



Commerce, Women Entrepreneurs and Recovery

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Abstract

The detailed examination of such a subject will be carried out on the basis of a fundamental problem, which will thus serve as a guideline in the presentation of the ideas which should underlie the approach. In this case, we are talking about the question of trade serving the inclusion and entrepreneurship of women in order to better promote their emancipation. In other words, how do trade standards or rules, through an inclusive and non-exclusivist policy, work to better take into account the role and integration of women in the Multilateral Trading System ?

Thus the problem of method is at the heart of any scientific work as it is true that the method sheds light on the hypotheses and determines the conclusions, our approach will be ordered with a few exceptions around the use of the analytical and exegetical but also comparative method. It is understood as the analysis, interpretation and explanation of the rules of law, particularly those contained in the various legal texts of the GATT and the WTO.

As for the expected results, firstly, like the GSP, special preferences annihilate the MFN clause. If this questioning is justified in the "bananas" jurisprudence by the dismantling of both the Community development cooperation policy and special preferences, it is not justified by the enabling clause. Indeed, knowr the Lomé convention weighed a sword of Damocles which made the status quo fragile. Long immune to any challenge, Lomé's trade regime was shaken in the early 1990s. Its gradual questioning opened the way to a plethora of litigation which continues to this day. The contentious inflation caused by the "banana" regime revealed the ineffectiveness of a defunct dispute settlement system which pushed the Contracting Parties to strengthen the power of sanction through the creation of an integrated judicial body.

Keywords: Special Preferences, MFN Clause, GATT, WTO.

As a result, WTO jurisprudence had to deal with a symbolic case which legally established the dismantling of specific preferences. It's the Banana affair. But the preferences were able to be maintained for a transitional period until December 2007, thanks to a waiver granted at the WTO Ministerial Conference in Doha. Indeed, the significance of the Banana affair is considerable for the ACP countries. After a long period of tolerance of special preferences incompatible with the principle of non-discrimination within the framework of the GATT, the WTO recognized their illegality and thus opened a period of renewal of the MFN clause. Then, at the level of special preferences, this dissonance was especially marked in the Lomé Conventions, by an asymmetric system of positive discrimination of the ACP in trade preferences and by a transition regime derogating from the principles of multilateralism and the original trade instruments.

The latter takes into account the legal debate for a normaliza-

tion of EU-WTO relations, namely the conflicts arbitrated by the WTO and the commercial policy according to the Cotonou Agreement, that is to say the exception to normalization. The era of the new WTO will be that of calling into question discriminatory special preferences. Some developing countries rightly do not condone other countries in the same category benefiting from preferential trade arrangements that contradict multilateral trade rules. This is the beginning of the dismantling of special preferences. The European preferential offer has known two eras and two different regimes. If the Yaoundé conventions were symmetrical and based on reciprocity, the Lomé conventions were asymmetrical and implied non-reciprocal trade preferences, discriminatory and contrary to GATT, although tolerated. The observation of the illegality of trade preferences arising from the Lomé conventions placed the European communities before an alternative : maintain the preferences and therefore non-reciprocity by extending them to other developing countries

or withdraw them to leave all potential beneficiaries on the hook. An equal footing. The second term of the alternative was chosen, with the proposal of a new commercial partnership. This could now only be conceived in perfect compliance with the provisions of the WTO. It is in this sense that the Cotonou Convention was signed. Even if it provides a transition period, its commercial dimension is oriented towards global reciprocity.

A Questioning Of Community Development Cooperation Policy And Special Preferences At The Wto Incompatible With The Principle Of Non-Discrimination

The admittedThe initial development of the Lomé trade regime is not the result of positive actions on the part of rich countries but is the result of two parallel dynamics : the fruitless rivalry between developing countries and the heterogeneity of the positions of developed countries. As soon as the Yaoundé agreements were implemented, a coalition of Latin American countries led by Brazil, Argentina and Chile was formed in opposition to these selective preferences that the European Union established in favor of its former colonial possessions. Scalded by the refusal of the United States to establish, as a counterweight to the community regime, forms of regional integration linking the two extremes of the continent, the bitterness of the countries of Latin America has undermined the mythical solidarity which united the southern countries. At the same time, rich countries were themselves divided over the legal regime of preferences. For some, these preferences should be generalized, for others selective, a third group with a resolutely liberal rule unwaveringly defending the continuation of trade liberalization [1].

This divergence of views continued within the embryonic GATT Dispute Settlement System. Asked on several occasions to pronounce on the successive Lomé conventions, the conclusions of the panels have never regained the required unanimity. Between 1973 and 1993, no state challenged the Lomé trade regime. According to Professor Gautron, “the Lomé Convention was the subject of a nuanced assessment, i.e. a de facto acceptance on the basis of an acquired tradition and taking into account the large number and economic weakness of the ACP States”.

Urging on the convention weighed a sword of Damocles which made the status quo fragile. Long immune from any challenge, Lomé's trade regime was shaken in the early 1990s. Its gradual questioning opened the way to a plethora of litigation which continues to this day. The contentious inflation caused by the “banana” regime revealed the ineffectiveness of a defunct dispute settlement system which pushed the Contracting Parties to strengthen the power of sanction through the creation of an integrated judicial body.

Throughout the GATT empire, the coercive power of the panels was almost non-existent, due to the method of adopting their reports. As a result of the domination of the rule of unanimity, the reports were in practice devoid of effects. It will be necessary to wait for the reform of the dispute resolution mechanism introduced by the Marrakech Accords to see the emergence and

then development of an effective litigation system governed by the rule of reverse consensus. Through this decision-making technique, the Contracting Parties have strengthened the justifiability of agreements since only the unanimity of the parties can oppose the adoption of a report.

The necessary paradigm shift, however, sounded the death knell for the Lomé trade regime. It is by calling into question Community regulations in agricultural matters that the ORD came to dismantle the central elements of a historic cooperation regime.

La banana has long been at the heart of an ideological struggle within the Community between supporters of trade liberalization and its detractors keen to preserve the economic and historical ties which bind them to their former colonies. On the sidelines of this ideological opposition, the economic stakes are important. The European Union, a major consumer of bananas, has two sources of supply, namely Latin American production and ACP production. The first highly competitive productions, because they are operated by powerful American firms, have difficulty coping with the unfair competition brought against them by island productions under the protection of the European Union. The stakes are high because it is the whole question of the modalities of access to the Community market which is in question [2].

The ideological division between European states continues on the economic level. Liberal state favor imports from more competitive Latin American states despite high customs duties. Conversely, other States opt either for preserving their domestic market or for imports from ACP States. This results in a heterogeneity of trade regimes with third countries, a situation which a unitary normative framework attempts to remedy.

Afin to put an end to the segmentation of the internal market generated by marketing regimes with disparate third States, the European Community adopted Regulation 404/93. This framework harmonizes quality and marketing standards and organizes intra-Community production, with a view to ensuring the sale of bananas from the Community and the ACP States.

Mays, its most controversial aspect is that which governs the regime of trade with third States. The system put in place established a distinction between, on the one hand, traditional and non-traditional ACP bananas and, on the other hand, bananas coming from third countries, that is to say mainly Latin American countries. ; another category was reserved for community bananas. While imports of traditional ACP bananas enjoyed duty-free access under Protocol of the Lomé Convention, the regime applicable to imports of bananas from third countries was more stringent.

The regime was so discriminatory that even imports of non-traditional ACP bananas enjoyed more favorable treatment. Within the framework of the tariff quota, no customs duties were applied to them ; which was not the case for bananas coming from

third countries. Beyond the tariff quota, the customs duty applied to bananas from third countries was higher than that imposed on ACP banana. Although the customs duties imposed on said production were reduced, the fact remained that the Community banana regime openly instituted discrimination according to the origin of the products which was not permitted by the general agreement on trade in goods. E Apart from these tariff obstacles, the regime established by the regulation ensured the management of the tariff quota through a system of licenses distributed according to the categories of operators. Lhe questioning of the Lomé preferential regime actually results from the challenge to the community regulations governing the common organization of the banana market (OCMB) [3].

