The EPAs do not comply with the WTO

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Although I have only written here the first point of a new paper I circulate it already to NGOs to give them food for thought until I complete the paper.

In the debate at the INTA Committee of the European Parliament (EP) on 15 June on the SADC EPA, which was signed on 10 June in Botswana, most MPs, including President Bern Lange and Ms Sandra Gallina form DG Trade, have repeatedly said that their biggest concern was that the EPAs, of which the SADC EPA, remain consistent with WTO rules.

We are way off the mark on many aspects:
- The WTO did not oblige to turn from the preferential Agreements of Lomé Conventions to the EPAs of the Cotonou Agreement
- The MFN clause will check South-South agreements
- The "rendez-vous" clause expanding liberalization to the themes of Singapore and beyond breaks the Doha Round mandate
- The non-inclusion of domestic farm subsidies in the EPAs contradicts the Agreement on Agriculture and the Agreement on Subsidies and Countervailing Measures
- The EPA safeguard measures are smaller than those of the WTO
- There is no WTO rule determining the percentage to liberalize and the duration of liberalization

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First, because the "banana war" was buried twice, first by an agreement at the WTO in December 2009 when the Latin American countries agreed that the EU maintains its duty free imports from ACP countries in exchange for lower tariffs on Latin American bananas and, on the other hand, by a gradual further decline of these tariffs in the free trade agreements (FTAs) concluded with these countries in 2012[1]. Then because the EU could have given and could still give the GSP+ status (Generalized System of Preferences) to the non LDCs of sub-Saharan Africa (SSA), of which to those of West Africa (WA) which, according to DG Trade, meet the economic vulnerability criteria, even if the EU would need to check also that they are implementing the 27 required international conventions, which Nigeria does.

But the main argument of the present paper is to underscore that the United States (US) has notified its preferential trade agreements under the Enabling Clause: the Andean trade preference act since December 1991 (no longer in force after the US Free trade agreements with these countries), the Caribbean Basin Economic Recovery Act (CBERA) since January 1984 (last waiver in December 2010) [2] and above all the AGOA since 2000.

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[1] *The West Africa-EU Economic Partnership Agreement: a lose-lose agreement*, SOL, 12 June 2016, http://www.sol-asso.fr/analyses-politiques-agricoles-jacques-b/

[2] http://ptadb.wto.org/ptaSearchDocuments.aspx

The WTO Council on Trade in goods has indeed renewed on 16 November 2015 for 10 years the waiver requested by the US for its "African Growth and Opportunity Act" (AGOA) as it relates to non-reciprocal trade with the 39 eligible countries of SSA (sub-Saharan Africa), which derogates from the principle of non-discrimination of GATT Articles I (Most Favoured Nation, MFN, clause) and XIII (on tariff quota)[3]. The European Commission has approved this waiver[4]. The US has begun to implement the AGOA in 2000 before applying first for a WTO waiver, which it did in 2005 for 10 years, without any complaint being brought against it at the WTO.

With the AGOA the US imports duty free and without quantitative restrictions (except for out of quotas agricultural products having tariff quotas) the eligible products of the eligible 39 SSA countries and with rules of origin often more favorable than those provided by the EU EPAs. Particularly the provision allowing AGOA LDCs to export apparels made from yarn and fabrics imported from non-AGOA countries ("third-country fabric provision")[5]. Eligibility to AGOA is subject to compliance with human and social rights – which is not the case for the EU GSP and EBA (Everything But Arms) status, but only for the GSP+ status –, graduation occurs above a certain level of per capita GDP (as for the EU GSP) and the list of eligible products may change from time to time. However, while the US GSP applying to a little more than 120 developing countries (DCs) is revised every year or every other year, the AGOA is planned for 10 years, although the US can change the eligible countries every year. The list of products covered by AGOA is more extensive than that of the US GSP: for example clothes and shoes are included in the AGOA but not in the GSP. Of the US 10,500 tariff lines, 3,800 are imported at zero MFN duties, 3,400 more are imported duty free under the GSP, 1,400 more for LDCs and 1,800 are added for AGOA (of which many are already in the 1,400 AGOA LDCs)[6]. Total AGOA duty free imports cover 86% of total US tariff lines. Curiously the US gives a LDC status to AGOA countries whose GDP is well above the UN level, such as Mauritius, Botswana and Namibia. And the status of "Third country fabric" is open to countries considered non-LDCs by the United Nations as by the EU: Cape Verde, Ivory Coast, Ghana, Nigeria, Kenya, Mauritius, Lesotho, Botswana, Namibia.

