
Revisiting EPAs and WTO Compatibility

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Executive Summary

1. The real objectives of the ACP-EU Economic Partnership Agreements currently under negotiation are poverty eradication; sustainable development; and the gradual integration of the ACP countries into the world economy. Insistence on the strict WTO compatibility of EPAs might hinder the achievement of these objectives, and might lead instead to reciprocal trade arrangements that have an adverse socio-economic impact on ACP countries.
2. WTO-compatibility of EPAs entails compliance with Article XXIV of the GATT and Article V of the GATS. Unlike the GATS provision, Article XXIV does not have any special and differential treatment provisions to accommodate a non-reciprocal RTA between developed and developing countries. In addition, the scope for using the gaps and ambiguities in Article XXIV as flexibilities is rather limited. The WTO dispute settlement system

can examine compatibility of RTAs with the WTO rules; and its power in this regard is not restricted by the parallel mandate of the Committee on Regional Trade Agreements, which itself is very ineffective. Notably, ACP countries have made a bold submission in the WTO negotiations for clarifying and improving the provisions on RTAs. Their proposal is to introduce S&D treatment into Article XXIV of the GATT. However, submissions by other Members and current negotiating dynamics indicate that the reform of Article XXIV may be towards tightening the existing loopholes and not creating general flexibilities.

3. The paper proposes a three-track approach for the ACP: legal, political, and development tracks. The legal track suggests that non-reciprocal trading arrangements with the EU and legal certainty against WTO challenge should be the immediate priorities. ACP countries should not allow the narrow focus on WTO-compatibility to restrain their policy choices. ACP countries should also continue to take an active part in the WTO negotiations on Article XXIV based on their earlier submissions and with the objective of securing legal certainty for non-reciprocal trade arrangements under the EPAs.
4. The political track recommends that the ACP should negotiate as a single bloc even if individual countries have different interests in some areas. The differences can be circumvented by strengthening the horizontal linkages between different EPA negotiations as well as by linking them to a central guiding vision and strategy. The unity portrayed by the ACP in the Article XXIV negotiations must be maintained. In addition, the ACP countries should take the case to the public, particularly in the North, pointing out the developmental implications of unfair trading arrangements being forced on them and emphasising the importance of effective solutions no matter how unorthodox.
5. Recognizing the limits of the two tracks in solving the deeper problems of under-development, the development track requires ACP countries to seriously consider their development strategies and to search for viable alternatives that can lead to broad and equitably shared socio-economic development. It suggests that the development strategies of the ACP countries should be tailored to their situation, resources, needs and aspirations.

I. Introduction

1. African, Caribbean and Pacific (ACP) countries and the European Union have a long history of cooperation in social, political and economic areas. The Cotonou Agreement signed on June 23, 2000 governs their present relationship. The preamble to the agreement affirms the parties' commitment to work together towards the achievement of the objectives of poverty eradication, sustainable development and the gradual integration of the ACP countries into the world economy.¹
2. The Cotonou Agreement is not a trade agreement but a 'commitment to agree' at a later date on new reciprocal trade agreements, called Economic Partnership Agreements (EPA). EPAs are different in nature from the earlier arrangements under which the trade relations of the EU and ACP were governed. Whereas previous arrangements were non-reciprocal, and focused on preferential access of ACP exports to the EU market, EPAs will be reciprocal free trade agreements. The EPAs will cover both trade in goods and trade in services. In the services sector, the EPAs will be extended to cover the liberalization and building supply capacity of ACP countries in labour, business, distribution, finance, tourism, culture, and construction and engineering related services. Additionally, there will be cooperation in competition policy, trade and labour standards, protection of intellectual property rights, sanitary and phytosanitary measures, and trade and environment.²
3. One of the main principles of the Cotonou Agreement is that the envisaged EPAs should be WTO-compatible.³ However, the WTO rules on regional trade agreements are neither clear nor enforced effectively; and at present, WTO Members are negotiating to clarify and improve the rules governing RTAs in the WTO.⁴ The ACP's submission in those negotiations calls for adopting special and differential treatment in Article XXIV of the GATT so as

¹ The second paragraph of the preamble to the Partnership Agreement between the Members of the African, Caribbean and Pacific Group of States and the European Community and its Members. See also Article 1, second paragraph, and Article 34 of the Agreement.

² Onguglo, B. and Ito, T. (2003) "How to Make EPAs WTO Compatible? Reforming the Rules on Regional Trade Agreements", *ECDPM Discussion Paper* No. 40, at p. 20, available at www.ecdpm.org, last accessed on 21 March 2005.

³ See Articles 34(4), 36(1) and (4), and 37(7). Other articles affirm the parties' adherence to the commitments in specific WTO agreements: Article 41(GATS) and Article 43 (Protocol on Basic Telecommunications attached to the GATS); Article 46 (TRIPS); Article 47 (TBT); and Article 48 (SPS).

⁴ The term "RTA" is used in this paper to denote customs unions and free trade area/ agreement. The terms "customs union" and "FTA" are used only when it is necessary to distinguish between the two. For the difficulty presented by parallel negotiations, i.e. EPA and WTO, see Bilal, S. "On the Compatibility of Doha and Cotonou", in (2002) *Trade Negotiations Insights*, Vol. 1, Issue no. 4, pp. 3 – 6, at p. 4, available at <http://www.acp-eu-trade.org/tni.html>, last accessed on 21 March 2005; and Bilal, S. (2002) "Implications of the Doha Development Agenda on the EPA Negotiations", at p. 4 (Paper presented at the Seminar on the EPA, October 31 – November 1, 2002, COMESA Secretariat, Lusaka, Zambia). Available at <http://www.agtradepolicy.org/output/resource/RegODI.pdf>, last accessed on 21 March 2005.

to provide flexibilities to developing country members of RTAs. The submission states that the ACP cannot rely on de facto flexibilities in the current rules.⁵

4. This paper argues that the search for WTO-compatibility and the fear of disputes should not restrain the ACP's policy choices in the EPA negotiations. Further, ACP countries should seek to comply with and maximize existing flexibilities in the context of the current rules as opposed to striving to anticipate the rules that will be applicable when amendments, if any, are made.
5. The first part of the paper examines the WTO provisions governing RTAs. The next assesses the WTO practice regarding RTAs. This practice is comprised of WTO jurisprudence and the notification and review of RTAs under the Committee on Regional Trade Agreements (CRTA). The cumulative effect of the sections on the provisions and the practice is to show that there are grey areas in the rules but that the possibility of using the gaps and grey areas as flexibilities has been limited in some instances. Following this will be an analysis of the proposals to clarify or improve the rules. The outcome of that analysis is that amendments, if any, might bring about more stringency and transparency, as opposed to flexibilities in the WTO provisions. The paper concludes with suggestions and recommendations.

II. WTO Provisions on RTAs

6. As mentioned in the introduction, one of the main principles of the Cotonou Agreement is that EPAs should be WTO-compatible. There are a variety of reasons for this.
7. First, as Members of the WTO, the EU⁶ and most of the ACP countries have an international obligation to ensure that they act consistently with the WTO rules. Parties to a binding treaty are subject to the principle of *pacta sunt servanda*: they must honour the treaty in good faith.⁷ Article XVI of the Marrakesh Agreement Establishing the WTO requires each Member to that its laws, regulations and administrative procedures conform to its obligations in the WTO. This requirement probably extends to situations where a Member is negotiating with non-WTO members because otherwise Members could always run away from their WTO obligations by involving non-members. On face value, this proposition might appear to be contrary to the well-known principle that a treaty will not oblige a third party to bear duty, nor will it endow a third party with a right⁸. That is not the case though because it is only the Member, and not the non-WTO member, that has the duty to follow the

⁵ TN/RL/W/155 (26 April 2004)

⁶ The terms "EU" and "EC" are used interchangeably in this paper although, for legal reasons, the European Union (EU) is known officially as the European Communities (EC) in WTO matters: http://www.wto.org/english/thewto_e/countries_e/european_communities_e.htm.

⁷ Article 26, Vienna Convention on the Law of Treaties.

⁸ Article 34, Vienna Convention on the Law of Treaties. The principle is better known by the maxim "*pacta terti nec nocent nec prosunt*".

rules. Therefore, although some ACP countries are not members of the WTO, EPAs have to be WTO-compatible because the EU is a WTO Member, and it will be answerable if it fails to comply with its WTO obligations.

8. Second, if the EPAs do not comply with WTO rules, the parties would have to obtain either a waiver under Article IX of the WTO Agreement or some other form of exemption. The problems with waivers are well summarized by Onguglo and Ito as follows:

“Members requesting a waiver must justify it with sound economic analysis and arguments, undergo a complex process of requesting WTO authorization, and abide by stringent conditions for maintaining the waiver if it stretches over several years...The waiver under the WTO has to be approved by three-fourths of WTO members...”⁹

The ACP and the EU experienced difficulties when they sought to obtain a waiver for the Cotonou Agreement in 2001. They do not want to go through the same process again. In addition, waivers do not provide real security because they have to be reviewed periodically, and could well be terminated at one of such reviews. Further, in some cases, a waiver might allow derogation from only some and not all provisions that parties may want to be exempted from. For example, in the *EC – Bananas* case, the Appellate Body found, contrary to the EC argument, that the Lome waiver only covered derogation from the MFN obligation under Article I:1 of the GATT, and not any other provisions.¹⁰ The parties to the EPAs would want derogation from more than just the MFN obligation.