Theset before the community legal order that the challenges arose for the first time, when Germany ibrought an action for annulment of the regulation en May 1993. Although the conclusions for annulment were declared unfounded, the Court recalled its case law established that the provisions of GATT were not among the standards with regard to which it controls the legality of Community acts.

DAlmost concomitantly, the countries of Latin America vschallenged, before the panel set up in February 1993, the legality not of the regulation which was not yet in force, but of the project relating to the import regimes of the different Member States which they judged to be contrary to Article XI du GATT prohibiting quantitative restrictions. The second argument which was raised was more pernicious for the preferential regime. The complainants noted, with Article I., the incompatibility of the tariff preferences granted to ACP countries. The EU did not contest this conclusion but believed it saw in Article XXIV a justification for this preferential regime. This question was not new because it had already been raised during the conclusion of the Yaoundé agreements.

The position taken by the Special Group was clearre : it sanctioned the Lomé trade regime contrary to Article I because it established special preferences not justified by the enabling clause. The panel took the opposite view of the Community's argument on the subject of regional integrations. He recalled that regional trade agreements do not allow for the absence of reciprocity. Therefore, the Lomé Convention which provided for a unidirectional dismantling of tariff barriers did not meet the conditions of §8 bi) of Article XXIV. Regarding the argument based on Part IV of the GATT, the panel found that the latter did not contain any derogation from the MFN clause. The panel concludes by inviting the EC either to come into compliance with the provisions of the General Agreement, or to request a waiver under Article XXV, for the continuation of the regime.

Opposing its inability to require reciprocity from the developing countries, the EU, enlisting the support of the ACP countries, managed to block the adoption of the report. Ecouraged by the failüre to follow the panel's conclusions, the Latin American countries introduced a new appeal. The failure of consultations with the Community precipitated the formation of the Special

Group.

Various grounds were presented in support of their request : violation of Articles I, II, III and XI. Latin American countries noted that the level of customs duty on banana imports under the tariff quota exceeded by four points that of the duties that had been bound on banana imports into the Community. Echoing the conclusions of the panel's previous report, the Special Group, in 1994, once again condemned the unilateral preferential treatment granted to ACP countries. It found a violation of Article II by the tariff regime. Regarding the allocation of licenses, the Special Group noted that the system encouraged the importation of ACP or Community bananas and was therefore contrary to Article III which excludes any discriminatory treatment. Finally, with regard to the generally more favorable ACP banana import regime, the Panel considered that the latter was contrary to the MFN clause [4].

Hasultimately, only the argument based on the violation of Article XI was deemed unfounded. The Panel ruled that the customs tariffs imposed on imports of bananas from third countries, even if prohibitive, did not constitute a request. The impact of this condemnation was generally null, the Community having once again opposed the adoption of the report. Aware, however, of the need for a normative framework for the preferential regime, it obtained an exemption Le December 9, 1994. The latter relieved the EU of its obligations under Article I § 1. This derogation covered the scope *ratione temporis* of the Fourth Lomé Convention until February 29, 2000.

Afin to prevent the possible resurgence of a new dispute, the EU concluded an arrangement with the countries of Latin America, in the form of a framework agreement, on March 29, 1994. In return for the renunciation by the countries of Latin America to submit any dispute that arises regarding the banana import regime, the text provided in particular for an increase in the quota allocated to Latin American producers, a reduction in the tariff quota allocated to ACP countries, by more than 50%, thus reducing their community market share as well as customs duties. This agreement aroused discontent within the Community but would also announce the involvement of the United States in yet another "bananas" conflict.

Lhe referral to the DSB marks a turning point in the evolution of the banana conflict. For the first time, the EU would find itself in à position to integrate the decisions that would be taken regarding its banana import regime. On May 22, 1997, at the request of the United States, Mexico, Guatemala and Honduras, the DSB adopted the panel's report which was confirmed, in broad terms, by the OAP on September 9, 1997.

Devant the panel, the EU attempted to cause the request to fail at the admissibility stage, by denouncing the lack of interest in acting on the part of the United States (EU) and Mexico which did not suffer, according to it, from any damage within the meaning of the Dispute Settlement Understanding. In fact, the US has never imported bananas into the Community. This argument,

although rejected on its merits by the panel, gave the Special Group the opportunity to establish its jurisprudence on the subject. Approaching general international law, the panel considered that the interest in taking action could arise from even potential damage, specifying that unlike the community legal order where the interest in taking action of privileged applicants is presumed, there is no similar system in the WTO Dispute Settlement System. The effectiveness of WTO law therefore requires a flexible interpretation of the requirement of interest in acting. By this jurisprudential construction, the ORD thus extended the status of privileged applicants, well known in Community law, to the contracting parties [5].

So on the merits, the panel confirmed the conclusions of the previous judges on the alleged violations, considering that if the derogation could cover the preferential regime, on the other hand it could not be invoked to justify the licensing regime. Following the panel's report, the EU obtained, through an arbitration award, a period of fifteen months to bring its banana import regime into compliance. By Regulations 1637/98 and 2362/98, the EU reformed its import regime by attempting to incorporate the DSB's recommendations. But the Community was content to remove only those regimes that the DSB had deemed explicitly illegal. In particular, it repealed the distinction between operators which generated patent discrimination. But for the rest, it maintained the tariff quotas in favor of the ACP countries, a regime which, in the opinion of the United States, was neither in conformity with the observations of the DSB, nor justified by the waiver.

So faced with the American threat to resort to unilateral trade sanctions, the Community decided to submit the dispute to an arbitrator who was to rule on the compatibility of the new regime. But the United States contested the Community initiative, perceived as a delaying tactic. Finally, the situation was resolved, "thanks" to the request filed by Ecuador aimed at having a panel judge the fact that by maintaining tariff quotas in favor of ACP countries in particular, the EU was failing to fulfill its obligations under the General Agreement on Trade in Services (GATS). Unsurprisingly, the panel reiterated its condemnation of the licensing regime.

Thus the ORD used for the first time, following this conviction, the option offered to it to authorize the suspension of concessions. This authorization was granted to the United States first, then to Ecuador. Unlike the preferences granted under the GSP, which concern almost all developing countries (DCs), special preferences are intended for a smaller number of beneficiaries for specific reasons. This is how, for example, most African countries, within the framework of the EEC/ACP Convention, benefited from special preferences due to their low economic weight but also their historical relations with their metropolis. Special preferences are at the heart of trade relations between Europe and the ACP countries. The history of commercial arrangements between the two partners began with the Yaoundé Conventions, but they took it to the next level with the signing of the Lomé Convention, strongly influenced by the philosophy of the New International Economic Order of the 1970s [6].

The European preferential offer is based on the principle of non-reciprocity contained in the various Lomé conventions. Article 25 of Chapter 4 of Lomé I indicating the general trade regime is based on the principle of free access for products from ACP countries to the European market. However, given the current development needs of the ACP, "it does not involve reciprocity for them in terms of free access". The principle is reiterated in the same terms by article 174 of the chapter relating to commercial cooperation. The experience of commercial cooperation under the Lomé conventions, or even the Cotonou Agreement (transitional period 2001-2008) has shown that tariff concessions alone were not sufficient for the development of foreign trade in ACP countries. Indeed, with a few exceptions, it is clear that the preferential trade regime has not allowed the ACP to increase their market shares in the EU, in comparison, for example, with Asian countries which, by the Generalized System of Preferences (GSP), nevertheless benefit from a less preferential import regime than the ACP on the Community market.

This is because products from ACP countries suffer from a considerable lack of competitiveness on an international level and it is now necessary, in addition to tariff preferences, to effectively assist the latter in restructuring their production tools. It is important to give appropriate importance to supply-side constraints, notably product diversification, control of production costs, rapid adaptability to changes in global demand, sanitary and phytosanitary measures, etc. The preferential regimes practiced by the EC have generated more controversy compared to those of other major industrialized countries. In fact, these regimes posed two types of problems : a legal problem relating to the compatibility of bilateral preferential agreements with Article I of the GATT, and a more substantial problem of the effectiveness of these programs in terms of achieving the objectives of industrialization or at least diversification of the productive fabrics of the beneficiary countries.

