for ACP exports, but ACP countries are expected to provide tariff-free access to their own markets for EU exports¹⁴¹.

The EPAs, like other free trade agreements between developed and developing countries, will be governed by WTO's Article XXIV GATT¹⁴². Article XXIV GATT requires that the countries entering into a reciprocal free trade agreement liberalize, i. e. elimination of duties and other restrictive regulations of commerce, "*substantially all the trade*" within a "*reasonable length of time*", without distinguishing between developed and developing countries¹⁴³. However, Article XXIV GATT does not contain any legal definitions on how much trade

¹³⁷ Huber, p. 427, see footnote 19.

¹³⁸ Huber, p. 427, see footnote 19.

¹³⁹ Hinkle/Newfarmer, p. 6, see footnote 126.

¹⁴⁰ Article 36.1, 37.7 Cotonou Agreement; Hinkle/Newfarmer, p. 6, see footnote 126.

¹⁴¹ Hinkle/Newfarmer, p. 6/7, see footnote 126.

¹⁴² Hinkle/Newfarmer, p. 7, see footnote 126.

¹⁴³ Article XXIV GATT; Hinkle/Newfarmer, p. 7, see footnote 126.

liberalization is meant by “*substantially all the trade*”, and thus gives way to interpretation. “*Substantially all the trade*” is interpreted by the EU to mean 90 % or more of trade, and 10 years is considered to be a “*reasonable length*” of time except in special cases¹⁴⁴.

However, the EU understands this 90% threshold as an average of the trade between the partners¹⁴⁵. In this context it means that as long as the average trade liberalization between the parties contains 90 % in total the developing countries can liberalize less, while the EU liberalizes more¹⁴⁶. In the context of EPAs, the popular understanding is therefore, that if the EU liberalizes 98% to 100% of its trade, the ACP countries will have to liberalize only 80%-82% of their trade to meet the EU’s criterion of an average of 90% for WTO compatibility¹⁴⁷.

(b) Special and differential treatment:

In addition to reciprocity, a second guiding principle of the Cotonou Agreement is differentiation¹⁴⁸. Article 35.3 of the Cotonou Partnership Agreement states:

“Economic and trade co-operation shall take account of the different needs and levels of development of the ACP countries and regions. In this context, the Parties reaffirm their attachment to ensuring special and differential treatment for all ACP countries.”

(aa) Least Developed Countries

The EU recognizes that the trading relationship need not to be symmetrical, in other words what is expected of the trading partners may vary according

¹⁴⁴ Hinkle/Newfarmer, p. 7/8, see footnote 126.

¹⁴⁵ San Bilal and Francesco Rampa, 2006, “Alternative (to) EPAs: Possible scenarios for the future ACP trade relations with the EU”, ECDPM Policy Management Report 11, February, Maastricht: European Centre for Development Policy Management, www.ecdpm.org/pmr11.

¹⁴⁶ Bilal/Rampa, see footnote 145.

¹⁴⁷ Bilal/Rampa, see footnote 145.

¹⁴⁸ Hinkle/Newfarmer, p. 8, see footnote 126.

to circumstances and ability to participate¹⁴⁹. The last part of Article 2 of the Agreement states:

“[...] differentiation and regionalization: cooperation arrangements and priorities shall vary according to a partner’s level of development, its needs, its performance and its long-term development strategy. Particular emphasis shall be placed on the regional dimension. Special treatment shall be given to the least-developed countries. [...]”

Part 1 of Article 85 then adds that:

“The least-developed ACP States shall be accorded a special treatment in order to enable them to overcome the serious economic and social difficulties hindering their development so as to step up their respective rates of development.”

Thus according to the Cotonou Agreement, the LDCs are not being expected to have to open their markets to EU exports as fast or as much as the non-LDCs in order to maintain their preferential access to the EU markets¹⁵⁰. Furthermore, for all LDCs the EC committed itself to grant a duty-free access for essentially all products as from 2005 at the latest¹⁵¹, which was realized by the introduction of the EBA initiative in 2001.

(bb) Non-Least Developed Countries

Regarding the non-LDCs the EU acknowledges that participation in Regional Free Trade Areas might not be in the interests of some ACP countries¹⁵². It might be impossible for others, given such constraints as their

¹⁴⁹ QCEA Short Report, p. 3, see footnote 50.

¹⁵⁰ Hinkle/Newfarmer, p. 8, see footnote 126.

¹⁵¹ Article 37.9 Cotonou Agreement; Huber, p. 433, see footnote 19.

¹⁵² Article 37.6 Cotonou Agreement; QCEA Short Report, p. 3, see footnote 50.

geographical location, market orientation or current level of economic development¹⁵³. Thus, for those ACP states not classified as least developed countries (LDC) and which are not in a position to negotiate an EPA, alternative trade arrangements will need to be developed¹⁵⁴.

The Cotonou Agreement explicitly provides an alternative option for countries ‘*that decide they are not in a position*’ to negotiate EPAs¹⁵⁵.

Article 37.6 of the Cotonou Agreement states:

“In 2004, [the EU] will examine all alternative possibilities, in order to provide [ACP] countries with a new framework for trade which is equivalent to their existing situation and in conformity with WTO rules”.

While the date formally indicated in Article 37.6 Cotonou Agreement is 2004, the ACP and the EU agreed to let the 2004 deadline for discussing alternatives pass and to be prepared for discussing such request whenever appropriate¹⁵⁶. However, to date the EU has failed to provide alternatives to the EPAs. According to the EC they were not provided yet because no ACP country has so far requested the EU to examine alternatives to EPAs¹⁵⁷.

(c) Regional integration:

A third objective of the EPA process is to promote outward oriented regional integration among the ACP counties and limit the “hub and spoke” effect that bilateral free trade just between the EU and individual ACP countries could have¹⁵⁸.

¹⁵³ QCEA Short Report, p. 3, see footnote 50.

¹⁵⁴ Huber, p. 427, see footnote 19.

¹⁵⁵ Article 37.6 Cotonou Agreement; Szepesi, p. 6, see footnote 136.

¹⁵⁶ San Bilal and Francesco Rampa, January-February 2006, “Reviewing EPAs negotiations and alternative scenarios”, ECDPM, Trade Negotiations Insight, Vol. 5, No. 1, www.ecdpm.org/tni.

¹⁵⁷ Bilal/Rampa, see footnote 156.

¹⁵⁸ Hinkle/Newfarmer, p. 7, see footnote 126.

In the case of free trade agreements like the EPAs when a hub country or region (the EU) signs FTAs with various small countries like those in SSA (the spokes) and the latter do not sign FTAs among themselves, the hub country benefits because it has free access to all markets whereas the spokes only have free access to the hub market¹⁵⁹. This “hub-and-spoke” effect increases the incentive for exporters to invest in the hub country, rather than in the spokes, in order to serve all of the markets¹⁶⁰.

Traditionally, the 77 ACP countries have been divided into 6 broad regional groupings: the Caribbean, the Pacific, and four loosely defined African sub-regions – Western, Central, Eastern, and Southern Africa¹⁶¹. The EPAs are intended to establish free trade areas between the EU and each of these regional EPA negotiating blocs, the precise composition which was to be determined by the ACP countries themselves¹⁶².

(d) Coordination of trade and aid:

The fourth objective of the planned EPAs is to more effectively coordinate trade and aid¹⁶³. The EU is one of SSA’s largest aid donors¹⁶⁴.

Summarizing, it can be said that for the European Commission EPAs will foster development mainly through trade liberalization and foreign investments¹⁶⁵. There will be standard gains for the ACP countries, such as the increased market access to the EU, reduced prices of EU imports for ACP consumers and more competition among the producers¹⁶⁶. In addition, by building on the ACP regional integration

¹⁵⁹ Hinkle/Newfarmer, p. 8, see footnote 126.

¹⁶⁰ Hinkle/Newfarmer, p. 8, see footnote 126.

¹⁶¹ Hinkle/Newfarmer, p. 8/9, see footnote 126.

¹⁶² Hinkle/Newfarmer, p. 9, see footnote 126.

¹⁶³ Part IV of the Cotonou Agreement; Hinkle/Newfarmer, p. 9, see footnote 126.

¹⁶⁴ Hinkle/Newfarmer, p. 7, see footnote 126.

¹⁶⁵ San Bilal and Francesco Rampa, November-December 2005, “The Development Dimension of EPAs and International Aid for Trade”, Trade Negotiations Insights, Vol. 4 No. 6, www.ictsd.org/tni.