Clearly all US imports from AGOA countries are not imported duty free as the SSA exports to the EU would be imported by the EU in the EPAs, provided they comply with the Rules of Origin (ROOs) and SPS requirements in both cases. But at least the most important WA EPAs countries exports to the US are imported duty free or at much lower rates than in the EU GSP, as shown in some following examples for 2015. Processed tunas are imported at a 0.6% duty under AGOA against 21% under the EU GSP. Cocoa powder is imported from AGOA at 0.08% against 3% by the EU and cocoa paste is imported duty free against 6.1% in the EU. US import of roses from AGOA pay a duty of 0.02% against 5% in the EU GSP. US imports of women trousers (code 61046320) from AGOA pay a duty of 0.96% against 9,6% under the EU GSP. US imports of AGOA yams pay a duty of 0.5% against 6% under the EU GSP. Bananas could be imported duty free from AGOA in the US but they are not competitive.

[3] https://www.wto.org/english/news_e/news15_e/good_10nov15_e.htm
[4] http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=COM%3A2015%3A0464%3AFIN
[5] http://www.nber.org/papers/w16623
[6] https://www.fas.org/sgp/crs/row/R43173.pdf

As the AGOA is a non-reciprocal trade agreement contrary to the EU EPAs, its text denounces "*the unfair practices by the European Union that condition African access to the European market on signing imbalanced and substandard trade agreements*"[7].

Above all the AGOA is notified to the WTO Committee on Trade and Development under the Enabling Clause[8] as does the EU for its GSP (including the specific status for LDCs and GSP+). However the EPAs as all free trade agreements are notified under GATT Article XXIV because, unlike the GSP-LDC regimes, they apply to a limited group of DCs.

According to Fatimata Zahra Niang "*The cardinal belief of the European Union that the Cotonou regime is dictated by the WTO law becomes a simplistic argument*"[9]. For several reasons. First Article 34.4 of the Cotonou Agreement provides that "*Economic and trade cooperation shall be implemented in full conformity with the provisions of the WTO, including special and differential treatment, taking account of the Parties' mutual interests and their respective levels of development*". But that special and differential treatment (SDT) is inconsistent with the rules of free trade in the WTO that resulted precisely in prosecutions against the Lomé Conventions and that is why, despite the Cotonou Agreement, the EPA provisions on SDT tend to work the other way round in favour of the EU.

The Enabling Clause of 1979 was integrated into the GATT 1994. It is a legal exception to Article I of the GATT – *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* – and its Article 2 states that it covers only 3 types of agreements reducing tariffs: those to GSP for DCs and to LDCs, and to regional agreements between DCs, plus agreements on non-tariff measures. This viewed has long been shared by most trade specialists, but DCs and some specialists have tried to change article XXIV, in vain, so that Bonapas Onguglo and Taisuke Ito have proposed to change also the Enabling Clause: "*A third option is to exclude the North–South RTAs from the purview of Article XXIV of GATT 1994 by amending the Enabling Clause in such a way that it also covers North–South RTAs formed between developed and developing countries. At present, the Enabling Clause covers only RTAs formed among developing countries*"[10].

Sure, but we should not forget the footnote of this article 2 which has formed the legal basis on which the US relied to justify first its "Caribbean Basin Economic Recovery Act" (CBERA) and then the AGOA, to which the WTO Members did not object. The footnote writes: "*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*". And Fatimata Zahra Niang concludes: "*A constructive reading of the Enabling Clause like that of the Americans is a valuable precedent for a new understanding of this provision so that finally it is recognized for its quality of equal legal value*" .

[7] http://www.ictsd.org/bridges-news/bridges-africa/news/draft-us-bill-provides-for-10-year-agoa-extension-south-africa

[8] http://ptadb.wto.org/ptaHistoryExplorer.aspx

[9] Fatimata Zahra Niang, *Les accords de partenariat économique, une exigence juridique du droit de l'OMC?* janvier 2008, https://unige.ch/gsi/files/9514/0351/6369/Niang.pdf

[10] Bonapas Onguglo and Taisuke Ito, *How to make EPAS WTO compatible?*, ECDPM, July 2003, http://ecdpm.org/wp-content/uploads/2013/11/DP-40-Make-EPAs-WTO-Compatible-Reforming-Rules-Regional-Trade-Agreements1.pdf

This reading and the actual behaviour of the General Council which agreed to extend the US waivers to CBERA and AGOA were confirmed by the WTO Appellate Body on 7 April 2004 in the case "*European Communities - conditions for the granting of tariff preferences to developing countries*" on complaint by India against the "drugs" component of the GSP+, and the Appellate Body stated: "*We conclude that the term "non-discriminatory" in footnote 3 does not prohibit developed-country Members from granting different tariffs to products originating in different GSP beneficiaries, provided that such differential tariff treatment meets the remaining conditions in the Enabling Clause. 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*"[11].

