THE WTO COMPATIBLE ACP-EU TRADE PARTNERSHIP: INTERPRETING THE RECIPROCITY REQUIREMENT TO FURTHER DEVELOPMENT

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INTRODUCTION

Prior to the Uruguay Round, which led to the establishment of the World Trade Organization (WTO), the trade partnership between the African Caribbean Pacific (ACP) countries and the European Union (EU) was conducted under the *General Agreement on Tariffs and Trade* (*GATT*) [1] regime. However, with the signing of the *Agreement of Marrakesh* (held in Morocco in 1994 with 123 participating governments), the WTO came into existence and its "single undertaking approach" to multilateral trade had immediate effect on ACP-EU trade relations.[2] It signalled a new era for the parties' trade partnership. The signing of the *Cotonou Agreement* in 2000 confirmed this shift.[3]

The *Cotonou Agreement* effectively transformed the trade relationship from a preferential non-reciprocal regime to one requiring the ACP countries to grant reciprocal trade access to EU goods and services. It is this transformation of the trade partnership from non-reciprocity to reciprocity that is at the centre of the controversy surrounding the Economic Partnership Agreement (EPA) to regulate ACP-EU trade starting in January 2008. According to the European Union, the reciprocal trade regime offered by the EPA is the only way that a trade partnership can meet the requirements for WTO compatibility; effectively removing the need for a waiver. Moreover, it would promote sustainable development as well as the integration of the ACP countries

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1 *General Agreement on Tariffs and Trade*, 30 October 1947, 58 U.N.T.S. 187 (entered into force 1 January 1948) [*GATT*].

2 *Marrakesh Agreement Establishing the World Trade Organization*, 15 April 1994, 1867 U.N.T.S. 154, 33 I.L.M. 1144 [*Marrakesh Agreement*].

3 *Partnership Agreement Between the Members of the African, Caribbean and Pacific Group of States of the one part, and the European Community and its Member States of the Other Part*, 23 June 2000, [2000] O.J. (L/317) 3 (entered into force 1 April 2003) [*Cotonou Agreement*].

into the world economy. On the other hand, critics of the new trade regime, including the ACP countries, are apprehensive that introducing reciprocity into the ACP-EU trade agreement would force ACP countries to fully liberalize their market in accordance with free trade ideology. Doing so could have an adverse impact on the development objectives of ACP states. This article demonstrates how the principle of reciprocity, promoted by the notion of "WTO-compatibility", became the hallmark of the ACP-EU trade partnership. It seeks clarification on what constitutes reciprocity in trade relations and points out its potential impact on ACP countries.

EVOLUTION OF ACP-EU TRADE RELATIONS

Free Trade Relations under the Yaoundé Conventions

Regardless of the ongoing controversy, the concept of reciprocity or free trade between the ACP countries and the EU and its member states is not a new phenomenon. In fact, as far back as 1957, Article 131 of the *Treaty of Rome* established an Association between the European Community (EC) and the Countries and Territories in Africa with the official purpose "[t]o promote the economic and social development of the countries and territories and to establish close economic relations between them and the Community as a whole."[4] This Association, embodied in Part IV of the *Treaty of Rome*, contained two elements, namely: rules regarding trade between the EC and the Associates and aid from the Community to the Associates. Commenting on the trade aspects of the Association, Enzo Grilli stated that the *Treaty of Rome* unilaterally created a free trade area between the EC states and their dependencies.[5] What this entailed in trade terms was that duties on imports, both between the EC members and the Associates and between the Associates themselves, were to be gradually abolished. The Associates maintained the right to protect infant industries and to keep or establish tariffs for revenue purposes (but without discriminating between EC member countries). Nationals and corporations from the EC could freely establish themselves in the associated territories of the Associates and vice versa.[6]

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[4] *Treaty Establishing the European Community*, 25 March 1957, 298 U.N.T.S. 3 (entered into force 1 January 1958) [*Treaty of Rome*].

[5] E.R. Grilli, *The European Community and the Developing Countries* (Cambridge: Cambridge University Press, 1993) at 11.

[6] *Ibid.* For an account of the trade relations under Yaoundé Conventions, see Christopher Clapham, *Africa and the International System: The Politics of State Survival* (Cambridge: Cambridge University Press, 1996); Stuart Holland,

This trade regime was carried over into the *Yaoundé Convention*,[7] an association between the six members of the European Communities[8] and eighteen Associated African and Malagasy States (AAMS).[9] The *Yaoundé I* Convention continued the free trade area arrangement[10] between each of the Associated States. The EC, accordingly, demanded reciprocal obligations.[11] Associated States kept the right to preferential access to the EC markets that they had gained under the *Treaty of Rome* and they also continued to grant EC goods, at least in principle, the same right of access to their domestic markets. Existing trade obstacles between individual Associated States and the Community were to be reduced at the same pace as those between the six members of the Community, with the goal of these obstacles eventually being eliminated altogether.[12] It must be noted that the Associated States kept their privilege to limit (in some areas) the access of EC goods, but each AAMS member undertook not to discriminate in trade against any nation of the Community. All members of the EC were to be treated equally. With respect to trade between the Associated States, they remained free to organize trade relations among themselves as they saw fit. *Yaoundé II*, signed in 1969,[13] continued the free trade regime of *Yaoundé I* until it

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Uncommon Market: Capital Class and Power in the European Community (London: Macmillan, 1980); Marjorie Lister, ed., *The European Community and the Developing World: the Role of the Lomé Convention* (Aldershot: Avebury, 1988).

[7] *Convention of Association Between the European Economic Community and Associated African States*, 20 July 1963, [1964] O.J. 1431, 2 I.L.M. 971 (entered into force 1 June 1964) [*Yaoundé I*]. Yaoundé I was named after the place where it was signed, the capital of Cameroon.

[8] The EC Member States were Belgium, France, Federal Republic of Germany, Italy, Luxemburg and the Netherlands.

[9] The AASMS States were Burundi, Cameroon, Central African Republic, Chad, Congo Brazzaville, Congo Leopoldville, Dahomey, Gabon, Ivory Coast, Madagascar, Mali, Mauritania, Niger, Rwanda, Senegal, Somalia, Togo and Upper Volta. These were mainly French-speaking African Countries, reflecting the role of France in the establishment of the relationship.

[10] It is worthy of note that free trade was not permitted in agricultural products which compete with the EC *Common Agriculture Policy*, found in the *Treaty of Rome*, *supra* note 4 at Article 39 [CAP].

[11] J.A. McMahon, "The Negotiation of the Cotonou Agreement: Negotiating Continuity or Change" in O. Babarinde & G. Faber, eds., *The European Union and the Developing Countries: the Cotonou Agreement* (Leiden: Martinus Nijhoff Publisher, 2005) 37 - 63 at 39 [McMahon, "Negotiating Continuity"].

[12] Grilli, *supra* note 5 at 19.

[13] *Convention of Association Between the European Economic Community and Associated African States*, 29 July 1969, (1970) O.J. (L282) 1, 9 I.L.M. 484 (entered into force 1 January 1971) [Yaoundé II]. Although signed in 1969, the second Yaoundé Convention was effective between 1 January 1971 and 31 January 1975. Alongside this Convention, the EU negotiated the Arusha

was superseded by the *Lomé I* Convention, which was signed by the ACP countries and the European Economic Community (EEC) in 1975.[14]

Preferential Treatment under the Lomé Conventions

The negotiation of *Lomé I* took place against the background of demands by countries emerging from colonialization for the establishment of a New International Economic Order (NIEO) that would grant developing nations economic independence.[15] This demand dated back to the 1950s, when the basic rules concerning international trade enshrined in *GATT* (non-discrimination and reciprocity) began to be criticized as unsuitable to the special needs of developing countries.[16] As a result of this criticism, Part IV of *GATT*, consisting of Articles XXXVI, XXXVII and XXXVIII, was added in 1965. Article XXXVI(8), in particular, sets out the principle that developed nations "do not expect reciprocity" for their commitments to remove or reduce tariffs and other trade barriers.[17]

Also, in 1971, *GATT* adopted two waivers to favour developing countries for two types of preferences: (1) a setting-aside of the most-favoured-nation obligation to permit a "generalized system of preferences"; and (2) permission for developing countries to exchange tariff preferences among themselves. In 1979, both waivers were made permanent through the so-called "Enabling Clause".[18] The Enabling

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Convention to regulate the trade relationship between it and four English-speaking Countries in Africa - Nigeria, Kenya, Uganda and Tanzania. See *Agreement Establishing an Association Between the EEC and the United Republic of Tanzania, the Republic of Uganda and the Republic of Kenya*, 26 July 1968, 8 I.L.M. 741 [Arusha Convention].

14 The Lomé Convention came into being to reflect the joining of the former British Colonies into the Yaoundé trade process, which only became possible with the accession of the United Kingdom to the EC Treaty in 1973.

15 See K.R. Simmonds, "The Lomé Convention and the New International Economic Order" (1976) 13 C.M.L. Rev. 315 [Simmonds, "New International Economic Order"]; see also K.R. Simmonds, "The Lomé Convention: Implementation and Renegotiation" (1979) 16 C.M.L. Rev. 425 [Simmonds, "Implementation and Renegotiation"].

16 See generally Robert E. Hudec, *Developing Countries in the GATT Legal System* (Aldershot: Gower (for the Trade Policy Research Center), 1987) [Hudec, "Developing Countries in GATT"].

17 *Protocol Amending the General Agreement on Tariffs and Trade to Introduce a Part IV on Trade and Development*, 8 February 1965, 572 U.N.T.S. 320, 17 U.S.T. 1977 [*GATT 1965*] at XXXVI(8).

18 *Differential and More Favourable Treatment: Reciprocity and Fuller Participation on Developing Countries*, GATT C.P. Dec. L/4903, 26th Supp. B.I.S.D. (1980) 203, online: World Trade Organization

Clause, while establishing the tenet of special and differential treatment, reinforced the principle of non-reciprocity in the following words:

> 5. The developed countries do not expect reciprocity for commitments made by them in trade negotiations to reduce or remove tariffs and other barriers to the trade of developing countries, i.e., the developed countries do not expect the developing countries, in the course of trade negotiations, to make contributions which are inconsistent with their individual development, financial and trade needs. Developed contracting parties shall therefore not seek, neither shall less-developed contracting parties be required to make, concessions that are inconsistent with the latter's development, financial and trade needs.
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> 6. Having regard to the special economic difficulties and the particular development, financial and trade needs of the least-developed countries, the developed countries shall exercise the utmost restraint in seeking any concessions or contributions for commitments made by them to reduce or remove tariffs and other barriers to the trade of such countries, and the least-developed countries shall not be expected to make concessions or contributions that are inconsistent with the recognition of their particular situation and problems.[19]

Consequently, during the negotiations for *Lomé I*,[20] the ACP countries requested that the principle of non-reciprocity should operate with respect to the trading relationship to be established. In recognition of this, the preamble to *Lomé I* recorded that the parties resolved to establish "a new model of relations between developed and developing States, compatible with the aspirations of the international community towards a more just and more balanced economic order."[21] The only obligations imposed on the ACP countries in the trade regime were that they should not discriminate against member states and they should grant treatment to the EC which is no less favourable than most-

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<http://www.wto.org/english/docs_e/legal_e/enabling_e.pdf> [Enabling Clause]. See Abdulqawi A. Yusuf, "Differential and More Favourable Treatment: The GATT Enabling Clause" (1980) 14 J. of World Trade Law 488.

