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# *The Past, Present and Future ACP-EC Trade Regime and the WTO*

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## **Abstract**

*The Lome IV Convention, which expired on 29 February 2000, provided for non-reciprocal trade preferences in favour of ACP states. Such a trade regime is incompatible in principle with WTO rules and it could only be maintained because the WTO granted a waiver from the obligations of Article I GATT. The successor regime, the so-called Partnership Agreement between the Community, its Member States and the ACP States, provides for a preparatory period from 2000 to 2007, during which the non-reciprocal trade preferences in favour of the ACP will be maintained. A new WTO waiver will therefore be necessary until 2007. During the preparatory period, economic partnership agreements (EPA) will be negotiated between the Community and subgroups of ACP states, which will provide for reciprocal liberalization of substantially all trade. They will constitute free trade areas in the sense of Article XXIV GATT and a waiver will no longer be needed. For those ACP states not classified as least developed countries (LDC) and which are not in a position to negotiate an EPA, alternative trade arrangements will need to be developed. The only viable alternative to an EPA would appear to be the integration of these countries into the Community's Generalized System of Preferences (GSP), which is authorized under WTO rules. For all LDCs, ACP states or otherwise, the Community will grant duty-free imports for essentially all products from 2005 at the latest. This differential treatment of LDCs is covered by the so-called Enabling Clause of the GATT of 1979 and a waiver is not required.*

## **1 Introduction**

The Fourth ACP-EC Convention,<sup>1</sup> which was concluded in 1990<sup>2</sup> and revised in 1995,<sup>3</sup> expired on 29 February 2000. For a long time before that date, thought had

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<sup>1</sup> Hereafter called Lome IV.

<sup>2</sup> OJ 1991 L 229/1.

<sup>3</sup> See the Agreement amending the Fourth ACP-EC Convention signed in Mauritius on 4 November 1995, OJ 1998 L 156/1.

been given in the European Union to the question of how to devise a trade regime with the ACP in the future which would in the long run be compatible with WTO rules without it being necessary to request from the WTO a waiver for an indefinite period of time.

Section 2 of this article will recall the trade provisions of Lome IV and their examination in GATT. Section 3 will describe the negotiations of the trade provisions of the successor agreement to Lome IV and examine the content of the trade regime of the new Partnership Agreement between the European Community and its member states on the one hand, and the ACP states on the other. Section 4 will address the issue of the compatibility of the post-Lome ACP-EC trade regime with the WTO provisions.

## 2 The Trade Provisions of Lome IV and Their Examination in GATT

The chapter on trade cooperation in Lome IV provided for non-reciprocal, preferential access to the Community market for products originating in the ACP states. For non-agricultural products the general rule was that they could be imported into the Community free of customs duties and charges having equivalent effect.<sup>4</sup>

Compared to that straightforward and generous rule for industrial products, the provisions governing trade in agricultural products were somewhat more complicated and restrictive. The only agricultural products that were allowed to be imported into the Community free of customs duties<sup>5</sup> were those for which the Community provisions in force at the time of import did not provide — apart from customs duties — for the application of any measure relating to their import. For all other agricultural products there was an obligation for the Community to take the necessary measures to ensure more favourable treatment than that granted to third countries benefiting from the most favoured nation clause for the same products.<sup>6</sup> These measures were enumerated in Annex XL of Lome IV and consisted mainly in a reduction of or exemption from customs duties or third-country levies, often subject to a limited quota or during a specific period of time during the calendar year.

For bananas, sugar, rum and beef detailed protocols annexed to Lome IV provided for special undertakings on the part of the Community. For bananas, Article 1 of Protocol 5 provided that in respect of banana exports to the Community market, no ACP state 'shall be placed as regards access to its traditional markets and its advantages on those markets, in a less favourable situation than in the past or at present'. For rum, Protocol 6 provided for an annual quota within which rum could be imported duty free. As far as beef was concerned, certain ACP states<sup>7</sup> were allowed to import boneless meat into the Community within specific quantities at import duties

<sup>4</sup> Article 168(1) Lome IV.

<sup>5</sup> Article 168(2)(i) Lome IV.

<sup>6</sup> Article 168(2)(ii) Lome IV.