9. Third, the WTO-consistency of the EPAs would enable the parties to successfully defend themselves against challenges to EPAs in the WTO dispute settlement system. Although the *Turkey – Textiles* case is the only WTO dispute in which a measure purportedly taken because of an RTA was challenged, it is possible that some WTO Members might request consultations on whether EPAs comply with the WTO. One simple reason is that the EU is one of the most frequent users, as complainant and respondent, of the WTO dispute settlement system. Although a dispute might only involve the EU, the consequences would affect the ACP countries as well. This has occurred both in the *EC – Sugar Subsidies* and the *EC – Tariff Preferences* cases.¹¹ In the former case, the complainants were challenging the EC sugar regime and they insisted that they were not against the EC’s preferential treatment of sugar from ACP countries’ and India. However, as the ACP countries argued, the sugar regime is so intricate that a negative finding on any of its aspects would have an effect on the economies of the ACP countries. Similarly, a negative finding against the EC in a dispute involving EPAs might

⁹ *Supra*, note 2, at p. 17.

¹⁰ *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R.

¹¹ *European Communities – Export Subsidies on Sugar*, WT/DS265/AB/R, WT/DS266/AB/R, WT/DS283/AB/R; and *European Communities – Conditions for Granting Tariff Preferences to Developing Countries*, WT/DS246/AB/R.

have adverse effects on the ACP countries. These countries therefore have every right to be cautious about possible challenges to the EPAs.¹²

10. In light of the above, it is necessary to identify the main WTO provisions governing RTAs and to assess if there are any gaps and grey areas that can be used as flexibilities by the ACP. Article XXIV of the GATT and the Uruguay Round Understanding on Article XXIV prescribe the rules for RTAs that cover trade in goods. If the RTA covers services as well, Article V of the GATS applies. Finally, the Enabling Clause applies to RTAs between developing countries only. These provisions will be discussed in turn.

a) GATT Article XXIV and the Understanding on Article XXIV

11. Article XXIV:4 provides that RTAs should facilitate trade between constituent territories and not raise barriers to trade. A question that has arisen is how this paragraph relates to the rest of the RTA provisions in Article XXIV. Are the parties to an RTA under an obligation to ensure that they comply with paragraph 4, or is compliance presumed once they have met the requirements of the other paragraphs? As the discussion on jurisprudence will show, this query was partly addressed by the WTO dispute settlement system.
12. An FTA is defined in Article XXIV:8(b) as 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, XIV, XV and XX) are eliminated on substantially all the trade between the constituent territories in products originating in such territories. GATT and WTO Members have never agreed on what the phrase “substantially all trade” means. Some say that a qualitative analysis should be used when evaluating whether barriers have been eliminated on substantially all trade. This would mean, for example, that no major sector could be exempted from liberalization in the FTA. Others prefer a quantitative approach whereby a statistical benchmark is defined. Such benchmark could be a certain percentage of the trade between FTA parties. Neither Article XXIV nor the Understanding provides any guidance as to which approach should be taken. Since the two approaches are not mutually exclusive, some Members would like a combination of the two to be used in the assessment. The result of such a combination is that the mere fact that a large percentage of trade has been liberalized would not automatically mean that the FTA is WTO-consistent.¹³
13. This discussion shows that there is some flexibility as to the way in which WTO Members determine whether the requirement of liberalizing “substantially all trade” is satisfied. For the ACP, it would appear that they

¹² Onguglo and Ito, *supra* note 2, at p. 42, on possible challenges against the EU import regime under EPA.

¹³ Matsushita M, (2004) “Legal Aspects of Free Trade Agreements: In the Context of Article XXIV of Article XXIV of the GATT 1994”, pp. 497-514, at p. 504, available at <http://www.worldtradelaw.net/articles/matsushitaftha.pdf>, last accessed on 21 March 2005.

would want an approach that ensures that the EU does not exclude sectors that they are most interested in, while at the same time giving themselves enough room to avoid liberalization in some sectors. For example, they would want to protect their infant industries but in a manner that does not violate their WTO obligations.

14. Another problematic aspect of Article XXIV:8 is the definition of “other restrictive regulations of commerce”. This expression has never been positively defined in the WTO.¹⁴ Therefore, the scope of the phrase is not clear. One of the main issues is whether it includes safeguards and anti-dumping duties, so that an RTA member can exempt other RTA members from the application of safeguards.
15. Article XXIV:5 prescribes the conditions for forming an RTA. It stipulates that the duties and other regulations of commerce maintained in each of the constituent territories and applicable to non-members shall not be higher or more restrictive than corresponding duties and regulations prior to the formation of the RTA. This is in keeping with the spirit of paragraph 4, which requires RTAs to facilitate trade and not to raise barriers to trade. But what is the scope of “other regulations of commerce”. Does this include rules of origin and standards? This is one of the topical issues that WTO Members have to grapple with when negotiating to clarify and improve the rules.
16. There has been some degree of flexibility as regards the transitional period under Article XXIV:5 (c). The article stipulates that an interim agreement for an RTA shall include a plan and schedule for the formation of the RTA within a reasonable length of time. The Understanding on Article XXIV defines “reasonable time”¹⁵ as ten years, and says this period may only be exceeded in exceptional cases. Parties claiming an exceptional case must give a full explanation. But it is not easy to discern what “full explanation” entails, or what circumstances would constitute an exceptional case. Further, the legal status of an RTA during the transitional period is far from clear. The ideal would be for the RTA rules to begin to apply after the completion of the transition period. Current practice appears to support this view, but it would be best if a common understanding were reached on this issue. Such an understanding would also have to address the question of the applicable rules during the transition period. Nonetheless, the fact that several RTAs have been allowed to have transition periods of longer than ten years¹⁶ suggests an element of flexibility in the application of the transitional period requirement. The ACP – EU might use this to their advantage.

¹⁴ WTO, (2002) *Compendium of Issues Related to Regional Trade Agreements*, TN/RL/W/8/Rev.1, at p. 19.

¹⁵ The phrase “reasonable time” has been described as “exceedingly imprecise” by John H. Jackson in (1997) “The World Trading System – Law and Policy of International Economic Relations” at p. 166.

¹⁶ For example: the Euro-Mediterranean Agreements (Morocco, Tunisia), the EC–South Africa FTA, and the EFTA–Morocco FTA provide a transitional period of 12 years; the Canada–Chile FTA provides 17 years; and NAFTA provides a 15-year transitional period for some products for the United States – Onguglo and Ito, *supra* note 2, at p. 59.

17. The procedural requirements for RTAs present ACP countries and the EU with another area of flexibility. Article XXIV:7(a) provides that Members entering into an RTA shall promptly notify the WTO and make available such information regarding the proposed RTA as would enable other Members to make such recommendations as they deem appropriate. The question is: how prompt is “promptly”? Does it mean a month or less before the formation of the RTA? It has been suggested that in order to allow an examination of the RTA and for recommendations to be made, it is reasonable to expect that the notification be given with enough time before the RTA enters into force.¹⁷ However, some countries’ legislative set ups would not allow the executive branch to notify the WTO about a proposed RTA before the RTA enters into force. It is not surprising that, in practice, Members have notified RTAs at such time as it pleases them. In some cases, RTAs have not been notified to the WTO at all. Another problem with the procedural requirements is that the nature of the information to be given is not defined. Although the provision qualifies that the information should be such as would enable WTO Members to make recommendations about the RTA, there is wide scope for a Member to submit any information and, if challenged, to argue that it felt that the information was sufficient for the purpose.
18. Finally, an RTA may be allowed even if it is not fully compliant with the WTO. This is because Article XXIV:10 says that the WTO members may by a two-thirds majority approve proposals that do not fully comply with the requirements of paragraphs 5 to 9 of the article. The caveat is that the proposals should lead to the formation of an RTA in the sense of Article XXIV. If the ACP and the EU are able to get the backing of two-thirds of the WTO membership, they need not comply fully with the provisions. The problem is that there is no guidance as to the extent of non-compliance that would be tolerated under paragraph 10. Presumably, the proposal for the RTA would have to meet most of the fundamental requirements of paragraphs 5 to 9. But is it safe to assume that an RTA accepted under paragraph 10 would not be challenged in the WTO dispute settlement? It appears that to assume otherwise would dilute the utility of paragraph 10. However, as will be shown below in the discussion on WTO jurisprudence, a fully WTO-consistent RTA is still susceptible to challenge in the dispute settlement system. Therefore, there is no reason to think that a paragraph 10 RTA would be excused.
19. There is no special and differential treatment in the provisions of Article XXIV. A possible explanation for this could be that developing country concerns were not on the agenda or at the forefront when the GATT 1947 was negotiated and drafted. The drafters thought that Article XXIV would apply to parties that were on the same or similar level of development.¹⁸ This should be contrasted with the GATS provisions, which are discussed in the next section.

¹⁷ Choi, W. (2003) “Regional Economic Integration in East Asia: Prospect and Jurisprudence” *JIEL* 6(1), pp. 49-77, at p. 72.