[19] Enabling Clause, *supra* note 18.

[20] *ACP-EEC Convention of Lomé*, 28 February 1975, [1976] O.J. (L25) 2, 14 I.L.M. 327 [*Lomé I*].

[21] *Ibid.*

favoured-nation status.[22] The abandonment of reciprocity in trade relations with a group of developing countries was seen as a significant concession by the EC in response to the demands for a New International Economic Order.[23]

The non-reciprocity principle thus became a feature of the *Lomé I* Convention. It was retained by the *Lomé II* Convention, which was signed in 1979.[24] *Lomé III*[25] reinforced the principle by providing in Article 18 that the trading arrangements "shall not comprise any element of reciprocity for those States as regards free access."[26] Chapter 4 of the *Lomé IV* agreement,[27] which sets forth the principles governing the cooperation instruments between the ACP and EU, provides that non-reciprocity should apply between the contracting parties. Accordingly, Article 18 of *Lomé IV* indicates that the general trade regime is based on the principle of free access of products of the ACP countries to the European market.

The principle of non-reciprocity was further enhanced by the provisions of Article 174 of *Lomé IV*, which stated explicitly that "in view of their present development needs, the ACP States shall not be required for the duration of this Convention to assume, in respect of imports of products originating in the Community, obligations corresponding to the commitment entered into by the Community under this Chapter in respect of imports of the products originating in the ACP States."[28] Consequently, it became clear that *Lomé IV*, just like the earlier Lomé Conventions, established unilateral preferences in favour of the ACP countries while EC products did not enjoy any preferential access to ACP

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[22] *Ibid.* at 7(2).

[23] See Simmonds, "New International Economic Order", *supra* note 15 at 316.

[24] *Second ACP-EEC Convention of Lomé*, 31 October 1979, [1980] O.J. (L347) 2, 19 I.L.M. 327 [*Lomé II*]. For an analysis of Lomé II trade provisions see K.R. Simmonds, "The Second Lomé Convention: the Innovative Features" (1980) 17 C.M.L. Rev. 415 [Simmonds, "Innovative Features"].

[25] *Third ACP-EEC Convention of Lomé*, 8 December 1984, 24 I.L.M. 588 [*Lomé III*]. See also Kenneth Simmonds, "The Third Lomé Convention" (1985) 22 C.M.L. Rev. 389 [Simmonds, "Third Lomé Convention"].

[26] Annex XL of Lomé III, *ibid.*, states that the "ACP States shall grant to the Community treatment no less favourable than that which they grant to developed States under trade agreements where those States do not grant ACP States greater preferences than those granted by the Community."

[27] *Fourth ACP-EEC Convention of Lomé*, 15 December 1989, 29 I.L.M. 783 [*Lomé IV*]. See also K.R. Simmonds, "The Fourth Lomé Convention" (1991) 28 C.M.L. Rev. 521 [Simmonds, "Fourth Lomé Convention"].

[28] Lomé IV, *supra* note 27.

markets.[29] To give effect to this preferential trade regime, the EU, by virtue of different protocols annexed to *Lomé IV*, assumed special commitments to guarantee preferential treatment for ACP countries in respect of certain products vis-à-vis competitors from third countries.[30]

To illustrate, Article 1 of the Fifth Protocol provided that, in respect of banana exports to the EU market, no ACP state "shall be placed, as regards access to its traditional markets and its advantages on those markets, in a less favourable situation than in the past or at present."[31] In the case of rum, Protocol Six provided for an annual quota within which rum could be imported duty-free;[32] while in the sugar protocol the EU undertook to purchase and import, for an indefinite period and at guaranteed prices, defined metric tons of sugar originating from specific ACP countries.[33] These protocols further entrenched the one-sided liberalization introduced by the *Lomé I* Convention as a response to the peculiar developmental needs of the ACP countries.

Criticism of the Preferential Regime

The Lomé preferential trade regime was bound to generate criticism sooner rather than later. In due course, third party countries – particularly those from Latin America who were not part of the ACP group but were classified as "developing" – began to express their discontent with the preferential trade regime that the ACP members enjoyed under the Lomé Conventions as a result of the applicability of the principle of non-reciprocity to their trade relations with the EU. The Latin American countries were apprehensive that the exports of tropical products from the preferred ACP nations would displace theirs and generally depress world prices.[34] They argued that, contrary to the rules established by the World Trade Organization, the ACP states enjoyed more favourable treatment to the EU markets; particularly under Articles I(1) (dealing with most-favoured-nation treatment) and XXIV (allowing preferences only in the framework of a free trade area or customs union where duties and other restrictive regulations are eliminated on substantially all the trade between the constituent territories) of *GATT*.

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[29] J. Huber, "The Past, Present and Future ACP-EC Trade Regime and the WTO" (2000) 11 E.J.I.L. 427 at 429.
[30] "Third Countries" and "Third Party Countries" in this article refer to Non-ACP Countries.
[31] Lomé IV, *supra* note 27 at 897.
[32] *Ibid.* at 898.
[33] *Ibid.* at 899.
[34] Grilli, *supra* note 5 at 12.

These complaints were similar to those raised at the inception of the *Lomé I* Convention in 1975. When *Lomé I*, establishing the regime of non-reciprocal trade preferences for the ACP countries, was examined in a *GATT* working party in 1976,[35] the then European Communities argued that the Community had, for its part, liberalized "substantially all trade" as required by Article XXIV of *GATT*. As far as the ACP countries were concerned, Part IV of *GATT*[36] (especially Article XXXVI) had to be considered in conjunction and together with Article XXIV. Some other members of the working party were of the view, however, that in any regional trading arrangement under Article XXIV all parties would have to enter into obligations corresponding to the commitments entered into by the other parties.[37] 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. It could only observe that "the parties to the Convention were prepared to periodically supply information and to notify any changes to the Lomé Convention."[38] This was clearly a stalemate and, especially for the ACP countries, represented an unsatisfactory state of affairs. The Lomé regime, which granted them preferential non-reciprocal trade with the EU, was increasingly coming under censure by third party countries who opposed similar developments at the Uruguay Round of the World Trade talks.

Uruguay Round and the Banana Dispute

In 1993, as part of the final round of negotiations to establish a new trading regime at the multilateral level, another *GATT* working party examined the compatibility of *Lomé IV* with *GATT* provisions.[39] The Community and the ACP countries again argued that nothing in Part IV of *GATT* prohibited a contracting party from invoking Article XXXVI(8) in conjunction with Article XXIV and that, since the preferences granted by the EU were non-reciprocal, they complied with Article XXXVI(8) of *GATT*. Accordingly, the Community did not consider that there was any necessity for requesting a waiver under Article XXV(5); which provides that, in exceptional circumstances not elsewhere provided for in *GATT*,

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35 GATT, *The ACP-EEC Convention of Lomé: Report of the Working Party adopted on 15 July 1976*, GATT Doc. L/4369, 32nd Sess., 23rd Supp. B.I.S.D. (1977) 46 [Report of the Working Party].

36 Part IV was introduced in 1965 to make special provisions for developing countries to enable them benefit from world trade. See *supra* note 17 and accompanying text.

37 Report of the Working Party, *supra* note 35 at 54.

38 *Ibid.* at 55.

39 See the Report of the Working Party adopted on 4 October 1994, GATT BISD, 41st Suppl. 125 at 128.

the contracting parties may waive an obligation imposed upon a contracting party.

It is arguable that the EU adopted this position because it perceived at that time that the overall objective of a regional preferential trade agreement such as the Lomé Convention was the economic development of the ACP countries. In the opinion of the EU, given the special relations between it and the ACP group, the United Nations' *Charter* mandated that it should promote the economic and social development of these countries. Trade preferences would be helpful to the economic development of the ACP countries by sustaining their exports.[40] Based on this ideology and on economic grounds, France and the United Kingdom clearly indicated during the *GATT* negotiations that their acceptance of non-discrimination was tempered by the perceived need for a pragmatic application of this principle.[41] In their view, dealing with developing countries required pragmatism as the economic conditions prevailing in most of these nations were significantly different from those faced by the developed members of *GATT*.[42]

An increasing number of members of the *GATT* working party, however, strongly rejected the arguments of the EU. They emphasized that Part IV only endorsed special treatment in favour of developing countries on a generalized basis. They further argued that *Lomé IV* violated most-favoured-nation treatment and that it would only be in conformity with the *GATT* provisions if the parties to *Lomé IV* were granted a waiver from their contractual obligations under the provisions of Article XXIV of *GATT*.[43] Again, the working party did not reach any unanimous conclusions on this matter. It is noteworthy that within a week of the adoption of that working party's report on 4 October 1994, the EU and the ACP countries who were party to *GATT* requested a waiver under Article XXV(5) from the obligations of the EU under Article I(1).[44] They did this without prejudice to their position that *Lomé IV* was entirely compatible with their obligations under Article XXIV of *GATT* in light of Part IV.[45]

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40 Grilli, *supra* note 5 at 12.
41 *Ibid.* at 13.
42 *Ibid.*
43 Report of the Working Party, *supra* note 39 at 127.
44 See *ACP Countries-European Communities Fourth Lome Convention: Request for Waiver*, Document L/7539, circulated on 10 October 1994 for GATT Council meeting on 10 November 1994; amended in L/7539/Corr.1 on 3 November 1994.
45 The waiver was granted on 14 October 1996 by the WTO General Council until 29 February 2000. In accordance with its provisions, waivers could be granted from Article 1 of *GATT* "to the extent necessary to permit the European Communities to provide preferential treatment for products originating in ACP

What may have prompted this change of mind, at least on the part of the EU? It is submitted that the need to conclude negotiations on the emerging WTO agreement to regulate multilateral trade was a decisive factor that forced the EU and the ACP countries to seek a waiver under *GATT* Article XXV(5). The negotiating parties at the Uruguay Round had to conclude negotiations by 1 January 1995, which was the date set for the establishment and commencement of a new trade regime to be regulated by the World Trade Organization. The principal objective of the new trade regime was to promote the most-favoured-nation[46] and national treatment[47] principles, both of which aspire to establish and advance equal treatment and non-discrimination among members. The EU was also concerned that failure to resolve the Lomé issue, by succumbing to the pressures to end the Lomé non-reciprocal trade arrangement, may have disadvantaged or marginalized it within the emerging multilateral trade regime and led to loss of market access opportunities in Asia and Latin American countries.[48] The EU requires good market access and fast growing markets if it is to remain an economic world power.

