David and Goliath: argument against the Economic Partnership Agreements (EPAs) between the European Union and the African, Caribbean and Pacific countries

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Outline

Summary

The European Union (EU) hides itself behind the so-called WTO constraints to impose on the poorest countries in the world, the ACP countries (ACPs) in which Sub-Saharan Africa (SSA) accounts for 94% of the population, the drastic remedy of a bilateral free trade under the pretext that 34 years of non reciprocal trade preferences did not prevent them from becoming poorer. Actually many WTO provisions and a finer interpretation of the allegedly most rigorous ones, together with the WTO case law of its Dispute settlement body, would allow to maintain these preferences, taking into account that ACPs are the poorest countries, including most of those non classified as LDCs.

Despite the hesitant conclusions, to say the least, of most evaluations of the EPAs impact, because essentially financed by the EU, it turns out that it is in the interest of ACPs, if they cannot receive the WTO green light to maintain non reciprocal preferences with the EU, to opt for the alternative solution of the EU GSP (Generalized System of Preferences) and EBA (Everything But Arms) regimes.

If the ACPs were nevertheless forced to accept the EPAs, they can avail of large margins of manœuvre to delay their signature and extend the length of the implementation period.

Above all the ACPs David dispose of a powerful sling to lay down the EU Goliath. Indeed not only the Cotonou Agreement does not oblige the EU to reduce its dumping and does not foresee a safeguard clause for the ACPs, but above all the EU cheats brazenly with the WTO rules, which allows it to practise a massive agricultural dumping highly detrimental to ACPs. Prosecuting the EU at the WTO against these EU breakings of the WTO rules and case law on the dumping effect of the domestic subsidies benefiting to its exported agricultural products would prevent the EU from exporting and would limit by the same token the EU interest to impose the EPAs on ACPs.

I – The near unanimity on substantial criticisms against the EPAs

- **The European Commission justifies the EPAs by a *reductio ad absurdum* argument**: since the preferential trade agreements of the Lomé Convention did not prevent the ACPs from getting poorer, then administering the sovereign remedy of exposing them to a full fledged free trade with their main partner will necessarily trigger a salutary reaction which will increase drastically their competitiveness: "*Past ACP-EC trade cooperation, which has primarily been built on non-reciprocal trade preferences, has not delivered the results expected. Although it has granted duty free access for nearly all products, it has not prevented the increasing marginalisation of the ACP in world trade (during the period of application of the successive Lomé Conventions ACP share in world exports fell from 3.4 % to 1.1 %), nor did it prevent the share of the ACP in total EC imports from decreasing… from 6.7 % in 1976 to 2.8 % in 1999, nor the ACP share of total EC direct investment from falling ever lower (from 2.8 % in 1996 to 1.7 % in 1999)… Trade preferences can confer a competitive edge but they do not automatically generate trade… Therefore, a more comprehensive approach is needed… Economic Partnership Agreements are an instrument to achieve these objectives…by removing progressively all barriers to trade between the EU and the ACP EPA groupings and enhancing co-operation in all areas relevant to trade*"[1]. This is a way of thinking as absurd as that consisting for a poultry producer to open the henhouse gate to allow the fox to test the poultry resistance capacity.

- **Actually the Cotonou Agreement provisions are profoundly contradictory**
  - "*The partnership shall be centred on the objective of reducing and eventually eradicating poverty consistent with the objectives of sustainable development and the gradual integration of the ACP countries into the world economy*" (article 1).
  - "*The ultimate objective of economic and trade cooperation is to enable the ACP States to play a full part in international trade… thereby facilitating their transition to the liberalised global economy*" (article 34).
  - "*Economic and trade cooperation shall build on regional integration initiatives of ACP States, bearing in mind that regional integration is a key instrument for the integration of ACP countries into the world economy*" (article 35).
  - The postulate is thus posed that sustainable development and poverty elimination in ACPs imply an increased integration into the world market. Despite the increase in poverty and hunger, there are not the international trading system and the EU which should adapt their rules to the ACPs' situation but there are the ACPs which have to adapt at all costs to the unavoidable liberalization.
  - The APE claims at the same time: a) to be compatible with the WTO rules, notably with the special and differential treatment (SDT) to be granted to all ACPs and that, larger, to be granted for those which are LDCs; and b) to promote an actual regional integration of ACPs.
  - In fact the language "*bearing in mind that regional integration is a key instrument for the integration of ACP countries into the world economy*" does not impose the exclusive interpretation that this forbids a higher import protection of ACPs' regional groupings vis-à-vis the rest of the world. "*Integration into the world economy*" should be understood as the level of trade integration compatible with a real regional integration able to foster a long run development which is posed as a first objective by the EU. UNCTAD shares this view: "*Implementing some temporary protection does not imply adopting an "anti-trade" strategy, rather it should be considered a key element of a policy aimed at "strategic trade integration"*"[2]. Actually if it difficult to know well if the EU ultimate goal is not rather the integration of ACP countries into the world economy as stated by article 34, regional integration being only a stage, along the World Bank and IMF's views to force them to lower at the same time their MFN tariffs (non preferential trade regime, known as of the most favoured nation) vis-à-vis other countries than the EU (see below).

[1] European Commission, *Regional integration and Trade*
http://www.europe-cares.org/africa/partnership_next_en.html
[2] UNCTAD, *Trade and Development Report, 2006. Global partnership and national policies for development*, 2006.

- The statement that an increased integration of ACPs into the world market – that is manly of Sub-Saharan Africa (SSA) since it concentrates 94% of the ACPs population in 4 on 6 EPAs – is an essential precondition of their development is denied by facts.
  - ✓ Under the pretext that the SSA share in the world trade has dropped from 2% in 1990 to 1.6% in 2004, one draws the conclusion that it us not enough inserted in the world market: this is totally false since the ratio of its trade (imports + exports) in GDP was of 52.7% in 2003 against 41.5% for the world average[3].
  - ✓ These ratios go from 19% in the US to 19.9% in Japan, 24.1% in South Asia, 30% in the euro zone[4], 34.9% in low income DCs, 38.3% in high income DCs, 38.7% in the United Kingdom, 42.2% in Latin America, 50.4% in the Middle East and North Africa. Among the countries the most inserted in world trade there are the emerging countries (70.5% in East Asia and Pacific) and very poor countries (62.9% in the highly indebted poor countries).
  - ✓ By and large the wealth of countries is therefore inversely proportional to their insertion in world trade, East Asia & Pacific and South Asia (given the importance of its domestic markets, particularly in India) being two noteworthy exceptions.
- The coexistence within ACPs, for example in ECOWAS, of 12 LDCs not forced to open their market to EU's exports on account of EBA (Everything But Arms) and of 3 others forced to do it on account of the EPA with the EU, would render regional integration almost impossible, in the absence of a single common external tariff (CET) and if this is one is not enough protective, namely for food products. Maintaining two different tariffs would paralyse internal trade and would blow up regional integration – LDCs being forced to protect themselves from the re-export of products entered duty free in the 3 non LDCs –, would increase tremendously the costs of controlling the rules of origin and open the door to enormous tax evasions. These costs would add to the loss of tariff revenues following the CET implementation, particularly for Nigeria.

➢ **<u>Most assessments of EPAs are ambiguous, having been financed essentially by the EU</u>**

- EPAs assessments underline their negative effects on farmers, tax revenues, increased unemployment, lower incomes and political destabilization.

- Nevertheless most of them conclude at the same time that "*consumers in African countries will be the main beneficiaries of the EPAs*"[5] and that accompanying measures allowed by the EU financial support should mitigate these negative effects.
- To be more concrete we will limit ourselves to evaluations on the West Africa EPA :
  - ✓ Sobia – a synthesis of evaluations on ECOWAS or WAEMU (UEMOA), or on some countries (Ivory Coast, Nigeria, Senegal) – underlines the losses if tax revenues, close to 15% in most countries[6].
  - ✓ The Ministry of agriculture of Guinea finds opposite results : "*For the State a loss of… 40% of tax revenues on food imports or 4 % of public revenues… The EPA… would increase at least in Conakry the households' purchasing power: + 3.11 % for the poor and + 2.7 % for the average households*"[7].
  - ✓ PCI International Consulting is also very contradictory for Burkina Faso: "*The implementation of the CET and VAT at the border has had the effect to reduce the gaps between the taxation rates of the various categories of imported goods. This drop has not been transmitted to… consumers as the consequence of a combine between traders… The fear in the EPAs framework is that*

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[3] http://web.worldbank.org/WBSITE/EXTERNAL/DATASTATISTICS/0,,contentMDK:20535285~menuPK:1192694~pagePK:64133150~piPK:64133175~theSitePK:239419,00.html

[4] http://www.ecb.int/press/key/date/2006/html/sp060331.fr.html

[5] Commission Economique pour l'Afrique, *Déclaration finale de la réunion ad hoc du groupe d'experts sur les questions de commerce et de l'OMC en Afrique centrale*, Pointe-Noire, 2004.

[6] Aissata Sobia, *Revue de la littérature sur les études d'impacts de l'Accord de partenariat économique (APE) sur les économies des pays membres de la CEDEAO*, CERES, Abidjan, 2005.

[7] Ministère de l'agriculture, de l'élevage et des eaux et forêts de la Guinée, *Impact des mesures tarifaires sur l'agriculture et l'agro-alimentaire guinéens, Rapport final*, 2005.

no price drop would occur to boost consumption"[8]. It concludes nevertheless : "*Eventually, the negative effects of an EPA seem to be by far larger to the beneficial effects for such a country as Burkina, if supports to adjustments are not made*".

✓ PricewaterhouseCoopers et al. have evaluated the EPA impact on the West Africa's agricultural chains:

▪ "*Today, the rural population is poorer than the urban population, so… full liberalisation will probably increase poverty in rural areas and increase inequalities. But the demographic trend shows that the urban population is growing faster than rural population, and that poverty is increasing in urban areas. If the urban poor become more numerous than rural poor full liberalisation will improve food security, by providing cheaper food to urban consumers*"[9]. The World Bank and IMF are surely delighted by such an analysis.

▪ However this relative advantage for poor urban consumers would clearly occur only in the short run because, without agricultural development in countries where farmers still represent 2/3 of the population, no overall development can take place and thus with which resources urban consumers will buy these low priced imported foods?

• Mamadou Cissokho had already answered clearly: "*The World Bank says… "The price you charge for rice is too high… you must allow rice imports". But if rice is at one CFA franc on the market and if the 300,000 families have lost their job, thus their income, what will they buy? How will they live?*"[10].

• Yahati Ghosh has well explained the mechanism: "*Thus, even when falling food prices positively affect the poor in particular years, the medium term implications of such exposure to volatile international prices may be negative for the poor. Sustainable food security for the poor in developing countries requires a certain relatively stable relationship between purchasing power and food prices to be maintained, which in turn means that even in rural areas, it is not the absolute price of food which matters so much as the relation between such prices and wages and available employment. The basic fallacy made by most trade theories that assess gains from trade in terms of the consumption benefits is that this result is based in full employment. In the absence of full employment, it is impossible to think of consumers as independent entities with money incomes that arrive as manna from heaven. Instead, consumers require purchasing power, which means they require wage incomes and or access to other livelihood which will allow them to make purchases in the first place. This means that open trade that generates lower food prices is not always unambiguously beneficial for the poor. If the same open trade which is providing access to lower priced food is also generating unemployment and loss of livelihood in the rural areas, and therefore reducing the purchasing power of the poor, then obviously the effects of such trade on the poor may be perverse*"[11].

▪ The more so as nothing can ensure that the world prices will remain low and everything to the contrary indicates that they will be very volatile, thus very high in some years when the poor countries which would have liberalized their agriculture would be condemned to starvation. This is the conclusion of Jean-Marc Boussard et al.'s analysis, for whom "*as a result of liberalization, prices become more and more volatile*"[12].

✓ Another frequent conclusion, notably of PricewaterhouseCoopers, is that the EPAs will facilitate regional integration, meaning because the EU financial support is implicitly conditioned

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[8] P.C.I. International Consulting, *Préparation d'un Accord de Partenariat Economique Union Européenne - Afrique de l'Ouest - Volume 1 : Diagnostics, Impacts et Recommandations pour le Burkina Faso*, éd. Secrétariat ACP - Unité de Gestion des APE, Mars 2005, 126 p.

[9] PricewaterhouseCoopers et al., *Sustainability Impact Assessment of the EU-ACP Economic Partnership Agreements, Phase Two, Final Report*, 2005.

[10] Mamadou Cissokho, *Discours au Congrès de la Coordination Rurale*, Caen, 28 novembre 2002.

[11] Jayati Ghosh, *Trade Liberalization in Agriculture: An Examination of Impact and Policy Strategies with Special Reference to India*, Human Development Report Office, Occasional paper, 2005/12. http://hdr.undp.org/docs/publications/background_papers/2005/HDR2005_Ghosh_Jayati_12.pdf

[12] J.-M. Boussard, F. Gérard & M.-G. Picketty, *Libéraliser l'agriculture mondiale? Théories, modèles et réalités*, CIRAD, 2005.

on agreeing to conclude the EPAs and because West African countries do not have the willingness to promote it by themselves.