<sup>7</sup> The ACP states concerned were Botswana, Kenya, Madagascar, Swaziland, Zimbabwe, and Namibia.

reduced by 90 per cent.<sup>8</sup> In the sugar protocol the Community undertook to purchase and import at guaranteed prices 1,300,000 tons of cane sugar, originating in specific ACP states, for an indefinite period.

Article 174 Lome IV provided explicitly that 'in view of their present development needs, the ACP states shall not be required for the duration of this Convention to assume, in respect of imports of products originating in the Community, obligations corresponding to the commitment entered into by the Community under this Chapter in respect of imports of the products originating in the ACP states'. It is therefore clear that Lome IV, just as the earlier Lome Conventions, established unilateral preferences in favour of the ACP states while EC products did not enjoy any preferential access to the ACP markets. The same Article contained a non-discrimination clause according to which the EC was not allowed to discriminate between ACP states in the field of trade.

Such a system of course raises the question as to whether it is compatible with the WTO rules. It will be recalled that Article XXIV GATT only allows preferences in the framework of a free trade area or a customs union where duties and other restrictive regulations are eliminated on substantially all the trade between the constituent territories. It is interesting to note that when the First Lome Convention, which also contained non-reciprocal trade preferences for the ACP states, was examined in a GATT working party in 1976,<sup>9</sup> the Community spokesman argued that the Community had liberalized for its part 'substantially all the trade' as required by Article XXIV GATT, whilst as far as the ACP states were concerned, Part IV of GATT<sup>10</sup> and especially Article XXXVI had to be considered in conjunction and together with Article XXIV. Some other members of the working party considered, however, that in any regional trading arrangements under Article XXIV, all parties would have to enter into obligations corresponding to the commitments entered into by the other parties.<sup>11</sup> At the end of its examination the GATT working party was not able to reach a conclusion as to the compatibility of Lome I with the GATT provisions and it could note only that the parties to the Convention were prepared to supply information on a periodic basis and to notify any changes to the Lome Convention.

This situation did not develop until 1993 when another GATT working party examined the compatibility of Lome IV with the GATT provisions. The Community and the ACP states argued again that nothing in Part IV GATT prohibited a Contracting Party from invoking Article XXXVI(8) in conjunction with Article XXIV, and that since the preferences granted by the Community were non-reciprocal, they complied with Article XXXVI(8) GATT. For these reasons the Community did not consider that there was any necessity for requesting a waiver under Article XXV.<sup>12</sup> However, an increasing number of members of the working party strongly rejected the EC's arguments. They emphasized that Part IV only endorsed special treatment in

<sup>8</sup> Article 1 of Protocol 7. The reduction was increased to 92% in 1995.

<sup>9</sup> See GATT BISD, 23rd, Suppl. 46.

<sup>10</sup> Part 4 introduced in 1966 specific provisions for developing countries.

<sup>11</sup> See GATT BISD, 23rd Suppl., 54.

<sup>12</sup> See the report of the working party adopted on 4 October 1994, GATT BISD, 41st Suppl., 125 at 128.

favour of developing countries on a generalized basis. They stressed that Lome IV violated most favoured nation treatment and that it would be only in conformity with the provisions of the GATT if the parties to Lome IV were granted a waiver from their contractual obligations under the provisions of Article XXV, as was done for the United States Caribbean Basin Initiative and Canada's Caribbean programme.<sup>13</sup>

Although the working party did not arrive at unanimous conclusions in this respect, it is interesting to note that no more than one week after the adoption of the report of that working party on 4 October 1994, the Community and the ACP states which were parties to GATT requested a waiver under Article XXV(5) from the obligations of the EC under Article I(1) GATT, without prejudice to their position that Lome IV was entirely compatible with their obligations under Article XXIV GATT in the light of Part IV.

