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Towards Greater Flexibility in Article XXIV of GATT 1994 in the Context of Reciprocal Trade Agreements beween ACP States and the EU

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The Partnership Agreement (PA) signed between the 77 ACP states and the 15 EU states in Cotonou, Benin, in June 2000 (but which has been in effect since March 2000 under special arrangement) is one of the most important instruments of development co-operation contracted between a group of developing countries and a group of developed countries. It retains and builds upon the *'acquis'* of the four Lomé Conventions, the last of which expired in February 2000, and provides a new framework for economic and trade co-operation to respond to challenges and opportunities arising from the rapidly changing and globalising world economy. A central tenet of the partnership is ensuring that the content and intent of the new trade relations is in full conformity with WTO provisions, *including special and differential treatment*, and promotes the active participation of ACP states in the multilateral trading system (Article 34, PA).

Building on this premise, the new framework for economic and trade cooperation can be construed as comprising four key pillars, namely (i) temporary non-reciprocal preferential treatment for ACP states, (ii) economic partnerships agreements (EPAs) between ACP states and the EU, (iii) alternative arrangements to EPAs, and (iv) special treatment for ACP least-developed countries (LDCs). The modalities of the LDC pillar has been addressed by the every-thing-but-arms (EBA) market access initiative of the EU, as an extension of its Generalised system of preferences (GSP) scheme, which entered into force in March 2001 for an indefinite period.[1] Such special GSP treatment for LDCs is compatible under the WTO with the Enabling Clause,[2] in particular paragraphs 2(a) and (d). It is also consistent with the market access provision of the decision taken by the First WTO Ministerial Conference in 1996 on a Plan for LDCs, and the conclusions of the High-Level Meeting on Integrated Initiatives for LDCs' Trade Development, held in Geneva in October 1997. The modalities of the EPAs and alternatives to EPAs would be defined through consultations and negotiations during a preparatory period lasting from September 2002 until the end of 2007. In designing and negotiating the modalities for EPAs, the WTO compatibility of the resultant agreements is a critical issue, in keeping with the underlying principle of the new trade relations as mentioned above. This issue is being addressed in this article. The modalities and WTO compatibility of the non-reciprocal preferential treatment is addressed briefly below (as a prelude to the examination of EPAs and WTO compatibility).

During a preparatory period from 1 March, 2000 to 31 December, 2007, the EU would continue to provide non-reciprocal market access treatment for ACP exports, as under the Lomé Conventions, and maintain the access arrangements under the commodity protocols (Article 36, PA). This agreement between the two concerned parties also required WTO endorsement. Thus in March 2000 the EU, supported by the ACP states, requested from the WTO a waiver of the PA from the EU's obligations under the dictates of Article 1:1 of GATT 1994 (MFN principle). It can be recalled in this connection that for the Lomé Conventions, the EU (and ACP states) have consistently maintained that the non-reciprocal preferential tariff treatment for ACP

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products is compatible with Part IV of GATT read in conjunction with GATT Article XXIV. However, disagreement with some GATT and then WTO members over this interpretation led the EU (and ACP states) to request a waiver for the Fourth Lomé Convention. With this difficult experience in mind, the EU (and ACP states) directly submitted a waiver request for the new PA. Concurrently, some legal ambiguity emerged as to whether this waiver request could also encompass the preferential treatment in quota allocations to ACP states in the EU's new interim banana import regime until December 2005, when it would be converted into a tariff-only system. Thus the EU requested in June 2001 another waiver from its obligations under paragraph 1 and 2 of GATT 1994 Article XIII, for the preferential allocation of a banana quota to the ACP states under its interim banana-import regime.

After a long delay in the WTO in launching examinations of the two waiver requests, both requests were considered and granted on 14 November, 2001 by the Fourth WTO Ministerial Conference in Doha, Qatar.[3] The GATT Article I:1 waiver exempts the EU from its MFN obligations until 31 December, 2007 in respect of the preferential tariff treatment provided for ACP products under the ACP–EU Partnership Agreement. The GATT Article XIII waiver permits the EU to provide a preferential banana quota of 750,000 tonnes for ACP states between 1 January, 2001 and 31 December. 2005. At the same time, the preferential tariff treatment for ACP bananas are covered by the GATT Article I:1 waiver, and this would include the new tariff-only banana regime which would be subjected to a special arbitration system prior to entering into force to ensure that the market access opportunities for MFN suppliers are guaranteed at the present-prevailing level at least. These waivers have been important in that they have removed the ambiguity surrounding the consistency of the PA with the EU's WTO obligations, and allow the ACP states and EU to concentrate their negotiations on the modalities of the new trading arrangements.