¹⁸ Onguglo and Ito, *supra* note 2, at p. 35.

b) GATS Article V

20. As noted earlier, EPAs will also cover trade in services. Therefore, it is imperative to assess the GATS provisions applicable to RTAs contained in Article V, entitled “economic integration”. Paragraph 1 of the article stresses that nothing in the Agreement shall prevent the formation of an RTA provided that the RTA: (a) has a substantial sectoral coverage in the sense of number of sectors, volume of trade and modes of supply; and (b) provides for the absence or elimination of substantially all discrimination. A footnote to the paragraph says that an RTA cannot provide for a priori exclusion of a mode of supply; it does not say that there cannot be a priori exclusion of a sector. Using the legal interpretation principle that the express mention of one is the exclusion of the other¹⁹, it is arguable that a priori exclusion of a sector is permissible. This reading finds support in the fact that the rules require “substantial” and not “total” sectoral coverage. However, others suggest that the flexibility provided by the word “substantial” does not allow for the exclusion of a sector from an RTA.²⁰ As in the GATT, it appears that the definition of the word “substantial” is crucial. This is because the GATS also requires elimination of substantially all discrimination in the RTA. Due to lack of data on services trade, it is very difficult to reach a percentage type test of “substantial”. Does this present some flexibility?
21. There is some flexibility in the provision relating to the time at which the conditions for forming an RTA should be met. The parties are given a choice. Article V:1 says the conditions must be met either at the entry into force of the RTA or on the basis of a reasonable time-frame. It is not clear who will define reasonableness and what criteria will be used in any such definition. The absence of a defined period is in contrast with the GATT, which explicitly provides for a period of ten years, and so appears more stringent. However, it should be noted that the GATS does not give the option of a period of time exceeding the reasonable time-frame, unlike the GATT which says parties might be granted a transition period of more than ten years in exceptional cases. Perhaps the assumption under the GATS is that the parties will get a long enough reasonable time frame.
22. Article 1(b) of GATS appears to contain an element of choice as it states that the absence or elimination of substantially all discrimination can be achieved through elimination of existing discriminatory measures and/or prohibition of new or more discriminatory measures. In contrast, GATT simply provides that duties and other restrictive regulations of commerce must be eliminated. However, it is still doubtful if there is real choice under the GATS. The apparent choice of means is restricted by the fact that the end result should be absence or elimination of substantially all discrimination. It is likely that if a Member has discriminatory measures, it will not be deemed to have eliminated

¹⁹The maxim “*expressio unius est exclusio alterius*” encapsulates this principle of statutory construction.

²⁰ Compendium, supra note 14, at p. 22 (The Compendium also lists other issues raised about “substantial sectoral coverage”)

them by simply prohibiting new or more discriminatory measures. It has to eliminate the old ones and prohibit new ones. Similarly, if the Member only eliminates the existing discriminatory measures but does not prohibit new measures, it is possible that in future new and more discriminatory measures might be adopted. In that regard, although the Member will at present be seen as having eliminated or ensured the absence of substantially all discrimination, the Member will not be deemed to have done so at a future date. The point is that the choice is rather restricted.

23. Both developing and developed countries can use the flexibilities mentioned thus far. But, the GATS also expressly provides for special and differential (S&D) treatment for developing countries. Article V:3 states that when developing countries are parties to an RTA, flexibility shall be provided for regarding the conditions in paragraph 1, that is, substantial sectoral coverage, and especially the absence or elimination of substantially all discrimination. The extent of flexibility will be in accordance with the level of development of the countries concerned, both overall and in individual sectors and sub sectors. It has been argued that the additional flexibility serves to cater for cases where undeniably legitimate developing country needs exceed the scope of the existing flexibilities.²¹
24. The availability of S&D treatment in the GATS shows that there is no a priori reason for the absence of similar treatment in the GATT.²²
25. Several issues have been identified in relation to the flexibilities under the GATS.²³ It is not necessary to repeat them here. Instead, it is more apt to ask the extent to which the flexibilities will be limited by Article V:4, which states that the purpose of RTAs is to facilitate trade and not to raise barriers to trade compared to the level applicable prior to the agreement. This question is similar to the one that arises in the GATT as to the relationship between Article XXIV:4 (from whose wording Article V:4 derives) and the other paragraphs in Article XXIV. As will be seen in the section on WTO jurisprudence, the GATT question was addressed in the *Turkey – Textiles* case. Despite the fact that the positioning of paragraph 4 within article V is different from the position of paragraph 4 in Article XXIV, the finding in the *Turkey – Textiles* case sheds light on the issue of the relationship of the paragraphs in the GATS Article V.²⁴

²¹ Onguglo and Ito, *supra* note 2, at p. 36.

²² *Ibid.*

²³ See Compendium, *supra* note 14, at p. 25.

²⁴ In its reasoning, the AB had stated that the fact that paragraph 4 is the first RTA provision in GATT Article XXIV and that paragraph 5 begins with the word “accordingly”, partly supports the view that paragraphs 5 onwards should be read in accordance with paragraph 4. In the GATS, paragraph 4 is in the middle of Article V, with RTA provisions on either side of it. But since the finding was based, to a large extent, on the nature of the language in the provision, it is also applicable to the similarly worded GATS provision.

c) The Enabling Clause²⁵

26. The Enabling Clause allows for differential and more favourable treatment to be provided to developing countries without extending such treatment to other WTO Members, that is, despite the Most-Favoured-Nation obligation in Article I:1 of the GATT. Paragraph 2 (c) of the Enabling Clause stipulates that this includes regional or global arrangements entered into amongst less-developed countries. Like the GATT and the GATS, the purpose is to facilitate and promote trade and not to raise barriers to trade. Since the EU is obviously not a developing country, the Enabling Clause is inapplicable to the EPAs. As such, it is not necessary to discuss the flexibilities available under the Clause.

III. WTO Practice Regarding RTA

a) WTO Jurisprudence

27. The WTO dispute settlement system was created in the Uruguay Round under the Dispute Settlement Understanding (DSU)²⁶. The dispute settlement system is the central element in ensuring security and predictability in the multilateral trading system. Its purpose is to preserve the rights and obligations of the Members under the covered agreements and to clarify the existing provisions.²⁷ According to the Sutherland report, the system has produced

“...more than 27,000 pages of jurisprudence...that...is extraordinarily rich and detailed. In addition, it is having the effect of illuminating certain key WTO treaty obligations questions, and providing some rule stability by resolving ambiguities...”²⁸

The prominence of the dispute settlement system means that WTO agreements should be read together with the panel and Appellate Body reports so as to see how the provisions have been interpreted in “confronting the endless and ever-changing ebb and flow of real facts in real cases in the real world”²⁹.

28. Therefore, this section will analyse the WTO jurisprudence relating to RTAs with a view to assessing whether and to what extent the WTO provisions on RTAs have been clarified. So far, there have not been any cases on RTAs created and notified under the Enabling Clause, and only one case involving

²⁵“Differential and More Favourable Treatment, Reciprocity, and Fuller Participation of Developing Countries”, Decision of 28 November 1979 (L/4903).

²⁶ “Understanding on Rules and Procedures Governing the Settlement of Disputes” - Annex 2 to the Marrakesh Agreement Establishing the World Trade Organisation.

²⁷ Article 3:2, DSU.

²⁸ Sutherland, P. et al, (2004) “The Future of the WTO – Addressing institutional challenges in the new millennium” Report by the Consultative Board to the Director-General Supachai Panitchpakdi, at p. 51. See also Jackson, J., (2005) “The Changing Fundamentals of International Law and Ten Years of the WTO” *JIEL* 8(1), pp. 3 – 15, at pp. 5 and 6.

²⁹ See *Japan — Alcoholic Beverages II*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, p. 31.

Article V of GATS.³⁰ The cases that have arisen dealt with Article XXIV of the GATT. Nonetheless, some of the findings and reasoning might be applicable to and might illuminate the provisions of Article V of the GATS because of the similarity in some of the wording. Such application would have to be cautious though, because some of the legal concepts that Article XXIV presupposes have no parallel in the GATS, and also because of the very difference between goods and services.³¹

29. Some of the cases in which Article XXIV has been invoked do not offer guidance on the interpretation of the Article's provisions.³² However, an opportunity to clarify the provisions of Article XXIV arose in the *Turkey – Textiles* case.³³ Turkey had signed an agreement with the European Economic Community (EEC) that envisaged the formation of a customs union and was gradually aligning its customs duties with those of the EEC. As part of the agreement, Turkey was supposed to adopt quantitative restrictions on imports of textiles and clothing similar to those applied by the EEC. In 1995, the parties notified the entry into force of the final phase of the customs union to the WTO under Article XXIV. In 1996, Turkey applied quantitative restrictions on imports of 19 categories of textile and clothing products originating from India. India challenged the measures as being inconsistent with GATT Articles XI and XIII and Article 2.4 of the Agreement on Textiles and Clothing.³⁴ It further claimed that GATT Article XXIV did not justify the measures. Both the panel and the Appellate Body found that the quantitative restrictions imposed by Turkey were inconsistent with the provisions cited. Further, the restrictions could not be justified under the provisions of GATT Article XXIV.

