

**LEGAL CHALLENGES FOR
DEVELOPING COUNTRIES EXPORTS OF
AGRICULTURAL FOOD PRODUCTS TO
THE EU**

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Chapter 7 The Caribbean region

1. Introduction

As demonstrated in Chapter 5 of this thesis, the European Union (EU) provides better market access to the African, Caribbean and Pacific (ACP) countries through the Cotonou Agreement than to other developing countries (DCs) under the Generalised System of Preferences scheme (GSP) or the Euro-Med Agreements. In the context of the conclusion of Economic Partnership Agreements (EPAs), ACP countries have been divided into several sub-regional groupings.¹ The decision to establish regional agreements was, according to the EU, essential to “ensure flexibility and would allow [...] tailoring [of] the EPAs to the economic realities and needs of the different regions.”² This Chapter will particularly focus on the Caribbean region of the ACP Group, which was selected as the case study for this thesis.

The EU has particularly strong historic ties with Caribbean countries. The colonisation of the Caribbean region, particularly by the British, French, Spanish and the Dutch empires, dates back to the 17th Century.³ While most colonised Caribbean countries obtained independence from their European colonial powers in the 1960s,⁴ the EU continued to maintain special economic and post-colonial

¹ Negotiations of EPAs through ACP regional groupings are in line with Articles 35(2) and 37(5) of the Cotonou Agreement as well as Article 7 of Annex IV attached to the 2000/483/EC: Partnership agreement between the members of the African, Caribbean and Pacific Group of States of the one part, and the European Community and its Member States, of the other part, signed in Cotonou on 23 June 2000- protocols-Final Act, Declarations, OJ L 317, 15.12.2000.

² ACP Secretariat-European Commission, “Joint Report on ACP – EU negotiations on Economic Partnership Agreements: 2nd all-ACP-EU Ambassadorial level meeting at ACP House, Brussels, 9 December 2002,” Brussels, 12 February 2003, ACP-EC/NG/MN/16, p 17.

³ European Commission, “An EU-Caribbean partnership for growth, stability and development”, Brussels, COM (2006) 86 final, 2.3.2006, p 14.

⁴ *Ibid.*, p 14.

relations with Caribbean countries. The European countries gave the newly independent countries preferential access for their commodities through preferential trade arrangements, thereby increasing their trade opportunities to the protected EU agricultural market.⁵ Such an involvement of the western powers in the economic life of the Caribbean region has allowed them to maintain “indirect control” over the former colonies.⁶ Even today, the relationship between the EU Member States (MS) and the region is close, mainly *via* the French *Départements d' Outre-Mer* (DOMs),⁷ and the Overseas Countries and Territories (OCTs) of the United Kingdom (UK)⁸ and the Netherlands.⁹ Accordingly, the EU remains “very present” in the Caribbean.¹⁰

This increase in Caribbean’s trade opportunities is today mediated through the EPA, concluded between the EU and the Caribbean Forum of ACP States (CARIFORUM) (hereafter the “EU-CARIFORUM EPA”), pursuant to the Cotonou Agreement. The CARIFORUM comprises the members of the Caribbean Community (CARICOM) and the Dominican Republic.¹¹ Cuba is also a member of the CARIFORUM since 2001, but has remained outside the EPA negotiations, as it did not sign the Cotonou Agreement.

⁵ *Ibid.*, p 14.

⁶ Childs, P. and Williams, P. “An Introduction to Post-Colonial Theory”, Prentice Hall/Harvester Wheatsheaf, Hertfordshire, 1997, p 5.

⁷ “French overseas department”. As explained in Chapter 1 of this thesis, France has three DOMs in the Caribbean, namely Guadeloupe, French Guiana and Martinique which form an integral part of France and thus of the EU.

⁸ Anguilla, British Virgin Islands, Cayman Islands, Montserrat and Turks and Caicos Islands.

⁹ Aruba and the Netherlands Antilles.

¹⁰ *Op. cit.* footnote no 3, p 14.

¹¹ Montserrat is a member of CARICOM but it did not sign the EPA as it is not independent. It is a British overseas Territory.

This chapter focuses on the agreed EU-CARIFORUM EPA, and aims to provide an analysis of the issues surrounding the agreement. This is a matter that merits examination, given that the EU-CARIFORUM EPA has been designed as a free trade Agreement. The trade and development provisions of the EU-CARIFORUM EPA were negotiated in order to be in full conformity with the WTO regulatory framework.¹² With this aim, they introduced for the first time the principle of reciprocity within the Caribbean-EU trade agreements,¹³ leading to the elimination of customs duties on goods exported by all partners.¹⁴ Caribbean countries are therefore now required to eliminate tariffs on imports from the EU.¹⁵

2. The Caribbean region: Contextualisation

2.1 Overview of the Caribbean region

When reference is made to the “Caribbean”, it is generally understood as to refer to the sea.¹⁶ However, the term is also commonly used to refer to the group of islands. In such a case, the Caribbean extends also to some countries situated on the mainland of South and Central America, ranging from Guyana in South America to Belize.¹⁷ Given the number of independent entities, it is believed that the Caribbean region possibly has “the largest conglomeration of small states in the world.”¹⁸ Most of them share the same history: their “colonial past of slavery.”¹⁹

¹² The rationale for negotiations and signature of EPAs was examined in Chapter 5 of this thesis

¹³ The principle of non-reciprocity in EU-ACP trade was previously established under Article 7 of ACP-EEC Convention of Lomé, OJ L 25, 30.1.1976.

¹⁴ Article 14 of the Economic Partnership Agreement between the CARIFORUM States, of the one part, and the European Community and its Member States, of the other part, OJ L 289, 30.10.2008

¹⁵ *Ibid.*, at Article 16.

¹⁶ Menon, P.K., “Regional integration: A Case Study of the Caribbean Community [CARICOM],” *Korean J. Comp. L.*, 1996, 24, pp. 197-258, p 201.

¹⁷ Axline, W.A., “Integration and development in the Commonwealth Caribbean: the politics of regional negotiations”, *International Organization*, 1978, 32(4), pp. 953-973, p 955.

¹⁸ *Op. cit.* footnote no 16, p 201.

Among them, 12 countries are part of the “Commonwealth Caribbean,”²⁰ which refers to the independent English-speaking States in the region sharing the same fundamental political values.²¹ Consequently this term does not solely refer to a “merely geographical notion.”²²

The Caribbean region has a small population. The most populous countries are Haiti and Dominican Republic with over 10 million inhabitants each.²³ These are followed by Jamaica and Trinidad and Tobago which have a population estimated at over 1 and 2 million people respectively. The other countries have a population ranging from 762,498 (Guyana) to 49,593 (St Kitts and Nevis). The Caribbean region’s economy is also small, underdeveloped, and varies widely among the countries. Caribbean countries have a relatively small GDP. Within the CARIFORUM, the Dominican Republic has the largest GDP with USD 46.8 billion in 2009. It is followed by Trinidad and Tobago with a GDP of USD 21 billion and Jamaica (GDP USD 13 billion). In contrast, Dominica has the smallest economy of the CARIFORUM countries (GDP USD 378 million).²⁴ In addition, the region has also on average a declining economic growth. For instance, between 2006 and 2010, the annual GDP growth for Antigua and Barbuda has decreased

¹⁹ Meijers, H., “New International Persons in the Caribbean” *Netherlands International Law Review*, 1977, 24(1-2), pp 160-188, p 163.

²⁰ Antigua and Barbuda, the Bahamas, Barbados, Belize, Dominica, Grenada, Guyana, Jamaica, St. Kitts and Nevis, St. Lucia, St. Vincent and the Grenadines, and Trinidad and Tobago. See the Commonwealth website, available from:

<http://www.thecommonwealth.org/Internal/191086/142227/members/> (Accessed 21/7/2011).

²¹ The core criteria for Commonwealth Membership are provided by the Commonwealth Heads of Government in “The Kampala Communiqué”, Commonwealth Head of Government Meeting, Uganda, 23-25 November 2007, Commonwealth Secretariat. para. 87.

²² Op. cit. footnote no 16, p 201.

²³ Haiti is considered “the poorest country in Latin American and Caribbean and among the poorest in the world.” See World Bank, “Accelerating Trade and Integration in the Caribbean: Policy Options for sustained growth, Growth, and Poverty Reduction.”, Herndon, VA, USA: World Bank, 2009, p 4.

²⁴ World Bank Data, available from: <http://data.worldbank.org/country> (Accessed 26/07/2011).

from 13.3 to -8.5 percent. GDP growth for Dominican Republic fell from 10.5 to 3.5 percent and for Jamaica from 2.7 to -3.0 percent.²⁵

Because of the limited range of resources, the Caribbean countries' economic activity is undiversified and is mainly based on exports, which are a major source of foreign exchange, employment opportunities and income growth.²⁶ It must be noted that the export of services is the main source of income in the Caribbean region.²⁷ They account for 61 percent of GDP for Barbados and 49 percent for St Lucia.²⁸ However, agriculture also remains an important sector in the Caribbean region. Agricultural commodities are essentially concentrated on traditional crops such as sugar, bananas and rice,²⁹ which are generally exported to a limited export market.³⁰ Furthermore, because these products are constantly subject to global competition and WTO rules on trade liberalisation, they export also non-traditional products such as tropical fruits.³¹ The rural population in most Caribbean countries is very important and can represent more than half of the total population. For example, in 2009, the rural population represented 70 percent of the total population in Antigua and Barbuda, 60 percent in Barbados, 69 percent in Grenada, 72 percent in Guyana, 52 percent in Haiti and 86 percent in Trinidad and

²⁵ World Bank Data, available from:

<http://data.worldbank.org/indicator/NY.GDP.MKTP.KD.ZG> (Accessed 26/07/2011).

²⁶ Deep Ford., J.R. and Rawlins, G., *Trade policy, trade and food security in the Caribbean* in Deep ford, J.R., dell'Aquila, C. and Conforti, P., "Agricultural trade policy and food security in the Caribbean-structural issues, multilateral negotiations and competitiveness" FAO, Rome, 2007, p 15.

²⁷ Op. cit. footnote no 23, p 8.

²⁸ World Bank Data, available from:

<http://data.worldbank.org/indicator/NE.EXP.GNFS.ZS/countries> (Accessed 26/07/2011).

²⁹ Paul, C.L., *The reorganization of Public Agricultural research in the Caribbean under the Pressures of Globalization and Privatization*, in Bigman, D., "Globalization and the Developing Countries: emerging Strategies for Rural Development and Poverty Alleviation" Wallingford, Oxon, GBR: CABI Publishing, 2002, p 295.

³⁰ Caribbean countries export mainly to the European Union, the USA and within the Caribbean region itself. See Deep Ford., J.R. and Khaira, H., *Caribbean countries as small and vulnerable economies in the WTO* in op. cit. footnote no 26, p 48.

³¹ Op. cit. footnote no 26, p 15.

Tobago.³² Although there is a decreasing population engaged in agricultural work, the sector remains an important employment provider in the economies of some countries. For instance, employment in agriculture represents 14.5 percent of total employment for Dominican Republic and 18.2 percent for Jamaica.³³

For some countries, import tariffs on agricultural commodities represent a significant share of total revenue and thus contribute significantly to their economic development. For instance, agricultural imports represented in 2009, 20 percent of GDP for Dominica and 21 percent of GDP for Guyana, while representing 6 percent of GDP for Jamaica, Grenada and Dominican Republic.³⁴ However, agricultural export earnings have also slightly decreased for many countries.³⁵ This certainly reflects the effects of trade liberalisation, international competition and the erosion of preferential tariffs regimes. In addition, it must also be noted that because of the limited diversity in agricultural production, Caribbean countries are also highly reliant on food imports, which help maintain its food security. Cereals are the main product which is imported into the region, and represent one-fourth of food imports.³⁶ Such a degree of trade concentration associated with the Caribbean countries' infrastructure deficiencies and "inadequate levels of [a] narrow range of trained human resource skills,"³⁷ affect their economic growth and development.

³² World Bank Data available from: <http://data.worldbank.org/indicator/SP.RUR.TOTL.ZS> (Accessed 25/07/2011).

³³ World Bank Data available from: <http://data.worldbank.org/indicator/SL.AGR.EMPL.ZS/countries> (Accessed 1/08/2011).

³⁴ See World Bank Data available from: <http://data.worldbank.org/indicator/NV.AGR.TOTL.ZS/countries> (Accessed 25/07/2011).

³⁵ Agriculture accounted for 15 percent of GDP in 2006 for 12 percent of GDP in 2008 for Belize. It accounted for 8 percent of GDP in 2006 and 7 percent of GDP in 2009 for St Vincent and the Grenadine. See Ibid.

³⁶ Op. cit. footnote no 30, p 47.

³⁷ Op. cit. footnote no 16, p 201.

Another challenge for Caribbean countries' economies is their geographical location. The Caribbean Sea has an extremely fragile ecosystem which makes the countries subject to natural disasters such as hurricanes, floods, earthquakes and volcanic eruptions. Given the very small size of the countries, these natural disasters tend to damage the countries as a whole (infrastructure, agricultural production and utilities) leading to significant economic losses. For example, following the severe Hurricane 'Gilbert' which hit Jamaica in 1988, the island suffered from severe devastation which amounted to approximately 33 percent of GDP. Another example is the damage of Hurricanes 'Luis' and 'Marilyn' of 1995 on Antigua and Barbuda's infrastructure. The island suffered from critical economic losses amounting to about 66 percent of GDP.³⁸ In light of their economic size, high reliance on external trade and dependence on food imports, concentrated export orientation and export market concentration, as well as their "susceptibility to natural disasters", Caribbean countries are considered to be "especially small and vulnerable economies."³⁹

The EU market is the Caribbean region's second largest agricultural export destination, after the United States.⁴⁰ In 2006, the EU accounted for some 19 percent of their total exports.⁴¹ The Caribbean region, as a member of the ACP group, has a long history of trading with the EU.⁴² The current EU agricultural trade relations with Caribbean countries are governed by the EU-CARIFORUM

³⁸ Bernard, R.L., "Globalization: Everything but Alms- the EPA and Economic Development", the GraceKennedy Foundation, 2008, p 34.

³⁹ Op. cit. footnote no 30, p 41.

⁴⁰ European Community – Caribbean region, "Regional Strategy Paper and Regional Indicative Programme, 2008-2013", Strasbourg, 15 November 2008, p 12.

⁴¹ Ibid., p 12.

⁴² This was discussed in Chapter 5 of this thesis.

EPA,⁴³ negotiated and signed under the umbrella of the Cotonou Agreement. Exports of Caribbean countries to the EU are not diversified, and substantially emanate from traditional agricultural products including cane sugar, rice and bananas. Income from trade in goods with the EU is important for the Caribbean. It represented EUR 4.1 billion in 2007.⁴⁴ The EU's biggest trading partner in the region is the Dominican Republic. Its other major partners are the Bahamas, Jamaica and Trinidad and Tobago.⁴⁵ The EU is also "the largest source"⁴⁶ of development aid to Caribbean countries, which is mainly provided via the European Development Fund (EDF) programme.⁴⁷ The EDF is the main instrument providing for the EU's financial support for development cooperation with ACP countries and OCTs.⁴⁸ Each EDF is managed by the Commission and is usually of five years duration.⁴⁹ The global amount of the EDF is agreed by the Council, and obtained from EU MS' financial contributions rather than the EU budget.⁵⁰ Accordingly, contributions have to be negotiated. In light of the difficult negotiations on EDF contributions, the European Commission has repeatedly proposed to include the EDF within the EU budget, the so-called "budgetisation" of the EDF.⁵¹ The integration of the EDF into the EU budget is planned for 2020, after the end of the 2014-2020 multiannual financial framework.⁵²

⁴³ Op. cit. footnote no 14.

⁴⁴ Op. cit. footnote no 40, p 12

⁴⁵ Ibid., p 12.

⁴⁶ Op. cit. footnote no 38, p 8.

⁴⁷ ACP countries also receive EU financial support from the EU budget through other development instruments such as the Development Cooperation Instrument or the European Instrument for Democracy and Human Rights. These instruments complement funding from the EDF.

⁴⁸ European Commission, "Towards the full integration of co-operation with ACP countries in the EU budget", Brussels, COM (2003) 590 final, 8.10.2003, not published in the Official Journal, p 3.

⁴⁹ The tenth EDF cycle covers the period from 2008 to 2013.

⁵⁰ Bretherton, C. and Vogler, J. *The European Union as a Global Actor*. London: Routledge, 1999, p 113.

⁵¹ Op. cit. footnote no 48, p 9.

⁵² European Commission, "Preparation of the multiannual financial framework regarding the financing of EU cooperation for African, Caribbean and Pacific States and Overseas Countries and

2.2 The Caribbean regional economic communities

The Caribbean region is made up of three different stages of economic integration processes: the CARICOM, the CARIFORUM and the Organisation of Eastern Caribbean States.⁵³ These are mainly the result of the “Treaty Establishing the Caribbean Community,” also referred to as the Chaguaramas Treaty.⁵⁴ It was signed in Trinidad on 4th July 1973 by the Government of Barbados, Guyana, Jamaica and Trinidad and Tobago, and came into force on 1st August 1973 for these independent, developing, English-speaking states.⁵⁵ Given the economics of the developing Caribbean countries, it is believed that the main aim of regional economic integration in the region is to contribute to “economic development.”⁵⁶ Indeed, while integration among “industrialized countries” aims to intensify their “economic patterns,” through the reduction of trade barriers, the less advanced countries adopt regional policies in order to restructure their “economic patterns.”⁵⁷ Although, it is not the aim of this chapter to provide an analysis of the history of the Caribbean regional integration process, it is still necessary to provide an overview of the different forms of regional cooperation within the region.

2.2.1 The Caribbean Community (CARICOM)

The CARICOM is “the pillar around which economic integration activities in the region revolve.”⁵⁸ It is a regional organisation, established in 1973 by the Chaguaramas Treaty, with the aim of enhancing the economic integration of the

Territories for the 2014-2020 period (11th European Development Fund)”, Brussels, 7.12.2011 COM (2011) 837 final.

⁵³ All countries of the Caribbean region are also members of the Association of Caribbean States (ACS). See Association of Caribbean States website, available from: <http://www.acs-aec.org/> (Accessed 21/7/2011).

⁵⁴ Treaty establishing the Caribbean Community, Chaguaramas, 4th July 1973.

⁵⁵ Ibid at Articles 24 and 33.

⁵⁶ Op. cit. footnote no 17, p 953.

⁵⁷ Ibid., p 954.

⁵⁸ Op. cit. footnote no 40, p 24.

member states of the CARICOM through the establishment of a single market.⁵⁹ As provided by the “Georgetown Accord”,⁶⁰ the Caribbean region had to move from a free trade area to a customs union. Accordingly, the CARICOM replaced the previous Caribbean Free Trade Association (CARIFTA).⁶¹ The CARIFTA was established by the “Dickenson Bay” Agreement signed by the Governments of Antigua, Barbados and British Guiana in December 1966. It aimed to accelerate the economic development of Caribbean countries through the elimination of barriers to trade between its member states.⁶² Consequently the agreement provided for “the immediate establishment of a Free Trade Economic Community for all the countries who so desire.”⁶³ The Agreement gave the possibility to any territory in the region to participate in the Agreement subject to the terms and conditions determined by the Council of the Territory.⁶⁴ Thus, Dominica, Grenada, Jamaica, Montserrat, St. Kitts-Nevis-Anguilla, St. Lucia, St. Vincent, and Trinidad and Tobago also became members in 1968, followed by Belize in 1971.

In accordance with Article 31 of the Chaguaramas Treaty, the members of the CARICOM agreed to adopt a Common External Tariff (CET) “in respect of all commodities imported from third countries.” However, due to implementation issues, the CET did not take effect until 1991.⁶⁵ The original Chaguaramas Treaty was revised in 2001 in order to strengthen the regional economic integration

⁵⁹ Op. cit. footnote no 54 at Article 4.

⁶⁰ Signed in April 1973 in Guyana.

⁶¹ See Article 2(1) of the Georgetown Agreement on the Organization of the African, Caribbean and Pacific Group of States, 1975 as amended by Decision No. 1/LXXVIII/03 of the 78th Session of the Council of Ministers, Brussels, 27 and 28 November 2003. ACP/27/005/00 Rev.16 [Final Version].

⁶² Preamble (3) of the Dickenson Bay Agreement Establishing the Caribbean Free Trade Association, 10th December 1966.

⁶³ Ibid at Preamble (4).

⁶⁴ Op. cit. footnote no 62 at Article 32.

⁶⁵ Op. cit. footnote no 16, p 239.

through the creation of a CARICOM Single Market and Economy (CSME).⁶⁶ In contrast to the earlier CARIFTA, the CSME provides for the free movement of goods, services, persons and capital within the Community, as well as, *inter alia*, an “economic policy co-ordination and financial and monetary integration of Member States” through a single economy. This would lead to the establishment of a Caribbean Monetary Union.⁶⁷ Given these “ambitious objectives”, it is believed that the CSME provides for “much wider and deeper forms of integration.”⁶⁸ The CSME was inaugurated in 2006 and currently provides for free movement of labour, services and goods provisions within thirteen participating members of CARICOM.⁶⁹ This process is due to be completed in 2015 with the harmonisation of economic and monetary policies and measures as well as the implementation of a Monetary Union.

Membership of the Community was firstly open to the member states of the earlier CARIFTA and the Bahamas.⁷⁰ However, given the principal objectives of the CARICOM established under the original Chaguaramas Treaty,⁷¹ it was pointed out that the Caribbean Community was “clearly designed to attract the attention, and the eventual participation, of non-[UK] Commonwealth countries in the region.”⁷² Accordingly, membership of CARICOM is now also open to any

⁶⁶ Revised Treaty of Chaguaramas Establishing the Caribbean Community including the CARICOM Single Market and Economy, Nassau, 5th July 2001.

⁶⁷ Ibid at Article 14(2).

⁶⁸ Girvan, N., “Whither CSME?,” *Journal of Caribbean International Relations*, 2005, 1(1), pp. 13-32.

