

# Possibility of obtaining a new ACP-EC waiver at the WTO

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## Aim and scope of the analysis

This analysis aims to examine whether the diplomatic and trade environment at the WTO is favourable to the introduction of a new waiver that would extend the Cotonou trade regime between the ACP countries and the European Union which is due to expire on 31 December 2007. If this were the case, what would be the obstacles that must be overcome by the two partners, both from a procedural and legal standpoint, to be able to negotiate its acceptance between now and 31 December 2007? Would a new waiver be the best option for the parties to the Cotonou Agreement to enable them to meet the challenge of ensuring the harmonious integration of the ACP countries into the multilateral trading system?

## Abbreviations

ACP	African, Caribbean and Pacific countries
AGOA	African Growth and Opportunity Act
EC	European Community
EPA(s)	Economic Partnership Agreement(s)
EU	European Union
GATT	General Agreement on Tariffs and Trade
GSP	Generalised System of Preferences
MFN	Most Favoured Nation
LDCs	Least Developed Countries
SDB	State Development Bank
TRIPS	Trade Related Aspects of Intellectual Property Rights
WTO	World Trade Organization

# 1 An environment not very conducive to the negotiation of a new waiver

## 1.1 Background

It must be remembered that the unilateral preferences granted by the European Union (EU) to the African, Caribbean and Pacific (ACP) countries that include 79 developing countries, of which 56 are members of the World Trade Organization (WTO) and almost one dozen are in the accession process, represent the Achilles' tendon of their cooperation since the successive Agreements beginning with the Yaoundé Convention, followed by that of Lomé Conventions and Cotonou Agreement. Following the Cotonou Agreement signed on 23 June 2000, a new trade framework was put in place to bring about the gradual removal of trade barriers to ensure conformity with the WTO rules. It was understood that in order to achieve this objective, Economic Partnership Agreements (EPA) would be negotiated as from September 2002 so as to bring trade between the European Union and the ACP countries into conformity with WTO rules as from 1 January 2008. In the interim, the non-reciprocal preferences that have always characterized this trade, as well as the different protocols, would be maintained.

It must be added that a WTO waiver is required for every trade preference that entails discrimination among WTO Members so as to cover the non-discrimination imposed by the first article of the General Agreement on Tariffs and Trade (GATT). A request for such a waiver was submitted by the EU to the WTO Goods Council in March 2000 (the previous waiver to the Lomé Convention had expired on 29 February 2000). For over one year, the Latin-American banana-producing countries had succeeded in blocking any consideration of the waiver, primarily for reasons of procedure due to their objection to the new banana import regime proposed by the European Union following the famous "banana III" dispute. The WTO Working Group, which was finally formed in October 2001 to examine the waiver request, was unable to reach a consensus before the Doha Conference because the Latin-American countries and others, like Australia, continued to raise fundamental questions and issues of principle regarding the Cotonou Agreement.

The ACP Trade Ministers, who met in Brussels in early November, one week prior to the opening of the Doha Ministerial Conference, to coordinate their positions, decided that it was now imperative to obtain the waiver which was no longer merely a technical issue. It was now a political issue that needed to be resolved at Doha. The ACP Ministerial Declaration which endorsed the Brussels deliberations, as well as the speech by Hon. Biwott, Kenya's Minister of Trade and Industry, and spokesman for the ACP Group in Doha, revealed that the "waiver granted in the WTO framework for the Cotonou Partnership Agreement was essential to enable the ACP countries to continue to participate actively in world trade"; and "if the waiver were not granted, [their] confidence and commitment to the WTO system would be affected". The ACP Ministers succeeded in having that item placed on the agenda of the Doha Conference even though the deadline for the submission of requests had already passed.

It must be stressed here that paragraphs 3 and 4 of Article IX of the Marrakech Agreement that created the WTO established the framework and very clear procedures for requests for, and the examination of, waivers based on two types of processes. One stems from exceptional circumstances that entitle the Ministerial Conference to grant a Member a waiver from one of its obligations under the WTO Agreements on condition that such a decision is taken by three quarters of the members. The second is an

ordinary procedure involving an initial presentation to the Council on Trade in Goods, the Council on Trade in Services, or the TRIPS Council, with a 90-day examination timeframe and submission of a report to the Ministerial Conference for decision. It is quite obvious that it was the procedure based on exceptional circumstances that prevailed with regard to the request of the European Community (EC) and the Governments of the ACP States for a waiver.