✓ According to the synthesis on impacts of the West Africa EPA made by GRET and the Platform (the "Hub" for West and Central Africa) in December 2005, "*The liberalization scenario favoured by the authors rests on an asymmetrical liberalization and an increase in the CET for the most sensitive products. Most agricultural and food products likely to be put in competition with imports from Europe should be excluded from liberalization. The limit of 20% of flows seems acceptable, as it allows to protect sensitive or strategic products and is compatible with GATT article XXIV. The possibility to implement this revised CET is hoped for by a majority till the end of the EPA implementation period, i.e. 2020, to take into account the gap in the development levels of the two zones. At the end of that period, the competitiveness of the West African agricultural sector will be appraised and, according to the conclusions, a more complete liberalization will be contemplated. However all the authors underline that the development component of the EPA, that is the EU support of the regional process of integration and capacity reinforcement has too be sizeable and that it is one of the conditions allowing the EPA to reach its objectives of sustainable development*"[13]. Thus, on the condition of an EU increased financial support, this report admits that an openness of West Africa to 80% of EU exports is enough to shelter its sensitive products, forgetting that agricultural products are not the only sensitive products, and that a 12 years period is also enough before contemplating to liberalize beyond 80%.

✓ This conclusion reflects the view of the EU Commission: "*Brussels rejected a review clause proposed by African states to allow them to freeze liberalisation after 10 years if EU promises on aid were not met. "While we are not against well-defined review clauses, we think that they should be limited in their scope and mainly aimed at accelerating or extending liberalisation," Commission negotiators said, adding that the market opening should not be linked to "undefined development targets. It may void the agreement of its sense'*""[14].

✓ Yet the EU Commission has advanced proposals of trade liberalization going from 67% to 83% according to African regions (Maerten, C. 2005). And ROPPA has proposed to limit West Africa's openness to 50%, "*which would lead to a liberalization rate of the overall trade by 72%. In that case, the margins of manoeuvre of West Africa become broader. They allow to exclude from its market openness process at the same time food products and other products considered sensitive. This can be the case of non food agricultural products or of some industrial products, notably of the textile industry and of upstream and downstream agricultural production*"[15]. It appears also that "*the conditions of this openness asymmetry remain open (Stevens, C., Kennan, J, 2005) and, according of the EU Commission itself (DG Trade), we should forget this unfortunate comparison with the EU-South Africa agreement. As this has been underlined previously, there are other precedents (infra, 1.3), notably the association agreements between the EU and Mediterannean countries, which do not impose thresholds to reciprocity*"[16].

- Other analyses are however more critical:
  - Abdou reports that the regional workshop of 20-22 September 2005 on the ECOWAS-EU EPA has concluded that: "*Signing an EPA presents more risks than opportunities for the economies of the area… The development component of the agreement is not clarified, notably the*

[13] Benoit Faucheux, Bénédicte Hermelin, Julieta Medina, *Impacts de l'Accord de Partenariat Economique Afrique de l'Ouest*, Note synthétique, GRET, Plateforme, République française, Décembre 2005, www.gret.org/ressource/pdf/07670.pdf.

[14] Andrew Bounds, *Brussels rejects moves to link trade with aid,* The Financial Times, 28 November 2006 http://www.ft.com/cms/s/8627e69e-7e85-11db-84bb-0000779e2340,dwp_uuid=70662e7c-3027-11da-ba9f-00000e2511c8.html

[15] Jacques Gallezot, *Les enjeux et les marges de manoeuvre de la CEDEAO face aux défis des négociations agricoles*, ROPPA, juillet 2006.

[16] Jacques Gallezot, *Pour un développement durable en Afrique de l'Ouest: la souveraineté alimentaire*, ROPPA, Forum sur la souveraineté alimentaire, Niamey, 7-10 novembre 2006, http://www.roppa.info/IMG/pdf/Gallezot_-_Souverainte_alimentaire_et_developpement_durable.pdf

objectives of the 5th negotiation group which will be in charge of the agricultural component… A better integration of the area markets is necessary before any implementation of the EPA"[17].

- Above all the peasant organizations have clearly underlined the enormous risks of the EPA for the already non competitive African peasantries.
- For Ndao, "*In order to avoid the extinction of African producers, the peasant organizations advocate… the rehabilitation of other tools which have shown their efficiency such as import quotas and variable levies*"[18].
- ROPPA's (Nework of peasant organizations and agricultural producers of West Africa) Convention has committed itself the 2 April 2006 to "*mobilize ROPPA to make known to the States the disagreement of farmers organisations about the EPAs and their acute anxiety about the real threats that the conclusion of such agreements could have on the future of the West Africa's 15 million rural families*"[19].
- The Representatives of the peasant organizations of 3 ACP regions – ROPPA, EAFF (East African Farmer's Federation) and WINFA (Windward Island Farmers Association) – have stated the 19 June 2006 in Vienna: "*Farmers' organizations feel it is urgent to develop and defend alternatives to the dogmatic liberalization scenario which currently dominates in the EPA negotiations. Margins for manoeuvre do exist, also with regard to the WTO, concerning both the time limits for establishing EPAs and the asymmetries of exchanges between ACP countries and the EU which can be allowed. A large proportion of the agricultural sector could benefit from temporary or even permanent protection. This is justified by the impact assessments carried out in the context of the EPA negotiations*"[20].

- The EPAs are so absurd that ACPs have been denouncing them from the start of the negotiation process in 2002 and their criticisms have been reinforcing recently[21], as well of those of civil society[22], despite that the EU has tried to "buy" their agreement with the carrot of its financial support.

- **<u>Opting for the alternative GSP + EBA would be much better than EPAs for the ACPs</u>**

Romain Perez of UN Economic Commission for Africa (UNECA) has compared the impact of EPAs according to two rate of openness of ACPs to EU exports and with alternatives to EPAs, using a general equilibrium approach (the last GTAP version 6.0 of 2005), contrary to most EPAs assessments which have used partial equilibrium models[23]:

- With the standard assymetrical EPAs (the ACPs eliminating 80% of their tariffs on EU exports and the EU eliminating 100% of its tariffs on ACPs exports), the SSA ACPs would suffer a drop of 1.4% in GDP (of which a drop of agricultural output by 1.8%), a drop of fiscal revenues of 1% of GDP, an increased trade deficit of $1.1 billion and a welfare loss of $0.9 billion while the EU would get a welfare gain of $1.7 billion.
- In the second scenario where the ACPs would only eliminate 50% of their tariffs on EU exports (the EU eliminating 100% of its tariffs on ACPs exports), the drop in GDP of SSA ACPs is reduced to 0.4% (of which a drop of industrial output by 1%), the drop in fiscal revenues is also of 0.4%, the trade deficit falls to $0.6 billion and the welfare loss to $0.3 billion.

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[17] Abdou, M. S. (Ministère du développement agricole de la République du Niger), *Rapport de mission de l'Atelier régional sur l'Accord de partenariat économique CEDEAO – UE*, Ouagadougou, 2005.

[18] Babacar Ndao, *Impacts d'un APE sur l'Agriculture dans le cadre des négociations commerciales de l'Accord de Cotonou et de l'OMC*, CESAG, 2004.

[19] ROPPA, *Résolution finale de la 4è Convention ordinaire*, St-Louis, Sénégal, 30 mars au 2 avril 2006, http://www.roppa.info/article.php3?id_article=52

[20] *Economic Partnership Agreements: Family farmers speak out!* 22-06-2006 http://www.bilaterals.org/article.php3?id_article=5102

[21] Martin Khor, *Trade: Leading Ministers of ACP states criticize EPA process*, SUNS #6122 Wednesday 18 October 2006.

[22] Malick Ndaw, *Accords de libre-échange entre l'Union européenne et l'Afrique de l'Ouest : les organisations de la société civile avertissent*, Sud-Quotidien, 27-09-06, http://www.bilaterals.org/article.php3?id_article=6252

[23] Romain Perez, *Are the Economic Partnership greements a First-best Optimum for the African Carribean Pacific Countries?* Journal of World Trade, 40(6): 999-1019, 2006.

- In the third scenario, based on the full elimination of tariffs inside each EPA group, regional trade is boosted by $1.9 billion in the absence of EPAs. Combined with the first scenario (elimination of tariffs on 80% of EU exports), the regional trade is reduced by $407 million despite the full regional integration and the welfare loss exceeds the benefit of full regional integration by $851 million. This is the best scathing refutation of the EU claim that EPAs are necessary to foster regional integration. Combined with the second scenario (elimination of tariffs on 50% of EU exports), the regional trade is still reduced by $179 million and the welfare loss exceeds the benefit of full regional integration by $309 million.
- The alternative scenario where the ACPs refuse to sign the EPAs and opt for the SGP for non LDCs ACPs) + EBA for the ACPs LDCs leads to an improvement compared to the first 3 scenarios. The current account of ACPs improves by $0.2 billion because, if their exports to the EU drop by $0.9 billion, their exports to the rest of the world rise by 0.8 billion and they reduce their imports, particularly in industrial goods: "*More protective for ACP-based industries, the GSP option is also more favourable in terms of regional integration and fiscal resource preservation. Regional trade slightly increases under this option, while it undergoes a severe shrinkage under the EPA proposals. In the meantime, ACP governments still record the customs revenues on European imports, and do not suffer from external imbalances. Even in terms of welfare and GDP changes, the GSP option seems preferable at least for non-SADC Sub-Saharan and Pacific ACP countries. For the world as a whole, this option is also better, as global welfare decreases by only $31 million versus $263 million in the first simulation*".
- The final scenario of a GSP+, where duty-free EU imports from ACPs are extended to 250 tariff lines sensitive for the EU, is clearly the best alternative: "*Abandoning the Cotonou preferences to the GSP+250 would leave the effective protection that ACP exporters enjoy on the European markets roughly unchanged… This scenario gives the most satisfactory results for all ACP sub-groups in terms of welfare, GDP value, fiscal and external balances as well as regional trade… The global welfare impact under this option is more favourable than under the EPAs option, especially for developing countries, which suffer from an unnoticeable loss of $53 million… Hence this GSP+ option leads to a quasi-status quo in the trade relationship between the EU and ACP countries, and is less costly than the EPAs option*".
- Even if these scenarios do not take into account the rules of origin, which are more favourable to ACPs in the Lomé-Cotonou regime than in the GSP or EBA regimes, the overall conclusion is that the ACPs should opt for the GSP and EBA rather than for the EPAs, the more so if they can avail of a GSP+.
- Unfortunately "*The EU Commission is rejecting special and differential treatment within the EPA regions even with regard to LDCs. The Commission insists on "single starting lines", meaning that all ACP countries within an EPA region have to apply the same tariffs for EU goods. This goes against the differentiation that the ACP countries have build into their existing integration processes. The EU Commission rejects ACP proposals that would allow the least-developed countries within regions to choose for the Anything But Arms*"[24].

- **<u>Despite the negative evaluations, the EU Commission concludes at their positive impact</u>**
  - However the criticisms of these assessments are mitigated by the fact they have been funded essentially by the EU Commission.
  - And, despite that these evaluations have not ended, the Commission has already concluded since the end 2005 that they are globally positive and that there is no doubt that the EPAs will be signed: "*The Commission-funded Sustainability Impact Assessment (SIA) of the EPAs, launched in September 2002, has also formed part of discussions with non-state actors both in the ACP and the EU. The SIA is continuing to provide analytical background and recommendations on opportunities and challenges of the EPAs. Overall the SIA confirms the expected opportunities and*

[24] Marc Maes, *EPA's: "Chronicle of a Death Foretold"?*, conference on "ACP-EU Trade Relations: The Development Challenges of EPAs", South Centre, Brussels, 12 October 2006.
http://www.acp-eu-trade.org/library/files/Maes_EN_071106_EPAs-chronicle-of-a-death-fortold.pdf

challenges of the EPAs in the economic, social and environmental areas and concludes that there are more positive impacts of concluding an EPA than of not doing so"[25].

- In the same report, the Commission concludes that, for the West Africa EPA, "*The major objective of the first stage, which dealt with regional integration in WA, was mainly achieved for the areas directly regarding the exchange of goods: free trade area, customs union, trade facilitation, technical standards and quality control, Sanitary and Phytosanitary Standards. The other negotiation areas – intellectual property rights, competition policy, trade in services and investment framework, to which other trade related subjects may be added – were the subject of discussions that will have to be continued. As for work on the sectors of production, it was decided that they will continue during the entire process of EPA negotiations and implementation*", so much so that "*The ministerial meeting in Brussels on 27 October 2005 ended with agreement to begin work on the next phase of negotiations in January 2006, adopting a timetable ending with a ministerial meeting at the end of 2006 to endorse the text of the agreement and launch negotiations of liberalisation*".
- As Gabriel Siles-Brugge puts it, "*The reorganization of the* [Lomé] *regime owes much to the emphasis the EU now places on WTO compliance, but doubts remain as to whether this is not simply a device to legitimate Economic Partnership Agreements (EPA's) that the EU wishes to pursue as part of its Cotonou strategy*"[26].
- Everything happens as if, whatever the extent of the negative impacts of the EPAs, ACPs, notably of West Africa, had no other choice but to resign to them, hoping that complementary financial supports will reduce these negative effects.
- This is a profound mistake: temporary financial perfusions will never be a substitute to the competitiveness loss of enterprises, particularly of farms, given the almost irreversibility of tariff reductions which, once granted to the EU, will be generalized unavoidably to the rest of the world in the WTO negotiations, or even before under the IMF and World Bank's pressures.