¹⁶⁶ Bilal/Rampa, see footnote 165.

processes EPAs should contribute to the establishment of effective regional markets thus attracting and stimulating investment, a necessary condition of sustainable development¹⁶⁷. EPAs will not only address tariff but also non-tariff barriers, and technical barriers to trade, as well as a number of trade-related “behind the border” measures (such as trade facilitation, competition, investment ect.) thus, increasing the benefits from trade¹⁶⁸. EPAs will not only cover trade in goods and agricultural products, but also in services¹⁶⁹. With its comprehensive coverage the new partnership should therefore also contribute to lock in policy reforms in the ACP countries, increasing the relevance and credibility of their regional integration process, as well as facilitating their integration in the world economy¹⁷⁰. Last but not least, EPA negotiations should be accompanied by discussions on the development assistance available for the ACP countries, as well as possible complementary support by other donors¹⁷¹.

VI. Concerns and critics

The European Union proclaims that EPAs will stimulate economic growth and development in ACP countries and enable them to integrate better into the world trade. The Cotonou Agreement states that the objective of Economic Partnership Agreements is “*to reduce poverty by supporting the sustainable development and the gradual integration of the ACP countries into the world economy*”¹⁷². However, the Non-Governmental-Organizations as well as the ACP countries themselves express concerns that the reciprocal trade liberalization between rich developed countries and poor developing countries is a major threat to poverty reduction and development¹⁷³, and many campaigns were initiated in order to stop this development¹⁷⁴.

¹⁶⁷ Bilal/Rampa, see footnote 165.

¹⁶⁸ Chapter 5, Article 44 – 53 Cotonou Agreement; Bilal/Rampa, see footnote 165.

¹⁶⁹ Chapter 4, Article 41 – 43 Cotonou Agreement; Bilal/Rampa, see footnote 165.

¹⁷⁰ Bilal/Rampa, see footnote 165.

¹⁷¹ Part 4 of the Cotonou Agreement; Bilal/Rampa, see footnote 165.

¹⁷² Articles 1, 34.1 Cotonou Agreement, Oxfam, p. 2, see footnote 131.

¹⁷³ Actionaid, p. 32, see footnote 115.

¹⁷⁴ Stop-EPA-Campaign, www.stopepa.org.

These concerns were expressed publicly, for the first time, by the ACP group during a hearing in the European Parliament's International Trade Committee in September 2005¹⁷⁵. The ACP Committee of Ambassadors' Trade Committee Chairman, Namibian Ambassador Katjavivi, who led the delegation of ACP Ambassadors to the meeting, informed parliamentarians that there has been little progress in addressing fundamental issues of concern to the ACP in a number of areas, related in particular to the development dimension and regional integration priorities in negotiations with the EC to date¹⁷⁶. The Ambassador noted however, that several EU Member States, including the United Kingdom, seem to understand ACP concerns about the need for more developmental support to address supply side needs and to provide sufficient transition periods for liberalization¹⁷⁷.

NGOs and ACP countries' governments see significant problems and negative effects in following areas/sectors:

1. Liberalization

One of the biggest concerns by the NGOs is the full trade liberalization proclaimed by the European Union. EPAs are premised on the assumption that indiscriminate trade liberalization and market deregulation are best for achieving development¹⁷⁸. EU claims that removing barriers to trade leads to increased competition, lower prices, transfer of knowledge, increased efficiency, and ultimately, overall positive welfare gains and economic development¹⁷⁹. However, NGOs fear that EPAs would follow the indiscriminate approach employed during structural adjustment programs (SAPs), i. e. opening markets without considering the development needs of individual countries¹⁸⁰. Indeed, there is little evidence that market liberalization is to be associated with trade growth and poverty

¹⁷⁵ Melissa Julian, September-October 2005, "EPA Negotiations Update", Trade Negotiations Insights, Vol. 4 No. 5, www.ictsd.org/tni.

¹⁷⁶ Julian, see footnote 175.

¹⁷⁷ Julian, see footnote 175.

¹⁷⁸ Actionaid, p. 4, see footnote 115.

¹⁷⁹ Actionaid, p. 11, see footnote 115.

¹⁸⁰ Actionaid, p. 9, see footnote 115.

reduction but in contrary, it can lead to more poverty, as seen in the 80s and 90s due to the ‘Washington Consensus’¹⁸¹. Furthermore, the NGOs argue that the impact of trade liberalization under EPAs would be deeper than that experienced under SAPs because SAPs involved tariff reduction not elimination that is foreseen under EPAs¹⁸². They claim that without some form of infant industry protection it is hard to see how African manufacturing in its nascent stage and already trailing the rest of the world will survive competition from European corporations¹⁸³. Premature trade liberalization can contribute to deindustrialization in developing countries, characterized by a decline in manufacturing, the collapse of industries, and a loss of jobs and ‘tacit knowledge’¹⁸⁴.

In contrary to the proposed full trade liberalization, the *Africa Economic Report 2004*¹⁸⁵ argues that the successful integration of Africa into the world economy will require better-educated and healthier workforces, improved economic and political governance, better quality infrastructure, and dynamic trade policies, including gradual and targeted trade liberalization. Trade liberalization needs to be timed and sequenced carefully: there are different optimal degrees of openness at different stages of development¹⁸⁶. If market opening occurs, it should not be dictated by arbitrarily devised timetables, but according to the developmental priorities of the country concerned¹⁸⁷.

2. Reciprocity

The major change to the previous agreements is the reciprocity. As noticed above, under the Lomé the developing countries were entitled to export their products duty free to the European market however, at the same time they were not obliged

¹⁸¹ Actionaid, p. 9, see footnote 115.

¹⁸² Actionaid, p. 11, see footnote 115.

¹⁸³ Actionaid, p. 11, see footnote 115.

¹⁸⁴ Actionaid, p. 7, see footnote 115.

¹⁸⁵ UNECA, *Africa Economic Report 2004*, New York, www.uneca.org/cfm/2004.

¹⁸⁶ Oxfam, p. 2, see footnote 131.

¹⁸⁷ Liz Stuart, March-April 2005, “Why the European Commission is wrong about EPAs”, *Trade Negotiations Insights*, Vol. 4, No. 2, www.ictsd.org/tji.

to open their markets for duty free European imports. EPAs however, are based on reciprocal commitments.

NGOs see big problems with reciprocity. Reciprocity between developing and developed countries can be very damaging to the former because the asymmetries in economic size mean that developing countries have to make relatively larger concessions and bear disproportionately high costs of adjustment than the developed countries¹⁸⁸. For African countries to liberalize 90 % of all trade with the EU within a 10-12 year period would require them to open all but 10 % of their markets to EU products within a decade, regardless of the structural weaknesses or the macro-economic conditions of their economies¹⁸⁹.

NGOs blame that most developed countries have historically made use of trade safeguarding measures to help their economies take off, and they still use concealed protectionism mechanisms that distort the free-competition system, as is the case in the agricultural sector¹⁹⁰.

The EU argues that existing imbalances can be addressed through ‘asymmetrical liberalization’, which would mean a differential approach to product coverage and to the pace and timing of liberalization¹⁹¹. However, NGOs argue that proposals for longer timeframes, combined with lower percentages of liberalization for ACPs, do not solve the problem¹⁹². “Many ACP countries are poorer today than they were two decades ago and could be in worse shape in 10 or 20 years. Yet the EU insists on tying reciprocity to pre-determined timelines and insists that a development component would only come in parallel with opening of markets”¹⁹³.

3. The ‘hub-and-spoke’ effect

¹⁸⁸ Actionaid, p. 7, see footnote 115.

¹⁸⁹ Actionaid, p. 7, see footnote 115.

¹⁹⁰ Karl, p. 24, see footnote 36.

¹⁹¹ Oxfam, p. 2, see footnote 131.

¹⁹² Oxfam, p. 2, see footnote 131.

¹⁹³ Oxfam, 2-3, see footnote 131.

The NGOs fear the ‘hub-and-spoke’ effect¹⁹⁴.