The waiver having been placed on the agenda, the ACP Group made its adoption a prerequisite for the acceptance of the Doha Ministerial Declaration. The EU, for its part, tried to persuade the countries hostile to the waiver. These included the Latin-American banana-exporting countries which felt that the waiver would be valid until 2008 whereas the EU's tariff quota system for bananas was due to be replaced in 2006 by a tariff only system for which the levels were yet to be decided (and which might be higher than what the Latin-American countries wanted). To take these concerns into consideration, the EU promised to hold consultations with any party concerned regarding any problem or issue likely to arise as a result of the implementation of the preferential tariff treatment for the ACP countries and, more specifically, the separate tariff quota for ACP bananas. If the consultations proved unsatisfactory, the parties could submit the case to the General Council for recommendations.

The EU also promised to consult the Latin-American countries on the new tariff structure proposed. It granted them the right to request independent arbitration to determine if the reconsolidation envisaged would ensure at least the maintenance of the current market access for the Most-Favoured Nation (MFN) exporters of bananas and, if not, to rectify the situation. If the EU did not redress the situation after two rounds of arbitration, the waiver would cease to apply to bananas when the EU's new tariff only regime came into force. It must be remembered, however, that the waiver does not in any way constitute an obstacle to the right of any WTO Member State to have recourse to the dispute settlement mechanism (as was done by Ecuador in a communication dated 28 November 2006 to the President of the Dispute Settlement Body requesting consultations on the EC regime applicable to the import, sale and distribution of bananas).

Given this arrangement, most of the Latin-American banana-exporting countries accepted the compromise and withdrew their opposition to the waiver, with the exception of one country, Ecuador, which called for additional guarantees. The EU succeeded in overcoming this obstacle by giving Ecuador the assurance that its access to the Community market would not be adversely affected by the access granted to ACP products.

The second group of countries opposed to the waiver was that of producers of canned tuna who threatened to block it by their objections to the EC import policy in the framework of the Cotonou Agreement. Those countries, principally Thailand, the Philippines and Indonesia, wanted commitments from the EU for better access of their tuna exports to the European Community market. In a letter from Pascal Lamy, the European Trade Commissioner, to the representatives of Thailand, the Philippines and Indonesia, the EC undertook to offer them a 12% tariff quota instead of the 24% GSP (the Cotonou tariff is 0% for the ACP States) - an expansion that represented an erosion of the ACP preferences. The EU also undertook to hold consultations in the framework of the application of these concessions. If Thailand, the Philippines and Indonesia considered the outcome of the consultations unsatisfactory, the EU would be open to the idea of seeking mediation. These factors were enough to remove the residual opposition to the waiver. In the framework of a special meeting of the Goods Council held on the morning of 14 November 2001, two ACP-EC waivers were therefore adopted by consensus:



- The first waiver concerning the ACP-EC Partnership Agreement which allows for a derogation to Article 1 of the GATT allows the European Communities to grant preferential tariff treatment to products originating in ACP States as required by Article 36.3 of Annex V and its protocols under the Cotonou Agreement, without being obliged to grant the same preferential treatment to similar products from any other Member. (Article 36.3 states that in order to facilitate the transition towards new trade agreements, non-reciprocal trade preferences applied in the framework of the fourth ACP-EC Convention will be maintained during the preparatory period for all the ACP countries, according to the conditions defined in Annex V of the current agreement.)
- The second waiver relating to the transitional regime for the autonomous tariff quotas applied to banana imports provided that the EC, as from 1 January 2002 until 31 December 2005, would ensure adequate protection for ACP countries that supply bananas by setting up a separate tariff quota of 750 000 tonnes. However, the EC undertook to hold consultations with any Member concerned regarding any problem that might arise from the setting up of the new separate tariff quota, if that Member felt that an advantage that it had under the GATT of 1994 could be inadvertently compromised by this process. The General Council was selected as the body to examine, in detail, the grievances of any member who felt that these consultations with the Communities were unsatisfactory owing to the setting up of the separate quota. The General Council would then formulate the appropriate recommendations.