The waiver from Article I(1) was granted by decision of the Contracting Parties of 9 December 1994 until the expiry of Lome IV, i.e. 29 February 2000, 'to the extent necessary to permit the European Communities to provide preferential treatment for products originating in ACP states as required by the relevant provisions of the Fourth Lome Convention, without being required to extend the same preferential treatment to like products of any other contracting party'.<sup>14</sup>

It is important to note that the waiver was granted, and indeed requested, only as far as the provisions of Article I(1) (most favoured nation treatment) were concerned, and not with regard to other provisions of GATT. When a WTO Panel examined the EC's bananas regulation No. 404/93, it came to the conclusion that the Lome waiver should be interpreted so as to waive not only compliance with the obligations of Article I(1), but also compliance with Article XIII (tariff quotas), because that would be necessary in order to give real effect to the waiver.<sup>15</sup> However, the Appellate Body, in its decision of 9 September 1997, disagreed with this conclusion of the Panel and reversed that finding. According to the Appellate Body, the wording of the Lome waiver was clear and unambiguous. It waived only the provisions of Article I(1) and, although Articles I and XIII were both non-discrimination provisions, their relationship was not such that a waiver from the obligations under Article I implied a waiver from the obligation under Article XIII.<sup>16</sup>

### 3 The Negotiations on a Post-Lome Agreement

Following the above WTO decisions, a long-term examination was undertaken within the Community as to how a future trade regime with the ACP could be envisaged which would be ultimately WTO-compatible, without the necessity for requesting a waiver for an indefinite period of time. The Commission published in November 1996

<sup>13</sup> *Ibid.*, at 127.

<sup>14</sup> GATT BISD, 41st Suppl., 26.

<sup>15</sup> See the report of the panel of 27 May 1997, WT/DS 27/R/USA, para. 7.106.

<sup>16</sup> WT/DS 27/AB/R, para. 183.

a Green Paper in order to stimulate a wide debate on the different options available for future ACP-EC relations. Impact studies on the feasibility of free trade areas with various regional ACP groupings in Africa, in the Caribbean and in the Pacific within the framework of Regional Economic Partnership Agreements were launched. When the negotiations with the ACP states on a successor agreement to the Lome IV Convention finally started in September 1998,<sup>17</sup> the Community and its member states were convinced that the ultimate goal should be to establish, after a transitional period, free trade areas through a gradual process in several stages, starting with regional sub-groups of ACP states which were engaged in a regional integration process, without excluding the possibility of negotiating, where appropriate, free trade areas with individual ACP states as well.

The ACP states, for their part, considered that the new agreement should increase non-reciprocal trade preferences and market access to the Community market. Such non-reciprocal preferences should be maintained after the transitional period for the ACP-LDC<sup>18</sup> whilst for the non-LDC ACP states alternative arrangements should be considered in the light of their performance during the transitional period. The ACP believed in this context that the current WTO rules regarding the transitional period for reciprocity with respect to an asymmetrical free trade area did not take full account of their current level of development and future needs. They were of the opinion that the EU and the ACP should together seek greater flexibility in the application of WTO clauses such as Articles XXXVI(8) and XXIV GATT.

The negotiations between the Community and the ACP states proved to be extremely difficult, mainly because of the participants' diverging views on the future trade regime. After 18 months of negotiations, including four conferences at ministerial level, the two sides agreed in February 2000, i.e. only a few weeks before the expiry date of Lome IV, on a successor agreement which is to be called Partnership Agreement (PA).

### ***A The Trade Regime Provided for by the Partnership Agreement***

According to the PA, the ultimate objective of the economic and trade cooperation it establishes is to enable the ACP states to play a full part in international trade.<sup>19</sup> Such cooperation is to be implemented in full conformity with the WTO provisions, including special and differential treatment taking account of the parties' mutual interests and their respective levels of development.<sup>20</sup> The parties also agree to conclude new WTO-compatible trading arrangements, progressively removing barriers to trade between them.<sup>21</sup>

These new trade arrangements will be introduced gradually, and the PA therefore provides for a preparatory period for all ACP states during which the non-reciprocal

<sup>17</sup> Article 366(3) of Lome IV provides that negotiations for a new convention have to start 18 months before the expiry of Lome IV.

<sup>18</sup> Least developed country.

<sup>19</sup> Article 34(2) PA.

<sup>20</sup> Article 35(1) PA.

<sup>21</sup> Article 36 PA.

trade preferences of Lome IV will be maintained.<sup>22</sup> The ACP states had insisted up to the very last minute that the existing ACP trade preferences should be improved during the preparatory period. The EC had rejected that request, on the grounds that increased discrimination against non-ACP WTO members would jeopardize the possibility of obtaining a WTO waiver for the preparatory period. As a final compromise the two sides agreed in a Joint Declaration on market access that in case the relative competitive position of the ACP states would be threatened during the preparatory period by multilateral trade liberalization, the Community and the ACP states would examine all necessary measures in order to maintain the competitive position of the ACP on the Community market.