⁶⁹ The Bahamas and Haiti are currently remaining outside the CSME process. See <http://www.csmeonline.org/> (Accessed 20/7/2011).

⁷⁰ Op. cit. footnote no 54 at Article 2(a).

⁷¹ Ibid at Article 4. The objectives of the CARICOM as provided in Article 6 of the Revised Treaty of Chaguaramas include the coordination of foreign economic policies, the enhancement of economic development and deeper trade and economic relations with third States.

⁷² Simmon, K.R., “The Caribbean Economic Community: A new Venture in Regional Integration”, *ICLQ*, 1974, 23(2), pp. 453-458, p 454.

Caribbean States or Territories, independent or not, “that is in the opinion of the Conference able and willing to exercise the rights and assume the obligations of membership in accordance with Article 29 of [the] [Chaguaramas] Treaty.”⁷³ The “Secretariat of the Community” is the principal administration of the CARICOM and is responsible for monitoring the “development and implementation of proposals for the achievement of Community objectives.”⁷⁴

The CARICOM currently comprises 15 members, namely Antigua and Barbuda, the Bahamas, Barbados, Belize, Dominica, Grenada, Guyana, Haiti, Jamaica, Montserrat, St. Kitts and Nevis, St. Lucia, St. Vincent and the Grenadines, Suriname, and Trinidad and Tobago.⁷⁵ With the exception of Belize and Guyana, all of these are islands states. The members are classified within the Chaguaramas Treaty according to whether they are More Developed Countries or Less Developed Countries.⁷⁶ The Treaty does not provide a specific definition of these two terms. However the definition of a Less Developed Country within the Chaguaramas Treaty does not totally follow the definition of a Least Developed Country provided by the United Nations (UN). In contrast to the UN, the Chaguaramas Treaty classifies some countries with a population exceeding 75 million as less developed.⁷⁷ The Less Developed Countries within the Chaguaramas Treaty are considered to be “disadvantaged countries” in terms of

⁷³ Op. cit. footnote no 54 at Article 2(b).

⁷⁴ Op. cit. footnote no 66 at Article 23.

⁷⁵ There are also five CARICOM associate members: Anguilla, Bermuda, British Virgin Islands, Cayman Islands, and Turks and Caicos Islands. Anguilla and the British Virgin Islands are considered as associate members of the organisation while the other countries are full members. (Op. cit. footnote no 66 at Article 3).

⁷⁶ Op. cit. footnote no 66 at Article 4. The Bahamas, Barbados, Guyana, Jamaica, Suriname and Trinidad and Tobago are classified as More Developed Countries. Antigua and Barbuda, Belize, Dominica, Grenada, Haiti, Montserrat, St. Kitts and Nevis, St Lucia and St. Vincent and the Grenadines are considered as Less Developed Countries.

⁷⁷ The UN criteria for the identification of the LDCs are available from: <http://www.un.org/special-rep/ohrls/lcd/lcd%20criteria.htm> (Accessed 20/7/2011).

“the size, structure and vulnerability of their economies.”⁷⁸ Menon argues that this terminology is “unfortunate” because “all the countries in the Community are under developed and dependant economies.”⁷⁹ However, he is also of the view that this classification is necessary since it “facilitates the allocation of preferences for the benefits of the [Less Developed Countries].”⁸⁰

2.2.2 The Organisation of Eastern Caribbean States

Within the CARICOM, nine countries are also members of the sub-regional Organisation of Eastern Caribbean States (OECS).⁸¹ It was established under the Treaty of Basseterre of 1981 in order to *inter alia* “promote co-operation” between the parties to the Treaty.⁸² Due to limited human and financial resources of Caribbean states, there was a need for the independent Caribbean countries to be able to cooperate on external affairs representation.⁸³ Article 4.1 of the Treaty of Basseterre provides that the OECS should *inter alia* promote co-operation among the OECS members, and assist them in fulfilling their international obligations and responsibilities.⁸⁴ The Treaty provides also that the OECS should establish a single economic area though the ‘Economic Union’ and ensure the successful development of its members.⁸⁵ Given the successful establishment of common

⁷⁸ Op. cit. footnote no 66 at Preamble (19).

⁷⁹ Op. cit. footnote no 16, p 222.

⁸⁰ Ibid. p 222.

⁸¹ Anguilla, Antigua and Barbuda, British Virgin Islands, Commonwealth of Dominica, Grenada, Montserrat, St Lucia, St Kitts and Nevis, and St Vincent and the Grenadines.

⁸² Article 3(1)(a) of the Treaty of Basseterre establishing the Organisation of Eastern Caribbean States Economic Union, 18th June 1981. The Treaty was revised in 2010.

⁸³ See OECS, “The Treaty of Basseterre and OECS Economic Union” (2009) Paper No.

OECS/AUT/03/38/17, OECS Secretariat, p 1 [Online] Available from: <http://www.oecs.org/doc-lib/economic-union> (Accessed 20/7/2011).

⁸⁴ Article 4(1)(a) and (c) of the Revised Treaty of Basseterre establishing the Organisation of Eastern Caribbean States Economic Union, 18th June 2010.

⁸⁵ Ibid at Article 4(1)(e) and (f).

institutions, it was pointed out that the OECS helped Caribbean members to “[...] collectively pool resources and work in the interest of citizens on several fronts.”⁸⁶

2.2.3 The Caribbean Forum of ACP States (CARIFORUM)

The CARIFORUM⁸⁷ comprises the Caribbean countries which signed the Cotonou Agreement and Cuba. The OCTs of the UK and the Netherlands as well as the French DOMs have observer status at CARIFORUM.⁸⁸ The forum was established in October 1992 as a political group, following accession of the Dominican Republic and Haiti to the 1990 Lomé Convention (“Lomé IV”).⁸⁹ It aimed to facilitate accession of these countries to the EPA negotiations between the Caribbean region and the EU, as well as allocating resources from the EDF to the region.⁹⁰ The CARIFORUM is responsible for managing and coordinating policy dialogue between the EU and the Caribbean region. It aims also to “promote integration and cooperation in the Caribbean and to coordinate the allocation of resources” under the EDFs.⁹¹ Finally the CARIFORUM is charged with the management of the implementation of the Caribbean Regional Indicative Programmes funded through the EDF and regional programmes financed by the

⁸⁶ WTO, “Trade Policy Review: Saint Vincent and the Grenadines” WT/TPR/G/190/VCT, 1/10/2007.

⁸⁷ Antigua and Barbuda, Bahamas, Barbados, Belize, Dominica, Dominican Republic, Grenada, Guyana, Haiti, Jamaica, Montserrat, St. Kitts and Nevis, Saint Lucia, St. Vincent and the Grenadines, Suriname and Trinidad and Tobago. See: Caribbean Community (CARICOM) Secretariat, available from:

http://www.caricom.org/jsp/community_organs/cariforum/cariforum_main_page.jsp?menu=cob (Accessed 21/7/2011).

⁸⁸ Ibid.

⁸⁹ See Commission of the European Communities, “Lomé IV (1990-2000) Background, innovations, improvements” Brussels, 1990. Haiti became a member of CARICOM in 2002, but not the Dominican Republic which signed a free trade agreement with CARICOM on 22nd August 1998 (the CARICOM-Dominican Republic Free Trade Agreement).

⁹⁰ Wellington, S., Singh, A., and Page, R., “Caribbean economic expansion, trade and investment: an innovative process for exploiting opportunities arising from the economic partnership agreement: implications for CARIFORUM member states” *small states digest*, 2010, issue 1, pp 13-18, p. 13

⁹¹ Op. cit. footnote no 40, p 21.

EU MS and any other source.⁹² Accordingly, the CARIFORUM provides a “useful platform for strategic political dialogue,”⁹³ and is considered to be the Commission’s “principal interlocutor for all matters related to regional cooperation in the Caribbean.”⁹⁴

3. The EU-CARIFORUM EPA

3.1 Schedule of negotiations and their objectives

The negotiations on the EPAs were divided into two phases. They started first at an “all-ACP-EC level,” which sought to determine and clarify “horizontal issues of interest to all parties.”⁹⁵ This design was established in order to ensure transparency before the start of negotiations at the level of ACP regions under the second phase negotiations, which aimed to address “specific commitments” to be undertaken between the parties to the agreement.⁹⁶ The EU and the Caribbean region started formal negotiations for an EPA, in Kingston, Jamaica, on 16 April 2004.⁹⁷ This has led to the adoption of a “joint Plan and Schedule for CARIFORUM-EC EPA negotiation” process.⁹⁸ This indicative template provided for four negotiating phases taking place at three levels,⁹⁹ with clear objectives and deadlines.

⁹² Ibid., p 21.

⁹³ Op. cit. footnote no 3, p 14.

⁹⁴ Op. cit. footnote no 40, p 19.

⁹⁵ ACP Secretariat-European Commission, “ACP-EC EPA negotiations: Joint Report on the all-ACP – EC phase of EPA negotiations,” ACP-EC/NG/NP/43, Brussels, 2 October 2003, p 1.

⁹⁶ Ibid., p 1.

⁹⁷ The Caribbean was then the fourth region to launch EPA negotiations with the EU. West and Central Africa, and Eastern and Southern Africa started the negotiations in October 2003 and February 2004 respectively.

⁹⁸ European Commission, “Plan and Schedule for CARIFORUM-EC Negotiations of an Economic Partnership Agreement”, Brussels, 22 April 2004.

⁹⁹ Ministerial, Principal Negotiators and subject-specific negotiators.

Chapter 7 – The Caribbean region

The negotiation process took place alternatively in the CARIFORUM region and Brussels. The CARIFORUM negotiations with the EU were carried out by the director of the Caribbean Regional Negotiating Machinery (CRNM)¹⁰⁰ who was appointed as the “CARIFORUM Principal Negotiator.”¹⁰¹ A Regional Preparatory Task Force (RPTF) was also established by both the EU and CARIFORUM in order to “cement the strategic link between EPA negotiations and development cooperation.”¹⁰²

The initial negotiation phase was planned to take place between April 2004 and September 2004 in order to establish the priorities of the EU-CARIFORUM EPA negotiations. The objective of this phase was to “establish an understanding of the fundamental concerns and interests of EPA negotiations for both CARIFORUM and the [EU].”¹⁰³ Following this first phase, the CARIFORUM and the EU were to focus on the CARIFORUM regional integration process. In this aim they had to set up a “common understanding” on the priorities for the Caribbean regional integration between September 2004 and September 2005.

The third phase was scheduled to take place from September 2005 to December 2006. This was the most importance phase of negotiations since its objective was to consolidate and structure the negotiations into a draft agreement. It was launched at the Second CARIFORUM-[EU] Ministerial EPA meeting in St Lucia.

¹⁰⁰ The CRNM was established in 1997 to “develop, coordinate and execute an overall negotiating strategy for various external negotiations in which the Region was involved.” See Office of Trade Negotiations of the Caribbean Community (CARICOM) Secretariat, available from: http://www.crnmm.org/index.php?option=com_content&view=article&id=45&Itemid=68 (Accessed 28/07/2011). The CRNM is now referred to as the Office of Trade Negotiations (OTN).

¹⁰¹ Op. cit. footnote no 98, p 3.

¹⁰² Ibid., p 4.

¹⁰³ Op. cit. footnote no 98, p 4.

The EU and the CARIFORUM had to focus on trade liberalisation as well as on the identification and treatment of sensitive products, such as sugar and bananas, for CARIFORUM countries. This phase also aimed to reinforce “the trading relations as well as overall co-operation between CARIFORUM Member States and DOMs/OCTs located in the Caribbean.”¹⁰⁴

Finally, the fourth phase, between January 2007 and December 2007, had to lead to the finalisation of the EU-CARIFORUM EPA negotiations. The CARIFORUM and the EU had to agree on “the institutional framework and structures of implementing the EPA along with designing a review process.”¹⁰⁵ An agreement had to be signed by the end of December 2007 by both parties.

3.2 The agreed EU-CARIFORUM EPA

After four phases of negotiations, a comprehensive or “full” EU-CARIFORUM EPA was initialled on 16 December 2007 and signed on 15th October 2008 at Barbados.¹⁰⁶ It applies provisionally as from 29 December 2008.¹⁰⁷ It was signed by the then European Commission Vice-President Siim Kallas who believed that it “[would] renew the historic partnership” with the EU.¹⁰⁸ The EU-CARIFORUM EPA is based on the fundamental principles of the Cotonou Agreement, being sustainable development, the reduction and eradication of poverty, and the regional

¹⁰⁴ Ibid., p 7.

¹⁰⁵ Ibid., p 7.

¹⁰⁶ Guyana signed on 20 October 2008. Haiti which signed the Agreement in 2009 but has not yet ratified it.

¹⁰⁷ Notice concerning the provisions application of the CARIFORUM-EC Economic Partnership Agreement, OJ L 352/62, 31.12.2008.

¹⁰⁸ EU Commission Vice-President Siim Kallas, “EU-CARIFORUM EPA signature,” Barbados, 15 October 2008, [Online] Available from: http://www.delbrb.ec.europa.eu/en/epa/epa_signing_docs/Carib_EPA_Speech_Kallas_FINAL.pdf (Accessed 25/01/2010).

integration of Caribbean countries into the global economy.¹⁰⁹ It therefore goes beyond trade and is more oriented towards development objectives. It also intends to improve these countries' capacity in trade policy and trade related issues.¹¹⁰ The agreement provides that these objectives must be achieved through “the establishment of a trade partnership,”¹¹¹ which must be “true, strengthened and strategic.”¹¹²

The EU-CARIFORUM EPA ensures the perpetuity of the EU-Caribbean preferential trade relationship since it was concluded for an indefinite period of time.¹¹³ The Caribbean countries are generally positive about the benefits of the EU-CARIFORUM EPA on their economic growth. For instance, Ramesh Dookooh, the President of the Guyana Manufacturing and Services Association pointed out that the agreed EU-CARIFORUM EPA is “a very useful tool that allows manufactures to expand their markets” but that the full potential of the agreement “has yet to be seen.”¹¹⁴

The EU-CARIFORUM EPA is a “full” free trade agreement and therefore covers goods, services, investment, innovation and intellectual property, public procurement, competition and development cooperation. While it focuses primarily on trade liberalisation for goods and services, it also covers trade-related matters such as sanitary and phytosanitary measures, food security, environment and social

¹⁰⁹ Op. cit. footnote no 14 at Article 1(a)(b)(c).

¹¹⁰ Ibid at Article 1(d).

¹¹¹ Ibid at Article 1(a).

¹¹² Op. cit. footnote no 1 at Article 34 (2).

¹¹³ Op. cit. footnote no 14 at Article 244(1).

¹¹⁴ Ramesh Dookooh, “Our EPA was signed in 2008, but its full potential has yet to be seen,” 30.3.2010 [Online] Available from: http://trade.ec.europa.eu/doclib/stories/full_stories.cfm?ID=151&langId=EN&sort=previous (Accessed 27/07/2011).

issues. In the area of agriculture, the agreement includes a full chapter on agriculture and fisheries,¹¹⁵ and sets out a clear objective; the increase of the competitiveness of production, processing and trade in agricultural products, in both traditional and non-traditional sectors, between the parties.¹¹⁶ This must be achieved through the progressive removal of trade barriers¹¹⁷ and other commitments undertaken by the EU and the Caribbean region.

3.3 The CARIFORUM's "raison d'être" for an EPA

Although it is certain that the granting of tariff-free access to imports from the EU implies a serious loss of revenue for Caribbean countries, it is noteworthy that the CARIFORUM was the first ACP region to sign an EPA. Errol Humphrey, Ambassador of Barbados and Vice-Dean of the CARIFORUM, gave eight reasons underpinning this decision.¹¹⁸ Besides the fact that ACP countries had to conclude an EPA before the expiry of the Cotonou Agreement waiver, as Humphrey pointed out, a key issue affecting the Caribbean regions was that following a careful review of the possible alternatives "a development-oriented EPA was clearly the best option for all CARIFORUM member states."¹¹⁹

In light of the new EU trade regime with ACP countries, Article 37(6) of the Cotonou Agreement offered ACP countries which refused to sign an EPA, an alternative relationship with the EU "equivalent to their existing situation and in

¹¹⁵ Op. cit. footnote no 14 at Chapter 5 of Title I of Part II.

¹¹⁶ Ibid at Article 37.

¹¹⁷ Ibid at Article 38.

¹¹⁸ See: Humphrey, E. Ambassador of Barbados & Vice-Dean of the CARIFORUM College of EPA Negotiators, "CARIFORUM EPA Negotiations: Initial Reflections on the Outcome", *Presentation to a DG Trade-organised workshop on the CARIFORUM-EC EPA*, Brussels, 2008.

¹¹⁹ Ibid.

conformity with WTO rules.”¹²⁰ The other alternative given by the EU was the GSP scheme, which was examined in Chapter 5 of this thesis.¹²¹ Non-Least Developed Countries (LDCs) of the ACP group were offered trade preferences *via* the standard GSP scheme or the GSP+, and LDCs of the ACP group were offered similar preferences under the “Everything But Arms” (EBA) arrangement. In contrast to the other ACP regions, the CARIFORUM is the only region which is largely composed of DCs, with Haiti being the only LDC, using the UN definition. Haiti would have thus been the only possible beneficiary of the EBA arrangement.

As examined in Chapter 5 of this thesis, in the context of non-LDCs of the ACP group, the EU GSP scheme is less generous than the Cotonou Agreement, and consequently the EPAs, in terms of product coverage and tariffs reduction.¹²² Given the limited options, Caribbean countries were left with no choice but to negotiate a reciprocal EPA. Opting for the EU GSP scheme would have adversely affected the Caribbean region, and reduced access for Caribbean commodities, which enjoyed preferential access to the EU. The need to secure their existing preferences was therefore the main CARIFORUM’s reason for signing an EPA.¹²³

In addition, it must also be noted that the Caribbean is the only region which signed a “full” EPA, covering not only trade liberalisation of goods but also free trade for services and investment. The signature of an “interim” partnership, which is limited to industrial and agricultural goods only, would have been in conformity

¹²⁰ Op. cit. footnote no 1 at Article 37(6).

¹²¹ See European Commission, “Economic Partnership Agreements”, Brussels, 23 October 2007, COM (2007) 635 final.

¹²² This was covered in Chapter 5 of this thesis.

¹²³ See CRNM Note on CARIFORUM Economic Partnership Agreement, “EPAs: The Way Forward for the ACP”, COMSEC-sponsored High Level Technical Meeting, Cape Town, 7-8 April 2008.

with the WTO legal requirements. The WTO rules on FTAs provides only for the elimination of customs duties on goods. The signature of a “full” EPA was therefore not required by the WTO rules. However, while the president of Guyana called for the conclusion of a goods only EPA,¹²⁴ the decision to sign a ‘full’ agreement was justified by the Caribbean negotiators. They considered the EPA to be a partnership going beyond market access for goods, and included “Development Cooperation, Trade in Goods, Trade in Services, and Trade related issues ([Sanitary and Phytosanitary] etc)”.¹²⁵ In their view, due to the issue of preference erosion and decline in agricultural prices, there was a need for the region to “diversify its export base,” and improve the region’s access to the EU market for non-traditional sectors.¹²⁶ The Caribbean is the only “net supplier of services” among ACP countries, with the service sector being an important contributor to most CARIFORUM countries.¹²⁷ Therefore ensuring privileged access to the EU services market was considered to be “a prime requirement to drive increased growth of Caribbean economies.”¹²⁸ It is believed that the conclusion of an interim partnership “would have entailed the adjustment cost of liberalization without garnering the gains from the inclusion of services, investment and development-boosting measures.”¹²⁹ The conclusion of such a partnership seemed therefore to be necessary for the Caribbean region. Ensuring privileged access for the Caribbean countries’ non-traditional products to the EU

¹²⁴ “Guyana wants goods only from EPA”, nationnews.com, Barbados’ leading newspaper, 9.7.2008 [online] Available from: <http://barpublish.bits.baseview.com/309387000746131.php> (Accessed 28/7/2011).

¹²⁵ Op. cit. footnote no 118.

¹²⁶ CRNM Note on CARIFORUM Economic Partnership Agreement, “What Europe is Offering Africa: the Pros and Cons of EPAs”, London, 2 April 2008.

¹²⁷ Caribbean Policy Research Institute, “The Long-Term Impact of EPA in the Caribbean: Jamaica and St. Lucia”, A working Paper, CaPRI, 2009, p 11.

¹²⁸ All CARIFORUM states, except Guyana and Suriname, have a service sector that is the most significant contributor to GDP. See Op. cit. footnote no 126.

¹²⁹ Op. cit. footnote no 38, p. 22

market will therefore improve their economic diversification, and allow them to be less dependent on agri-food exports which currently suffer from preference erosion.

4. EU and Caribbean’s legal commitments in agriculture and agricultural trade matters

4.1 Market access for agricultural products

As was discussed in Chapter 5 of this thesis, the EU has adopted Regulation (EC) No 1528/2007 which provides for the new arrangements for products imported from the ACP Group of States.¹³⁰ In accordance with Article 3 of this regulation, ACP Caribbean countries, as well as all other ACP regions, have received duty and quota free access to the EU market for their agricultural commodities since January 2008 with a transitional period for sugar examined further below.¹³¹ However, in line with Article 37 of the Cotonou Agreement, ACP Caribbean countries were granted a flexible transition period and were given in some cases up to twenty-five years to open their domestic market to EU products in order to protect sensitive sectors.¹³² This option would thus allow “firms and governments to adjust gradually in keeping with their capacities” in order to be more competitive.¹³³

In addition, pursuant to Article 37(4) of the Cotonou Agreement and in line with Article XXIV GATT 1947, the elimination of customs duties on Caribbean

¹³⁰ Article 3(1) of Council Regulation (EC) No 1528/2007 of 20 December 2007 applying the arrangements for products originating in certain states which are part of the African, Caribbean and Pacific (ACP) Group of States provided for in agreements establishing, or leading to the establishment of, Economic Partnership Agreements, OJ L 348/1 31.12.2007.

