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Article XXIV of GATT and the EPA: Legal Arguments to support West Africa's Market Access Offer

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Analytical document of Enda Third World, prepared on behalf of the West African
Platform of Civil Society Organizations on the Cotonou Agreement
(POSCAO- AC)

PRESENTATION OF ENDA THIRD WORLD

ENDA TM is an associative international non-profit development organization created in Senegal in 1972 as a joint program of the United Nations Program on Environment, the African Institute of Economic Development and Planning and of the Swedish Organization for International Development. It is a network of South-south and South-north experts, this expertise is the result of social experimentation, the battle of ideas and integration in national and international social movements.

ENDA is made up of autonomous entities based in countries of the South, sharing a vision and working for a common mission in accordance with the conditions of each place of intervention.

Among its fundamental objectives one can mention:

- the promotion of social justice and human rights;
- the fight against material and social poverty through solidarity and inclusion;
- advocacy and influencing public policies;
- the promotion of integrated and sustainable development through strategic alliances with social movements worldwide.

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THE WEST AFRICAN PLATFORM OF CIVIL SOCIETY ORGANIZATIONS ON THE COTONOU AGREEMENT (POSCOA- AC):

Since the renegotiation of the Lome IV *bis* and Cotonou Agreements, several civil society organizations in West Africa working on the themes of cooperation between the EC and ACP countries have established national platforms and engage in political dialogue and advocacy activities in the related areas. These platforms have each a national focal point. National focal points constitute in their turn regional platforms whose secretariat is ensured by ENDA Third World.

Since the negotiation of an EPA between West Africa and the EC has been launched, several national focal points and the secretariat of the platform are part of the regional structure of the EPA negotiations. The national focal points at the level of the Technical Support Committee and the secretariat of the platform (ENDA) at the level of the Regional Committee of Negotiation, the latter committee is in charge negotiating on behalf of the region.

¹ Benin (Pascib, Grapad); Burkina (Spong, Orcade); Côte.d'Ivoire (Recsy EU-ACP States; OSCAF); The Gambia (Tango); Guinea (Cecide); Mali (CNP-ANE-AC); Niger (Roddadh); Nigeria (Nants); Senegal (EPA Committee/ Congad); Togo (Gared);

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FOREWORD

African countries and in particular West African countries are often blamed for their unfortunate habit of negotiating backwards. The experience drawn from the involvement of most African countries in the multilateral negotiations, from the Uruguay Round to the WTO, has shown in many cases either a lack of technical preparation in the negotiations or a lack of anticipation, or finally a lack of coordination or harmonization from the negotiating teams or between national and regional commitments and the new multilateral obligations. Although it is widely acknowledged that African countries are faced with a visible deficit of resources and negotiation skills depending on the cases, their lack of negotiating positions which is often displayed is not always justified by the lack of resources. In many cases, there was also a lack of commitment to determine its own interests, of willingness to defend them, and of a clear and deep understanding of the stakes and challenges in the trade negotiations, especially in the long run.

If in the early years of the negotiations of the Economic Partnership Agreements (EPAs) between the EU and ACP regions, many actors had seemed to note and denounce the same shy and passive defensive stance in the attitude of the negotiators, some among the former have demonstrated renewed commitment in recent years by increasing research and analysis studies, documenting and arguing positions, and opening up more to other actors to profit from their experiences, resources and strategies.

This was certainly a breakthrough and that is what has enabled this work to emerge.

One should admit that the Economic Partnership Agreements (EPAs) under negotiation between the EU and West Africa has mobilized in the past eight years, a large portion of the regional expertise available in the area of trade,

agriculture and industry among others, without this pooling of energies and skills being sufficient to cope with the powerful machine, which does not always use “Conventional¹⁴” negotiation processes. To alleviate this shortage and thus contribute to supplement the efforts already undertaken by ECOWAS to build strong positions, that the NGO ENDA Third World, within the framework of the West African Platform of Civil Society Organizations on the Cotonou Agreement (POSCOA- AC) which it coordinates, and as the representative of the civil society at the negotiating table, undertook to initiate and carry out discussions on the major issues on which the region is expected to make commitments.

This analysis seeks to lay the legal framework to support the market access offer that West Africa has submitted to the European Commission within the framework of the EPA negotiations. It is based on the most sophisticated research methodologies and a thorough literature search. More specifically, the study analyzed the relevant documents of WTO, which were supplemented by interviews with experts in international trade law whose authority is undisputed. WTO rules and jurisprudence have been dissected. Disputes brought to the WTO, the interpretation of rulings as well as the practices of members have been thoroughly and objectively analyzed.

This analysis shows that the whole interpretation of the notion of “substantially all the trade” and “reasonable period” adopted by the European Union to impose in its interim or final agreements a liberalization rate on 80% over a 15 year period is a European unilateral interpretation in conformity with its own interests.

In truth, nothing in the WTO or around it makes it an obligation for West Africa to go in the direction indicated by the EC. This study shows that the “only consensus on the definition of these concepts is that there is no consensus”.

¹ Following the signing of interim agreements by the Côte.d’ivoire and Ghana in 2007, the Trade Ministers of the West Africa region denounced on the occasion of the Ministerial Monitoring Committee of December 2007 in Ouagadougou, the “pressures exerted by the European Commission “.

Thus, after having undertaken difficult, but rigorous work involving broad categories of actors in the region to determine the sensitive products to exclude from liberalization, West Africa can indeed limit its offer to 60% over a period 25 years at least. Nothing in Article XXIV of GATT militates against such a position.

Since nothing in the law constitutes an insurmountable constraint to West Africa, a possible change of this offer should therefore only emerge from a sovereign political will of the region. That will should however be justified by both economic and real development, identified and validated by all States and actors who contributed to the development of the market access offer and the list sensitive products.

On behalf of the West African Platform of civil society organizations on the Cotonou Agreement (POSCAO-AC), ENDA Third World expresses its gratitude to the President of the ECOWAS Commission for his commitment to receive the conclusions of the work undertaken by civil society, the negotiating team and all the actors who, directly or indirectly, are helping to defend the interests of member States and the region in the EPA negotiations.

ENDA would also like to thank its partners from the Spanish and Catalan Cooperation and the SETEM and NOVIB Organizations for their support.

Taufik Ben ABDALLAH
ENDA SYSPRO Senior Officer

SUMMARY

1. Trade preferences are based on an exception to one of the pillars of the WTO system which is the most favoured nation clause (MFN Clause). This provision, which binds signatories to extend trading benefits equal to those accorded any third state, is subject to two exceptions relating to the special and differentiated treatment; the preferences granted to developing countries (SGP) and Regional Trade Agreements (RTAs). All RTAs are governed by the WTO three main provisions: GATT Article XXIV, the Enabling Clause and Article V of the General Agreement on Trade in Services (GATS).
2. RTAs may either take the form of a Customs Union or a Free Trade Area. The difference between the two mainly lies in the fact that the Customs Union has a Common External Tariff (CET). Trade relations between the EC and West African countries are now undergoing a profound legal transformation. The former unilateral trade preferences in the previous Lomé Conventions are now being replaced by the Economic Partnership Agreements (EPA). The EPA will take the form of a free trade area, which will be the combination of two customs unions; that of the European Community (EC) on the one hand and ECOWAS' on the other.
3. The new Free Trade Areas will have a totally new form. It will be a mixed RTA concluded between developed and developing countries. As such, it is an economic reality that is taken into account by WTO law by default because Article XXIV, which governs the RTAs has no provision for this type of mixed RTA. It thus raises the issue of the legal regime to be applied to them. Should we endorse the traditional interpretations of Article XXIV, which do not provide for special and differentiated treatment (SDT) in the RTAs and does not take into account the interests of developing countries? How should we understand this legal gap in the GATT/WTO Law? How to take into account the mix nature of the EPAs and provide for asymmetries in favour of West

African countries? These issues which are still not resolved; let foresee the difficulty in the interpretation and implementation of Article XXIV.