## ***1.2 Developments since the setting up of the ACP-EC waiver***

### **1.2.1 Elusive compromise with the MFN banana producers**

The waiver for the ACP-EC Partnership Agreement contained an annex on bananas asking that the future EC tariff only regime “have the effect at least of maintaining complete market access for the suppliers of MFN bananas” considering “all the EC’s market access commitments in the framework of the WTO”<sup>1</sup> At the General Council meeting on 15 December 2004, **Honduras and Guatemala** submitted a joint **request for the modification by the EC of their concessions on bananas**. At a subsequent meeting of the same General Council held on 15 February 2005, the EC expressed their intention to engage in consultations with the MFN banana suppliers to explain the methodology that they proposed with a view to setting up the tariff only regime (in accordance with the provisions of section 1 of the Annex). The consultation meeting was held on 22 February 2005 at the EC delegation in Geneva between the parties to the Cotonou Agreement, the MFN banana suppliers (Colombia, Costa Rica, Ecuador, Nicaragua, Guatemala, Honduras, Mexico, Panama, Venezuela, Peru, Chile, and Brazil) with the United States as observer. The European Communities maintained, with explanations, that the new customs duty obtained from their calculations to maintain complete market access to the MFN producers was 230 Euros/tonne; the MFN producers questioned the calculation method used and proposed, instead, that a more realistic custom duty level would be 75 Euros/tonne. What must be remembered from this process that would lead to arbitration, as provided for in the annex to the waiver, is that in two arbitration rulings, one handed down on 1 August 2005 and the other on 27 October 2005, the arbitrators noted that the EC proposals for bananas

<sup>1</sup> *European Communities - ACP-EC Partnership Agreement*, WT/MIN(O1)/15, 14 November 2001, Annex, indent 4

were not in conformity with the rule stipulated in the annex, with consequence that the waiver to the first Article of the GATT for bananas would come to an end with the implementation of the EC's tariff only regime as from 1 January 2006.<sup>2</sup>

The new customs duty proposed by the EC after the two arbitration exercises, i.e. 176 Euros/tonne, came into effect in the framework of the new tariff only regime on 1 January 2006. The mechanism which was set up following the 6<sup>th</sup> WTO Ministerial Conference held in Hong Kong has, according to some MFN producers, highlighted that their complete access to the community market was not guaranteed by the new customs duty. Ecuador decided to cross the Rubicon by introducing a request for consultations under Article 21:5 before the WTO Dispute Settlement Body on 28 November 2006.<sup>3</sup>

Given that Community Regulation N° 1964 and the associated rules of application authorise, since 1 January 2006, a different treatment with regard to the access of ACP bananas (tariff quota in the volume of 775 000 tonnes reserved for bananas from ACP States; ACP bananas within the limits of the quota enter the EC market duty-free. This means that they benefit from a preferential margin of 176 Euros per tonne, which is combined with an unlimited access authorized with a tariff of 176 Euros per tonne. The volume of the tariff quota of 775 000 tonnes requires import licenses and allocation) whereas the autonomous tariff of 176 euros per tonne (bear in mind that this is a legal rate more than twice the rate requested by the MFN producers, i.e. 75 Euros per tonne) is applied to all other bananas.

Faced with this situation, Ecuador requested the opening of consultations before the SDB for an examination of the compatibility of the EC regime on bananas with all its obligations contracted by the EC with the WTO, namely:

- compatibility with Article 1 of the GATT of the different duties applied to ACP States and other countries;
- compatibility with Article XIII :1 and XIII :2 from the GATT on the tariff quota regime reserved exclusively for bananas from ACP countries; and,
- compatibility with Article II of the GATT on the "autonomous" tariff of 176 Euros per tonne applied, since 1 January 2006, to all countries and all bananas that are not beneficiaries of the tariff quota.

A review at all the articles mentioned shows that Ecuador and the rest of countries which supported its cause as third parties (Colombia, Panama, United States) during the consultations which took place in Geneva on 14 December 2006, question the entire structure of the preferences, either by referring to the violation of Article 1 on the MFN clause which the EC did not respect; or violation of Article II according to which the EC, as a WTO member, must not grant treatment any less favourable to any other member (namely the MFN banana producers) than what is appropriate; or the EC's non-application of non-discrimination in the quantitative restrictions mentioned under Article XIII of the GATT. For the time being, Ecuador and the third parties that supported it are awaiting responses from Europe before initiating new legal proceedings.

<sup>2</sup> Arbitrator's Decision, *European Communities - ACP-EC Partnership Agreement – Recourse to arbitration according to the Decision of 14 November 2001*, WT/L/616, paragraph 94 ; Arbitrator's Decision, *European Communities - ACP-EC Partnership Agreement - Recourse to arbitration according to the Decision of 14 November 2001*, WT/L/625, 27 October 2005, paragraph 127

<sup>3</sup> *European Communities -Regime applicable to the importation, sale and distribution of Bananas, Recourse by Ecuador to Article 21:5 of the Memorandum of Agreement on dispute settlement*, WT/DS27/65/Rev.1 of 29 November 2006