The PA stipulates that economic partnership agreements are to be negotiated during the preparatory period and that the new trading arrangements have to enter into force at the latest on 1 January 2008.<sup>23</sup> These economic partnership agreements also have to establish a timetable for the progressive removal of barriers to trade between the parties, in accordance with Article XXIV GATT.<sup>24</sup>

According to Article 37(6) PA the Community will assess the situation in the year 2004 of the non-LDC ACP states which decide, after consultation with the Community, that they are not in a position to negotiate economic partnership agreements (EPAs); the Community will then examine all alternative possibilities, in order to provide these countries with a new framework for trade which is equivalent to their existing situation under Lome IV and in conformity with WTO rules. This provision is rather vague and leaves it completely open as to which 'alternative possibilities' are meant. In Part 4 other available trading arrangements that would be compatible with WTO rules, will be examined.

As far as the least developed ACP states are concerned, Article 37(9) provides that the EU will start a process by the year 2000 which at the end of multilateral trade negotiations and at the latest 2005 will allow duty-free access for essentially all products from all LDCs building on the level of the trade provisions of Lome IV. It has to be stressed that this commitment of the EC is not limited to ACP-LDC but concerns all LDCs, even those which have never been parties to any Lome Convention.

As far as the commodity protocols are concerned, there was an agreement between the two sides that following the decisions of the WTO Dispute Settlement Body on the EC bananas regime, it was not possible to maintain the bananas protocol contained in Lome IV which provided for preferential market access in the Community.<sup>25</sup> Therefore it was agreed that appropriate preferential access for ACP bananas would be provided in the EU's future bananas regime. The other protocols on sugar and beef<sup>26</sup> are maintained but they will be reviewed in the context of the new trading arrangements,

<sup>22</sup> Article 36(3) PA.

<sup>23</sup> Article 37(1) PA.

<sup>24</sup> Article 37(7) PA.

<sup>25</sup> The Second Bananas Protocol attached to the PA does not contain any provisions on market access.

<sup>26</sup> As regards rum all quotas have been phased out as from the year 2000 and that product can be imported into the EC duty-free and without quantitative restrictions. A rum protocol is therefore no longer necessary.

'in particular as regards their compatibility with WTO rules' with a view to safeguarding the benefits derived from them.<sup>27</sup>

The post-Lome ACP-EC trade regime can therefore be summarized as follows:

- From 2000 to 2007 the Lome IV trade rules of non-reciprocal trade preferences are maintained. A WTO waiver is therefore necessary.
- During that period, free trade areas called EPAs will be negotiated with ACP groupings of countries. Those agreements have to enter into force by 1 January 2008 and they must be in conformity with Article XXIV GATT without a waiver being necessary.
- For those non-LDC ACP with which no EPAs have been negotiated in 2004, the EC will consider alternative trade regimes equivalent to the existing situation under Lome IV and in conformity with WTO.
- For all LDCs the EC will grant duty-free access for essentially all products as from 2005 at the latest.

## 4 The Post-Lome Trade Regime and the WTO

We will now examine the above four hypotheses one by one for their compatibility with the WTO provisions.

### A *The Preparatory Period*

Since during this period the non-reciprocal preferential system of Lome IV will be maintained this will be only compatible with WTO provisions if a waiver is granted, because the regime does not constitute a free trade area as required by Article XXIV GATT. Following the decisions of the WTO Dispute Settlement Body on the EC bananas regime, it would appear to be impossible to argue any longer that such a non-reciprocal preferential regime is covered by the WTO rules on the grounds that the EC has liberalized substantially all the trade on its side, whilst on the ACP side Article XXXVI(8) GATT would apply and allow customs duties to be maintained.