4. Two important issues should absolutely be resolved to achieve a balanced EPA which takes into account the interests of the West African party. That is first, the interpretation of the notion of *substantially all the trade* which will enable to determine the level of liberalization. Secondly, it is the definition of the concept of *reasonable length of time* which will determine the deadline for the implementation of the EPA under negotiation. WTO Law still remains silent on the issue, even if a Memorandum on the Understanding of the interpretation of Article XXIV was adopted in 1994. This memorandum gives some clarifications regarding the computation timeline for the implementation of RTAs, but does not solve the problem of the level of liberalization. Article V of GATS adopted more recently, just introduced the concept of *substantial sectoral coverage* in determining the level of liberalization, but gives no indication on lead time.
5. WTO jurisprudence does not provide additional information. It only tells us that the substantial part of the trade that should be liberalized in a RTA is not the totality of the trade... but it is more than just a certain part of the trade. All interpretation methods used do not give any quantified indication either. However, there seems to be a consensus around a liberalization rate of 80% so that the RTA does not run a real risk of being rejected at the WTO. The question was whether this rate is the average of liberalization efforts for both parties or a starting point. If we refer to the mixed nature of the EPA and the implicit recognition of a possible asymmetry by the EC which proposes a 100% liberalization, we have come to the conclusion that the 80% rate is a weighted average that allows West African countries to propose an opening up of their markets for up to 60%. Such a rate will not be challenged for incompatibility with WTO Law.
6. On the issue of length of time for the EPA implementation, GATT Article XXIV provides for a period of 10 years which may be extended under exceptional circumstances. But no clear definition of exceptional circumstances is given.

Ultimately, it is the practice of members which could guide us towards a solution for countries in West Africa. The RTAs analyzed show that asymmetry is the rule in the presence of partners with different levels of development. Moreover, all RTAs concluded recently, including between developed nations, provide for lead times, which exceed by far the prescribed period of 10 years, with no proof of the existence of exceptional circumstances being brought by the contracting parties. The most prominent example is the US-Morocco Free Trade Agreement, which extends over a period of 24 years for implementation for Morocco. By referring to such practice, the uncertainty surrounding the definition of exceptional circumstances, the mixed nature of the EPA and the low economic level of countries in West Africa, we came to the conclusion that the latter could be granted a transition period of 25 years with the EC. Nothing in WTO law and in the practices of Member States pleads for the opposite.

Introduction

1. Multilateral trade ruled by the World Trade Organization (WTO), is governed by the sacrosanct principle of the Most Favoured Nation Clause (MFN Clause).¹ This clause stipulates that any trading benefit granted by a country to another, must be immediately granted to all GATT contracting parties. In other words, what is granted to one contracting party is granted to all the others which are in the same category of development without discrimination. The two types of exceptions which it admits are closely related to taking into account the specific interests of developing countries. They relate to regional economic integration agreements which are agreements by which a group of countries mutually agrees on preferential trade benefits. These benefits are then reserved to the contracting parties to the agreement and denied to others. The second type relates to the trade preferences granted to developing countries by developed countries on a voluntary and unilateral basis.
2. RTAs are organized in free trade areas² or customs unions³. The latter being more integrated to the extent of proposing a common external tariff. The questioning of

¹ Article 1 of GATT: "All advantages, favours, privileges or immunities granted by a part contracting to an originating product or bound for any other country and without condition, extended to very will be immediately produced similar originating or bound for the territory in all other contracting parts."

Any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties

- ² GATT Article XIV.8.b: by free trade area, a group of two or more customs territories between which customs duties and other restrictive regulations of commerce (except, in so far as may be necessary, restrictions permitted under Articles XI, XII, XIII, XIV, XV and XX) are eliminated on substantially all the trade in products originating in the constituent territories of the zone of free trade.
- ³ GATT Article XXIV.8.a "means customs union by the substitution of a single customs territory for two or more customs territories."

the Lome Convention⁴ induced two bleak prospects for the countries of West Africa: the return to a total reciprocity in their relations with Europe, as was the case previously with the Yaoundé conventions⁵; or the resignation to see its preferences hitherto exclusive be extended to other developing countries. This alternative raises the whole the reality of the Economic Partnership Agreements (EPAs) under negotiation between West Africa and the EC. This EPA has the particularity of being mixed in nature, by putting together developed countries and developing countries, within the framework of a free trade area which will be an addition between two customs unions. Regional Trade Agreements (RTAs) are covered by in WTO law in three main legal provisions. These are Article XXIV of GATT, Article V of the General Agreement on Trade in Services (GATS) and the Enabling Clause which provides the legal basis for the SDT of developed countries towards developing countries, and among developing countries.

3. Article XXIV of GATT, which is considered as the main legal basis for future EPAs, does not propose a univocal reading that would allow a harmonized application in all RTAs. The two important points we are concerned with in this study are those related to the definition of the notions of *the substantial part of the trade*⁶ and of *reasonable length of time*⁷ for the implementation of the EPA. The first is to be used to define the level of liberalization which each party in the EPA must reach. The second must be used to set the deadline for the implementation of the EPA. West African countries legitimately invoke special and differentiated treatment in the implementation of the EPAs on these particular points. However, in that case, the request does not translate any chronic need for unlimited need of assistance. It is up these countries to set their own pace by opening up their market at their rate

⁴ Trade relations EU / ACP have been governed for 25 years by so-called Lomé Conventions. There were four from 1975 to 2000. They operated on the basis of non reciprocity to facilitate access into the European territory for ACP products in duty free and quota-free sometimes.

⁵ The Lomé Conventions mentioned above were preceded by the two Yaoundé Conventions. In contrast to their successors, they were established on the basis of reciprocal trade relations between the ACP and the EU.

⁶ Paragraphs a.1 and b of Article XXIV of GATT have respectively that customs unions and free trade should cover substantially all trade to be considered as regional trade agreements under GATT / WTO

⁷ Paragraph 5.c of Article XXIV provides that any tentative agreement includes a plan and schedule for the establishment, within a reasonable time, customs union or a free trade area.

depending on their own economic situation. Article XXIV is supplemented by a Memorandum of Agreement concerning its interpretation which was adopted by members in 1994. It adds nothing new in the determination of the level of liberalization, it offers a useful clarification as to the fixing of a reasonable length of time for the implementation of the RTAs. Article XXIV has the great defect of being conceived at a time when mixed RTAs did not exist and they have not been updated since then.

4. Article V of GATS lays the legal basis of RTAs in the field of trade in services, which is also enshrined in the roadmap of both parties and which soon be subject of negotiations. This article has the advantage of having being developed in more recent times and covers the need to take into account development issues and of a certain asymmetry in the mixed RTAs. It introduces the concept of *substantial sectoral coverage*⁸ in services, but does not specifically mention any deadline of for the implementation.
5. The Enabling Clause provides the legal basis for the RTAs between developing countries, to the exclusion of all others. As such, it is not a priori not to be invoked in the case of the EPAs which include developed countries. But, it will be useful in the developments which follow insofar as it is omnipresent in terms of granting SDT.
6. In the current situation, none of these provisions covers the new reality of the mixed RTAs. Thus none especially provides for a SDT for the countries of West Africa as part of their future EPAs. Therefore, how should the dilemma of the need to reconcile the legal requirement of compliance with WTO rules (according to the current traditional interpretation) and the economic need economic for trade preferences in the EPAs be dealt with? Should the countries of West Africa give up the special and differentiated treatment from which they benefit at the WTO and in their bilateral and multilateral relations with the EC? These issues raise the problem of solving *the legal vacuum* in the system of mixed RTAs. Therefore, the main concern is how to continue to continue to benefit from preferences within the context of a trade relationship supposed to be governed by reciprocity.

⁸ The concept of substantial sectoral coverage is for services what substantially all the trade is for goods.

7. The object of this study is to suggest readings or possible interpretations of Article XXIV of GATT, from a legal point of view and by taking into account the practice of GATT and WTO members of the GATT/WTO. The initial assumption is that most of the usual interpretations of this article are unilateral and serve special interests which do not cover those of the countries of West Africa.
8. In view of what is aforementioned, our study will be divided into three parts. Thus, the first part of this study will deal with the problems arising from interpretation of Article XXIV of GATT, in relation to the EPAs and flexibilities which can result from them(I). In a second part, we will see the conditions for opening up the African market in light of Article XXIV of GATT with an emphasis on the levels of liberalization and the transition periods (II). And to conclude, we will list some salient points which could be used as arguments and possibly as negotiating positions for the countries of West African countries (III).