As noted above, to prevent the ‘hub-and-spoke’ effect the EU proposes to sign FTAs with groups of ACP countries and not separate agreements with each ACP country. However, there are doubts that the ‘hub-and-spoke’-problem will be significantly diminished¹⁹⁵. According to the EU’s proposal there should be six or seven Regional Integration Agreements (RIAs) signed between the ACP-countries themselves and thereafter these RIAs-blocks will sign the EPAs with the EU¹⁹⁶. However, these six or seven RIAs will represent spokes, four or five of which are in Sub-Saharan Africa, as they will open their markets to the EU but not among themselves, the EU however, will open its markets to each of the RIAs-blocks¹⁹⁷. Furthermore, the EU is already becoming the hub of a massive hub-and-spoke structure with its linking up to the East with the Europe Agreements, to the South with the Euro-Med Agreements, and to the West with Mexico and MERCOSUR (Agreement between EU and South American countries)¹⁹⁸. This expansion raises incentives to locate in the hub rather than in the spokes, including the ACP countries¹⁹⁹.

4. Negotiations

NGOs blame that the European Commission has taken advantage of its political and economic power to dictate the pace and terms of EPA negotiations to ACP countries, because many ACP countries have weak trade negotiating capacities and are heavily dependent on EU aid²⁰⁰. Trade with the EU is very important especially for Africa²⁰¹. The EU is a far more important market for Africa than the

¹⁹⁴ Actionaid, p. 28, see footnote 115.

¹⁹⁵ Schiff/Winters, p. 8, see footnote 120.

¹⁹⁶ Schiff/Winters, p. 8, see footnote 120.

¹⁹⁷ Schiff/Winters, p. 8, see footnote 120.

¹⁹⁸ Schiff/Winters, p. 8, see footnote 120.

¹⁹⁹ Schiff/Winters, p. 8, see footnote 120.

²⁰⁰ Actionaid, p. 29, see footnote 115.

²⁰¹ Actionaid, p. 4, see footnote 115.

US or Japan²⁰². For historical reasons, the EU is sub-Saharan Africa's single largest trading partner, receiving about 31% of Africa's exports and supplying 40% of its imports²⁰³. In contrast, trade between Africa and the EU is much less important for the EU than it is for Africa because the EU's economy is much larger than the economies of the SSA countries²⁰⁴. Thus, the impact on the EU of free trade arrangements with Africa is likely to be quite limited and much easier for the EU to adjust to than for Africa²⁰⁵. The differences in economic size and the relative importance of EU-SSA trade to the two sides would give the EU a much stronger bargaining position than SSA if the negotiations were conducted strictly on commercial terms²⁰⁶. Most ACP countries are severely disadvantaged by the small size of their delegations; their inability to participate effectively in meetings; and opaque processes that leave them marginalized and assumed to be part of the consensus if they are not physically present to argue their case²⁰⁷.

5. Europe's offensive interests

The NGOs believe that the EU wants to open up the ACP countries' markets further to European companies. The EU is pushing offensive interests - such as services - in the EPA negotiations, against the explicit wishes of the ACP and with no clear developmental benefits²⁰⁸.

NGOs take the view that the replacement of the Lomé regime with free trade areas is a massive risk for the ACP but the EU has nothing to lose²⁰⁹. ACP countries are unlikely to gain better access to the European market but will see their local industries put under severe strain by competition from cheap European imports,

²⁰² Actionaid, p. 4, see footnote 115.

²⁰³ L. Hinkle and M. Schiff, 2004, "Economic Partnership Agreements between Sub-Saharan Africa and the EU: a development perspective", *World Economy*, Vol. 27, Issue 9.

²⁰⁴ Hinkle/Newfarmer, p. 5, see footnote 126.

²⁰⁵ Hinkle/Newfarmer, p. 5, see footnote 126.

²⁰⁶ Hinkle/Newfarmer, p. 5, see footnote 126.

²⁰⁷ Oxfam, p. 3, see footnote 131.

²⁰⁸ Stuart, see footnote 187.

²⁰⁹ Bond, "Economic Partnership Agreements", www.bond.org.uk.

often subsidized and of poor quality²¹⁰. The European Commission's own impact assessment notes that, 'EPAs could lead to the collapse of the manufacturing sector in West Africa'²¹¹.

6. The timescale

The timescale offered for establishing regional FTAs is another difficulty²¹². The idea that they could be established successfully within the next twenty years ignores according to NGOs the vast political and economic differences which obtain between regions, and within countries themselves²¹³. ACP countries can point to the length of time it has taken to establish the EU as a regional market: it took Europe nearly half a century to complete the elimination of all internal barriers to trade in goods²¹⁴. Yet the EU is now demanding that African countries not only eliminate internal barriers amongst themselves, but also all barriers to trade with the EU within 10-12 years²¹⁵. The extent to which developing countries liberalize their trade should be based on their individual development and economic needs, and not determined by arbitrary timeframes and product coverage²¹⁶. The year 2017 (an end-date quoted by Commission officials) appears to be optimistic if many of the ACP countries are not to suffer from the loss of their existing privileges²¹⁷.

7. High adjustment costs/Lost of fiscal revenues

The NGOs claim that the EPAs will cause high adjustment costs regarding the loss of fiscal revenues for ACP countries, as trade taxes constitute a large share of total

²¹⁰ Bond, see footnote 209.

²¹¹ Bond, see footnote 209.

²¹² QCEA Short report, p. 5, see footnote 50.

²¹³ QCEA Short Report, p. 5, see footnote 50.

²¹⁴ Actionaid, p. 11, see footnote 115.

²¹⁵ Actionaid, p. 11, see footnote 115.

²¹⁶ Stuart, see footnote 187.

²¹⁷ QCEA Short Report, p. 5, see footnote 50.

tax revenue in these countries²¹⁸. Some of the more peripheral countries are dependent on customs duty as a source of income for around one third of their national revenue - in some cases the proportion is far higher -, which would be removed with the creation of FTAs²¹⁹. For example, in Ivory Coast, Sierra Leone, and Uganda, trade taxes represent 40 per cent, 49 per cent, and 48 per cent of total government revenue respectively²²⁰.

On one hand, tariff revenues will be lost in the RIAs among ACP countries²²¹. On the other hand, EPAs with the EU will result also in a significant loss in fiscal revenues²²². Thus for example, Cape Verde and the Gambia stand to lose 19.8 per cent and 21.9 per cent of their national incomes respectively; and Ghana and Senegal stand to lose 10 per cent and 11 per cent²²³. Estimated fiscal revenue losses for Kenya are 12 per cent²²⁴. Such large decreases in fiscal revenue would substantially harm ACP countries' budgetary capacities to finance key expenditures in areas such as education, health service, and poverty alleviation²²⁵.

8. Unemployment

There are serious concerns about the expected impact on wages and employment²²⁶. If existing industries have to compete with imports, the result might be unemployment not automatically offset by growth of employment in export sectors²²⁷. This would seriously affect the poor²²⁸. If no new opportunities will be created for the poor, they could be considerably worse off than before²²⁹.

²¹⁸ Schiff/Winters, see footnote 120.

²¹⁹ QCEA Short Report, p. 5, see footnote 50; Oxfam, p. 5, see footnote 131.

²²⁰ Oxfam, p. 5, see footnote 131.

²²¹ Schiff/Winters, see footnote 120.

²²² Schiff/Winters, see footnote 120.

²²³ Oxfam, p. 5, see footnote 131.

²²⁴ Oxfam, p. 5, see footnote 131.

²²⁵ Oxfam, p. 5, see footnote 131.

²²⁶ Oxfam, p. 5, see footnote 131.

²²⁷ Oxfam, p. 5, see footnote 131.

²²⁸ Oxfam, p. 5, see footnote 131.

²²⁹ Szepesi, p. 10, see footnote 136; Oxfam, p. 5, see footnote 131.

9. The Singapore Issues

The European Commission's proposals for EPAs also seek to include agreements on investment, government procurement and competition policy, issues often known within the WTO as the 'Singapore issues'²³⁰. The EU argues that an investment agreement would attract much-needed foreign direct investment (FDI) into these countries²³¹. NGOs agree that FDI could aid Africa's development if managed responsibly, but disagree with the European Commission's policy of greater deregulation of African investment regimes and indiscriminately opening up African markets to European corporations²³². This would remove the policy tools that governments might use to ensure that investment is socially responsible, economically productive and consistent with national development goals²³³.

Three of the four Singapore Issues (investment, competition, transparency in government procurement) - of which the EU has been the strongest proponent – were dropped from the Doha work program as a result of continued opposition by ACP countries, in alliance with other developing countries²³⁴. However, these issues are concluded into the EPA negotiations again²³⁵. In effect, ACP countries will have to “re-fight a battle” already won in the WTO, but from a weaker bargaining position²³⁶. The Cotonou Agreement contains a strong commitment to ownership of local policies²³⁷. Article 4 says:

“The ACP States shall determine the development principles, strategies and models of their economies and societies in all sovereignty. [...]”