The waiver, however, did not bring the matter to an end. Other developing countries, which were not part of the ACP group, continued to protest the Lomé preferential trade – especially the banana protocol attached to the *Lomé IV* Convention. Thus, the establishment in 1994 of the WTO and its binding dispute settlement mechanism provided an opportunity for these third party countries to challenge the banana

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States as required by the relevant provision of the Fourth Lomé Convention without being required to extend the same preferential treatment to like production of any other contracting party." See WTO, *EC- The Fourth ACP-EC Convention of Lomé, extension of waiver, WTO General Council Decision of 14 October 1996*, WTO Doc. WT/L/186 (1996) [*WTO Waiver Extension*]. A similar waiver was granted by the WTO 2001 Doha Ministerial Conference in respect of the interim preferential trade regime under the Cotonou Agreement, *supra* note 3, until 31 December 2007, to the extent necessary to permit the European Communities to provide preferential tariff treatment for products originating in ACP States as required by Article 36.3, Annex V and its Protocols of the ACP-EC Partnership Agreement. WTO, Ministerial Conference, *European Communities - The ACP-EC Partnership Agreement*, WTO Doc. WT/MIN(01)/15 (2001).

46 Most-favoured-nation status is when a country enjoys all the lowered tariffs and reductions of trade barriers that all other members of the World Trade Organization receive. All members of the WTO have most-favoured-nation status and all receive the same trade benefits as all other members.

47 National treatment means treating foreign and locally produced goods and services equally.

48 O. Babarinde and G. Faber "From Lomé to Cotonou: Business as Usual?" (2004) 9 European Foreign Affairs Review 27 at 29 – 31.

regime under the Lomé Convention. It is worthy of note that, although the banana regime had been criticized previously by two *GATT* panels,[49] changes to the regime never took place because of *GATT*'s ineffective dispute settlement system. It ensured that the EU could ignore the panel's reports and continue its banana regime with the ACP countries.[50]

Consequently, when the WTO's new dispute settlement system was finally operational it was inevitable that the Lomé banana regime would be a target. Indeed, on 5 April 1996, a group of developing countries comprised of Ecuador, Guatemala, Honduras and Mexico (the dollar zone banana producers), supported by the United States,[51] embarked upon a consultative procedure which resulted in the drafting of several reports and led to the establishment of a Special Group to resolve the very complex dispute relating to bananas.[52] The plaintiffs contested the import regime for bananas, instituted by the European Economic Community's *Regulation on the Common Organisation of the Market in Bananas* (COMB),[53] which enabled the EU to grant preferential treatment to bananas originating from ACP countries over and above that enjoyed by the plaintiffs who were also developing nations. Under the

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[49] *EEC-Member States' Import Regimes for Bananas* (1993) WTO Doc. DS32/R (Panel Report) (unadopted); the second panel submitted its report on February 11, 1994 (unadopted); see *European Communities—Regime for the Importation, Sale and Distribution of Bananas (Complaint by the United States)* (1997), WTO Doc. WT/DS27/R/USA at para. 3.29 (Panel Report) [Banana Regime Panel].

[50] Joseph Pelzman, "The WTO Dispute Settlement Mechanism: The Case of Bananas" (paper presented at the International Trade and Finance Association Annual Conference, held in conjunction with the Allied Social Sciences Association, New York, 4 January 1999), online: The George Washington University <http://www.sbpm.gwu.edu/eucenter/eurc/The%20WTO%20Dispute%20Settlement%20Mechanism%20-%20The%20Case%20of%20Bananas.pdf>.

[51] The United States Government was pressured into supporting the Latin American Countries in their dispute against the EU by US corporations who had banana plantations in South America.

[52] *European Communities – Regime applicable to the importation and distribution of bananas*, Appeal Body (AB) Report and Special Group Reports, WTO Docs. WT/DS27/R/USA, WT/DS27/R/ECU, WT/DS27/R/GTM and WT/DS27/R/HND (22 May 1997), as amended by AB Report, WT/DS27/AB/R (9 September 1997) adopted on 25 September 1997; Arbitration Report WT/DS27/15, 7 January 1998; *Arbitration – EU appeal against Article 22.7 of Understanding*, WT/DS27/ARB, 9 April 1999; *Arbitration – EU Appeal against Article 22.6 of the Understanding*, WT/DS27/ARB, 9 April 1999; *SG Report – EC Appeal against Article 21.5*, WT/DS27/RW/ecu (12 April 1999) adopted on 6 May 1999 and *Arbitration – EC Appeal against 22.6 of Understanding*, WT/DS27/ABR/ECU, 24 March 2000.

[53] EC, *Council Regulation (EEC) No 404/93 of 13 February 1993 on the Common Organization of the Market in Bananas*, [1993] O.J. L47/1 [COMB].

trade with third countries element of COMB, three import categories were established. Two categories covered traditional ACP and non-traditional ACP bananas imports, and the third category dealt with third country imports. Traditional ACP imports were allowed to enter the Community duty-free up to a ceiling limit fixed for each country, whereas a maximum duty-free quota of 90,000 tonnes was set for non-traditional ACP imports. Duty-free import access was not granted to third country bananas, but a reduced tariff of 75ECU per tonne operated up to the overall 2.1 million tonnes import quota ceiling.[54]

The first series of Panel reports issued in 1997 found the EU's banana regimes contravened Article I(1) of *GATT* on most-favoured-nation treatment and Article XIII on non-discrimination. The Appellate Body largely upheld this view, adding that the EU would only escape liability if the Lomé waiver covered it.[55] The text of the Lomé waiver states that liability under Article I(1) of *GATT* would be disregarded "to the extent necessary to permit the community [to] provide preferential treatment for products originating in ACP states as required by the relevant provisions of the Fourth Lomé Convention."[56] In considering whether the Lomé waiver could save the ACP-EU banana regime, the Appellate Body rejected the Panels' conclusion that "real effect" should be given to the wording of the waiver, insisting that the language was "clear and unambiguous."[57] Accordingly, and in contrast to the Panels, it found that the waiver would not extend to violations of Article XIII because the text only referred to exemption from Article I(1) of *GATT* and that, if the *GATT* Contracting Parties had intended to extend the coverage of the Lomé Waiver to Article XIII, the wording would reflect that. The Panels had reasoned that, since both Articles I(1) and XIII were designed to promote non-discrimination in international trade, by implication the waiver must also extend to breaches of Article XIII.[58] They had concluded

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[54] Special arrangements were made for Colombia, Costa Rica, Venezuela and Nicaragua under the *Framework Agreement on Banana Imports*, 29 March 1994, 34 I.L.M. 1 (entered into force 1 January 1995) [*Bananas Framework Agreement*] See EC, *Commission Regulation (EC) No. 3224/94 of 21 December 1994 Laying Down Transitional Measures for the Implementation of the Framework Agreement on Bananas as Concluded as part of the Uruguay Round of Multilateral Trade Negotiations*, [1994] O.J. L 337/72.

[55] *European Communities – Regime for the Importation, Sale and Distribution of Bananas (Complaint by Ecuador, Honduras, Guatemala, Mexico and the United States)* (1997), WTO Doc. WT/DS27/AB/R at para. 191 (Appellate Body Report) [Banana Regime Appeal].

[56] See WTO Waiver Extension, *supra* note 46.

[57] See Banana Regime Appeal, *supra* note 55 at para. 182.

[58] Banana Regime Panel, *supra* note 49 at paras. VII.106 – 107.

that to find otherwise would not give "real effect" to the wording of the waiver.[59]

The Panels' reasoning is much preferred; the Appellate Body's interpretation of the coverage of the waiver was too narrow and unduly legalistic and ultimately led to a restrictive scope for the Lomé waiver. It would have been possible for the Appellate Body to hold that the waiver extended to the breaches of Article XIII because the Lomé Convention promoted the objective of improving the standards of living and sustainable development in ACP countries as reiterated in the WTO Agreement[60] and that restricting the waiver's coverage would undermine the stated objectives. The failure of the Lomé waiver to save the preferential banana regime enjoyed by the ACP countries also signalled the end to the one-sided liberalization trade regime under the Lomé Conventions. The ACP-EU trade relations were seen as constituting a unilateral form of liberalization in breach of the reciprocity requirement set forth in Article XXIV8(b) of *GATT*.[61] Liberalization of trade was not only an obligation of the EU but the ACP countries were also obliged to make reciprocal commitments if the ACP-EU trade relations were to be consistent with WTO trade rules. This demand for reciprocity has altered the ACP-EU trade partnership and in this regard the influence of the World Trade Organization cannot be overstated.[62] As a major player in the WTO, the EU had to bring its bilateral trade regime in line with WTO rules in order not to lose its influence within the new multilateral trading system. The issue became how to achieve the objective of WTO-compatibility within the ACP-EU trade partnership.

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[59] *Ibid.*

[60] See *Marrakesh Agreement*, *supra* note 2 at the second preamble.

[61] See F. Smith, "Renegotiating Lomé: the impact of the World Trade Organisation on the European Community's development policy after the Bananas conflict" (2000) 25 Eur. L. Rev. 247 (argues that the WTO dispute settlement panel rulings in the banana dispute between the United States, some Latin American Countries and the European Union makes the retention of the non-reciprocal preferential trade regime under the Lomé Conventions untenable); O. Babarinde, "The Changing Environment of ACP-EU Relations" in O. Babarinde & G. Faber, eds., *The European Union and the Developing Countries: The Cotonou Agreement* (Leiden: Martinus Nijhoff Publishers, 2005) 17 (contends that, given the exclusivity of most of the privileges of Lomé, the conventions were vulnerable on legal grounds).

[62] McMahon, "Negotiating Continuity", *supra* note 11 at 43.

1996 EU Green Paper on the Future of ACP-EU Relations

The European Union's response came in the form of the 1996 *Green Paper* on the future of ACP-EU relations.[63] While stressing the need to make the ACP-EU trade partnership WTO-compatible, the *Green Paper* proffered four options.[64] The first was to maintain the status quo, which meant the preservation of the current Lomé Convention's non-reciprocal, differentiated (in respect of least developed countries), contractual, uniform scheme focusing on strict market access terms.[65] The second option was to integrate ACP countries into the EU Generalized System of Preferences. This would involve grouping the least developed ACP countries in the same category as other least developed non-ACP countries, while the more advanced ACP countries would graduate into the normal scheme.[66] The third option was uniform reciprocity. It would require all ACP countries to extend reciprocity (consistent with WTO rules) after a common transition period to EU exports.[67] The final option, termed "differentiated reciprocity", would also require the ACP countries to make reciprocal concessions to the EU in trade, but as homogenous regional groups rather than as one trading bloc.[68] The *Green Paper* also recognized that the ACP countries would be able, in agreement with the EU, to select the trade option that best fit their needs and capabilities.[69]

The aim of the *Green Paper* was to provide food for thought, trigger wide-ranging debate and pave the way for dialogue among those concerned by the expiry of the Lomé Convention. To what extent this objective was achieved in reality remains in doubt. Although a number of discussions on the *Green Paper* where held in Europe and in ACP capitals, at those meetings the European Commission repeatedly

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63 European Commission, *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* (Brussels: European Commission, 1996), online: Euforic <http://www.euforic.org/greenpap/intro.htm> [Green Paper].