PART I

Article XXIV of GATT, EPAs and additional flexibilities

1. Difficulties of interpretation raised by Article XXIV of GATT

9. Article XXIV of GATT continues to be indiscriminately interpreted regardless of the composition of the members of the RTAs which refers to it. The status of developing member, although protected by the trading system since at least the early sixties, is swallowed up by that of dominant members, in a legal unit which destroys the recognized economic categories. This unilateral interpretation seems to condemn any asymmetrical relation in the EPAs to a fatal nonconformity with WTO provisions.
10. However, nothing in Article XXIV of GATT, expressly allow to take into account the development issues through a SDT. But what prohibits it? On what legal basis? What are the precedents? What are the methods of interpretation invoked? If lines of enquiry exist for a traditional reading of the conditions of existence for the RTAs, that isn't the case with the mixed RTAs.
11. In common international law, an unclear, ambiguous treaty or showing obvious divergences in reading may be subject to interpretation. The general rules of interpretation are defined in the Vienna Convention on the Law of Treaties.¹ The WTO has not developed a clear system of interpretation for those texts. It took the precaution to use the existing rules of international law by stipulating in Article 3.2 of the Dispute Settlement Understanding (DSU) that “ Members recognize that the Dispute Settlement system serves ... to

¹ Vienna Convention on the Law of Treaties done in Vienna on 23 May 1969. Entry into force on 27 January 1980. United Nations, *Treaty Series*, vol. 1155, p. 331

clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law.

Members recognize that the dispute settlement system is aimed... at clarifying the existing provisions of (WTO) agreements in accordance with the usual rules of interpretation of public international law". These rules are contained in Articles 31 and 32 of the Vienna Convention on the Law of Treaties.

12. The general rule laid down by article 31 is that a treaty must be interpreted in good faith according to the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose... In addition to the context, any subsequent agreement between the parties linked to the modalities of interpretation, any subsequent practice in the application of the text, any relevant rules of public international law should be taken into account. Article 32 provides additional means of interpretation which are in the preparatory work and the circumstances under which the treaty was concluded... In order to confirm the meaning of an interpretation in good faith or to determine the meaning if the text is still ambiguous, obscure, or leads to a result which is obviously absurd and unreasonable. We will later see that WTO jurisprudence has tried these methods to clarify Article XXIV, with varying degrees of success.

2. Mixed RTAs (EPAs) are only taken into account by WTO law by default

13. We have seen that the RTAs are organized by three GATT/WTO provisions: Article XXIV of GATT, the Enabling Clause and Article V of GATS. This last provision is the only one to take into account differences in economic level in the RTAs and provides an explicit SDT², even if the implementation methods are left to the discretion of members. This progressive position of

² Paragraph 3.a of Article V of the GATS provides that "In cases where developing countries are parties to an agreement as referred to in paragraph 1, flexibility shall be provided in respect of requirements that paragraph, in particular with regard to subparagraph b) of that paragraph, depending on their level of development, both overall and by sector and subsector. "

GATS is to be sought in its posteriority to the other GATT provisions. It was negotiated and signed recently³ and it was possible to include in its discussions the need to take into account development issues and fill, at least for emerging issues such as services, the legal vacuum noted in Article XXIV of GATT. If we consider the fact that the Enabling Clause exclusively governs the RTAs between developing countries⁴, it is not surprising that it did not plan an asymmetrical system of exchange that is not adapted to the nature of the economic situation that it governs. However, one cannot say Article XXIV of GATT was exclusively developed for the RTAs between developed countries. Better still, it is believed that its scope was extended to the mixed RTAs by default because they were not covered by the Enabling Clause and no other specific legislation has been introduced. However, the fact of the matter is that Article XXIV does not cover the economic specificity of the RTAs like the EPAs between the EC and West Africa's member states. It could not be an efficient legal basis unless it allows a consistent asymmetry founded on the general spirit that guides the integration of developing countries into the system and based on the development requirements resulting from the Doha mandate. These contextual elements and the updating of Article V of the GATS show that the legal vacuum noted in Article XXIV is not a voluntary systemic orientation that would deny the specificity of mixed RTAs. Those remain economic realities that are not captured by WTO law and show a legal loophole whose interpretation should not be detrimental to developing members.

³ This provision came into force on 1 January 1995, like other WTO agreements, but almost half a century after the GATT agreements.

⁴ The Enabling Clause of 1979 provides among others that apply to "regional or global arrangements entered into between less-developed contracting parties for the reduction or elimination of tariffs on a reciprocal basis and in accordance with criteria or conditions as may be prescribed by the CONTRACTING PARTIES, for the reduction or elimination, on a reciprocal basis, of non-tariff measures, prohibitions on products such Contracting Parties importing from each other. "

3. The mixed nature of the EPAs introduces a fourth level of special and Differentiated Treatment (SDT)

14. Liberalization is never total in an RTA. Three series of exceptions are provided by the System. In the specific context of EPAs, the mixed nature of the RTA sets a fourth level of flexibilities that could further erode the liberalization principle in favour of developing countries

15. The notion of *the substantial part of the trade* does not include restrictive regulations of commerce provide for in GATT Articles XI, XII, XIII, XIV and XV. These provisions relate mainly to the exceptions to the general elimination of quantitative restrictions, restrictions designed to protect the stability of the balance of payments, and exceptions to the rule against discrimination. They are supplemented by the general exceptions in GATT Article XX, which automatically exclude some products from trade liberalization. There are various grounds for exclusion and they may be related to the justification of a trade restriction measure justified by the protection of public morals, health protection, and preservation of the lives of people, animals and plants. They may also be related to the nature of the product itself and would relate to the trade of gold or silver, of items made in prisons, of exhaustible natural resources, etc. All EPAs are supposed to include these systemic exceptions. This is the first level of exception to the liberalization of trade.

16. The second level is the one whose existence is inherent to that of the RTA itself. Insofar as this latter is an exception to the MFN Clause, it is required to discriminate between third members and to ipso facto validate a system of reciprocal preferences between parties. All EPAs are supposed to be governed by this principle that is quite as systemic. The third level is that provided by the exclusion lists. Whatever the interpretation and scope of the notion of *the substantial part of the trade*, each party to the RTA has the possibility to choose its products considered as most sensitive to competition and to withdraw them from trade liberalization. This is an opportunity offered by the system.

17. The common point to these three levels of exception is that they all are discriminatory with the principle of integral trade, for the benefit of RTA parties. They thus are SDTs with reference to the system and regarding third states, without that modifying the rights and obligations of EPA parties among themselves.
18. There lies the originality of EPAs which are mixed RTAs. They incorporate a fourth level of exception into integral liberalization by differentiating the rights and obligations of parties according to their category of development. The legal specificity of EPAs and mixed RTAs in general, is that they combine two SDT sources in WTO law. First, the very nature of the RTA, already mentioned, which confers reciprocal trade preferences. Secondly, and most importantly in this case, the possibility of a trade asymmetry protected by differences in development levels.
19. The existence of this fourth level is further corroborated by the European negotiating position. In choosing to liberalize at 100% and not requiring a reciprocal same level of liberalization, the EC implicitly endorsed the existence of a principle of non-reciprocal trade preferences in a mixed EPA without needing to convene an express legal provision of WTO and without invoking the possibility of incompatibility with the system. It is an attitude that confirms the possibility of the above-mentioned pro-development interpretation. Insofar as nothing prohibits it, it is permissible to take advantage of it in the spirit of the system. The opposite would have been ground for wonders. The WTO is a pure result of Anglo-Saxon practices and law. It results from a more permissive than liberticidal philosophy. In this system, everything that is not expressly prohibited is assumed to be allowed. The gap in the law or the absence of consensus should not constitute an obstacle to the consideration of development issues.

PART II

GATT Article XXIV and opening conditions of the West African market

20. In practice, the differences on the interpretation of GATT Article XXIV relate to two main points: the opening level of the African market through the interpretation of the concept of *the substantial part of the trade*, and the determination of the transition period of EPAs, once signed.

1. The market access offer and the notion of “substantially all the trade”

1.1. The notion of *substantially all the trade* in the GATT / WTO law and practice: the West African market opening rate in question.

21. The implicit or explicit implementation of the above mentioned rules of interpretation did not make it possible to reach a consensual interpretation, particularly regarding the definition of *substantially all the trade*. The only consensus on GATT Article XXIV.8, is that there is no consensus on its interpretation, and thus on the modalities for its implementation. It lacks clarity regarding the content of the notion of *substantially all the trade*. What needs to be liberalized? To what extent? How to determine the products to be excluded from liberalization between the two parties?