Further on, Article 19.1 states that:

²³⁰ Chapter 5 of the Cotonou Agreement; Actionaid, p. 23, see footnote 115.

²³¹ Actionaid, p. 23, see footnote 115.

²³² Actionaid, p. 23, see footnote 115.

²³³ Actionaid, p. 23, see footnote 115.

²³⁴ Oxfam, p. 3, see footnote 131; Actionaid, p. 23, see footnote 115.

²³⁵ Oxfam, p. 3, see footnote 131.

²³⁶ Oxfam, p. 3, see footnote 131.

²³⁷ Article 19 Cotonou Agreement; Stuart, see footnote 187.

“[...] cooperation framework and orientations shall be tailored to the individual circumstances of each ACP country, shall promote local ownership of economic and social reforms [...]”

However, according to NGOs, it is difficult to see how these principles and objectives are compatible with the EU’s proposals on the Singapore Issues²³⁸, as ACP countries are strongly opposed to these issues but EU insists on their inclusion into the negotiations.

NGOs claim that in insisting on these issues under the EPAs despite of being them already rejected at the WTO, the EU is pursuing a self-interested market access agenda without due consideration to the development needs of African countries²³⁹. Agreements on these issues would create one-sided rules that would disproportionately benefit EU investors at the expense of domestic African investors, leading to the economic exploitation of African producers, workers, small-scale and medium-level processors²⁴⁰. It would also curtail the policy choices available to African governments in pursuit of their development objectives²⁴¹. Furthermore, NGOs claim that there is no absolute evidence that FDI necessarily precede economic growth²⁴². Interestingly, countries such as China and Malaysia, with comparatively illiberal investment regimes have been amongst the largest recipients of FDI during the last decade²⁴³. This suggests that the level of a country’s per capita income, its rate of growth and its physical and human capital infrastructure are more critical determinants of FDI than free markets or legal and regulatory frameworks²⁴⁴. There is therefore, no compelling reason why investment agreements under EPAs will lead to increased FDI flows to Africa²⁴⁵. On the contrary, such agreements, including increased rights for

²³⁸ Stuart, see footnote 187.

²³⁹ Actionaid, p. 23, see footnote 115.

²⁴⁰ Actionaid, p. 23, see footnote 115.

²⁴¹ Actionaid, p. 23, see footnote 115.

²⁴² Actionaid, p. 23, see footnote 115.

²⁴³ Actionaid, p. 23, see footnote 115.

²⁴⁴ Actionaid, p. 23, see footnote 115.

²⁴⁵ Actionaid, p. 23, see footnote 115.

European corporations to repatriate profits abroad, could increase capital flight from the continent²⁴⁶. In particular, Africa has already a higher proportion of wealth held overseas by residents than any other region of the world²⁴⁷. Capital flights amount to a significant economic loss for Africa, constituting a diversion of domestic savings from investment and a loss of fiscal revenue (through loss of taxation)²⁴⁸.

Furthermore, NGOs argue that the economic history demonstrates that non-discrimination or national treatment, i. e. the idea that a country cannot or should not systematically discriminate between domestic and foreign investors, is not a successful development strategy²⁴⁹. During the early stages of their development, many of the now developed countries did not adhere to this principle²⁵⁰. They used a range of instruments, including limits on foreign ownership, insistence on joint ventures between foreign and local firms, local employment and performance requirements to build up their national industries²⁵¹. Infant industry protection is necessary, if not sufficient, for developmental success²⁵². Every now-developed country adopted such a strategy; every successful developing country since 1945 followed such a path²⁵³. By denying African countries this same right, developed countries are hampering their industrial development²⁵⁴.

The UK government supports the initiative to remove the Singapore Issues from the EPA negotiations, unless these issues are specifically requested by a regional grouping²⁵⁵.

²⁴⁶ Actionaid, p. 23-24, see footnote 115.

²⁴⁷ Actionaid, p. 24, see footnote 115.

²⁴⁸ Actionaid, p. 24, see footnote 115.

²⁴⁹ Actionaid, p. 25, see footnote 115.

²⁵⁰ Actionaid, p. 25, see footnote 115.

²⁵¹ Actionaid, p. 25, see footnote 115.

²⁵² Actionaid, p. 25, see footnote 115.

²⁵³ Actionaid, p. 25, see footnote 115.

²⁵⁴ Actionaid, p. 25, see footnote 115.

²⁵⁵ Stuart, see footnote 187; Department for International Development (DFID), March 2005, "Economic Partnership Agreements: making EPAs deliver for development", A position paper published by the UK Government, www.dti.gov.uk/ewt/epas.pdf.

10. Agricultural sector

The agricultural sector is vital for the ACP countries²⁵⁶. Agriculture is the mainstay of many African economies and livelihoods, accounting for the bulk of national income, providing livelihoods for 89-90 % of the population, and supplying about 20 % of Africa's merchandise exports²⁵⁷.

Observers fear that the European Union intends to remain the Common Agricultural Policy (CAP). This means on the one hand, that the EU's overall spending on the CAP will remain at around 40 bn per year until 2013²⁵⁸, and thus, African farmers will not be able to compete with the European farmers due to the European support for the latter. The average EU farmer receives 100 times more in agricultural support than the average annual earnings of an African peasant farmer²⁵⁹.

On the other hand, some authors allege that by using its interpretation of Article XXIV GATT the European Union retains the possibility to maintain protected sectors in FTAs, which are for example sensitive agricultural products and processed food products²⁶⁰.

European Union has signed several FTAs with, for example, Mediterranean countries or South Africa, Mexico and Chile respectively²⁶¹. An analysis of these various FTAs signed by the EU shows that the EU excludes a certain number of important products from the free trade principle²⁶². The protection and aids from which certain agricultural products benefit at the national level within the EU are

²⁵⁶ Arlène Alpha, Benoît Facheux, Vincent Fautrel, Bénédicte Hermelin, November-December 2005, "The WTO and EPA Negotiations on Agriculture: for Enhanced Coordination of ACP Positions", Trade Negotiations Insights, Vol. 4 No. 6, www.ictsd.org/tmj.

²⁵⁷ Actionaid, p. 11, see footnote 115.

²⁵⁸ Oxfam, p. 2, see footnote 131.

²⁵⁹ Stuart, see footnote 187.

²⁶⁰ Alpha and others, p. 22, see footnote 43.

²⁶¹ Alpha and others, p. 22, see footnote 43.

²⁶² Alpha and others, p. 23, see footnote 43.

undoubtedly the decisive factor in the choice of the exceptions²⁶³. In the case of sensitive products, important tariff reductions are made by putting in place preferential access, but up to the limit of the quotas²⁶⁴. On the other hand, imports above the quota are heavily taxed²⁶⁵. Accordingly, imports of sensitive products are limited, via the introduction of tariff quotas²⁶⁶.

11. Regionalism

Some observers fear that the EPAs will inevitably give rise to the risk of division between the ACP countries²⁶⁷. The unity of the Group risks collapsing in the long term and economic disparities could arise even within the ACP regions, because of the different trade regimes which would be set up²⁶⁸. Developing countries has formed an ACP/AU/LDC alliance (also known as the G-90) in the WTO negotiations to defend their own development priorities²⁶⁹. In Cancun they signaled once and for all that the interests of small and vulnerable countries could no longer be ignored²⁷⁰. Yet, this alliance is under threat because it is much harder for ACP countries to maintain this resolve in the EPA negotiations, given their level of dependence on the EU for markets and development funds²⁷¹.

Further complications are presented by the fact that many ACP countries belong to more than one regional trade agreement, so for example among others African Union (AU), the East African Community (EAC), the Economic Community of West African States (ECOWAC), the Southern African Development Community (SADC), the Central African Economic and Monetary Community (CEMAC), the West African Economic Monetary Union (WAEMU), and the African

²⁶³ Alpha and others, p. 23, see footnote 43.

²⁶⁴ Alpha and others, p. 23, see footnote 43.

²⁶⁵ Alpha and others, p. 23, see footnote 43.

²⁶⁶ Alpha and others, p. 23, see footnote 43.

²⁶⁷ Karl, p. 24, see footnote 36.

²⁶⁸ Karl, p. 24, see footnote 36.

²⁶⁹ Oxfam, p. 3, see footnote 131.

²⁷⁰ Oxfam, p. 3, see footnote 131.

²⁷¹ Oxfam, p. 3, see footnote 131.