30. As a preliminary point, Turkey had argued that the EC should have been a party to the dispute as the measures were taken pursuant to an RTA between Turkey and the EC. The panel rejected the argument for several reasons. First,

³⁰ *Canada – Certain Measures Affecting the Automotive Industry*, WT/DS139/AB/R and WT/DS142/AB/R.

³¹ Zhao, H. (2002) "Proliferation of Free Trade Areas in East Asia in the Context of the European Union and the North American Free Trade Agreement – Options for the PR China" Unpublished Masters Degree Thesis, Lund University, p. 25.

³² For example, , *Argentina – Safeguard Measures on Imports of Footwear*, WT/DS121/AB/R; *Canada – Certain Measures Affecting the Automotive Industry*, WT/DS139/AB/R and WT/DS142/AB/R; *European Economic Communities – Import Regime for Bananas*, DS38/R (unadopted GATT panel report); *United States – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities*, WT/DS199/R; *United States – Definitive Safeguard Measures on Imports of Certain Steel Products*, WT/DS248/R; *United States – Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Pipe from Korea* WT/DS202/R; and *United States – Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb from New Zealand*, WT/DS177/R. Apart from *Canada – Autos*, the other cases dealt with the issue of the application of safeguards by an RTA member.

³³ *Turkey – Restrictions on Imports of Textile and Clothing Products*, WT/DS34/R and WT/DS34/AB/R. The dispute relates to a customs union but the statements in the reports are equally applicable to FTAs.

³⁴ Article XI prohibits WTO members from applying quantitative restrictions, except in specified circumstances; Article XIII prohibits discriminatory application of quantitative restrictions; and Article 2.4 of the ATC provides that no new quantitative restrictions shall be introduced except under the provisions of the GATT 1994 or the ATC.

the facts showed that the measures at issue were Turkish measures: they were adopted by the Turkish government at a date different from the EC measures and they were applied and enforced by Turkey alone. Second, even if the EC was affected by the dispute, the absence of the concept of “essential parties” in the WTO means that a panel can adjudicate on a dispute involving several parties even when one or more of the parties are not participating. The panel said that in any event, the terms of reference and the panel decision not to examine the compatibility of the whole RTA meant that the EC was not an essential party. Third, the EC could have chosen to appear as a respondent or a third party but did not do so; and the panel has no authority to direct the EC to be a party to the proceedings. Finally, there are no special provisions in the DSU for dispute settlement proceedings involving RTAs. Except for the EC, RTAs are not members of the WTO and have no WTO legal personality. As such, they cannot be subject to any DSU procedure.

31. The implication of the ruling is that any member of an RTA can be challenged individually on the basis of measures taken pursuant to that RTA. It is immaterial that other RTA members have also taken similar measures and are not challenged. The RTA as an entity cannot be subjected to the dispute settlement procedure of the WTO, unless it is recognized as a having legal personality in the WTO.
32. Turning to substantive issues, the panel dispelled any hopes of arguing that an RTA can be deemed compatible with the WTO simply because it has not been challenged. Turkey had argued that the fact that no Article XXIV:7 recommendation has ever been made to parties to a customs union to change or abolish any import restrictions, and in particular the fact that no recommendation has been made in respect of previous Turkey – EC agreements, suggests that its measures are compatible with the WTO. The panel cited with approval earlier jurisprudence to the effect that it would be erroneous to interpret the fact that a measure had not been challenged over a number of years as tantamount to its tacit acceptance by Members.³⁵ It said that the unclear wording of Article XXIV may explain the absence of challenges under the GATT, and that it could not draw any conclusion as to the GATT/WTO compatibility of the measures at issue on the basis of the absence of challenges.
33. Related to this, the recent panel ruling in the *EC – Sugar Subsidies* case suggests that it is only in limited situations where the fact that a measure has not been objected to in WTO negotiations or challenged in the dispute settlement system will act as a bar to a subsequent challenge against that measure.³⁶ Therefore, there is every chance of an RTA being the subject of a dispute under the DSU. This limits the extent to which the gaps and ambiguities in the rules and practice regarding RTAs can be availed of as flexibilities. As Onguglo and Ito correctly point out, it appears that the existing

³⁵ Panel Report, paras 9.172-174.

³⁶ *European Communities – Export Subsidies on Sugar* (Complaint by Brazil) WT/DS266/R, paras. 7.61 – 7.75.

flexibilities inherent in Article XXIV and the tacit tolerance by Members of certain practices cannot be relied on indefinitely against possible challenges.³⁷

34. The preceding statement is especially true because even if the CRTA³⁸ finds that an RTA is compatible with the WTO, other Members can still challenge either the RTA or specific measures within the RTA. One reason for saying this is that a Member's right to invoke the DSU cannot be curtailed by a declaration of the CRTA. There is no institutional hierarchy in the WTO in this sense. Second, it appears that panels have jurisdiction to assess an RTA's overall compatibility with the WTO. This point requires elaboration.
35. Paragraph 12 of the Understanding on Article XXIV stipulates that dispute settlement provisions may be invoked with respect to any matters arising from the application of the RTA provisions in Article XXIV. On the basis of this provision, the panel in *Turkey - Textiles* said that panels have jurisdiction to examine the WTO-consistency of measures arising from agreements made pursuant to Article XXIV.³⁹ However, it opined that it is arguable that panels do not have jurisdiction to assess the compatibility of a customs union with the requirements of Article XXIV. The panel stated that such an assessment is a very complex undertaking involving consideration by the CRTA, from the economic, legal and political perspectives of different Members, of the numerous facets of an RTA in relation to the provisions of the WTO.⁴⁰
36. The Appellate Body was not called upon to address the issue but it pointed to its ruling in *India - Quantitative Restrictions*⁴¹ on the jurisdiction of panels to review the justification of balance-of-payments (BOP) restrictions under Article XVIII:B of the GATT. In that case India had argued that panels could examine whether specific balance-of-payments restrictions are applied in a manner that is consistent with the WTO agreements. In India's view, however, panels are not allowed to examine the overall justification for balance-of-payments restrictions under Article XVIII:B. The Appellate Body rejected that argument and found that panels have competence to review balance-of-payments justification even though the BOP committee is also mandated to carry out such reviews. It endorsed the panel's view that the role of the BOP committee does not become redundant merely because the panel also has competence over the matter: the BOP Committee and panels have different functions, and their procedures differ in nature, scope, timing and type of outcome.⁴² The Appellate Body went further to say that panels are not required

³⁷ Supra note 2, at p. 41.

³⁸ See pages 16-18 below for a discussion of the CRTA.

³⁹ Panel Report, paras 9.49 – 51.

⁴⁰ Paras 9.52 – 55. The panel said it was not necessary to assess the compatibility of the Turkey – EC customs union in this case and thus exercised judicial economy on the issue.

⁴¹ *India - Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products*, WT/DS90/AB/R.

⁴² Note, however, that the terms of reference of examination of an RTA contain language very similar to the terms of reference of a dispute settlement panel.

to exercise judicial restraint simply because an issue is being addressed by the BOP committee.⁴³

37. By referring to the *India – Quantitative Restrictions* ruling, the Appellate Body implies that panels also have jurisdiction to assess the overall compatibility of RTAs, despite the existence and mandate of the CRTA. Indeed, the Appellate Body's statements immediately preceding the reference to *India – Quantitative Restrictions* bear this out. The Appellate Body indicated that in a dispute a party must fulfill two conditions in order to avail itself of a defence on the basis of Article XXIV. First, it must show that the measure being challenged was introduced upon the formation of a customs union that fully meets the requirements of Article XXIV. Second, the party must demonstrate that the formation of the customs union would be prevented if it were not allowed to introduce the measure at issue. The Appellate Body said that it would expect a panel to require a party to establish that both of these conditions have been fulfilled. And then, importantly, it stated:

“It may not always be possible to determine whether the second of the two conditions has been fulfilled without initially determining whether the first condition has been fulfilled. In other words, it may not always be possible to determine whether not applying a measure would prevent the formation of a customs union *without first determining whether there is a customs union.*”⁴⁴

38. This means that panels should examine whether there is a customs union before assessing whether Article XXIV justifies a GATT-inconsistent measure. Such an examination amounts to determining the compatibility of the overall customs union with the WTO. This is because, except for customs unions adopted by a two-thirds majority under Article XXIV:10, a customs union will only exist if it meets the requirements of Article XXIV.

39. Since there is no principle of institutional balance in the WTO, different bodies can assess the same issue at the same time, and there is no mechanism for ensuring that they do not prejudice each others work, or render it inutile.⁴⁵ Therefore, panels' competence over the assessment of the overall compatibility of an RTA raises the question of the status of the CRTA findings vis-à-vis dispute settlement. It is obvious that the findings are not conclusive, since an RTA can be challenged even if declared WTO-compatible by the CRTA. In fact, the negotiations to clarify and improve the RTA provisions show that Members want recourse to dispute settlement to be possible always, irrespective of the discussions and assessment made in the CRTA.⁴⁶ Why, then, should parties bother to go through the whole CRTA examination process? Would the findings be considered prima facie evidence of consistency with the WTO? There is no clear guidance on this, as the

⁴³ Paras 80 – 109.

⁴⁴ Paras 58 – 59. Italics supplied.

⁴⁵ *India – Quantitative Restrictions*, paras 98 – 105.