➢ As 12 years of implementation of the WTO agreements have already made a lot of damage in the poorest DCs and did not prevent the rise of the number of people chronically undernourished, the EPAs would clearly be even more harmful as they imply a rate of trade opening much higher and even the obligation to implement the "Singapour issues" – the rules on investments, competition and public procurement – that DCs had however refused at the WTO. In fact the EU medicine will trigger a race to the abyss in ACPs, with the foreseeable backfire effects on the EU: very high surges of clandestine immigration, drugs trafficking, and likely push of terrorism.

➢ **Besides the EPAs have been denounced by the House of Commons, the British government and the French National Assembly**

- In parallel with a March 2005 report on EPAs from the Commission of international development of the House of Commons, the UK Minister of trade and industry (DTI) and the Minister of international development (DFID) have published the same month a statement entitled "Economic Partnership Agreements: making EPAs deliver for development", underlining that "*In its work on EPAs with ACP regional groups, the EU should take a non-mercantilist approach and not pursue any offensive interests. Developing countries can benefit from liberalisation in the long run, provided they have the economic capacity and infrastructure they need to trade competitively. However, without the capacity or the right conditions, trade liberalisation can be harmful… We will not force trade liberalisation on developing countries either through trade negotiations or aid conditionality… The EU should propose within the WTO that Article XXIV of the General Agreement on Tariffs and Trade, should be reviewed as suggested by the Commission for Africa, in order to reduce the requirements for reciprocity and increase the focus on development priorities*"[27].
- The French National Assembly is even more straightforward: "*These negotiations are heading straight for failure…If the Commission persists, Europe will commit a political, tactical, economic and geostrategic mistake… Can we really assume the responsibility of leading Africa, which*

[25] EU Commission, *The trade and development aspects of EPA negotiations*, Brussels, 09-11-2005 http://trade.ec.europa.eu/doclib/docs/2005/november/tradoc_125863.pdf
[26] http://blogs.warwick.ac.uk/eubilateraltrade/
[27] www.dti.gov.uk/files/file9845.pdf

in a few years will be home to the greatest number of persons living on less than one dollar a day, to more chaos, on the grounds that OMC rules are being complied with? Do we believe this chaos will be limited to Africa, which would already be unbearable?… And if we were to persist down this path we would contribute to the splitting, if not the end, of the EU-ACP partnership… It is therefore absolutely necessary for politicians to give a new negotiating mandate to the Commission, following a Franco-British initiative"[28].

- It is surely to take into account the much larger political openness of several EU Member States than the European Commission itself – notably because it is the DG Trade and not the DG Development which negotiates the EPAs – that ACPs have begun to interpellate directly the Member States, and lastly Germany which will take on the EU presidency the first semester 2007, on the necessity to modify radically the conception of EPAs.

II – The WTO does not impose the trade reciprocity devised for the EPAs

Despite the opposite statements of the European Commission, shared by most commentators, several WTO provisions do not impose the end of the non reciprocal trade preferences, thus the EPAs. Many arguments can be put forward.

1) With EPAs it is the EU which would benefit from a huge special and differential treatment

The assertion that reciprocal trade agreements, thus free trade, are the only ones compatible with the WTO is highly questionable since a hundred of WTO provisions insist on the necessity to grant to DCs a special and differential treatment (SDT) in all cases, which the EPAs contradict radically. It is indeed the EU which would benefit of a huge SDT the wrong way since its domestic market is already open to 97% of ACP agricultural exports, 3% only paying tariffs at full MFN (most favoured nation) rate, and to 100% of their industrial exports. Only ACPs would be forced to dismantle at least 80% of their tariffs to the EU exports.

2) Other GATT articles contradict article XXIV

- **Paragraph 8 of GATT article XXXVI**, added in 1965 together with articles XXXVII and XXXVIII to constitute Part IV ("Trade and development") of GATT 1947, states: "*The developed contracting parties do not expect reciprocity for commitments made by them in trade negotiations to reduce or remove tariffs and other barriers to the trade of less-developed contracting parties*".
  - And the interpretation of this paragraph 8 by the WTO specifies: "*It is understood that the phrase "do not expect reciprocity" means, in accordance with the objectives set forth in this Article, that the less-developed contracting parties should not be expected, in the course of trade negotiations, to make contributions which are inconsistent with their individual development, financial and trade needs, taking into consideration past trade developments*"[29].
  - Not to have included this provision of GATT article XXXVI in article XXIV is due to the fact it is as far-reaching as that of article XXIV on the permission of customs unions and free-trade areas. Therefore the statement of the ACPs group at the WTO that *"there are no explicit provision on* de jure *S&D treatment for developing countries in meeting the requirements set out in Article XXIV of GATT 1994*"[30], and their request to add this explicit provision, are questionable. This would undermine the reach of other GATT articles referring to SDT, of which articles XXXVI to XXXVIII, and it would then be necessary to insert the reference to SDT in all GATT articles!

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[28] Jean-Claude Lefort, *Rapport d'information sur la négociation des accords de partenariat économique avec les pays d'Afrique, des Caraïbes et du Pacifique*, Assemblée Nationale, 5 juillet 2006 http://www.assemblee-nationale.fr/12/europe/rap-info/i3251.asp#TopOfPage

[29] http://www.wto.org/english/res_e/booksp_e/analytic_index_e/gatt1994_10_e.htm#article34B

[30] ACP Group of States, *Developmental Aspects of regional trade agreements and special and differential treatment in WTO rules: GATT 1994 Article XXIV and the Enabling Clause*, TN/RL/W/155, 28 April 2004.

- Article XXIV.8.b defines the working conditions of free-trade areas: "*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… are eliminated on substantially all the trade between the constituent territories in products originating in such territories*".
- The WTO Appellate Body has stated, in the *US – Gasoline* case: "*One of the corollaries of the 'general rule of interpretation' in the Vienna Convention is that interpretation must give meaning and effect to all the terms of a treaty. An interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility*"[31]. Therefore article XXIV has to be interpreted in a way compatible with article XXXVI.
- Besides, the EU has invoked in the past article XXXVI to justify its unilateral trade preferences of the Lomé 1, 2 and 3 Conventions[32].

➢ **GATT article XII on "Restrictions to Safeguard the Balance of Payments" and article XVIII on "Governmental Assistance to Economic Development"**.

- Article XII states that "*any contracting party, in order to safeguard its external financial position and its balance of payments, may restrict the quantity or value of merchandise permitted to be imported*".
- And article XVIII, devised particularly for "*the economies of which can only support low standards of living and are in the early stages of development*" (paragraph 1), states in paragraph 2: "*The contracting parties recognize further that it may be necessary for those contracting parties, in order to implement programmes and policies of economic development designed to raise the general standard of living of their people, to take protective or other measures affecting imports, and that such measures are justified in so far as they facilitate the attainment of the objectives of this Agreement. They agree, therefore, that those contracting parties should enjoy additional facilities to enable them (a) to maintain sufficient flexibility in their tariff structure to be able to grant the tariff protection required for the establishment of a particular industry and (b) to apply quantitative restrictions for balance of payments purposes in a manner which takes full account of the continued high level of demand for imports likely to be generated by their programmes of economic development*.
- ACPs can therefore avail of enough tariffs flexibility to raise them "*to implement programmes and policies of economic development designed to raise the general standard of living of their people…in so far as they facilitate the attainment of the objectives of this Agreement*". The GATT preamble specifies these objectives: "*Recognizing that their relations in the field of trade and economic endeavour should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand*".
- And, when they face balance of payments problems, they can also use quantitative restrictions, notably variable levies and import quotas. Indeed *ad valorem* tariffs (fixed percentage of the CIF price) cannot ensure an efficient protection in the face of extremely volatile and often very low world prices, and this not only in dollars but also in national currency given the volatility of exchange rates. Furthermore the volatility of prices and exchange rates are reinforced by agricultural trade liberalization[33].
- The WTO interpretation of article XVIII states that "*It is clear from these provisions that Article XVIII reflect an acknowledgement of the specific needs of developing countries in relation to measures taken for balance-of-payments purposes… In particular, the conditions for taking balance-of-payments measures under Article XVIII are clearly distinct from the conditions applicable to developed countries under Article XII of GATT 1994*".
- However, in the "US-India - Quantitative Restrictions" case, India lost the case and has been obliged to eliminate its quantitative restrictions because the IMF, which is necessarily consulted

[31] WTO Report of the Appellate Body, *United States - Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, 29 April 1996 (96-1597).
[32] http://www.fao.org/tc/Tca/pubs/TMAP41/41chap7.htm
[33] Jean-Marc Boussard et al., op. cit.

at the WTO on balance of payments issues, declared that the exchange reserves were adequate so that India did not need to maintain quantitative restrictions[34].

✓ Yet India had reduced its average tariff on all products from 82% in 1990 to 30% in 1997. Criticized to have maintained quantitative restrictions on agriculture, it has replied that "*in the Indian situation, they secure a degree of certainty which it is not possible to get with measures founded on prices*". Indeed India had liberalised progressively its economy since 1991 but argued that its policy "*was centred during its first phase on structural reforms which obliged India to liberalize imports of equipment goods, industrial intermediate products and raw materials. A simultaneous liberalization of imports of consumer goods would have undermined India's capacity to pursue its structural reforms on the balance of payments front*".

✓ The current account balance has remained negative until 2000-01 (from -$4 billion in 1998-99 to -$2.7 billion in 2000-01, has reached a positive peak of $14.1 billion in 2003-04 but was again negative by -$5.4 billion in 2004-05) because of a large deficit in the trade balance (from -$13 billion in 1998-99 to -$11.6 billion in 2001-02 and even -$36 billion in 2004-05), mitigated by a positive balance of invisibles (mainly remittances of Indian workers, from $10.3 billion in 1998-99 to $12.9 billion in 2000-01 and $20.3 billion in 2004-05)[35]. Of course the overall balance of payments has remained positive owing to inflows of foreign direct investments (FDI, from $2 billion in 1998-99 to $5.9 billion in 2000-01 and $12.1 billion in 2004-05), foreign portfolio investments and external borrowing. But even if the foreign exchange reserves have been increasing rapidly (from $20 billion in 1997 to $40 billion in 2001 and $140 billion in 2004), the component part of foreign portfolio investments is higher than that of FDI and is thus fragile since these assets in foreign securities could rapidly leave the country[36].

✓ But the main problem, underlined by Jayati Gosh, is the impact of liberalization on Indian farmers: "*Tariff rates for most agricultural commodities were low or zero in the early 1990s, largely because quantitative restrictions on imports rendered tariffs irrelevant, and also because world prices were substantially higher than Indian prices over that period. Subsequently, and especially after 2000, tariff rates have generally been coming down… so that Indian agriculturalists effectively had to deal with all the volatility of world prices… With increased trade liberalization, reduction in cereal consumption became very pronounced… The combination of liberalized trade and reduced protection of other kinds certainly led to increased levels of exports and imports of agricultural commodities… From 1999-2000 onwards, some of the export growth is actually a form of distress sale at the macroeconomic level, as the publicly held stocks of food grains were sought to be disposed of through subsidized exports… Such exposure to global price volatility has been associated with a growing reliance on private debt, because of the lack of extension of institutional credit, coupled with growing inability to meet debt service payments because of the combined volatility of crops and prices. This in turn has led to loss of assets, including land, by the small peasantry. This has been so marked that the proportion of rural households without any land increased dramatically over the 1990s, and by 1999-2000 accounted for around 45 per cent of rural households according to National Sample Survey data. The pervasive agrarian crisis has been most harshly illustrated by the increase in suicides by farmers, which amounted to nearly 10,000 cases across India by the end of 2004*"[37].

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o Despite this rebuttal of India's claims, the Doha Decision of 20 November 2001 on "Implementation-related issues and concerns" "*Reaffirms that Article XVIII of the GATT 1994 is a special and differential treatment provision for developing countries and that recourse to it should be less onerous than to Article XII of the GATT 1994*"[38].

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[34] Appellate Body report, *India – Quantitative restrictions on imports of agricultural, textile and industrial products*, 23 August 1999, WT/DS90/AB/R.

[35] http://indiabudget.nic.in/es2005-06/chapt2006/chap62.pdf

[36] Charan Singh, *Should India Use Foreign Exchange Reserves for Financing Infrastructure?* Stanford Institute for Economix Policy Research, September 2005, siepr.stanford.edu/Papers/briefs/policybrief_sep05.pdf

[37] Jayati Ghosh, *Trade Liberalization in Agriculture*, op. cit. (footnote 11).