Also during the preparatory period, starting in September 2002 and lasting until December 2007, the ACP states and the EU will negotiate and conclude economic partnership agreements which will then enter into force from January 2008 (and replace the system of non-reciprocal trade preferences). The EPAs will be comprehensive in scope, encompassing trade in goods (Articles 37 and 38, PA). They will also be extended to cover both trade in services and the building of the services supply capacity of ACP states (Articles 41 and 42, PA) and trade-related areas (Articles 44-52, PA). The negotiations on EPAs will be undertaken by ACP states that consider themselves in a position to do so, at a level they consider appropriate and in accordance with the procedures set by the ACP group of states (Article 37:5, PA). The EPAs shall aim to establish timetables for progressively removing barriers to trade between the concerned ACP states and the EU, in full conformity with relevant WTO provisions, and thus implying reciprocity in the granting of trade preferences, namely free trade areas (FTAs). As the EPAs involve developed countries (the EU), the relevant WTO provisions pertain to GATT 1994 Article XXIV on free trade agreements, customs unions, and interim agreements and the Uruguay Round Understanding on the interpretation of that article. In fact, recent mixed North–South regional trade agreements (RTAs) such as those concluded by the EU with North African countries (Algeria, Egypt, Jordan, etc.) and Canada and Chile have been notified to the WTO under the terms of GATT 1994 Article XXIV. The main requirements for FTAs are substantial trade coverage; no raising of trade barriers against third countries; a 10-year transition period for interim agreements unless exceptionally extended by the WTO; and notification and examination.[4]

Notwithstanding full compliance with WTO provisions then prevailing, the EPAs shall be as flexible as possible in establishing the duration of a sufficient transitional period, the final product coverage (taking into account sensitive sectors), and the degree of asymmetry in the timetable for dismantling tariffs (Article 37:7, PA). The transitional period is directly linked to the dismantling of tariffs as it comprises two aspects, namely the absolute duration of the period and the asymmetry between the ACP states on the one hand and the EU on the other in dismantling tariffs during the fixed transitional period. GATT 1994 Article XXIV

and the 1994 Understanding accept the need for transitional periods by allowing for interim RTAs. In addition, the 1994 Understanding sets a maximum period of 10 years for the interim RTAs unless exceptionally extended. GATT Article XXIV is silent on the asymmetric period (within the fixed absolute transitional period) for the dismantling of tariffs between parties, so this can be assumed to be acceptable. The Enabling Clause is silent on the transitional period and, within it, the asymmetric elimination of tariffs. In this sense, the Enabling Clause sets no upper or lower limits. Thus the only limit placed on a possible transitional period for EPAs by WTO provisions is by GATT Article XXIV and the 1994 Understand (although this limit can be extended). This possible limitation has to be juxtaposed against the adjustment needs of ACP states for sufficient flexibility to allow them to seek a period longer than 10 years in view of the trade, financial and development needs of ACP states.

With regard to the trade and product coverage under EPAs, the flexibility to be sought for ACP states is to be accorded a lower level of coverage for liberalisation compared to the EU for reasons of revenue, industry and employment sensitivity. ACP states should be able to exclude certain products from trade liberalisation under EPAs, but on a temporary basis and they must allow their gradual integration into the liberalisation programme. This flexibility can to be woven into current WTO provisions that recognise the need for less than total trade and product coverage in the context of RTAs. GATT Article XXIV requires the liberalisation of substantially all the trade between the parties, meaning that not all the trade has to be liberalised. There is thus a certain implicit flexibility already integrated into GATT Article XXIV. Also, various SDT provisions in the legal architecture of WTO, in particular Part IV of GATT 1994 (Article XXXVI:8) and the Enabling Clause (paragraph 5), provide that developed countries do not expect reciprocity from developing countries in removing barriers to trade and shall not expect commitments from developing countries inconsistent with their development, financial, and trade needs. Furthermore, GATS Article V:3(a), which is a counterpart to GATT Article XXIV, allows a lower level of services liberalisation by developing countries.