¹³¹ A transitional period applied also to rice import. See *Op. cit.* footnote no 30 at Article 6 and 8.

¹³² See *Op. cit.* footnote no 14 at Appendix 1 of Annex III which provides for the schedule of tariff liberalisation of CARIFORUM States.

¹³³ *Op. cit.* footnote no 38, p 65.

countries' exports does not apply to products indicated in Annex II of the agreement.¹³⁴ In order to protect local producers, the Caribbean countries were given the possibility to exclude about 20 percent of EU imports from the scope of GATT liberalisation.¹³⁵ Products excluded comprise for instance meat, dairy and certain fruits and vegetables. Sugar and bananas, as key tropical food commodities for the Caribbean region, have also been excluded from the process.¹³⁶ This possibility would thus limit the impact of liberalisation on the Caribbean's economy.

There is no doubt that free market access for EU products will impact on the small economic size of Caribbean countries. As a result, the EU-CARIFORUM EPA authorises countries to apply safeguard measures of limited duration to products which are imported in "such quantities and under such conditions as to cause or threaten to cause" disturbances into the markets of the importing country.¹³⁷ The latter will have the possibility to introduce tariff quotas,¹³⁸ or apply a customs duty to the products concerned.¹³⁹ The safeguard clause would therefore be of particular benefit to CARIFORUM countries.

In addition to the liberalisation of trade in goods, the EU-CARIFORUM EPA also protects local agricultural producers from the EU export subsidies. The EU has committed itself to remove all existing export subsidies on the exportation of

¹³⁴ As explained in Chapter 5 of this thesis, GATT Article XXIV requires liberalisation on only "substantially all the trade" on goods.

¹³⁵ Meyn, M., "Economic Partnership Agreements: A 'Historic Step' Towards a 'Partnership of Equals'?", *Development Policy Review*, 2008, 26(5), pp. 515-528, p 524.

¹³⁶ See Op. cit. footnote no 14 at Appendix 1 of Annex III for products excluded from the liberalisation process.

¹³⁷ Ibid at Article 25(2).

¹³⁸ Quantitative restrictions are normally prohibited by the EPA under its Article 26.

¹³⁹ Op. cit. footnote no 14 at Article 25(3).

agricultural products to the Caribbean region, for which the latter has agreed to the elimination of customs duties.¹⁴⁰ In contrast, given the importance of subsidies for the economic development of DCs, the EU-CARIFORUM EPA confirms the WTO special and differential treatment provisions,¹⁴¹ and does not require Caribbean countries to eliminate export subsidies which comply with the WTO rules.¹⁴² The agreement further provides that both Caribbean countries and the EU must not increase any agricultural export subsidies nor introduce any agricultural export subsidies programme.¹⁴³

4.2 Information sharing and consultation

Under the EU-CARIFORUM EPA, the Caribbean region and the EU have committed themselves to consult with each other on any issues relating to the removal of barriers for agricultural producers in the Caribbean.¹⁴⁴ Such a consultation process is wide, with parties agreeing to exchange experiences, information and ideas on agriculture production, consumption and trade, the respective market developments for agricultural products, rural development policies, laws and regulations.¹⁴⁵ The EU and the CARIFORUM must also discuss policy and institutional changes required to “underpin the transformation of the agricultural [...] sector as well as the formulation and implementation of regional policies on agriculture, food, rural development [...] in the pursuit of regional integration.”¹⁴⁶ In addition to this, the EU has also committed itself to consult with

¹⁴⁰ Ibid at Article 28(2).

¹⁴¹ Article 9(4) of the WTO Agreement on Agriculture and Article 27 of the WTO Agreement on Subsidies and Countervailing.

¹⁴² Op. cit. footnote no 14 at Article 28(4).

¹⁴³ Ibid at Article 28(1).

¹⁴⁴ Ibid at Article 40(1).

¹⁴⁵ Ibid at Article 41(a) and (c).

¹⁴⁶ Ibid at Article 41(d).

the Caribbean region before engaging in trade policy developments and arrangements with third countries.¹⁴⁷ This is because potential developments and arrangements with other countries could impact on the competitive positions of the Caribbean countries' traditional agricultural products in the EU market. This would include consultations on bananas, rum, rice and sugar exports.¹⁴⁸

4.3 Sanitary and Phytosanitary standards issues

As discussed in Chapter 6 of this thesis, sanitary and phytosanitary (SPS) requirements imposed by the WTO members can serve as barriers for agricultural product market access. The EU in particular imposes strict and high food safety standards, both on domestic and on imported products.¹⁴⁹ The EU has always acknowledged the necessity to maintain and increase the protection of plant, animal and human health, so no special treatment in EU SPS measures has been granted to Caribbean countries under the EU-CARIFORUM EPA. Instead, it promises to facilitate the access of Caribbean countries' products by preventing and minimising unintended trade barriers as the result of SPS measures.¹⁵⁰ The EU has made a commitment to assist Caribbean countries to comply with the EU SPS standards, by developing the capacity of CARIFORUM enterprises,¹⁵¹ and by sharing expertise. This would improve market access conditions for Caribbean countries' agricultural food products. The EU has also promised to ensure a harmonisation of SPS measures within its market,¹⁵² and to notify CARIFORUM

¹⁴⁷ Ibid at Article 42(1) and 200.

¹⁴⁸ Ibid at Article 42 (1) and 200.

¹⁴⁹ This issue was covered in Chapter 6 of this thesis.

¹⁵⁰ Op. cit. footnote no 14 at Article 53(a) and (b).

¹⁵¹ Ibid at Article 53 (d) and Article 59(2)(c).

¹⁵² Ibid at Article 56(2).

on any SPS issues that may affect trade.¹⁵³ When such problems arise, the ‘Competent Authorities’ of the EU and the CARIFORUM must undertake consultations with each other in order to reach a “mutually agreed solution.”¹⁵⁴

5. The implementation of the EU-CARIFORUM EPA

5.1 Institutional arrangements

The commitments undertaken by the CARIFORUM and the EU are reinforced by four joint consultative and decision-making institutions which have been established in order to facilitate the implementation of the agreement. The joint CARIFORUM-EU Council is the most important of these.¹⁵⁵ It is composed of members of the Council of the EU, members of the European Commission and representatives of the governments of the Caribbean countries.¹⁵⁶ The joint Council has been set up to supervise the implementation of the EU-CARIFORUM EPA and to monitor the fulfilment of its objectives. It is therefore necessary for the joint Council to meet regularly, at least every two years. It is responsible for examining proposals and recommendations addressed by the EU and the CARIFORUM for the review of the EU-CARIFORUM EPA.¹⁵⁷ Final decisions with regard to all matters covered by the EU-CARIFORUM EPA rest with the joint Council, whose decisions must be observed by all the EPA participants.¹⁵⁸

¹⁵³ Ibid at Article 58(1).

¹⁵⁴ Ibid at Article 58(2).

¹⁵⁵ The first meeting of the Joint Council was held on 17th March 2010.

¹⁵⁶ Op. cit. footnote no 14 at Article 228. The Joint council is chaired in turn by a representative of the EU party and by a CARIFORUM representative.

¹⁵⁷ Ibid at Article 227(3).

¹⁵⁸ Ibid at Article 229 (1) and (2).

The joint Council is assisted by a joint Trade and Development Committee, which is the second most important institutions of the EU-CARIFORUM EPA. Its members are representatives of the EU and the CARIFORUM at senior official level who can meet whenever needed.¹⁵⁹ The Committee must nevertheless meet at least once a year for an overall review of the implementation of the EU-CARIFORUM EPA.¹⁶⁰ The Committee performs the administrative tasks of the agreement. It is particularly responsible for monitoring and controlling the implementation of the agreement in the areas of trade and development, in addition to resolve any disputes that may arise.¹⁶¹

In addition, the EU-CARIFORUM EPA provides for the establishment of a Parliamentary Committee to allow members of the EP and of the Caribbean states' parliaments to meet at regular intervals and exchange views.¹⁶² The joint Council must therefore communicate its decisions and recommendations to this Committee and provide it with additional information if requested.¹⁶³ The Parliamentary Committee can also make recommendations to both Joint Council and Trade and Development Committee.¹⁶⁴ Finally, a Consultative Committee has been set up in order to "promote dialogue and cooperation" with organisations of civil society, including the academic community, and social and economic partners.¹⁶⁵ The Consultative Committee fulfils its activities on the basis of consultation by the

¹⁵⁹ Ibid at Article 230(4)(b).

¹⁶⁰ Ibid at Article 230(5).

¹⁶¹ The functions of the Trade and Development Committee are set up in Article 230(3) of the EU-CARIFORUM EPA.

¹⁶² Op. cit. footnote no 14 at Article 231(1).

¹⁶³ Ibid at Article 231(5) and (6).

¹⁶⁴ Ibid at Article 231(7).

¹⁶⁵ Ibid at Article 232(1).

Joint Council, or on its own initiative. It can also make recommendations to both Joint Council and Trade and Development Committee.¹⁶⁶

These joint EU-CARIFORUM EPA bodies, as well as the domestic institutions, have been given a crucial role in the implementation process of the agreement. They must “ensure that the objectives of the Agreement are realised, the Agreement is properly implemented and the benefits for men, women, young people and children deriving from their Partnership are maximised.”¹⁶⁷ Given the permanent nature of the EU-CARIFORUM EPA, it is also believed that the institutional arrangements under the agreement will help meeting the needs of the EU and CARIFORUM which will certainly evolve over time.¹⁶⁸

5.2 EU development support provisions

The EU-CARIFORUM EPA is more than a free trade agreement and is also accompanied by development support measures. This is in line with the decision taken by both ACP countries and the EU during the negotiations process, to integrate “appropriate development support measures,” which must be “complementary and mutually supportive.”¹⁶⁹ These measures were necessary to help ACP countries and regions “maximise the benefits deriving from EPAs.”¹⁷⁰

While, providing development aid to the Caribbean region is not the primary purpose of the agreement, development cooperation is considered to be a “crucial

¹⁶⁶ Ibid at Article 232(3) and (5).

¹⁶⁷ Ibid at Article 5.

¹⁶⁸ Op. cit. footnote no 38, p 88.

¹⁶⁹ Op. cit. footnote no 95, p 7

¹⁷⁰ Ibid., p 7.

element” of the partnership.¹⁷¹ Given the capacity limits of Caribbean countries, it is expected that the EU-CARIFORUM EPA will lead to major implementation costs. The agreement is thus taking into account the level the CARIFORUM economies growth and has identified eight priority areas. This includes, providing technical assistance to build human, legal and institutional capacity in the CARIFORUM States, support for institutional reforms, new investment and the development of new sectors, enhancing the technological and research capabilities, the development of technological capacity, and support measures to promote private sector and enterprise development.¹⁷² Development aid given to Caribbean countries under the EU-CARIFORUM EPA has two dimensions. It is given as a “compensatory scheme”¹⁷³ in order to help countries comply with implementing the provisions of the agreement and in meeting the costs of adjustment. Moreover, countries also receive aid in order to enhance market access opportunities for the export of goods and services.¹⁷⁴ Consequently, aid under the EU-CARIFORUM EPA is also designed as a “promotion scheme.”¹⁷⁵ The development cooperation clause of the EU-CARIFORUM EPA addresses the vulnerability of Caribbean countries and seeks to increase the participation of the Caribbean within the international trade competition. It is therefore believed that this assistance “[could] have a positive impact on [economic] growth.”¹⁷⁶

¹⁷¹ Op. cit. footnote no 14 at Article 7.

¹⁷² Ibid at Article 8.

¹⁷³ Moreira, E.P., “Aid for Trade, Infrastructure, and the Growth Effects of trade Reform: Issues and Implications for Caribbean Countries”, Policy research Working Paper 5265, the World Bank, 2010, p 6.

¹⁷⁴ Op. cit. footnote no 127, p 13.

¹⁷⁵ Op. cit. footnote no 173, p 11

¹⁷⁶ Op. cit. footnote no 38, p 8.

A joint declaration on development cooperation, attached to the EU-CARIFORUM EPA has identified the EDF and the MS contributions to the EU Aid for Trade Strategy program, as the main financial instruments providing financial support to help Caribbean countries implement the EPA. The 10th EDF has an overall budget of EUR 22 682 million for the period 2008-2013 and has allocated EUR 21 966 million to ACP countries.¹⁷⁷ The Caribbean region has been allocated EUR 165 million for financing the Caribbean Regional Indicative Programme (CRIP).¹⁷⁸ Between 85-90 percent of this amount is allocated to support the regional economic integration and the CARIFORUM-EU EPA development cooperation priority areas. The rest of the fund serves to address vulnerabilities and social issues.¹⁷⁹ It must also be noted that the EDF allocations also provide support to the national indicative programmes (NIP)¹⁸⁰ of each Caribbean country which are geared to implementing the EU-CARIFORUM EPA. This is of particular importance given the differences among Caribbean countries' economies and needs. For instance, under the 10th EDF NIP, Guyana and Jamaica have been allocated EUR 51 million and EUR 110 million.¹⁸¹ The 10th EDF will be followed by a financial protocol covering the period 2014-2020.¹⁸² This will ensure the

¹⁷⁷ Council regulation (EC) No 617/2007 of 14 May 2007 on the implementation of the 10th European Development Fund under the ACP-EC Partnership Agreement, OJ L 152, 13.6.2007. Most funds of the 10th EDF are programmed in Decision No 1/2006 of the ACP-EC Council of Ministers of 2 June 2006 specifying the multiannual financial framework for the period 2008 to 2013 and modifying the revised ACP-EC Partnership Agreement, OJ L 247, 9.9.2006.

¹⁷⁸ Op. cit. footnote no 40, p 40.

¹⁷⁹ Ibid., p 40.

¹⁸⁰ The NIPs are agreed in consultations between the European Commission and each ACP country. See Dearden, S., "The EU Banana Protocol" in Dearden, S. Ed. *The European Union and the Commonwealth Caribbean*, Ashgate Publishing Limited, England, 2002, p 27.

¹⁸¹ See Jamaica-European Community, "Country strategy Paper and National Indicative Programme for the period 2008-2013", signed by both the EU and Jamaica in November 2008, p 2 and Co-operation between the European Commission and the Co-operative Republic of Guyana, "Country strategy Paper and National Indicative Programme for the period 2008-2013", signed by both the EU and Guyana in December 2008, p 30.

These Country Strategy Papers are available from:

http://ec.europa.eu/europeaid/where/acp/overview/csp/csp_10th_edf_en.htm (Accessed 20/7/2011).

¹⁸² Op. cit. footnote no 52.

continuity of funds to ACP countries until the end of the Cotonou Agreement scheduled for 2020.

The EU Aid for Trade Strategy works towards “generating growth, employment and income.”¹⁸³ It provides that the EU, through the European Commission, and its MS is committed to provide EUR 1 billion each year by 2010 in order to support DCs and LDCs’ “efforts to reform and to adjust to the world trading system, in the wider context of sustainable development.”¹⁸⁴ The Council decided to make 50 percent of the total amount available to ACP countries needs.¹⁸⁵ This is confirmed by the EU-CARIFORUM EPA under which the EU MS have committed to ensure that Caribbean countries will benefit from “an equitable share” of their Aid for Trade obligations.¹⁸⁶ The EU-CARIFORUM EPA is thus going beyond the EDF which is the main source of EU aid funding for ACP countries.

6. The treatment of bananas within the EU-CARIFORUM EPA

6.1 Duty and quota free access to the EU banana market

In the context of the EPAs the Cotonou Agreement provided that the EU and the ACP countries agreed to review the commodity protocols attached to the Cotonou agreement, “in particular as regards their compatibility with WTO rules, with a view to safeguarding the benefits derived therefrom [...]”¹⁸⁷ Consequently, all ACP signatories of the EPAs were granted duty- and quota-free access to the EU

¹⁸³ European Commission, “Towards an EU Aid for Trade strategy – The Commission’s contribution”, Brussels, 4.4.2007, COM (2007) 163 final, p 2.

¹⁸⁴ *Ibid.*, p 2 and 4.

¹⁸⁵ The Council of the European Union, “EU Strategy on Aid for Trade: Enhancing EU support for trade-related needs in developing countries- Conclusions of the Council and of the Representatives of the Governments of the Member States meeting the Council”, Brussels, 29 October 2007, p 12.

¹⁸⁶ *Op. cit.* footnote no 14 at “Joint Declaration on Development Cooperation.”

¹⁸⁷ *Op. cit.* footnote no 1 at Article 36(4).

banana market from January 2008.¹⁸⁸ With regard to ACP Caribbean countries, such a treatment was not made reciprocal. As was discussed in Chapter 5 of this thesis, Article XXIV GATT provides a degree of flexibility with regard to the liberalisation of goods in free trade areas. Accordingly, bananas have been identified as sensitive products for Caribbean producers, and they were excluded indefinitely from the scope of GATT liberalisation.

In addition, the EU-CARIFORUM EPA contains a joint declaration on bananas which clearly recognizes the importance of bananas to the social, political and economic development of a number of Caribbean countries. The EU and CARIFORUM countries also fully acknowledge that the substantial tariff preferences granted in the past have been of particular benefit to Caribbean banana exports, hence “the maintenance of such preference for as long as possible would increase the benefits resulting from the [EU-CARIFORUM EPA].”¹⁸⁹ The joint declaration also commits the EU to provide funding to “help the CARIFORUM banana industry” to adjust to the challenges arising from the new EU banana import regime.¹⁹⁰ Finally, as previously mentioned, Article 42 of the EU-CARIFORUM EPA, dealing with traditional agricultural products, commits the EU to undertake “prior consultations” with the CARIFORUM on trade policy issues that may impact on the competitive position of Caribbean bananas.¹⁹¹ Accordingly, this provision should give Caribbean banana producers some assurance with regard to any tariff changes to be made by the EU in light of the need to be in compliance with the WTO rules, or under other agreements between

¹⁸⁸ Op. cit. footnote no 130 at Article 3(1).

¹⁸⁹ Op. cit. footnote no 14 at “Joint Declaration on Bananas.”

¹⁹⁰ Ibid.

¹⁹¹ Op. cit. footnote no 14 at Article 42(1).

the EU and DCs. Echoing the provisions of the Joint declaration on bananas attached to the EU-CARIFORUM EPA, Article 42 of the EU-CARIFORUM EPA further requires the EU to “endeavour to maintain significant preferential access within the multilateral trading system” for Caribbean’s bananas “for as long as it is feasible and to ensure that any unavoidable reduction in preference is phased in over as long a period as possible.”¹⁹²

6.2 The Banana Accompanying Measures (BAM)

In March 2010, the EU Commission acknowledged the socio-economic importance of banana exports to the EU market for some ACP countries, and therefore the need to address the reduction in their tariff preferences that they will face due to the new MFN tariffs.¹⁹³ Consequently, the Commission proposed the Banana Accompanying Measures (BAM) programme, which was designed to assist ACP countries to cope with the new market conditions. The BAM builds on previous support programmes, the Special System of Assistance (SSA) provided from 1994 to 1999,¹⁹⁴ and the Special Framework of Assistance (SFA) which was in place from 1999 to 2008.¹⁹⁵ These programmes were established in the past in order to assist traditional ACP suppliers adversely affected by the changes in the EU Common Market Organisation for Bananas (CMOB), which will be analysed in Chapter 9 of this thesis. It must be noted that although the SFA scheme expired in

¹⁹² Ibid at Article 42(2).

¹⁹³ European Commission, “Banana Accompanying Measures: Supporting the Sustainable Adjustment of the Main ACP Banana-Exporting Countries to New Trade Realities,” Brussels, 17.3.2010, COM (2010) 101 final.

¹⁹⁴ Council Regulation (EC) No 2686/94 of 31 October 1994 establishing a special system of assistance to traditional ACP suppliers of bananas, OJ L 286, 5.11.1994.

¹⁹⁵ Council Regulation (EC) No 856/1999 of 22 April 1999 establishing a special framework of assistance for traditional ACP suppliers of bananas, OJ L 108, 27.4.1999 and Commission Regulation (EC) No 1609/1999 of 22 July 1999 laying down the detailed rules for the implementation of Council Regulation (EC) no 856/1999 establishing a special framework of assistance to tradition ACP suppliers of bananas, OJ L 190, 23.7.1999.

December 2008, disbursement of all on-going programmes will continue until the end of 2012.¹⁹⁶ The BAM programme is proposed to be temporary, and would last for a maximum of four years, starting from 2010. The Commission has proposed a budget of EUR 190 million for the implementation of the BAM. However, the BAM programme is not offered to all ACP countries and the Commission has identified ten main ACP banana-supplying countries that would benefit from the BAM on the basis of the quantity exported to the EU. Accordingly, the BAM will provide financial support to seven ACP Caribbean countries, and to three ACP African countries, as they have exported more than 10,000 tonnes of bananas on average over the last ten years.¹⁹⁷ According to the Commission, the BAM will take into account “the countries’ own policies and adaptation strategies.” This should help them adapt to new international trade environment and “guide the delivery of EU assistance,” thereby ensuring that the BAM measures are “relevant and effective.”¹⁹⁸ Consequently, the BAM will support banana exporters “to become more competitive,” support economic diversification and help tackle social, environmental and economics impacts, in ACP countries, where this is an important and feasible strategy.¹⁹⁹ Support will be allocated on the basis of a National Adaption Strategy provided by each ACP country. Consequently, depending on the importance of the banana industry in their economy, it is crucial for each ACP country to clearly identify the key issues in their banana sector that need to be addressed and that require EU intervention. The Commission proposed the BAM to be included within the EU’s Development Cooperation Instrument,

¹⁹⁶ European Commission, “Biennial Report of the Special Framework of Assistance for Traditional ACP suppliers of Bananas,” Brussels, 17.3.2010, COM (2010) 103 final.

¹⁹⁷ Belize, Cameroon, Cote D’Ivoire, Dominica, Dominican Republic, Ghana, Jamaica, Saint Lucia, Saint Vincent and the Grenadines, and Suriname.