[38] http://www.worldtradelaw.net/doha/impdecis.pdf

- Therefore ACPs should use variable levies, largely used by the EU for agricultural imports before the WTO, since they guarantee fixed entrance prices in the domestic currency whatever the level of prices in dollars and the exchange rate.
  - ✓ They could use as well import quotas, largely used by the US up to 1994 also.
  - ✓ Admittedly this provision of article XVIII would not so easily advocated by all EPAs, for example it would be more difficult to advocate for ECOWAS where balance of payments are not a big issue because of Nigeria's oil exports and because UEMOA countries are linked to the euro through the CAF franc.
  - ✓ Besides, instead of raising applied tariffs as long as they are lower than their bound level, FAO suggests "*to set price bands whereby applied rates are varied automatically in response to the gap between domestic and world market prices in order to stabilize the former. Although price band policies are still followed by some WTO members, their compatibility with WTO provisions is open to question, since the AoA explicitly outlaws variable levies. However, it has been argued that such policies are legitimate as long as applied duties do not exceed the bound rates*"[39].
  - ✓ Incidentally ACPs should at least use specific import duties – x CFA Francs or nairas per amount of measurement: tonne, hectolitre, cattle head… – instead of *ad valorem* duties since they are authorized by the WTO and because their protecting effect is much higher when the world prices are low. It is the reason why more than half of the EU agricultural tariff lines are using specific duties, sometimes in combination with an ad valorem tariff, as in the case of fruits and vegetables[40]. The US is doing the same. In 2005 WTO Members have had to convert all their specific duties in *ad valorem* duties, but this was only done to compare their contemplated tariff reductions during the Doha Round negotiations, without impling an actual conversion of the existing specific duties in ad valorem ones. Yet these specific duties are closer to variable levies, which are forbidden by the WTO, than simple *ad valorem* duties!

3) The "Enabling Clause" may and should be understood differently from the unanimous view

- The "Enabling Clause" has taken up article XXXVI.8, notably in paragraphs 1 and 5 – its official title being "Differential and more favourable treatment, reciprocity and fuller participation of developing countries, Decision of 28 November 1979" – which write:
  - Paragraph 1: "*Notwithstanding the provisions of Article I of the General Agreement, contracting parties may accord differential and more favourable treatment to developing countries, without according such treatment to other contracting parties*"[41].
  - Paragraph 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.*
  - Paragraph 2 specifies the cases to which this SDT applies: a) SDT granted to DCs in the framework of the developed countries' GSP (Generalized System of Preferences); b) SDT for non-tariff measures; c) Regional or global arrangements among DCs; d) SDT granted to LDCs.

- Given these rules of the Enabling Clause, which has been incorporated into the GATT 1994, all commentators and WTO Members, and first the EU Commission, state that this SDT between developed and developing countries can only apply in the framework of trade preferences granted by developed countries to all DCs (as with the GSP) or to DCs at the same development level as LDCs with the EU Decision on EBA ("Everything But Arms"). SDT could not be applied only to DCs

[39] http://www.fao.org/docrep/003/X8731e/x8731e07.htm
[40] Jacques Gallezot, *Data base of European agricultural tariffs DBTAR*, TradeAG, European Commission, working paper 05/07.
[41] http://www.wto.org/french/docs_f/legal_f/enabling1979_f.htm

selected on a geographical basis as it is the case of ACPs which, besides, gather together LDCs and other DCs in their 6 regional groupings identified by the EU to negotiate the EPAs.

- This unanimous interpretation is however questionable for several reasons:
  - Footnote 2 to paragraph 2 of the Clause states: "*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*", i.e. beyond the 4 cases listed, and notably outside the framework of GSP and LDCs. In other worlds WTO Members are free to allow the ACPs, at least those which are the poorest DCs, to have non reciprocal trade agreements with developed countries.

  - This interpretation is reinforced by other paragraphs of the Clause:
    - ✓ Paragraph 5: "…*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*".
    - ✓ Paragraph 7 which refers to GATT article XXXVI: "*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*".
    - ✓ Paragraph 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*".

  - Contrary to all the WTO Members, particularly the EU Commission, and commentators, another interpretation of point c) of paragraph 2 of the Clause is possible and necessary:
    - ✓ This paragraph 2 specifies the conditions or cases in which paragraph 1 applies: "*The provisions of paragraph 1 apply to the following… (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*".
    - ✓ That paragraph 1 applies to the whole paragraph 2 is confirmed by the EU Commission: "*Paragraph 1 "applies" equally to all the subparagraphs included in Paragraph 2*"[42].
    - ✓ Instead of saying that point c) of paragraph 2 authorizes the "regional arrangements", that is customs unions and free-trade among DCs, – which would be totally redundant with GATT article XXIV which authorizes already such agreements among all Contracting Parties (today among all WTO Members), whatever they are developed or developing countries –, the interpretation which imposes itself is that "*Contracting Parties may accord differential and more favourable treatment to developing countries, without according such treatment to other contracting parties*" (paragraph 1) when the DCs are grouped together in "regional arrangements" (customs unions or free-trade areas) (paragraph 2.c).
    - ✓ The wording "*Contracting Parties may accord differential and more favourable treatment to developing countries*" suggests strongly that these *Contracting Parties* are not themselves DCs but developed countries.
    - ✓ FAO underlines that it is not clear that the Enabling Clause cover RTAs among DCs: "*Among contracting parties, views differ as to whether the Enabling Clause covers regional integration agreements (customs unions and free trade areas) for which provision is also made in Article XXIV*"[43], and again: "*Some WTO Members argue that the Enabling Clause is not appropriate to deal with RTAs* [regional trade agreements] *which take the form of either a customs union or FTA*

[42] http://trade-info.cec.eu.int/doclib/docs/2003/november/tradoc_114581.pdf
[43] FAO, *The implications of the Uruguay Round Agreement on Agriculture for Developing Countries. Chapter 7: Regionalism and the Agreement on Agriculture*, http://www.fao.org/docrep/004/w7814e/W7814E11.htm

which should be covered by Article XXIV. According to this view, the Enabling Clause should be confined to preferential trade agreements which stop short of an FTA or customs union"[44].

✓ The two specificities that FAO finds in a RTA among DCs as defined in the Enabling Clause are that:

- "*First, it allows for preferential trade agreements which fall short of either an FTA or a customs union. That is, it does not require the elimination of duties, nor does it require that substantially all trade should be liberalized*".

• The argument of the first sentence is not convincing as even GATT article XXIV.5 authorizes interim agreements before being transformed in legal customs unions or free-trade areas: "*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:… c) any interim agreement referred to in subparagraphs (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*".

• As for the argument of the second sentence, it does not go in the sense of the necessary reinforcement of regional integration among DCs and is not in line with the Clause's objective to foster their development. Therefore it does not contradict our assumption that paragraph 2.c may and should be interpreted in the sense of allowing preferential trade agreements between developed countries and RTAs of DCs, as in the EPAs.

- "*Second, the only constraints on the operation of preferential trade arrangements between developing countries are that (i) they shall be designed to facilitate and promote the trade of developing countries and not to raise barriers or to create undue difficulties for the trade of any other contracting parties, and (ii) they shall not constitute an impediment to the reduction or elimination of tariffs and other restrictions to trade on a most-favored-nation basis. This language is less demanding than the corresponding injunction in Article XXIV that the post-agreement trade policies shall not be more restrictive than the trade policies in force in the constituent countries prior to the formation of the agreement. Finally, there is no requirement for any indicative timetable for such liberalization with respect to trade in goods*". These arguments are even weaker as we do not see a higher liberty for RTAs among DCs to increase their tariffs vis-à-vis third countries beyond the average level they were applying on a national basis before entering in a customs union, in line with the general rule of GATT article XXIV.5.b.

- This is confirmed by paragraph 3 of the Clause: "*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*".

- This is also confirmed by the Cotonou Agreement article 34: "*1. Economic and trade cooperation shall aim at fostering the smooth and gradual integration of the ACP States into the world economy, with due regard for their political choices and development priorities, thereby promoting their sustainable development and contributing to poverty eradication in the ACP countries. 2. The ultimate objective of economic and trade cooperation is to enable the ACP States to play a full part in international trade*".

- The right to increase the external tariff of the RTAs among DCs has not been recognized by the WTO Appellate Body in the EU-India case on the EU GSP which, if it confirms in its conclusions that the Enabling Clause is an exception to GATT article I:1, adds that it *"upholds the Panel's finding, in paragraph 7.53 of the Panel Report, that the Enabling Clause "does not exclude the applicability" of Article I:1 of the GATT 1994*"[45].

- The more so as the World Bank Representative at the WTO has declared, in a workshop on EPAs the 5 October 2005 in Brussels: "*MFN tariffs in ACP countries need to be lower, otherwise there will be trade diversion putting EU exporters in a monopolistic position; MFN tariffs should gradually be reduced to 10%; government revenue losses of 10% to 20% are to be expected;*

[44] http://www.fao.org/docrep/004/y4793e/y4793e08.htm

[45] WTO Appellate Body report, *European Communities, Conditions for the granting of tariff preferences to developing countries*, 7 April 2004 (WT/DS246/AB/R).

measures are needed like the introduction or improvement of VAT or excise; or a uniform tariff of e.g. 5%"[46]. The IMF has *a fortiori* a similar position: "*Consolidating the applied tariffs at levels close to the applied levels would increase the credibility of Africa's trade policy*"[47]. Thus, for the World Bank and IMF, far from allowing ACPs to rise the tariffs of their regional groupings, as their are allowed to do given the large margins remaining with their bound tariffs at the WTO, EPAs should to the contrary be a means to reduce their existing MFN duties to avoid a trade diversion in favour of the EU. This is a huge threat that ACPs have not yet taken into account in their assessments of EPAs, and particularly of their losses in fiscal revenues, given the pressures almost insuperable exerted on them by the World Bank and IMF.

✓ And, in order that it would not be redundant with GATT article XXIV, this provision of the Enabling Clause paragraph 2.c has to have a meaning in line with the title and purpose of the Clause: "*Differential and more favourable treatment, reciprocity and fuller participation of developing countries*". The only fact that the regional trade agreements (RTAs) of paragraph 2.c, i.e. between DCs, have to be notified to the Committee on Trade and Development (CTD) and not to the Committee on Regional Trade Agreements (CRTA) as those concluded in the context of GATT article XXIV, does not change anything on the substance of their constraints as we have just seen[48]. Besides some RTAs among DCs, as that of Mercosur, have also been notified to the CRTA.

✓ Therefore, in order not to be redundant with GATT article XXIV, the only justification of the Clause paragraph 2.c) is to authorize the existence of non reciprocal trade preferences between developed countries, of which the EU, and RTAs among DCs, of which those of ACPs negotiating EPAs with the EU. Moreover this interpretation satisfies the double concern to foster trade liberalization within RTAs among DCs and to establish or maintain the non reciprocity of their trade with developed countries.

✓ Unfortunately the EU has managed – maybe to escape the Clause's authorization to maintain non reciprocal trade preferences of its paragraph 2.c) although we are not sure it has realized this possibility – to devise the 6 regional groupings of ACPs negotiating the EPAs in such a way as not to recover the RTAs already established among the ACPs. Furthermore, these 6 EPAs groupings are all bringing together LDCs and non LDCs:

- The West Africa EPA extends beyond the 15 ECOWAS Member States (Benin, Burkina Faso, Cape Verde, Ivory Coast, The Gambia, Ghana, Guinea, Guinea Bissau, Liberia, Mali, Niger, Nigeria, Senegal, Sierra Leone, Togo) to encompass Mauritania.
- The Central Africa EPA extends beyond CEMAC (Cameroun, Central Africa Republic, Congo, Gabon, Equatorial Guinea, Congo Democratic Republic, Chad) to encompass Sao Tome & Principe.
- The East and South Africa EPA (ESA: Burundi, Comores, Djibouti, Erythrea, Ethiopia, Kenya, Madagascar, Malawi, Maurice, Rwanda, Seychelles, Sudan, Uganda, Zambia, Zimbabwe) does not include several Member States of COMESA: Angola, Congo Democratic Republic, Egypt, Namibia, Swaziland.
- The austral Africa EPA, SADC (Angola, Botswana, Lesotho, Mozambique, Namibia, Swaziland, Tanzania) does not encompass all SADC Member States which groups also Malawi, South Africa, Zambia and Zimbabwe.
- This configuration of East and Southern Africa is highly detrimental to the EAC (East African Community) since Tanzania does not belong to the same EPA than its two partners Kenya and Uganda although the EAC has reached a very advanced stage o regional integration (with a common parliamentary assembly). Another problem is that of South Africa, not participating formally to an EPA as it has already a free-trade agreement with the EU, but which is member of SACU (Southern African Customs Union, comprising also Botswana, Lesotho, Namibia and Swaziland). As

[46] http://agritrade.cta.int/fr/content/view/full/2036

[47] IMF, *Regional economic outlook, Sub-Saharan Africa*, May 2005. http://www.imf.org/external/pubs/ft/AFR/REO/2005/eng/01/SSAREO.htm

[48] Negotiating group on rules, *Transparency mechanism for regional trade agreements*, 29 June 2006, http://www.wto.org/english/news_e/news06_e/rta_july06_e.htm

SACU has a common external tariff, these other 4 countries are obliged to reduce their tariffs on the products imported by South Africa from the EU, which could reduce their tariff revenues by 21%[49].