22. In this precise case, the role of interpreter has been almost exclusively devoted to jurisprudence. Since the days of the GATT, no jurisprudence or official interpretation has been able to help define the contours of liberalization within an RTA concluded under the auspices of GATT Article XXIV.8. Better still, the few times when the WTO jurisprudence has attempted to unravel this legal hank, it stumbled over the reality of the consensus over

a non-consensual interpretation. Ultimately, the RTAs law is not clear and does not offer a univocal interpretation, regardless of the period of time taken into account in the evolution of GATT / WTO. The jurisprudence had a go at the Vienna Convention recommendations by resorting to the preparatory work.¹ The information taken from there does not seem conclusive:

“We ... have undertaken a detailed analysis of the negotiating history of Article XXIV. We note that the wording of Article XXIV is of sub-optimal clarity and has been the object of various, sometimes opposing, views among individual contracting parties and Members, and in the literature.”²

It also tried to explore the Members' practices to detect the clues that would make it possible to provide guidance in one way or another. The lack of clarity of Article XXIV and the absence of jurisprudence on the matter are not contradicted by the existence of an agreed upon practice³ in the system that could prejudice a preference of members.

“After examination of GATT/WTO practice... it is quite evident that no consensus was reached, nor was any practice agreed upon regarding Article XXIV of GATT⁴.”

24. Therefore, neither the reading of Article XXIV.8 according to the ordinary meaning to be given to terms⁵, neither the preparatory work, nor the existence of an agreed upon practice seem operational. More specifically, the notion of *substantially all the trade* which Article XXIV.8 refers to is not subject to any definition and the meaning of the word *substance* which is supposed to determine the level of liberalization in RTAs has never been grasped. Both the Panel and the Appellate Body have reached this conclusion.

¹ Article 32 of the Vienna Convention on the Law of Treaties.

² Turkey – Restrictions on imports of textiles and clothing. Panel Report, paragraph 9.97

³ Article 31.3.b of the Vienna Convention on the Law of Treaties

⁴ Turkey – Restrictions on imports of textiles and clothing. Panel Report, paragraph 9.166

⁵ Article 31.1b of the Vienna Convention on the Law of Treaties

*“We are aware that GATT Contracting Parties and WTO Members have never reached agreement on the interpretation of the term “substantially” in the context of Article XXIV: 8.”*⁶

*“Neither the GATT Contracting Parties nor WTO Members have ever reached an agreement on the interpretation of the term “substantially” in this provision.”*⁷

The EC, which is party to an anthology of RTAs, corroborates this absence of clear, precise rules with univocal interpretation, and which would give RTAs a systemic harmony regarding liberalization levels.

*“The negotiations must be based on the recognition that Members have interpreted the relevant WTO rules differently and, hence, adopted different approaches in their RTAs”*⁸

- 26.** Ultimately, the only interpretation rule used by the jurisprudence and which seems to apply to the content of Article XXIV.8 is the implicit reference to the *context*⁹ and *circumstances in which the treaty was concluded*. The panel opened this breach for another reading of this article in a different context.¹⁰

*“We are ... aware that the economic and political realities that prevailed when Article XXIV was drafted have evolved and that the scope of regional trade agreements is now much broader than it was in 1948.”*¹¹

- 27.** Using the process of reasoning in contrast, the Panel suggests that GATT Article XXIV be read and implemented taking into account economic and

⁶ Turkey – Restrictions on imports of textiles and clothing. Panel Report, paragraph 9.148

⁷ Turkey – Restrictions on imports of textiles and clothing. Report of the Appellate Body, 22 October, 1999 (WT/DS34/AB/R), paragraph 48

⁸ EC communication of 12 May 2005, TN/RL/W/179

⁹ Article 31.2 of the Vienna Convention on the Law of Treaties

¹⁰ Article 32 of the Vienna Convention on the Law of Treaties

¹¹ Turkey - Restrictions on imports of textiles and clothing. Panel Report, Paragraph 9.97

political realities of today that are more complex and the consequence of which is the enlargement of the scope and coverage of RTAs. This posture includes the new dimension of mixed RTAs and suggests a more contextual interpretation that legitimates a consistent asymmetry in EPAs.

28. This possibility of acknowledged flexibility applies, within the framework of Article XXIV.8, to two agreed upon approaches, one qualitative and the other quantitative.

“The ordinary meaning of the term “substantially” in the context of subparagraph 8(a) appears to provide for both qualitative and quantitative components.”¹²

29. The qualitative approach postulates the taking into account of the products targeted by liberalization and raises the problem of a sectoral protectionism. In this case, whole sectors of the economy may be deemed sensitive and be excluded from liberalization. That has long been the case of agricultural products in several RTAs, and also more recently in the EFTA/Tunisia Free Trade Area. Replaced in the context of EPAs, such an approach could justify the complete exclusion of agriculture for food safety and/or rural development reasons¹³. In the same way, certain sectors excluded from the Doha Round negotiations for obvious economic reasons should not get into liberalization on the sideline of the system. For example, opening a liberalization agenda on the investment and competition¹⁴ in EPAs amounts to ignoring the major economic reasons which exempt the African countries from an opening in these fields, and to a denial of a treatment to the least differentiated. The

¹² Ibid, Paragraph 9.148

¹³ This possibility of complete exclusion is mentioned here as indicative, knowing that the parties have chosen to emphasize a quantitative approach. But the process remains relevant to the Singapore issues.

¹⁴ African countries have always announced their will not to start negotiations on the Singapore issues at WTO: Competition, Investment, Government Procurement and Trade Facilitation. Ultimately, the first three subjects were excluded from the Doha Round. Only those of trade facilitation will remain.

management of these sectors offers a two term alternative to the countries of the region. If they are included in EPAs, some or even all could be excluded from liberalization, depending on the flexibility of the exclusion rate. In this case, they would join the list of the other sensitive products of agriculture, industry, services, etc. However, they could be totally excluded from the field of EPAs and would yield up to other sensitive products which would then be exempt from liberalization. The fact that these sectors are included in the roadmap means that they must be negotiated. But the obligation to negotiate does not imply the obligation to reach an agreement.

As for the quantitative approach of the notion of *substantially all the trade*, it seems highly acclaimed by members, and using the qualitative approach remaining marginal.

*“Concerning the possible types of quantitative benchmarks, as described in a report by the Secretariat (WT/REG/W/46, p. 5) of 2002, “[t]he percentage of trade method has been traditionally favoured as an indication of RTA coverage in the GATT/WTO context.”*¹⁵

31. The primacy of the quantitative approach alone does not solve the problem. It remains to determine the thresholds. But no digital or quantified indication is put forward by GATT / WTO texts, the jurisprudence, or the agreed upon practices in the system. Besides, the jurisprudence has recently given its opinion on this issue.

*“It is ...clear that “substantially all the trade” is not the same as all the trade, and also that “substantially all the trade” is something considerably more than merely some of the trade.”*¹⁶

¹⁵ EC Communication of 12 May, 2005, TN/RL/W/179

¹⁶ Turkey - Restrictions on imports of textiles and clothing. Report of the Appellate Body, 22 October 1999 (WT/DS34/AB/R), paragraph 48 .

32. Therefore, any quantified indication can only be perceived as a unilateral negotiation that must be assessed in relation to the mindset of partners and the balance proposed by the WTO Dispute Settlement Body (DSB)

1.2 - A West African market opening at 60% legally justifiable

33. Since asymmetry is allowed in the EPAs¹⁷, it remains to determine its scope. Neither all the trade, nor merely some of the trade, according to the WTO jurisprudence. Therefore, neither 100% of the trade, nor 50% of the trade to remain credible, what then can be covered by the notion of *substantially all the trade*? The members' practice, which appears to be a consensus, suggests that an RTA, of which approximately 80% of products are liberalized, will be accepted without any difficulty by WTO members.¹⁸ The question is to well define the understanding to have on how to establish 80% of the trade in EPAs. Two interpretations are possible. The first one is that each party shall have to liberalize at least 80% of its products. In this case, the threshold would be consolidated on a ground below which the EPA would no longer be compatible with the WTO. This interpretation seems wrong. Article XXIV.8 states clearly that *substantially all the trade* that must be liberalized relates to products originating in the constituent territories of the Free Trade Area." There is thus no attempt at distributing liberalization charges between the parties. And the numerous RTAs signed under the auspices of Article XXIV almost never confer perfectly equal liberalization charges to parties. In addition to that, there is the already mentioned mixed nature of EPAs which, even in the case of an interpretation validating the distribution of charges into equal shares, would allow a distribution proportional to the economic weight of parties. It's for these various reasons that, to us, the second interpretation is the one that appears to legitimately apply. In such a case, the consensual 80% will be considered as a weighted

¹⁷ With reference to non-reciprocal use of the EC to open its market fully (100%) and mixed EPAs.