On a legal level, the Europeans had opted to justify the preferences granted to ACP countries and countries bordering the Mediterranean, by resorting to the coverage of Article 24 taken alone or in combination with Part 4. These regimes will face the weakness of their legal justification during actions brought by certain contracting parties first developed, then developing which did not benefit from these measures. Two important cases illustrate this questioning of the legal foundations of the European approach to this conflict : the so-called citrus affair raised by the United States in 1974 and the banana affair initiated by various developing countries from 1992. In the banana affair, the preferences granted by Europe to the ACP countries were contested by five developing countries : Colombia, Costa Rica, Guatemala, Nicaragua and Venezuela [6].

Two special groups looked into the issue after consultations and good offices missions failed. The first complaint concerned the old system of supplying the Community market and the second the new system put in place since July 1, 1993. In both cases, the Panel concluded that the preferences granted by the EEC to imports from the bananas were not justified by Article 24 and

that they were inconsistent with the provisions of Article I of the GATT. The GATT, by refuting the legal justification of the Europeans, consolidated the principle of MFN and gave reason to the derogation approach. From now on, the rule of non-discrimination can only be circumvented by derogation. Following the loss of this legal battle, Europe will now seek to bring the special preferences regime for the benefit of ACP countries into compliance with WTO rules. It seems appropriate to return in more detail to this important case which called into question the special preferences at the WTO that are the banana jurisprudence. The European banana market is highly coveted.

Of the four million tonnes imported each year, the ACP countries held a 20% market share. A community regulation relating to the Common Organization of the Banana Market (OCBM) clearly granted an exclusive preferential regime to ACP countries and continued to be denounced by their export competitors, the Latin American countries in particular. Occurrence. Well even before the WTO agreements came into force, a dispute had arisen tending to call into question the conditions of access for Latin American bananas to the European market.

A first GATT report condemned the OCBM regime, on the grounds of the illegality of quantitative restrictions and the existence of trade preferences in favor of the ACP, contrary to the provisions of Article 11.1 of the GATT 1947. Second panel report had reached the same decision, based on its incompatibility with Article 1 of the GATT 1947. The two reports were rejected, respectively on June 3, 1993 and February 11, 1994, by the European communities, in taking advantage of the rule of the need for positive consensus at the time which was the condition for adoption of reports in the GATT of 1947.

If the lack of effect resulting from this system could guarantee a certain impunity, the implementation place of negative consensus as a condition for adoption of DSB decisions would revive members' interest in the dispute settlement system, and put the banana issue back on the table. Relying on Article 4 of the Dispute Settlement Understanding (DSU), Ecuador, Honduras, Guatemala, Mexico and the United States had seized the European communities with a request for consultations, with a view to contesting the OCBM regime based in part on the Lomé Convention.

This being manifestly discriminatory, it could only exist by obtaining a waiver granted by the GATT Council on December 9, 1994, with a view to circumventing provisions I. of the GATT. Subsequently confirmed by the General Council of the WTO (in October 1996), the waiver was valid until February 29, 2000. Knowing the legality of the preferential regime from which the ACP countries benefit is then equivalent for the DSB to examining beforehand the exemption for Lomé. Even if the European communities oppose it, the Appellate Body also considers that a proper examination of the waiver requires an interpretation of the Lomé Convention which has become, to a certain extent, a question falling within the WTO. This is how it found itself at the heart of the dispute over the determination of the legal

regime for ACP preferences. The relevant provision of the Lomé Convention, in this case, is Article 1 of its Protocol 5 which provides that "for its exports of bananas to Community markets, no ACP State is placed, as regards concerns access to its traditional markets and its advantages on these markets, in a less favorable situation than that which it previously knew or which it currently knows. » According to the Appellate Body, Article 168(2)(a) (ii), as interpreted, is a complement to this provision and means that the EC provides treatment for all ACP bananas more favorable than that granted to third countries benefiting from MFN treatment. Therefore, the methodology required by the Appellate Body is to verify whether the disputed measures taken by the EC are obligatory under the Lomé Convention. If applicable, they will be considered covered by the exemption [7].

Otherwise, their compliance with WTO provisions will be verified. This approach teaches us that the exemption granted by the WTO Council can serve as a screen for the Convention, as long as it offers the guarantee of not constituting the basis for a misuse of procedure. In carrying out this examination, the Appellate Body came to the conclusion that the duty-free access granted by the EC for all traditional ACP bananas, that granted by the EC for the 90,000 tonnes of bananas non-traditional ACP, as well as the tariff margin granted to all other bananas were required by Article 1 of Protocol No. 5 on bananas, Article 182, paragraph 2 (ii) and Article 183 of the Convention of Lomé 4.

On the other hand, the Appellate Body concludes that the other measures challenged were not required by the Convention. It thus appeared that the measures required by Lomé were in fact contrary to Article 1 of GATT (MFN Treatment) but covered by the derogation granted in this sense. Lomé's preferences could also not find legal justification in Article 24 of the GATT on free trade areas (FTAs) and customs unions, contrary to what was argued by the EC and some of its partners. ACP. The reason is that in this regime, it is a one-way liberalization ; which does not meet the criterion reciprocity of required by paragraph 8 (b) of Article 24.

WTO jurisprudence dealt with a symbolic case which legally established the dismantling of specific preferences. It's the Banana affair. But the preferences were able to be maintained for a transitional period until December 2007, thanks to a waiver granted at the WTO Ministerial Conference in Doha. Indeed, the significance of the Banana affair is considerable for the ACP countries. After a long period of tolerance of special preferences incompatible with the principle of non-discrimination within the framework of the GATT, the WTO recognized their illegality and thus opened a period of renewal of the MFN clause. But this questioning is not immediately applicable. The waiver granted in Doha extends the preferential regime for a few years.

Indeed, proof of the incompatibility of the Lomé regime with WTO agreements was not difficult to provide. It implied a change of direction and the establishment of a cooperation regime of another generation which should make it possible to move from cooperation to development, and economic partnership, from

non-reciprocity to full reciprocity. The Cotonou Agreement, the announced agent of this paradigm shift, did not really make it possible to change course, at least not immediately. Most of the provisions deemed illegal by the Dispute Resolution Body are maintained ; which leaves the question of incompatibility unresolved. To avoid putting this new trade regime at risk, the EU and the ACP States had to send a request to the WTO for a waiver to maintain the Lomé regime during the transitional period, running until December 31, 2007.

The Doha Waiver proved to be an interweaving of political, economic and political considerations. It was one of the highlights of the 2001 Doha Ministerial Conference, granting the ACP countries a concession which they had made a prerequisite for the acceptance of any consensus in the final declaration. Citing economic reasons, it was the EU, the first, which introduced a request for a waiver to the WTO Council for Trade in Goods in March 2000, after the expiration of the previous waiver to the Lomé Convention on 29 March 2000 [8].

Throughout the period from this request to the Doha Ministerial Conference, the Latin American countries, winners in the aforementioned banana affair, put up fierce resistance in the negotiations, arguing that the DSB's conclusions did not leave no room in the EU for a new banana import regime which would go against their interests. This perception that they had of the Cotonou Agreement and this request which accompanied it prevented the WTO Working Group , set up in October 2000, to achieve any result.

Having understood that the situation could only be resolved during the Ministerial Conference, the ACP countries carried out significant lobbying and coordination work which resulted in the establishment of a formal position before the Doha meeting. They decided that the granting of the waiver was now urgent and did not constitute a technical question but a political question which must be decided in Doha, even under penalty of seriously undermining the confidence of the ACP States in the multilateral trading system.

They therefore included the question in their official statement, while sending a letter to the President of the Conference to request its inclusion on the agenda, outside the time limit of several weeks imposed by WTO procedures in such cases. This failure did not prevent the President from taking the request into account and declaring in his official opening speech that this will be added to the agenda as a sub-item under the decisions to be taken by the ministers. This surprise effect, added to the political maturity of the ACP countries as trade negotiators, and the guarantees given by the EU to the still recalcitrant Latin American countries, made it possible to reach a consensual decision to grant the Exemption.