64 For an analysis of the trade options post-Lomé, see J.A. McMahon, "Lomé V: Towards a New Trade Horizon?" [1997] 4 Web J.C.L.I., online: Web Journal of Current Legal Issues <http://webjcli.ncl.ac.uk/1997/issue4/mcmahon4.html> [McMahon, "New Trade Horizon"]. See also Melaku Geboye Desta, "EC-ACP Economic Partnership Agreements and WTO Compatibility: An Experiment in North-South Inter-regional Agreements?" (2006) 43 C.M.L. Rev. 1343.

65 See Green Paper, *supra* note 63, particularly chapter V.

66 *Ibid.*

67 *Ibid.*

68 *Ibid.*

69 *Ibid.*

stressed the need for any new arrangement to be WTO-compatible.[70] This effectively ruled out the first option, which called for the maintenance of the Lomé non-reciprocal trade regime; but favoured option three, which would require all ACP countries to extend reciprocity to the EU. The Final EU Commission Negotiating Mandate recommended a variant of options three and four, which in essence demanded that the ACP countries make reciprocal concessions to the EU in line with the dictates of WTO rules.[71]

It is submitted that, from the onset, the EU was determined that its future trade arrangement with the ACP countries should reflect the trends and features of the new global context, such as multilateral and regional liberalization. The Lomé trade regime was seen as incompatible with the neo-liberal economic order prevailing at the multilateral level. It should be recalled that since the 1980s there has been a dramatic shift in development thinking in the North. Neo-liberalism emerged in the North in response to the crisis of welfare capitalism in the 1970s. According to neo-liberalism, the way forward was to dismantle the welfare state and embrace the global market. The International Monetary Fund and the World Bank, strong advocates of this perspective, advised developing countries to liberalize their economies in order to achieve the economic development that had eluded them for a long time. As a consequence, it was not surprising that the European Union – as a major player within the WTO and as an initiator of policy within the ACP-EU partnership – pushed for an agenda in which trade liberalization became an objective of development cooperation.[72] Thus, future ACP-EU trade cooperation necessitated doing away with the unilateral liberalization regime operational under the Lomé Conventions and setting up a WTO-compatible free trade area or customs union in which the contracting parties would make reciprocal commitments. This transition was finally accomplished with the entry into force of the *Cotonou Agreement* in April 2003.

The Cotonou Trade Regime

Given the shift in economic philosophy, the lack of proven results in the 25 years of the Lomé trade cooperation[73] and the challenge to the

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[70] A.K. Dickson, "The Unimportance of Trade Preferences" in K. Arts and A.K. Dickson, eds., *EU Development Cooperation: From Model to Symbol* (Manchester: Manchester University Press, 2004) 42 at 48.

[71] Council of the European Union, "Negotiating Directives for the Negotiation of a Development Partnership Agreement with the ACP Countries" (1998) Document 10017/98 ["EU Negotiating Mandate"].

[72] Dickson, *supra* note 70 at 56.

[73] Committee of Experts of the Conference of African Ministers of Finance, Planning and Economic Development, *Economic Report on Africa 2004: Unlocking*

EC banana preferential trade policy in the World Trade Organization by non-ACP countries,[74] the European Union became determined to change the fundamentals of the non-reciprocal and preferential trade regime established under the Lomé Conventions for the benefit of the ACP states. As a result, the *Cotonou Agreement*, which will regulate the ACP-EU partnership, introduced major changes to the traditional Lomé preferential and non-reciprocal trade regime.[75] The emphasis of the trade regime created by the *Cotonou Agreement* is to be compatible with WTO trade rules by making the trade relationship reciprocal. Indeed, the Trade Cooperation title under the *Cotonou Agreement* emphasised that the trade arrangement between the parties shall be implemented "in full conformity with the provisions of the WTO."[76]

The trade provisions of the *Cotonou Agreement* generally reflect the desire to have in place an agreement that should qualify as a free trade arrangement within the meaning of Article XXIV(5) of *GATT*, therefore rendering trade relations between the EU and ACP countries WTO-compatible without the need for a waiver. According to Article 34(1) of the *Cotonou Agreement*, "[e]conomic and trade cooperation shall aim at fostering the smooth and gradual integration of the ACP States into the world economy." Article 36(1) stresses that the parties agree to conclude "WTO-compatible trading arrangements, removing progressively barriers to trade between them and enhancing cooperation in all areas relevant to trade." The aim of these negotiations shall be to establish the timetable for the progressive removal of barriers to trade between the parties in accordance with the relevant WTO rules.[77] Negotiations of economic partnership agreements were to start in September 2002 and the agreements were to enter into force by 1 January 2008 at the latest.[78] In

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Africa's Trade Potential in the Global Economy Overview, UNECAOR 2004, E/ECA/CM.37/6, online: United Nations Economic Commission for Africa <http://www.uneca.org/cfm/2004/overview.htm> (which found that between 1975 and 1995, Africa's share of the EU market fell by two-thirds; from 6.7 to 2.7 per cent). See also the 1996 EU Green Paper, *supra* note 63, that put forward the major reasons for the need for reform of the ACP-EU relationship; Dickson, *supra* note 70.

74 B. Martenczuk, "From Lomé to Cotonou: The ACP-EC Partnership Agreement in a Legal Perspective" (2000), 5 European Foreign Affairs Review 461; S.R. Hurt, "Co-operation and Coercion? The Cotonou Agreement between the European Union and ACP States and the end of the Lomé Convention" (2003) 24 Third World Quarterly 161.

75 However, until 2008, at the latest, the Cotonou Agreement will continue to provide a non-reciprocal preferential trade regime for all ACP states. See Section 36(3) of the *Cotonou Agreement*, *supra* note 3.

76 *Cotonou Agreement*, *supra* note 3 at Article 34(4).

77 *Ibid.* at Article 37(7).

78 *Ibid.* at Article 37(1).

order to meet the January 2008 deadline, the European Union negotiated EPAs[79] with ACP countries divided into six regional groups: the Caribbean group,[80] the Central African group,[81] the East and Southern African group,[82] the Pacific group,[83] the South Africa Development Community group[84] and the West African group.[85]

DETERMINING RECIPROCITY UNDER THE EMERGING ECONOMIC PARTNERSHIP AGREEMENT

The emerging ACP-EU trade regime to be regulated by the Economic Partnership Agreements will establish a free trade area in order to be WTO-compatible. This falls under the WTO rules on regional trade agreements. According to Article XXIV(5)(c) of *GATT*, "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." Furthermore, Article XXIV(8)(b) *GATT* goes on to say that:

> 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 (except, where necessary, those permitted under Articles XI, XII, XIII, XIV, XV and XX) are eliminated on substantially all the trade between the constituent territories in products originating in such territories.

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79 For an update on the state of the negotiations see International Centre for Trade and Sustainable Development *Trade Negotiations Insights,* online: ICTSD <http://www.ictsd.org/tni/>.

80 Antigua and Barbuda, the Bahamas, Barbados, Belize, Dominica, Dominican Republic, Grenada, Guyana, Haiti, Jamaica, St Kitts and Nevis, Saint Lucia, Surinam, Trinidad and Tobago, Saint Vincent and the Grenadines.

81 Cameroon, Central African Republic, Chad, Republic of Congo, Gabon, Equatorial Guinea and Sao Tome and Principe.

82 Burundi, Comoros, Democratic Republic of Congo, Djibouti, Eritrea, Ethiopia, Kenya, Madagascar, Malawi, Mauritius, Rwanda, Seychelles, Sudan, Uganda, Zambia and Zimbabwe.

83 The Cook Islands, Federated States of Micronesia (FSM), Fiji, Kiribati, Nauru, Niue Palau, Papua New Guinea (PNG), Republic of the Marshall Islands (RMI), Samoa, Solomon Islands, Tonga, Tuvalu and Vanuatu.

84 Angola, Botswana, Lesotho, Mozambique, Namibia, Swaziland and Tanzania.

85 Cape Verde, Gambia, Ghana, Guinea, Liberia, Nigeria, Sierra Leone, Benin, Burkina Faso, Cote d' Ivoire, Guinea Bissau, Mali, Niger, Senegal and Togo.

Similar provisions to Article XXIV *GATT* are made in Article V of the *General Agreement on Trade in Services* (*GATS*), entitled "Economic Integration".[86] Article V(1) of *GATS* provides:

> This Agreement shall not prevent any of its Members from being a party to or entering into an agreement liberalizing trade in services between or among the parties to such an agreement, provided that such an agreement:
>
> (a) has substantial sectoral coverage, and
>
> (b) provides for the absence or elimination of substantially all discrimination, in the sense of Article XVII, between or among the parties, in the sectors covered under subparagraph (a), through:
>
> (i) elimination of existing discriminatory measures, and/or
>
> (ii) prohibition of new or more discriminatory measures,
>
> either at the entry into force of that agreement or on the basis of a reasonable time-frame, except for measures permitted under Articles XI, XII, XIV and XIV bis. (footnotes omitted)

Complying with the above provisions on the formation of a Free Trade Area (FTA) as envisaged under the *Cotonou Agreement* would require the ACP countries and the EU to liberalize substantially all trade between them within a reasonable time. According to the EU, this is what the EPAs are designed to achieve as the process of market opening by the ACP group will be done over a period of time. The ACP countries, on the other hand, argue that any commitment to the EPAs will entail immediate and full opening of their markets to foreign goods and services without reference to their level of development. Resolving this impasse will require careful scrutiny of the interpretation to be given to the terms "within a reasonable time" and "substantially all trade", since they are the heart of the reciprocity controversy.

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[86] *General Agreement on Trade in Services*, 15 April 1994, 33 ILM 1167 (Annex 1B of the *Marrakesh Agreement*) [*GATS*].