⁴⁶ See for instance the statements in TN/RL/M/16 (Summary of Report of Meeting of the NGR – 29 June 2004) and TN/RL/M/15 (Summary of Report of Meeting of the NGR – 5 May 2004).

Appellate Body did not address the issue in *Turkey – Textiles*; but other cases do offer a pointer. In *India - Quantitative Restrictions*, it was stated that panels should follow the example of the panel in *Korea –Beef* and take into account the deliberations and conclusions of the BOP committee.⁴⁷ The Appellate Body’s endorsement of the panel’s approach in *Korea - Beef* is instructive because the panel did not simply espouse the conclusions of the BOP committee; instead, it looked to other sources of information and evaluated all the evidence before it.⁴⁸ Therefore, in the case of RTAs, it appears that panels would conduct their own examination and use the CRTA report merely as part of the evidence.

40. Another important aspect of the *Turkey – Textiles* case is that it brings out the significance of paragraph 4 of Article XXIV. The paragraph states that the purpose of a customs union or an FTA should be to facilitate trade between the constituent territories and not to raise barriers. One of the questions has always been whether this is merely an introduction to the rest of the RTA paragraphs of Article XXIV.⁴⁹ The Appellate Body answered clearly, stating that:

“Paragraph 4 contains purposive, and not operative, language. It does not set forth a separate obligation itself but, rather, sets forth the overriding and pervasive purpose for Article XXIV which is manifested in operative language in the specific obligations that are found elsewhere in Article XXIV. Thus, the purpose set forth in paragraph 4 informs the other relevant paragraphs of Article XXIV...”⁵⁰

41. This means that the paragraph is not a mere introduction. The RTA provisions in Article XXIV will be measured against the values set out in paragraph 4. Flexibilities will be allowed only insofar as they do not cause the RTA to raise barriers to trade with outsiders, or to fail to facilitate trade between the constituent members of the RTA. It is likely that the same applies to the GATS because its Article V:4 contains similar wording. Moreover, Article V:4 is certainly not an introductory paragraph, it being positioned in the middle of the other RTA provisions in Article V.
42. Some have questioned the extent to which Article XXIV can be used to justify WTO-inconsistent measures. For example, in *Turkey – Textiles*, India argued in the appeal that the terms of Article XXIV:5 exempt from the other obligations of the GATT 1994 only those measures that are inherent in the formation of a customs union.⁵¹ Some construe Article XXIV as only providing derogation from the MFN obligation, and nothing more.⁵² The WTO Compendium states that both views have co-existed in the

⁴⁷ Para 103.

⁴⁸ *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, WT/DS161/R, WT/DS169/R.

⁴⁹ Compendium, supra note 14, p. 14.

⁵⁰ Para 57, AB report.

⁵¹ Para 21.

⁵² Compendium, supra note 14, p.11.

membership.⁵³ Perhaps recourse to the text of the relevant provisions can give some guidance on the issue. The chapeau to Article XXIV:5 provides that

“...the provisions of this Agreement...shall not prevent the formation of a customs union or of a free trade area or the adoption of an interim agreement necessary for the formation of a customs union or free trade area...”

The Appellate Body read this provision as indicating that Article XXIV may, under certain conditions, justify the adoption of a measure that is inconsistent with other GATT provisions, and may be invoked as a possible defence to a finding of inconsistency.⁵⁴ Therefore, the defence justifies derogation from any GATT provision, not just the MFN obligation, but only if the formation of an RTA would be prevented if the measure is not introduced.⁵⁵

43. In fact the defence might in some cases extend beyond the GATT to other WTO agreements. The Appellate Body left open this possibility by saying in a footnote that since the ATC made reference to the GATT, Article XXIV is incorporated in the ATC and may be invoked as a defence to a claim of inconsistency with Article 2.4 of the ATC, provided that the necessary conditions in Article XXIV are met.⁵⁶ The panel in *US – Wheat Gluten* seized upon this footnote and declared that Article XXIV may provide a defence to a claim of inconsistency with a provision of another covered agreement if it is somehow incorporated in that provision or agreement.⁵⁷
44. Finally, the panel and the Appellate Body in *Turkey - Textiles* had to clarify how to approach the phrase “substantially all trade” in Article XXIV:8. The Appellate Body opined that “substantially all trade” is not the same as “all the trade”, and also that it means something considerably more than merely “some of the trade”.⁵⁸ Thus it remains open where the benchmark between “all the trade” and “some of the trade” will be set; thereby suggesting that the Appellate Body acknowledged that there is some scope for flexibility.⁵⁹ But at the same time the phrase “substantially all trade” acts as a limit to the flexibility Members enjoy when they are asked to ensure that duties and other regulations of commerce are eliminated. This is especially so because the Appellate Body said “substantially” appears to contain both qualitative and quantitative elements,⁶⁰ thereby providing a basis for arguing that it is no

⁵³ Ibid.

⁵⁴ Para 45, AB report.

⁵⁵ Trachtman, J. (2003) “Toward Open Recognition? Standardization and Regional Integration under Article XXIV of GATT”, *JIEL* 6(2), pp. 459 – 492, at 473.

⁵⁶ Footnote 13 to para 45.

⁵⁷ *United States – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities*, WT/DS199/R, para 8.180.

⁵⁸ Para 48.

⁵⁹ Oesch, M. (2001) “Commentary on Turkey – Restrictions on Imports of Textile and Clothing Products”, *International Trade Law Reports*, Vol. 5, pp. 614-633.

⁶⁰ Para 49.

longer possible to exclude trade in a whole sector in an RTA.⁶¹ Similarly, the word “substantially” limits Members’ flexibility when harmonizing their duties and other regulations of commerce.⁶² It appears that neither the panel nor the Appellate Body could offer more useful clarification of these phrases.

45. The *Turkey – Textiles* case is only binding on the parties involved. Since there is no doctrine of binding precedent in the WTO, it can be argued that the interpretation of the provisions in one case is solely for the purpose of the dispute being resolved. However, the absence of the doctrine of binding precedent in the International Court of Justice has not inhibited the development by the ICJ of a body of case law in which considerable reliance on the value of precedent is highly discernible.⁶³ Similarly, WTO panels and the Appellate Body constantly refer to earlier jurisprudence in their rulings. As the Sutherland Report notes, some degree of a “precedent” concept motivates the WTO dispute settlement processes and their reliance on prior cases provides a degree of consistency and enhances predictability.⁶⁴ Therefore, the statements of the panel and the Appellate Body in *Turkey – Textiles* should not be seen as once-off, and without effect on future interpretation and application of the provisions relating to RTAs.

b) Notification, Examination and Review of RTAs by the Committee on Regional Trade Agreements

46. As is clear from the discussion of WTO jurisprudence, the dispute settlement system does not enjoy a monopoly over the examination of the WTO compatibility of RTAs. During the GATT era, RTAs were notified to the Council for Trade in Goods (CTG), which established a working party to review the agreement. The working party would then issue to the CTG a report of its conclusions and recommendations on whether the RTA complies with the GATT. Almost all of the reports were inconclusive. In the entire 46 years up to 1994, consensus on the conformity of these agreements with the GATT was reached in only one of the ninety-eight notified RTAs: the Czech – Slovak customs union.⁶⁵

47. The Committee on Regional Trade Agreements (CRTA) was established in February 1996. Its mandate is: to examine individual regional agreements; to consider the systemic implications of the agreements for the multilateral

⁶¹ Cottier, T. (2004) “Legal Framework for Free Trade Areas and Customs Unions in WTO Law” at p. 4 (Section 6 of the record of a workshop on “Multilateralism and Bilateralism after Cancun – Challenges and Opportunities of Regionalism” held on 15 April 2004 by the State Secretariat for Economic Affairs and the World Trade Institute).

⁶² Para 50.

⁶³ Cameron, J. and Gray, K. (2001) “Principles of International Law in the WTO Dispute Settlement Body”, *ICLQ* 50 (2), pp. 248 – 297, at p.249.

⁶⁴ At p. 52, where footnote 37 states that the panel report in *United States – Definitive Safeguard Measures on Imports of Certain Steel Products*, WT/DS248/R, contains over 5,800 footnotes, most of which are references to prior cases, and includes a list of the 54 cases actually cited and relied upon.