The second element of significance to note regarding the operation of the waiver is that the **EC held negotiations in the framework of Article XXVIII with a view to modifying its concessions** for reasons linked to its enlargement (Article XXIV :6), as well as the movement towards the tariff only system. Honduras, Guatemala, Colombia and Costa Rica expressed their interest to the EC to participate in these two sets of negotiations. However, owing to the non-recognition of their status as substantial suppliers of bananas to the Community market as claimed by Honduras and Guatemala and compensations for the market share they ought to obtain subsequent to the enlargement of the European Union, their cause was not acknowledged by the EC, in spite of the unending mediation of the President of the General Council throughout 2005. The Geneva-based representatives of these countries denounced the distrustful and arrogant attitude of the European Communities. According to the Honduran negotiators, this is one of the reasons why they decided on 28 October 2005, i.e. immediately following the second arbitration, to place the banana issue on the agenda for the Hong Kong Ministerial Conference and to call for a monitoring mechanism, because the General Council had been powerless to resolve the problem. The dossier is still open before the WTO General Council which continues to examine it.

This issue of the condescending attitude of the EU, introduced by the MFN banana producers, added another unfavorable element to all that already affected the ACP preferences, and seriously compromises any possibility of negotiating an ACP waiver in the framework of the Goods Council. This situation is also not immune to the hostility that has been observed within the Negotiating Committee on Agriculture in the Doha Round, from the Latin-American countries, mainly from the banana exporters, regarding the examination of the long-standing preferences and their erosion as claimed by the ACP countries and recorded in paragraph 44 of the July Framework Agreement of 2004, and paragraph 19 of the Annex on Agriculture from the Hong Kong Ministerial Declaration. This situation prompted the countries among the promoter nations of tropical and diversification products, to claim the widest possible trade liberalization for these products that include fresh or dried bananas, including plantains<sup>4</sup>.

### 1.2.2 Lack of response from the Goods Council to requests for waivers

The third important element is the **lack of response to a new request for a waiver submitted by the EC**. It must be pointed out that in view of the scheduled expiry on 31 December 2005 of the waiver to the tariff quota applicable to bananas from ACP countries, agreed in the framework of Article XIII (paragraph 1 and 2) of the GATT of 1994, the EC submitted a new request for a waiver to the Goods Council on 11 October 2005<sup>5</sup>. By way of explanation, the EC indicated that the ultimate objective of the tariff quotas for ACP bananas was to maintain their preferential access with a view to guaranteeing complete access to the markets by MFN banana producers. The EC added that it did not consider the tariff quota incompatible with its commitments under the GATT, but that their request for a waiver should provide a certain degree of legal security both for ACP and MFN operators. Several meetings were held, in November 2005, March 2006, May 2006 and July 2006. As the President of the Council on Trade in Goods said in his report to the General Council from 14 –15 December 2006, “there

<sup>4</sup> See list presented in the document JOB(06)/129 presented by Bolivia, Colombia, Costa Rica, Ecuador, Guatemala, Nicaragua, Panama and Peru and reproduced in Annex F of the *Draft potential modalities concerning Agriculture* (TN/AG/W/3) of 12 July 2006.

<sup>5</sup> *EC's request for extension of Article XIII waiver regarding a tariff rate quota for bananas of ACP origin*, G/C/W/529, dated 11 October 2005

were many differing views among the members regarding that request. Some countries like Panama, Honduras and Nicaragua felt that no purpose would be served by examining the request since it had no legal basis. On the one hand, the request had not respected the terms of the Memorandum of Agreement concerning the waivers to obligations under the GATT Agreement of 1994 and, on the other, the EC had not provided the maximum information to facilitate the taking of an informed decision". Continuing, he added that "a minority group of members who wanted a peaceful outcome to the issue seemed prepared to examine it on condition that the European Communities put all their cards on the table. That position was motivated by the desire to receive all information possible, including the EC's commitment to consolidate the new customs duty in view of the impending tariff only regime (Ecuador, Colombia and Guatemala). The third group of members was calling for its adoption." The issue is still pending before the Goods Council and the waiver has still not been approved.

The fourth major factor is the **stalling before the same Goods Council of the request for a waiver for AGOA** (African Growth and Opportunity Act) adopted since 2000 by the American Government. The United States did not request a WTO waiver at the time of the adoption inasmuch as the Decision could have given rise to legal action. It submitted an official request for a waiver in February 2005, following which comments were made and questions asked by China, India, Pakistan and Brazil. Although these different countries have gradually withdrawn their opposition, this unilateral scheme of preferences has still not been addressed by the WTO due to resistance from one country, Paraguay, which remains opposed to the adoption, apart from AGOA, of the Andean Trade Preference scheme and the Caribbean Basin Economic Recovery Act. All the procedures and compensatory offers from the Americans have so far not persuaded Paraguay to withdraw.