Timing Liberalization

In order to comply with Article XXIV of *GATT*, liberalization within a Free Trade Area must take place within a reasonable length of time. According to the EU, market opening in the EPAs will be gradual and be based on asymmetrical liberalization. In the words of the former EU Trade Commissioner, Pascal Lamy:

> Asymmetrical liberalization means differences in product coverage and the pace and timing of liberalisation on both sides. Improved market access is not just an issue of tariffs and quotas but also of non-tariff measures. And capacity is required in both the public and private sectors to make the best use of the opportunities provided.[87]

The position of the EU that the emerging trade regime with the ACP countries will be based on asymmetrical liberalization is supported by the provisions of the *Cotonou Agreement*, which allows for liberalization to be implemented over a transitional period – starting on 1 January 2008, at the least.[88] Even then, least developed countries among the ACP states have until 2020 to fully open their markets to goods and services originating from the EU.[89] The primary objective of the interim phase will be to further provide the opportunity to the ACP economies to adjust to free trade in line with WTO requirements and thereby to bolster the liberalization of ACP-EU trade. This will no doubt also meet the requirement of Article XXIV(5)(c) of *GATT*, which allows so-called interim agreements for the establishment of Free Trade Areas, provided that such interim agreements include a plan and schedule for the formation of an FTA "within a reasonable time." That latter term has now been clarified by the *Understanding on the Interpretation of Article XXIV of GATT*, adopted during the Uruguay Round, as a period that should only exceed 10 years in exceptional cases and in such cases would have to be justified.[90] Indeed, practice within the EU – South

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[87] Pascal Lamy (Statement at the Opening of the negotiations for the Economic Partnership Agreement (EPA) between the Caribbean Forum of ACP States (CARIFORUM) and the European Union, Jamaica, 16 April 2004), online: Europa World <http://www.europaworld.org/week174/speechlamy23404.htm> [Lamy Statement].

[88] *Cotonou Agreement*, *supra* note 3 at Article 37.

[89] Babarinde and Faber, *supra* note 48.

[90] *Understanding on the Interpretation of Article XXIV of the General Agreement on Tariffs and Trade 1994*, 15 April 1994, 33 I.L.M. 1161 (in Annex 1A of the Marrakesh Agreement, *supra* note 2) at para. 3.

Africa Free Trade Area confirms the time frame to be 10 - 12 years.[91] It has been argued that, given this understanding, the earliest that fully-fledged FTAs between the EU and its ACP associates will be established is 2020.[92]

ACP countries and critics of the proposed EPAs are skeptical. They contend that the current WTO rules regarding the transitional period for reciprocity with respect to asymmetrical free trade did not take into full account ACP countries' current level of development and future needs. ACP governments have expressed concern regarding the ability of their national economies and development to withstand the potential impacts of reciprocal free trade agreements. In fact, the ACP guidelines for negotiations state that: "given the possible adverse effect of reciprocity on domestic production and fiscal stability in ACP states, the latter cannot *a priori* accept to provide reciprocity in EPAs with the EU," "[ACP countries] do not have the capacity to liberalize in parallel and concurrently with the EU" and thus the implementation of tariff dismantlement should be linked to the attainment of certain development indicators.[93] These concerns appear to be credible and well-founded.

For instance, in spite of the 5- to10-year time frame granted to developing countries to bring their intellectual property rights regime in line with the *Trade Related Aspects of Intellectual Property Protection* (*TRIPS*) Agreement, most developing countries are, with the expiration of the deadline, not yet in a position to comply. Whether the time frame allowed for the ACP countries to meet the EU's market-opening demands will be sufficient to meet the concerns of the ACP governments and the non-governmental organizations (NGOs) remains to be seen. It is submitted that the emphasis should be less about imposing arbitrary timetables for achieving liberalization and more about dealing with the supply-side constraints[94] which may hinder the capacity of the ACP countries to fully implement their trade obligations. It is well documented

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91 Hurt, *supra* note 74.

92 Francis A.S.T. Matambalya and Susanna Wolf, "The Cotonou Agreement and the Challenges of Making the New EU-ACP Trade Regime WTO Compatible" (2001) 35 J. World Trade 123 at 131.

93 ACP Guidelines for the Negotiation of Economic Partnership Agreements ACP/61/056/02/FINAL, 5 July 2002, Brussels, online: European Commission <http://trade.ec.europa.eu/doclib/docs/2006/september/tradoc_130235.pdf>.

94 These constraints range from the unreliable provision of public utilities (e.g. electricity and water supply) and poor public infrastructure (run down roads and railways) through weak institutional and policy frameworks (leading to fluctuating exchange rates and high inflation) to low labour productivity (arising from poor education, health and housing provision).

that strengthening Africa's supply-side capacity is essential to more successful integration into the global economy.[95]

Weak infrastructure – such as poor road transportation, inadequate power supply and telecommunication systems, poor trade facilitation services and inadequate physical and human capital – are impediments to the development of Africa's export sectors.[96] In this regard, restructuring assistance should be made available and programs implemented so that the economies of the ACP countries would be better equipped to meet the challenges posed by looming trade liberalization with the EU. It is only by providing more trade-related assistance to ACP countries that they can bear the heavy costs associated with trade liberalization and at the same time exploit the opportunity arising from a more integrated global community.

Scope of Liberalization

The primary building block for EPAs is the establishment of free trade areas; progressively eliminating tariffs and non-tariffs, such as quotas and measures having equivalent effect, on substantially all trade between the parties.[97] How much liberalization each ACP country would have to undertake to satisfy the definition of "substantially all trade" is another issue that requires determination. Critics point out that entering into economic partnership agreements with the EU will force ACP states to liberalize all sectors of their economy in order to comply with the requirement of "substantially all trade" within the meaning of XXIV(8) of *GATT* , which would have adverse consequences for ACP countries.[98] For its part, the EU has recently clarified that, despite the EPAs demanding reciprocity in trade from ACP countries in accordance with the WTO

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[95] Economic Commission for Africa, *Economic Report on Africa 2004: Unlocking Africa's Trade Potential*, UNECAOR (2004), online: United Nations Economic Commission for Africa <http://knowledge.uneca.org/about-ecas-km-initiative/publication-special-initatives/economic-report-on-africa/past-publications/ERA%202004.pdf> [Economic Report on Africa], particularly Chapter 8 on trade.

[96] *Ibid.*

[97] *EU Guidelines for negotiating Economic Partnership Agreements with ACP Countries and Region*, online: EPA Watch <http://www.epawatch.net/general/text.php?itemID=16&menuID=12>.

[98] Actionaid International, "Trade Traps: Why EU-ACP Economic Partnership Agreement pose a threat to Africa's development" (16 December 2004), online: Actionaid <www.actionaid.org/docs/trade_traps.pdf>; Eurostep, "New ACP- EC Trade Arrangements: New Barriers to Eradicating Poverty?" (March 2004), online: Friedrich Ebert Stiftung <http://fesportal.fes.de/pls/portal30/docs/FOLDER/COTONOU/DOWNLOADS/NGO/OTHER_BACKGROUND_TRADE/EUROSTEP-EPA-POVERTY.PDF>.

trade rules, there will be no equality of obligations between the European Union and the ACP nations. According to Peter Mandelson, the current EU Trade Commissioner:

> Let me stress, up front, that our EPA agenda is emphatically not about opening markets to our own exports: it is about opening European, as well as crucial regional markets to developing countries and enabling them to take advantage of these opportunities. *To comply with our WTO obligations there has to be an element of reciprocity in these agreements, but there will be no equality in these obligations*. Our ACP partners will only be expected to open their markets progressively over a long period, and only as their capacity to trade allows. And further access to our markets will be part of the package for ACP countries which are not LDCs [Least Developed Countries].[99]

The declaration by the EU that ACP countries will be required to grant reciprocal obligations but on an unequal basis may be grounded in Article 238 of the *Treaty of Rome*, which provides the legal basis for the EU to conclude "with one or more States or international organizations agreements establishing an association involving reciprocal rights and obligations, common action and special procedures." The European Court of Justice has declared that reciprocity in the context of Article 238 does not imply equality of contractual obligations.[100] The *Cotonou Agreement* is an example of such an Association Agreement because it was concluded based on Article 238 exclusively.[101]

The foregoing notwithstanding, there is no indication as to how the inequality of obligations will be determined. Thus, ascertaining the nature of reciprocity demanded by the EPAs will require us to define the meaning of "substantially all trade" in XXIV(8) of *GATT*. The precise meaning of "substantially all trade" remains elusive,[102] since neither

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[99] Peter Mandelson, Address (Speech presented to INTA Committee, European Parliament, 23 May 2005), online: European Commission <http://ec.europa.eu/commission_barroso/mandelson/speeches_articles/sppm029_en.htm> [emphasis added].

[100] *Conceria Deniele Bresciani v. Administrazione Italiana delle Finanze*, C-87/75, [1976] E.C.R. I-129 at para. 22, online: British and Irish Legal Information Institute <http://www.bailii.org/eu/cases/EUECJ/1976/R8775.html>.

[101] Elena G. Fierro, *The EU's Approach to Human Rights Conditionality in Practice* (The Hague: Martinus Nijhoff Publishers, 2003) at 27.

[102] A 2005 European Communities submission on Regional Trade Agreements failed to arrive at the exact meaning of the term "substantially all trade". See

GATT nor the WTO has provided a workable legal definition. During the Uruguay Round negotiations, no clarification of Article XXIV(8) took place and the *GATT* contracting parties were reluctant to submit the interpretation of the term "substantially all trade" to dispute settlement panels.[103]

To what extent can Article V of *GATS*, which makes similar provisions, be of assistance? Pursuant to Article V(1)(a) of *GATS*, an economic integration agreement such as the ACP-EU Economic Partnership Agreement, must have "substantial sectoral coverage." The footnote to the provision states that "substantial sectoral coverage" should be "understood in terms of the number of sectors, volume of trade affected and modes of supply." The footnote also provides that an economic integration agreement may not *a priori* exclude any of the four modes of supply. This may mean that no economic integration agreement should *a priori* exclude investment and labour mobility in the sense of modes 3 and 4.[104]

WTO members are not in agreement as to whether one or more service sectors can be excluded from an economic integration agreement. The use of the wording "number of sectors" in the footnote to paragraph 1(a) of Article V of *GATS*, though, seems to indicate that not all sectors must be covered under an economic integration agreement to meet the "substantial sectoral coverage" test.[105] However, it is clear that the number of exclusions must be limited, as the Panel in the *Canada – Auto* case[106] stated:

> …the purpose of Article V is to allow for ambitious liberalization to take place at a regional level, while at the

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WTO, *Submission on Regional Trade Agreements by the European Communities to the Negotiating Group on Rules*, WTO Doc. TN/RL/W/179 (2005), online: World Trade Organization <http://docsonline.wto.org/GEN_highLightParent.asp?qu=&doc=D%3A%2FDDFDOCUMENTS%2FT%2FTN%2FRL%2FW179%2EDOC%2EHTM&curdoc=21&popTitle=TN%2FRL%2FW%2F179> at 5.

[103] Mitsuo Matsushita, Thomas J. Schoenbaum and Petros C. Mavroidis, *The World Trade Organization: Law, Practice and Policy* (Oxford: Oxford University Press, 2003) at 357 – 360.