Development Bank (ADB)²⁷². African regional integration is intended to promote the self-reliant development of African states by expanding markets, creating economies of scale and diversifying African economies²⁷³.

However, yet through the EPA process African countries are being forced to choose one bloc through which to negotiate with the EU²⁷⁴. For example, in East and Southern Africa many countries have overlapping membership in the Common Market for East and Southern Africa (COMESA) and SADC, in addition to smaller blocs like the EAC and Southern African Customs Union (SACU)²⁷⁵. For the purposes of EPAs, countries have had to choose whether to negotiate as SADC or COMESA, which means that some countries are placed in a difficult dilemma, and on-going processes towards intra-regional co-operation are being undermined²⁷⁶.

The clustering of LDCs and non-LDCs within negotiating blocs is likely to produce even more difficulties because there are wide disparities between the costs and benefits of EPAs for different countries in the same group²⁷⁷. LDCs already have the Everything But Arms arrangement, which allows them to benefit from market access into the EU without reciprocating²⁷⁸. Therefore, the LDCs may have little incentive to open their markets to the EU on a preferential basis under an EPA²⁷⁹. In ECOWAS, for example, 14 out of the 16 member countries are LDCs²⁸⁰. Yet if these countries choose to opt out of an EPA, but continue with the ECOWAS regional integration process, they will still feel the effects of EU imports coming into their markets via their non-LDC regional neighbors²⁸¹, or in the case of an EPA signed between the EU and regional blocs combining LDCs and non-LDCs the LDC ACP countries will experience an erosion of current

²⁷² Actionaid, p. 26, see footnote 115.

²⁷³ Actionaid, p. 26, see footnote 115.

²⁷⁴ Oxfam, p. 6, see footnote 131.

²⁷⁵ Oxfam, p. 6, see footnote 131.

²⁷⁶ Oxfam, p. 6, see footnote 131.

²⁷⁷ Stuart, see footnote 187.

²⁷⁸ Oxfam, p. 6, see footnote 131.

²⁷⁹ Hinkle/Newfarmer, p. 14, see footnote 126.

²⁸⁰ Oxfam, p. 6, see footnote 131.

²⁸¹ Oxfam, p. 6, see footnote 131.

preferences, as both groups (LDCs and non-LDCs) will have the same conditions of access to the European market²⁸². According to NGOs, the poorest countries therefore, are put in a no-win situation: either they maintain their non-reciprocal access to the European market under the Everything But Arms program but leave their regional grouping, or stick with their regional partners and open their market to the EU²⁸³.

12. No alternatives

NGOs doubt that the form of an FTA as the proposed EPAs is the only option open to ACP countries²⁸⁴. They accuse that the EU is refusing to look at alternatives to free trade EPAs²⁸⁵.

Indeed, the European position is that EPAs provide the best way to achieve the development objectives of the Cotonou Agreement²⁸⁶. Therefore, unless a non-LDC country expressed an interest in assessing ‘alternatives’ because it was not in a position to sign an EPA, the EC would not put any efforts into ‘alternatives’ or any economic assessment of them simply because any alternative would be an inferior solution to the envisaged EPAs²⁸⁷. Mr Mandelson, EC Commissioner for Trade, confirmed that any alternative to EPAs is, in the EC view, only the “second best”²⁸⁸.

VII. ACP countries’ proposals and expectation

In order to avoid the feared negative impacts which developing countries would have to face after the implementation of the EPAs in their proposed form by the EU, the

²⁸² Alpha and others, p. 20, see footnote 43.

²⁸³ Bond, see footnote 209.

²⁸⁴ Among others f. i., Oxfam, p. 5, see footnote 131.

²⁸⁵ F. i., Oxfam, p. 5, see footnote 131.

²⁸⁶ Bilal/Rampa, see footnote 145.

²⁸⁷ Bilal/Rampa, see footnote 145.

²⁸⁸ Bilal/Rampa, see footnote 145.

ACP countries as well as NGOs have made alternative proposals as to how to shape further ACP-EU trade relations.

1. Implementation of the Special and Differential Treatment (SDT) provisions into the Article XXIV GATT²⁸⁹

The ACP States submitted to the WTO on the 28th of April 2004 a proposal on “Developmental aspects of regional trade agreements and special and differential treatment in WTO rules: GATT 1994 Article XXIV and the Enabling Clause”,²⁹⁰. The key objective in the ACP submission is to introduce SDT into GATT Article XXIV and in doing so, secure legal security of future EPAs with SDT from legal challenges as to their compatibility with WTO disciplines²⁹¹. There are four key aspects of the ACP submission as follows²⁹²:

- a) Article XXIV:8(a)(i) and (b) on “substantially all the trade” in respect of duties and other restrictive regulations of commerce;
- b) Article XXIV:5(c) and paragraph 3 of the 1994 Uruguay Round Understanding on this Article on the “reasonable period of time” in respect of the transition period for RTAs;
- c) Article XXIV:7 and paragraphs 7-10 of the 1994 Uruguay Round Understanding on notification, reporting and review of RTAs in the Committee on Regional Trade Agreements (CRTA); and
- d) Paragraph 12 of the 1994 Uruguay Understanding on dispute settlement.

The aspects on “substantially all the trade” and the “reasonable period of time” are core pillars of the ACP’s submission²⁹³.

²⁸⁹ B. Onguglo, T. Ito, 2005, “In Defense of the ACP Submission on Special and Differential Treatment in GATT Article XXIV”, (ECDPM Discussion Paper 67), Maastricht: ECDPM, www.ecdpm.org.

²⁹⁰ Onguglo, p. 2, see footnote 289.

²⁹¹ Onguglo, p. 2, see footnote 289.

²⁹² Onguglo, p. 3, see footnote 289.

²⁹³ Onguglo, p. 3, see footnote 289.

The submission contains following details²⁹⁴:

- (1) Regarding the SDT on “substantially all the trade” in respect of duties ACP’s submission proposes that appropriate flexibility shall be provided to developing countries in meeting the “substantially all the trade” requirement in respect of trade and product coverage. This can be provided through the application of a favourable methodology and/or lower (i.e. differentiated) threshold levels in the measurement of trade and product coverage of developing countries’ parties to a North-South RTA in meeting the Substantially all trade requirement.
- (2) Regarding the SDT on “substantially all the trade” in respect of other restrictive regulations of commerce the ACP propose to apply a flexible interpretation that allows developing countries’ members of a North-South RTA to apply contingency protection measures including safeguards and non-tariff measures on intra-regional trade. While contributing to the clarification of WTO rules, this is aimed at preserving the right to apply trade defense measures in future EPAs, if needed.
- (3) The ACP proposal on SDT in respect of the transition period for RTAs is buttressed by the need for a secure and sufficient period that would facilitate smother integration and adjustment of ACP economies under EPAs. It is comprised of two aspects. First, the ACP submission seeks to clarify that the full provisions of an RTA (primarily the reciprocal free trade agreement) would become fully operational at the end of the transitional period – in other words, ACP States would not be required to liberalize fully or substantially at the start of the formation of an EPA, but towards its end date. Currently, there is no agreement among WTO members as to when exactly do the substantive disciplines of GATT 1994 Article XXIV start to apply to an RTA – at the beginning or at the end of the transition period. Second, the ACP proposal

²⁹⁴ Onguglo, p. 3-4, see footnote 289; Bilal/Rampa, see footnote 145.

seeks to ease the conditions under which a transition period of longer than 10 years can be authorized and thus broadening the scope of the “exceptional circumstances” under which such extensions can be granted. It seeks to link the transition period to the trade, development and financial conditions of developing countries, so that the ACP States’ need for longer transition period under EPAs, which ACP States argue should not in any case be less than 18 years, can be legally sanctioned under GATT Article XXIV.

- (4) The ACP submission proposes furthermore to introduce the SDT principle into the procedural requirements for notification, reporting and reviewing of regional trading agreements (GATT Article XXIV:7), with a view to facilitating these procedural requirements for developing countries and giving due consideration to developmental aspects when reviewing regional agreements.
- (5) The ACP submission also proposes that the compatibility of regional trading agreements should be determined only by the WTO Committee on Regional Trade Agreements, thus removing the possibility of a challenge under the WTO Dispute Settlement Mechanism, in an effort to obtain greater legal certainty.

The proposal to reform GATT Article XXIV has also received the support of the Commission for Africa (2005), which calls, for instance, for a transition period of over 20 years to implement EPAs if necessary, a proposal also supported by the British government²⁹⁵. The African Union, the LDC Group and NGOs have also called for a revision of WTO rules²⁹⁶.