- The EPA of the Caribbean Forum's ACPs (CARIFORUM) groups together the 15 Members of the Carribean Community (CARICOM), the Dominican Republic and Haiti.

✓ Therefore, in order to render the maintenance of EU non reciprocal trade agreements with ACP compatible with the Enabling Clause, they should be renegotiated with their genuine RTAs and not with the EPAs configuration imposed by the EU.

o Let us add that paragraph 3.c of the Enabling Clause states that "*3. Any differential and more favourable treatment provided under this clause:… (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*". And, in the EU-India GSP case, "*The European Communities claims that, in the light of the objectives associated with special and differential treatment, providing additional preferences to countries with particular development needs is not discriminatory in the context of the Enabling Clause*"[50]. The WTO Appellate Body added: "*In granting such differential tariff treatment, however, preference-granting countries are required, by virtue of the term "non-discriminatory", to ensure that identical treatment is available to all similarly-situated GSP beneficiaries, that is, to all GSP beneficiaries that have the "development, financial and trade needs" to which the treatment in question is intended to respond*" (paragraph 173). We will see that, precisely and at least in the West Africa EPA, the economic situation of the 13 non LDCs ACPs is not better that that of the 13 LDCs.

o Contrary to the allegation that only the GSP regimes do not discriminate among DCs, including when they put some additional preferences as in the EU GSP+ regime provided "*that identical treatment is available to all similarly-situated GSP beneficiaries, that is, to all GSP beneficiaries that have the "development, financial and trade needs'*"' (Appellate Body ruling above), the fact is that GSPs select often the beneficiaries according to criteria which have nothing to do with these economic conditions but are based on political or human rights criteria.

✓ The US is a case in point which has always attached political conditions (e.g., relating to terrorism, communism, and workers' and human rights) to its granting of preferences, including in the AGOA for SSA[51]. However Robert Howse, alluding implicitly to the US, mentions also "*the use of GSP conditionality to induce a developing country to increase further levels of intellectual property protection might well be contrary to development needs in a manner that runs afoul of 3.c)*"[52]. Gregory Shaffer and Yvonne Apea add: "*The US system permits any interested US private party to petition for a country's removal, in whole or in part, as a GSP beneficiary, creating a* de facto *public-private review process. Labour unions and intellectual property trade associations have been the two most active users of these procedures… The United States withdrew GSP benefits in the 1980s on labour protection grounds from Nicaragua (governed by the Sandinists) and not from El Salvador or Guatemala, actions that appeared targeted to advance the Reagan administration's foreign policy goals rather than labour protection*"[53]. Moreover the US GSP does not provide sure advantages for DCs since "*The United States… decides on the allocation of SGP benefits at least annually… For example, in July 2004, Brazil's GSP status was renewed for three months rather than the customary year*".

✓ They also add that, on the other hand, "*The EC, in contrast, provided GSP benefits as early as 1971 but it did not apply any specific conditions… until 1998 when it added specific incentive arrangements to advance labour, environmental, and anti-drug trafficking goals. Although the EC has*

[49] Oxfam, *Unequal partners: how EU-ACP Economic Partnership Agreements (EPAs) could harm the developments prospects of many of the world's poorest countries*, Oxfam briefing note, September 2006.
[50] European Communities, *Conditions for the granting of tariff preferences*, op. cit (footnote 45).
[51] http://www.africa.upenn.edu/Urgent_Action/apic011403b.html
[52] Steve Charnovitz, Lorand Bartels, Robert Howse, *Internet roundtable, The Appellate Body's GSP decision*, World Trade Review 2 (2004), p. 239-263.
[53] Gregory Schaffer and Yvonne Apea, *Institutional choice in the General System of Preferences case: who decides the conditions for trade preferences? The law and politics of rights*, Journal of World Trade, 977-1008, 2006.

included provisions for the withdrawal of trade preferences on labour grounds since 1994, it only applied it once, which was against Myanmar in 1997".

✓ Let us be cautious however on the true protectionism that is often hidden under the social and environmental clauses, as most DCs' civil society have argued. At least, as Steve Charnovitz writes, "*In the US GSP, a failure to afford internationally recognized worker rights can disqualify a country from receiving GSP. In the EC GSP, countries that meet certain international environmental standards can receive additional GSP benefits*"[54].

4) Other reasons to enlarge the interpretation of GATT article XXIV and of the Enabling Clause

➢ For Robert Howse, one of the best specialist of the WTO law, "*In determining what are the needs referred to in 3(c) for purposes of establishing what developing countries are similarly situated, the AB suggested that the adjudicator should look for a benchmark of development needs in WTO treaties, as well as in other multilateral instruments related to development. This implies a further role for non-WTO law (hard and soft) it articulating standards or benchmarks relevant to the application of WTO agreements*"[55]. Indeed, the Appellate Body statement reads: "*When a claim of inconsistency with paragraph 3(c) is made, the existence of a "development, financial [or] trade need" must be assessed according to an objective standard. Broad-based recognition of a particular need, set out in the WTO Agreement or in multilateral instruments adopted by international organizations, could serve as such a standard*" (paragraph 163). And Howse adds that "*it is encouraging that the Appellate Body cited the conditions in the EC's environmental and labor preferences as examples of objective and transparent criteria*"[56].

➢ **We should therefore take into account the extent to which WTO Members have approached or not the Millenium Development Goals**, and particularly the Objective n°1 to halve, from 1996 to 2015, the number of chronically undernourished population.

o On that account, according to FAO, "*Sub-Saharan Africa remains the most food-insecure region in the world. The absolute number of undernourished people increased about 22 percent, from 169 million in 1990–1992 to 206 million in 2001–2003*"[57].

o It is precisely Sub-Saharan Africa (SSA) which, by very far, weighs the most within the 79 ACPs, not only in terms of countries (48, of which South Africa but which has only a partial statute of ACP), but also through the number of LDCs among ACPs (34 on 40) and above all in terms of its relative population within ACPs (94%). Even if its share of the total GDP weighs relatively less since the SSA ACPs are the poorest: $331 billion in 2004, without South Africa ($213 billion for it), against $529 billion for all ACPs in 2005.

➢ **The economic situation of the 3 non LDCs ACPs of West Africa is comparable to that of the 13 LDCs**

o The criteria qualifying a DC as a LDC: it is the "Committee for Development Policy" of the United Nations which establish every 3 years the list of LDCs from the list of "the low income countries" of the World Bank. Its last two reports are from 2003 and March 2006. To become a LDC, a country must:

✓ Not exceed the ceiling of 75 million inhabitants: one condition imposed in 1991 and without retroactive effect for Bangladesh. Therefore this ceiling excludes Nigeria. For the first time the Committee wondered on this anomaly in its 2006 report[58].

✓ Fulfil 3 criteria. However the proposal to be classified as a LDC requires the formal approval of the country. For political reasons Ghana has refused to become a LDC in the 80s although it was fulfilling the criteria.

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[54] Steve Charnovitz et al., *Internet Roundable*… op. cit.
[55] Robert Howse, *Appellate Body ruling saves the GSP, at least for now*, ICTSD, Bridges, April 2004.
[56] Rober Howse, *Internet roundable*, op. cit.
[57] FAO, *Mid-term review of achieving the world food summit target*, Committee on world food security, Rome, EO October – 4 November 2006.
[58] Telephone call of 3 May 2006 with an UNCTAD civil servant following the issue of LDCs.

- ✓ These 3 criteria are the following:
  - A gross national income (GNI) per head (average of the last 3 years) lower than $750, $900 being the ceiling beyond which one can be upgraded from LDCs.
  - A human assets index (HAI) lower than 55 and not higher than 61. This composite index combines 4 indicators: (a) the percentage of population undernourished; (b) the mortality rate for children aged five years or under; (c) the gross secondary school enrolment ratio; and (d) the adult literacy rate.
  - An economic vulnerability index (EVI) higher than 37. It is a combination of 7: (a) population size; (b) remoteness; (c) merchandise export concentration; (d) share of agriculture, forestry and fisheries in gross domestic product; (e) homelessness owing to natural disasters; (f) instability of agricultural production; and (g) instability of exports of goods and services.

- o <u>According to these criteria, the 3 non LDCs ACPs of West Africa taken together have an economic situation comparable to that of the 13 LDCs</u>
  - ✓ The exclusion of Nigeria is only linked to its population cap since its 3 criteria are in line with those of LDCs. In particular its GNI per head was only of $267 in 2002 (reference year for the 2003 evaluation) against $321 for the average of the 13 LDCs[59] and, in 2004 (reference year for the 2006 evaluation), of $347 against $354 for the average of 13 LDCs[60].
  - ✓ The exclusion of Ivory Coast was only linked to its EVI in 2003.
  - ✓ The exclusion of Ghana was only linked, by a very narrow margin, to its HAI in 2003.
  - ✓ The average of the 3 indicators for the 3 non LDCs taken together makes them a LDC, and their weighted GNI per head was even lower by 22% to that of the 13 LDCs in 2002 – 321 $ contre 412 $ –, even if it was slightly higher (by 7.3%) in 2004: $380 against $354.

- o <u>The average indicators of the 3 non LDCs are closer to those of LDCs than for the other "low income countries"</u>, which are potential candidates to the LDC statute, particularly for per capita income in 2004: Bangladesh ($403), and a fortiori the other low income countries as Vietnam ($487), India ($543), Pakistan ($537) and Indonésie ($970). Which implies that it would be politically difficult for those DCs to oppose to a preferential statute for the West African non LDCs ACPs.

- o In its 2005 report, the Committee for Development Policy advocates more flexibility in the inclusion criteria to become LDCs: "*The Committee stressed the importance of flexibility in the application of the three criteria for the identification of least developed countries… in order to take into account some degree of substitutability among the criteria and the possible combined impact of the handicaps*"[61].

- o Even if a request to the WTO for extending the ACPs waiver on their non reciprocal trade agreements with the EU much beyond end 2007 requires a 2/3 majority vote, it should be easy to find it as it would be politically very difficult to the DCs Members to turn down the ACPs' request, particularly of West Africa. Already the 52 ACPs which are WTO Members plus the EU-27, that is 79 Members, make a majority of 52.7%. The 21 additional votes should not be difficult to find among the other 11 OECD countries and 10 high income or emerging DCs. For Dominique Njinkeu, of the International Lawyers and Economists against Poverty, "*The key question is which members, apart from the least developed countries (LDCs), could be allowed to receive these preferences. If the set of beneficiaries is defined in such a manner as to comprise only those countries that suffer the most, ther should be no difficulty in getting the rest of the membership to agree*".

- o Besides, the preamble and article 16 of the AoA put on the same level LDCs and net food importing DCs (NFIDCs): "*Article 16 - Least-developed and Net Food-Importing Developing*

[59] UN Economic and Social Affairs, *Local development and global issues*, 7-13 April 2003.
[60] UN Economic and Social Council, Committee for Development Policy, *Report on the eight session*, 20-24 March 2006.
[61] Committee for Development Policy, *Development challenges in sub-Saharan Africa and post-conflict countries*, UN Department of Economic and Social Affairs, 2005.

Countries: 1. Developed country Members shall take such action as is provided for within the framework of the Decision on Measures Concerning the Possible Negative Effects of the Reform Programme on Least-developed and Net Food-Importing Developing countries ". Now, if the official list of NFIDCs comprises only 24 DCs – among which middle income DCs such as Mauritius ($5260 per capita in 2005), Tunisia ($2890), Venezuela ($4810) –, the FAO makes a list of 86 actual net food importing DCs in the only list of "low income countries" defined as those with a per capita income lower than $1450 at the end of the 90s and which have been in that state during the 3 preceding years and agreeing to be classified as such, among which we have Ivory Coast and Nigeria in West Africa[62]. Although Ghana is not included in the list, nevertheless it has also become a net food deficit DC, as attested by its trade statistics.

- According to ILEAP, the AGOA, which is part of the US GSP, seems to discriminate unilaterally in favour of non LDCs African DCs since it "*has led to marked increases in exports from African countries that had not previously used their ACP access to the EU. This is because of the more flexible rules of origin for countries defined as 'lesser developed' (not only LDCs, but all African countries eligible under the scheme except Mauritius and South Africa)*"[63].

- **The rate of openness of the ACPs has to take into account the weight of the exempted LDCs**

- The EU interprets the GATT demand that "*the duties and other restrictive regulations of commerce… are eliminated on substantially all the trade between the constituent territories in products originating in such territories*" (article XXIV paragraph 8 point b) as meaning an overall trade liberalization of 90% in both directions (imports + exports), which allos ACPs to open only 80% of their market to the EU exports as long as it agrees to open its own market at 100%, which requests only a minuscule effort since it is already open at 97%.