[104] Peter Van den Bossche, *The Law and Policy of the World Trade Organization*: *Text, Cases and Materials* (Cambridge: Cambridge University Press, 2005) at 663.

[105] *Ibid.*

[106] WTO, *Canada – Certain Measures Affecting the Automobile Industry: Report of the Panel*, WTO Docs. WT/DS139R and WT/DS/42/R (11 February 2000, adopted 19 June 2000), online: World Trade Organization <http://www.wto.org/english/tratop_e/dispu_e/6100d.pdf> [*Canada – Auto* case].

> same time guarding against undermining the MFN obligation by engaging in minor preferential arrangements.[107]

Given the lack of a clear and authoritative pronouncement from the WTO, it remains unclear how much trade the proposed EPAs will cover. However, attempts have been made by various authors to define the term "substantially all trade". According to Jurgen Huber, the appropriate approach is probably to make a quantitative and a qualitative assessment of the scope of trade to be covered. The quantitative requirement would be that a high coverage of around 90 percent of current trade and 90 percent of the tariffs lines listed in the harmonized system must be achieved by the FTA. The qualitative test would be that no major sector of trade should be excluded.[108] This view is consistent with the practice under the EU-South Africa Free Trade Agreement, where the product coverage is 90 percent.[109] Others have suggested that the 90 percent product coverage refers to FTAs between developed countries and that, since the EPAs are a free trade arrangement between a group of developed and developing nations, there is a need to agree that the definition of "substantially all trade" in Article XXIV of *GATT* be significantly below the 90 percent average.[110]

Matambalya and Wolf are of the view that the term "substantially all trade" should prevent the classification of too many products and/or sectors as "sensitive" for the purpose of excluding them from liberalization, but concede that the failure of the WTO provisions to specify concrete indicators or thresholds will make the task of classification contentious.[111] Stevens and Kennan, adopting a literal interpretation of Article XXIV of *GATT*, have concluded in a report on the effects of reciprocity under the ACP-EU economic partnership agreement that, because not all trade must be liberalized, ACP countries may be required to liberalize only about 80 percent of their imports. This would leave some room for maneuvering in order to maintain their current barriers on some imports from the EU.[112] Their study, which is based on

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107 *Ibid.* at 10.271.

108 Huber, *supra* note 29 at 434.

109 European Research Office, *What Does the Recent ACP-EU Agreement Mean for Southern Africa's Future Trade Relation with the EU?* (Brussels: European Research Office, 2000).

110 Mark Pearson, "Negotiating the Trade and Development Dimension of EPAs – A Way forward", online: (2005) 4:3 Trade Negotiation Insights 1 <http://www.ictsd.org/tni/tni_english/TNI_EN_4.3.pdf>.

111 Matambalya and Wolf, *supra* note 92 at 135.

112 Christopher Stevens and Jane Kennan, "EU-ACP Economic Partnership Agreements: The Effects of Reciprocity" *Institute of Development Studies* (May

55 ACP countries (excluding the Pacific Countries), found that ample scope exists to restrict liberalization; a vital part of the EPA negotiations will be the amount of room there is to maneuver and how the ACP countries will make use of it.[113]

A literal interpretation of "substantially all trade" may imply that parties involved in an FTA in accordance with Article XXIV of *GATT* have some regulatory space to impose restriction on certain imports. Given that the WTO provisions do not specify concrete indicators, such as criteria for excluding a particular sector from the arrangement or percentage of trade to be excluded, the literal meaning of "substantially all trade" is at best ambiguous.[114] This notwithstanding, the scope and extent of liberalization required of the ACP countries in the emerging trade regime can be gleaned from the provisions of the *Cotonou Agreement*. For instance, Article 35(1) states that the principles of economic and trade cooperation shall be "based on a comprehensive approach." Article 36, relating to the Agreement's modalities, provides that the new trade regime to regulate the parties in the future shall be compatible with the WTO rules, thereby removing trade barriers between them progressively and enhancing cooperation in all trade-related areas.

In furtherance of the liberalization agenda, Article 41(4) provides that the parties also agree to the objective of extending "their partnership to encompass the liberalisation of services in accordance with the provisions of *GATS*." Although the provision states that this extension will not occur until after the ACP nations have acquired some experience in applying the most-favoured-nation treatment under *GATS*, it nevertheless obliges the contracting parties to liberalize their trade in services under the EPA. This is a clear departure from the *Lomé IV* convention.[115] In addition to incorporating *GATS*, the *Cotonou Agreement* acknowledges the need for parties to ensure an adequate and effective level of protection of intellectual, industrial and commercial property rights and other rights covered by *TRIPS*.[116] Articles 47(1) and 48(1) of

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2005), online: Southern African Regional Poverty Network <http://www.sarpn.org.za/documents/d0001254/EPA_reciprocity_BP2.pdf>.

[113] *Ibid.*

[114] Matsushita, Schoenbaum and Mavroidis, *supra* note 103 at 357.

[115] See Articles 114 – 134 of Title IX of Part II (fields of cooperation) of Lomé IV, *supra* note 27, relating to the development of services. Accordingly, Article 114(2) – relating to the objectives and principles of cooperation in this area – provides that the EU should support the efforts of the ACP States, aiming to 'increase their domestic capacity to provide services' with a view to improving the working of their economies, relieving balance of payments constraints and stimulating regional integration processes.

[116] *Cotonou Agreement*, *supra* note 3 at Article 46.

the *Cotonou Agreement* respectively reaffirm the parties' commitment to the *Agreement on Technical Barriers to Trade* (*TBT Agreement*) and the *Agreement on the Application of Sanitary and Phytosanitary Measures* (*SPS*), both annexed to the *Marrakesh Agreement.*[117] Fundamentally, the *Cotonou Agreement* acknowledges the prominent role that private investment can play in the development of ACP countries.[118]

In order to achieve this objective, the parties have incorporated provisions on investment guarantees,[119] promotion into the EU-ACP trade and commercial cooperation,[120] and competition policy.[121] Coincidentally, two of these issues – investment and competition policy, together with transparency in government procurement – were not included in the Doha Development Round agenda of the World Trade talks. This was because the developing countries, specifically ACP governments, rejected the idea of discussing these issues at the 2003 WTO Ministerial meeting in Cancun, Mexico.[122] Clearly, the wide ranging trade issues included in the *Cotonou Agreement* provide a guide to the scope of liberalization expected of the ACP states by the EU in the proposed EPAs as a means of meeting the test of "substantially all trade". Indeed, existing free trade agreements that the EU has recently negotiated indicate how extensive the liberalization commitments by ACP countries can go. For instance, the EU-Mexico free trade agreement, which came into effect in 2000, is very comprehensive and involves the liberalization of industrial and agricultural products, services, investment and government procurement.[123] With regard to government procurement, the Commission notes that "EU operators will have guaranteed access to Mexico's lucrative markets on the best terms."[124]

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117 *Supra* note 2.

118 Article 21(1) of the *Cotonou Agreement*, *supra* note 3, indicates that cooperation between the EU and ACP countries shall support economic and institutional reforms and policies at national and regional levels, aiming at creating a favourable environment for private investment and the development of a dynamic, viable and competitive private sector.

119 *Ibid.* at Article 77.

120 *Ibid.* at Article 78.

121 *Ibid.* at Article 45.

122 See generally Bridges Weekly Trade News Digest, online: (2003) 7:28 <http://www.ictsd.org/weekly/03-08-21/BRIDGESWeekly7-28.pdf>. It worthy of note that at Doha Development Agenda of the World Trade Talks, investment, government procurement and competition policy were withdrawn and put into working groups.

123 EC, *Decision No 2/2000 of the EC-Mexico Joint Council of 23 March 2000*, [2000] O.J. L 157/10, online: European Commission <http://trade.ec.europa.eu/doclib/docs/2004/october/tradoc_111722.pdf>.

124 European Commission, External Relations Release, IP/00/703 "Entry into force of EU-Mexico Free Trade Agreement Signals Start of New Era in Europe's

Access to markets at federal government levels "includes most government enterprises and key sectors," such as petrochemical, electricity, dredging, construction and information technology.[125] The EU-Chile agreement, which came into effect in 2003, also involves reciprocal liberalization in goods, services, government procurement, investment and capital flows.[126]

EFFECT OF TRADE RULES HARMONIZATION ON ACP COUNTRIES

The new trade regime requiring ACP countries to enter into WTO-compatible trading arrangements has generated widespread criticism. At the centre of the controversy is the impact such reciprocal trade, as demanded by WTO rules, would have on ACP countries. A Report by Actionaid argues that reciprocal trade liberalization is at the heart of the proposed *Economic Partnership Agreement* between the EU and ACP countries and concludes that reciprocal trade liberalization between rich developed nations and poor developing countries is a major threat to development and poverty reduction.[127] ACP countries are also concerned about the potential that the emerging WTO-compatible trade regime will have on them. For example, in the *Libreville Declaration*, after reaffirming their commitment to the obligations arising from the international trading system, the ACP countries continued:

> Nevertheless, we are deeply disturbed by the prospect of disruption in our fragile and vulnerable economies and disintegration of the social fabric of our countries which would arise from the insensitive application of WTO rules and obligations.[128]

Relations with Mexico" (3 July 2000), online: European Commission <http://ec.europa.eu/external_relations/news/2000/07_00/ip_00_703.htm>.

[125] See EC, *Decision No 2/2000 of the EC/Mexico Joint Council of 23 March 2000*, [2000] O.J. L 157/10, online: SICE <http://www.sice.oas.org/TPD/MEX_EU/Implementation/JointCouncil/DEC02_2000_e.pdf> at Article 25 (covering trade in goods, government procurement, cooperation for competition, consultation on intellectual property rights and dispute settlement).

[126] See *Chile-European Community Association Agreement*, 18 November 2002, online: SICE <http://www.sice.oas.org/Trade/chieu_e/cheuin_e.asp> (entered into force 1 February 2003).

[127] Actionaid International, *supra* note 98.

[128] The Libreville Declaration, adopted by the First meeting of ACP Heads of State and Government, ACP/28/051/97 [FINAL] Libreville Gabon, 7 November 1997,

In the search for a fair international trading system (i.e. development oriented), the ACP countries have proposed that the existing non-reciprocal trade preferences system be maintained for a period sufficient for the ACP group to improve the competitiveness of their economies. This point was re-emphasized at the joint ACP-EU ministers' meeting held in Gaborone on 6 May 2004, where the President of Botswana expressed grave doubts concerning reciprocity by defending the non-reciprocal trade preferences under Lomé.[129] He described them as "equal to none, in their capacity to create opportunities for the integration of the economies of ACP countries into the world economy."[130] The President then issued the following warning about EPAs:

> You will understand, therefore, if we are apprehensive about the proposed Economic Partnership Agreements (EPAs), which are currently being negotiated. This is in spite of repeated EU assurances that the Economic Partnership Agreements would not disadvantage any ACP country.
>
> We fear that our economies will not be able to withstand the pressures associated with liberalization, as prescribed by the World Trade Organization (WTO). This therefore challenges us all as partners to ensure, that the outcome of the ongoing EPA negotiations does not leave ACP countries more vulnerable to the vagaries of globalization and liberalization, thus further marginalizing their economies.[131]

The European Union, on the other hand, invoking the need to comply with Article XXIV of *GATT*, argues that the EPAs represent the only way to achieve WTO compatibility.[132] The effect is that, unlike in the

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online: ACP Group <http://www.acpsec.org/summits/gabon/2805197e.htm> at para. 13.