Professor Robert Howse, one of the best experts of the WTO law, commenting the Appellate Body's report, concludes: "*The reversal of the panel's holding that 'non-discriminatory' means 'identical' and the creation of a complex test for 'non-discrimination'… may… give donors significant scope to differentiate among different developing countries… In determining what are the needs referred to… 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*"[12].

Therefore there is no legal reason for the WTO members to deny to the EU the waivers they have granted to the US. There is no economic reason either as, if the average per capita GDP of the whole SSA was of 1,879 dollars (1,414 euros) in 2014, it was of 1,983 dollars (1,493 euros) in the 39 AGOA countries and of 1,777 dollars (1,338 euros) in the countries of the 5 regional EPAs[13].

But the per capita GDP of the SSA EPA countries can also be compared with that of the other US preferential agreement, the CBERA, which was of 17,627 dollars in 2014, even if its population was of only 1.257 million inhabitants in the 6 countries of Barbados, Belize, British Virgin Islands, Curaçao, Bahamas and Aruba[14]. However the CBERA was enlarged in 2000 with the Caribbean Basin Trade Partnership Act (CBTPA) which added the 12 countries of Haiti, Dominica, Grenada, Guyana, Jamaica, Montserrat, St Kitts and Nevis, Sta Lucia, St Vincent, Trinidad and Tobago so that the agreement is known now as the CBERA-CBTPA with

[11] WT/DS246/AB/R of 7 April 2004.

[12] http://www.peacepalacelibrary.nl/ebooks/files/BRIDGES8-4.pdf

[13] Indeed the average per capita GDP of the 10 SSA countries not eligible to AGOA – Democratic Republic of Congo, Sudan, South Sudan, Central African Republic, Eritrea, Somalia, Gambia, Equatorial Guinea, Sao Tome and Principe, Zimbabwe – was only of 978 dollars (736 euros) while that of Angola, which did not sign the SADC EPA, was of 5,710 dollars (4,298 euros). However, the average per capita GDP of the countries of the 3 EPAs close to finalisation (WA, EAC, SADC) was of 2,161 dollars (1,627 euros) and would be of 1,725 dollars (1,298 euros) without South Africa (also beneficiary of AGOA, with a GDP per capita of 6,488 dollars or 4,883 euros). The average per capita GDP of ECOWAS and West Africa was of 2,122 dollars (1,596 euros), that of the East African Community (EAC) of 938 dollars (706 euros) and that of the SADC of 4,499 dollars (3,387 euros) but only of 1,451 dollars (1,092 euros) without South Africa. However, the average GDP per capita of the 3 EPAs would be significantly lower than that of the whole SSA if Nigeria had not revalued by 89% its GDP in 2013, and it is likely that some other SSA countries could have done the same. Indeed Nigeria's GDP accounted for 35.5% of the whole SSA GDP in 2014, and if he had not been revalued the per capita GDP of the 3 EPAs would have fallen to 1,651 dollars (1,243 euros) in 2014 and that the WA EPA to 1,333 dollars (1,003 euros).

[14] https://ustr.gov/sites/default/files/2015-CBI-Report-Final.pdf

an average per capita GDP of 6,608 dollars (4,974 euros) for a total population of 17,9 million inhabitants. Once more the EU has approved the 27 May 2009 the WTO waiver enlarging the CBERA[15]. Let us remember that the EU per capita GDP is of 35,786 dollars (26,937 euros), 16.6 times that of the average of the 3 EPAs (WA, EAC and SADC) or 16.9 times that of WA.

Therefore, apart from the possibility for the EU to recognize a GSP+ status to Ivory Coast, Ghana and Nigeria in the WA EPA – the best solution as it does not require a WTO waiver –, it can and should ask for a waiver at the WTO Committee on Trade and Development to be able to notify under the Enabling clause new preferential trade agreements with the five SSA RECs (regional economic communities), particularly with ECOWAS.

As Fatimata Zahra Niang concluded: "*None of the judgments of the panel and the appellate body have forced the EU to negotiate EPAs – contrary to what the EU stands – the panel and Appellate Body reports contenting to remind the general requirement of compliance with WTO law*".

The dire and sad reality is that the EU did not reinstate the non-reciprocal preferences because it pursues exclusive short term business interests, which will be fatal to it on the geopolitical level as well as on pure business interests in the medium and long terms.

[15] http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A52015PC0033