Jointly, the ACP States, also Members of the WTO, and the EU requested and obtained that the European Communities be relieved of their obligations under paragraph 1 of Article 1 of the GATT, with regard to the granting of treatment preferential tar-

iff for products originating from ACP States required by Article 36.3, Annex V and its ACP-EC partnership protocols. Article 36.3 of the Cotonou Agreement crystallizes the desire to facilitate the transition to the new trade agreements, by maintaining the non-reciprocal trade preferences applied within the framework of the fourth ACP-EC convention during the preparatory period for all ACP countries. The applicable conditions are those defined in Annex V of the Cotonou Agreement which organizes the commercial regime applicable during the preparatory period and whose operation is governed by paragraph 1 of its article 37 which provides that partnership agreements economic will be negotiated during the preparatory period which will end on December 31, 2007 at the latest. Formal negotiations of the new trade agreements began in September 2002 and the resulting agreements will enter into force on January 1, 2008, unless the parties agree on earlier dates [9].

The establishment of this preparatory period in the Cotonou Agreement itself was retained by the WTO Ministerial Conference as one of the bases of the derogation. It guarantees the international community of its exceptional nature limited in time and which would not threaten the integrity of the trading system. Two other types of guarantees will also have been decisive. Those of an economic nature and those granting the possibility to members who are still recalcitrant to reverse the concessions made, if the members benefiting from the derogation were to use their concessions more than they are entitled to. The ministerial conference retained as fundamental the fact that the Cotonou Agreement aims after all to improve the standard of living and economic development of the ACP States and remains in line with the principles and motivations of special and differential treatment. Even if the derogation results in the breakdown of equality between developing countries, it remains legitimate in that it eliminates, progressively and following an agreed deadline, trade concessions maintained for a long time and which were justified both for economic reasons for development aid and colonial considerations. The reasoning of the Ministerial Conference was facilitated by the de facto extension of an exceptional regime from the moment when the trade provisions under review were applied, since March 1, 2000, on the basis of transitional measures adopted by the common ACP-EC institutions. The WTO naturally made a pragmatic choice. Rejecting the waiver request would have amounted to finding itself in the clear situation of violation of its legal order, as was the case with the Lomé agreements in the GATT. This attitude would also not be consistent with the WTO's policy of granting implementation deadlines in all its agreements, to better enable developing countries to adjust and integrate the multilateral trading system with a minimum of preparation. What would be the economic situation of the ACP countries if the trade preferences from which they benefit were to be abruptly ended without a substantial transition period ?

The other type of guarantee is linked to the assurances given, by the European Communities in particular, to members who could feel harmed by the arrangements made. The various parties to the Agreement have undertaken to initiate, upon request and as

soon as possible, consultations with any interested member regarding any difficulty or question that may arise as a result of the implementation of preferential tariff treatment for products originating from the ACP States required by Article 36.3, Annex V and the protocols of the Agreement. This is an open procedure, very flexible in its triggering methods, constituting a guarantee of recourse and a possibility of returning concessions which weighs on the EC and the ACP countries. It is supplemented by a more binding guarantee on the sensitive subject of bananas which crystallizes the demands of Latin American countries. Knowing that the implementation of preferential tariff treatment for bananas may be affected following negotiations under Article XXVIII of GATT, two firm commitments were made to them. First, the customs duty applied to bananas, within the framework of quotas A and B, will not exceed 75 euros per tonne until the entry into force of the new EC tariff-only regime. Second, any rebinding of the EC customs duty on bananas, under the relevant procedures of GATT Article XXVIII, should have the effect of at least maintaining full market access for MFN banana suppliers and the fact that they are willing to accept multilateral monitoring of the implementation of this commitment [10].

On these bases, the derogation from paragraph 1 of Article I of the GATT 1994 was declared until December 31, 2007, to allow the European Communities to continue to grant preferential treatment to products originating in the ACP States, without being required to grant the same preferential treatment to like products of any other member. The Decision of the Ministerial Conference requires the parties to the Agreement to notify, as soon as possible, the WTO General Council, any modification of the preferential tariff treatment for products originating in the ACP States required by the relevant provisions of the Agreement covered by the exemption granted. A litigation mechanism has also been put in place with a general regime concerning the implementation of the exemption and a specific regime which only covers questions linked to the importation of bananas.

The general regime concerns members who consider that one of their advantages resulting from the General Agreement risks being or is unduly compromised due to the implementation of the Waiver and the preferential treatment which results from it. A gradual procedure is offered to them to recover their lost or threatened rights. Firstly, the opening of consultations, at their request and as soon as possible, on the measures that could be taken with a view to resolving the issue satisfactorily. Secondly and following the failure of the consultations initiated, the possibility of bringing the matter before the General Council which will examine it as soon as possible and make any recommendations it deems appropriate [11].

The specific regime concerning questions related to the importation of bananas has the particularity of being more anchored in litigation. Its starting point is the end of negotiations under Article XXVIII of GATT aimed at the establishment of a tariff-only system which would replace the quota system. The introduction of this system should take place no later than 1 January 2006. Three months before its entry into force, the parties to the Coto-

nu Agreement will have to enter into consultations with members exporting to the EU on an MFN basis. And no later than ten days after the conclusion of negotiations under Article XXVIII, these members must be informed of the EC's intentions regarding the rebinding of the EC customs duty on bananas. The EC's main obligation under this procedure will be to provide information on the methodology used for this rebinding, taking into account all market access commitments made under the WTO. These obligations echo the guarantees given by the EC and which served as motivation at the Ministerial Conference for granting the Doha waiver. Any interested party may request arbitration within sixty days of the EC's declaration of intent. An arbitrator will be appointed within ten days of the request, unless the parties reach a mutually satisfactory solution. Otherwise, it is up to the Director General of the WTO to appoint the arbitrator within thirty days of the request for arbitration, after consultations between the parties. The chosen arbitrator will have to give its opinion within 90 days, for the purposes of determining whether "the envisaged reconsolidation of the customs duty applied by the EC on bananas would have the effect of at least maintaining full market access for banana suppliers MFN, taking into account the above-mentioned commitments of the EC".

If at the end of the procedure, "the arbitrator determines that the reconsolidation would not have the effect of at least maintaining full market access for MFN suppliers, the EC will rectify the situation. Within ten days of notification of the arbitral decision to the General Council, the EC will enter into consultations with interested parties who have requested arbitration. In the absence of a mutually satisfactory solution, the same arbitrator will be invited to determine, within thirty days of the new request for arbitration, whether the EC has rectified the situation. The second arbitral decision will be notified to the General Council. If the EC has not rectified the situation, this waiver will cease to apply to bananas upon entry into force of the new EC tariff regime. Negotiations under Article XXVIII and arbitration proceedings will be completed before the entry into force of the new tariff-only regime of the European Communities on January 1, 2006".

Very quickly, it appeared that the reconsolidation announced by the EC did not meet with the approval of Latin American banana exporting countries. This had the effect of opening the aforementioned arbitration procedure. On January 31, 2005, the EU notified the WTO of its proposed new tariff of 230 euros for MFN banana imports, intended to replace the previous tariff quota system, while maintaining a preference for ACP countries. This new tariff was to come into force on January 1, 2006. Latin American banana-exporting countries immediately rejected it. On the other hand, ACP countries have lobbied for the EU to further increase banana tariffs – from the current base level of 75 euros to 275 euros per tonne – to protect their preferential access to the European market. Negotiations between the EU and Latin American countries have not resulted in a compromise; this failure prompted the latter to make a request for arbitration to the WTO in accordance with the aforementioned Annex [12]. Indeed, the originality of this arbitration procedure was the possibility offered to the arbitrator to involve third parties, without

this being expressly permitted by WTO law. This is somewhat similar to the application of the expanded third party theory noted in some WTO disputes. Thus, at the request of certain African, Caribbean and Pacific ("ACP") banana-exporting countries, the arbitrator, after consulting the parties, invited Saint Lucia, Cameroon, Ivory Coast, Dominica, Dominican Republic, Ghana, Grenada, Jamaica, Kenya, Madagascar, Suriname, Tanzania, Belize and Saint Vincent and the Grenadines (the "Relevant ACP Members") to participate, in a limited manner, in this arbitration. The arbitrator explained his decision in a letter addressed to the parties and the ACP members concerned.