- As the EU has opened its market without reciprocity to 100% of LDCs exports (Everything But Arms), one should deduct from these 80% the percentage of imports of LDCs Members from the EU in each of the EPAs in order that the EU complies with its commitments. Even if there were not signed in a formal treaty but of a unilateral revocable decision, although politically practically impossible to revoke, notably vis-à-vis the poorest countries.

- As the imports of the 13 West African LDCs coming from the EU have been of 37.2% of the West Africa total in 2003 and that the LDCs are exempted from any opening on account of Everything But Arms, the rate of openness of the 16 West African States vis-à-vis EU exports should be at most of 42.8% (80% - 37.2%).

- Furthermore the EU should not demand that the ACPs would reduce their tariffs at lower levels than those it is already maintaining in its MFN non preferential regime, i.e. vis-à-vis third countries, particularly on its most sensible agricultural products on which it has not to fear the competition of ACPs, such as cereals (particularly wheat and wheat flour), sugar, dairy and meats. It should not demand either, including indirectly through the IMF and World Bank's pressures, that ACPs would establish the common external tariffs of their RTAs at levels lower than those it intends to maintain, taking into account the concessions it would make in the final stage of the Doha Round.

- To be consistent with the rights recognized to LDCs by the EU in EBA and the objective of the Cotonou Agreement "*of reducing and eventually eradicating poverty consistent with the objectives of sustainable development*", but also by Annex F of the WTO Hong-Kong Declaration to

[62] Ulrike Grote & Peter Wobst, *What do liberalized agricultural markets mean for food importing developing countries?* 2004,
http://www.rural-development.de/fileadmin/rural-development/volltexte/2006/01/en/ELR_engl_18-21.pdf
[63] ILEAP, *Preferences and the Doha Negotiations*, Background brief n°7, 2005
http://www.ileapinitiative.com/index.php?option=com_remository&Itemid=82&func=fileinfo&filecatid=327&parent=folder&lang=en

"*Provide duty-free and quota-free market access on a lasting basis for all products originating from all LDCs*" and "*that least-developed country Members will only be required to undertake commitments and concessions to the extent consistent with their individual development, financial or trade needs, or their administrative and institutional capacities*", these objectives can only be reached if the ACPs LDCs are not prevented to enter into the RTAs with their neighbour non LDCs ACPs, a regional integration unavoidable if they are to develop. Indeed they would have to choose between benefiting from the non reciprocal trade with the EU and renounce to remain in these necessary RTAs or remain in the RTAs and renounce to their duty-free and quota-free access to the EU market. The only means to avoid this dilemma is that the WTO rules would extend to the non LDCs ACPs members of these RTAs the benefit of the non reciprocal preferential trade with the EU, that is to maintain the Lomé Convention by adopting the interpretation of paragraph 2.c) of the Enabling Clause suggested above.

- **Contrary to GATT article XXIV, GATS article 5 authorizes non reciprocal trade in North-South trade agreements on services**, which proves that it is not the WTO as a whole which is opposing them as a general principle:

  - "*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, and (b) provides for the absence or elimination of substantially all discrimination, in the sense of Article XVII, between or among the parties… 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*".

  - OECD underlines the flexibility thus granted to DCs: "*The General Agreement on trade in services (GATS) codifies an approach of liberalisation which differs from that retained in the other WTO Agreements. The very structure of the agreement – its progressive approach of liberalization – allows to incorporate with flexibility the development objectives along the text. Market access and national treatment are concessions negotiated for a particular sector or sub-sector of services on the base of positive voluntary commitments, allowing a more progressive trade liberalization and some flexibility of action in sectors where countries think they cannot or are not willing to contemplate such a liberalization. In other words, WTO Members can chose the sectors in which they liberalize their trade (« positive lists ») and can impose conditions and limits to that liberalization, provided those limits are specified (« negative lists »). Some developing countries have observed that the GATS structure makes of GATS an agreement more « development oriented »*"[64].

  - According to S.N. Karingi and R. Lang, "*Paragraph 29 of the Doha Declaration emphasises the need through ongoing negotiations to redress the imbalance between S&D in Article V of GATS and its absence in the Article XXIV of GATT. The paragraph 29 states that: "We also agree to negotiations aimed at clarifying and improving disciplines and procedures under the existing WTO provisions applying to regional trade agreements. The negotiations shall take into account the developmental aspects of regional trade agreements*"[65].

[64] OCDE, *Le rôle du "Traitement spécial et différencié" à l'interface des échanges, de la concurrence et du développement*, Groupe conjoint sur les échanges et la concurrence, 7 mai 2002.

[65] Stephen N. Karingi & Rémi Lang, *Negotiations on Rules with regard to Regional Trade Agreements*, 5-6 November 2005, http://www.uneca.org/eca_programmes/trade_and_regional_integration/TRID%20policy%20brief%20on%20negotiations%20on%20rules-RTAs.htm

- **The WTO is not really monitoring the RTAs**

o The US is less finicky vis-à-vis WTO rules than the EU since it has decided to maintain its unilateral trade preferences with SSA until 2015 in the AGOA framework[66]. It did not seek a waiver at the WTO when it adopted the AGOA in 2000 so that this program could have been subject to challenges[67], but it asked for one in February 2005, following which observations and questions on the request have been formulated by China, India, Pakistan and Brazil. The Committee on trade in goods has considered the request the 15 July 2005, but no decision had been taken as of October 2005, which did not trouble the US too much.

o One understands all the more its attitude that, according to the confession of the WTO itself, "*The Regional Trade Agreements Committee has developed procedures to examine the agreements, including compiling information. These procedures are for assessing whether each agreement is consistent with WTO provisions. However, since there is no consensus among WTO members on how to interpret the criteria for assessing this consistency, the committee now has a lengthening backlog of uncompleted reports. In fact, consensus on consistency with Article 24 has been reached in only one case so far: the customs union between the Czech Republic and the Slovak Republic after the break up of Czechoslovakia*"[68]. And this on more than 300 RTAs notified to GATT and WTO!

o This confession is made explicit by WTO staff: "*Existing WTO rules on RTAs have proved throughout the years to be ill-equipped to deal with the realities of RTAs. In practice the task of verifying the WTO compliance of RTAs notified under GATT Article XXIV and GATS Article V is entrusted to the Committee on Regional Trade Agreements (CRTA). This body, however, has enjoyed little progress so far in assessing the consistency of the RTAs notified to the WTO, due to various political and legal difficulties, most of which were inherited from the GATT years… The CRTA has also been unable to carry out effectively its functions of review and oversight of the implementation of RTAs*"[69].

o This has led the South Centre to conclude that "*The inefficiency of the CRTA and the ambiguity of the rules have led some to suggest that a Member need only notify an RTA in a timely fashion either before or after the RTA enters into force; and that until the rules are changed, there is no imminent need for RTA members to worry about compliance with all the provisions of the substantive WTO agreements*[70]"[71].

o The EU Commission, while maintaining an inflexible attitude vis-à-vis the ACPs in the EPAs "negotiation", recognizes that the WTO rules should allow for much more flexibility in maintaining preferential trade agreements between developed and developing countries: "*At present, there seems to be little coherence, let alone logic, to the treatment of the various types of RTAs to which developing countries are parties…*
(a) Existing rules fail to create fair and equitable treatment between different types of RTAs based on their developmental impacts and promotion of developing countries' participation in world trade. For example, while preferential tariff and partial liberalization agreements among developing countries fall under the Enabling Clause, ambitious and full-fledged RTAs, such as Free Trade Agreements between developed and developing countries, are subject to the stricter requirements of GATT Article XXIV. Yet, North-South RTAs can have at least as high a developmental impact as any of those falling

[66] http://www.wto.org/english/tratop_e/tpr_e/tp261_e.htm
[67] Gregory Schaffer and Yvonne Apea, *Institutional choice in the General System of preferences*, op.cit..
[68] WTO, *Rules: Regional Trade Agreements, building blocks or stumbling blocks?* http://www.wto.org/english/thewto_e/minist_e/min05_e/brief_e/brief09_e.htm
[69] Jo-Ann Crawford and Roberto V. Fiorentino, *The changing landscape of Regional Trade Agreements*, WTO, Discussion Paper n°8,
[70] For example, Wang, J. (2004) "China's Regional Trade Agreements: The Law, Geopolitics, and Impact on the Multilateral Trading System", 8 *Singapore Yearbook of International Law*, pp. 119-147, at 138.
[71] South Centre, *Revisiting EPAs and WTO compatibility*, July 2005, SC/TADP/AN/DS/2 http://www.southcentre.org/publications/AnalyticalNotes/Other/2005Jul_EPA_WTO.pdf

under the Enabling Clause, and it is difficult to see why the substantive requirements should be radically different. [Not underlined in the text]
(b) Existing rules fail to establish fair and equitable treatment between different types of RTAs based on their potential effects on third parties. For example, no distinction is made in respect of regional trade agreements among developing countries that are relatively sizeable actors in world trade, and whose RTAs therefore are likely to have implications on other WTO Members and for the system as a whole, as compared to those between parties who represent only a small portion of world trade…
It should also be recognized that the ability of many developing countries to adjust to greater competition on their domestic markets, or to take full advantage of additional market access opportunities under RTAs, may depend on their own individual level of development, particularly in RTAs with developed countries. Therefore, the European Communities believe that the DDA negotiations on RTAs should aim to clarify the flexibilities already provided within the existing WTO rules on RTAs, in order to give greater security to developing country parties to RTAs to ensure that the rules facilitate the necessary adjustments"[72].

- **Since UNCTAD and even the World Bank judge that the multilateral liberalization has been harmful to poor countries, this is all the more so for wider bilateral liberalization**
  - The last UNCTAD report stresses the harmful impact of past liberalization on poor countries and the higher risks associated with additional bilateral free-trade agreements: "*There are widespread concerns that the international trade rules and regulations, which are emerging from multilateral trade negotiations and a rising number of regional and bilateral trade arrangements, could rule out the use of the very policy measures that were instrumental in the development of today's mature economies and late industrializers. This would imply a considerable reduction in the flexibility of national governments to pursue their development objectives. Another concern is that these rules and commitments, which in legal terms are equally binding for all countries, in economic terms might impose more binding constraints on developing than on developed countries, because of the differences in their respective structural features and levels of industrial development*"[73].
  - Even the World Bank makes amends at last in its World Development Report 2006: "*Most policy advice given to poor countries over the last several decades – including that by the World Bank – has emphasized the advantages of participating in the global economy. But global markets are far from equitable, and the rules governing their functioning have a disproportionately negative effect on developing countries. These rules are the outcome of complex negotiating processes in which developing countries have less voice. Moreover, even if markets worked equitably, unequal endowments would limit the ability of poor countries to benefit from global opportunities. Levelling the global economic and political playing fields thus requires more equitable rules for the functioning of global markets, more effective participation of poor countries in global rule-setting processes, and more actions to help build and maintain the endowments of poor countries and poor people*"[74].

- **Let us finally hear the message of Friedrich List and Ulysses Grant**
  - "*Any nation which, through protecting tariffs and restrictions on navigation, has risen its manufacturing and naval power to such a development degree that not a single other nation is able to sustain a free competition with it cannot do anything more judicious than to cast off these ladders which have made its greatness, to preach to other nations the benefits of free trade, and to declare in a penitent's tone that it has lost its way up to now on the wrong track and that it has now, for the first time, succeeded in discovering the truth*" (Friedrich List, economist, 1840).

  - "*For centuries, England has relied on protection, has observed it until its most extreme limits, and has gained good results from it. After two centuries, it has judged appropriate to adopt free trade, since it thinks that protection has nothing more to offer for itself. Well, Sirs, the understanding that I have of our country leads me to think than in less than two hundred years from*

[72] Negotiating Group on Rules, *Submission on Regional trade agreements by the European Communities*, WTO, 12 May 2005, TN/RL/W/179.
[73] UNCTAD, *Trade and Development Report, 2006*.
[74] World Bank, *World Development Report 2006. Equity and development*, 2005.

now, when America would have got from protection everything it has to offer, it will adopt free trade"[75] (Ulysses Grant, President of the United States, 1868 to 1876).

III – The ACPs arguments to delay the signature of EPAs and extend their implementation

1) The Doha Round uncertain fate justifies to extend the waiver to sign the EPAs

- Whereas the Doha Round hibernation has intensified negotiations of bilateral free-trade agreements, notably by the EU which finds here an additional reason to sign the EPAs in the prescribed time limit of 31 December 2007, ACPs to the contrary find there a good reason to postpone the signature, given the uncertainty on the huge incidence that the new agreements which would result from the Doha Round would have on their economies and on the EPAs impact. And this independently of the substantive reasons to turn down the EPAs.

- That is what Mamadou Cissokho, ROPPA's honorary President, has underlined in a recent seminar in Brussels: "*While the WTO negotiations are deadlocked, one would like to sign an agreement which has to be compatible with something which is not yet defined and with which we do not agree*"[76]. He has specified, in a subsequent colloquium, that ACPs cannot sign EPAs with the EU given the importance of agricultural products imported from the EU before that it would have reformed its agricultural policy, which it intends to do thoroughly from 2013[77].