2. Amending the Enabling Clause

²⁹⁵ Bilal/Rampa, see footnote 145.

²⁹⁶ Bilal/Rampa, see footnote 145.

Alternatively to the proposed changes to the Article XXIV GATT NGOs and ACP countries recommend to amend the enabling clause²⁹⁷. The enabling clause in its Article 2 states that the discrimination principle which is allowed in favor of developing countries applies also to the

“Regional or global arrangements entered into amongst less-developed contracting parties for the mutual reduction or elimination of tariffs and, in accordance with criteria or conditions which may be prescribed by the CONTRACTING PARTIES, for the mutual reduction or elimination of non-tariff measures, on products imported from one another; [...]”

NGOs propose therefore, that such not-fully-reciprocal FTAs which are allowed under the enabling clause could be amended to apply not only to the South-South FTAs but also to the North-South FTAs²⁹⁸.

This option, however, is not very realistic. Indeed, such a revision of the Enabling Clause would seriously erode the principles of non-discrimination and most-favoured nation (MFN) by allowing a developed partner to arbitrarily discriminate among developing countries while avoiding the more rigorous discipline of GATT Article XXIV, which justifies RTAs, raising serious systemic issues in regard to WTO rules²⁹⁹. As a consequence, such a reform is likely to arouse the strong opposition of many WTO members, including among developing countries³⁰⁰.

3. Extension of the current preferences

NGOs propose an extension of the ‘Everything But Arms Initiative’³⁰¹ - however, it seems to be an unrealistic outcome because it would open the EU market also to

²⁹⁷ Oxfam, p. 5, see footnote 131; Bilal/Rampa, see footnote 145.

²⁹⁸ Oxfam, p. 5, see footnote 131.

²⁹⁹ Bilal/Rampa, 2006, see footnote 145.

³⁰⁰ Bilal/Rampa, 2006, see footnote 145.

³⁰¹ Actionaid, p. 31, see footnote 115; Bilal/Rampa, see footnote 145.

large and highly competitive developing countries³⁰² -, or to find ways in the EU's current GSP to allow for ACP interest to be taken into account³⁰³. One of the main advantages of this scenario is that the EU would justify it at the WTO not under Article XXIV GATT 1994, and thus, without the necessity of reciprocal liberalization, but under the Enabling Clause³⁰⁴.

4. New waiver

As a further alternative, a new waiver could be sought under the WTO³⁰⁵. However, it seems to be also an unrealistic approach. It is highly improbable that it will be possible for the EU to obtain a further waiver in order to provide ACP countries with preferences and in doing so to discriminate against other developing countries. As already stated above, it was a 'hard fight' for the EU to obtain this second waiver and it was granted only under the condition of creating a WTO compatible future trade regime in the EU-ACP trade relations. Both the EU and several WTO members seem unwilling to follow such an approach³⁰⁶.

Furthermore, the nature of the waiver arrangement itself constitutes another serious problem³⁰⁷. Waivers are no longer of an indefinite duration and are subject to annual review³⁰⁸. This greatly diminishes the commercial value of any waiver arrangement as commercial interests will be unwilling to undertake new long term investments when trade arrangements can be so readily terminated³⁰⁹. Thus, it is extremely unlikely that a Lomé system that is subject to continual scrutiny and annual review will constitute a foundation for investment in ACP states³¹⁰.

³⁰² Bilal/Rampa, see footnote 145.

³⁰³ Oxfam, see footnote 131; Bilal/Rampa, see footnote 145.

³⁰⁴ Bilal/Rampa, see footnote 145.

³⁰⁵ Bilal/Rampa, see footnote 145.

³⁰⁶ Bilal/Rampa, see footnote 145.

³⁰⁷ Grynberg, p. 20, see footnote 10.

³⁰⁸ Article IX (4) WTO Agreement.

³⁰⁹ Grynberg, p. 20, see footnote 10.

³¹⁰ Grynberg, p. 20, see footnote 10.

5. Special Safeguard Mechanism (SSM)

There are suggestions from the ACP countries that it might also be possible to envisage a specific safeguard mechanism for EU imports within the EPA framework, to limit the consequences linked to an increase in EU imports after the introduction of reciprocity of preference³¹¹. The construction of such a mechanism could possibly be drawn from the definition of a SSM within the WTO contained in the Article 5 of the Agreement on Agriculture³¹², which allows countries to impose additional duties on the agricultural imports in the case of import surges³¹³.

6. ‘Sensitive products’

ACP countries governments are pushing for the designation of ‘Sensitive Products’ in both developing and developed countries, as the retention of higher tariffs on developed country Sensitive Products would benefit developing countries enjoying preferential market access in these products, protecting them against preference erosion³¹⁴.

7. Alternative EPAs

There are suggestions to regard alternative EPAs. The basic principle of most of the alternative EPA scenarios is to stretch flexibility on the requirements for WTO compatibility (notably with regard to the level of reciprocity) as much as possible and/or to adjust the current EPA framework to better accommodate some development concerns³¹⁵.

³¹¹ Alpha and others, see footnote 256.

³¹² Alpha and others, see footnote 256.

³¹³ Article 5 Agreement on Agriculture.

³¹⁴ ICTSD, September-October 2005, “WTO Negotiations in the Lead-Up to Hong Kong: ACP Priorities & Challenges”, Trade Negotiations Insights, Vol. 4 No. 5, www.ictsd.org/tni.

³¹⁵ Bilal/Rampa, p. 2, see footnote 156.

8. “Menu approach”

As already discussed above, the ACP countries have repeatedly rejected the agreements on investment and competition, both in the context of the Doha Round of the WTO negotiations and in the context of the EPAs. Many civil observers and NGOs call to respect these wishes and propose that the different components of an EPA (trade in goods and in services, investment, possible sector-specific arrangements as in fisheries, and so forth) could be covered under separate individual agreements, and countries in one region would be offered a ‘menu’: all would sign a ‘master agreement’ establishing the principles to govern the EPA relationship but individual countries would be allowed to join only those specific ‘subsidiary agreements’ they are prepared to commit to³¹⁶. Potentially very different treatment of different countries under market-access arrangements (as well as non-trade areas) risks breaking up the ACP regions, and the WTO compatibility of such a scenario is, at best, uncertain³¹⁷.

VIII. Results so far

The Economic Partnership Agreements’ negotiations were launched at all-ACP levels in September 2002³¹⁸. In October 2003 the EPAs negotiations started with the regions of West and Central Africa, and in February 2004 with the regions of East and Southern Africa³¹⁹.

There are several phases in the EPAs negotiating process:

1. Phase I

³¹⁶ Bilal/Rampa, see footnote 145.

³¹⁷ Bilal/Rampa, see footnote 145.

³¹⁸ Article 37.1 Cotonou Agreement; Hinkle/Newfarmer, p. 6, see footnote 126.

³¹⁹ ACP Secretariat, see footnote 5.

The first phase began in September 2002 between the EU and all ACP-countries negotiating as a bloc³²⁰. The talks in phase I concerned mere consultations between the parties on the framework and principles of EPA negotiations³²¹. Whereas the ACP group wanted a formal agreement to conclude phase I, the European Commission rejected this, emphasizing that the purpose of the talks was to clarify issues rather than to reach a formal agreement³²². In fact, the only concrete outcome of Phase I was a joint report outlining issues debated thus far³²³.

There had been little agreement on many key issues between the ACP and the EU³²⁴. Issues that were still under discussion at the end of Phase I included: WTO-compatibility; the definition of the parties to the EPAs and the treatment of non-LDCs not entering into an EPA; rules of origin; technical barriers to trade (TBT) and sanitary and phyto-sanitary (SPS) issues; safeguards, anti-dumping, and dispute settlement; commodity protocols; an ACP-EU framework agreement on fisheries; the fiscal, economic, balance of payments, and social implications of EPAs; and implementation mechanisms³²⁵.

One issue with particularly important implications for the EPA negotiations is the question of financial resources to support the trade liberalization process in SSA³²⁶. The ACP group has argued that the financial resources currently available under the Cotonou Agreement are insufficient to support trade liberalization and expansion as well as the ACP countries' other needs³²⁷. In response, the EU has stated that the amount of development finance available from it until 2008 under the 9th European Development Fund has already been set and is not open for renegotiation³²⁸.

³²⁰ Szepesi, p. 6, see footnote 136.

³²¹ Szepesi,, p. 6, see footnote 136.

³²² Szepesi, p. 6, see footnote 136.