He noted particularly that there was no rule preventing the participation of these members and that the arbitrator had the discretionary power to organize the conduct of the procedure. The arbitrator also noted that this participation should not have a negative impact on either the timetable of the proceedings or the deadline for the conclusion of the arbitration, as provided for in the Annex to the Doha Waiver. Consequently, the ACP members concerned were invited to send a written communication to the arbitrator, in the form of a collective communication. They were also invited to attend the meeting with the parties and were given the opportunity to make a single brief statement and respond to questions from the arbitrator. In addition, the ACP members concerned had access to the communications presented by the parties, before the hearing with the arbitrator.

So, on August 1, 2005, the WTO arbitrators have spoken out against the MFN tariff rates proposed by the EU for banana imports. They judged that the tariff proposed by the EU of 230 euros per tonne would not at least preserve the current market access opportunities offered to suppliers benefiting from the MFN regime – mainly in Latin America – by the European quota regime. Existing tariffs for bananas. They also considered that the proposed tariff level would de facto widen the margin of preferential market access from which ACP exports benefited, to the detriment of banana suppliers benefiting from the MFN regime. However, they did not indicate what a reasonable tariff rate would be for MFN suppliers [13].

In their reasoning, the arbitrators found inadequacies in the methodology and pricing data used by the EU to arrive at the new tariff rates. In particular, they agreed, with Latin American countries, that the EU should have taken into account the advantage that the new tariffs would give ACP suppliers over MFN countries. Consequently, and under the terms of the waiver, the EU must rectify the proposed tariff regime, in accordance with the arbitration decision.

Concerning the latter, Latin American banana exporters expressed their satisfaction with the arbitrator's decision. Ecuador's Trade Minister, Oswaldo Molestina, noted that Latin Americans were hoping for a low tariff level of 33 euros per ton. According to the minister, "Ecuador and other Latin American exporters estimate that the tariff cannot exceed 75 euros, and based on our calculations using the correct methodology, it should not exceed 33 euros." Banana-exporting ACP countries, for their part, have

expressed their disappointment with this decision. Marshall Hall, president of the Jamaican Banana Exporters, said only that the decision "is not in our favor at all and we are not satisfied." Hall also noted that banana growers would be "virtually wiped out." Prior to the publication of this arbitral decision, Cameroonian and Ivorian banana exporters had also made public, on July 26, 2005, a declaration in which they underlined the importance of their banana sectors for the reduction of poverty and the sustainable development of their economies. According to the statement, the tariff rate of 75 euros or less advocated by Latin American exporters would "eliminate ACP exports to the EU."

The EU should start new consultations with Latin American countries. If they are unable to reach a mutually satisfactory agreement, the same arbitrators will have to determine whether the EU has rectified the decision. The second arbitral decision would be notified to the WTO General Council and if the EU once again fails to comply, the waiver will cease to apply to bananas upon entry into force of the new tariff regime. Of the EU In a press release dated August 1, 2005, the EU expressed its intention to carefully study the arbitrator's report and examine available options to move this process forward. The EU also reiterated its intention to have a tariff-only system in place on January 1, 2006, as agreed at the Doha Ministerial Conference. The European Executive Commission said it would initiate consultations with the countries concerned and expected their constructive engagement.

The precariousness of the Lomé regime results both from legal considerations relating to the necessary use of the derogation tool, but also from political considerations linked to the weakness of the legal criterion in granting derogations.

In fact, it is Article XXV paragraph 5 of the GATT which determines the regime of derogations. It provides that "in exceptional circumstances other than those provided for by other articles of this Agreement, the Contracting Parties may relieve a contracting party of one of the obligations imposed on it by this Agreement, on the condition that such a decision is sanctioned by a two-thirds majority of the votes cast and that this majority includes more than half of the contracting parties."

The scope of this provision was extended by Article IX, paragraph 3 of the WTO Agreement. Thus, "in exceptional circumstances, the Ministerial Conference may decide to grant a member a waiver from one of the obligations imposed on it by this agreement or by one of the multilateral trade agreements, on the condition that such decision is taken by three quarters members, except as provided in this paragraph. The two provisions do not differ on the basis of the exemption, since they require "exceptional circumstances". They also agree on the procedure to follow with a view to adopting a derogation. However, neither legal requirement has been implemented in practice.

Regarding the requirement to vote, this is ineffective because all decisions are taken by consensus. Concretely, unlike the inverted consensus that governs the DSB's decisions, when it comes to

examining waiver requests, a single opposition can prevent any decisions from being taken. The second criterion relating to the existence of exceptional circumstances, due to its vague content, is not uniformly interpreted although paragraph 4 of Article IX provides for an obligation to provide reasons for requests for exemption. Thus, "a decision taken by the Ministerial Conference, to the effect of granting a derogation, will indicate the exceptional circumstances which justify the decision, the terms and conditions governing the application of the derogation and the date on which it will take effect. END ". This gap thus made it possible to legitimize regimes as diverse as the European Coal and Steel Community of 1952. The liberalization established by the pool only extended to specific products, it could not be based on the regime of regional trade agreements established by Article XXIV. The derogation thus covered a treaty which lasted for fifty years.

Although paragraph 4 continues by establishing an obligation for annual review of exemptions whose duration exceeds one year, in practice the latter tend to multiply and become permanent. Faced with this situation, the dispute settlement system has developed very strict case law, regarding the regime of exemptions which are not immune from any challenge.

The precariousness of the waiver regime is illustrated by the conclusions of the ORD rendered in the "bananas" case. In defense, the EU had invoked the derogation that it had obtained, in December 1994, following the condemnation, by the GATT panel, of its banana import regime, in order to justify the breaches of the General agreement constituted by its licensing regime as well as the framework agreement of March 1994. This argument was to lead the panel and then the OAP to rule on the material scope of the exemption. Both the Special Group and the appellate body adopted a strict, not to say restrictive, interpretation. Of the "ratione materiae" scope of the derogation.

First of all, noting the resolutely discriminatory nature of the banana classification system – distinguishing according to the origin of the bananas – for the benefit of the ACP countries, the OAP denounces a violation of Article I. This violation is not significant. If it is justified by a GATT rule (article XXIV, Enabling Clause) or if it falls within the scope of the waiver. Indulging in a careful examination of the exemption, the OAP establishes a double observation. It notes that the differentiation introduced according to the import regime for similar bananas can only be justified, with regard to the derogation, if it aims to satisfy one of the objectives of the convention. Using the terms of the latter, the judge considers that the differentiation indeed meets an objective of the agreement, insofar as it aims to grant preferential treatment to bananas originating in ACP countries, thus accepting the adoption of regimes of different imports.

On the other hand, with regard precisely to the violation of the prohibition of discriminatory quantitative restrictions generated by specific quotas intended only for certain members of the framework agreement, this violation could not find justification with regard to the derogation, in the to the extent that it is not

based on the defense of the preferential link guaranteed by the waiver.

The Appellate Body held to a strict understanding of the waiver. At the same time, he denied any useful effect to the criterion of interpretation identified by the panel, namely the search for the even implicit finality of the Lomé agreement -. A different approach would have allowed it to note that the violation of Article XIII responds to an imperative of the convention in terms of development, an objective also shared by certain provisions of WTO law, and that from then on any limitation on the scope of the derogation compromises it. By this strict interpretation of the derogation covering the Lomé commercial regime, the OAP proved, if necessary, that the derogation was not an exception and that consequently it did not confer a right equivalent to the fundamental principles of which it is supposed to reduce the range [14].

In addition to the weakness of the legal mechanism of the exemption, the conditions for its granting escape any legal criteria and are driven by economic policy considerations. In this regard, the weighing of the interests involved reveals a constant weakening of the Community position in the negotiation of derogations which requires an overhaul of its commercial policy, so that other trading partners accept the temporary renewal of a regime doomed to disappear.

The use of the derogation, in order to cover the Lomé regime, although it is a legally acceptable solution, did not constitute a satisfactory alternative for the sustainability of the preferential regime. Citing its political incapacity to sustainably maintain the Lomé regime, the Community opted for the solution it considers the most secure by bringing the trade regime into conformity with common WTO law.