¹⁸ Although our developments mention a lack of consensus within the legal framework for the percentage of trade, we agree that 80% is still a limit agreed by members. Everything depends on the result of how this percentage will be established.

average aggregating the efforts of various parties. The fact is that the EC will open up to 100% given, first a unilateral political will, then the fact that most partners of the EC party to an EPA already have a duty-free and quota-free market access; and finally there is a range of latent non-tariff measures that will always protect a part of the EC market. Therefore, to reach the weighted average of 80% of liberalized trade, nothing but a unilateral political will of West African countries, or an efficient pressure of the EC, should force them to go beyond the opening up of 60%. This position would not go against any WTO rule and would not be an obstacle to the legality of an EPA.

34. For the surplus, the risk of incompatibility with WTO law, raised by the EC, is so tenuous that it should not be taken as a major problem. Not to be satisfied with a legally weak EPA that can be challenged any time, but because the operation of the WTO system does not provide the legal tools to do so. First, it is important to know that this compatibility issue cannot be automatically raised by WTO competent bodies. If the Committee of Regional Trade Agreements (CRTA) happens to assess notified agreements - which would be trivial - it will take note and shall not give a decision on the compatibility of the agreement through the liberalization percentage.¹⁹ Then the only remaining possibility of action would be the loss put forward by a WTO Member, because of asymmetry situations found in EPAs. It will not happen for several reasons. The first is that we are in a framework of legal discrimination that is the EPA. No member will be able to support the right to a treatment equal to the one RTA members apply between them. As to the non-reciprocity argument, it is disqualified by the new mixed nature of EPAs which doesn't fall within any prohibition. Secondly, members that are external to the EPA could act only if the EPA creates for them trade conditions that are more stringent than the ones existing before, being thus detrimental to third parties as mentioned in paragraph 8.a.2 of GATT Article XXIV. This will not be the case either insofar as the configuration of EPAs does not modify any of the rights and obligations of third countries. The protective measures taken

¹⁹ We will later see that in the notification procedure, the WTO bodies do not carry out a compatibility test with the WTO provisions. Their practice on the issue of implementation times is particularly eloquent in this register.

by African countries will be opposable only to the EC. Third, an action based on a low liberalization rate, incompatible with WTO law, would be almost impossible to back up. Let us not forget that according to the WTO jurisprudence, *“It is ...clear that “substantially all the trade” is not the same as all the trade, and also that “substantially all the trade” is something considerably more than merely some of the trade.*²⁰ “ We can not reasonably conclude that 80% of liberalized trade in an RTA is not more important than merely some of the trade. “

2. Transition Periods

2.1 - Reasonable Length of Time and Exceptional Cases in WTO Law

35. In terms of applying GATT Article XXIV to EPAs, the problem arising from the notion of *“substantially all the trade”* is the same, mutatis mutandis, as that arising from the transition period. It is Article XXIV as a whole that raises interpretation problems and is not in conformity with the new economic reality of EPAs. For this reason, all the developments on interpretation methods will not be repeated here. They naturally apply to the issue of transition period.
36. In the same way, it is important to note that the legal bases are the same. These are GATT Article XXIV, the Enabling Clause and GATS Article V. But there are two major differences. The first one is that GATS just mentions a reasonable time-frame in the implementation of an RTA without any specific deadline. It does not repeat the reference of 10 years mentioned in Article XXIV. The second difference is that the 1994 interpretation of Article XXIV made an effort to clarify the computation of transition periods. It states that the reasonable length of time for RTAs should exceed 10 years only in exceptional cases... and that in cases contracting parties to an interim agreement find that 10 years would be insufficient; they will explain in detail to the Council for Trade in Goods why a longer period is necessary.

²⁰ Turkey - Restrictions on imports of textiles and clothing. Report of the Appellate Body, 22 October 1999 (WT/DS34/AB/R), paragraph 48

37. The principle of a 10 year transition period is therefore set there, with the possibility of exemptions justified by exceptional cases. The rule is now clear, consensual and is not subject to various interpretations, except as regards the definition of the notion of exceptional cases. The only possibility for African countries to benefit from transition periods longer than 10 years in their EPAs is to list situations that could be perceived as exceptional by the relevant WTO bodies in the evaluation of EPAs. But the position of the EC remains ambivalent about the opportunities to be drawn.

“The European Communities continues to consider that, if at all invoked, “exceptional cases” should only be applied to a limited number of products under RTAs, should not unreasonably postpone the end of the transition periods, and should be used only for prolonged phase-in of commitments by developing and especially least-developed countries, not by developed countries.”²¹

38. A small number of products would thus be affected by the extension of transition periods beyond 10 years. They would possibly be products of mixed sensitivity. Not sensitive enough to be in the exclusion lists but not competitive enough to be liberalized at the same rate as common products. But the good news is that the European observation leaves an opening for developing and least developed countries. In the same way as on the asymmetry of market opening rates, this position is an implicit confession of another possible asymmetry of transition periods. Therefore and with regard to the mixed nature of EPAs, a period much longer than the 15 years generally proposed by the EU remains possible.

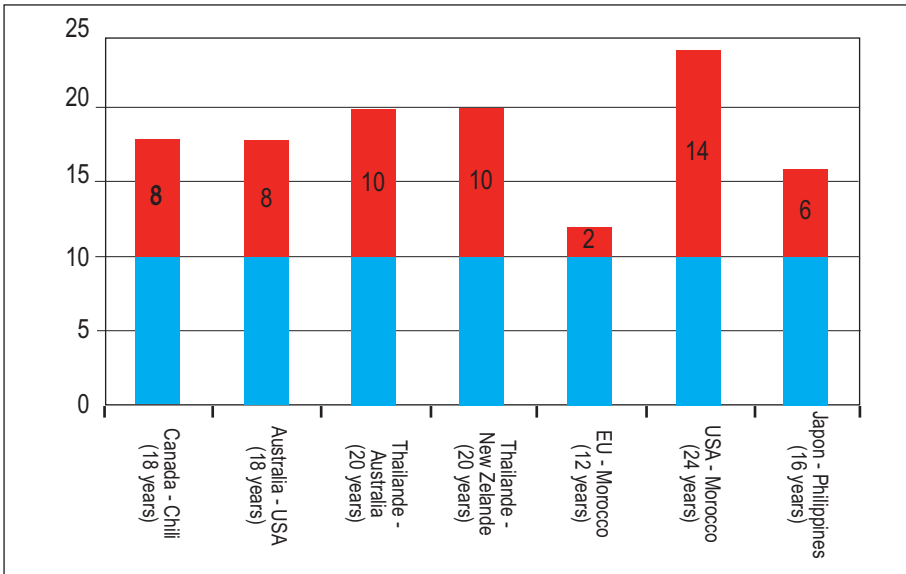
2.2 - Practice of State Members and Justification of a Transition Period of 25 years for African Countries

39. The interpretation of Article XXIV in favor of a transition period of 10 years extendable only in exceptional cases was followed by a period of legalism before members adopted more permissive positions regarding the computation of transition periods of RTAs.

²¹ Communication presented by the European Communities on regional trade agreements, TN/RL/W/179, 12 May 2005

“With regard to RTAs entering into force in the latter half of the 1990s, “only in rare cases do transition periods exceed ten years”. In the recent surge of RTAs, however, transition periods have been known to go well beyond ten years. These cases are becoming the rule rather than the exception.”²²

40. However, no RTA concluded with transition periods beyond the standard has been deemed incompatible with WTO. The main guideline of RTAs is no longer the idea of compliance with WTO law, but the taking into account of the specific interests of the parties to RTAs. It is in this logic that enters the ACP countries’ proposal to WTO²³, specifically formulated to benefit from a transition period of not less than 18 years, taking into account their situation in terms of trade, development and finance. If no resolution of the members has been taken in this direction, the practice has provided interesting cases and orientations, as shown in the following table.



²² Report by the WTO Secretariat, 2002 (WT/REG/W/46, page 22)

²³ Communication of ACP countries to the WTO, 28 April 2004 (TN/RL/W/155)

41. All RTAs mentioned on the table have been concluded recently, most of them after the new interpretation of 1994 on a reasonable period of 10 years extendable in exceptional cases. These are agreements between developing and developed countries, as in EPAs, or even between developed countries. We can see that the longest transition period goes to Morocco in its agreement with the USA. It is 24 years and is basically similar to the period of 25 years requested by African countries for their EPAs. This agreement has been notified to the WTO with no difficulties noted other than the interrogations of some members. When Morocco was asked to give the reasons for this long transition period, it explained that adjustment periods of over 10 years were necessary and appropriate for a number of products designated by the parties²⁴. This explanation was challenged neither by WTO bodies nor by other members. It can thus be concluded that the choice of criteria for exceptional cases are at the discretion of parties to RTAs.