⁶⁵ Crawford, J. and Laird, S. (2000) “Regional Trade Agreements and the WTO”, CREDIT Research Paper No. 00/3 (2000) at p. 8.

trading system; and also to consider the relationship between regional agreements and the multilateral trading system.⁶⁶ RTAs covering trade in goods and notified under GATT Article XXIV are referred to the CRTA by the CTG; the Council for Trade in Services (CTS) refers RTAs covering services and notified under GATS Article V; and the Committee on Trade and Development (CTD) refers those notified under the Enabling Clause. After the parties submit preliminary information, there is an exchange of oral and written questions and replies. In 2004 it was agreed that a factual presentation by the Secretariat would be added experimentally as a new option for the provision of initial information on RTAs that have to be examined.⁶⁷ Upon conclusion of the factual part of the examination, the WTO Secretariat is requested to draft a report of the examination, which is used as the basis for consultations among Members. The consensual CRTA report is then sent to the CTG, CTS or CTD as appropriate.⁶⁸ The purpose of the CRTA examination is two-fold: to ensure transparency of RTAs and to allow Members to evaluate an agreement's consistency with WTO rules.⁶⁹

48. The 2004 CRTA report to the General Council indicates that 300 RTAs have thus far been notified, 110 are being examined, and the factual examination has been completed for 40.⁷⁰ However, like almost all the CRTA reports since 1998, the 2004 report says that there is no progress on the completion of the examination reports, and also that there are long-standing examinations. Several reasons account for this lack of progress. First, the ambiguity in the WTO provisions on RTAs makes it difficult if not impossible for Members to conduct the examination. Second, some Members are wary of giving out RTA information that may be used against them later in a dispute.⁷¹ Third, some parties specifically request for delays in their examinations. Crawford and Fiorentino summarize the situation well by saying the CRTA has enjoyed little success due to various political and legal difficulties, most of which were inherited from the GATT.⁷²
49. The inefficiency of the CRTA and the ambiguity of the rules have led some to suggest that a Member need only notify an RTA in a timely fashion either before or after the RTA enters into force; and that until the rules are changed, there is no imminent need for RTA members to worry about compliance with all the provisions of the substantive WTO agreements.⁷³ The Director-General of the WTO has conceded that the CRTA procedure is not working effectively. In the 2002, 2003 and 2004 WTO Annual Reports, he said that the CRTA has

⁶⁶ See www.wto.org/english/tratop_e/region_e/regcom_e.htm. The CRTA's terms of reference are set out in WT/L/127.

⁶⁷ WT/REG/W/50, 1 November, 2004

⁶⁸ Compendium, supra note 14, at p. 32.

⁶⁹ See www.wto.org/english/tratop_e/region_e/regcom_e.htm

⁷⁰ WT/REG/W/50, 1 November, 2004.

⁷¹ Compendium, supra note 14, para 20.

⁷² Crawford, J., and Fiorentino, R., (2005) "The Changing Landscape of Regional Trade Agreements", WTO Discussion Papers, No. 8, at p. 8.

⁷³ For example, Wang, J. (2004) "China's Regional Trade Agreements: The Law, Geopolitics, and Impact on the Multilateral Trading System", 8 *Singapore Yearbook of International Law*, pp. 119-147, at 138.

failed “so far in assessing the consistency of the...RTAs notified to the WTO...”⁷⁴ and that “since the establishment of the WTO, Members have been unable to reach consensus on the format, let alone the substance, of the reports of any examinations entrusted to the CRTA”⁷⁵. Indeed Mansfield and Reinhardt quote a WTO staff as saying history has proved the GATT and CRTA procedure to be one of the most unsatisfactory of all GATT procedures.⁷⁶

50. In the negotiations to clarify the RTA rules, the subject of the next section, some Members have proposed that the CRTA should not assess the compatibility of RTAs. There were divergent views on this proposal and others suggested that a better option would be to clarify the legal status of a CRTA examination in relation to the dispute settlement.⁷⁷

IV. Clarifying and Improving the Rules: the Doha Mandate

51. Given the ambiguity in the provisions, the inability of the dispute settlement system to provide clarity and the marked ineffectiveness of the CRTA, paragraph 29 of the Doha Ministerial Declaration provides that Members should negotiate to clarify and improve the disciplines and procedures under the existing WTO provisions applying to RTAs. The paragraph requires the negotiations to take into account the developmental aspects of RTAs.⁷⁸ The negotiations are taking place in the Negotiating Group on Rules and are part of the Single Undertaking.
52. This section will discuss Members’ submissions in the negotiations. The purpose is not to provide a comprehensive or exhaustive account of the proposals, but rather to evaluate whether Members seek to introduce more stringency or laxity in the rules and to assess the possibility of amendments being made. The discussion will show that ACP countries should not expect a positive, pro-EPA outcome as it is very difficult to foretell the direction that the negotiations on the RTA rules will take.
53. ACP countries made a submission proposing the introduction of special and differential treatment for developing countries in Article XXIV.⁷⁹ The submission points to the absence of such treatment in the GATT whereas GATS contains flexibilities for developing countries. Although it recognizes

⁷⁴ WTO, Annual Report 2002, at p. 114.

⁷⁵ WTO, Annual Report 2003, at p. 111 and Annual Report 2004, at p. 69.

⁷⁶ Mansfield, E. and Reinhardt, E. (2003) “Multilateral Determinants of Regionalism: The Effects of GATT/WTO on the Formation of Preferential Trading Arrangements” *International Organisation*, Vol. 57 No. 4, pp. 829 – 862, at p. 833.

⁷⁷ TN/RL/M/15 (Summary Report of Meeting of NGR - 15 May 2004)

⁷⁸ WT/MIN(01)/DEC/1, adopted on 14 November 2001.

⁷⁹ Supra note 5. For a discussion of the rationale of the ACP submission, Members’ reactions to the submission, and the responses to those reactions, see Onguglo, B., and Ito, T., “In Defence of the ACP Group of States’ Submission on ‘Developmental Aspects of Regional Trade Agreements and Special and Differential Treatment in WTO Rules: GATT 1994 Article XXIV and the Enabling Clause’”, available at http://www.ecdpm.org/Web_ECDPM/Web/Content/Navigation.nsf/index.htm, last accessed on 30 May 2005.

de facto flexibilities arising from the ambiguity of the provisions of Article XXIV and the permissive practice of Members, the submission states that such flexibilities cannot be a substitute for legally binding, operational and effective S&D treatment provisions. It further cautions that the flexibilities have been limited by the *Turkey – Textiles* ruling.

54. The submission proposes several ways of incorporating S&D treatment. First, there should be flexibility in meeting the “substantially all trade” requirement in Article XXIV:8 and also in interpreting the term “other restrictive regulations of commerce” so as to allow developing countries to apply contingency protection measures. Second, the reasonable length of time in Article XXIV:5 and the modalities for determining “exceptional circumstances” should be construed in such a way as to make it legitimate and easy for developing countries to get a transition period of more than 10 years. Third, and related, the length of the transition period should be determined in such a manner that is consistent with the development, financial and trade situation of developing countries; in any case, the period should not be less than 18 years. Fourth, the notification, reporting and review process should give due account to the developmental aspects of RTAs involving developing countries. Members should adopt streamlined, efficient and less onerous transparency and examination procedures of RTAs involving developing countries.
55. More generally, the submission suggests that the RTA disciplines should only become applicable after the expiry of the transition period. Further, the ACP countries want the legal validity of the Enabling Clause to be affirmed, and to ensure that its provisions apply exclusively. On dispute settlement, the submission would like the relationship between CRTA and the WTO dispute settlement mechanism to be clarified so that the CRTA is not unduly overridden.
56. It is clear from the ACP’s S&D treatment oriented and general proposals that they seek flexibility in the rules. Their stand is reflected in the proposals of some Members. Jamaica, for instance, suggests that Article XXIV should be examined with a view to providing developing countries with adequate scope for absorbing the adjustment costs of trade liberalization.⁸⁰ And both Chile and India support the preservation of the Enabling Clause.⁸¹
57. An area where some Members are also advocating flexibility is on the application of the new rules. Hungary and Turkey have both insisted that RTAs under present review should be judged on the basis of the rules applicable at the time of notification of the agreements.⁸² Hungary further asserts that these agreements should be deemed to be virtually consistent with Article XXIV of the GATT and Article V of the GATS. However, other Members are in favour of more stringent rules. India has argued that the

⁸⁰ WT/GC/W/317 (15 September 1999).

⁸¹ TN/RL/W/15 (23 April 2003) and TN/RL/W/114 (6 June 2003), respectively.

⁸² WT/GC/W/213 (18 June 1999) and TN/RL/W/32 (25 November 2002), respectively.

grandfathering suggestion is not a correct proposition in view of the overall purpose of the negotiations. It stated that:

“If the results of negotiation are not applied to the existing RTAs, it would lead to an abnormal situation where the fruits of the efforts of negotiation would only be available for the future RTAs whereas the Members’ proposal for clarification of GATT Article XXIV is based on their experiences with the existing RTAs.”⁸³

58. This seems to be a thorny issue because Members are likely to be divided depending on their involvement in RTAs that are currently being negotiated, examined or awaiting examination in the CRTA. The meeting reports of the Negotiating Group on Rules show that initially Members had divergent views on whether the new rules should apply to existing RTAs.⁸⁴ But lately it appears that they generally want the new rules to be applied to existing RTAs. They feel that exempting the existing RTAs from the new rules would not be in line with the overall purpose of the negotiations. Perhaps as a compromise, a number of Members have referred to the need for granting existing RTAs a transition period to conform to any new rules.⁸⁵
59. The law gives the WTO Members leeway on the issue of retroactivity of amendments. The general principle is that a treaty does not apply retroactively unless a different intention appears from the treaty or is otherwise established.⁸⁶ This principle has been recognized in WTO jurisprudence⁸⁷ and allows the parties to agree to apply a treaty retroactively. Therefore, it will be up to the WTO Members to decide whether or not they want to apply the new rules retroactively.⁸⁸
60. The views on S&D treatment have been diverse. In its written comments on the ACP submission, Japan has challenged the need for negotiating S&D treatment provisions at this stage of the process.⁸⁹ Likewise, another Member has said that S&D treatment should not be the overriding rule in Article XXIV.⁹⁰ Although some Members sympathized with the idea of introducing greater flexibility for developed-developing country agreements within Article XXIV, they cautioned that any flexibility agreed upon would have to be well-

⁸³ TN/RL/W/114 (6 June 2003).