¹⁹⁸ Op. cit. footnote no 193, p 6.

¹⁹⁹ Ibid., p 6.

which is currently governed by Council Regulation (EC) 1905/2006. Therefore, support will additionally be provided under the BAM, as well as under the European Development Fund.

7. The treatment of sugar within the EU- CARIFORUM EPA

7.1 Transitional periods

7.1.2 From 1st January 2008 to 30 September 2009

In light of the new legal framework for trade with ACP countries and, also in the context of the reformed EU sugar market, which will be examined in Chapter 8 of this thesis, the EU has decided to terminate the ACP-EU Sugar Protocol (SP), effective 1st October 2009. The SP, which was provided in conjunction with the provisions of the wider Cotonou Agreement,²⁰⁰ offered to the beneficiaries ACP countries preferential access for sugar to the EU market. The trade preference programme for ACP sugar will be discussed further in Chapter 8 of this thesis.

During the first phase, the SP continued until the 30th September 2009 and thus maintained guaranteed prices for specific quantities of sugar imported from SP countries for an additional year. During this phase, and until the complete elimination of EU customs duties, ACP regions that initialled interim or comprehensive EPAs gained further market access to the EU through additional quantities of sugar at zero duty. The quantities were set over and above the quantities given under the SP.²⁰¹ The CARIFORUM region received an additional quantity of 60 000 tonnes, with half of this amount reserved for the Dominican

²⁰⁰ Protocol 3 on ACP sugar attached to Annex V of the Cotonou Agreement of 2000.

²⁰¹ Op. cit. footnote no 130 at Article 7(2).

Republic.²⁰² It must be remember that the island is not a member of CARICOM and was not a signatory of the SP.²⁰³ In light of this, it was pointed out that giving the most important share of the additional quota to a country that was not exporting sugar to the EU market under the SP could be seen as a “*de facto* reduction of access for traditional Caribbean sugar suppliers based on historical levels of preferential access granted.”²⁰⁴ However it is also recognised that this decision was in line with the fact that the island is among the “more competitive Caribbean raw-sugar suppliers” and is the “best placed to expand sugar exports.”²⁰⁵ Therefore, with the Dominican Republic included in the CARIFORUM EPA, it is possible to argue that sugar exports from the Caribbean region to the EU could be significant. During this period, the EU also reallocated any undelivered agreed quantities of sugar from the SP signatories, among other CARIFORUM members exporting sugar under the SP.²⁰⁶

7.1.3 From 1st October 2009 to 30th September 2015

Following the termination of the SP, the second phase provides for duty- and quota free access to the EU sugar market from October 2009 for all ACP countries exporting cane sugar.²⁰⁷ Up to 30th September 2012, EU importers can purchase sugar at a minimum price of no lower than 90 percent of the EU reference price, as

²⁰² Op. cit. footnote no 14 at Annex II(4).

²⁰³ See Annex to Protocol 3 on ACP sugar “Exchange of letters between the Dominican Republic and the Community concerning the protocol on ACP sugar”, under which Dominican Republic notified the Community its intention not to accede “neither now nor in the future” to the sugar protocol.

²⁰⁴ Technical Centre for Agriculture and Rural Cooperation ACP-EU (CTA), “News and analysis of events affecting ACP agricultural trade,” Sugar: Executive brief, 2009, p 9.

²⁰⁵ Ibid., p 9.

²⁰⁶ Op. cit. footnote no 14, “Joint declaration on reallocation of undelivered quantities under the Sugar Protocol.”

²⁰⁷ Op. cit. footnote no 130 at Article 7(1).

established in Article 3 of Regulation (EC) No 318/2006.²⁰⁸ In such a case, preferential import license must be granted to the EU importer.²⁰⁹ Between 1st October 2009 and 30th September 2015, the quantities imported are subject to a transitional volume-safeguard mechanism, which applies when sugar imports from ACP countries “cause or threaten to cause disturbances in the economic situation of one or several of the [EU]’s outermost regions.”²¹⁰ Accordingly, the EU may decide to apply MFN tariffs on sugar imported from CARIFORUM countries when the total imports from all ACP countries exceeds 3.5 million tonnes in a marketing year, and when imports from non-LDCs of the ACP group exceed the quantities of sugar set in Annex II of the CARIFORUM-EU EPA.²¹¹ However, this measure does not affect Haiti, which is the only country in the region recognised by the UN as LDC.²¹²

Lastly, from the 1st October 2015, the regular safeguard measures,²¹³ as provided in Article 25 of the CARIFORUM-EU EPA will apply if during a period of twelve consecutive months, the price of white sugar within the EU market falls below 80 percent of the internal price for white sugar “prevailing during the previous marketing year.”²¹⁴

²⁰⁸ Op. cit. footnote no 14 at Annex II(6).

²⁰⁹ Ibid.

²¹⁰ Op. cit. footnote no 130 at Article 12(2).

²¹¹ 1.38 million tonnes during the 2009/2010 year, 1.45 million tonnes in 2010/2011 and 1.6 million tonnes per marketing year during the 2011/12-2014/15 periods. See Op. cit. footnote no 14 at Annex II(5).

²¹² Op. cit. footnote no 14 at Annex II (5b).

²¹³ The safeguard measures include for instance an increase in the customs duty and the introduction of tariff quotas. See Op. cit. footnote no 14 at Article 25(3).

²¹⁴ Ibid at Annex II(6).

7.2 The Accompanying Measures for Sugar Protocol Countries (AMS)

Given the socioeconomic importance of the sugar sector for ACP countries, its multifunctional role as well as the degree of reliance on the EU market, the Commission is committed to provide support to SP countries in their adjustments to the new market conditions.²¹⁵ While EU farmers receive direct compensation for their income loss, some “accompanying measures” have been established for SP countries affected by the sugar reform.²¹⁶ This assistance was granted in addition to other development assistance instruments in place and included financial as well technical assistance, including budget support.²¹⁷ An overall amount of EUR 40 millions was adopted by the European Parliament and the Council in order to finance these measures.²¹⁸ Each SP country was allocated a share of this financial envelope, fixed by the Commission and based on the needs of each country.²¹⁹ Accordingly, assistance was provided on the basis of each country’s accompanying “comprehensive, multiannual adaptation strategy” that would pursue specific objectives.²²⁰ These objectives include enhancing the competitiveness of ACP sugar cane sector, promoting alternative economic activities such as the production of bio-ethanol, and addressing the broader social, employment and environmental impacts generated by the reforms.²²¹ Although the AMS scheme was provided until 31 December 2006, SP countries continue to receive further long-term support under the Development Cooperation Instrument (DCI). The DCI is guided by the Millennium Development Goals and provides DCs with financial assistance

²¹⁵ European Commission, “Action Plan on accompanying measures for Sugar Protocol countries affected by the reform of the EU sugar regime”, Brussels, SEC (2005) 61, 17.1.2005.

²¹⁶ Regulation (EC) No 266/2006 of the European Parliament and of the Council of 15 February 2006 establishing accompanying measures for Sugar Protocol countries affected by the reform of the EU Sugar Regime, OJ L 50, 21.2.2006.

²¹⁷ *Ibid* at Article 1 and 11(2).

²¹⁸ *Ibid* at Article 8.

²¹⁹ *Ibid* at Article 9.

²²⁰ *Ibid* at Article 3(4).

²²¹ *Ibid* at Article 4.

for the period 2007-2013.²²² Under this broader financial framework, ACP SP countries have been allocated EUR 1 244 billion by the EU.²²³

8. Conclusion

The CARIFORUM-EU EPA, which was concluded in 2008 between the Caribbean region and the EU, continues to provide Caribbean countries preferential access to the EU agricultural market. With all Caribbean countries' agricultural food products entering the EU market duty and quota free, the Caribbean region is ensured a permanent preferential access to the EU market that is compliant with WTO rules. However, the agreement has also changed the crucial aspect of the traditional non-reciprocal trade regime between the EU and Caribbean countries. The reciprocal trade preferences have been implemented between two regions which do not enjoy the same economic power. In contrast to the EU, the Caribbean region has a 'fragile' economy and 'structural environment.'²²⁴ So, there is no doubt that the shift towards reciprocity will involve significant consequences for Caribbean countries. Although it is too early to assess the real socio-economic impact, there is no doubt that, while the government of the Caribbean countries will lose important revenue due to the elimination of tariffs on EU imported products, they will also have to face important EU-CARIFORUM EPA implementation costs. This latter issue remains probably the greatest challenges for Caribbean countries. Therefore, while the principle of reciprocity is in line with the WTO requirements, it is obvious that it has also reduced the value of the WTO special and differential treatment principle.

²²² Article 2 (1) of Regulation (EC) No 1905/2006 of the European Parliament and of the Council of 18 December 2006 establishing a financing instrument for development cooperation, OJ L 378/41, 27.12.2006

²²³ Ibid at Annex IV.

²²⁴ Op. cit. footnote no 23, p 25.

In addition, while the EU-CARIFORUM EPA was well received among the signatories, it has particularly left a “bitter taste” for the president of Guyana, Bharrat Jagdeo, who claims that the concluded EU-CARIFORUM EPA was a “well thought-out ploy by Europe to dismantle the solidarity of the ACP [...] countries by effectively dividing the ACP into six negotiating theatres – that is six EPAs – and playing one off against the other which they did very effectively.” He believes that the Caribbean region “did not win anything whatsoever.”²²⁵ However, everything is not lost for the Caribbean region. It is worth recalling that Caribbean countries’ trade liberalisation towards EU agricultural food products has been treated as an exception. Most agricultural food products which Caribbean countries would look to export have been either excluded from the liberalisation process or subject to longer implementation phases. Given these exceptions, the Agreement is therefore not a fully reciprocal agreement. Moreover, the CARIFORUM-EU EPA takes into account the Caribbean countries’ level of development, and has therefore put a “development cooperation” clause at the centre of the agreement. This clause commits the EU to provide financial assistance to Caribbean countries to help them with capacity building and structural changes. It is important for Caribbean countries to clearly identify their needs and assess whether the funds allocated to them will help them to cope effectively with the changes caused by the implementation of the EU-CARIFORUM. At last, if necessary, the Caribbean region will have the possibility to seek amendments of the provisions of the agreement, following the mandatory review of the EU-CARIFORUM EPA, which

²²⁵ “The Caribbean lost in the negotiations with Europe” Starbroek News, 6th January 2008, [Online] Available from: <http://www.starbroeknews.com/2008/news/stories/01/06/the-caribbean-lost-in-the-negotiations-with-europe-jagdeo/> (Accessed 28/07/2011).

must take place every five years following its conclusion.²²⁶ The aim of this review is to “determine the impact of the Agreement, including the costs and consequences of implementation” and to revise the provisions of the EU-CARIFORUM EPA as well as adjusting their application if needed.²²⁷ This will, for example, give Caribbean countries the opportunity to extend their liberalisation schedule.

Furthermore, as examined in Chapter 2 of this thesis, the Lisbon Treaty has given the European Parliament and the EU MS important leverage in EU agricultural policy making. However, in light of the provisions of the EU-CARIFORUM EPA, there is little doubt that these internal changes would affect the EU’s external trade relations with Caribbean countries in agricultural commodities. The EU and the Caribbean region are bound by a partnership agreement providing firm commitments on agriculture and trade related areas, which must be undertaken by each party. The agreement further requires that any policy changes, particularly if they are likely to impact on Caribbean countries’ exports capacity, must be discussed and agreed on by all partners within the established joint institutions. Membership of these joint institutions comprises both members of the EU and CARIFORUM, which must mutually agree on decisions taken. The EU-CARIFORUM EPA has thus preserved the autonomy of Caribbean countries and the Caribbean regional economic communities. Consequently, it is important for Caribbean countries to maintain a constant dialogue with the EU on important issues, in order to ensure that their interests are effectively taken into account.

²²⁶ Op. cit. footnote no 14, “Joint Declaration on the signing of the Economic Partnership Agreement.”

²²⁷ Ibid.

Chapter 8 The EU sugar import regime

1. Introduction

The commodities of sugar and bananas, specifically those produced by the Caribbean region of the African, Caribbean and Pacific (ACP) Group, have been selected to function as case studies for this thesis. In order to further the understanding of the context and operation of the legal framework for the European Union-destined trade in these commodities, it is important to examine both the internal and external dimension of the European Union (EU) regime for sugar and bananas. This chapter focuses on the various provisions of the EU sugar regime which have an impact on the trade into and out of the EU in sugar, while the following chapter examines the EU banana regime.

The EU policy regime for sugar, referred to as the common organisation of the market (CMO) in sugar, was first set up in July 1968 by Regulation (EEC) No. 1009/67, making sugar fully part of the Common Agriculture Policy (CAP).¹ The CMO in sugar covers raw and white sugar, as well as isoglucose and insulin syrup, which are two liquid substitutes for sugar.² It was implemented in order to guarantee “a fair income” to the producers, and ensure supplies to the market from internal production.³ Cane sugar is the only agricultural commodity produced in developing countries (DCs) which competes directly with beet sugar produced in

¹ Regulation No 1009/67/EEC of the Council of 18 December 1967 on the common organisation of the market in sugar, OJ 308, 18.12.1967.

² Article 1(1) and Preamble 1 of Council Regulation (EC) No 1260/2001 of 19 June 2001 on the common organisation of the markets in the sugar sector, OJ L 178, 30.6.2001. The Regulation carried forward the CMO in sugar of 1968.

³ Commission Staff Working Paper, “Reforming the European Union’s sugar policy-summary of impact assessment work”, Brussels, SEC (2003), 23.9.2003, p 8.

developed countries.⁴ The EU was thus implementing a complex system of instruments in order to secure domestic sugar beet producers' incomes and protect them from world competition. The market management tools used included export refunds, guaranteed prices for producers, production quotas and high import quotas, as well as high duties in order to control sugar imports. As a result, sugar soon became one of the most "heavily protected sectors" in EU agriculture.⁵ Nevertheless, the CMO in sugar has maintained EU post - colonial ties with ACP countries, and has also offered preferential access to all least-developed countries (LDCs), using the United Nations definition, and India.⁶ Import of raw sugar from ACP countries was regulated by two specific agreements, the Agreement on Special Preferential Sugar and the ACP-EU Sugar Protocol (SP), with the latter being the most important for its beneficiaries. The SP appeared in the first Lomé Convention of 1975⁷ and ACP country signatories of the SP, such as Caribbean countries, had exported raw cane sugar to the EU at guaranteed prices on a duty-free basis from then until 1st October 2009. Consequently, sugar has been considered to be "a key example of the EU's preferential trade relations with developing countries."⁸

However, after escaping substantial changes under the 1992, 2000 and 2003 CAP reforms which were examined in Chapter 2 of this thesis, the sugar policy underwent its first major reform in 2006, with a focus on cutting subsidies to

⁴ Dickson, A. and Ndhlovu, T., "The Sugar Protocol" in Dearden, S. Ed., *The European Union and the Commonwealth Caribbean*, Ashgate Publishing Limited, England, 2002, p 114.

⁵ Gibb, R., "developing countries and market access: the bitter-sweet taste of the European Union's sugar policy in Southern Africa", *J. of Modern African Studies*, 2004, 42(4), pp. 563-588 p 569.

⁶ Op. cit. footnote no 2 at Article 35.

⁷ ACP-EEC Convention of Lomé, OJ L 25, 30.1.1976.

⁸ European Commission, "Agriculture and Preferential Trade Relations with Developing Countries: The Case of ACP countries," Directorate-General for Agriculture and Rural Development, Brussels, 2008.

farmers. This has led to direct impacts on both EU sugar producers and the ACP countries benefitting from contractual trade agreements with the EU. The aim of this chapter is to provide an analysis of the EU's sugar regime pre- and post- the 2006 reforms, with a particular focus on sugar trade between ACP countries and the EU. Special attention will be given to the two non-LDCs of the ACP Caribbean islands, Guyana and Jamaica, selected as case studies, as they are important sugar producers in the Caribbean Community (CARICOM) region.⁹

As was discussed in Chapter 1 of this thesis, Guyana and Jamaica both rely on cane sugar exports to the EU, and also have long benefited from preferential access under the SP.¹⁰ As was discussed in Chapter 1 of this thesis, “sugar” for the purpose of this thesis, refers to raw sugar extracted from sugar beet and sugar cane, with “raw sugar” being defined as sugar “not flavoured or coloured or containing any other added substances.”¹¹ Accordingly, trade in more highly processed sugars such as fructose or glucose, together with the growing trade in biofuel refined from sugar beet and sugarcane, will be excluded as they are not covered by the WTO definition of agriculture provided by the WTO Agreement on Agriculture, Annex I, as used in this thesis.

⁹ McDonald, I., “The sugar industry of the Caribbean community (CARICOM): An overview,” *International Sugar Journal*, 2004, 106(1266), pp. 324-328, p 325.

¹⁰ Protocol 3 on ACP sugar attached to Annex V to the 2000/483/EC: Partnership agreement between the members of the African, Caribbean and Pacific Group of States of the one part, and the European Community and its Member States, of the other part, signed in Cotonou on 23 June 2000-protocols-Final Act, Declarations, OJ L 317, 15.12.2000.

¹¹ Commission Regulation (EC) No 1719/2005 of 27 October 2005 amending Annex I to Council Regulation (EEC) No 2658/87 on the tariff and statistical nomenclature and on the Common Customs Tariff, OJ L 286, 28.10.2005.

2. The pre-2006 Common Market Organisation for sugar

2.1 The arrangements within the EU internal market

2.1.2 The production quotas arrangements

Before the first reform of the EU sugar policy in 2006, the CMO in sugar was regulated by Regulation (EC) No. 1260/2001,¹² also referred to as the ‘basic Regulation.’¹³ This regulation controlled the EU sugar market, and provided for the rules applicable for the marketing years 2001/2002 up until 2005/2006.¹⁴ In order to grant price support within the EU, the CMO in sugar established two types of production quotas. These were the so-called ‘A’ and ‘B’ sugar quotas. The ‘A’ quota referred to the domestic production for consumption within the internal market. The ‘B’ sugar quotas related to production allowed beyond the basic ‘A’ quota limit, but which remained within the total ‘A’ and ‘B’ quantities.¹⁵ This additional quantity which was established according to the market conditions, gave the most competitive EU factories the possibility to further expand their production without penalties.¹⁶ The ‘A’ and ‘B’ quotas were split between the EU Member State (MS) each marketing year in accordance with the criteria established by Article 10(4) of the ‘basic Regulation.’ Then, the EU MS allocated an ‘A’ and ‘B’ quota to its sugar factories on the basis of “their actual production during a particular reference period.”¹⁷ Sugar produced within the quota limits was guaranteed to receive the EU prices.¹⁸ Following the enlargement of the EU in

¹² Op. cit. footnote no 2.

¹³ European Commission, “A Description of the Common Organisation of the Market in Sugar”, Brussels, AGRI/63362/2004, September 2004, p. 4

¹⁴ Op. cit. footnote no 2 at Article 2.

¹⁵ Ibid. at Article 1(2).

¹⁶ Op. cit. footnote no 13, p 10.

¹⁷ Op. cit. footnote no 2 at Article 11 and Preamble (11).

¹⁸ Ibid at Article 10(3).

2004, the EU-25 quota was fixed at 17.4 million tonnes.¹⁹ The Commission declared that “the decision to impose sugar quotas was a political choice, made to ensure a spread of production over the entire [EU], rather than to encourage economic specialisation in the most competitive regions of the EU.”²⁰ Accordingly, the quota classification helped control the production of sugar beet and ensured each EU MS “a certain share of the EU sugar market”, thereby providing clarification within the internal market.²¹

Although, ‘A’ and ‘B’ quotas together constituted the maximum quota, the CMO in sugar did not prevent the MS from exceeding their allocated quotas. Sugar produced over and above the ‘A’ and ‘B’ quantity was referred to as ‘C’ sugar.²² This excess sugar production was not subject to a quota limit, but it would not benefit from domestic support prices, and it could not be disposed on the internal market.²³ Consequently, the MS had the possibility to carry it forward to the next marketing year, so that it could be treated as ‘A’ sugar production, thereby helping to reduce the amount of ‘C’ production.²⁴ According to Article 14(2) of the ‘basic Regulation’, sugar carried forward had to be “stored” for a period of 12 consecutive months.²⁵ All ‘C’ sugar produced that had not been carried forward had to be exported on the international market. The sugar factories, however, are not entitled to receive an export refund on this sugar.²⁶ If the producer had not

¹⁹ Op. cit. footnote no 13, p 10.

²⁰ European Commission, “Accomplishing a sustainable agricultural model for Europe through the reformed CAP- the tobacco, olive oil, cotton and sugar sectors”, Brussels, COM (2003) 554 final, 29.3.2003, p 19.

²¹ Serrano, K. A., “Sweet like sugar: Does the EU's new sugar regime become Fiji's bitter reality or welcome opportunity?” *Journal of South Pacific Law*, 2007, 11(2), pp.169-193, p 171.

²² Op. cit. footnote no 2 at Article 10(5).

²³ Ibid at Article 13(1).

²⁴ Ibid at Article 14(1).

²⁵ Ibid at Article 14(2).

²⁶ Ibid at Article 13(1).

proven the total export of excess ‘C’ sugar within the required time limits, it was subjected to an export levy.²⁷ Given the financial penalties, producers were clearly encouraged to export ‘C’ sugar to the international market.²⁸

While the system of quotas was a crucial benchmark for allocating internal prices, the difference between the ‘A’, ‘B’ and ‘C’ types of sugar was only applicable within the internal market. It is important to note that there is only “one world price for sugar,”²⁹ hence once exported onto the international market each classification of sugar simply became ‘sugar’. Therefore, in light of the quota system, it is pointed out that the EU was treating the world sugar market “as a residual market.”³⁰

2.1.3 The EU internal sugar support prices

2.1.3.1 Intervention price

In order to provide support to EU producers, and secure their income support, the CMO in sugar established minimum and intervention prices for sugar. The intervention price, considered as a “safety net”, was the price at which the designated intervention agencies of the sugar-producing MS were required to “buy in any white and raw sugar produced under quota offered to [them]” which has been manufactured within the EU market.³¹ The intervention price for white sugar

²⁷ Ibid at Article 13(3).