42. The Canada-Chile Free Trade Agreement proposes transitional periods of up to 18 years for some products (wheat and wheat flour). When the question of compatibility with Article XXIV.5.e on the reasonable length of time was asked, they replied that:

*“These products are very sensitive because of the strong distortions created in the international market by the subsidies granted by other countries. Nevertheless, Parties have agreed that it is better to include these products in the disciplines of CCFTA and submit them to a longer progressive elimination period rather than to exclude them all.”*²⁵

43. It can be noted that distortions in the international market comparable to those faced by ECOWAS countries constitute exceptional cases that can justify an exemption. And especially that all the products with mixed sensitivity, or excluded from the lists following the aggregation of national

²⁴ See WTO Document WT/REG38/4

²⁵ See WTO Document WT/REG38/4

lists, may be liberalized in a transition period longer than that of other products introduced in the common law.²⁶

44. It appeared that the vast majority of Areas of free-trade between developed and developing countries are asymmetric, and a systematic transition period of 20 years is nothing exceptional (case of Thailand in its agreements with Australia and New Zealand). More interesting still, even agreements between developed countries such as the Australia-United States Free Trade Area adopt a transition period of 18 years with no established existence of exceptional cases. What could anyway justify such a long transition period, which is obviously an SDT for developed countries and would not be applicable to the situation of an EPA that is not only mixed, but includes LDCs that are among the world's poorest countries. It is a double exceptional case that justifies that African countries can benefit from a transition period of 25 years, just above that of the Morocco / USA Agreement.

²⁶ In West Africa for example, each country has its own national list of sensitive products, before the region does arbitration to present a common list

PART III

Summary of Arguments and Negotiating Positions for West Africa's states

1. On Article XXIV of GATT in general

- The only consensus on the interpretation of Article XXIV of GATT, it is that there is no consensus.
- The EPA between the EC and West Africa is a Free Trade Area. It is a mixed Regional Trade Agreement which is governed by Article XXIV of GATT by default. Actually, no provision is planned for this type of agreement.
- The fact that there are no provisions for special and differentiated treatment for developing countries in Article XXIV of GATT, is not a voluntary choice of the system. It is just that the consequence of this article that was conceived in a context where the mixed RTAs were not taken into account. One cannot use the pretext of this vacuum to deny flexibilities to West Africa's member states.
- WTO bodies will not automatically raise a compatibility issue for reasons related to the level of liberalization or the deadline for implementation. Only member States will be able to do it. And for that, they would have to feel prejudiced by the flexibilities granted to West Africa's member states in their EPA, with the modification in their rights and obligations. And that will not be the case.
- WTO is an Organization soaked with the Anglo-Saxon culture, just like its law. It promotes free trade. This legal culture stipulates that what is not expressly prohibited is supposed to be allowed. The absence of explicit provisions granting flexibilities to developing countries in Article XXIV should not thus be interpreted as a prohibition.

- Contrary to Article XXIV which governs trade in goods, Article V of GATS provides for special and differentiated treatment for developing countries in the mixed RTAs. The GATS was conceived at a recent time which integrates the reality of the mixed RTAs. That means that the silence of Article XXIV in relation to SDT should not be interpreted to the detriment of developing countries.
- The mixed nature of the EPA necessarily leads to a SDT for developing countries. It is in line with the GATT/WTO provisions and the Doha Development Round.
- Jurisprudence explicitly recognized that the economic and political realities which existed at the time when Article XXIV was drafted have changed, and that the scope of the new RTAs have widened. That applies perfectly to the new reality of mixed RTAs in the form of the EPA. The context and the economic situation of the parties must then be taken into account.

2. On the level of liberalization

- A key finding in WTO jurisprudence on the level of liberalization in the RTAs: *“substantially all the trade” is not the same as all the trade, and also that “substantially all the trade” is something considerably more than merely some of the trade.*
- The rate of 80% of the trade seems to be a consensual rate for the credibility of a RTA. But it is not a minimum rate for each of the two parties to the RTA, it is a weighted average of the liberalization rates of liberalization of both parties put together.
- Europe's offer for full market access is not a favour in itself. It was already granted to most of the LDCs who would not see the usefulness of an EPA under more stringent conditions. Moreover, it is a proposal that will be significantly diluted by non-tariff barriers such as rules of origin and sanitary and phytosanitary measures.

- The European request for West Africa to open its market up to 80% is not based on any compatibility requirement with the WTO. It is a unilateral interpretation of Article XXIV which leads to a simple negotiation proposal.
- The European offer to open its market to 100% without waiting that West Africa's member states do the same is an implicit recognition that a possibility of asymmetry is not incompatible with WTO law. The right question to ask is just related to the importance of this asymmetry.

3. On the transition periods

- The exceptional circumstances that may justify the extension of the transition period in the EPA are not clearly defined. WTO members resort to them whenever their specific interests require it.
- Virtually all the RTAs signed recently, even after the precision of the 10 year legal deadline in 1994 and of the exceptional circumstances which can justify its extension, largely exceed this deadline of 10 years without any justification. That refers to both RTAs between developing countries than among developed countries. Two examples deserve to be mentioned: the RTA between the USA and Morocco provides for an transition period of 24 years for Morocco; the RTA between Australia and the USA involving two developed countries provides for an transition period of 18 years.

APPENDICES

Appendix I

Article XXIV: Territorial application — Frontier Traffic — Customs Unions and Free Trade Areas

1. The provisions of this Agreement shall apply to the metropolitan customs territories of the contracting parties and to any other customs territories in respect of which this Agreement has been accepted under Article XXVI or is being applied under Article XXXIII or pursuant to the Protocol of Provisional Application. Each such customs territory shall, exclusively for the purposes of the territorial application of this Agreement, be treated as though it were a contracting party; Provided that the provisions of this paragraph shall not be construed to create any rights or obligations as between two or more customs territories in respect of which this Agreement has been accepted under Article XXVI or is being applied under Article XXXIII or pursuant to the Protocol of Provisional Application by a single contracting party.
2. For the purposes of this Agreement a customs territory shall be understood to mean any territory with respect to which separate tariffs or other regulations of commerce are maintained for a substantial part of the trade of such territory with other territories.
3. The provisions of this Agreement shall not be construed to prevent:
 - a) Advantages accorded by any contracting party to adjacent countries in order to facilitate frontier traffic;
 - b) Advantages accorded to the trade with the Free Territory of Trieste by countries contiguous to that territory, provided that such advantages are not in conflict with the Treaties of Peace arising out of the Second World War.

4. The contracting parties recognize the desirability of increasing freedom of trade by the development, through voluntary agreements, of closer integration between the economies of the countries parties to such agreements. They also recognize that the purpose of a customs union or of a free-trade area should be to facilitate trade between the constituent territories and not to raise barriers to the trade of other contracting parties with such territories.

5. Accordingly, the provisions of this Agreement shall not prevent, as between the territories of contracting parties, 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 of a free-trade area; provided that:
 - a) with respect to a customs union, or an interim agreement leading to a formation of a customs union, the duties and other regulations of commerce imposed at the institution of any such union or interim agreement in respect of trade with contracting parties not parties to such union or agreement shall not on the whole be higher or more restrictive than the general incidence of the duties and regulations of commerce applicable in the constituent territories prior to the formation of such union or the adoption of such interim agreement, as the case may be;
 - b) with respect to a free-trade area, or an interim agreement leading to the formation of a free-trade area, the duties and other regulations of commerce maintained in each of the constituent territories and applicable at the formation of such free-trade area or the adoption of such interim agreement to the trade of contracting parties not included in such area or not parties to such agreement shall not be higher or more restrictive than the corresponding duties and other regulations of commerce existing in the same constituent territories prior to the formation of the free-trade area, or interim agreement as the case may be; and
 - c) any interim agreement referred to in sub-paragraphs (a) and (b) 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.