Finally, flexibility in the application of EPAs could also be sought in terms of the treatment of possible non-tariff barriers, or what is referred to as 'other restrictive regulations of commerce' in GATT 1994 Article XXIV:8, which must be eliminated on substantially all the trade of the parties. In particular, the non-reference in this article to contingency protection measures such as anti-dumping and countervailing duties (GATT Article VI), or safeguards (GATT Article XIX), and given the increasing use of these measures, there is debate as to whether and how members of an RTA (like an EPA) are allowed or obliged by GATT Article XXIV to apply those measures among themselves and with regard to third parties. ACP states may be interested, within the framework of EPAs, in setting stricter conditions on the use of such measures (against them) by the EU and more flexible conditions for ACP states to deal with sudden and unpredictable surge in imports. Another issue in terms of 'other regulations of commerce' in the context of EPAs concerns the preferential rules of origin that would underpin the FTAs. The PA provides for the EU to review its rules of origin pertaining to preferential treatment to ACP products to improve market access conditions. This needs to be closely studied to assess what flexibility could be usefully provided to ACP states in promoting industrial transformation to take advantage of the EPAs.

Accordingly, the flexibility in EPAs should allow for the differentiated application of reciprocal trade liberalisation commitments – with the EU liberalising faster, maybe even immediately – for a greater range of products with less stringent rules of origin, while the ACP would have a slower liberalisation pace and gradual integration of products. The EU liberalisation shall build on and improve current market access for ACP states. The emphasis on flexibility in the EPAs for ACP states despite maintaining WTO compatibility is justified on several grounds. One reason is the level of reciprocity that would be required under GATT Article XXIV. It is likely to pose greater adjustment costs on the part of ACP states, for example in establishing alternative sources of fiscal revenue to deal with the dismantling of tariffs, or in developing measures to deal

with uncompetitive industries and improve their competitiveness *vis-à-vis* European products and industries, or support their adaptation or the formation of new industries to exploit the wider EU market. Small and vulnerable ACP states in particular may not be in a position to bear the cost of full liberalisation given their high level of economic protection in general; the high dependence of governments on tariff revenue (and for some of them on stable revenue from the commodity protocols); low mobility of capital; and underdeveloped social security systems. This rationale is implicit in the provision of the PA (Article 37:7) that the EPA negotiations shall take into account the capacity of ACP states to adapt and adjust their economies to the liberalisation process. Another reason, not specifically mentioned in the PA, is the potential for region-to-region EPAs, i.e. a regional economic partnership agreement (REPA) between a regional group of ACP states, such as UEMOA (West Africa Monetary and Economic Union), and the EU. The conformity of the UEMOA–EU REPA to GATT Article XXIV might prove contestable (unless full liberalisation in keeping with GATT Article XXIV is pursued) given that UEMOA has been formed and accepted by the WTO membership under Enabling Clause conditions and as such, by definition, is likely to be a 'GATT Article XXIV-minus' agreement while the EU is a GATT Article XXIV agreement. This possibility raises the need for flexibility, but more so for special and differential treatment (SDT) for ACP states that form, via their economic grouping, an EPA with the EU.

Having argued the case for flexibility and SDT in EPAs for ACP states, there is a need to establish whether there is a case for introducing provisions for flexibility and SDT into the relevant WTO provisions. The question is how do EPAs fit into existing WTO rules on RTAs, and if they do not, how such WTO rules could be modified to benefit ACP states parties to an EPA or, for that matter, a mixed North–South RTA. The ACP states and the EU both recognise the need for such a case. The PA itself (Article 37:7) provides that the parties shall cooperate in the WTO in defending the EPAs, in particular with respect to the degree of flexibility accorded. The Third ACP Trade Ministers' Meeting in December 2000 reiterated the need for flexibility in the new trading arrangements and for this flexibility to be reflected in the relevant WTO rules. Furthermore, the trade ministers directed the ACP Group to seek to 'modify' the WTO provisions to cater for the flexibility required by ACP states. The call for the modification of WTO provisions to provide greater flexibility for ACP states has also been made by eminent persons from the ACP Group and other gatherings of ACP states.