### **1.3 Lessons to be learnt**

All these facts indicate that there exists a rather heavy atmosphere within the Goods Council regarding waivers and, particularly concerning the ACP-EC waivers included in the two ministerial decisions taken in Doha on 14 November 2001. The main group of countries which could refuse the adoption of a new waiver is the Latin-American MFN banana-producing countries. I believe that this hostility could be mitigated if our partner, the EC, showed some willingness to accede to their demands, subject to a trade assessment and the presentation of specific economic and legal compensatory measures.

There is a way for the ACP countries in general, and more so the African countries, to reduce the Latin-American resistance to the waiver by using the conclusions of the 1<sup>st</sup> Summit of Heads of State from Africa and South America held in Abuja, Nigeria, on 30 November 2006, especially the text called the Abuja Declaration and the Plan of Action which endorsed the discussions.<sup>6</sup> Paragraph 4 of the Declaration stressed that in the ongoing WTO negotiations, the two parties will strive to coordinate the positions of the two regions in order to promote the interests of the developing countries, while paying particular attention to the challenges facing the LDCs; paragraphs 24 and 25 of the Plan of Action urged the two parties to hold regular consultations with a view to harmonizing their positions on international trade issues, and to promote and coordinate their positions on issues of bilateral and multilateral trade. Paragraph 38 of the Plan of Action states that a joint Conference of Trade Ministers from Africa and Latin America will be held in Morocco on a date to be decided. The African ACP

<sup>6</sup> See ABUJA Declaration of the First Africa-South America Summit (ASA/Summit/Doc.01(I) and ABUJA Plan of Action ( ASA/Summit/Doc. 02(I) adopted on 30 November 2006. ([www.asasummit-abuja2006.org](http://www.asasummit-abuja2006.org)).

countries could use this opportunity to clearly discuss the problem of the waiver with their Latin-American counterparts and so prepare the way forward for consideration of a request for a new waiver.

However, there is some curiosity on the part of certain Asian delegates who have expressed astonishment at the about-turn that a new waiver would represent, given that there has not been any fundamental change in the circumstances affecting the situation of the ACP countries, and that the multilateral trade system must be built on the basis of predictability and legal security for all the stakeholders. Some delegates pointed out that seven (7) years is a sufficiently long period to conclude an agreement in the ACP-EC bilateral negotiations, i.e. the EPAs. For those countries, it would be difficult, therefore, for the South-East Asian countries to justify an extension of this discrimination. This would give rise to requests for concessions that would be costly both for the EU and the ACP States, and the main products at the centre of the discussions would be, in addition to bananas, tuna, beef, sugar, textile and many others.

The other grey area is to persuade the EC to raise the problem, within the WTO, of the extension of the waiver to the ACP-EC Agreement so as to continue to ensure that the ACP countries benefit from a system of preferential access to the Community market. Here, the Trade Commissioner's wiggle room is intact, provided he obtains consensus from the Union, with the full understanding that the Europe of 15 in Doha now has 27 Member States, including a number of members with a very special recent history, in particular very different economic and trade conditions from those of Western Europe. Once that obstacle is removed, the EC and ACP States ought to use the fast track of the Ministerial Conference as seen in Doha, and use as justification the *exceptional circumstances* in accordance with the provisions of Article IX, paragraphs 3 and 4, *the idea of additional time for the conclusion of EPA negotiations called for by certain regions in order to complete the technical work*. This argument could be supported by the commitment to hold consultations with any member concerned by any problem or question that might arise from the application of the preferential tariff treatment for ACP products.

Of course, there can be no implacable hostility to the extension of the waiver, provided that the costs of a request for a new waiver are fully assessed, quantified, and borne by the parties concerned, from a legal, commercial and economic standpoint. However, this does not constitute the best guarantee for an extension of the preferential benefits granted to the ACP countries on the Community market because the duration of a new waiver would inevitably be limited and the preferences thus maintained risk being substantially eroded by the outcome of the ongoing Doha Round.

The ACP countries should situate themselves in the context of a dynamic long-term perspective and seek to safeguard their preferences within the framework of the ongoing EPA negotiations which, when concluded, would constitute the better way forward. In that way, the preferences would be protected from any potential litigation due to the legal coverage provided under Article XXIV of the GATT and the flexibility it affords. This implies, however, that the ACP countries will adopt a strategic vision of their trading ties with the European Union by identifying the constraints linked to the Doha multilateral process and seeking a long-term multilateral solution to the issue of preferences, the temporary comfort of a WTO waiver and, lastly, their overall development prospects.

The harmonious integration of the ACP countries into the multilateral trading system and the enhancement of their development prospects will require in-depth consideration and analysis based on this strategic approach.

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