⁸⁴ See for example: TN/RL/M/2 (Summary Report of Meeting of NGR – 6 and 8 May 2002); and TN/RL/M/4 (Summary Report of Meeting of NGR – 16-18 October 2002).

⁸⁵ TN/RL/M/20 (Summary Report of Meeting of NGR – 3 to 4 November 2004).

⁸⁶ Article 28, Vienna Convention on the Law of Treaties.

⁸⁷ See for instance: *Brazil – Measures Affecting Desiccated Coconut*, WT/DS22/R, para 279; *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R, para 235; *Canada – Term of Patent Protection*, WT/DS170/AB/R, paras 71- 74; *European Communities – Trade Description of Sardines*, WT/DS231/AB/R, para 200.

⁸⁸ The WTO Secretariat prepared a note “Issues Related to the Retroactive Application of Possible New WTO Rules on Regional Trade Agreements”, Job (03)/44/Rev.1. It has not been possible to access this document. The latest submission from Australia states that any clarification or improvement of Article XXIV must apply to all agreements in force at the time: TN/RL/W/180 (13 May 2005).

⁸⁹ TN/RL/W/165 (24 September 2004).

⁹⁰ TN/RL/M/15 (Summary Report of Meeting of NGR – 5 May 2004).

defined and targeted, and should not allow agreements to be outside the rules-based system.⁹¹ Others have asked developing countries to make further submissions on the S&D treatment that they are seeking in the area of RTA transparency so that the group could have a constructive discussion.⁹² It is encouraging to note that the most recent submissions by Australia and the EC show a willingness to consider S&D treatment provisions in the RTA disciplines.⁹³ S&D treatment is a principle that is recognized by the Doha Declaration, and the Doha mandate for clarifying and improving RTAs requires Members to address the development aspects of RTAs in the negotiations. There is no reason for Members to defer the discussions on S&D treatment until the so-called ‘systemic’ issues have been dealt with. Indeed, the EC submission stresses that the developmental dimension of RTAs must form an integral part of the negotiations.

61. Japan’s written comment also stated that there should be maximum transparency in the notification process, regardless of the development status of the Members to the RTA.⁹⁴ Others have said that it is inappropriate to provide for different transparency rules for the developed-developing country agreements; rather, technical assistance should be provided to enable developing countries to meet the transparency requirements.⁹⁵ Indeed several Members have called for greater transparency, suggesting that Members should provide detailed information about RTAs, that the WTO Secretariat should prepare a factual examination of a notified RTA, and generally that there should be a more rigorous notification and examination process.⁹⁶ They want this increased transparency to apply to all RTAs, including those notified under the Enabling Clause.⁹⁷
62. In addition, Australia and other countries want a strict interpretation of the substantive aspects of RTA provisions. For example, Australia has submitted that a qualitative approach to the “substantially all trade” requirement should entail coverage of at least 95% of the tariff lines at 6-digit level in the Harmonized Commodity Description and Coding System. The reason for this is to ensure that neither major sectors nor highly traded products are excluded from liberalization in RTAs. It says that this and other obligations should apply to the RTAs that are already in force.⁹⁸ This appears to be an attempt to provide a chance for challenging those RTAs that exclude the entire agricultural sector, for instance.

⁹¹ TN/RL/M/16 (Summary Report of Meeting of NGR – 29 June 2004).

⁹² TN/RL/M/21 (Summary Report of Meeting of NGR – 13 December 2004).

⁹³ Supra, note 88, (Australia submission) and TN/RL/W/179 (12 May 2005) (EC submission).

⁹⁴ Supra note 89.

⁹⁵ Supra note 90.

⁹⁶ See generally: Australia, WT/GC/W/183 (19 May 1999); Australia, TN/RL/W/2 (24 April 2002); Australia, Chile, Hong Kong, Korea and New Zealand, TN/RL/W/117 (10 June 2003); Chile, TN/RL/W/16 (10 July 2002); Japan, WT/GC/W/214 (22 June 1999); Korea, WT/GC/W/171 (16 April 1999).

⁹⁷ TN/RL/M/9 (Summary Report of Meeting of NGR – 11 June 2004).

⁹⁸ TN/RL/W/173 (28 February 2005).

63. The above discussion shows that some of the Members' proposals are almost diametrically opposed: flexibility on the one hand and utmost stringency on the other. This diversity of views is epitomized by the most recent Australian and EC submissions. Regarding the elimination of duties, Australia would like to see a discipline that establishes a rigorous standard applicable at the time of entry into force of an RTA. On the transition period, Australia cautions that the current practice of notifying RTAs with substantial amounts of trade subject to implementation or transition periods has no legal basis. It recalls that only those RTAs notified as interim agreements, and including a schedule and a plan, can rely on the ten year implementation period. Australia states that ten years is an adequate period for RTAs not notified as interim agreements; and proposes more stringency for relying on the ten year period than has been the practice of Members.
64. The EC submission has a different approach, and states that systemic interests, reasonableness and the developmental dimension are overriding principles that will be instrumental for meaningful progress in the negotiations.⁹⁹ On the elimination of duties, the EC's view is that the appropriate level of quantitative benchmarks should be negotiated after some convergence is achieved on the type of benchmarks to be used and on the methodology for calculating them. It wants the numerical threshold to reflect a reasonable balance between the shared systemic interest in clarifying the rules and Members' current interpretation of the disciplines.
65. This contrasts sharply with Australia's eagerness to propose percentages, calculations of tariff lines, et cetera. Regarding the transition period, the EC notes that periods exceeding ten years are becoming the rule, rather than the exception. It proposes that "exceptional cases" should be applied to a limited number of products, should not unreasonably postpone the end of the transition periods, and should only be used for the prolonged phase in of commitments by developing and especially least-developed countries, not developed countries. The implication would be that in an RTA between a developed and developing country, the developing country would be given a longer transition period. This is reasonable as it takes into account the differences in the level of development of parties to the RTA, and acknowledges that developing countries might need more than ten years to gradually phase in their commitments.
66. The EC view is thus more development friendly than the Australian approach, which appears to assume that the ten years transition period is sufficient for all and sundry, and does not consider the level of development of the parties. As for the development aspects of RTAs, the EC endorses the ACP proposal on ensuring coherence between the developmental dimensions in the different WTO rules on RTAs. The EC implicitly aligns itself to the ACP position that

⁹⁹ The submission stresses that negotiations must be based on the recognition that Members have interpreted the relevant rules differently and, hence, adopted different approaches in their RTAs. Any future clarifications would have to take into account such variations in approaches by Members, while going beyond the lowest common denominator: Supra note 93.

there is no a priori reason for the lack of S&D treatment in GATT Article XXIV, noting that it is difficult to see why the substantive requirements for developing countries party to full-fledged RTAs are so radically different from those applicable to developing countries under the Enabling Clause. The EC submission seems to have EPAs in mind as it wants the negotiations to clarify the existing flexibilities in the rules in order to give greater security to developing country parties to RTAs.¹⁰⁰ It could be said that the EC has, to this extent, complied with the Cotonou Agreement requirement that

“the Parties shall closely cooperate and collaborate in the WTO with a view to defending the arrangements reached, in particular with regard to the degree of flexibility available”¹⁰¹

67. One of the main reasons for the differences in views is that Members intend to protect the RTAs that they are already part of or those that they are in the process of negotiating. The EC clearly states in its earlier submission that its view in the negotiations will be

“...guided by three parameters: its interests in guaranteeing the proper functioning and continued good health of the open, rules-based multilateral trading system for the benefit of both developing and developed countries, *its market access interests in respect of third country markets and its own regional agreements. Similar considerations could be expected to apply for all WTO Members - the clear majority - who are participants in some RTAs and not in others*”¹⁰²

68. It is reasonable to expect that it will be very difficult for Members to agree on the areas that need reform. It will be even more difficult to predict which amendments will be made, and how these will affect the existing RTAs; and certainly it will not be easy, if at all possible, to get extra flexibilities or to affirm the current flexibilities in Article XXIV. At the moment it appears likely that Members will push for more stringency in both the procedural and substantive aspects of the RTA provisions. It is hoped that the reactions to the latest Australian and EC submissions will indicate whether Members will continue to insist on rigorous rules or will accept to affirm or increase the present flexibilities.

69. In the meantime, the ACP would be well advised not to rely solely on a positive outcome from these negotiations, that is, an outcome that enables them to have flexibilities in the EPAs. Indeed, amendments will not

¹⁰⁰ The EC also points out that the RTA rules are deficient because they do not distinguish between RTAs among developing countries that are relatively sizeable actors in world trade and RTAs among parties who represent only a small portion of world trade. It will be interesting to see how developing countries will react to the introduction of differentiation between developing countries in the RTA rules.

¹⁰¹ Article 37(8), Cotonou Agreement.