In addition to the political impetus, it makes perfect economic and legal sense for an appropriately designed, well-targeted and reasonable degree of flexibility in the form of SDT for ACP states in WTO rules governing RTAs. The economic rationale lies in the need to facilitate the integration of particularly the small and vulnerable ACP states into the EPAs at a pace and level that would be economically viable and sustainable, and that adequately address their development needs.

The legal case arises from several considerations. First, the ACP states and EU need to pre-empt possible future legal challenges against flexibility measures introduced within EPAs. There is, however, a possibility that given the current implicit flexibility in GATT Article XXIV, future EPAs with flexibility might be covered under the prevailing WTO provisions without any reform. The difficulty with this assumption is that a reliance on implicit flexibility introduces uncertainty as to whether an ACP state (or the EU) in the case of a dispute can invoke GATT Article XXIV, as presently crafted, as a defence against an MFN violation complaint by third parties. Thus, reaching some formal understanding on the type and degree of flexibility and SDT permissible under GATT Article XXIV would serve to clarify and enhance the legal security. Second, there is a more universal, systemic consideration in respect of the relevance, equity and overall coherence of the WTO Legal architecture in dealing with mixed, North–South RTAs. GATT Article XXIV was designed in the 1940s to deal with RTAs among developed countries. It is thus irrelevant in catering for mixed RTAs, such as would comprise the EPAs, between highly developed countries (the EU) and developing countries (the ACP states), several of which are characterised by

small and vulnerable economies. There is no explicit SDT in GATT Article XXIV for developing countries in the context of mixed RTAs, although SDT is and has become even more so a fundamental principle of the WTO. Neither is a provision made in the Enabling Clause for mixed RTAs. In contrast, SDT for developing countries is clearly recognised and locked into GATS Article V for economic integration agreements (a counter part of GATT Article XXIV).

Thus there is a case for introducing explicit SDTs into WTO rules for mixed, North–South RTAs to address this phenomena (and thus update WTO disciplines to present-day realities) and to redress the legal lacuna and inconsistency in WTO legal architecture in terms of SDTs for developing countries. In the case of ACP states and the EU, the incorporation of flexibility and SDTs into WTO rules would provide a sound legal basis for WTO-compatible EPAs with flexibility for ACP states. Such reforms can be most usefully negotiated in the context of the negotiations launched at Doha on WTO rules governing RTAs in 'clarifying and improving disciplines and procedures under the existing WTO provisions applying to regional trade agreements,' and which would take into account 'the development aspects of regional trade agreements' (paragraph 29, Doha WTO Ministerial Declaration).[5] Moreover, the SDTs dimension of RTAs can also be linked to the Doha negotiations on SDTs provisions 'with a view to strengthening them and making them more precise, effective and operational' (paragraph 44, Doha WTO Ministerial Declaration).

In order to incorporate flexibility and SDTs within the scope of WTO rules, three modalities are conceivable, namely (i) through reforming the Enabling Clause; (ii) through reforming Part IV of GATT 1994; and (iii) through reforming GATT Article XXIV. These are the relevant WTO provisions disciplining RTAs. The Enabling Clause option would involve extending the scope of the clause to encompass mixed, North–South RTAs such as EPAs. This would ensure that the maximum flexibility enjoyed by developing countries under this clause in the formation of RTAs among themselves would also apply to RTAs they formed with developed countries. It would also in effect exclude the future EPAs from the purview of GATT Article XXIV and its tougher terms (as compared to the Enabling Clause). In this respect, paragraph 2(c) of the Enabling Clause dealing with RTAs can be targeted for review and modification. A serious shortfall with this option, however, is that the legal validity of the Enabling Clause in general, and its coverage of agreements formed among developing countries in particular, has increasingly been subject to pressure from some WTO Members.[6] For example, Australia has proposed that RTAs formed pursuant to the Enabling Clause should be brought under the disciplines of GATT 1994 XXIV and the purview of the Committee on Regional Trade Agreements. It has been contested whether the Enabling Clause covers at all all the RTAs agreements formed among developing countries. In the light of these attacks on the Enabling Clause, there is the danger that opening discussions on the reform of the Enabling Clause may lead to a weakening of the clause. This is not in the general interest of developing countries in terms of retaining the legal validity of the Enabling Clause for receiving unilateral preferences under the GSP and for maintaining the SDTs provided to RTAs formed among developing countries.