- This is also what the Economic Commission for Africa of the United Nations underlines: "*An important consideration for African countries… is that the Doha Declaration (paragraph 29) launched an effort to clarify the understanding of Article XXIV and the role of special and differential treatment in regional trade agreements. These points of negotiations under the WTO will be of crucial importance and could determine what form the EPAs will take in the future, as well as the degree of flexibility that could flow from it for African countries*[78]. Therefore the ACPs should not sign EPAs as long as this clarification will not be made.

- Glenys Kinnock, co-president of the EU-ACP's Joint Parliamentary Assembly, has declared that the expiry of the WTO waiver the 31 December 2007 should not force the ACPs to sign an EPA agreement perceived as harmful to their development[79].

- The Ministerial committee monitoring the negotiations of the West Africa EPA has requested the 30th November 2006 a three-year extension of the 2007 deadline, up to January 2011, for the conclusion of negotiations, "*based on the volume of outstanding tasks, the completion of which determines the viability of the EPA. Among them is the upgrading of the economies of Member States to improve their competitiveness, which requires the injection of funds from the EU*"[80].

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[75] These two quotations are by Bernard Cassen, *Verbatim*, Le Monde Diplomatique, December 2005.
[76] Mamadou Cissokho, *Impact des APE sur l'agriculture*, Séminaire sur les "Relations commerciales UE-ACP: les APE face au défi du développement", Bruxelles, 12 novembre 2006.
[77] Mamadou Cissokho, Intervention dans la table-ronde sur *Accords de partenariat économique et marchés régionaux : que peut-on attendre des négociations?*, Colloque international "Quel cadre pour les politiques agricoles, demain, en Europe et dans les pays en développement ?", Notre Europe, Pluriagri et FARM, 27-29 novembre 2006, Paris.
[78] African Trade Policy Center, *Assessment of the impact of the Economic Partnership Agreement between the ECOWAS countries and the European Union*, Economic Commission for Africa of the United Nations, December 2005, http://www.uneca.org/atpc/Work%20in%20progress/29.pdf
[79] Peter Richards, *Politics: Old trade beefs to resurface at ACP meet*, IPS, 5 December 2006, http://ipsnews.net/news.asp?idnews=35725.
[80] http://www.thestatesmanonline.com/pages/news_detail.php?newsid=1629&section=2

➢ Ahmed Youssef, economic adviser to the Sudan Embassy at the EU, has declared the 6 December 2006 in Khartoum: "*The ACP nations want to extend Article 37 of the Cotonou Agreement for a further duration… They need additional time to think. That is the debate here… The one year that is left is not enough for all the regions to prepare and sign agreements and make informed decisions. Some countries want three years, some want four or six*"[81].

2) The WTO rules imply a very long delay to implement the EPAs

➢ According to the WTO interpretation on GATT article XXIV, "*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*"[82].

➢ ACPs have requested in April 2004 that the tariffs reduction period would not be lower than 18 years – a delay programmed for Chile in the Canada-Chile FTA (free-trade agreement) and for the US in the Australia-US FTA –, and the Economic Commission for Africa of the United Nations has proposed 20 years in March 2005, a delay already programmed for Thailand in its FTAs with Australia et with New-Zeeland[83].

➢ The ACPs' proposal has been taken over by the United Kingdom the 21 March 2005: "*EPAs must ensure that ACP regional groups have maximum flexibility over their own market opening. The EU should therefore offer all ACP regional groups a period of 20 years or more for market opening, on an unconditional basis. Each regional group should be offered this full period*"[84].

➢ The report of the International Development Commission of the House of Commons of March 2005 adds another good reason to delay the openness of ACPs' markets: "*We do not believe that ACP states should be asked to open their markets to EU products [agricultural products] until all trade-distorting subsidies have been removed. The transition period for full reciprocity in the agricultural sector should be explicitly linked to CAP reform*"[85].

➢ And the EU Commission has replied the 11 April 2005: "*This is an arbitrary period, that is anyway not in line with the Commission's negotiation directives calling for a case by case consideration of specific constraints faced by the ACP. We will define transition periods as appropriate together with our partners. These could be both less than or more than 20 years but will depend on specific circumstances. We should note that such an upfront offer universally across all ACP groups is not compatible with existing WTO rules for RTAs where transition periods "should exceed 10 years only in exceptional cases" nor consistent with the agreed EC line on appropriate clarifications of these rules as part of the DDA negotiations*" (same reference).

➢ It is however the same EU Commission which wrote to the WTO one month later: "*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… Longer transition periods might be necessary*

[81] Noël King, *Development: ACP states feeling the pinch of 2007 trade deadline*, IPS, 6 December 2006, http://www.ipsnews.net/news.asp?idnews=35744

[82] WTO, *Understanding on the Interpretation of Article XXIV of the General Agreement on Tariffs and Trade 1994*, WTO Analytical index: GATT 1994.

[83] Sanoussi Bilal and Francesco Rampa, *Alternative (to) EPAs. Possiblescearios for the future ACP trade relations with the EU*, ECDPM, policy management report 11, March 2006, http://www.ecdpm.org/.

[84] European Commission, *Recent UK statements on EPAs. Note for the attention of Delegations in ACP countries*, Trade/MPC D(2005) 3910, Brussels, 11 April 2005, www.epawatch.net/documents/doc287_1.doc.

[85] House of Commons, International Development Committee, *Fair trade? The European Union's trade agreements with African, Caribbean and Pacific countries*, Sixth Report of Session 2004–05, 23 March 2005.

to facilitate market building and consolidation through gradual openness to trade in weak and vulnerable developing countries, taking into account their specific needs and constraints"[86].

➢ Actually, since, through its 2001 "Everything But Arms" Decision, the LDCs have not be subjected to any tariffs reduction along time, the 12 years it has agreed have to be extended at least by the percentage representing the LDCs share in imports of ACPs from the EU. As this share has been of 37.2% in 2003 in West Africa, the minimal length of time to implement the EPA should be of 16.5 years.

➢ However, as the Agreement on Agriculture (AoA), still in force until the Doha Round would replace it, has granted 10 years to non LDCs DCs to reduce their tariffs by 24%, the compliance of the EPAs with the AoA demands 33 years to reduce them by 80%, at least for the share of agricultural products in total imports. In fact, as there has no been any agreement on non agricultural products during the Uruguay Round and that there is no other reference on an implementation period for these products, one should use the same rate of reduction for non agricultural products. A very long period is all the more justified for West Africa that 13 of its 16 Members are LDCs, that the 3 other non LDCs are also net food importing DCs, and that the food deficit of ECOWAS has increased by 91% (from $2.6 to 4.9 billion) from 1995 to 2004[87].

➢ On the substance, ACPs request very logically that the dismantling of their tariffs would only begin once they would have reached a sufficient level of competitiveness with the EU, and this for the different products.

➢ According to the Economic Commission for Africa of the United Nations, "*African countries cannot benefit from the EPAs unless: • Full reciprocity is preceded by deepened regional integration; and • The implementation time frames are long enough to allow for the necessary internal adjustments and absorption of the adjustment costs that such liberalization entails*"[88].

➢ The Barbados' Prime Minister has underlined the 20 November 2006, at the opening session of the ACP-EU 12th Joint Parliamentary Assembly, that "*Countries in the developed world have enjoyed 50 years within which to prepare their economies and societies to accommodate today's liberalisation. Too much adjustment compressed into too short a period can be as fatal as no adjustment at all.*

➢ Let us underline finally that the GATS does not fix any time limit for the full trade liberalization in the bilateral free-trade agreements on services.

IV – The Cotonou Agreement does not force the EU to reduce its agricultural dumping

➢ The Cotonou Agreement did not foresee a specific procedure to manage the trade disputes between the EU and ACPs within the EPAs so that paragraph 7 of article 37 refers to the WTO rules.

➢ On agricultural trade, the AoA, the Framework Agreement of 31 July 2004 and the Hong-Kong Ministerial Declaration of 18 December 2005 try to establish a balance between the rules of the three pillars relating to the reductions of tariffs, export subsidies and trade distorting domestic supports. The AoA preamble speaks of "*achieving specific binding commitments in each of the following areas: market access; domestic support; export competition*". More specific, article 3 of the Annex on agriculture of the Framework Agreement states that "*The reforms in all three pillars form an interconnected whole and must be approached in a balanced and equitable manner*".

[86] Negotiating Group on Rules, *Submission on Regional Trade Agreements by the European Communities*, WTO, 12 May 2005, TN/RL/W/179.
[87] J. Berthelot, *Food sovereignty, challenges to West Africa, WTO and EPA*, ROPPA, Forum sur la souveraineté alimentaire, Niamey, 7 au 10 Novembre 2006 (http://solidarite.asso.fr/home/Agriculture06.php).
[88] Op. cit.

➢ There is not such thing in the Cotonou Agreement and the EU Commission proposals: while the EPAs are going much farther than the AoA on the reduction of tariffs – which should be eliminated on at least 80% of ACPs imports from the EU –, the EU has no obligation to eliminate its agricultural export subsidies, the more so to eliminate the domestic subsidies on its exported products.

➢ This contradicts the WTO rules, even if, clearly, the elimination of export refunds the 31 December 2013, agreed to in the Hong-Kong Ministerial Declaration, will only be imperative in the EPAs if the Doha Round is eventually finalized.

➢ **To the contrary the EU will schedule in advance its export refunds to ACPs**

o The only provision of the Cotonou Agreement on the EU agricultural exports is that of Article 54 on "Food security": "*1. With regard to available agricultural products, the Community undertakes to ensure that export refunds can be fixed further in advance for all ACP States. in respect of a range of products drawn up in the light of the food requirements expressed by those States. 2. Advance fixing shall be for one year and shall be applied each year throughout the life of this Agreement, it being understood that the level of the refund will be determined in accordance with the methods normally followed by the Commission*".

o We find again here the same EU thoughtlessness on the pernicious effects of EU refunds for the ACPs' farmers that the EU Commission shared already in Seattle when it was proud to communicate that, "*on account of the privileged relations with ACP countries, the European Union grants the benefit of larger refunds to almost all countries of Sub-Saharan Africa than to other third countries*"[89]. For instance export refunds on EU wheat exports to ACPs have been 53% larger than that to other countries in 1997-98[90].

o It is absurd that the EU commits itself to fix one year in advance its export refunds to ACPs since it ignores, not only which will be then the levels of the world prices and the exchange rate with the euro, but also which will be the needs of food-deficit ACPs. Such prefixation of refunds will depress agricultural prices in ACPs, which contradicts the objective of promoting their agricultural development.

o It is however the same Commission which, in the Doha Round agricultural negotiations, demands that the US will reduce its subsidized agricultural loans and credit guarantees on exports and its non emergency food aid as a condition for the EU to agree on reducing its export refunds, since, for the time being, their full elimination is conditioned on the Doha Round finalisation.

➢ **However the Cotonou Agreement's reference to WTO rules on trade issues will oblige the EU to eliminate its agricultural dumping**

o Since the Hong-Kong Ministerial Declaration has foreseen the elimination of all export subsidies the 31 December 2013 at the latest, with a first step at the end 2010, this step should be devoted in priority on exports to the poorest countries, then on LDCs and particularly of West Africa.

o But the EU must also eliminate its domestic subsidies going to exported products, in accordance with the recent rulings of the WTO Appellate Body which have constituted very important precedents, breaking happily at last the conventional definition of dumping in the GATT (article VI) and the AoA article 9.1.b: "*The sale or disposal for export by governments or their agencies of non-commercial stocks of agricultural products at a price lower than the comparable price charged for the like product to buyers in the domestic market*".

✓ In its ruling of 3 December 2001 in the Dairy products of Canada case, the Appellate Body has stated: "*We consider that the distinction between the domestic support and export subsidies disciplines in the Agreement on Agriculture would also be eroded if a WTO Member were entitled to use domestic support, without limit, to provide support for exports of agricultural products* (paragraph 91)*… The potential for WTO Members to export their agricultural production is preserved, provided that any export-destined sales by a producer at below the total cost of production are not financed by virtue of governmental action* (paragraph 92)".

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[89] European Commission, *Argumentaire. Agricultural policy and trade*, 23-11-1999, 14 p.
[90] J. Berthelot, *L'agriculture, talon d'Achille de la mondialisation*, L'Harmattan, 2001, p. 118.

✓ The Appellate Body has again stated the 20 December 2002, in the same case: "*Subsidies may be granted in both the domestic and export markets, provided that the disciplines imposed by the Agreement on the levels of subsidization are respected. If governmental action in support of the domestic market could be applied to subsidize export sales, without respecting the commitments Members made to limit the level of export subsidies, the value of these commitments would be undermined. Article 9.1(c) addresses this possibility by bringing, in some circumstances, governmental action in the domestic market within the scope of the "export subsidies" disciplines of Article 3.3.* (paragraph 148)".

