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Trade: European Union's EPAs don't comply with WTO

Toulouse, 23 Jun (Jacques Berthelot*) -- When the International Trade Committee of the European Parliament (EP) debated on 15 June the European Union's EPA agreement with Southern African Development Community (SADC), signed on 10 June in Botswana, most MEPs, including President Bern Lange and Ms Sandra Gallina from DG Trade, repeatedly said that their biggest concern was that the accord is consistent with WTO rules.

On this question, the EU was way off the mark on many aspects, In sum,

* The rules of the WTO did not oblige the EU to turn from the preferential Agreements of Lome Conventions to the EPAs of the Cotonou Agreement;

* The MFN clause in the SADC-EPA will come in the way of South-South agreements;

* The "rendezvous" clause in the EPA, expanding the agenda of trade liberalization to the themes of "Singapore" issues, goes against the Doha Round mandate;

* The non-inclusion of domestic farm subsidies in the EPAs contradicts the WTO Agreement on Agriculture (AoA) and the Agreement on Subsidies and Countervailing Measures (SCM);

* The EPA safeguard measures are less than those of the WTO; and

* There is no WTO rule determining the percentage to liberalize and the duration of liberalization.

There was no obligation on the EU, in terms of the rules of the WTO, to convert its Lome preferential agreements with the 71 African, Caribbean and Pacific (ACP) countries into the Economic Partnership Areas (EPAs) of the Cotonou Agreement.

The oft-repeated reason advanced for this, namely, the disputes between some Latin American countries and the EU over the preferential tariff regime for import of bananas from the ACP economies, known as the "banana war", was buried twice: first by an agreement at the WTO in December 2009 when the Latin American countries agreed to the EU maintaining its duty-free imports from ACP countries in exchange for lower tariffs on Latin American bananas and by a gradual further decline of these tariffs in the free trade agreements (FTAs) concluded with these countries in 2012.

Moreover, the EU could have given and could still give the GSP+ status (Generalized Scheme of Preferences) to the non-LDCs of sub-Saharan Africa (SSA). Extending the GSP+ to the West African countries, according to the European Commission's DG Trade, would have met the economic vulnerability criteria, even if the EU would need to check 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) 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) and above all the US African Growth and Opportunity Act (AGOA) since 2000.

The WTO Council for Trade in Goods indeed renewed on 16 November 2015 for 10 years the waiver requested by the US for its AGOA, as it relates to non-reciprocal trade with 39 countries of SSA (sub-Saharan Africa), which derogates from the principle of non-discrimination under GATT Articles I (Most Favoured Nation, MFN, clause) and XIII (on tariff quota).

The European Commission has approved this waiver. The US had begun to implement the AGOA in 2000, even before it first applied 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-quota agricultural products having tariff quotas) the eligible products of the eligible 39 SSA countries and with rules of origin often more favourable than those provided by the EU EPAs, in particular, the provision allowing AGOA LDCs to export apparels made from yarn and fabrics imported from non-AGOA countries ("third-country fabric provision").

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 for AGOA LDCs). 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, and Namibia.

Clearly all US imports from AGOA countries are not imported duty-free as the SSA exports to the EU would be in the EPAs, provided they comply with the Rules of Origin (RO) 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 the following examples for 2015. Processed tuna are imported at a 0.6% duty under AGOA against 21% under the EU GSP.

Cocoa powder is imported under AGOA at 0.08% against 3% by the EU and cocoa paste is imported duty-free against 6.1% in the EU. US imports 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.

As the AGOA is a non-reciprocal trade agreement, 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*".

Above all, AGOA is notified to the WTO Committee on Trade and Development under the Enabling Clause 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*", for several reasons:

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 (S&DT) is inconsistent with the rules of free trade in the WTO that resulted precisely in challenges against the Lome Conventions and that is why, despite the Cotonou Agreement, the EPA provisions on S&DT 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 an 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 three 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 view has long been shared by most trade specialists, but DCs and some specialists have tried to change Article XXIV, in vain; it is for that that Bonapas Onguglo and Taisuke Ito have proposed changing 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*".

However, 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, and to which the WTO Members did not object.

The footnote says: "*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*".

(i) 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 a complaint by India against the "drugs" component of the GSP+.

In that dispute, the Appellate Body (DS246/AB/R-7 April, 2004) 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*".

[The AB however had struck down the EU's GSP+ "drug preferences", on the grounds that at a minimum the EU had failed to justify how its scheme came within the purview of the Enabling Clause, and that it was confined only to the 12 designated countries included in Annex I of the relevant EC regulation, and there was nothing in the regulation, either of the criteria used or for inclusion of other developing countries similarly situated.

[The EC's Drug Arrangements, the AB said, may be found to be consistent with the non-discriminatory requirement only if the EC proves at a minimum that the preferences granted under the Drug Arrangements are available to all GSP beneficiaries that are similarly affected by the drug problem. "We do not believe this to be the case." See, Chakravarthi Raghavan, "AB rules against EC preferences under drug arrangements" SUNS #5550 of 8 April 2002. SUNS]

Professor Robert Howse, one of the best experts of the WTO law, commenting on the Appellate Body's report, concludes: "*The reversal of the panel's (finding) 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) in articulating standards or benchmarks relevant to the application of WTO agreements*".

There is no reason for the WTO Members to deny to the EU the waivers they have granted to the US. Particularly on the issue of per capita GDP which is about the same in AGOA countries and in the EU EPAs countries of SSA.

Indeed the average per capita GDP of the SSA countries in the three EPAs being finalized (WA, EAC, SADC) is likely the lowest in the world: an average of 2,161 dollars (1,627 euros) in 2014, of which 1,725 dollars (1,298 euros) without South Africa (which is among the AGOA beneficiaries, with a GDP per capita of 6,488 dollars or 4,883 euros).

The average GDP per head of ECOWAS as well as of 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 of only 1,451 dollars (1,092 euros) for the five members other than South Africa.

But this is also to be compared with the other US preferential agreement of the CBERA whose per capita GDP was of 17,627 dollars in 2014, though for a smaller population of 1.257 million inhabitants in the 6 countries of Barbados, Belize, British Virgin Islands, Curacao, Bahamas and Aruba.

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, St. Lucia, St Vincent, Trinidad and Tobago so that the agreement is known now as the CBERA-CBTPA which has an average per capita GDP of 6,608 dollars (4,974 euros) for a total population of 17.9 million inhabitants.

The EU, here too, approved on 27 May 2009 the WTO waiver enlarging the CBERA. Also, the EU per capita GDP is 35,786 dollars (26,937 euros), 16.6 times that of the average of the three 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 -, is that the EU can and should ask for a waiver at the WTO Committee on Trade and Development to notify under the Enabling clause the 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 its own exclusive short-term business interests, which will be fatal to it on a geopolitical level as well as on pure business interests in the medium and long terms.

[* Jacques Berthelot, a French agro-economist and retired academic of ENSAT (Ecole Nationale Superieure Agronomique de Toulouse), and civil society activist at SOL (ex-Solidarite), France, contributed this comment. The full text of the paper, "The EPAs Do Not Comply with the WTO", with references and footnotes, can be found at or downloaded from [http://www.sol-asso.fr/analysis-politiques-agricoles-jacques-b/]