¹⁰² TN/RL/W/14 (5 July 2002). Italics supplied.

automatically result in RTAs being compatible with the WTO. As Cottier posits,

“...while the clarifications sought in current proposals are likely to improve legal security, they will not eliminate the fundamental weakness of the system in controlling and containing the proliferation of trade agreements not fully compatible with WTO disciplines.”¹⁰³

70. A further problem is that even if the members agree on the amendments that they would like to be made, it is far from easy to amend the WTO rules. The CTG or the CTS would have to initiate the proposed amendment under Article X of the Marrakesh Agreement. Then, the amendment would be made only if there is a consensus in support of it. This is rare. As has been noted:

“At least one thing is clear about WTO interpretations and amendments: they are not designed to be taken regularly or readily. In fact, there has not been a single interpretation or amendment adopted since the WTO came into effect in 1995, and there were only six amendments (the last in 1965) in the previous forty-eight years of GATT.”¹⁰⁴

The only hope is that it might be easier to push the amendments because the RTA negotiations are part of the Single Undertaking and Members will be trading off various concessions. In addition, Members know that failure to amend the provisions would constitute a missed opportunity to make RTA rules more effective.

V. Conclusion and Recommendations

71. ACP countries are faced with a major challenge. Their present economic structures are closely tied to preferential trade and economic relationship with the European Union. This historical relationship may not be exactly in line with the development problems and aspirations of these countries. However, any major change in the relationship, e.g., if the on-going EPA negotiations were to result in reciprocal trade arrangements between the EU and the ACP countries, will have serious adverse socio-economic implications. Volumes of trade and investment will decrease and incidence of poverty and unemployment will increase.
72. On the other hand, the EU insistence on a strict WTO-compatibility of any future trade relationship with the ACP countries will require compliance with Article XXIV of the GATT and Article V of the GATS. Since services are only a small part of current ACP trade and GATS also provides for non-reciprocity through a special and differential treatment provision (Article V.3), the main concern is compliance with Article XXIV of the GATT which essentially envisages reciprocity among parties to an RTA. This issue has been examined in the paper and major conclusions from the analysis include:

¹⁰³ Supra note 61 at p. 9.

¹⁰⁴ Posner, T. and Rief, T., (2000) “Homage to a Bull Moose: Applying Lessons of History to Meet the Challenges of Globalisation”, 24 *Fordham International Law Journal*, pp. 481 – 518, at pp. 504-505, quoted in Shaffer, G. (2003) “Defending Interests – Public-Private Partnerships in WTO Litigation”, p. 156, footnote 37.

- Article XXIV currently does not have any special and differential treatment provisions to accommodate for a non-reciprocal RTA between developed and developing countries.
- The present ambiguities in the Article, e.g., regarding the definitions of “substantial coverage of trade” and “reasonable period of time for implementation” provide some flexibility.
- The process of examination in the Committee on Regional Trade Agreements (CRTA) has never led to the adoption of any adverse ruling on the compatibility of an RTA with the WTO. In fact, no decision has even been taken in the CRTA either in favour or against any RTA.
- However, the lack of disapproval by CRTA is no guarantee against a challenge under the binding WTO dispute settlement system. It is reasonable to expect that other WTO Members might take recourse to the dispute settlement, particularly against the EU, to challenge the compatibility with the WTO rules of any non-reciprocal RTA.¹⁰⁵
- Clear and binding flexibility provisions in Article XXIV might be a guarantee against dispute settlement. The mandated negotiations to clarify and improve Article XXIV under the Doha Round provide an opportunity for this purpose.
- ACP countries have made a bold attempt to take advantage of this opportunity through their submissions in these negotiations. But most submissions by other Members are directed at removing the existing flexibilities and not creating additional general flexibilities.

73. ACP countries must have a clear strategy and plan of action to face this challenge and fulfill their developmental aspirations. Recommended below is the outline of a three-track approach in this regard:

a) Legal Track – Leading the Negotiations

74. Non-reciprocal trading arrangements with the EU and legal certainty against WTO challenge are the immediate priorities. These should be the central objectives of ACP countries in the EPA negotiations with the EU and in the Article XXIV negotiations in the WTO. ACP countries must insist that EPA negotiations are not about a typical free trade arrangement but about economic partnerships to promote development. Given the huge differences in the levels of development of the EU member countries on the one hand and the ACP

¹⁰⁵ The EU is susceptible to challenges as it is one of the largest markets for international trade. In fact, the EC is the second most complained against Member of the WTO. According to Shaffer, as of 17 January 2003, the EC was a respondent in 11.6% of all WTO cases that resulted in adopted panel or Appellate Body reports. Only the US, with 37.7 %, has been a more frequent respondent: supra note 98, at 157. From 1995 to 2004, the EC was a respondent in 51 out of the 324 WTO disputes (15.7%): Leitner, K. and Lester, S. (2005) “WTO Dispute Settlement 1995 – 2004, A Statistical Analysis” *JIEL* 8(1) pp. 231 – 244, at p. 234.

countries on the other, only non-reciprocal trade arrangements between the two can be feasible. Therefore, the EPAs should be based on the development needs of ACP countries. ACP countries should also insist that the narrow focus on WTO-compatibility must not be the guiding principle for EPA negotiations as WTO rules are not written in stone and are subject to negotiations themselves.

75. ACP countries should also continue to take an active part in the WTO negotiations on Article XXIV based on their earlier submissions. Their objective is to secure legal certainty for their non-reciprocal trade arrangements under the EPAs. This objective can be served through several means and no option should be excluded a priori. For example, a tightening of Article XXIV to reduce the current ambiguity and flexibility can be combined with specific special and differential treatment provisions for developing countries. The two are not mutually exclusive. But ACP countries should work out several options and be ready to adapt provided their primary objective is met. Some of the possible options include:

- A comprehensive amendment of Article XXIV for clear flexibilities in all areas;
- A narrower amendment that is focused only on special and differential treatment provisions for developing countries;
- An even narrower amendment that focuses only on ACP needs, i.e., EPAs with the EU.

There could be other options. The idea is to focus on the central objective of ACP countries and find legal certainty without being dogmatic about one or the other option.

76. It is also important to keep in mind that the best opportunity to strike a deal is towards the end of Doha Round. That is the time when other WTO Members will be ready to offer concessions to complete the complex deals under a number of areas as part of the Single Undertaking. But it is equally important to lay out the case clearly and build enough pressure in the meanwhile. This requires not only technical, legal work related to negotiations, but also political work which is addressed under the next track.

b) Political Track – Building Pressure and Public Opinion

77. Outcomes of negotiations are always based on respective powers of the negotiating partners. ACP countries individually do not have the economic and political power to match that of the EU or other bigger WTO Members. But they can improve this power balance in their favour by at least two means.

78. One, they should negotiate as a single bloc. The central objective is common and should allow them to work together even if individual countries have

different interests in some areas. Unfortunately, the current configuration of EPA negotiations is working against the adoption of a strong, central vision. This can be overcome by strengthening the horizontal linkages between different EPA negotiations as well as by linking them to a central, guiding vision and strategy. ACP countries are already united in the WTO Article XXIV negotiations. This unity must be maintained. Other WTO Members cannot ignore the joint demand of a group of 50 plus Members, particularly if it is based on development needs.

79. Two, ACP countries have a strong case based on development needs and fair treatment in an unequal world. They should take the case to the public, particularly in the North. They should point out the development implications of unfair trading arrangements being forced on them and emphasize the importance of effective solutions no matter how unorthodox. They should also expose the underhand tactics of major negotiating partners with the help of media and civil society.
80. Political pressure and public opinion can be the deciding factor at the end and ACP countries should actively engage in this exercise.¹⁰⁶

c) Development Track – Searching for Alternatives

81. Legal and political tracks can at best assist the ACP countries in facing the immediate challenge. These will not solve the deeper problems of under development. ACP countries should seriously consider their development strategies and the viable alternatives that might be used to achieve broad and equitably shared socio-economic development. Continued dependence on historical ties, often distorted in favour of the past colonial masters, will not bring long term prosperity. Nor will the existing patterns of trade with the rest of the world. Their development strategies should be tailored to their situation, resources, needs and aspirations. They must maintain the space for policy choices that are most appropriate for them. And their relationship with others, either through the WTO or EPAs, should not curtail this space.
82. There are potential alternatives to the existing dependence on the North, particularly on the EU. Deeper integration at sub-regional and regional levels among groups of ACP countries is one. But this process should be independent of external pressures, e.g., the EPA negotiations. Closer collaboration with other developing countries in the sub-region/region can be helpful to face such pressures.

¹⁰⁶ At an ICTSD, ECDPM and Christian Aid sponsored meeting on “WTO Compatibility and the Economic Partnership Agreements: Coherence for an ACP Agenda” on 22 April 2005 in Geneva, Richard Kamidza of SEATINI gave a presentation emphasizing the importance of political will and political action for the attainment of the ACP objectives in the EPA negotiations. Several discussants also highlighted the need for coordination between ACP negotiators in Brussels, Geneva, the regions, and capitals.

83. Another viable alternative can be broader, inter-regional trade, economic and political relationships among developing countries. There is tremendous scope for such initiatives that should be based on a sense of solidarity and mutuality of benefits. For example, the 3rd Round of negotiations under the Global System of Trade Preferences (GSTP) among developing countries can be an opportunity for ACP countries to deepen their ties with the developing world. The long term vision of ACP countries to develop and get out of dependence and poverty trap is not and should not be limited by the EPA and WTO negotiations.

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