²⁸ Hoekman, B. and Howse, R., “Case Comment: EC-Sugar”, *World T.R.*, 2008, 7(1), pp. 149-178, p 153.

²⁹ Ibid at p 150.

³⁰ Clough, M., “Sugar, agricultural subsidies and the WTO dispute”, *Int.T.L.R.*, 2003, 9(5), pp. 126-132, p 128.

³¹ Op. cit. footnote no 2 at Article 7(1).

was set at EUR 63.19 per 100kg and at EUR 52.37 per 100kg for raw sugar.³² In addition, in order to take into account sugar beet grown and produced in deficit areas, the Commission also established each year a “derived” intervention price.³³ A sugar area was recognised as suffering from a “deficit” when production shortages were expected to occur in the forthcoming marketing year.³⁴ Accordingly, during the 2005/2006 marketing year, Spain, Portugal, Finland, Ireland and the United Kingdom (UK) were recognised as deficit areas. The ‘derived’ intervention prices were fixed according to the regional variations in the price of sugar.³⁵ For instance, Ireland and the UK, considered a “common deficit area”,³⁶ were allocated EUR 646.50 per tonne.³⁷

2.1.3.2 Minimum prices

The EU established a minimum price to be paid by sugar companies buying beet from producers for the production of quota sugar. This price aimed to guarantee “a fair income to the grower and a proper balance in the distribution of income from sugar between growers and factories.”³⁸ The price was fixed according to the type of sugar quota. The minimum price given to the ‘A’ sugar was superior to the ‘B’ sugar. It was set at EUR 46.72 per tonne for ‘A’ beet intended for producing ‘A’ sugar, and EUR 32.42 per tonne for ‘B’ beet intended for processing into ‘B’

³² Ibid at Article 2.

³³ Ibid at Article 2(1)(b).

³⁴ Preamble (3) of Commission Regulation (EC) No 1005/2005 of 30 June 2005 fixing the derived intervention prices for white sugar for the 2005/2006 marketing year, OJ L 170, 1.7.2005.

³⁵ Ibid at Preamble (2).

³⁶ Op. cit. footnote no 13, p 7.

³⁷ Op. cit. footnote no 34 at Article 1(b).

³⁸ Op. cit. footnote no 13, p 7.

sugar.³⁹ These prices were derived from the ‘basic price’ for beet, which was fixed at EUR 47.67 per tonne.⁴⁰

2.1.3.3 Additional Aid

In addition to the above, Italy, Portugal and Spain were also allowed to grant adjustment aid for the production of sugar within the ‘A’ and ‘B’ quota limits.⁴¹ However, this amount of aid was subject to restrictions. In Italy, aid could not exceed EUR 5.43 per 100kg and limited to specific regions. Adjustment aid was limited to EUR 3.11 and EUR 7.25 per 100kg, in Portugal and Spain respectively.⁴² In addition, in light of the particular geographical location of Guadeloupe and Martinique, both French *Départements d' Outre-Mer* (DOMs), cane sugar produced in these departments was subject to appropriate measures.⁴³ Article 7 of the ‘basic Regulation’ provided for the grant of a disposal aid for sugar transported from these departments and for the refining of this sugar inside the European regions.⁴⁴

2.2 The EU’s external sugar trading provisions

The EU domestic prices were supported by other market tools that regulated the amount of sugar imported within the internal market. These included high import tariffs, the export refunds system, and preferential trade agreements with third countries.

³⁹ Op. cit. footnote no 2 at Article 4(1).

⁴⁰ Ibid. at Article 3.

⁴¹ Ibid. at Article 46.

⁴² Ibid. at Article 46.

⁴³ Ibid. at Preamble (4).

⁴⁴ Ibid. at Article 7(4).

2.2.1 Import duties

Sugar imported into the EU market was highly restricted through the imposition of import duties. These duties were very high, and aimed to “ensure that the price of imported sugar [did] not fall below the EU sugar price and that sugar imports from certain countries receive[d] preferential status.”⁴⁵ The import duties comprised a fixed and an additional duty. The EU import duties were fixed at EUR 419 per tonne for white sugar and EUR 339 per tonne for raw beet and cane sugar.⁴⁶ Additional special safeguard duties were also imposed in order to prevent disturbances within the internal market arising from imported sugar,⁴⁷ the application of which is in line with the special safeguard provisions of the WTO Agreement on Agriculture (AoA).⁴⁸

2.2.2 Preferential Sugar Import Arrangements

2.2.2.1 The ACP/EU Sugar Protocol

As was discussed in Chapter 5 of this thesis, the Cotonou Agreement offers better market access to ACP countries to the protected EU agricultural market. Hence, in order to maintain the ACP countries’ position in the EU sugar market, 20 ACP sugar-producing countries⁴⁹ were also signatories to the ACP-EU Sugar Protocol (SP) provided in conjunction with the provisions of the Cotonou Agreement.⁵⁰ In accordance with Article 1 of SP, the EU promised, for an indefinite period, to

⁴⁵ Elbehri, A., Umstaetter, J. and Kelch, D., “The EU Sugar Policy Regime and Implications of Reform”, ERR-59.U.S. Dept. of Agr., Econ. Res. Serv., 2008, p 12.

⁴⁶ Commission Regulation (EC) No 1789/2003 of 11 September 2003 amending Annex I to Council Regulation (EEC) No 2658/87 on the tariff and statistical and nomenclature and on the Common customs tariff, OJ L 281, 30.10.2003.

⁴⁷ Op. cit. footnote no 2 at Article 24.

⁴⁸ Article 5(1)(b) WTO Agreement on Agriculture.

⁴⁹ Barbados, Belize, Republic of Congo, Fiji, Guyana, Ivory Coast, Jamaica, Kenya, Madagascar, Malawi, Mauritius, Mozambique, St. Kitts and Nevis, Suriname, Swaziland, Tanzania, Trinidad and Tobago, Uganda, Zambia and Zimbabwe.

⁵⁰ Op. cit. footnote no 10.

purchase and import specified quantities of cane sugar, raw or white, at guaranteed prices, on a duty-free basis from ACP countries, which in turn undertook to supply these quantities.⁵¹ The SP was the result of the UK's accession to the EU in 1973 and its "desire to bring its special trade preferences for bananas and sugar under the [EU] umbrella."⁵² The protocol, which repeated the main terms of the 1951 UK Commonwealth Sugar Agreement,⁵³ entered into force with the adoption of the Lomé Convention in 1975, and has been since then an integral part of the EU sugar regime.⁵⁴

Under the SP, the EU had committed itself on a contractual basis to import from the SP countries a total of 1.3 million tons of sugar, which has remained unchanged since 1995. As the SP was a "legally binding intergovernmental agreement" between the EU and the ACP countries,⁵⁵ this quantity could "not be reduced without the consent of the individual states concerned."⁵⁶ The EU extended this access for sugar by purchasing and importing the agreed national quota quantities at "guaranteed prices,"⁵⁷ which were "generally...almost double the world price."⁵⁸ Article 5(4) of the SP stated that these prices were negotiated, on an annual basis, between the EU and SP countries "within the price range obtaining in the [Union], taking into account all relevant economic factors."⁵⁹ The

⁵¹ Ibid. at Article 1.

⁵² Rena, R. "Developing Countries and Their Participation in the WTO in Making Trade Policy-An Analysis," *Indian Journal of Social Development*, 2006, 6(2), pp. 143-156, p 149.

⁵³ In 1951, the United Kingdom, the Queensland Sugar Board and sugar industry associations in British West Indies, Fiji, Mauritius and South Africa signed the Commonwealth Sugar Agreement.

⁵⁴ Op. cit. footnote no 21, p 173.

⁵⁵ African Caribbean and Pacific Sugar Group website, "The ACP/EU Sugar Protocol," (Online) Available from: <http://www.acpsugar.org/Sugar%20Protocol.html> (Accessed 31/08/2009).

⁵⁶ Op. cit. footnote no 10 at Article 3(2).

⁵⁷ Article 13 of Annex V of the Cotonou Agreement and Article 1 of the Sugar Protocol.

⁵⁸ Bartels, L., "The trade and development policy of the European Union," *European Journal of International Law*, 2007, 18(4), pp.715-756, p 735.

⁵⁹ Op. cit. footnote no 10 at Article 5(4).

importance of the guaranteed price has been emphasized by the ACP countries which believed that without it, the SP would become an “empty shell.”⁶⁰ Therefore, it was possible to say that guaranteed prices, as a benefit for ACP countries, were the cornerstone of the SP. However, the SP was limited to 20 countries within the ACP group, and Serrano argues that such a limitation was not compatible with the “goals of the current WTO trading system.”⁶¹ She is of the view that the SP clearly discriminated against other ACP sugar producing countries which were not eligible to accede to this sugar partnership. Along with non-ACP sugar producing countries, these countries were left outside the SP.⁶²

Despite the Cotonou Agreement being implemented in 2000 for a period of twenty years, the SP attached to it was not to expire, having been included for an “indefinite duration.”⁶³ It is believed that this has happened in order “to give a precise legal guarantee to ACP sugar supplying states, reflecting the guarantees which had preceded the Protocol in the Commonwealth Sugar Agreement, and the obligations of the [EU] in the Treaties.”⁶⁴ However, following the 2006 Sugar reform, the SP was terminated in 2009. This did not, however, affect the EU’s commitment under Article 1 of the SP to purchase sugar from ACP countries for an indefinite period of time. In the context of the EU Economic Partnership Agreements (EPAs) with ACP countries, which were discussed in Chapters 5 and 7 of this thesis, the EU continues to purchase ACP sugar under the terms of each respective EPA signed with each ACP region.

⁶⁰ Op. cit. footnote no 55.

⁶¹ Op. cit. footnote no 21, p 174.

⁶² Ibid., p 174.

⁶³ Op. cit. footnote no 10 at Article 1.

⁶⁴ Op. cit. footnote no 55.

2.2.2.2 The Special Preferential Sugar

The EU also imported raw cane sugar from ACP countries benefitting from the SP under the Agreement on Special Preferential Sugar (ASPS).⁶⁵ The ASPS Agreement was signed on 1 June 1995,⁶⁶ and gave further market access to ACP sugar suppliers in order to “ensure adequate supplies to [Union] refineries.”⁶⁷ However, since quotas provided under the other preferential import arrangements, and imports from the French DOMs, allowed meeting the maximum supply the EU needed, it is pointed out that the ASPS Agreement quota has only had “a residual function.”⁶⁸ The ASPS Agreement provided for a temporary import allocation of sugar, and the quantities varied yearly, according to EU import needs.⁶⁹ The agreed quantities of sugar benefited from a reduced rate of duty.⁷⁰ From 1995 to 2001 the reduced rate was fixed at ECU 6.9 per kilos.⁷¹ From 2002 to 2006, the reduced rate was set at zero.⁷² The ASPS Agreement thus created additional income transfer for ACP SP countries. However, in contrast to the SP, the ASPS Agreement was of fixed duration.⁷³

⁶⁵ Op. cit. footnote no 2 at Article 39(1). India was also benefitting from the ASPS Agreement

⁶⁶ Agreement in the form of an exchange of letters between the European Community and Barbados, Belize, the republic of the Congo, Fiji, the Cooperative Republic of Guyana, the Republic of Cote d'Ivoire, Jamaica, the Republic of Kenya, the Republic of Madagascar, the Republic of Malawi, the Republic of Mauritius, the Republic of Suriname, Saint Kitts and Nevis, the Kingdom of Swaziland, the United Republic of Tanzania, the republic of Trinidad and Tobago, the Republic of Uganda, the Republic of Zambia and the Republic of Zimbabwe on the supply of raw cane sugar to be refined, OJ L 181/24, 1.08.1995.

⁶⁷ Op. cit. footnote no 2 at Article 39(1).

⁶⁸ Op. cit. footnote no 21, p 175.

⁶⁹ Op. cit. footnote no 2 at Article 39(3).

⁷⁰ Ibid. at Article 39(1).

⁷¹ Op. cit. footnote no 66 at Paragraph (5).

⁷² Article 16 of Commission Regulation (EC) No 1159/2003 of 30 June 2003 laying down detailed rules of application for the 2003/04, 2004/05 and 2005/06 marketing years for the import of cane sugar under certain tariff quotas and preferential agreements and amending Regulations (EC) No 1464/95 and (EC) No 779/96, OJ L 162, 1.7.2003.

⁷³ Op. cit. footnote no 2 at Article 39(1).

2.2.3 Export subsidies

As previously mentioned, sugar was primarily produced by the EU for domestic consumption. Each MS and their factories were given ‘A’ and ‘B’ production quotas higher than domestic consumption.⁷⁴ In addition, the EU’s preferential sugar import commitments in respect of ACP countries have led to an increased amount of sugar on the EU internal market. In light of supply exceeding demand, the extra sugar production was sold back to countries outwith the EU. Sugar exported from the EU therefore consisted of domestic production not sold within the EU market,⁷⁵ as well as sugar imported under preferential arrangements.⁷⁶ In light of the EU’s self-sufficiency in sugar, it is pointed out that all ACP-originating sugar was in effect re-exported on the world market.⁷⁷ In order to dispose of surplus sugar production, the EU was providing direct export subsidies to sugar exporters. This system of “export refunds” aimed to cover the difference between the world and the internal market prices for sugar.⁷⁸ This system therefore allowed excess sugar to be sold on the global market, and compensated EU producers when world market prices were lower than domestic prices. Refunds were fixed at regular intervals, or by a tendering procedure.⁷⁹ The amount of the refund was fixed at a high price. It was at EUR 443 per tonne for the 2001/2002 marketing year, and EUR 485 per tonne and EUR 512 per tonne for the 2002/2003 and 2003/2004 periods respectively.⁸⁰ It is pointed out that these prices corresponded to “the amount by which the [EU] internal market prices [exceeded] the world market

⁷⁴ Op. cit. footnote no 30, p 128.

⁷⁵ This comprises the ‘B’ and ‘C’ sugar.

⁷⁶ Op. cit. footnote no 2 at Article 27(12).

⁷⁷ Op. cit. footnote no 28, p 151.

⁷⁸ Op. cit. footnote no 2 at Article 27(1).

⁷⁹ Ibid. at Article 27(5).

⁸⁰ Op. cit. footnote no 13, p 22.

price.”⁸¹ In light of the amount of export refunds, it was argued that EU farmers could “sell quota sugar profitably, regardless of how low the world price for sugar drops.”⁸²

The cost of export subsidies were partly financed through a production levy charged on ‘A’ and ‘B’ sugar quotas, and collected by the MS in order to cover the ‘overall loss’ for the marketing year.⁸³ Each type of quota was charged a maximum of 2 percent of the intervention price for white sugar.⁸⁴ The ‘B’ sugar could be charged an additional levy which could not exceed 37.5 percent of the intervention price for this type of sugar, if the permitted levies did not fully cover the overall loss.⁸⁵ These levies were part of the “self-financing scheme” of the EU sugar regime.⁸⁶

3. Issues with the EU sugar regime

The high level of support and the market management instruments have helped the EU to protect its sugar market effectively, at the expense of countries, mostly developing, which have a comparative advantage on the world market. The imposition of both fixed and additional import tariffs have maintained high prices within the EU market, which amounted to three times the world price.⁸⁷ Accordingly, these practices have made the import of sugar from countries outside

⁸¹ Powell, S.J. and Schmitz, A., “The cotton and sugar subsidies decisions: WTO’s dispute settlement system rebalances the agreement on agriculture,” *Drake J. Agric. L.*, 10(2), 2005, pp. 287-330, p 315.

⁸² Op. cit. footnote no 5 at p 573.

⁸³ Op. cit. footnote no 2 at Article 15(3) and (7).

⁸⁴ Ibid. at Article 15(3).

⁸⁵ Ibid. at Article 15(5).

⁸⁶ See Ibid. at Article 10(4), preambles (12), (13) and (15).

⁸⁷ Op. cit. footnote no 13, p 15.

preferential agreements “uneconomic.”⁸⁸ However, while the EU was considered “a high-cost producer” of beet sugar, when compared to major low-cost cane sugar producers, it has also been an important player on the world sugar market.⁸⁹ Total sugar exports from the EU, including unsubsidised ‘C’ sugar, amounted to approximately 6 million tons a year in the late 1990s.⁹⁰ The EU became the “second largest sugar exporter in the world.”⁹¹ It must be noted that during the 2000/2001 marketing year, the EU contributed to about 30 percent of world exports, and became the “world’s largest exporter of white sugar.”⁹² Brazil, which was up until that period the leading exporter,⁹³ ranked second with 16 percent of world exports followed by Australia with 6 percent.⁹⁴

Consequently, in 2002 and 2003, Brazil, Australia and Thailand (henceforth the “complainants”) filed a complaint at the WTO against the ‘basic Regulation’ on the EU’s CMO in sugar. The concerns of these countries over the COM in sugar were threefold. First, they argued that the amount of EU export subsidies for sugar was not complying with its reduction commitments, to the level specified in Section II of Part IV of its WTO Schedule of Concessions. This related to the excess ‘C’ sugar, and to the approximately 1.6 million tons of sugar per year which benefitted from export subsidies. Secondly, they believed that the CMO in sugar, which led to over production of sugar, indirectly allowed exporters of ‘C’ sugar to export it at prices below its total cost of production, resulting in dumping of cheap

⁸⁸ Op. cit. footnote no 21, p 172.

⁸⁹ Vandenhole, W., “Third State Obligations under the ICESCR: A Case Study of EU Sugar Policy”, *Nordic Journal of International Law*, 2007, 76(1), pp. 73-100, p 76.

⁹⁰ Op. cit. footnote no 45, p 10.

⁹¹ Chaplin, H. and Matthews, A., “Coping with the Fallout for Preference-receiving countries from EU Sugar Reform”, *The Estey Centre Journal of International Law and Trade Policy*, 2006, 7(1), pp. 15-31, p 19.

⁹² Op. cit. footnote no 5 at p 573.

⁹³ Op. cit. footnote no 30, p 128.

⁹⁴ Op. cit. footnote no 5 at p 569.

subsidised sugar on other countries. Thirdly, since domestic sugar refiners benefitted from a guaranteed high intervention price that was not offered to imported sugar, the latter was thus treated in a less favourable manner. In light of these elements, the complainants considered that the EU violated several provisions of the WTO AoA, the Agreement on Subsidies and Countervailing Measures, and GATT 1994.⁹⁵

4. The WTO dispute on sugar

4.1 Arguments of the parties

The dispute about the EU CMO in sugar centred on the export subsidies provided by the EU within that sector. According to the complainants, the export of ‘C’ sugar and ACP/Indian equivalent sugar outside the EU market was subsidised and this has led the EU to exceed its agreed level of commitments for export subsidies.

4.1.1 The ‘C’ sugar

As seen above, the so-called ‘C’ sugar referred to the quantity of sugar produced over and above the ‘A’ and ‘B’ quantity. In the view of the complainants, exports of ‘C’ sugar benefitted from export subsidies within the meaning of Article 9.1(c) of the WTO AoA.⁹⁶ This article provides that payment on the export of agricultural products resulting from government intervention should be considered as export subsidies, and therefore be subject to reduction commitments. Such payments include those “that are financed from the proceeds of a levy imposed on the

⁹⁵ *European Communities–Export subsidies on sugar*: request for consultations by Australia, 1 October 2002 (WT/DS265/1), request by Brazil, 1 October 2002 (WT/DS266/1) and request by Thailand, 20 March 2003 (WT/DS283/1).

⁹⁶ *European Communities- Export subsidies on sugar*, report of the panel, complaint by Brazil, 15 October 2004, (WT/DS266/R), para. 4.36.

agricultural product concerned or on an agricultural product from which the exported product is derived.”⁹⁷ However the EU disagreed, and rejected this claim by recalling that in contrast to the ‘A’ and ‘B’ quota, the ‘C’ sugar did not benefit from any form of export subsidies.⁹⁸

Nevertheless, in the view of the complainants, Article 9.1(c) AoA involves different type of payments in the production and sale for export of a product. They pointed out, relying on the *Canada – Dairy* jurisprudence,⁹⁹ that “a ‘payment’ within the meaning of Article 9.1(c) denoted a ‘transfer of economic resources’ whether in the form of money, or in some other form which conferred value such as payments-in-kind, and that it “may take place in many different factual and regulatory settings.”¹⁰⁰ They argued that because ‘C’ sugar was being sold to the world market by the sugar producer at below the average total cost of production, the export of ‘C’ sugar ought to be considered “subsidised.”¹⁰¹

The complainants argued further that even if the ‘C’ sugar did not benefit from direct export subsidies, the high prices given to sugar produced within quota provided producers “with a strong quota insurance incentive to produce ‘C’ sugar.”¹⁰² They believed that export subsidies and high domestic support provided to the established ‘A’ and ‘B’ sugar quotas were spilling over into non-quota sugar and resulting in the “cross-subsidizing” of exports of ‘C’ production.¹⁰³ They

⁹⁷ Article 9 (1) (c) of WTO Agreement on Agriculture.

⁹⁸ Op. cit. footnote no 96 at para. 4.37.

⁹⁹ WTO Panel Report, *Canada – Measures Affecting the Importation of Milk and the Exportation of Dairy Products*, WT/DS103/R, WT/DS113/R, adopted 27 October 1999, as modified by the Appellate Body Report, WT/DS103/AB/R, WT/DS113/AB/R, DSR 1999:VI, 2097.

¹⁰⁰ Op. cit. footnote no 96 at para. 4.38.

¹⁰¹ Ibid. at para. 4.39.

¹⁰² Ibid. at para. 4.74.