The option of amending Part IV of GATT is useful in the context of the broader review by the WTO under the Doha agenda of the generic SDTs concept under WTO architecture to make SDT operational and effective. Part IV of GATT could be amended to render it explicitly legally binding and applicable to mixed, North–South RTAs. This reform would be directed at ensuring that the concept of non-reciprocity by developed countries in their relations with developing countries can be made to become enforceable – and not just in terms of best endeavour language – and rendered applicable to negotiations in the regional context, for example the EPAs by ACP–EU, as is not currently the case. It is not presently the case because the contracting parties of GATT have argued that the Lomé Convention does not conform to GATT Article XXIV taken in conjunction with Part IV of the GATT, as argued by the EU and ACP states. The amendments could be focused on GATT Article XXXVI:8 on non-reciprocity including the footnote which could be

modified to be applicable to RTAs negotiated outside of GATT/WTO framework but in pursuance of reciprocal trade agreements. A key difficulty with this option of modifying Part IV Article XXXVI(8) to be applicable to RTAs is that it would also authorise unilateral preferences to be provided under mixed-RTAs (developed contracting parties do not expect reciprocity ... to the trade of less-developed contracting parties). While this may appear to be a preferred outcome for ACP states, as it provides an excessive degree of flexibility to members of mixed RTAs, it is likely to meet stiff resistance from other WTO members, and thus cannot be a workable basis for negotiations.

The GATT 1994 Article XXIV option could prove to be a sounder and more viable option to cater for EPAs with flexibility for ACP states. A modification and reform of GATT Article XXIV could be done either (1) through an amendment of the Article itself or (2) through a reinterpretation by way of the revision of the interpretative notes contained in the Understanding on the Interpretation of Article XXIV of the GATT 1994. There is a practical difficulty in formally reopening, renegotiating and amending GATT 1994 Article XXIV itself, as it needs consensus by the Ministerial Conference (Article X of Marrakesh Agreement). The adoption of new interpretations through a revision of the 1994 Understanding, which may be agreed by a three-fourths majority, may prove to be more feasible option (Article IX:2, Marrakesh Agreement). This was indeed the approach adopted in the Uruguay Round that clarified the meaning of articles by agreeing on their interpretation through Understandings and various substantive agreements, which were adopted in the end as a 'single undertaking.' Such an approach would also prove to be more realistic because the wording of GATT Article XXIV is open enough to allow for various interpretations, leaving room for certain flexibility to be incorporated depending on the way they are interpreted. Nonetheless, to the extent that the rules negotiations under the Doha agenda are subject to a 'single undertaking,' which needs consensus, there would appear to be little difference between the two approaches in that both need consensus at the end of negotiations.

Three options are conceivable in introducing flexibility as a form of SDT within GATT Article XXIV, with the second and the third options appearing to be the more feasible. These are (i) a special case for ACP–EU relations in GATT Article XXIV; (ii) generic provisions on SDTs within GATT Article XXIV in favour of developing countries; and (iii) a review of specific provisions in GATT Article XXIV. Option (i) would seek provisions for special derogation for ACP–EU relations only in line with Article XXIV:11 on special arrangements between India and Pakistan. However, an exception is open to criticism as ACP–EU relations cannot be the only exception. Other 'mixed' RTAs may arise, such as from the Free Trade Agreement of the Americas.