[129] However, see WTO, *World Trade Report 2004*, online: WTO <http://www.wto.org/english/res_e/booksp_e/anrep_e/world_trade_report04_e.pdf> at 26 - 44 (which questions the effectiveness of the non-reciprocal trade preferences in integrating developing countries into the world trading system).

[130] Festus Mogae, President of Botswana, Address (Speech officially opening the Joint ACP-EU Ministers Meeting in Gaborone, 6 May 2004), online: The Secretariat of the African, Caribbean and Pacific Group of States <http://www.acp.int/en/archives/discourspdtbotsw_en.html>.

[131] *Ibid.*

[132] Article XXIV of GATT requires all trading relations, such as those under the ACP-EU Partnership, to cover substantially all trade within a reasonable time as

past, the ACP countries will be under an obligation to grant reciprocal market access to EU goods and services within a reasonable period of time.

The position adopted by the ACP countries and critics of EPAs that market-opening demands may have adverse effects on the development goals of ACP nations cannot be substantiated at the present time in view of the fact that negotiations of the EPAs are ongoing. Regardless, the reluctance of ACP countries to acquiesce to reciprocal trade obligations with the EU is entrenched in the belief held among developing countries that they were short-ended in the Uruguay Round trade talks, where the emphasis on reciprocal trading arrangements and the elimination of all barriers to trade culminated in the establishment of the World Trade Organization.[133] The primary mandate of the WTO is perceived to be the liberalization and secure placement of international trade, which will contribute to the economic growth, development and welfare of the world's people.[134] Member states are obliged to follow some key free trade rules, such as granting all trading partners the same treatment they offer to their most favoured trading partners ("most-favoured-nation" rule)[135] and treating imported goods as they treat similar or "like" products produced in their country ("national treatment" rule).[136] Consequently, two rules of thumb for trade at the multilateral level are non-discrimination and reciprocity.

Prior to the Uruguay Round, however, developing countries had legal backing to free themselves from prevailing *GATT* rules, which also promoted non-discrimination. For instance, Article XVIII, Section B of *GATT* concerned trade restrictions to protect the balance of payments and it was widely used by developing countries as legal cover for a variety of import restrictions.[137] The Enabling Clause was considered to provide

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well as concerns about the adverse consequences of not bringing its preferential trade arrangement within the purview of WTO rules.

133 According to the *Marrakesh Agreement*, *supra* note 2 at the third preambular paragraph:

"Being desirous of contributing to these objectives by entering into reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade and to the elimination of discriminatory treatment in international trade relations."

134 See Preamble to the *Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Agreement establishing the Multilateral Trade Organisation*, 1993, 33 I.L.M.13.

135 GATT, *supra* note 1 at Article I.

136 *Ibid.* at Article III.

137 Michael Hart and Bill Dymond, "Special and Differential Treatment and the Doha 'Development' Round" (2003) 37 J. World Trade 395.

philosophical as well as legal reasoning for developing countries to generally exempt themselves from the disciplines that the *GATT* otherwise provided. The Uruguay Round changed all that; in the concern to set up a transparent and non-discriminatory trading system where all duties and other restrictive regulations of commerce would be eliminated, the developed countries forced the developing nations into a "grand bargain."[138] The bargain required developing countries to eliminate all tariffs to trade in addition to taking on new areas like intellectual property and services, while the developed nations would open up areas of particular export interest to developing countries, namely agriculture and textiles/clothing.[139]

Doubts have been raised as to whether developing countries have actually benefited from this grand bargain.[140] These doubts are supported by the fact that, over 10 years since the agreement was reached, developing countries are still negotiating agricultural access under the Doha Development Round.[141] More so, the lack of progress at the Geneva World Trade talks, resulting from the failure of the European Union and the United States to agree on the level of cuts for farm subsidies, further reinforces that suspicion.[142] While making market opening demands on the ACP group, the EU has continued to maintain the *Common Agricultural Policy* (CAP) which prevents the ACP countries from exporting certain agricultural products to the European Union.[143] As a matter of fact, the 1996 EU *Green Paper* recognizes that agriculture remains a sensitive area and argues for the continuation of the status quo, as this would "provide a breathing space for the common agricultural policy to evolve under the impulse of the next stage of the WTO and enlargement of the Union."[144]

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138 Sylvia Ostry, "The Uruguay Round North-South Grand Bargain: Implications for Future Negotiations" (Paper presented at a Conference on 'The Political Economy of International Trade Law' in honour of Professor Robert E. Hudec, University of Minnesota, September 2000), online: University of Toronto <http://www.utoronto.ca/cis/Minnesota.pdf>.

139 Robert E. Hudec, "GATT and the Developing Countries" (1992) 1992 Colum. Bus. L. Rev. 67 [Hudec, "GATT and the Developing Countries"].

140 Frank J. Garcia, "Beyond Special and Differential Treatment" (2004) 27 B.C. Int'l. & Comp. L. Rev. 291 at 298-299.

141 For an update on the Doha Development Round, see the WTO website at <http://www.wto.org/english/tratop_e/dda_e/dda_e.htm>.

142 World Trade Organization, News Release, "Talks Suspended: 'Today there are only Losers'" (24 July 2006), online: WTO <http://www.wto.org/english/news_e/news06_e/mod06_summary_24july_e.htm>.

143 *Supra* note 10.

144 *Supra* note 63 at Chapter V(C).

Furthermore, commentators have suggested that the financial cost of implementing the Uruguay Round agreements for developing countries is very high.[145] In a review of World Bank project experience, it was found that to get up to speed in three areas – customs valuation, *TRIPS* and sanitary/phytosanitary measures – would cost each nation some 150 million dollars, which is more than a full year's development budget in many of the least developed countries.[146] Indeed, with its package of minimum protective standards, the *TRIPS* Agreement is said to have placed many developing and least developed countries under pressure to invest their limited resources in legislation and enforcement machinery to implement the standards of protection in order to avoid a reference to the WTO dispute settlement system.[147] Such a point was tacitly acknowledged by the European Commission in its paper, *EU Strategy for the Enforcement of Intellectual Property Rights in Third Countries*.[148]

More important for developing countries is that, as a result of the WTO emphasis on establishing an integrated trading system that promotes the principle of reciprocity in trade obligations, they will lose the policy space to take measures or regulate domestically in the public interest. The trade panel decision in the *Thai Cigarette* case[149] went further to reinforce the suspicion that the right to regulate at the

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145 J.M. Finger, "Implementing the Uruguay Round Agreements: Problems for Developing Countries" in Peter Lloyd and Chris Milner, eds., *The World Economy, Global Trade Policy 2001* (Boston: Blackwell Publishers Limited, 2002) 7.

146 See J. Michael Finger and Philip Schuler, World Bank Development Research Group, Policy Research Working Paper No. 2215, "Implementation of Uruguay Round Commitments: The Development Challenge" (October 1999), online: The World Bank Group <http://wbln0018.worldbank.org/Research/workpapers.nsf/(allworkingpapers)/A2B8146004EF01BE85256818005BF0CF?OpenDocument>.

147 S. Anderman and R. Kariyawasm, "TRIPS and Bilateralism: Technology transfer in a development perspective" in Janet Dine and Andrew Fagan, eds., *Human Rights and Capitalism: A Multidisciplinary Perspective on Globalisation*, (Cheltenham: Edward Elgar, 2006) at 170.

148 EC, *EU Strategy for the Enforcement of Intellectual Property Rights in Third Countries*, [2005] O.J. C 129/03, online: European Commission <http://trade.ec.europa.eu/doclib/docs/2005/april/tradoc_122636.pdf>, particularly at 8: "Most of the countries with deficient enforcement will claim a lack of resources and the existence of more pressing priorities than protecting IP rights. IP enforcement is a complex and multi-disciplinary activity. It involves drafting legislation, training judges, police forces, customs officials and other experts, setting up agencies or tax-forces, public awareness raising, etc."

149 GATT, *Thailand – Restrictions of importation of and Internal Taxes on Cigarettes: Report of the Panel adopted on 7 November 1990*, GATT Doc. DS10/R, 37th Supp. B.I.S.D. (1991) 200 [*Thai Cigarette* case].

national level has been curtailed. In that case, the exceptions granted to states under *GATT* Article XX for the protection of human, animal and plant life and health in the implementation of trade rules were given very narrow interpretation.[150] The Thai government had imposed a ban on foreign cigarettes in order to protect the health of its citizens, but permitted the sale of domestic cigarettes through a state-owned industry. The United States brought a complaint against the Thai ban, arguing that the reasons were geared towards trade protectionism. The panel agreed with the United States and ruled against the Thai government ban. Despite noting that *GATT* Article XX clearly allowed contracting parties to give priority to human health over trade liberalization, the panel held that the policy goal of protecting citizens' health could be achieved with instruments less restrictive to trade (such as labeling and ingredient disclosure regulations) that did not discriminate between domestic and foreign goods. This decision had the effect of limiting the policy space available to the Thai Government to act in the interest of her citizens.[151]

It is arguable that the move from negative integration in *GATT* 1947 to positive integration in the 1994 WTO agreement[152] may be principally responsible for this state of affairs. Drawing a distinction between the two types of market integration, Sheldon Leader says:

> A negative strategy requires that a Member of a trading system not use domestic policy to erect undue barriers to trade. Market integration in this mode happens via a

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150 This type of interpretation gives priority to trade interest over the public interest by emphasizing that states relying on GATT exceptions must do so in a manner having the least impact on the objective of creating a more liberal and integrated multilateral trading system.

151 However, see WTO, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products: Report of the Appellate Body on 12 March 2001,* WTO Doc. WT/DS135/AB/R (2001), online: World Trade Law <http://www.worldtradelaw.net/reports/wtoab/ec-asbestos(ab).pdf> (where the WTO Appellate body confirmed each WTO Member's right to determine the level of health protection that it considers appropriate in a given situation).

152 Ernst-Ulrich Petersmann, "Time for a United Nations 'Global Compact' for Integrating Human Rights into the Law of Worldwide Organisations: Lessons from European Integration" (2002) 13 E.J.I.L. 621 [Petersmann, "Lessons from European Integration"] (argues that the WTO may endanger the protection of human rights and democratic governance in areas such as health protection and intellectual property law as a result of the move from the GATT negative to the WTO positive integration). See also Ernst-Ulrich Petersmann, "From 'Negative' to 'Positive' Integration in the WTO: Time for 'Mainstreaming Human Rights' into WTO Law?" (2000) 37 C.M.L. Rev. 1363 [Petersmann, "Negative to Positive Integration"].