³²³ Bilal/Rampa, see footnote 145.

³²⁴ Hinkle/Newfarmer, p. 10, see footnote 126.

³²⁵ Hinkle/Newfarmer, p. 10, see footnote 126.

³²⁶ Hinkle/Newfarmer, p. 11, see footnote 126.

³²⁷ Hinkle/Newfarmer, p. 11, see footnote 126.

³²⁸ Hinkle/Newfarmer, p. 11, see footnote 126.

2. Phase II

The second phase has been ongoing since October 2003 at the respective ACP regional level for individual EPAs with the EU³²⁹. The six self-determined ACP regions are as follows³³⁰:

<i>Central Africa</i>	CEMAC (Communauté Economique et Monétaire de l'Afrique Centrale) plus Sao Tome and Principe	negotiations launched on 3 October 2003
<i>West Africa</i>	ECOWAS (Economic Community of West African States) plus Mauritania	negotiations launched on 6 October 2003
<i>East and Southern Africa</i>	an open configuration currently comprising COMESA countries minus Egypt and South Africa	negotiations launched on 7 February 2004
<i>Southern African Development Community (SADC)</i>	Botswana, Lesotho, Namibia, Swaziland (BLNS) plus Angola, Mozambique and Tanzania	negotiations launched on 8 July 2004
<i>CARIFORUM</i>	Caribbean Forum of ACP States	negotiations launched on 16 April 2004
<i>Pacific ACP States</i>		negotiations launched on 10 September 2004

The regional negotiations take place independently from each other³³¹.

3. Phase III

The third phase of the negotiations was launched on the 29th of September 2005 in the Caribbean and is expected to start in 2006 in the other regions³³². It should address substantive issues, notably the specific structure and scope of each EPA, the approach to trade liberalization, as well as the drafting of legal provisions³³³. Negotiations on EPA legal texts are the focus for ACP-EU negotiators in 2006³³⁴.

³²⁹ Szepesi, p. 6, see footnote 136.

³³⁰ Bilal/Rampa, see footnote 145.

³³¹ Bilal/Rampa, see footnote 145.

³³² Bilal/Rampa, see footnote 145.

³³³ Bilal/Rampa, see footnote 145.

³³⁴ Melissa Julian, January-February 2006, EPA Negotiations Update, ECDPM, Trade Negotiations Insights, Vol. 5 No. 1, www.ictsd.org/tni.

Furthermore, as foreseen in the Article 37.4 Cotonou Agreement, “*a formal and comprehensive review*” of EPA negotiations will have to be carried out in 2006 for all ACP countries³³⁵. In this context, the year 2006 will be crucial for the negotiations.

To date, no ACP country has opted out of EPA negotiations³³⁶. Of course, countries can always withdraw from the negotiations and opt for an alternative at later stages³³⁷. In this respect, it is no surprise that even those ACP countries most reluctant to negotiate reciprocity have remained on board so far³³⁸.

IX. Summery and conclusion

More than three years after the start of negotiations (2002) there is no consensus between the parties on the practical way forward to integrate the development dimension into EPAs³³⁹. Rather, sharp differences still prevail on the approach to development in these negotiations, creating tensions and frustrations among the parties³⁴⁰.

While the European Commission’s emphasis is towards trade liberalization and the creation of the right policy framework to attract investment, which according to the EU will foster development, the ACP governments emphasize that trade liberalization alone is not sufficient to create development and growth; rather trade liberalization should be accompanied by development support to address supply-side constraints, as well as related institutional and structural weaknesses³⁴¹.

³³⁵ Article 37.4 Cotonou Agreement.

³³⁶ Szepesi, p. 6, see footnote 136; Bilal/Rampa, see footnote 145.

³³⁷ Szepesi, p. 6, see footnote 136.

³³⁸ Szepesi, p. 6, see footnote 136.

³³⁹ Bilal/Rampa, see footnote 165.

³⁴⁰ Bilal and Rampa, see footnote 165.

³⁴¹ Bilal and Rampa, see footnote 165.

It is a stated fact that trade reforms can lead to efficiency gains, increased competition, lower prices, knowledge transfers and ultimately higher economic growth³⁴². The question is therefore, whether the success of the trade liberalization predominantly demonstrated by the North-North trade relations (such as the EU) can be realized also by the North-South trade relations as planned in the case of EPAs?

EU's answer is a positive one. It alleges that by creating free trade areas with the EU, the ACP regions will benefit from the standard gains from trade: increased market access to the EU, reduced prices of EU imports for ACP consumers, and associated competitive effects should foster economic growth and hence development³⁴³. Therefore, as result trade creation occurs.

Trade creation is the welfare improvement that arises because high-cost domestic production in the ACP region is replaced by lower-cost production in the EU³⁴⁴. Trade creation thus allows partner countries to better exploit their comparative advantage³⁴⁵. As markets are opened, both the ACP region and the EU further specialize their production, thereby serving the markets of partner countries with products at lower prices³⁴⁶. For the FTA as a whole, trade creation improves resource allocation and welfare.³⁴⁷

However, it is questionable whether trade liberalization will automatically result in trade creation in ACP markets, as alleged by the EU. The major comparative advantage of the ACP countries is the agriculture. However, if the EU remains its CAP policy and keeps subsidizing its agricultural products, it is hard to believe that ACP countries could further specialize in the agricultural sector and compete with the European producers. Moreover, the full reciprocity will be very costly for Africa, in

³⁴² Szepesi, p. 8, see footnote 136.

³⁴³ Bilal and Rampa, see footnote 165.

³⁴⁴ Szepesi, p. 8, see footnote 136.

³⁴⁵ Szepesi, p. 8, see footnote 136.

³⁴⁶ Szepesi, p. 8, see footnote 136

³⁴⁷ Szepesi, p. 8, see footnote 136.

terms of revenue losses, adjustment costs associated with de-industrialization, and its undermining effect of regional integration³⁴⁸.

The effect would be therefore, not trade creation, as promulgated by the EU, but on the contrary, trade diversion. Trade diversion occurs when higher-cost imports from the EU as result of the new tariff-free system become cheaper and therefore, more favorable for the ACP consumers than the lower-cost imports from third countries³⁴⁹. Though ACP consumers gain from lower prices, economy-wide welfare is negatively affected because the tariff revenue that was previously yielded from the third-country imports is now lost³⁵⁰.

The ACP governments have continuously stressed that high adjustment costs, which the African countries will have to bear as a result of revenue shortfalls³⁵¹, may even negate the benefits from market liberalization through an EPA³⁵².

One of the EU's objectives in the current EPA's negotiating process is the continuation to provide aid for the ACP countries. Many ACP governments are holding on to the hope that EPAs will provide the means to address these supply-side problems³⁵³. Yet the stark reality is that the EU has persistently said that the funding available under the current EDF will not be substantially increased³⁵⁴. However, further trade liberalization, as planned in the framework of EPAs, will cause additional adjustment costs which point to the need for more resources, as accompanying measures to trade should not come at the expense of other legitimate (often more vital) development concerns already addressed through aid (e. g. infrastructure

³⁴⁸ Stephen Karingi, Rémi Lang, Nassim Oulmane, Romain Perez, Mustapha Sadni and Hakim Ben Hammouda, United Nations Economic Commission for Africa (UNECA), September-October 2005, „The Economic and Welfare Impacts of the EU-Africa Economic Partnership Agreements“, Trade Negotiations Insights, Vol. 4 No. 5, www.ictsd.org/tni.

³⁴⁹ Szepesi, p. 8, see footnote 136.

³⁵⁰ Szepesi, p. 8, see footnote 136.

³⁵¹ UNECA, see footnote 348.

³⁵² Bilal/Rampa, see footnote 165.

³⁵³ Oxfam, p. 6, see footnote 131.

³⁵⁴ Oxfam, p. 6, see footnote 131.

development, education, health, etc.)³⁵⁵. The additionality of resources was therefore the most substantial disagreement of phase I of the EPA negotiations: Whereas the Commission finds that the funds agreed in the 9th European Development Fund (EDF) should suffice to address EPA-related concerns, the ACP pressed for extra commitments so as to safeguard the original allocation of the EDF to non-trade-related area³⁵⁶.

Also regarding the timetable envisaged by the European Union towards the beginning of 2008 there is no mutual understanding between the parties on how, in practical, operational terms, to ensure that the European Commission effectively implements its development policy and Cotonou Partnership Agreement's commitments in a timely manner³⁵⁷.