¹⁰³ Ibid. at para. 4.75.

believed that it was still profitable for the beneficiaries of ‘A’ and ‘B’ quota allocations to export the supposedly non-subsidised ‘C’ sugar to the world market. In contrast, the EU was of the view that the incidental ‘financing’ or ‘cross-subsidizing’ effects of domestic support provided to sugar subject to a quota limit “would not be sufficient to consider that those exports [had] benefited from ‘export subsidies’ subject to reduction commitments under the *Agreement on Agriculture*.”¹⁰⁴

4.1.2 The ACP/Indian “equivalent” sugar

The EU was re-exporting an amount of sugar which was equivalent to the quantity of sugar imported from the ACP/India. This ACP/Indian equivalent sugar was benefitting from export subsidies corresponding to the same level of exports refund granted to ‘A’ and ‘B’ quota sugar.¹⁰⁵ The complainants indicated that during the 2001/2002 period the EU had exported 1,725,100 tonnes of this preferential sugar alone, and that such subsidized exports were thus exceeding its WTO scheduled commitment levels for that period.¹⁰⁶ They argued that this type of sugar was part of the EU’s budgetary outlay and export quantity reduction commitments.¹⁰⁷ The EU agreed with the fact that ACP/Indian equivalent sugar was receiving export subsidies. However, it argued that these subsidies were not in excess of its reduction commitments. As a justification, it pointed out that its schedule commitments provided for a footnote which was misinterpreted by the complainants.¹⁰⁸ It recalled that its reduction commitments comprised “one

¹⁰⁴ Ibid. at para. 4.78.

¹⁰⁵ Ibid. at para. 4.176.

¹⁰⁶ Ibid. at para. 4.177.

¹⁰⁷ Ibid. at para. 4.175.

¹⁰⁸ Schedule CXL-European Communities, Part IV, Section II, Footnote 1. This Footnote 1 of the EU’s schedule excludes sugar of ACP and India origin from the EU’s export subsidy commitments.

component which has been subject to gradual reduction, and a second component, ACP/Indian equivalent sugar, which is subject to a ceiling of 1.6 million tonnes, but which has not been subject to a gradual reduction. Overall, subsidies have been reduced.”¹⁰⁹

4.2 The WTO panel decision

4.2.1 The ‘C’ sugar

It is clear that there were several aspects of the EU sugar regime which had raised concerns for DCs. However, the WTO Panel decided to focus specifically on the issue of the “cross-subsidization” of ‘C’ sugar, which clearly did not form part of the EU CMO in sugar. The decision resulted from the panel’s observation that the same companies were producing, at the same time, quota and non-quota sugar, and that these were “made in a continuous line of production.”¹¹⁰ The Panel agreed with the claims made by the complainants and found that exports of ‘C’ sugar were subsidised within the meaning of Article 9.1 (c) of WTO AoA for three reasons. First, it found that the sales of ‘C’ beet below the total cost of production to ‘C’ sugar producers involved subsidies paid to producers.¹¹¹ Secondly, these subsidies were made on the export of sugar because ‘C’ sugar was not carried forward, and must be exported onto the world market.¹¹² Thirdly, the Panel held that these payments were financed by virtue of various governmental actions. According to the Panel, these actions included the complete control of the government action over the production and sale of ‘A’ and ‘B’ sugar beet through quotas and high

¹⁰⁹ *European Communities – Export subsidies on sugar*, first written submission by the European Communities, Geneva, 11 March 2004, para. 157.

¹¹⁰ *Op. cit.* footnote no 96 at para. 7.294.

¹¹¹ *Ibid.* at para. 7.269.

¹¹² *Ibid.* at para. 7.277.

prices, which in turn allowed the government to control and affect the production and sales conditions of ‘C’ beet.¹¹³ On the basis of discussion in this chapter about the trade distorting effects of both direct and hidden subsidies, there is no doubt that WTO Panel has given a favourable decision on the ‘C’ sugar which had proven to be undermining world market prices as well as DC’ export opportunities.

4.2.2 The ACP/Indian sugar

According to the WTO panel, the total of sugar exported from the EU market since 1995 went beyond its agreed exports commitment levels.¹¹⁴ Its commitment level for the 2000/2001 period was of 1,213,500 tonnes of sugar, while its total exports of sugar for that same year amounted to 4,097,000 tonnes.¹¹⁵ Accordingly, it is clear that the EU was over-producing sugar, and was also importing too much ACP/Indian sugar. This practice has led to a “world market distortion,” and has adversely affected sugar producers outside the EU through dumping.¹¹⁶ In the view of the Panel, the EU’s export subsidy commitment provided in Footnote 1 of its schedule commitments,¹¹⁷ was “inconsistent and conflict[ed] with Articles 3, 8, 9.1 and 9.2(b)(iv) of the WTO AoA” and was therefore “of no legal effect.”¹¹⁸ In Chapter 1 of this thesis and in this chapter, it has been argued that the SP had a special legal status and created legally binding obligations for the EU. As such, there is no doubt that the Panel’s decision raises concerns and in light of this decision, it is clear that the WTO considers that the EU commitments towards ACP countries should not affect its WTO’s legal obligations, which will prevail should

¹¹³ Ibid. at para. 7.283 and 7.291.

¹¹⁴ Ibid. at para. 7.239.

¹¹⁵ Ibid. at para. 7.239.

¹¹⁶ Op. cit. footnote no 21, p 172.

¹¹⁷ Op. cit. footnote no 108.

¹¹⁸ Op. cit. footnote no 96 at para. 7.197 and 7.198.

any conflict arise. However, it is this author's view that in finding that the provisions of Footnote 1 to have no legal force, the WTO had clearly disregarded the legal value of the SP and its full benefits for ACP sugar producers.

The Panel concluded that the EU was in breach of the provisions of Articles 3 and 8 of the WTO AoA.¹¹⁹ The EU appealed this 2005 Panel decision to the WTO Appellate Body (AB).¹²⁰ The WTO AB report upheld the rulings of the Panel, and recommended that the “Dispute Settlement Body request the [EU] to bring Council Regulation (EC) No. 1260/2001, as well as all other measures implementing or related to the [EU's] sugar regime (...) into conformity with its obligations” under the WTO AoA.¹²¹

5. The New CMO in sugar

5.1 The rules within the EU market

In light of the WTO legal action brought against the EU COM in sugar, the reform of the EU sugar regime was inevitable. In order to meet the WTO AB decision and to ensure an appropriate market balance, the EU had to lower its sugar production. The EU Commission initially put forward a draft proposal for a sugar reform in July 2004.¹²² Following the WTO AB report, the Commission revised its proposals and presented on 22 June 2005 three regulations concerning the new sugar

¹¹⁹ Ibid. at para. 7.238.

¹²⁰ *European Communities-Export Subsidies on Sugar (WT/DS265, WT/DS266, WT/DS283)*, appellant submission of the European Communities, Geneva, 20 January 2005.

¹²¹ *European Communities-Export Subsidies on Sugar*, report of the Appellate Body, (WT/DS265/AB/R, WT/DS266/AB/R, WT/DS283/AB/R), 28 April 2005, paras. 346 and 347.

¹²² European Commission, “Accomplishing a sustainable agricultural model for Europe through the reformed CAP- the sugar sector reform”, Brussels, 17.7.2004, COM (2004) 499 final, p 5.

sector.¹²³ The EU agriculture ministers reached a political agreement on the legislative proposals in November 2005, and formally adopted the legal package on 20 February 2006.¹²⁴ Accordingly, the sugar reform measures were implemented on 1st July 2006 through Regulation (EC) No 318/2006.¹²⁵ These are in place until the end of the 2014/2015 marketing year.¹²⁶

The 2006 sugar reform package has led to important changes within the EU internal market. While the reform has maintained the quota system, it has simplified the quota arrangements. The distinction between the ‘A’ and ‘B’ quotas has been removed, and they now form one single production quota.¹²⁷ Out of quota production is still permitted, but it is limited to a total of 1 100 000 tons within the EU market and subject to a one-off EUR 730 levy.¹²⁸ The biggest holder of additional sugar quota is Metropolitan France, with a quota of 351 695 tons. It is followed by Germany, with 238 560 tons, and Poland with 100 551 tons.¹²⁹ Sugar

¹²³ European Commission, “Proposal for a Council Regulation on the common organisation of the markets in the sugar sector - Proposal for a Council Regulation amending Regulation (EC) No 1782/2003 establishing common rules for direct support schemes under the common agricultural policy and establishing certain support schemes for farmers - Proposal for a Council Regulation establishing a temporary scheme for the restructuring of the sugar industry in the European Community and amending Regulation (EC) No 1258/1999 on the financing of the common agricultural policy”, Brussels, 22.6.2005, COM (2005) 263 final.

¹²⁴ Council of the European Union, “Proposal for a Council Regulation on the common organisation of the markets in the sugar sector - Proposal for a Council Regulation amending Regulation (EC) No 1782/2003 establishing common rules for direct support schemes under the common agricultural policy and establishing certain support schemes for farmers - Proposal for a Council Regulation establishing a temporary scheme for the restructuring of the sugar industry in the European Community and amending Regulation (EC) No 1258/1999 on the financing of the common agricultural policy,” 14982/05, Brussels, 30 November 2005.

¹²⁵ Council Regulation (EC) No 318/2006 of 20 February 2006 on the common organisation of the markets in the sugar sector, OJ L 58, 28.2.2006.

¹²⁶ *Ibid.* at Article 46.

¹²⁷ A total of 17 440 537 tons was allocated to the EU Member States and their regions (See *Op. cit.* footnote no 125 at Annex III).

¹²⁸ *Ibid.* at Article 8(3).

¹²⁹ *Ibid.* at Point I of Annex IV.

surplus is still subject to the carry-over system.¹³⁰ All sugar quotas are charged a production charge of EUR 12.00 per tonne.¹³¹

In addition to the above, the intervention prices for white and raw sugar were replaced by “reference” prices. These prices were subject to a price cut of 36 percent over four years, commencing from the 2006/2007 marketing year.¹³² As a result, since the 2009/2010 period, the reference price for white sugar is EUR 404.4 per tonne and is EUR 335.2 per tonne for raw sugar.¹³³ The intervention price was temporarily maintained from 2006 to 2010. It was kept as a transitional measure, contributing to “stabilising the market for cases where market prices in a given marketing year would fall below the reference price fixed for the following marketing year.”¹³⁴ Until the 2009/2010 marketing year the intervention price was set at 80 percent of the reference prices of the following marketing year, and EU MS were limited to buying in a maximum of 600 000 tonnes of sugar per year.¹³⁵ A private storage scheme was introduced as a new market tool, replacing the old intervention price system, and was used as a safety net in case market prices fell below the reference price.¹³⁶ In line with the reference price cuts, the minimum price for quota beet was also gradually reduced. It is now fixed at EUR 26.29 per tonne since the 2009/2010 marketing year.¹³⁷

¹³⁰ Ibid. at Article 14.

¹³¹ Ibid. at Article 16.

¹³² It must be noted that the EU Commission initially proposed a price cut of 39 percent. see Op. cit. footnote no 123.

¹³³ Op. cit. footnote no 125 at Article 3.

¹³⁴ Ibid. at Preamble (21).

¹³⁵ Ibid. at Article 18.

¹³⁶ Ibid. at Preamble (22) and (18).

¹³⁷ Ibid. at Article 5(1).

In accordance with Regulation (EC) No 319/2006, in order to compensate EU sugar growers for the support price cuts, their income support has been increased.¹³⁸ These payments represent on average 64.2 percent of the revenue loss from the price cuts.¹³⁹ They have been integrated into the Single Payment Scheme (SPtS), which was covered in Chapter 2 of this thesis, and hence decoupled from production.¹⁴⁰ They are also conditional on fulfilling the cross-compliance requirements.¹⁴¹ In addition, under Article 36 of Regulation (EC) 318/2006, EU MS which reduced their sugar quota by at least 50 percent may grant an additional aid to farmers coupled to production. The aid was established as a transitional measure, and payments should be equivalent to a maximum of 30 percent of the income loss arising from the reduction in support prices, and must be given for a maximum of 5 consecutive years ending in the 2013/2014 marketing year.¹⁴²

In addition to the support price reductions, a temporary restructuring fund was established in order to deal with the structural problems faced by the sugar industry within the internal market.¹⁴³ The fund was spread from 2006/2007 to 2009/2010 marketing years, and was given to the less competitive sugar factories that

¹³⁸ Preamble (2) of Council Regulation (EC) No 319/2006 of 20 February 2006 amending Regulation (EC) No 1782/2003 establishing common rules for direct support schemes under the common agricultural policy and establishing certain support schemes for farmers, OJ L 58/32, 28.2.2006.

¹³⁹ European Commission, “The European sugar sector- A long-term competitive future”, September 2006.

¹⁴⁰ Council Regulation (EC) No 1782/2003 of 29 September 2003 establishing common rules for direct support schemes under the common agricultural policy and establishing certain support schemes for farmers and amending Regulations (EEC) No 2019/93, (EC) No 1452/2001, (EC) No 1453/2001, (EC) No 1454/2001, (EC) No 1868/94, (EC) No 1251/1999, (EC) No 1254/1999, OJ L 270, 21.10.2003. The arrangements for the SPtS provided in this regulation were amended by Council Regulation (EC) No 319/2006 in order to integrate payments arising from the 2006 sugar reform.

¹⁴¹ Op. cit. footnote no 140 at Article 6.

¹⁴² Op. cit. footnote no 138 at Article 110q (2).

¹⁴³ Council Regulation (EC) No 320/2006 of 20 February 2006 establishing a temporary scheme for the restructuring of the sugar industry in the Community and amending Regulation (EC) No 1290/2005 on the financing of the common agricultural policy, OJ L 58/42, 28.2.2006.

permanently abandoned sugar quota production and renounced to their quota.¹⁴⁴ The aim of this voluntary scheme was threefold. It was designed to provide incentives to encourage the less competitive factories to leave the industry, to give money to cope with the social and environmental impacts of factory closure, and to grant funds for the most affected regions.¹⁴⁵ Accordingly, the allocation of aid was strictly controlled and subject to the respect of social, economic and environmental commitments.¹⁴⁶ The restructuring aid was set at EUR 730 per tonne from the 2006/2007 to 2007/2008 marketing years, EUR 625 per tonne for the 2008/2009 year and EUR 520 for the final period.¹⁴⁷ A minimum of 10 percent of the aid was to be reserved for growers of beet sugar and machinery contractors.¹⁴⁸

The restructuring fund scheme was an important aspect of the reform, which assisted the EU in reducing its level of sugar production. This in turn helped the EU to avoid overproduction, with five of the less competitive EU regions, Bulgaria, Ireland, Latvia, Portugal and Slovenia, completely abandoning sugar production.¹⁴⁹ In May 2007, the Commission reported that the renunciation of quota under the scheme reached 2.2 million tonnes from the marketing years 2006/2007 to 2007/2008.¹⁵⁰ However, this was well below the expected target of 5 million tonnes.¹⁵¹ In order to avoid overproduction, the Commission decided to

¹⁴⁴ The restructuring fund is part of the European Agricultural Guidance and Guarantee Fund and since January 2007 of the European Agricultural Guaranteed Fund. See *Ibid.* at Article 1(1).

¹⁴⁵ *Op. cit.* footnote no 123, p 7.

¹⁴⁶ *Op. cit.* footnote no 125 at Article 4.

¹⁴⁷ *Op. cit.* footnote no 143 at Article 3(5).

¹⁴⁸ *Ibid.* at Article 3(6).

¹⁴⁹ Bruhns, J., “The Reform of the EU Sugar Regime and its Effects on the Industry”, *SugarJournal*, 2009, 71(11), pp. 13-16, p 14.

¹⁵⁰ 1.5 million tonnes during the first marketing year of implementation and 0.7 million tonnes during the second period.

¹⁵¹ European Commission, “proposals to amend Council regulation (EC) No 318/2006 on the common organisation of the markets in the sugar sector and Council Regulation (EC) No 320/2006

withdraw a further 2 million tonnes of sugar quota. Given the limited effects of the scheme on significantly reducing market imbalances, more adjustments were required. The EU Commission proposed in 2007 to improve the restructuring scheme, and to make it “more attractive.”¹⁵² It proposed to set the limit of aid to be given to growers and machinery contractors at 10 percent, with an additional payment for growers to be made retroactively.¹⁵³ This change was implemented in response to the concerns from sugar processors about the provisions of Article 3(6) of Regulation (EC) 320/2006. As discussed above this article provided that farmers were to be allocated more than 10 percent of aid, thereby leaving the processors uncertain about the exact amount of aid that was available to them. Accordingly, this new measure removes the “uncertainty resulting from the [previous] possibility that a Member State might decide to set a higher percentage.”¹⁵⁴ In addition to this, farmers who renounced their quotas, within the limit of 10 percent of the factory’s total quota, have the possibility of applying directly for restructuring aid.¹⁵⁵

The introduction of these adjustments resulted in a further renunciation of over 20 percent of sugar quota from the most efficient producers, namely France, Germany, Poland and the UK.¹⁵⁶ As a result the overall EU sugar quota was

establishing a temporary scheme for the restructuring of the sugar industry in the Community” Brussels, COM (2007) 227 final, 7.5.2007.

¹⁵² European Commission, “proposals to amend Council regulation (EC) No 318/2006 on the common organisation of the markets in the sugar sector and Council Regulation (EC) No 320/2006 of 20 February 2006 establishing a temporary scheme for the restructuring of the sugar industry in the Community. OJ C 116/5, 26.5.2007.

¹⁵³ The amount of aid for the 2008/2009 marketing year was fixed at EUR 237, 5 per tonne of sugar renounced (See Council Regulation (EC) No 1261/2007 of 9 October 2007 amending Regulation (EC) No 320/2006 establishing a temporary scheme for the restructuring of the sugar industry in the Community, OJ L 283, 27.10.2007).

¹⁵⁴ Op. cit. footnote no 152.

¹⁵⁵ Op. cit. footnote no 153 at Article 1(3).

¹⁵⁶ Op. cit. footnote no 149, p 14.

significantly reduced, thereby decreasing the production of sugar in the EU. The Commission declared in 2009 that since the implementation of the restructuring scheme, a total of 5.8 million tons of production quota was given up, hence very close to the anticipated target of 6 million tons.¹⁵⁷ The sugar reform was considered to be “a success.”¹⁵⁸

5.2 The end of the Sugar Protocol

Under the 2006 sugar reforms, the EU decided to maintain its commitments towards ACP countries benefitting from the SP.¹⁵⁹ However, in the context of the reciprocal Economic Partnership Agreements (EPAs) removing progressively trade barriers between the EU and ACP countries, the EU Council of Ministers denounced the SP in September 2007,¹⁶⁰ arguing that “in the context of a transition towards liberalization of ACP-[EU] trade, unlimited quantities cannot coexist with the price and volume guarantees of the Sugar Protocol.”¹⁶¹ In addition, the then EU Commissioners for Trade, Development and Humanitarian Aid, and Agriculture and Development¹⁶² also pointed out that the provisions of the protocol were no longer compatible with the reform of the EU’s sugar regime, which was “bringing

¹⁵⁷ Press Releases, “CAP reform: Commission welcomes success of EU sugar reform as restructuring process concludes”, Brussels, IP/09/366, 6 March 2009.

¹⁵⁸ Ibid.

¹⁵⁹ Op. cit. footnote no 125 at Article 31.

¹⁶⁰ The denunciation was made in accordance with Article 10 of the Sugar Protocol which provides that the latter can be denounced by any parties subject to two years’ notice.

¹⁶¹ Council Decision 2007/627/EC of 28 September 2007 denouncing on behalf of the Community Protocol 3 on ACP sugar appearing in the ACP-EEC Convention of Lomé and the corresponding declarations annexed to that Convention, contained in Protocol 3 attached to Annex V to the ACP-EC Partnership Agreement, with respect to Barbados, Belize, the Republic of Congo, the Republic of Côte d’Ivoire, the Republic of the Fiji Islands, the Republic of Guyana, Jamaica, the Republic of Kenya, the Republic of Madagascar, the Republic of Malawi, the Republic of Mauritius, the Republic of Mozambique, the Federation of Saint Kitts and Nevis, the Republic of Suriname, the Kingdom of Swaziland, the United Republic of Tanzania, the Republic of Trinidad and Tobago, the Republic of Uganda, the Republic of Zambia and the Republic of Zimbabwe. OJ L 255, 29.09.07.

¹⁶² Peter Mandelson was the EU Commissioner for Trade; Louis Michel was the EU Commissioner for Development and Humanitarian Aid; and Mariann Fisher Boel as the then EU Commissioner for Agriculture and Development.

an end to guaranteed prices for the EU's own producers."¹⁶³ As a result, the SP ended on the 1st October 2009, allowing free access for all ACP countries exporting sugar, but leading to important consequences for the SP countries' economy. Nevertheless, given the sensitive nature of sugar and its role in the economies of ACP sugar producing countries, a transition to duty- and quota-free access for sugar exports to the EU market, examined in Chapter 7 of this thesis, has been created.

6. The implications for ACP Caribbean countries

6.1 Cane sugar and ACP Caribbean countries

Despite the granting of financial assistance, there is no doubt that the end of the SP implied important disruptions in the sugar sector and significant income losses for its beneficiaries. In the context of the Caribbean region, the SP was seen as the "lifeblood of Caribbean economies and communities."¹⁶⁴ Cane sugar, was the prime product at the time of the slave trade, and is still an important industry for the Caribbean countries' economy.¹⁶⁵ The Sugar Association of the Caribbean¹⁶⁶ reported in 2008 that "sugar exports to Europe - which accounts for just under 90 percent of the Caribbean sugar market - amounted to 349,949 tonnes for the crop year to May 2008, earning approximately €496.8 per tonne."¹⁶⁷ Sugar exported to

¹⁶³ "Why has the EU proposed to end the EU-ACP Sugar Protocol?" Comment by Commissioners Peter Mandelson, Louis Michel and Mariann Fisher Boel in *The Guyana Chronicle*, 25 July 2007.

¹⁶⁴ McDonald, I. on behalf of the Sugar Association of the Caribbean (SAC), "The Sugar Protocol- Socio-economic aspects", paper presented at *ACP workshop on sugar*, Brussels, 2004.