However, this argument does not seem to reveal all the issues involved. While there is no doubt that the derogation regime, due to its characteristics, does not offer all the necessary legal certainty due to its temporary nature but also its justiciability, this circumstance cannot in any way deny it its value. With regard to the law. Within the WTO, there are important exemptions granted, some of which are similar to those which legitimized the ancient preferential trade regime. It is therefore necessary to look for the factors which pushed the EU to give up negotiating a new derogation.

Authors consider that if the exemption necessary to maintain the Lomé system had been requested, it would have been granted. This speculation is based on two empirical observations : the existence of regimes similar to the Lomé system and the economic and political weight of the EU within the WTO. If it is true that added to the ACP countries, the EU enjoys significant weight because it has a majority, on the other hand such an analysis does not seem to reveal the reality of the balance of power within the WTO.

The WTO, as a "member driven organization", fundamentally

differs from international integration organizations, due to the (low) place and importance of the legal norm. Although the ORD constitutes an integrated body whose decisions are supposed to be binding on the members, the organization remains above all a permanent negotiation forum whose continual extension to new members greatly relativizes the place of its historic members. Thus, the EU, although remaining an important economic partner, must adapt to developments in the multilateral framework. Also, the emergence of new economies united in strategic groups strongly erodes the room for maneuver of the Union, which must multiply concessions so that its interests are taken into account. In this regard, it had to use the strategy of "bargaining" in order to convince the countries of South-East Asia to vote in favor of the derogation allowing the maintenance of tariff quotas until December 31, 2006. This group of countries led by Thailand, the Philippines and Indonesia were thus granted a very favorable tariff quota allowing them to import their fisheries resources into the community territory.

According to Mr. Roberto Fiorentino, economist at the Trade Policy Review Division, it appeared that the Community was not prepared to "negotiate" a new waiver. This can be explained in two ways : on the one hand, the group of Latin American countries did not agree to accept new preferences if concessions were not granted to them and on the other hand, the cost-benefit balance revealed that the latter, being very competitive, had an advantage in exporting to the Community and that consequently the maintenance of preferences harmed them in their access to the Community market. Not being able to grant concessions to its Latin American partners, the Community simply gave up any negotiation. It must be said that the "bananas" affair has undermined the confidence, already undermined by the agricultural conflict, of the Community's trading partners with regard to the multilateral conventional standard. This resulted, on the part of the latter, in the implementation of an offensive policy aimed at dismantling all the sui generis regimes developed by the European Union, whether in terms of its foreign policy or its policies Communities.

In this regard, the trade war between the EU and the United States, within the framework of the difficult negotiations within the WTO on the subject of the Common Agricultural Policy (CAP), offers a framework for analysis and understanding of the community position. Thus, in the same way that the United States did not fail to use Section 301 of the Trade Act of 1974 to sanction the community in the "bananas" conflict, the Americans used the threat of taking commercial retaliatory measures if the Europeans did not fundamentally reform, beyond cosmetic changes, the CAP. Therefore it is not surprising that the successive reforms of the CAP conceal a form of mimicry of the state of negotiations in the multilateral forum. Thus, for example, the United States, in addition to having obtained the conversion of variable import levies guaranteeing community preference into customs duties, gradually accelerated the reduction of export refunds which have significantly contributed to expand the global market shares won by Community agriculture.

Thus, this American attitude, offensive and contrary to the multilateral trade disciplines that the United States claims to defend, reveals a discrediting of continued strength of the EU vis-à-vis its other partners. Failing to be able to set an example and comply with the DSB's rulings, the EU sees, at the same time, its room for maneuver reduced because whether the legal norm is weakening, politics is regaining the upper hand and, in this matter, the dominant power imposes the rules of the game. Although the other partners of the EU are not the most respectful of multilateral trade disciplines, the bellicose frenzy of the Community within the ORD has ended up exhausting the other global players tired of a "banana" conflict which continues to tarnish the effectiveness of the dispute settlement system overridden by economic policy considerations.

Studying the framework for negotiating the waiver granted in Doha, in order to maintain the preferential regime in favor of the ACP countries, allows us to understand the other political basis of the waiver. During the conduct of the negotiations, it appeared that the Latin American group, led by Costa Rica, Ecuador, Guatemala, Honduras and Panama, refused to consider the request for a waiver for the maintenance of the Lomé regime during the transitional phase, as long as the "banana" affair would not be liquidated. In the text of the exemption, these reluctances, which are the expression of a form of commercial blackmail, appear clearly highlighted. We learn in particular that in the assessment of the exemption request, several elements were taken into account, in order to probe the good faith of the community partner. Among the indices were the objectives of the Cotonou Agreement relating to improving the standard of living of the ACP countries and particularly the least favored among them (LDCs). It is also noted that development objectives were pursued to an extent consistent with WTO law. Finally, we also note that the community partner is committed to complying with the principle of consolidation of customs duties, the control of which it accepts by the jurisdictional bodies of the multilateral framework. Following the decision rendered at the request of Ecuador, the Community implemented a new regime of banana imports. This regime provides for a transitional period of five years ending on January 1, 2006, at the end of which an exclusively tariff system would be put in place (removal of quotas). A waiver from Article XIII was granted to the EU until December 31, 2005, to allow it to maintain tariff quotas.

Before the new regime came into force, various challenges to the tariff proposals made by the Commission came from Latin American countries and in particular from Ecuador. In March 2007, Ecuador, which tried in vain to find negotiated solutions, requested the creation of a panel. In support of his request, he considered that the tariff applied by the EU to ACP countries was not in conformity with the tariff commitments consolidated in its list of concessions. The EU did not attempt to justify this difference in treatment by the derogation which had already expired. Even more recently, Colombia, until now a third party in the conflict, has joined Ecuador's arguments to challenge the community banana import regime. This protest arises as the negotiations for the conclusion of an EPA have entered a critical phase.

Some observers believed they detected, in Colombia's attitude, a maneuver aimed at influencing the content of the new arrangements. The Commission considered that Colombia's reaction, reflecting its desire to protect its local producers to the detriment of production from ACP countries and presaging a new revolt from Latin American countries, goes against the principles of good faith and of equity and could lead to further marginalization of the most vulnerable economies on the planet. It appears clearly that in this complex "banana" conflict, the search for respect for the norm of law is no longer the priority of the contracting parties and that each of them only seeks to defend the interests of its national producers [15].

A Transition Regime Derogating From Wto Rules

It results in the legal debate of a commitment to the normalization of EU-WTO relations, namely the conflicts arbitrated by the WTO and by commercial policy according to the Cotonou Agreement, i.e. exception to normalization.

The banana has occupied the center of the media and legal scene for several years. It is emblematic of relations between countries of the North and the South ; the latter entirely dependent on the former for their commercial outlets. The European Union had acquired a special place in the world banana trade, since it had become the world's leading importer since 1995, when Austria, Sweden and Finland joined. Behind the commercial issues were also hidden economic policy issues. The two major production areas cover, on the one hand, Latin American countries, some of which have been trying for several years to escape the control of American multinationals, and, on the other hand, ACP countries, with agricultural and commercial structures archaic inability to face Latin American competition on their own.

For a long time, the European Community has compensated for the imbalances between ACP countries and other exporting countries, by granting them broad commercial advantages not limited to banana exports, since they extended to almost all of their production. The Lomé Accords granted an exemption from customs duties for these productions and had guaranteed that the commercial achievements of the ACP countries could not be revised downwards . This very favorable regime could not satisfy Latin American countries or American agri-food groups. Divergences of interests were accentuated when the European Community established, for the first time in 1993, common rules on the banana market.

Essentially, the regulation provided for a tariff quota of 2 millions tonnes. Within this quota, ACP bananas were exempt from customs duties while bananas from third countries were subject to a duty of ECU 100 per tonne. Beyond the quota, the duty rose to 850 ECU per tonne for third countries and 750 ECU for "non-traditional" ACP bananas, that is to say which did not correspond to traditional exports defined in the annex. Contested within the Community itself by Germany (major importer of Latin American bananas), this regulation was mainly attacked within the GATT by Latin American countries. Modified in 1998 to comply with decisions of WTO bodies, the regulation continued to be challenged by Latin American countries and the United

States. The community rules adopted before 1993, in 1993 and in 1998, were the subject of numerous decisions by the GATT bodies, then the WTO. During each procedure, identical or similar arguments were presented.