Option (ii) could consist of inserting a generic paragraph in GATT Article XXIV or the 1994 Understanding stating that flexibility is to be provided for developing countries in terms of key requirements stipulated in Article XXIV:5 and 8. Some guidance on such an option could be drawn from GATS Article V, which provides flexibility to developing countries in integration agreements liberalising trade in services. The flexibility would seek longer transitional periods, and product and trade coverage that allows developing countries to retain sensitive sectors of key importance to their economies, and tariff reduction approaches that allow developing countries to pursue a slower pace of liberalisation. Option (iii) is an alternative to option (ii); it consists of revising and modifying specific provisions on the key requirements under GATT Article XXIV so as to allow differentiation, or SDTs, for developing countries, in particular GATT Article XXIV:5(c) and XXIV: 8. The distinction between the latter two approaches is rather arbitrary and depends on actual negotiations. The aim of these changes in any option would be to allow flexible interpretation of key requirements of GATT Article XXIV for developing countries in the form of SDTs while clarifying and improving general disciplines applicable to all countries.

In conclusion it is important for ACP states to be aware of the sequence of negotiations under the Doha agenda and the built-in agenda of ACP–EU Partnership Agreement on trade and economic cooperation, so as to elaborate negotiation options

in both fora that promote ACP objectives in a systematic, coherent and mutually reinforcing manner. The Doha negotiations, including on RTAs, are scheduled to be completed and adopted as a single undertaking in 2006. By then the ACP states and the EU would have been mid-way through their deliberations and negotiations of regional economic partnership agreements, and would be able to gauge the WTO compatibility of the evolving terms of future EPAs with the newly adjusted WTO rules then prevailing. The EPAs would have to conform to these rules.

Endnotes

1. For an assessment of EBA, see UNCTAD and Commonwealth Secretariat, *Duty and quota free market access for LDCs: An analysis of Quad initiatives* (UNCTAD/DITC/TAB/Misc.7), London and Geneva, 2001.
2. Decision of 28 November, 1979 on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries.
3.. For a review of the ACP Group's efforts in securing the WTO waivers, see Julian Melissa, 'The Cotonou Waiver: An Unlikely Doha Deal Maker' in *Bridges: Between Trade and Sustainable Development* (Year 5, No. 9, November/December 2001).
4.. The integration of services into EPAs will oblige the EU and ACP states to ensure conformity of the services agreements with WTO provisions in respect of Article V of the General Agreement on Trade in Services (GATS). GATS Article V requirements parallel those articulated in GATT Article XXIV namely, 'substantial sectoral coverage' with no *a priori* exclusion of any mode of supply of services and 'the absence or elimination of substantially all discrimination'. Unlike GATT Article XXIV however, GATS Article V:3(a) specifically allows flexibility for developing countries' members of economic integration agreements in meeting the two aforementioned requirements.
5. The WTO surveillance of RTAs has increased and become more regular, unlike under GATT 1947. However, as under GATT, the WTO examinations of GATT Article XXIV RTAs under the Committee on Regional Trade Agreements has so far been inconclusive. While over 60 RTAs notified under GATT Article XXIV have been reviewed by the Committee, no report as yet has been released on the compatibility or not of any agreement to the WTO rules. This deadlock in the examination process has led some WTO members (Japan, Korea, Hong Kong–China and Australia), during the preparatory process for the Third WTO Ministerial Conference, to seek to clarify, improve and tighten the existing WTO rules on RTAs and strengthen procedures to examine the notified RTAs. In response, several other members (Hungary, Turkey and Romania), while agreeing to reforming GATT Article XXIV, sought to ensure that new disciplines should apply only to new agreements and not existing ones. One proposal by Jamaica emphasised the development dimension of RTAs and sought flexibility for adjustments costs for developing countries. RTAs among developing countries continue to be notified under the Enabling Clause and are examined by the Committee on Trade and Development. These different concerns will re-emerge under the Doha negotiations on RTAs.
6. The EU's GSP schemes have been the subject of complaints by some WTO members such as Brazil in respect of the preferential treatment provided to soluble coffee from Andean Group countries; by Thailand regarding the EU's GSP scheme in general but motivated by a concern (voiced together with the Philippines during the Doha discussions with the ACP States on the waiver request for the PA) over the treatment of their tuna products; and by India for the EU's positive incentive schemes for combating drug production and trafficking, and ensuring international labour and environmental standards. Also, unilateral preferences provided by developing countries to LDCs (i.e. South-South preferences) could not secure agreement from WTO membership as its compatibility with the Enabling Clause, and thus a waiver was sought and granted.