The Community therefore requested a waiver from Article I GATT in February 2000. That request was introduced extremely late if one bears in mind that the waiver for Lome IV expired on 29 February 2000 and that according to Article 9(3) of the WTO Agreement a period of up to 90 days can be set by the WTO to consider the request for a waiver. However, one has to remember that the final agreement between the ACP and the EC on the post-Lome trade regime could only be secured during the fourth ministerial negotiating conference held at the beginning of February 2000, i.e. only a few weeks before the Lome IV waiver expired. There was therefore no basis on which a waiver for a future trade regime could have been requested at an earlier date. The only possibility would have been to extend the Lome IV trade regime and request a waiver on that basis for a certain period of time. This would have had the disadvantage that the request for a waiver could not have given any indication as to

<sup>27</sup> Article 36(4) PA.

how the ACP and the EC intended in the medium and long term to make their trade regime WTO-compatible without the necessity for a waiver.<sup>28</sup>

The waiver was requested only in respect of Article I GATT and not Article XIII. Following the trade disputes with the US and some Latin American countries, it was felt that a waiver from Article XIII had no chance of being approved by the other WTO members.<sup>29</sup>

### **B *Economic Partnership Agreements (EPAs)***

As mentioned earlier, it is the ultimate goal of the Community to negotiate during the preparatory period up to 2007 with a maximum number of ACP sub-groups, and if necessary with individual ACP states, so-called EPAs which will basically provide for the establishment of free trade areas in accordance with Article XXIV GATT. It is not the intention for complete free trade areas to be created immediately when the EPAs enter into force in 2008. The idea is rather to make use of Article XXIV(5)(c) GATT which allows so-called interim agreements for the establishment of free trade areas, provided that such interim agreements include ‘a plan and schedule’ for the formation of a free trade area ‘within a reasonable length of time’. That latter term has now been clarified by the Understanding on the interpretation of Article XXIV GATT 1994,<sup>30</sup> adopted during the Uruguay Round, which specifies that the reasonable length of time should only exceed 10 years in exceptional cases, which would have to be justified.

In order to meet the requirements of Article XXIV(8) GATT in any free trade area which will be created through an EPA, duties and other restrictive regulations of commerce (with certain exceptions) have to be eliminated on ‘substantially all the trade’ between the Community on the one side, and the ACP states concerned on the other side. However, Article XXIV does not further elaborate on that term, so it remains unclear how much trade the FTA has to cover. The reports of the Committee on Regional Trade Arrangements of the WTO on the examination of regional trade arrangements are not of much help in this respect, because there exists no agreement between the different members of the Committee on what the exact interpretation of that term should be.

The correct approach is probably to make a quantitative and a qualitative assessment. The quantitative requirement would be that a high coverage must be achieved by the FTA of around 90 per cent of current trade and of 90 per cent of the tariff lines listed in the Harmonized System. The qualitative test would be that no major sector of trade should be excluded.

Since it is far from clear which exact test the WTO will apply when it will examine the EPA between the Community and the different ACP sub-groups, a ‘WTO-compatibility clause’ should be included in the EPA. Indeed, when EPAs are concluded

<sup>28</sup> At the time of writing the WTO had not yet taken a decision on the waiver request.

<sup>29</sup> It is recalled that according to Art. 9(3) WTO Agreement, a waiver is in principle to be granted by consensus. If no consensus is reached it can be granted by a majority of three-quarters of the WTO members.

<sup>30</sup> OJ 1994 L 336/16.

they bind the ACP concerned as well as the Community. On the other hand, the Community has to respect Article XXIV GATT as it will be interpreted by the WTO bodies when they examine the EPA. If they come to the conclusion that an EPA is not in conformity with Article XXIV, the Community cannot maintain that EPA.<sup>31</sup> In that situation there would be two conflicting legal commitments for the Community: on the one hand to respect the EPA concluded with the ACP, and on the other hand to respect Article XXIV GATT. That conflict can be resolved by inserting in each EPA a WTO-compatibility clause which could provide that in case the WTO finds a violation of WTO rules, either the EPA will automatically be terminated, or, if possible, the joint body which will be established by each EPA<sup>32</sup> is authorized to adapt the EPA provisions in such a way that they become compatible with the WTO provisions as interpreted by the WTO bodies.

It follows from the above that the EPAs which will enter into force in 2008 will have to provide for the reciprocal elimination of trade obstacles in respect of substantially all the trade by the end of a transitional period of 10 years, or maybe 12 years in exceptional cases where it can be justified, which means that all ACP states<sup>33</sup> that are parties to such EPAs will have to grant full reciprocity in trade preferences to the EC by 2018 or 2020 as the case may be. It will not be easy to achieve that goal. Only time can tell whether the majority of ACP states will be in a position to join EPAs in 2008 and to assume commitments in the trade sector equivalent to those entered into by the Community.