6. If, in fulfilling the requirements of sub-paragraph 5 (a), a contracting party proposes to increase any rate of duty inconsistently with the provisions of Article II, the procedure set forth in Article XXVIII shall apply. In providing for compensatory adjustment, due account shall be taken of the compensation already afforded by the reduction brought about in the corresponding duty of the other constituents of the union.

7.
 - (a) Any contracting party deciding to enter into a customs union or free-trade area, or an interim agreement leading to the formation of such a union or area, shall promptly notify the Contracting Parties and shall make available to them such information regarding the proposed union or area as will enable them to make such reports and recommendations to contracting parties as they may deem appropriate.
 - (b) If, after having studied the plan and schedule included in an interim agreement referred to in paragraph 5 in consultation with the parties to that agreement and taking due account of the information made available in accordance with the provisions of sub-paragraph (a), the Contracting Parties find that such agreement is not likely to result in the formation of a customs union or of a free-trade area within the period contemplated by the parties to the agreement or that such period is not a reasonable one, the Contracting Parties shall make recommendations to the parties to the agreement. The parties shall not maintain or put into force, as the case may be, such agreement if they are not prepared to modify it in accordance with these recommendations.
 - (c) Any substantial change in the plan or schedule referred to in paragraph 5 (c) shall be communicated to the Contracting Parties, which may request the contracting parties concerned to consult with them if the change seems likely to jeopardize or delay unduly the formation of the customs union or of the free-trade area.

8. For the purposes of this Agreement:
 - (a) A customs union shall be understood to mean the substitution of a single customs territory for two or more customs territories, so that

- (i) duties and other restrictive regulations of commerce (except, where necessary, those permitted under Articles XI, XII, XIII, XIV, XV and XX) are eliminated with respect to substantially all the trade between the constituent territories of the union or at least with respect to substantially all the trade in products originating in such territories, and,
 - (ii) subject to the provisions of paragraph 9, substantially the same duties and other regulations of commerce are applied by each of the members of the union to the trade of territories not included in the union;
- (b) A free-trade area shall be understood to mean a group of two or more customs territories in which the duties and other restrictive regulations of commerce (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.
9. The preferences referred to in paragraph 2 of Article I shall not be affected by the formation of a customs union or of a free-trade area but may be eliminated or adjusted by means of negotiations with contracting parties affected.* This procedure of negotiations with affected contracting parties shall, in particular, apply to the elimination of preferences required to conform with the provisions of paragraph 8 (a)(i) and paragraph 8 (b).
10. The Contracting Parties may by a two-thirds majority approve proposals which do not fully comply with the requirements of paragraphs 5 to 9 inclusive, provided that such proposals lead to the formation of a customs union or a free-trade area in the sense of this Article.
11. Taking into account the exceptional circumstances arising out of the establishment of India and Pakistan as independent States and recognizing the fact that they have long constituted an economic unit, the contracting parties agree that the provisions of this Agreement shall not prevent the two

countries from entering into special arrangements with respect to the trade between them, pending the establishment of their mutual trade relations on a definitive basis.*

12. Each contracting party shall take such reasonable measures as may be available to it to ensure observance of the provisions of this Agreement by the regional and local governments and authorities within its territories.

Ad Article XXIV

Paragraph 9

It is understood that the provisions of Article I would require that, when a product which has been imported into the territory of a member of a customs union or free-trade area at a preferential rate of duty is re-exported to the territory of another member of such union or area, the latter member should collect a duty equal to the difference between the duty already paid and any higher duty that would be payable if the product were being imported directly into its territory.

Paragraph 11

Measures adopted by India and Pakistan in order to carry out definitive trade arrangements between them, once they have been agreed upon, might depart from particular provisions of this Agreement, but these measures would in general be consistent with the objectives of the Agreement.

Appendix II

UNDERSTANDING ON THE INTERPRETATION OF ARTICLE XXIV OF THE GENERAL AGREEMENT ON TARIFFS AND TRADE 1994

Members,

Having regard to the provisions of Article XXIV of GATT 1994;

Recognizing that customs unions and free trade areas have greatly increased in number and importance since the establishment of GATT 1947 and today cover a significant proportion of world trade;

Recognizing the contribution to the expansion of world trade that may be made by closer integration between the economies of the parties to such agreements;

Recognizing also that such contribution is increased if the elimination between the constituent territories of duties and other restrictive regulations of commerce extends to all trade and diminished if any major sector of trade is excluded;

Reaffirming that the purpose of such agreements should be to facilitate trade between the constituent territories and not to raise barriers to the trade of other Members with such territories; and that in their formation or enlargement the parties to them should to the greatest possible extent avoid creating adverse effects on the trade of other Members;

Convinced also of the need to reinforce the effectiveness of the role of the Council for Trade in Goods in reviewing agreements notified under Article XXIV, by clarifying the criteria and procedures for the assessment of new or

enlarged agreements, and improving the transparency of all Article XXIV agreements;

Recognizing the need for a common understanding of the obligations of Members under paragraph 12 of Article XXIV;

Hereby agree as follows:

1. Customs unions, free-trade areas, and interim agreements leading to the formation of a customs union or free-trade area, to be consistent with Article XXIV, must satisfy, inter alia, the provisions of paragraphs 5, 6, 7 and 8 of that Article.

Article XXIV:5

2. The evaluation under paragraph 5(a) of Article XXIV of the general incidence of the duties and other regulations of commerce applicable before and after the formation of a customs union shall in respect of duties and charges be based upon an overall assessment of weighted average tariff rates and of customs duties collected. This assessment shall be based on import statistics for a previous representative period to be supplied by the customs union, on a tariff-line basis and in values and quantities, broken down by WTO country of origin. The Secretariat shall compute the weighted average tariff rates and customs duties collected in accordance with the methodology used in the assessment of tariff offers in the Uruguay Round of Multilateral Trade Negotiations. For this purpose, the duties and charges to be taken into consideration shall be the applied rates of duty. It is recognized that for the purpose of the overall assessment of the incidence of other regulations of commerce for which quantification and aggregation are difficult, the examination of individual measures, regulations, products covered and trade flows affected may be required.
3. The “reasonable length of time” referred to in paragraph 5(c) of Article XXIV should exceed 10 years only in exceptional cases. In cases where Members parties to an interim agreement believe that 10 years would be

insufficient they shall provide a full explanation to the Council for Trade in Goods of the need for a longer period.

Article XXIV:6

4. Paragraph 6 of Article XXIV establishes the procedure to be followed when a Member forming a customs union proposes to increase a bound rate of duty. In this regard Members reaffirm that the procedure set forth in Article XXVIII, as elaborated in the guidelines adopted on 10 November 1980 (BISD 27S/26-28) and in the Understanding on the Interpretation of Article XXVIII of GATT 1994, must be commenced before tariff concessions are modified or withdrawn upon the formation of a customs union or an interim agreement leading to the formation of a customs union.
5. These negotiations will be entered into in good faith with a view to achieving mutually satisfactory compensatory adjustment. In such negotiations, as required by paragraph 6 of Article XXIV, due account shall be taken of reductions of duties on the same tariff line made by other constituents of the customs union upon its formation. Should such reductions not be sufficient to provide the necessary compensatory adjustment, the customs union would offer compensation, which may take the form of reductions of duties on other tariff lines. Such an offer shall be taken into consideration by the Members having negotiating rights in the binding being modified or withdrawn. Should the compensatory adjustment remain unacceptable, negotiations should be continued. Where, despite such efforts, agreement in negotiations on compensatory adjustment under Article XXVIII as elaborated by the Understanding on the Interpretation of Article XXVIII of GATT 1994 cannot be reached within a reasonable period from the initiation of negotiations, the customs union shall, nevertheless, be free to modify or withdraw the concessions; affected Members shall then be free to withdraw substantially equivalent concessions in accordance with Article XXVIII.
6. GATT 1994 imposes no obligation on Members benefiting from a reduction of duties consequent upon the formation of a customs union, or an interim agreement leading to the formation of a customs union, to provide compensatory adjustment to its constituents.