The central argument of the various States having challenged the Community rules was the discrimination made between producers or importers of ACP bananas and others. As early as 1993, a panel (GATT body responsible for arbitrating trade conflicts) noted that the exemptions from customs duties resulting from the Lomé Agreements were contrary to the rules according to which, on the one hand, national operators must not be favored. And, on the other hand, all operators must benefit from the most favorable treatment. The Community then negotiated a waiver allowing it to maintain its exemptions until February 2000, the date on which the last Lomé Agreement was to end.

Pursuant to this derogation, customs exemptions could not longer be called into question within the GATT or the WTO. However, the Latin American states did not disarm. The tariff quotas established by the 1993 regulation appeared to them to be as discriminatory as the customs exemptions. The Community then concluded a Framework Agreement with the Latin American countries which had won their case before the panels. Tariff quotas were increased and shared between the countries concerned. Finally, in 1998, the Community extended the preferential treatment granted to the ACP to all less developed countries ; which benefited seven countries.

The trade war was not over, however. Under pressure from the banana lobby, the American government decided to intervene directly ; which contributed significantly to accelerating the standardization of EU-ACP relations. Alongside the States that had not signed the Framework Agreement, he referred the matter to the new WTO Dispute Settlement Body. The DSB issued its decision in May 1997, and the appellate body confirmed a few months later. Once again, discrimination against third countries was condemned, including with regard to the General Agreement on Services. The importation of bananas fell under the wholesale trade service covered by the agreement which also prohibited discrimination. The import licensing system resulting from the 1993 regulation needed to be reviewed, because it favored Community or ACP bananas. The Framework Agreement also, because it favored its signatories. The Community complied in 1998.

It modified the regulation to eliminate distinctions between importers, while maintaining tariff quotas differentiated according to the exporting country. The United States, still dissatisfied, responded with a commercial threat and a new referral to the DSB. Finally, at the request of Ecuador, it concluded that the tariff quotas set in 1998 were also discriminatory. The Community had no other solution, to comply with international trade rules, than to put an end to the privileged regime from which the ACP States had benefited.

Secondary argument, compared to discrimination, the accusation of having too much increased customs duties compared to

the amounts consolidated in 1961 during the Dillon round negotiations (20%) earned the Community a condemnation, after the adoption of the 1993 regulation. This resulted in the Community's room for maneuver, both in its unilateral decisions and in its trade negotiations with the ACP States, was limited by this international commitment.

The existence between the Community and the ACP of a regional free trade area within the meaning of the GATT was the main argument put forward by the Community in its defense. It was rejected without difficulty in the first panel report in 1993. Indeed, the regional free trade zones authorized by the GATT are based on the reciprocity of commercial advantages.

This is not the case for the customs exemptions granted by the Lomé Agreements for the sole benefit of the ACP States. Although this decision did not have immediate practical effect, to the extent that the Community changed its commercial rules by the 1993 regulation without taking any further action on the 1993 report, it contributed to marking the limits of this that the Community could negotiate with its ACP partners.

The intense activity of the bodies of the GATT, then of the WTO, in the banana conflict, should not mask the limited confidence placed in them by the American government which, dissatisfied with the community reaction to the decisions of the organs of the WTO in 1997 returned to a unilateral policy. At the end of 1998, he threatened to apply unilateral retaliatory measures against any state which pursued a commercial policy contrary to its interests. This announcement was based on an American law but opposed all efforts to fight against unilateralism at the origin of the creation of the GATT and even more against the prohibition of unilateral retaliatory measures within the WTO. The United States filed a new request before the WTO bodies, without being certain that it would be judged because they had no new arguments to put forward. They therefore chose to exert pressure on the EU and the South American states. The maneuver succeeds. Colombia and Costa Rica agreed to significantly improve the position of American companies marketing their bananas. Ecuador (which had never before referred the matter to the WTO bodies) submitted the request which resulted in the 1999 DSB decision.

After the banana dispute, will the sugar dispute be brought before the WTO bodies ? In October 2002, Australia and Brazil, joined by Thailand since March 2003, began proceedings before the DSB. A panel is being constituted. These three states are contesting the 2001 community regulation on the organization of the sugar market. Export subsidies and guaranteed prices would contravene the GATT Agreements, as well as the Agreement on Agriculture. The arguments put forward are identical to those put forward during the banana conflict.

The negotiations that led to the Cotonou Agreement began in 1996, after the publication of a green paper by the Commission, and at a time when the banana conflict was in full swing. Unlike the Lomé Agreements, those of Cotonou dissociate trade policy

and development aid. Trade policy is no longer designed as an instrument of development aid. It becomes a goal in itself. This dissociation was the only way to comply with WTO rules. The banana conflict had clearly shown that the advantages granted to ACP countries had to disappear. Customs exemptions were no longer permitted, trade policy could no longer serve development.

From the statement of the objectives of the Cotonou Agreement, the desire to treat the ACP States like other States in the commercial field appears clearly, since their "progressive integration into the world economy" is sought. The means implemented are clear. Customs exemptions are certainly maintained until the end of 2007 (and covered by a waiver obtained in 2001 at the WTO) but the EU and its ACP partners must take advantage of this period to conclude "economic partnership agreements" based on reciprocity and "compatible with WTO rules". Only voluntary states will be affected. For States which are not able to conclude such agreements, other measures will be considered, which should make it possible both to maintain the existing situation and to comply with WTO rules.

This is akin to squaring the circle because, unless exemptions are obtained from the WTO, only reciprocal and temporary commercial advantages are authorized, under regional free trade zones. In other words, to comply with WTO rules, the EU and ACP States should strive to conclude economic partnership agreements as quickly as possible. The Cotonou Agreement sounds the death knell for the trade exception that the European Community had desired for the benefit of the ACP States. The international legal framework prohibits the maintenance of this exception. It would still be necessary to ensure that development aid, preserved by the Cotonou Agreement, will allow the States concerned to apply the new trade agreements in a competitive position ; which is far from being acquired insofar as the ACP States will start by losing significant customs resources. The threat of a return to unilateral trade measures at the slightest slippage should also be avoided. The ACP States have not hidden their concern. In the very text of the Cotonou Agreement, sugar producers obtained that the protection of current advantages be sought. More generally, the ACP States have solemnly reaffirmed within the WTO the importance of trade advantages and the need to take into consideration the unfavorable situation of developing countries, with particular mention for the agricultural sector, and in particular the sugar.

The observation of the illegality of trade preferences arising from the Lomé conventions placed the European communities before an alternative : maintain the preferences and therefore non-reciprocity by extending them to other developing countries or withdraw them to leave all potential beneficiaries on the hook. An equal footing. The second term of the alternative was chosen, with the proposal of a new commercial partnership. This could now only be conceived in perfect compliance with the provisions of the WTO.

It is in this sense that the Cotonou Convention was signed. Even

if it provides a transition period, its commercial dimension is oriented towards global reciprocity. Organized in the form of a Free Trade Zone, the new commercial framework will be governed by Article 24 of the GATT. In this sense, it does not include preferential provisions in principle, even if the two partners are at different levels of development. The ultimate goal of economic and commercial cooperation in the Cotonou Agreement is to enable ACP States to participate fully in international trade, with a view to better responding to the challenges of globalization, to gradually adapt to the new conditions of international trade to facilitate their transition to the liberalized world economy. The commercial dimension of this agreement therefore responds to a need to adapt to the requirements of the WTO, but with a view to retaining the specificities linked to regional integration type cooperation.

with the share of special and differential treatment measures relating to it. According to the wishes of the parties, this cooperation will follow the contours of an Economic Partnership Agreement which will gradually remove obstacles to trade between them and strengthen cooperation in all areas related to trade. If article 36.1 of the Cotonou Agreement tells us about the conclusion of new trade agreements, it is article 37.1 which tells us that they will be called Economic Partnership Agreements (EPA). These EPAs, proposed by the European Commission, were known as Regional Economic Partnership Agreements (REPAs) in its green paper published in 1996 and covering relations between the EU and the ACP countries at the dawn of the 21st century. Following the derogation obtained by the EU at the WTO level, a transition period is planned before the conclusion of the EPAs, on the initial date of December 31, 2007.