### ***C The Trade Regime of Non-LDC ACP States, Not Parties to an EPA***

Since the non-LDC ACP states ultimately have the possibility 'to decide that they are not in a position' to negotiate an economic partnership agreement,<sup>34</sup> there will certainly be a certain number of non-LDC ACP states for which 'alternative trade arrangements' will have to be provided by 2008, as they will not have joined any EPA at that point in time. This term has deliberately been kept very vague because there was no agreement either between the member states of the European Union, or between the ACP states, let alone between the ACP side and the EU side, as to what was meant exactly by 'alternative trade arrangement'.

The difficulty of giving this term a concrete meaning is increased even further by two qualifications which are contained in Article 37(6) PA: first, the new framework for trade must be equivalent to the situation of the ACP state concerned under Lome IV, and secondly it must be in conformity with WTO rules. We therefore have to examine which kind of alternative trade arrangements could meet these two tests.

The main option that comes to mind is the Generalised System of Preferences (GSP). The Decision of the Contracting Parties of GATT of 25 June 1971 on 'Generalised

<sup>31</sup> See Article XXIV(7)(b) GATT.

<sup>32</sup> Normally it will be an Association Council or Cooperation Council.

<sup>33</sup> At least those that are non-LDC ACP states.

<sup>34</sup> See Art. 37(6) PA.

System of Preferences',<sup>35</sup> waived the provisions of Article I GATT for a period of 10 years in order to allow developed countries to implement a system of generalized non-reciprocal and non-discriminatory preferences in favour of developing countries, as agreed at the Second UNCTAD 1968. This decision was not renewed because the decision of 28 November 1979 on 'Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries' (the so-called 'Enabling Clause'<sup>36</sup>) now authorizes, on a permanent basis, 'preferential tariff treatment accorded by developed contracting parties to products originating in developing countries in accordance with the Generalised System of Preferences'.<sup>37</sup>

On the basis of these decisions the Community has established a GSP since 1971 which has been regularly renewed and adapted. The current GSP of the Community is part of a decennial system to be applied from 1995 to 2004, at which time it will be reviewed.<sup>38</sup> As this GSP is based on the Enabling Clause of 1979 which provides for a waiver from Article I GATT, it would be possible for the Community to cover all non-LDC ACP states which are not in a position to negotiate an EPA, and thus a free trade area, by this GSP in conformity with WTO rules.

It has to be pointed out that, contrary to an EPA, this option would constitute a unilateral system of trade preferences granted by the Community without a contractual commitment to maintain such an arrangement. It could therefore be withdrawn unilaterally.

A further problem is that the GSP preferences do not attain the level of the trade regime provided for the ACP states in Lome IV and in the PA during the preparatory period. That would of course not constitute a problem with regard to the WTO, because the ACP states concerned would be treated just as the other developing countries under the GSP of the Community. The difficulty stems however from the fact that Article 37(6) PA stipulates that the alternative trade arrangements have to be equivalent to the existing situation under Lome IV. If this is to be interpreted as requiring that every single non-LDC ACP state not party to an EPA has to be granted a regime equivalent to that which it enjoyed under Lome IV, this could only be achieved by enhancing the preferences contained in the GSP of the Community by 2008, to the level of the trade preferences contained in Lome IV. Indeed, it would not be possible to build into the GSP special increased preferences for ACP states only, since a geographical differentiation between ACP states and other developing countries as such would be incompatible with a 'generalized' system of preferences, which must be open to all developing countries according to objective criteria. Participation in the system may therefore be made subject to graduation or differentiation according to the level of development of the different beneficiaries of the system, since this is an objective criterion which can be satisfied at different points in time by any of the

<sup>35</sup> GATT BISD, 18th Suppl., 24.

<sup>36</sup> GATT BISD, 26th Suppl., 203.

<sup>37</sup> Para. 2(a) of the Enabling Clause.