✓ This is also in line with the US statement of 16 January 2006 at the WTO: "*In its Subsidies Disciplines paper, the United States stated that an obvious next step in the progressive deepening of subsidy disciplines is the expansion of the existing category of prohibited subsidies under Article 3 of the Subsidies Agreement to include those instances of government intervention that have a similarly distortive impact on competitiveness and trade as do export and import substitution subsidies… These subsidies distort normal market mechanisms and provide recipient firms with a considerable competitive advantage in their export markets as well as their home markets… The Group should focus its discussions on those additional types of actionable subsidies that represent the most intrusive government interference in the marketplace. It is these subsidies that have the potential to create the most significant trade distortions*"[91]. This statement is very interesting even if the US has been cautious enough to add a footnote saying that "*subsidies rules developed in the agriculture negotiations should prevail over the general subsidy rules as established, or as may be established, in the Subsidies Agreement*".

o **The "special and differential treatment" demands that the EU should eliminate its dumping more and faster than the ACPs would reduce their tariffs** : the EU should then cut its export refunds by more than the 80% reduction that the ACPs would have to make in their tariffs on EU exports and this EU cut should be done more rapidly than the ACPs reduction in tariffs.

o **The elimination of all subsidies to the EU exported agricultural products will prevent the EU exports**: eliminating all subsidies on exported products, including the domestic subsidies going to them, will end up in eliminating most of these exports since they would no longer be profitable to the EU farmers (the same thing will occur for US exports). This will eliminate the threat weighing on ACPs' agriculture and farmers despite the elimination of their tariffs on EU agricultural exports. However this would not protect the ACPs' industrial products and services, which justifies still to turn down the EPAs.

o **The Cotonou Agreement did not foresee a safeguard clause for the ACPs, only for the EU**

✓ The British government has declared the 21 March 2005 that "*There should be an effective safeguard mechanism for ACP countries to use if faced with a surge of subsidised EU imports*"[92].

✓ The European Commission has replied the 11 April 2005: "*We agree with the incorporatlon of such a mechanism. It should also be noted that the inclusion of safeguard mechanisms is already established EC practice in its existing RTAs*", a clear evidence that the Cotonou Agreement did not programmed any for the ACPs.

✓ But the most surprising is that, if safeguard clauses are in effect foreseen in articles 8 to 11 of Annexe 5 of the Cotonou Agreement relating to the "Trade regime applicable during the preparartory period referred to in article 37", they are intended for the EU only: "*Where any product is being imported into the Community in such increased quantities and under such conditions as to cause or threaten to cause serious injury to its domestic producers of like or directly competitive products or serious disturbances in any sector of the economy or difficulties which could bring about serious*

[91] Paper from the United States, *Expanding the prohibited "red light" subsidy category*, WTO, Negotiating group on Rules, TN/RL/GEN/94, 16 January 2006.
[92] European Commission, *Text of UK statement with EC responses inserted in bold*, Brussels, 11 April 2005.

deterioration in the economic situation of a region, the Community may take appropriate measures under the conditions and in accordance with the procedures laid down in Article 9"[93].

✓ However the Framework Agreement and the Hong-Kong Ministerial Declaration have foreseen a Special Safeguard Mechanism for DCs, which should be triggered by a slump in import prices and a sharp increase in the imported volumes, which confirms that the EPAs arte much more dangerous than the WTO for the ACPs.

V – The EU is badly placed to claim that the EPAs are imposed by the WTO rules

➢ **The EU (and US) notifications of their agricultural domestic supports to the WTO are overdue by 4 years,** their last notified year being 2001. They do not comply with the 4 months maximum delay after the end of the marketing year prescribed in 1995 by the WTO (G/AG/2), and this overdue has allowed them to change their agricultural policies through box shifting of their trade-distorting supports – from the amber box to the blue box and then to the green box –, thus escaping any proceeding at the WTO since they do not have, except in restricted cases, a retroactive effect.

➢ **The EU (and US) are cheating on their feed subsidies**: the AoA article 6.2 is exempting from reductions the input subsidies given to DCs' poor farmers, which implies that they are not exempted for developed countries farmers. Now about 60% of the EU (and US) production of cereals, oilseeds and pulses (COP) are fed to animal products on their domestic market, they are input subsidies for them, so that 60% of direct payments to COP – i.e. €9.8 billion on average from 1995 to 2001 and €68.6 billion in total – should have been subject to reductions but the EU has notified all of them in the blue box[94]. The CAP (Common Agricultural Policy) reform of June 2003, which has transferred about 90% of direct payments to COP from the blue box to the "single farm payment" (SFP) allegedly in the green box, does not change their statute of input subsidies to notify in the amber box. These domestic feed subsidies are at the same time hidden export subsidies of the animal products which have consumed the feed (see below).

➢ **The EU is cheating on other input subsidies**[95] :

- The EU has "forgotten" to notify each year at least €1.2 billion in irrigation subsidies and €2 billion in tax exemptions to agricultural fuel.
- It has under-notified its subsidies to agricultural loans by at least €200 million and to agricultural insurances by at least €500 million.
- It has put in the green box €5.6 billion on average subsidies to farm investments and agri-food industries investments, in contradiction with the same article 6.2, the paragraph 4 of the Annex 4 and the paragraph 13 of the Annex 3. Among the last concessions that Peter Mandelson was prepared to make in the last days of the Doha Round negotiations before they stalled the 24 July 2006, there was the withdrawal from the green box of the subsidies to agricultural investments, which is a clear confession of the illegality to have notified them there[96].

➢ **The "single farm payment" cannot be put in the green box**, since it does not abide by 3 of the 5 conditions imposed by the AoA Annex 2 paragraph 6:

- 1) It is based on the amount of direct payments received from 2000 to 2002, a criterion not allowed by the condition a) of paragraph 6.

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[93] http://knowledge.cta.int/en/content/view/full/1163

[94] J. Berthelot, *Review of the EU agricultural distorting supports to rebuild fair and sustainable agricultural trade rules after the Doha Round hibernation*, Solidarité, 21-08-06, http://www.wto.org/english/forums_e/ngo_e/posp63_solidarite_e.pdf.

[95] The US are doing the same: J. Berthelot, *The king is naked: the impossible U.S. promise to slash its agricultural supports*, Solidarité, 7 November 2005 (http://www.wto.org/english/forums_e/ngo_e/posp52_e.htm); J. Berthelot, *Canada's mystifying simulations on the US cuts in its trade-distorting domestic supports*, Solidarité, 1 July 2006.

[96] AGRA Presse Hebdo of 31 July 2006.

- 2) Above all it contradicts the condition b): EU farmers cannot produce what they want since many productions are either forbidden (fruits and vegetables; milk and sugar beet if farmers have no production quota) or capped (rice, cotton, tobacco and olive oil and not beyond the milk or sugar beet quotas). Now, the only interdiction to grow fruits and vegetables has been enough to condemn the US direct payments to cotton as coupled (WTO Appellate Body of 3 March 2005).
- 3) It contradicts the condition d): EU farmers must show each year that they have eligible hectares to receive the SFP so that it is still coupled to the hectarage.
- Besides, since the SFP cannot be attributed to a particular production, it can be attributed to all of them of which it is reducing the sale price below the production cost. All EU agricultural exports can therefore be prosecuted on dumping as to the extent their producers are getting the SFP, whch concerns nearly all EU-15 farmers.

➢ **Consequently the EU is cheating massively on its export subsidies**: it is bragging of having enormously slashed its export refunds – which is true – whereas they have largely been compensated by domestic subsidies going to the exported products which, according to the WTO Appellate Body's rulings quoted above, have from now on to be taken into account to assess the actual dumping.

- This is the case of exported cereals which have received €1.673 billion on average in domestic subsidies from 1995-96 to 2001-02 (years notified to the WTO), 3.5 times more than the average €477 million in refunds[97]. As these refunds have almost disappeared, the domestic subsidies represented in 2002 94% of the subsidies to the exported cereals. Comparing the average €2.150 billion of subsidies to the exported cereals to the sum of these subsidies plus the €2.956 of their export value gives an average dumping rate of 42.1%.
- The EU has granted on average €329 million in total subsidies to poultry meat exports in the same period for 1.011 million tonnes, or €325 per tonne, of which €243 in domestic subsidies which have been 3 times larger than the €83 million in refunds. Comparing these €329 million to the €1.043 billion in export value gives a dumping rate of 24%.
- Total subsidies on pig meat exports (refunds plus domestic subsidies to exports) have reached an average of €316.0 million, of which €188.2 million in domestic subsidies, 47% more than the €127.8 million in export refunds. Comparing to an export value of €2.243 billion, the implied dumping rate has been of 12.3%.
- Even though refunds on dairy products exports have remained considerable, the domestic subsidies to the exported dairy products have nevertheless represented 38.2% of total subsidies or 61.7% of the refunds, giving an average dumping rate of 33.3%[98] for the same period.
- It is bovine meat which has had the highest dumping rate – 63.7% on average from 1996 to 2002 – since the total subsidies to the exported bovine meat have been higher by 75.1% to its export value, the domestic subsidies to this exported meat having exceeded the refunds by 9.2%[99].
- "*EU's domestic support and export subsidies for tomato have enabled the EU cover about 80% of the demand for this product in West Africa at cheaper prices than local supplies. As a result, several countries in the sub-region have experienced significant increases in the importation of subsidized EU tomato concentrates, a corresponding displacement of local supplies and closure of local tomato processing plants*"[100].
- The weight of domestic subsidies going to the exported products shows that the elimination of refunds the 31 December 2013 decided by the WTO Hong-Kong Declaration of 18 December 2005, if the Doha Round is finalised, would not put an end to the EU dumping.

[97] J. Berthelot, *Feed subsidies to EU and US exported poultry and pig meats*, Solidarité, 10 January 2006.
[98] J. Berthelot, *The comprehensive dumping of the European Union's dairy produce from 1996 to 2002*, Solidarité, 31 January 2006.
[99] J. Berthelot, *The comprehensive dumping of the EU bovine meat from 1996 to2002*, Solidarité, 19 April 2006.
[100] http://www.ileapinitiative.com/index.php?option=com_remository&Itemid=82&func=fileinfo&filecatid=170&parent=folder&lang=en

Conclusion: the ACPs should adopt an offensive stance vis-à-vis the EU

- Facing the arrogant and inflexible stance of the Goliath EU, the David ACPs have nevertheless a powerful sling at their disposal to avoid a desperate future for them and the EU itself: they can easily prosecute the EU at the WTO for not complying with the AoA rules.

- In doing so the ACPs, and more largely the DCs, can even avail of the easier procedure that the EU itself is using against the exports of "non market economies" (the remaining former communist countries not yet in the WTO). Indeed most EU agricultural products are not products of a "market economy" as they are no longer sold, since the CAP reform of 1992 enlarged by the reforms of 1999 and 2003-06, at prices reflecting their "*normal value… in the ordinary course of trade*" because they are much below the average production cost they would have had "*without significant State interference*"[101], given the massive subsidies, not only export refunds but also domestic subsidies benefiting to exported products.

- Finally, the only valid alternative to EPAs is their pure and simple elimination from the Cotonou Agreement, the continuation and improvement of the preceding Lomé Conventions and the EU disinterested support to the regional integration of genuine RTAs between ACPs, that is for a higher protection of their domestic markets.

- This is also the only solution politically sustainable and economically profitable for the EU itself in the long run.
  - Presently the EU is confronted to a large wave of clandestine immigration: 10,156 boat people from West Africa have reached the Canaries Islands in the first six months of 2006 alone, and thousands of others from SSA have reached Ceuta, Mellila, Spain, Lampedusa and Malta[102]. Despite the high death toll paid by these boat people, this is clearly the symptom of the economic disaster affecting SSA (94% of ACPs' population), and particularly its agriculture which is still employing 2/3 of its active population. These courageous young people are clearly running away from despair and attempt to earn a minimum to remit to their hungry families. But this is only the present situation.
  - The EU-27 population is expected to decrease by 2% between 2006 and 2050 (from 493 to 475 million) whereas that of developing countries (DCs) would rise from 5.3 to 8 billion, among which that of SSA would jump from 767 million to 1.749 billion and would be then larger than that of India (1.628 billion) as of China (1.437 billion)[103]. The West African population alone would skyrocket by 135% (from 271 to 637 million) and would thus be 25% larger than that of the EU-27 whereas it is presently lower by 45%. This drastic change in the demographic balance between the EU and SSA, hence ACPs, will have profound impacts in their relative political and economic powers, and therefore in the evolution of international rules, including trade rules. If the EU politicians want to prepare a peaceful world for their grand children, time is up to change these rules.

  - If we add the impact of climate change which would hit much more SSA, we realize the imperative for the EU, and more broadly the international community, to mobilize themselves urgently to adapt agricultural trade rules to the needs of the poorest and most fragile continent.

[101] Council regulation (EC) n° 384/96 of 22 December 1995 on protection against dumped imports from countries not members of the European Community.
[102] Patrick Gaubert, *L'UE face à l'immigration clandestine*, http://europe.rfo.fr/imprimer.php3?id_article=99
[103] Population Reference Bureau, *2006 World Population Data Sheet*, http://www.prb.org/pdf06/06WorldDataSheet.pdf. These prospects are higher than those of the United Nations but they are also more recent (established in August 2006 instead of February 2005).