According to article 36.3 of the Cotonou Agreement, the Non-reciprocal trade preferences, applied within the framework of the Lomé 4 convention, will be maintained during the preparatory period for all ACP countries, according to the conditions defined by Annex 5 attached to the agreement. Annex 5 reproduces the quintessence of the provisions of articles 167-185 of the Lomé Convention 4, with minor changes. The protocols on sugar and beef are maintained ; that on bananas is replaced by another which no longer contains specific commitments in the commercial field, which should facilitate the reform of the OCMB and ensure the compatibility of the Community banana import regime with the law of WTO. The rum protocol has been eliminated. These transitional provisions prepare for the conclusion of the EPAs and the full implementation of the trade regime of the Cotonou Agreement signed for 20 years. The study of future EPAs can be done on the basis of five pillars which underpin its legal-commercial regime. These are the extension of the scope of liberalization, compatibility with WTO agreements, reciprocity, special and differential treatment and regional integration.

The extension of the scope of liberalization results from Article 36.1 of the Cotonou Agreement which lays the foundations for the liberalization of trade between the two partners through the progressive removal of barriers to trade and the strengthening of their cooperation in all areas. Areas related to commerce. Be-

yond the classic areas of trade, the Agreement follows the logic of the WTO, by proposing the extension of the commercial area to other sectors. First of all, these are areas already mentioned as such within the framework of the WTO, such as the protection of intellectual property rights, standardization and certification, sanitary and phytosanitary measures, and the environment. Then there are other areas which, even if they are not yet governed by the WTO, are likely to be so soon, given the ongoing debate on their relationship with trade and the evolving nature of WTO negotiations.

These are labor standards, consumer policies, the tax exception clause, fishing agreements and food security. It appears that EPAs go beyond traditional Free Trade Areas and raise the problem of compatibility with the WTO agenda. On the question of fundamental labor standards, disagreements between countries of the North and the South remain persistent. A more agenda was released by the EU within the framework of the negotiations and relating to questions which not only have not yet been the subject of agreements at the WTO, but come up against the refusal of African countries for their inclusion in the liberalization agenda. These are what we refer to as the Singapore themes (investment, competition, public procurement and trade facilitation). Strongly rejected by African countries in the WTO negotiations, they were ultimately partially eliminated from the Doha round Negotiations ; only the theme of trade facilitation remains. The refusal of African countries to discuss it at the WTO did not only concern the substance or modalities of competition or investment, it focused on the very opportunity to discuss it.

The economic reasons put forward for this remain applicable within the framework of the EPAs and do not justify any derogation. And yet, Europe continues to make efforts to include these issues in future EPAs, ignoring the convergence between the WTO level and its approach in the EPAs. In January 2005, African trade ministers reiterated in Dar es Salaam, Tanzania, to Mr. Karl Falkenberg, Director of the Directorate General for Trade of the European Commission, their opposition to the inclusion of Singapore issues in the negotiations. EPAs. This did not prevent questions of investment and competition from being found in the West African road map. Faced with the obvious discomfort, the Ministerial Monitoring Committee considered, when adopting the road map for phase II negotiations, that the Singapore themes will be negotiated at the appropriate time, that is to say as soon as a consensus would be reached at the WTO level. Thus, the extension of the scope of liberalization puts the ACP countries at risk of a Doha Plus whose bilateral terrain remains more favorable to deployment.

Compatibility with WTO law is a requirement of the Bananas jurisprudence which sounded the death knell for specific African preferences acquired through the various Lomé Conventions. This situation can be assimilated to the renewal of the MFN Clause and the return to orthodoxy in the application of the principle of non-discrimination set out in Article I of the GATT. It is also noted that Lomé's preferences contrary to this article could not find a legal basis in Article 24 of the GATT which governs

RTAs, on the grounds that it was a one-way liberalization. Cannot therefore constitute a Free Trade Area or a Customs Union. From then on, the EU was faced with an alternative offered by Article 24 to continue distributing its preferences. They had to be made reciprocal to benefit from free trade zone status or granted to all other developing countries without discrimination. The EU and ACP countries chose the first option. Future EPAs will be concluded in this logic while remaining compatible with WTO rules, in accordance with the provisions of Article 36.1 of the Cotonou Agreement.

Reciprocity is also a consequence of the application of Article 24 of the GATT. Concessions between partners in an RTA must be reciprocal, while not leading to an increase in the level of protection towards third countries. If applicable, compensation will be due to them. At the same time, the benefit of the possibility of discriminating against third parties is subject to a condition of merit which postulates that the bulk of commercial exchanges of the RTA is covered by liberalization and within a reasonable period which may not exceed ten years except in exceptional cases. The principle of special and differential treatment is laid down in Articles 34.4 and 35.3 of the Cotonou Agreement which provide that the parties reaffirm their commitment to guaranteeing special and differential treatment to all ACP countries, to maintaining special treatment in favor of the States ACP LDCs, to take due account of the vulnerability of small landlocked or island countries, taking into account the mutual interests of the Parties and their respective levels of development. This provision poses a real problem of delimiting the scope of the TSD. It seems inspired by the development objectives linked to the EPAs. Indeed, the European Commission seems to consider the EPAs as a process, a means of achieving the objectives set out in the Cotonou Agreement. In this sense, they are above all instruments of development. But the fact is that an RTA is by definition the natural locus of special and differential treatment recorded between parties and to the exclusion of all third parties. If the commercial advantages granted remain reciprocal, the symmetry between partners is not broken and the TSD can be considered non-existent. Ultimately, this provision is simply incantatory and does not reflect the reality of flexibilities provided in favor of the most vulnerable partner. The only valid SDT, within the framework of the EPAs, would be that which goes beyond the requirements of Article 24 or the restrictive interpretation of the Enabling Clause. The principle of regional integration – regionalism – is set out in Article 35.2 which provides that economic and commercial cooperation is based on the regional integration initiatives of the ACP States. Its implementation was made difficult by disparities in development and commercial configurations in different regions. African regional integration patterns remain very complex. In the same region, several entities with very similar objectives and orientations can coexist, without it being possible to identify objective criteria for differentiation. The example of West Africa can be cited, where face-to-face arbitration, for negotiation with the EU, between UEMOA and ECOWAS, was very delicate. In addition, the regions themselves overlap without it being easy to find a credible geographical delimitation. In the end, and after several arbitrations, we arrived at six regional

groupings modeled, in part, on pre-existing sub-regional entities :

- The Economic Community of West African States (ECOWAS), to which all member countries of the West African Economic and Monetary Union (UEMOA) also belong, for Africa West
- The Central African Economic and Monetary Community (CEMAC) for Central Africa
- Eastern and Southern Africa (AFOA), better known by its English acronym Eastern and Southern Africa (ESA)
- The Southern African Development Community (SADC) for Southern Africa
- The Caribbean Community (CARICOM) with the Caribbean Forum (CARIFORUM)
- The peaceful zone for the 14 countries of the region.

The negotiations took place in two stages. A first phase, called All ACP, which started in September 2002 and lasted one year. The European Commission negotiated with the entire bloc of ACP countries to define the format, structure and principles of the negotiations. The ACP had to see for their part what their common problems were and what approach to adopt, so as to better defend their individual and collective interests. Six working groups have been identified for this.

Purpose :

Market access, services, agriculture and fisheries, trade-related issues, development-related issues and legal issues. The second phase offered the opportunity to each of the six regions to begin substantive negotiations with the EU, even if an ACP monitoring mechanism for this phase II was adopted. This is how these negotiations began on October 4, 2003 for the countries of Central Africa, on October 6, 2003 for the countries of West Africa, on February 7, 2004 for Eastern and Southern Africa, on 16 April 2004 for Caribbean countries, July 8, 2004 for SADC countries and September 10, 2004 for Pacific countries.

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