The experience which the European Union has undergone shows that trade liberalization process has taken much more time in Europe than EU has planned for the ACP countries. Even for middle income countries with substantial institutional capacity, dynamic leadership, and strong political support for reforms implementation of EPA alike programs would be a challenge³⁵⁸. For least developed and other low income countries with serious capacity constraints and lukewarm political support for reform, the list of actions envisaged is daunting³⁵⁹. A single mega-agreement with a 10-12 year implementation period may be too demanding to negotiate and implement; in any case, especially SSA countries will need some time to mobilize the necessary political support and to develop the institutional capacity for the trade and related reforms that need to accompany the EPAs³⁶⁰.

Also it is questionable whether the full trade liberalization will bring more than under the Lomé. Under the Lomé preferences ACP countries enjoyed a tax and duty free

³⁵⁵ Bilal/Rampa, see footnote 165.

³⁵⁶ Szepesi, p. 6, see footnote 136.

³⁵⁷ Melissa Julian, November-December 2005, EPA Negotiations Update, ECDPM, Trade Negotiations Insight, www.ictsd.org/tni.

³⁵⁸ Hinkle/Newfarmer, see footnote 126.

³⁵⁹ Hinkle/Newfarmer, see footnote 126.

³⁶⁰ Hinkle/Newfarmer, see footnote 126.

market access but the results were not gratifying. So, why and how does the European Union expect better results due to the establishing of Free Trade Areas? If the ACP countries were not able to gain any profits under the trade preferences how would it be possible for them to obtain any positive results without any preferences but to compete on equal terms with European producers? It is hard to find a positive answer for this question, especially because some research and the past experiences are not promising - during the 80s and 90s due to Washington Consensus as result of the trade liberalization African and South American industries suffered enormous losses and damages - but in contrary, very discouraging.

However, the United Nations Economic Commission for Africa (UNECA) stated in its research paper³⁶¹ that even with reciprocity, a free trade area that does not exclude sectors of export interest to Africa, and one that deals with non-tariff barriers, promises positive results for African countries; however, the sequencing of policy reforms by Africa is critical to the success of EPAs. It makes following suggestions³⁶²:

Firstly, EPAs should focus on deepening intra-African trade. This will increase African producers' competitiveness. Secondly, any tariff dismantlement by African countries will need to be implemented in phases, hand in hand with unrestricted market access for African exports into the EU market. Clearly, the 10-12 years under GATT Article XXIV is only sufficient for the deepening of the intra-African trade. The EPAs should look to seek more than 12 years for introducing reciprocity. And thirdly, measures must be implemented to compensate ACP countries for high adjustment costs that African countries will have to bear as a result of revenue shortfalls. If no appropriate measures are put in place to forestall the macroeconomic imbalances that are likely to result from the falling revenues, the EPAs will have the possibility of undermining the developmental objectives of the African countries.

³⁶¹ UNECA, see footnote 348.

³⁶² UNECA, see footnote 348.

So far no clear alternatives to EPAs have been presented to ACP countries despite concerns by many of them over the need to start looking at different scenarios³⁶³. However, presenting alternatives is an important part of the Cotonou Agreement and as shown above, there are numerous suggestions by the ACP governments and NGOs.

The most realistic alternative to EPAs (considered by many as the only real alternative to EPA, especially by EC officials) remains the preferential trade regime granted by Europe to all developing countries, known as the Generalized System of Preferences³⁶⁴. However, an unchanged application of the current GSPs will represent significant income losses for the ACP countries, as the GSP system is less favorable, i. e. the rules of origin are stricter than the current preferences under the Cotonou Agreement³⁶⁵. Of course, it is possible to avoid such negative effect if the EU is willing to extend the Cotonou arrangements for ‘cumulation’ (i. e. allowing several developing countries to contribute to production of a good) to the GSP rules of origin³⁶⁶, and indeed, the European Union must do so in order to fulfill its commitments contained in the Article 37.6 of the Cotonou Agreement. As already discussed above, the EU has committed itself in Article 37.6 of the Cotonou Agreement “[...] to provide [ACP] countries with a new framework for trade which is *equivalent* to their existing situation [...]”. If the EU offers, as intended, the ACP countries which are not willing or not able to sign an EPA as an alternative to import into the European market under the current European GSP which is less favorable than the rules of origin under the Cotonou Agreement this will not be “*equivalent*” to the “*existing situation*”, and thus, the EU will be in violation of the provisions of the Cotonou Agreement. The provision that every single non-LDC ACP state not party to an EPA has to be granted a regime equivalent to that which is enjoyed under Lomé IV could only be achieved by enhancing the preferences contained in the GSP of the Community by 2008, to the level of the trade preferences contained in Lomé IV or

³⁶³ Bilal/Rampa, see footnote 145.

³⁶⁴ Bilal/Rampa, see footnote 145.

³⁶⁵ Matthias Busse, Harald Großmann, „Assessing the Impact of ACP/EU Economic Partnership Agreement on West African countries“, HWWA Discussion Paper 294, p. 2, www.hwwa.de/Forschung/Publicationen/Discussion-Paper/2004/294.pdf.

³⁶⁶ Stevens, see footnote 116.

Cotonou Agreement respectively³⁶⁷. It would not be possible to build into the GSP special increased preferences for ACP states only, since a geographical differentiation between ACP states and other developing countries as such would be incompatible with a ‘generalized’ system of preferences which must be open to all developing countries according to objective criteria³⁶⁸. However, it would of course be possible to add new products on a non-discriminatory basis to the GSP, which are of particular importance to a certain number of ACP states³⁶⁹. The Institute of Development Studies (IDS) research indicates that this is technically feasible; political will is the only potential obstacle³⁷⁰. Moreover, IDS research suggests that in most cases the inclusion of these products in GSP+ would not significantly erode ACP preferences³⁷¹. This is because some competitors will either be excluded from GSP+ or already enjoy duty-free access (now or within a few years) under one agreement or another³⁷².

Also the suggestions by the ACP countries’ governments and NGOs regarding the change of the WTO/GATT-rules must be seriously taken into consideration. The EU reacted to this proposal and submitted a paper in May 2005 on Article XXIV GATT in which it called for the RTA negotiations to work to achieve rules “that support the developmental impacts of RTAs”³⁷³. The paper acknowledged the need to take SDT principles into account however, it did not offer any concrete suggestions on implementation³⁷⁴.

However, a reform of Article XXIV GATT, as requested by the ACP countries’ governments, might allow the ACP countries to limit their trade liberalization, and in

³⁶⁷ Huber, p. 436, see footnote 19.

³⁶⁸ Huber, p. 436, see footnote 19.

³⁶⁹ Huber, p. 437, see footnote 19.

³⁷⁰ Stevens, see footnote 116.

³⁷¹ Stevens, see footnote 116.

³⁷² Stevens, see footnote 116.

³⁷³ ICTSD, see footnote 314.

³⁷⁴ ICTSD, see footnote 314; Onguglo, p. 5, see footnote 289.

doing so to reduce the risk associated with an increase in import competition from the EU following EPAs accords³⁷⁵.

Regardless whether the suggestions presented by the ACP countries or NGOs respectively do represent effective alternatives to EPAs or do not they deserve thorough consideration and an open debate. Discussing alternatives will give the ACP governments a real choice and will bring more clearance into their autonomous decision-making-process.

Despite all expressed concerns the positive effect of the EPAs is that these are ‘agreements’, and therefore, as the name already implies, will be negotiated on a bilateral or multilateral basis. This represents an enormous advantage to the ACP countries. In comparison, the EBA initiative, for example, is not a negotiated agreement and can therefore, be amended or changed or withdrawn at any time unilaterally by the EU. The same applies also to the envisaged alternative under the GSP system: The GSP is an autonomous EU action; not only can it be reversed at any time, but the new regime just created applies only until 2008, creating great uncertainty over what will happen thereafter³⁷⁶. Thus, ACP countries can influence the EPAs negotiating process and must do so in order to make sure that their interests are best defended and taken into account, and that the European Union fulfils its commitments, in particular regarding the extent and the form of the SDT contained in the future EPAs, and regarding the alternative trading arrangements. As Dr. Sanoussi Bilal³⁷⁷ said: “ACP countries and regions should not feel obliged to sign onto an unsatisfactory deal”.

³⁷⁵ Alpha and others, see footnote 256.

³⁷⁶ Stevens, see footnote 116.

³⁷⁷ Dr. Bilal, one of the authors of the ECDPM report on the alternatives to EPAs, see footnote 145.