Review of Customs Unions and Free Trade Areas

7. All notifications made under paragraph 7(a) of Article XXIV shall be examined by a working party in the light of the relevant provisions of GATT 1994 and of paragraph 1 of this Understanding. The working party shall submit a report to the Council for Trade in Goods on its findings in this regard. The Council for Trade in Goods may make such recommendations to Members as it deems appropriate.
8. In regard to interim agreements, the working party may in its report make appropriate recommendations on the proposed time-frame and on measures required to complete the formation of the customs union or free-trade area. It may if necessary provide for further review of the agreement.
9. Members parties to an interim agreement shall notify substantial changes in the plan and schedule included in that agreement to the Council for Trade in Goods and, if so requested, the Council shall examine the changes.
10. Should an interim agreement notified under paragraph 7(a) of Article XXIV not include a plan and schedule, contrary to paragraph 5(c) of Article XXIV, the working party shall in its report recommend such a plan and schedule. The parties shall not maintain or put into force, as the case may be, such agreement if they are not prepared to modify it in accordance with these recommendations. Provision shall be made for subsequent review of the implementation of the recommendations.
11. Customs unions and constituents of free-trade areas shall report periodically to the Council for Trade in Goods, as envisaged by the CONTRACTING PARTIES to GATT 1947 in their instruction to the GATT 1947 Council concerning reports on regional agreements (BISD 18S/38), on the operation of the relevant agreement. Any significant changes and/or developments in the agreements should be reported as they occur.

Dispute Settlement

12. The provisions of Articles XXII and XXIII of GATT 1994 as elaborated and applied by the Dispute Settlement Understanding may be invoked with

respect to any matters arising from the application of those provisions of Article XXIV relating to customs unions, free-trade areas or interim agreements leading to the formation of a customs union or free-trade area.

Article XXIV:12

13. Each Member is fully responsible under GATT 1994 for the observance of all provisions of GATT 1994, and shall take such reasonable measures as may be available to it to ensure such observance by regional and local governments and authorities within its territory.
14. The provisions of Articles XXII and XXIII of GATT 1994 as elaborated and applied by the Dispute Settlement Understanding may be invoked in respect of measures affecting its observance taken by regional or local governments or authorities within the territory of a Member. When the Dispute Settlement Body has ruled that a provision of GATT 1994 has not been observed, the responsible Member shall take such reasonable measures as may be available to it to ensure its observance. The provisions relating to compensation and suspension of concessions or other obligations apply in cases where it has not been possible to secure such observance.
15. Each Member undertakes to accord sympathetic consideration to and afford adequate opportunity for consultation regarding any representations made by another Member concerning measures affecting the operation of GATT 1994 taken within the territory of the former.

Appendix III

GATS ARTICLE V: ECONOMIC INTEGRATION

1. 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 (a) 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.

2. In evaluating whether the conditions under paragraph 1(b) are met, consideration may be given to the relationship of the agreement to a wider process of economic integration or trade liberalization among the countries concerned.
3. (a) Where developing countries are parties to an agreement of the type referred to in paragraph 1, flexibility shall be provided for regarding the conditions set out in paragraph 1, particularly with reference to subparagraph (b) thereof, in accordance with the level of development of the countries concerned, both overall and in individual sectors and subsectors.

(b) Notwithstanding paragraph 6, in the case of an agreement of the type referred to in paragraph 1 involving only developing countries, more favourable treatment may be granted to juridical persons owned or controlled by natural persons of the parties to such an agreement.

4. Any agreement referred to in paragraph 1 shall be designed to facilitate trade between the parties to the agreement and shall not in respect of any Member outside the agreement raise the overall level of barriers to trade in services within the respective sectors or subsectors compared to the level applicable prior to such an agreement.
5. If, in the conclusion, enlargement or any significant modification of any agreement under paragraph 1, a Member intends to withdraw or modify a specific commitment inconsistently with the terms and conditions set out in its Schedule, it shall provide at least 90 days advance notice of such modification or withdrawal and the procedure set forth in paragraphs 2, 3 and 4 of Article XXI shall apply.
 - (a) *This condition is understood in terms of number of sectors, volume of trade affected and modes of supply. In order to meet this condition, agreements should not provide for the a priori exclusion of any mode of supply.*
6. A service supplier of any other Member that is a juridical person constituted under the laws of a party to an agreement referred to in paragraph 1 shall be entitled to treatment granted under such agreement, provided that it engages in substantive business operations in the territory of the parties to such agreement.
7. (a) Members which are parties to any agreement referred to in paragraph 1 shall promptly notify any such agreement and any enlargement or any significant modification of that agreement to the Council for Trade in Services. They shall also make available to the Council such relevant information as may be requested by it. The Council may establish a working party to examine such an agreement or enlargement or modification of that agreement and to report to the Council on its consistency with this Article.
 - (b) Members which are parties to any agreement referred to in paragraph 1 which is implemented on the basis of a time-frame shall report periodically to the Council for Trade in Services on its implementation. The Council may

establish a working party to examine such reports if it deems such a working party necessary.

- (c) Based on the reports of the working parties referred to in subparagraphs (a) and (b), the Council may make recommendations to the parties as it deems appropriate.
8. A Member which is a party to any agreement referred to in paragraph 1 may not seek compensation for trade benefits that may accrue to any other Member from such agreement.

Appendix IV

DIFFERENTIAL AND MORE FAVOURABLE TREATMENT, RECIPROCITY AND FULLER PARTICIPATION OF DEVELOPING COUNTRIES

**Decision of 28 November 1979
(L/4903)**

Following negotiations within the framework of the Multilateral Trade Negotiations, the CONTRACTING PARTIES decide as follows:

1. Notwithstanding the provisions of Article I of the General Agreement, contracting parties may accord differential and more favourable treatment to developing countries¹, without according such treatment to other contracting parties.
2. The provisions of paragraph 1 apply to the following²:
 - a) Preferential tariff treatment accorded by developed contracting parties to products originating in developing countries in accordance with the Generalized System of Preferences³,
 - b) Differential and more favourable treatment with respect to the provisions of the General Agreement concerning non-tariff measures governed by the provisions of instruments multilaterally negotiated under the auspices of the GATT;

¹ The words "developing countries" as used in this text are to be understood to refer also to developing territories

² It would remain open for the CONTRACTING PARTIES to consider on an ad hoc basis under the GATT provisions for joint action any proposals for differential and more favourable treatment not falling within the scope of this paragraph

³ As described in the Decision of the CONTRACTING PARTIES of 25 June 1971, relating to the establishment of "generalized, non-reciprocal and non discriminatory preferences beneficial to the developing countries" (BISD 18S/24).

- c) Regional or global arrangements entered into amongst less-developed contracting parties for the mutual reduction or elimination of tariffs and, in accordance with criteria or conditions which may be prescribed by the CONTRACTING PARTIES, for the mutual reduction or elimination of non-tariff measures, on products imported from one another;
 - d) Special treatment on the least developed among the developing countries in the context of any general or specific measures in favour of developing countries.
3. Any differential and more favourable treatment provided under this clause:
- a) shall be designed to facilitate and promote the trade of developing countries and not to raise barriers to or create undue difficulties for the trade of any other contracting parties;
 - b) shall not constitute an impediment to the reduction or elimination of tariffs and other restrictions to trade on a most-favoured-nation basis;
 - c) shall in the case of such treatment accorded by developed contracting parties to developing countries be designed and, if necessary, modified, to respond positively to the development, financial and trade needs of developing countries.
4. Any contracting party taking action to introduce an arrangement pursuant to paragraphs 1, 2 and 3 above or subsequently taking action to introduce modification or withdrawal of the differential and more favourable treatment so provided shall⁴:
- a) notify the CONTRACTING PARTIES and furnish them with all the information they may deem appropriate relating to such action;
 - b) afford adequate opportunity for prompt consultations at the request of any interested contracting party with respect to any difficulty or matter that may arise. The CONTRACTING PARTIES shall, if requested to do so by such contracting party, consult with all contracting parties concerned with

⁴ Nothing in these provisions shall affect the rights of contracting parties under the General Agreement.

respect to the matter with a view to reaching solutions satisfactory to all such contracting parties.

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.
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.
7. The concessions and contributions made and the obligations assumed by developed and less-developed contracting parties under the provisions of the General Agreement should promote the basic objectives of the Agreement, including those embodied in the Preamble and in Article XXXVI. Less-developed contracting parties expect that their capacity to make contributions or negotiated concessions or take other mutually agreed action under the provisions and procedures of the General Agreement would improve with the progressive development of their economies and improvement in their trade situation and they would accordingly expect to participate more fully in the framework of rights and obligations under the General Agreement.

8. Particular account shall be taken of the serious difficulty of the least-developed countries in making concessions and contributions in view of their special economic situation and their development, financial and trade needs.
9. The contracting parties will collaborate in arrangements for review of the operation of these provisions, bearing in mind the need for individual and joint efforts by contracting parties to meet the development needs of developing countries and the objectives of the General Agreement.