<sup>38</sup> The precise GSP rules applicable between 1 July 1999 and 31 December 2001 are contained in regulation (EC) No. 2820/98 of the Council of 21 December 1998, OJ 1998 L 357/1.

beneficiaries. By contrast, differentiation on a geographical basis would not be covered by the WTO decision granting a waiver for GSP systems, as this differentiation would constitute a discrimination against other developing countries on arbitrary grounds. On the other hand it would of course be possible to add new products on a non-discriminatory basis to the GSP, which are of particular importance to a certain number of ACP states.

Apart from the GSP it is difficult to envisage other trading arrangements as alternatives to EPAs for non-LDC ACP states which would be compatible with WTO rules and would not require a waiver. Clearly, non-reciprocal trade preferences in favour of such ACP states only, whether in the framework of an agreement or granted unilaterally by the Community would be incompatible with WTO rules and in particular with Article I GATT, unless they were covered by an appropriate waiver granted by the WTO on the basis of Article XXV(5) GATT.

Another option would be, as required by the ACP, 'to make the WTO rules more flexible' as far as asymmetrical trade arrangements are concerned. This would require however a modification of the GATT provisions or at least a binding understanding on the interpretation of certain of its provisions, especially of Articles XXIV and XXXVI and the relationship between them. It is far from certain that any of these options could be achieved during the next multilateral WTO trade negotiations.

#### ***D The Trade Regime for the Least Developed Countries (LDCs)***

As stated earlier, the Community has committed itself to allow at the latest in 2005 duty free access to the Community market of essentially all products from all LDCs, ACP or otherwise, building on the level of the trade provisions of Lomé IV.

The decision for this commitment had already been taken in principle by the Council of the EU on 2 June 1997, following the Plan of Action adopted by the WTO Singapore Ministerial Declaration of 13 December 1996, which provided for 'positive measures, for example duty-free access on an autonomous basis' to be granted by developed countries to the LDCs. It was the firm intention of the Community to achieve at the Third Ministerial Conference of the WTO in Seattle in December 1999 a multilateral commitment by a substantial number of developed countries to grant such duty-free access to LDCs. Unfortunately this draft decision fell victim to the failure of that Conference and was not adopted on that occasion. The Community did however, decide to stand firmly by its own commitment in that respect and it was therefore included in the new PA.

Such increased preferences for LDCs as compared to other developing countries are compatible with WTO rules. Indeed, the Enabling Clause<sup>39</sup> of 1979 allows in its paragraph 2(d) special treatment for the least developed among the developing countries in the context of any general or specific measures in favour of developing countries.

As far as relations with the ACP are concerned, the insertion of the provision on duty-free access for essentially all products of the LDCs in the PA has only been

<sup>39</sup> *Supra* note 37.

possible because the PA no longer contains the non-discrimination clause of Article 174(2)(b) of Lome IV which prohibited differential treatment between ACP states in the trade field. Indeed, the EC would not have been prepared, for a variety of reasons, to extend this favourable treatment of LDCs to the non-LDC ACP states as Article 174 of Lome IV would have required. Furthermore, such extension would have constituted a further discrimination against other WTO members which were developing countries but not ACP states and it could have jeopardized the possibility of obtaining a WTO waiver for the ACP-EC trade regime during the preparatory period.<sup>40</sup>

## 5 Conclusion

As can be seen from the above, the relationship between the ACP-EC Conventions and the WTO has not been easy in the past, but the design of the post-Lome ACP-EC trade regime in the new Partnership Agreement with the ACP will be much more complex as regards its relations with the WTO provisions. The best possible solution in WTO terms is fully fledged free trade areas between the Community and the different groupings of ACP states in accordance with Article XXIV GATT.

Where it is not possible to negotiate such FTAs with certain ACP states which consider that they are not in a position to do so, the only viable option which is compatible with the WTO and which does not require a waiver is to cover the non LDC ACP states concerned with the Community's GSP as from the year 2008. For the LDC ACP states a more favourable preferential regime as compared to the GSP can be provided in accordance with the Enabling Clause of 1979.

<sup>40</sup> A joint declaration is annexed to the Final Act of the PA which provides that the Community, notwithstanding specific provisions in the Annex on the trade regime during the preparatory period, shall not discriminate between ACP states in the trade regime provided for in the framework of that annex, taking account however of the provisions of the PA and of specific autonomous initiatives in the multilateral context, such as that in favour of the LDCs pursued by the Community. Therefore, the above initiative in favour of LDCs is permitted by the PA.