¹⁶⁵ Kingsman, J. *Sugar Trading Manual*, Cambridge, England: Woodhead Publishing Limited, 2000, p 49.

¹⁶⁶ The Sugar Association of the Caribbean is an association of the sugar industries of Barbados, Belize, Guyana, Jamaica, St. Kitts & Nevis and Trinidad & Tobago.

¹⁶⁷ Jamaica Gleaner News, "Caribbean sugar production falters- volumes, exports down in current year," 23 July 2008 [Online] Available from: <http://www.jamaica-gleaner.com/gleaner/20080723/business/business5.html> (Accessed 07/09/2009).

the EU is therefore considered as an “essential source of Caribbean foreign exchange earnings.”¹⁶⁸

Guyana and Jamaica, two former British colonies, are among the two most important Caribbean sugar-producing nations.¹⁶⁹ Among ACP Caribbean SP countries, they were the two largest quotas holders, with fixed quotas originally set in 1975 of 157,700 and 118,300 tons per year respectively for Guyana and Jamaica.¹⁷⁰ These quantities remained around these levels for both countries until the end of the SP in 2009. Sugar accounted in 2005 for nearly 12 percent of GDP in Guyana¹⁷¹ and earns Jamaica around 100 million Jamaican Dollar per year.¹⁷² Any change in this situation would have a profound effect on economy and society of both countries.

6.1.1 Jamaica's Sugar Industry

When the British captured Jamaica in 1655, the island became “a slave-based economy producing sugar for export.”¹⁷³ Jamaica was the main producer and the leading exporter of sugar in the world in the 17th and 18th centuries,¹⁷⁴ and

¹⁶⁸ Paugam, J.-M. and Novel, A.-S. “Reviving the Special and Differential Treatment of Developing Countries in International Trade: the twin challenges of preferences erosion and differentiation of Developing Countries,” Paris: La Documentation Francaise, 2006, p 78.

¹⁶⁹ In 2009, Guyana was the largest producer of sugar with 43.608 tonnes followed by Jamaica with 36.024 tonnes. See Radiojamaica.com, “Thousands of tons of sugar exported in March,” 21 April 2009 [Online] Available from:

http://www.radiojamaica.com/index.php?option=com_content&task=view&id=17322&Itemid=87 (Accessed 04/09/2009).

¹⁷⁰ Op. cit. footnote no 10 at Article 3(1).

¹⁷¹ The Guyana Office for Investment, “Agriculture and Agro-processing”, [Online] Available from: <http://www.goinvest.gov.gy/agriculture.html> (Accessed 20/05/2012).

¹⁷² African Caribbean and Pacific Sugar Group, “Sugar facts and Figures,” [Online] Available from: <http://www.acpsugar.org/Facts%20and%20Figures.html> (Accessed 04/09/2009).

¹⁷³ Walden Publishing Ltd., “Jamaica Profile,” Cambridge, England: World of Information, 2006.

¹⁷⁴ Sugar Industry Authority and Sugar Industry Research Institute, “Jamaica Sugar Industry,” 2001, [Online] Available from: <http://www.jamaicasugar.org/> (Accessed 10/04/2010).

remained an important sugar-exporting region during the 19th and 20th centuries.¹⁷⁵ Sugar production is therefore a long standing and embedded industry in Jamaica. In 1970, the Sugar Industry Authority was established as a statutory body in order to “ensure the viability of the industry (...) by taking a leadership role in the development of the industry and by being a strong efficient organization with highly motivated and professional employees.”¹⁷⁶

When the EU started to produce sugar beet, Jamaica began to diversify its trade exports. Therefore, tourism, mineral extraction and mineral refinement, in addition to the exports of traditional agricultural products such as bananas and sugar, play an important role within Jamaican economy.¹⁷⁷ Jamaican cane sugar production has declined over the decades. While Jamaica produced a quantity of 186,133 tons of sugar in 1998, it produced in 2008 a total of 140,872 tons of sugar.¹⁷⁸ This decline was mainly due to worsening hurricane seasons. An example of this was Hurricane Dean in 2007, which caused significant flooding and excessive rainfalls and led to a significant decline in sugar output. This has resulted in a decline of cane sugar production by 307,000 tonnes.¹⁷⁹ Despite this, sugar has a multifunctional role in Jamaica, and therefore remains an important commodity for the island, mainly in rural areas.¹⁸⁰ The existing sugar factories in Jamaica

¹⁷⁵ Op. cit. footnote no 173.

¹⁷⁶ Jamaica Sugar Industry Authority, “Annual Report,” Sugar Industry Research Institute (SIRI), 2005.

¹⁷⁷ Laaksonen, K., Mäki-Fränti, P. and Virolainen, M., “Mauritius and Jamaica as case studies of the Lomé sugar protocol,” TradeAG Working Paper, Commission of the European Communities, 2007, p 25.

¹⁷⁸ Op. cit. footnote no 176.

¹⁷⁹ Ibid.

¹⁸⁰ Government of Jamaica website, “Jamaica,” [Online] Available from: http://www.jis.gov.jm/special_sections/CARICOMNew/jamaica.html (Accessed 26/01/2010).

contribute largely to the national income, employment and export earnings.¹⁸¹ Sugar is the “largest agricultural export earner” accounting for 5.8 percent of the total export.¹⁸² The Jamaica’ Sugar Industry company is also the “largest single employer of labour as well as the largest industry within the agricultural sector.”¹⁸³

6.1.2 Guyana’s Sugar Industry

Sugarcane is also one of the main cash crops in Guyana.¹⁸⁴ Sugar cultivation was introduced for the first time into Guyana in the 1630s, and since then the sugar industry has played an important role in its economy.¹⁸⁵ In 2006, Guyana’s sugar industry accounted for “18 percent [of its] GDP, 57 percent of [of its] agricultural GDP and 30 percent of [of its] merchandise exports.”¹⁸⁶ Accordingly, it is a fundamental export industry for the country which is the largest island within the Caribbean Forum of ACP States (CARIFORUM).

The Guyana Sugar Corporation (GuySuCo), which operates five sugar estates and eight factories, is the dominant company within the sector and widely controls sugar production and processing.¹⁸⁷ It was formed in 1976 as “a world class sugar industry producing high quality sugar and added value by-products, while ensuring customer satisfaction, employee development, environmental protection and safe

¹⁸¹ The factories are: Appleton, Bernard Lodge, Frome, Hampden, Long Pond, Monymusk, St. Thomas Sugar Estates and Worthy Park.

¹⁸² Estandards forum, “Country Brief, Jamaica,” February 2009, [Online] Available from: http://www.estandardsforum.org/secure_content/country_profiles/cp_92.pdf (Accessed 29/08/2009)

¹⁸³ Op. cit. footnote no 173.

¹⁸⁴ The other main cash crops in Guyana are rice and shrimps.

¹⁸⁵ Guyana’s National Development Strategy Home Page, “Guyana’s Development Strategy, the Sugar Industry,” 29 May 1996, [Online] Available from: <http://www.guyana.org/NDS/chap33.htm> (Accessed 25/08/2009).

¹⁸⁶ Guyana- European Commission, “EC Multiannual adaptation strategy for the period 2006-2013- In support of the National Action Plan under the Accompanying Measures for Sugar Protocol countries,” 7.08.06, p 4.

¹⁸⁷ Guyana Sugar Corporation INC, “GuySuCo and the Guyanese Community,” [Online] Available from: http://www.guysuco.com/about_gsc/gsc/gsc_today/gsc_comm/Default.asp (Accessed 15/08/2009).

working practices.”¹⁸⁸ It also plays a crucial role in Guyana’s economy. The corporation is known worldwide as the exporter of brown Demerara sugar. In 2004, the annual revenue for sugar exports for Guyana was USD121m., with sugar exports being seen as the “backbone” of Guyana’s economy.¹⁸⁹

In addition to its role in Guyana’s economy, GuySuCo also contributes to the social development of Guyana, and is the largest single employer in the country employing around 18 000 employees. Its contribution to Guyana’s society is vast. It contributes to Guyana’s rural and youth development by creating educational and recreational centres, and sports activities for both the sugar industry, and the country as a whole. It also makes donations to several benevolent organizations, health improvement, land developments programs to house the population, cultural and heritage preservation programs and youth development.¹⁹⁰

6.2 The implications for Jamaica and Guyana

The sugar industry has been an important part of Caribbean countries’ history and a central business for their welfare. This is why anxious ACP countries pointed out that the EU Commission proposals on the EU sugar regime, closely linked to the SP, would destroy their sugar industries, with severe consequences for their economies and societies.¹⁹¹ The SP was considered the “perfect trading instrument” for Caribbean countries, and it has “immensely assisted in

¹⁸⁸ Ibid.

¹⁸⁹ Ramsaroop, P., “Case study: Guyana-Linking Brazil with the Caribbean- Potential Meets Opportunity,” 2009, [Online] Available from: www.visionguyana.com/2009/02/page/2/ (Accessed 09/02/2009).

¹⁹⁰ Op. cit. footnote no 185.

¹⁹¹ ACP Press Release, “The ACP group considers that the Commission’s proposals on sugar would devastate their sugar industries with severe socio-economic consequences for their populations,” 7 October 2004, [Online] Available from: http://www.acp.int/en/archives/sugarcmnq_en.html (Accessed 09/02/2009).

development.”¹⁹² It provided to its beneficiaries guaranteed trade access to the EU, with stable prices and an important cash flow for an unlimited period. This is particularly true for Jamaica and Guyana, which had the largest EU sugar quotas, and it was provided the most significant market for their sugar export earnings.¹⁹³ The benefits of the SP for these islands’ sugar industries, and thus for their economies and communities, were apparent. It created jobs in direct or indirect employment, developed essential infrastructures, and supported community services such as housing, health, pure water supply, education and sports.¹⁹⁴

Since the SP has been terminated only recently it is difficult to fully evaluate the real consequences of this development for both Jamaica and Guyana. However, given the socio-economic value of sugar for Caribbean countries, it is undeniable that the end of the SP will have serious implications for both Jamaica and Guyana’s welfare and poverty. It is undeniable that foreign exchange earnings from sugar, which contributed massively to Jamaica and Guyana’s economies, will be undermined with a serious drop in revenues. This will probably lead to the closure of factories, which will affect hundreds of thousands of workers who depend on the sugar industry. These unemployed workers will probably try to migrate legally or, more probably, illegally to rich neighbouring countries.¹⁹⁵

¹⁹² Op. cit. footnote no 164.

¹⁹³ Hewitt, A. P., “Guyana, Sugar and EBA: Case-study of a country which is not quite Least Developed,” paper presented at *Regulatory Framework of Globalisation*, Barcelona, 2001.

¹⁹⁴ Op. cit. footnote no 191.

¹⁹⁵ Ibid.

Since the direct welfare gains of these islands arise from sugar cane, there are few opportunities to diversify away from sugar.¹⁹⁶ Against this background there appears to be one main solution in response to this challenge: converting the sugar crop to biofuel. Sugarcanes are normally grown to produce sugar, but through the process of fermentation, they can also produce ethanol as transportation biofuel, an alternative to the increasingly expensive fossil fuels. In view of the current challenge of climate change, biofuels are considered to be environmental friendly fuels, as they considerably reduce greenhouse-gas emissions.¹⁹⁷ Thus, in light of the high demand, particularly in industrialized countries, for biofuels, as a source of cheaper and cleaner energy, Jamaica and Guyana could, with appropriate and targeted investment, develop an infrastructure for the production of sugarcane for biofuel exports. With appropriate investment and key staff training, the development of biofuel industries on these islands, in order to tackle global warming, could be a key future opportunity for ACP countries, and the key factor to remedy the estimated socio-economic implications linked to the ending SP. These investments need to be made in a timely way in order to ease the transition from the SP trading regime to the proposed bio-fuel focused economies.

However, it is must also be noted that serious issues have been raised with regard to the production of biofuels and their impact on society, the economy and the environment. For instance, it is argued that sugarcane burning before a manual

¹⁹⁶ Donald Mitchell points out that Jamaica tried to diversify into fresh fruits and vegetables but this have generally been disappointing. See Mitchell, D. O. "Sugar in the Caribbean: Adjusting to Eroding Preferences," World Bank Policy Research Working Paper 3802, 2005, p 18.

¹⁹⁷ Hill, J., et al., "Environmental, economic, and energetic costs and benefits of biodiesel and ethanol biofuels," *Proceedings of the National Academy of Sciences*, 2006, 103(30), pp.11206-11210, p 11206.

harvest can lead to air pollution.¹⁹⁸ It is also pointed out that the growth of food crops for the production of biofuels could also “impose pressure on food and water supplies.”¹⁹⁹ Consequently, a shift to biofuels should also take these concerns into consideration.

7. Conclusion

Sugar is one of the products falling under the EU’s CAP. Since 1968 the EU has been able to control both the production of EU sugar, and the import of sugar within its market, through a plethora of market tools. While the EU sugar market was heavily protected by import restrictions, sugar imports from ACP countries were facilitated under preferential arrangements. Under the SP, the EU committed itself to purchase and import fixed quantities of sugar from ACP countries at guaranteed prices. However, the latest sugar reforms have led to a new EU sugar regime, which complies with the WTO AoA. In addition, the introduction of the EPA arrangements, requiring ACP countries to liberalize their import regimes with respect to trade in goods,²⁰⁰ have altered the market conditions for ACP countries which benefited from the SP. The sugar reform has led to reduced sugar prices within the EU market and therefore lower revenue for sugar beet producers. In this context, the SP, denounced by the EU Council of Ministers, ended on the 1st October 2009, allowing free access for all ACP countries which export sugar. Despite this, the EU has maintained its commitments towards ACP countries, and

¹⁹⁸ Smeets, E., Junginger, M., Faaij, A., Walter, A., Dolzan, P. and Turkenburg, W., “The sustainability of Brazilian ethanol-An assessment of the possibilities of certified production”, *Biomass and Bioenergy*, 2008, 32(8), pp. 781-813, p 784.

¹⁹⁹ Rajagopal, D., Sexton, S.E., Roland-Holst, D. and Zilberman, D., “Challenge of biofuel: filling the tank without emptying the stomach?,” *Environmental Research Letters*, 2007, 2(4) , pp. 1-9, p 2.

²⁰⁰ Op. cit. footnote no 10 at Article 36(1).

continues to provide them with preferential access under the negotiated EPAs which were analysed in Chapters 5 and 7 of this thesis.

The SP has been an important feature of the EU trade policy for beneficiary ACP countries. Undoubtedly the termination of the SP, as well as the introduction of the EPAs arrangements, have deeply undermined the value of the ACP Caribbean sugar trade regime. This change will influence the future conditions of access to the EU market for ACP Caribbean countries and particularly for Jamaica and Guyana which held the largest quotas under the SP. Their loss of guaranteed access to the EU market means that they now must compete with other traditional ACP suppliers of sugar.²⁰¹ For instance, between 2007 and 2009, the EU has imported an overall volume of 416 932 tonnes and 197 854 tonnes from Mauritius and Fiji, respectively.²⁰² However, during the same period, the EU only imported 134 332 tonnes of sugar from Jamaica and 198 026 tonnes from Guyana.²⁰³ Both Fiji and Mauritius²⁰⁴ signed interim EPAs with the EU which cover only trade in goods, in December 2009²⁰⁵ and August 2009 respectively.²⁰⁶ Accordingly, Fiji and

²⁰¹ These countries are Fiji, Mauritius, Ivory Coast, Kenya, Madagascar, Malawi, Mozambique, Republic of Congo, Swaziland, Tanzania, Uganda, Zambia and Zimbabwe. They have in the past benefitted from the Sugar Protocol.

²⁰² European Commission “EU raw cane sugar imports from ACP countries (main suppliers), average 2007-2009 tonnes (product weight),” 7.3.2012, [Online] Available from: http://ec.europa.eu/agriculture/developing-countries/commodities/index_en.htm (Accessed 11/04/2012)

²⁰³ Ibid.

²⁰⁴ Fiji is a member of the ACP Pacific region and Mauritius is a member of the ACP Eastern and Southern Africa region.

²⁰⁵ Interim Partnership Agreement between the European Community, of the one part, and the Pacific States, of the other part-Protocols-Final Act-Declarations, OJ L 272, 16.10.2009.

²⁰⁶ Interim Agreement establishing a framework for an Economic Partnership Agreement the Eastern and Southern Africa States on the one part, and the European Community and its Member States, on the other part. The agreement is not yet published in the Official Journal.

Mauritius have received duty and quota free access to the EU internal market since 2008.²⁰⁷

In addition, it must also be noted that the EU has also extended duty and quota free sugar access to all LDCs, irrespective of their origin, from 1st October 2009 under the “Everything But Arms” (EBA) trade preferences regime.²⁰⁸ The EBA is part of the Generalised System of Preferences scheme which was examined in Chapter 5 of this thesis. Consequently, it is possible that ACP Caribbean countries may lose their guaranteed access to the EU market and would have to compete with LDCs. In addition to this, all ACP sugar producing countries will also suffer as a result of increased competition from highly competitive countries, particularly from Australia, Brazil and Thailand.

The current situation has evolved significantly from that of colonial trade preferences, and given the multifunctional aspects of the sugar industry, it could be difficult for Jamaica and Guyana to reorient their production for external trade. As a consequence, there is a risk that the ACP Caribbean countries will suffer massive economic and social shocks in the near future, which will have a knock on effect for its neighbouring, and wealthier countries. Alternatively Caribbean countries, particularly Jamaica and Guyana may benefit from timely and focused investment in infrastructure and training in order to redirect their sugar production focus, from

²⁰⁷ Council Regulation (EC) No 1528/2007 of 20 December 2007 applying the arrangements for products originating in certain states which are part of the African, Caribbean and Pacific (ACP) Group of States provided for in agreements establishing, or leading to the establishment of, Economic Partnership Agreements, OJ L 348/1 31.12.2007.

²⁰⁸ See Article 11(3) of Council Regulation (EC) No 732/2008 of 22 July 2008 applying a scheme of generalized system of preferences for the period from 1 January 2009 to 31 December 2011 and amending Regulations (EC) No 1933/2006 and Commission Regulation (EC) No 110/2006 and (EC) No 964/2007, OJ L 211, 6.8.2008.

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the export of raw and white sugar to the EU market, to the production of high value bio-fuels. Given the high cost of transport of fuel oils, bio-fuels will probably find a market in the western hemisphere. Either way, there will be less raw sugar entering the global market from the Caribbean countries. The future for Jamaica and Guyana will depend on the strategic decisions currently being made by their governments, and their ability to obtain strategic investment for infrastructure and retraining investment for a future in bio-fuels production and export.

Chapter 9 The EU banana import regime

1. Introduction

Bananas, along with sugar, are traditional agricultural commodities of Caribbean countries, and play a major role in the economy, living standards and conditions of the population.¹ Banana production for exports had been developed in the 1950s in many Caribbean countries, in order to supply the United Kingdom (UK) market, and to replace their decline in sugar production.² The UK historically operated a protective regime for the Commonwealth Caribbean banana export under which the Caribbean banana industry was able to flourish.³ The UK retained its post-colonial trading relationships with Caribbean countries on accession to the European Union (EU), alongside similar banana policies operated by France.⁴ These traditional trade preferences were guaranteed under the four Lomé Conventions concluded between the EU and African, Caribbean and Pacific (ACP) countries.

Trade in bananas forms the largest share of the international fruit trade market, with the EU being the largest consumer of bananas.⁵ However, the EU is not a big producer of bananas and its exports are considered “virtually non-existent.”⁶ Most

¹ European Commission, “Banana Accompanying Measures: Supporting the Sustainable Adjustment of the Main ACP Banana-Exporting Countries to New Trade Realities,” Brussels, COM (2010) 101 final, 17.3.2010, p 2.

² Mlachila, M, Cashin, P. and Haines, C., “Caribbean Bananas: The Macroeconomic Impact of trade preference Erosion in Bauer, A., Cashin, P. and Panth, S., Ed., *The Caribbean: Enhancing Economic integration*, International Monetary Fund, Washington, D.C, 2008, p 86.

³ The Caribbean Banana Exporters Association website, available from: <http://www.cbea.org/> (Accessed 23/11/2011).

⁴ The French market was mainly reserved for bananas from the DOMs and Africa (mainly Cameroon and the Ivory Coast).

⁵ Op. cit. footnote no 1, p 2.

⁶ European Commission, “Agriculture products: Bananas,” Brussels, 2006, [Online] Available from: <http://trade.ec.europa.eu/doclib/html/133193.htm> (Accessed 23/11/2011).

EU bananas are produced in the EU Member States' outermost regions, as identified in Article 349 and 355(1) of the Treaty on the Functioning of the European Union (TFEU).⁷ The most important EU banana-producing regions are the Spanish's Canary Islands, the French overseas departments of Guadeloupe and Martinique, as well as the Portugal's islands of Azores and Madeira, which together account for 16 percent of the EU's total supply.⁸ Cyprus, Greece and Portugal also produce bananas, but in very small quantities.⁹ The rest of the EU's supply is mainly imported from the ACP countries and the Latin American countries. In 2010, the EU imported a total of 4,491,116 tonnes of bananas from these countries. Accordingly, the EU is considered the biggest importer of bananas, followed by the United States (US).¹⁰

ACP countries, as former EU colonies, have been traditional bananas suppliers to the EU. In order to promote the ACP's economic development, ACP banana-exporting suppliers were granted duty-free access for specific quantities of bananas to the EU market, at the expense of Latin American countries producing the so-called "dollar bananas,"¹¹ which were charged a high import levy. This was in line with the special Banana Protocol (BP) attached to the four Lomé Conventions¹² and assuring preferential treatment of bananas imported from ACP countries over non-preferred banana producers. Consequently, this situation has led to both

⁷ The EU currently has nine outermost regions. These are Guadeloupe, French Guiana, Martinique, Réunion, Saint-Barthélemy, Saint-Martin, the Azores, Madeira and the Canary Islands. OJ C 83, 30.3.2010.

⁸ Op. cit. footnote no 6.

⁹ Ibid.