> series of prohibitions of such obstacles. Examples include the prohibitions against discrimination among sources of imports; against discrimination in favor of domestic producers; and against unjustified non-tariff barriers to trade. A positive strategy takes the demand for market integration a step further, requiring that the terms on which goods, services, or people are allowed to penetrate the borders of another country should be based on common standards fashioned through a policy set by the institution administering trade.[153]

Consequently, unlike under *GATT* – where regulatory powers were left at the national level to be used by contracting parties so long as they did not create or maintain impediments to trade between member states – the positive integration introduced by the WTO requires the centralization of trade rules, leaving little room for states to maneuver domestically. The significance of maintaining flexibility for determining national policy was underscored by the *São Paulo Consensus*, adopted at the United Nations Conference on Trade and Development (UNCTAD) IX in São Paulo, Brazil, thus:

> The increasing interdependence of national economies in a globalizing world and the emergence of rule-based regimes for international economic relations have meant that the space for national economic policy, i.e. the scope for domestic policies, especially in the areas of trade, investment and industrial development, is now often framed by international disciplines, commitments and global market considerations. It is for each Government to evaluate the trade-off between the benefits of accepting international rules and commitments and the constraints posed by the loss of policy space. It is particularly important for developing countries, bearing in mind development goals and objectives, that all countries take into account the need for appropriate balance between national policy space and international disciplines and commitments.[154]

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153 S. Leader, "Trade and Human Rights II," in Patrick F. J. Macorory, Arthur E. Appleton & Michael G. Plummer, eds., *The World Trade Organization: Legal, Economic and Political Analysis* (New York: Springer, 2005) 663 at 674.

154 *São Paulo Consensus*, UNCTADOR, 11th Sess., UN Doc. TD/L.40 (2004), online: United Nations Conference on Trade and Development <http://www.unctad.org/en/docs/td410_en.pdf> at para. 8.

It is submitted that the essence of the *São Paulo Consensus* is to remind WTO member states, including the ACP group as developing countries, that in negotiating and implementing their trade partnerships the right to regulate at the national level should be preserved in order to promote development objectives that would benefit their citizens. This consideration should guide any commitment decision to be undertaken within the context of the emerging economic partnership agreement.

It must be emphasized that, while trade has rescued millions from deprivation and poverty, successful development requires more than the governmental pursuit of free trade. Thus, the role of government in promoting development must be protected and promoted rather than diminished. In the past, it was believed that the root of Asia's economic success lay in state neutrality towards economic sectors, allowing existing comparative advantage to determine the composition of production and exports. Later, it began to be recognized that Asian countries were not at all neutral in their promotion of individual sectors and did much to foster export competitiveness, using mechanisms such as maintenance of export-friendly effective exchange rates and grants of large subsidies to exporters.[155] It is recognized that today's most advanced economies used a range of industrial and trade policy tools during early stages of their development to support emerging industries. British industrial capacity was built up by early protection; external openness only came once the country had emerged in the mid-19th century as the world's most developed nation. It was only after the Second World War that the United States opened its economy after a century of restrictive trade policies. France, Germany and Japan also pursued industrial development in a highly controlled context, and were able to take advantage of high levels of protection to achieve strong growth rates.[156]

The loss of policy space for ACP countries, engineered by the WTO Agreement, represents the significant difference between the *GATT* free trade regime operational under the Yaoundé Conventions and the free reciprocal trade relations under the WTO-compatible ACP-EU economic partnership agreements. The focus of the Yaoundé trade regime between the EC and the associate states was development as determined by ACP countries. Article XXIV of *GATT* was read in conjunction with Part IV of *GATT* on "Trade and Development", which stated that developed

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[155] Economic Report on Africa, *supra* note 95 at 59.

[156] For an historical account of the protectionist measures adopted by developed countries, see Ha-Joon Chang, *Kicking Away the Ladder: Development Strategy in Historical Perspective* (London: Anthem Press, 2002).

countries should not expect developing countries to make reciprocal commitments in a trade partnership. No doubt this interpretation was greatly influenced by the commitments by states under Articles 55 and 56 of the United Nations' *Charter*, where members pledged through joint and separate actions to promote higher standards of living, full employment, and conditions of economic and social progress and development.

With the formation of the WTO and its emphasis on a single undertaking and reciprocity in trade obligations, however, the EU has opted to give a strict and narrow interpretation to Article XXIV of *GATT*, which limits the policy space ACP countries enjoy to promote development domestically. Commenting on the effect of the Uruguay Round on trade and developing countries, Andrew Hurrell stated:

> As we moved into the 1980's, that (always limited) political space diminished significantly. In the case of trade, although it would be wrong to suggest that developing countries received no benefits from the Uruguay Round, the principle of special trading status for developing countries and privileged market access had been pushed off the General Agreement on Tariff and Trade (*GATT*) agenda…[157]

The ACP countries have accordingly expressed their concern that the emerging trade relations with the EU, although promoting free trade between the parties, will not allow them policy space to regulate domestically and that it fails to take into cognizance the ACP countries' level of development. They insist that by signing on to the new trade arrangements, every ACP country – both least developed and developing countries – will, to their detriment, be under an obligation to open their markets immediately to goods and services from the European Union.[158] Actionaid research conducted in Kenya and Ghana lends credence to the ACP view by suggesting that reciprocity represents a major threat to development and poverty reduction in Africa, propelled not by legal or development imperatives but mainly by EU market access interests in Africa and globally.[159] The continued concern of ACP governments regarding the ability of their national economies and development to withstand the potential impacts of reciprocal free trade agreements was

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[157] A. Hurrell, "Global Inequality and International Institutions" in Thomas W. Pogge, ed., *Global Justice* (Oxford: Blackwell Publishing, 2001) 32 at 49.
[158] Actionaid International, *supra* note 98; Eurostep, *supra* note 98.
[159] *Ibid.*

reiterated in the *ACP Guidelines for EPA negotiations*.[160] It asserts that, given the possible adverse effect of reciprocity on domestic production and fiscal stability, ACP states cannot agree to provide reciprocity in EPAs with the EU and the implementation of tariff dismantlement should be linked to certain development indicators.[161] On the other hand, the European Union contends that the reciprocal trade demands of the EPAs represent the only way to achieve WTO compatibility in its trading relations with ACP countries. Moreover, the EPAs will not only stimulate economic development in ACP countries but will also be sensitive to their level of development.[162]

For the ACP countries, non-reciprocal trading arrangements with the EU and legal certainty against WTO challenges are immediate priorities. These should be the central objectives of ACP countries in the EPA negotiations and in the Article XXIV negotiations currently on-going in the WTO. ACP countries ought to insist that EPA negotiations are not about a typical free trade arrangement but instead encourage economic partnerships to promote development. Therefore, the EPAs should be based on the development needs of ACP countries. The WTO preamble recognizes that there is necessity for positive efforts designed to ensure that developing countries, especially the least developed among them, secure a share in the growth in international trade commensurate with the needs of their economic development.[163] This commitment was reaffirmed in the *EC- Tariff Preferences* Case, where the WTO Appellate Body ruled on India's challenge against the EU practice of conditioning of trade preferences.[164] They held that in granting preferences under the Generalized System of Preferences, the EU was obligated to ensure that such preferences responded to the "development, financial and trade needs" of the recipient countries.[165]

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160 ACP Guidelines for the Negotiation of Economic Partnership Agreements, *supra* note 93.
161 *Ibid.*
162 Lamy Statement, *supra* note 87.
163 *European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries* (2004), WTO Doc. WT/DS246/AB/R at para. 161 (Appellate Body Report).
164 *European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries* (2003), WTO Doc. WT/DS246/R (Panel Report), online: World Trade Law <http://www.worldtradelaw.net/reports/wtopanels/ec-preferences(panel).pdf>.
165 *Ibid.* at 173.

CONCLUSION

The ACP-EU trade relations, which hitherto had played second fiddle to the development aid aspect of the ACP-EU Partnership, have assumed a higher profile as result of the establishment of the WTO in 1994. The ascendancy of neo-liberal economic philosophy – coupled with the banana dispute between the EU and some Latin American countries – made it imperative for the ACP-EU trade relations to change from a preferential non-reciprocal regime to one that requires the ACP countries to grant reciprocal access to EU goods and services. It has been noted that the WTO "single undertaking" approach was principally responsible for this shift. In compliance with this change, the EU, in negotiating a new trade agreement with the ACP countries, is making WTO-compatibility, which requires reciprocity in obligations, a principal criterion while also emphasizing that the EPAs will promote development.

The issue here appears not to be whether the emerging trade relations will promote WTO-compatibility and development, but rather the priority or weight to be attached to either. The EU appears to give more weight to the reciprocity element of WTO-compatibility, whereas the ACP countries are of the view that the balance should be tilted in favour of development. The EU should commit itself more expressly to a development-oriented approach rather than a "trade negotiator" tactic that seeks concessions from ACP countries.[166] This may entail allowing individual ACP nations to sequence their own trade reform in line with their own poverty reduction and development plans, and providing additional financial assistance to support ACP countries in building the capacity they need to trade and adjust to more open markets.

Also relevant in this regard is a review of the interpretation currently being given to *GATT* Article XXIV and *GATS* Article V to reassess and reduce reciprocity requirements in the domain of free trade agreements, such as the emerging ACP-EU economic partnership agreements, in order to prioritize development. This can be achieved by reading the provisions of the second preamble to the WTO Agreement and Part IV of *GATT*, both dealing with the need to promote development in trade relations with developing countries, into the provisions of *GATT* Article XXIV and *GATS* Article V. Indeed, a pro-development approach to EPAs was jointly reiterated by the ACP-EU Joint Parliamentary Assembly

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[166] Commission for Africa, *Our Common Interest: Report of the Commission for Africa* (March 2005), online: Commission for Africa <http://www.commissionforafrica.org/english/report/thereport/english/11-03-05_cr_report.pdf> at 288.

in the *Cape Town Declaration*, which called for the establishment of development benchmarks against which to assess the conduct and outcome of the ACP-EU trade negotiations.[167]

[167] *Cape Town Declaration on the forthcoming ACP-EU negotiations with a view to New Trading Arrangements*, adopted by the ACP-EU Joint Parliamentary Assembly on 21 March 2002 in Cape Town, South Africa, ACP-EU 3382/02/fin, online: Friedrich Ebert Stiftung <http://fesportal.fes.de/pls/portal30/docs/FOLDER/COTONOU/DOWNLOADS/OFFICIAL/ACPEU/CAPETOWNDECLARATION.PDF>.