¹⁰ European Commission, "Bananas-Market Report 2010," Directorate-General for Agriculture and rural Development, Brussels, 2011.

¹¹ Dollar bananas refer to bananas grown by Latin American producers for the US Multi National Company (MNC) of Chiquita, Dole and the Del Monte Corporation. See Dearden, S., "The EU Banana Protocol" in Dearden, S. Ed. *The European Union and the Commonwealth Caribbean*, Ashgate Publishing Limited, England, 2002, p 55.

¹² Lomé I (1975-1980), Lomé II (1980-1985) and Lomé III (1985-1990) and Lomé IV (1990-2000)

internal and external legal actions against the 1993 Common Market Organisation for Bananas (CMOB), which was discussed in Chapter 1 of this thesis.

The legality of Council Regulation (EEC) No 404/93 which implemented the CMOB,¹³ was challenged before the Court of Justice of the European (CJEU) by Germany in May 1993, supported by Belgium and the Netherlands. In accordance with the “Banana Protocol” attached to the then Treaty of Rome, Germany was the only EU Member State (MS) to give duty-free access to its market for specific quotas of bananas imported from Latin American countries.¹⁴ Germany argued that the CMOB was in breach of, *inter alia*, the General Agreement on Tariffs and Trade (GATT) and the then Protocol on tariff quota for imports of bananas which was attached to the Treaty establishing the European Economic Community.¹⁵ The dispute was unsuccessful in 1994 when the CJEU denied the direct effect of GATT provisions within the EU.¹⁶

In addition to this, the CMOB was challenged several times by Latin American countries, later joined by the US, leading to a protracted dispute in the GATT/WTO since 1993 over the EU banana import regime. This conflict became to be known as “the banana war.” However, while the EU banana policy was first contested under the GATT, the chapter will focus on the dispute launched under the WTO when the US entered the case to act on behalf of Chiquita Brands International, Dole Food and Del Monte, all of which were US companies. In

¹³ Council Regulation (EEC) No 404/93 of 13 February 1993 on the common organization of the market in bananas, OJ L 47, 25.2.1993.

¹⁴ Protocol on the tariff quota for imports of bananas attached to the Treaty establishing the European Economic Community, 1957.

¹⁵ Case C-280/93 *Federal Republic of Germany v Council of the European Union*, [1994] ECR I-4973, para 26.

¹⁶ *Ibid.* at paras 110 and 111.

1978, the Chiquita Company, which was then known as the United Brands Company (UBC), was involved in a major competition law case. In this case, UBC, then the largest banana group in the world and which accounted for 35 percent of world exports, was found by the European Commission to have abused its dominant position in the EU MS' banana supply markets, thereby breaching the (post-Lisbon) rules on competition provided in Article 102 TFEU.¹⁷ In an appeal against this decision, the CJEU considered bananas as a separate product market from the other fresh fruits markets because the prices of the latter only affected bananas prices during a short period and to a limited amount. This can be explained by the fact that bananas can be produced and supplied throughout the year in sufficient quantities as opposed to other fruits.¹⁸ The CJEU upheld most findings of the Commission's decision on the abuse of UBC's dominant position.

Earlier GATT rulings have found both previous EU national banana regimes and the 1993 CMOB to be illegal.¹⁹ However, given the weaknesses of the GATT dispute settlement system, as highlighted in Chapter 3 of this thesis, the EU has been able to ignore the panel reports. As was discussed in Chapter 3 of this thesis, with the upgrade from the GATT rules to the WTO rules, the EU's approach in this area can no longer be sustained. The original CMOB was repeatedly changed due to successive GATT/WTO rulings. The last reform of the CMOB took place in 2001 when, in order to comply with its legal obligations stipulated under WTO law, the EU adopted a tariff-only import regime for bananas, applicable from 1st

¹⁷ Commission Decision 76/353/EEC of 17 December 1975 relating to a procedure under Article 86 of the EEC Treaty (IV/26699- Chiquita), OJ L 95, 9.4.76.

¹⁸ Case 27/76, *United Brands Co v Commission of the European Communities* [1978] ECR 207, para. 26.

¹⁹ GATT, *EEC-Member States' Import Regimes for Bananas*, Report of the Panel, 3 June 1993, DS32/R, (not adopted) (*EEC-Bananas I*) and GATT, *EEC- Import Regime for Bananas*, Report of the Panel, 11 February 1994, DS38/R, (*EEC-Bananas II*) (not adopted).

January 2006. Accordingly, the system ended all restrictions on the volumes of bananas imported. The EU bananas market is now supplied on a “first come, first served” basis, thereby avoiding discrimination between suppliers.²⁰ However, issues remained with regard to the Most-Favoured-Nation (MFN) tariff level for bananas. This was settled in 2009 with the conclusion of two agreements on bananas, one between the EU and the Latin American countries, and the other between the EU and the US. The “banana war” was then finally over. The terms of these agreements will be analysed further in this chapter.

Against this background, it remains to examine whether developing countries (DCs) will still encounter issues to export bananas to the EU market in the future, under the new rules of the 2006 CMOB. Although attempts have been made to keep a layout comparable to the sugar chapter, this chapter had to be written in a format that makes it more compatible to the complexity of the banana issue. It should be noted that for the purposes of this chapter, “bananas” refer only to fresh bananas, classified under the combined nomenclature (CN) code 08030019, thereby excluding plantains.

2. The pre-2006 Common Market Organisation for Bananas

2.1 The arrangements within the EU internal market

Following the introduction of the 1993 CMOB, the protection that domestic bananas producers enjoyed in the past under the national arrangements was

²⁰ European Commission, “the ‘First Come, First Served’ method for the banana regime and the implications of a ‘tariff only’ system”, Brussels, COM (2000) 621 final, 4.10.2000.

altered.²¹ In order to cover the loss of income resulting from the implementation of the CMOB, a compensatory aid scheme was established. The scheme gave EU bananas producers “an adequate income to cover their production costs.”²² In accordance with Article 12 of Council Regulation (EEC) No 404/93, aid was granted to producers who were “members of a recognised producers’ organization which [was] marketing in the [EU] bananas complying with the [common quality and marketing standards].”²³ There were twenty one such recognised organizations of producers, with the Canary Islands regrouping comprising the biggest number.²⁴

Compensation given to farmers under the above scheme was calculated on an annual basis. It was based on the difference between the “flat-rate reference income” and the “average production income” for bananas produced and marketed within the then Community.²⁵ The “flat-rate reference income” was calculated for the ex-packing shed stage on the basis of the data recorded during the 1991.²⁶ In 1998, it was fixed at EUR 62.25 per 100 kg and at 64.03 per 100 kg in 1999.²⁷ The “average production income” was also calculated for the ex-packing shed stage. It was based on “the average selling prices on local markets, less a flat-rate amount of EUR 0.29 per 100 kg net weight corresponding to the forwarding costs to the

²¹ Thagesen, R. and Matthews, A., “The EU’s Common banana Regime: An Initial evaluation”, *Journal of Common Market Studies*, 1997, 35(4), pp. 615-627, p 616.

²² Op. cit. footnote no 13 at Preamble (12).

²³ Exceptionally, individual producers unable to join a producers’ organization because of their geographical situation could also receive aid. See *Ibid.* at Article 12(1).

²⁴ The Canary Islands regrouped 5 producers’ organisations, Guadeloupe (2), Martinique (4), Madeira (2), Azores (5), Algarve (1), Crete (1) and Laconia (1). See: European Commission, “Report on the operation of the common organisation of the market in bananas,” Brussels, COM (2005) 50 final, 17.2.2005.

²⁵ Op. cit. footnote no 13 at Article 12(3).

²⁶ Article 2(1) of Commission Regulation (EEC) No 1858/93 of 9 July 1993 laying down detailed rules for applying Council Regulation (EEC) No 404/93 as regards the aid scheme to compensate for loss of income from marketing in the banana sector, OJ L 170, 13.7.1993.

²⁷ *Ibid.* at Article 2(2).

markets concerned.”²⁸ In addition to this, the Council also recognised that certain very small regions with inappropriate climatic conditions were struggling with the production of bananas.²⁹ Therefore, in order to encourage the definitive cessation of banana production, farmers received a single premium of ECU 1 000 per hectare.³⁰

Compensation was paid to EU producers up to a total banana production of 854 000 tonnes.³¹ This quantity was divided between the eight EU regional producers, namely the Canary Islands, Guadeloupe, Martinique, Madeira, Azores, Algarve, Crete and Laconia.³² With a quota volume of 15 000 tonnes each, Crete and Lakonia were holding the lowest quantity among the producers, whereas the Canary Islands received almost 50 percent of the share. The French DOMs and the Portuguese territories were given a general quota of 369 000 tonnes, and 50 000 tonnes, respectively.³³

2.2 The EU’s external banana trading provisions

In contrast with the internal arrangements, the rules for importing bananas from third countries were more complex. Bananas were imported under a tariff-quota scheme which consisted of three categories of bananas comprising traditional ACP bananas, non-traditional ACP bananas and third-countries bananas, which each group subject to a particular tariff-quota treatment.

²⁸ Ibid. at Article 3(2).

²⁹ Op. cit. footnote no 13 at Preamble (13).

³⁰ Ibid. at Article 13(3). The premium was given in accordance with the conditions established under Article 13(2) of Council Regulation (EEC) No 404/93.

³¹ Ibid. at Article 12(2).

³² Op. cit. footnote no 24.

³³ Op. cit. footnote no 13 at Article 12(2).

2.2.1 Preferential Banana Imports Arrangements

2.2.1.1 The ACP/EU Banana Protocol

As was discussed earlier in Chapter 5 of this thesis, in order to maintain the past colonial ties, ACP agri-food products were granted non-reciprocal duty and quota-free access to EU market under the Lomé Conventions.³⁴ With regard to bananas, the BP successively attached to each Lomé Convention allowed “the improvement of the conditions under which bananas originating in the ACP states are produced and marketed.”³⁵ Under the BP the EU promised that, in relation to ACP exports to the EU market, “no ACP state shall be placed, as regards access to its traditional markets and its advantages on those markets, in a less favourable situation than in the past or at present.”³⁶ This provision, in itself, clearly required the EU to provide preferential market access to ACP bananas. ACP countries were therefore given duty-free access for specific quantities of bananas. ACP countries were mainly exporting bananas to France, Italy and the UK. The UK Commonwealth Caribbean producers were the most important banana suppliers to the UK. The majority of banana supplies exported to France were coming from its *Départements d' Outre-Mer* (DOMs)³⁷ and the ACP countries of Cameroon, Ivory Coast and Madagascar. Italy's traditional ACP supplier was Somalia.³⁸ However, it is also argued that the specific commitment of the BP have “authorized” the EU MS “to restrict the

³⁴ See for instance Article 2(1) and Article 3(1) of ACP-EEC Convention of Lomé OJ L 25, 30.01.1976

³⁵ Article 18 of the second ACP-EEC Convention signed at Lomé on 31 October 1979, OJ L 347, 22/12/1980.

³⁶ Article 1 of Protocol 6 on bananas of Lomé I, Protocol 4 of Lomé II, Protocol 4 of Lomé III and Protocol 5 on bananas of Lomé IV.

³⁷ “French overseas department.”

³⁸ Chacon-Cascante, A. and Crespi, J.M., “Historical overview of the European Union banana import policy”, *Agronomia Costarricense*, 2006, 30(2), pp. 111-127, p 113.

importation” of bananas from non-ACP countries and non-overseas territories.³⁹ These latter bananas were taxed a 20 percent common external tariff (CET) of import value and subject to quantitative limitations.⁴⁰ This has led to the pre 1993 EU market being fragmented into different banana import regimes, which obstructed the free movement of bananas between the then EU MS.

The BP also provided for trade development measures. In accordance with Article 2 of the BP, the EU also agreed to provide financial and technical support in order to “improve conditions for the production and marketing of [ACP] bananas.”⁴¹ The measures implemented for this purpose, such as the Stabilisation of Exports Earnings (STABEX) finance scheme, aimed to enhance the competitiveness of ACP countries on the EU market, and hence expand the EU-ACP banana trade.⁴² Given the economic dependence of certain ACP countries, such as Caribbean countries, on banana exports, the BP gave ACP banana suppliers legal commitments to safeguard their traditionally advantageous access to the EU market in the long term.⁴³

When the 1993 CMOB was created, Council Regulation (EEC) No 404/93 had to honour the EU’s legal commitments towards ACP banana suppliers, as defined in the BP attached to the fourth Lomé Convention. The latter was signed in 1989 for a

³⁹ Bartels, L., “The trade and Development Policy of the European Union”, *The European Journal of International Law*, 2007, 18 (4), pp 715-756, p 735.

⁴⁰ Peter, C., “Caribbean Banana Trade: from Colonialism to Globalization”, Gordonsville, VA, USA: Palgrave Macmillan, 2002, p. 101.

⁴¹ Article 2 of Protocol 5 on bananas attached to the Fourth ACP-EEC Convention signed at Lomé on 15 December 1989, OJ L 229, 17.08.1991.

⁴² Ibid. at Article 2 of Protocol 5 on bananas.

⁴³ Op. cit. footnote no 40, p 104.

period of 10 years, starting on 1st March 1990.⁴⁴ The CMOB provided that in accordance with the BP, the EU had to preserve the “traditional trade patterns” of ACP bananas countries under the common regime, and could not limit their imports.⁴⁵ Accordingly, in order to meet the Lomé commitments, the EU import regime maintained duty-free access for ACP bananas, but introduced a system of quotas which differentiated between traditional and non-traditional ACP banana suppliers.

2.2.1.2 Imports of bananas from traditional ACP countries

ACP countries which exported specific quantities of bananas to the EU under the BP were considered as traditional ACP suppliers.⁴⁶ They consisted of 12 countries, with the majority being in the Caribbean region.⁴⁷ These countries received under the 1993 CMOB duty-free access for fixed quantities of bananas.⁴⁸ The total annual ACP banana quota allowed duty-free access, and was fixed at 857, 700 tonnes. Each country received a quantity of that amount, according to the amount of bananas they had traditionally exported to the EU prior to 1991.⁴⁹ In the context of ACP Caribbean countries, Saint Lucia held the biggest quota within the Caribbean region with a total quantity of 127, 000 tonnes. This was followed by Jamaica which was granted an annual import volume of 105, 000 tonnes. St Vincent and the Grenadines was allocated a quota of 82 000 tonnes, Dominica had a quota of 71 000 tonnes, Belize, Suriname and Grenada, each being given a quota

⁴⁴ Article 366(1) of the Fourth ACP-EEC Convention signed at Lomé on 15 December 1989, OJ L 229, 17.08.1991.

⁴⁵ Op. cit. footnote no 13 at Preamble (15).

⁴⁶ Ibid. at Article 15(1).

⁴⁷ Belize, Cameroon, Cape Verde, Ivory Coast, Dominica, Grenada, Jamaica, Madagascar, Somalia, Saint Lucia, Saint Vincent and the Grenadines, Suriname. See Ibid. at Annex X.

⁴⁸ Ibid. at Article 21.

⁴⁹ Ibid. at Article 15(1).

of 40 000, 38 000 and 14 000 tonnes respectively.⁵⁰ Despite the imposition of quota limits, it must be noted that the 1993 banana regime aimed to maintain ACP countries' "traditional trade patterns as far as possible."⁵¹ Accordingly, it was pointed out that these restrictions did not affect the export performance of ACP countries which almost all exported bananas below "the maximum duty-free quantities allowed from 1994 to 2000."⁵²

2.2.1.3 Imports of bananas from non-traditional ACP countries

On the other hand, the term "non-traditional" ACP countries referred to bananas imported within the EU market from traditional ACP suppliers above the agreed quantity level, or bananas imported from non-traditional ACP suppliers.⁵³ Non-traditional ACP bananas were also subject to an import restriction. A total of 90,000 tonnes was allocated to non-traditional ACP bananas. This quantity was shared between the Dominican Republic, as a non-traditional ACP supplier, and the traditional suppliers, namely Belize, Cameroon, and the Ivory Coast.⁵⁴ In accordance with Article 18 of the CMOB, non-traditional ACP banana-suppliers received duty-free access to the EU market within the established quota limit.⁵⁵ However, bananas imported above the agreed quantity were subject to a penalty levy of ECU 750 per tonne.⁵⁶ This high duty rate was imposed in order to ensure that internal production and traditional ACP quantities were "disposed of in

⁵⁰ Ibid. at Annex X. The biggest quota holders among the traditional ACP countries were Ivory Coast and Cameroon with a quantity of 155 000 tonnes.

⁵¹ Ibid. at Preamble (15).

⁵² Op. cit. footnote no 38, p 117.

⁵³ Op. cit. footnote no 13 at Article 15(2).

⁵⁴ Annex I of Commission Regulation (EC) No 478/95 of 1 March 1995 on additional rules for the application of Council Regulation (EEC) No 404/93 as regards the tariff quota arrangements for imports of bananas into the Community and amending Regulation (EEC) No 1442/93, OJ L 49, 4.3.1995.

⁵⁵ Op. cit. footnote no 13 at Article 18(1).

⁵⁶ Ibid. at Article 18(2).

acceptable conditions.”⁵⁷ The biggest quota holder was the Dominican Republic with 55,000 tonnes. It was followed by Belize which was holding a quota of 15,000 tonnes. The Ivory Coast and the Cameroon were allocated each 7,500 tonnes.⁵⁸ The EU also reserved 5,000 tonnes for bananas imported from ACP countries which were newly embarked or were about to embark on banana sector activity.⁵⁹ These countries were referred to under the “other ACP States” category.⁶⁰

2.2.2 Import from non ACP-third countries

In order to protect the internal and preferential imports arrangements, the EU imposed a high duty rate under a tariff-quota on bananas from non-preferred suppliers. Imports of bananas from non ACP-third countries, together with non-traditional ACP suppliers, were subject to an annual basic tariff quota of 2 million tonnes per year.⁶¹ This quota was to be adjusted in accordance with the “forecast supply balance on production and consumption in the [Union] and of imports and exports.”⁶² Bananas imported from non ACP-third countries within the agreed quota limit were subject to a levy of ECU 100 per tonne. Bananas exported above the fixed quota faced a punitive duty of ECU 850 per tonne.⁶³

In addition to this, imports of third countries bananas were restricted by a system of import licences which divided the 2 million tonnes tariff quota into three

⁵⁷ Ibid. at Preamble (16).

⁵⁸ Op. cit. footnote no 54 at Annex I.

⁵⁹ Ibid. at Annex I and Op. cit. footnote no 13 at Preamble (18).

⁶⁰ Article 3(1) (a) and Annex I of Commission Regulation (EC) No 478/95.

⁶¹ Op. cit. footnote no 13 at Article 18.

⁶² Ibid. at Article 16 2) and (3).

⁶³ Ibid. at Article 18(1) and (2).

categories of EU importers.⁶⁴ In accordance with Article 19 of Council Regulation (EEC) No 404/93, the tariff quota system guaranteed EU operators who marketed on their own account EU and/or traditional ACP bananas, a market share of 30 percent. This quota is referred to as “Category B”. Operators for third country and/or non-traditional ACP bananas were allocated 66.5 percent of the 2 million tonne quota (“Category A”). The remaining 3.5 percent, referred to as “Category C,” was reserved to operators who started marketing bananas other than EU and/or traditional ACP bananas from 1992. In accordance with Article 13 of Council Regulation (EEC) No 1442/93, import licences were transferable between operators in the same category, and among Category A and B operators. These two categories were also able to transfer their import licences to Category C importers.

3. Issues with the EU banana regime

As stated earlier, the 1993 CMOB was designed in accordance with the framework of the Lomé Convention. It continued to give preferential treatment to ACP banana countries while maintaining a protectionist approach vis-à-vis the EU banana market. The tariff quota system and specific import duties have restricted imports from non-ACP countries, thereby resulting in an important difference between the world price and the EU market price for bananas, with the latter being higher.⁶⁵ These practices have helped secure market access for ACP bananas, hence ensuring full respect of the EU’s commitments set out in Article 1 of the BP. As a consequence, ACP countries were protected from non-favoured banana exporting countries, those being mainly in Latin American countries, which are considered to

⁶⁴ Ibid. at Article 18. This system was implemented in order to monitor banana imports under the tariff quota arrangements (Article 17 of Council Regulation (EEC) No 404/93).

⁶⁵ Op. cit. footnote no 21, p 618.

produce “cheaper” bananas than those of ACP bananas.⁶⁶ This price difference is explained by the large capital traditionally invested by multinational corporations in the Latin American banana industry. These factors make their plantations “larger than those of the ACP and significantly more efficient,” thereby reducing considerably the cost price of production.⁶⁷

In addition, it has been observed that the CMOB has provided a further “incentive” to import ACP bananas through the system of import licences.⁶⁸ In light of the poor competitiveness of ACP bananas when compared to Latin America countries, the import licence procedure was “designed to make marketing EU/ACP bananas more attractive by reducing the effective price differential between dollar and EU/ACP bananas.”⁶⁹ Accordingly, it is believed that the system intended to allow the “cross-subsidisation” of ACP bananas “with the more lucrative sources” in the dollar region.⁷⁰

It is clear that such discriminatory treatment between DCs associated with the EU external protection has “adversely affected” non-ACP exporting countries,⁷¹ thereby conflicting with the then EU’s goal not to “undermine imports of bananas from other third countries suppliers.”⁷² Given that Latin American bananas suppliers are also DCs, it is to be assumed that preferential treatment provided in favour of ACP countries, which was not falling under one of the Special and

⁶⁶ Lyons, R., “European Union banana controversy”, *Fla. J. Int’l L.*, 1994, 9(1), pp. 165-188, p 167

⁶⁷ *Ibid.*, p 173.

⁶⁸ *Op. cit.* footnote no 11, p 63.

⁶⁹ *Op. cit.* footnote no 21, p 618.

⁷⁰ *Ibid.*, p 618.

⁷¹ Trachtman, J.P., “Bananas, Direct Effect and Compliance”, *EJIL*, 1999, 10(4), pp. 655-678, p 661

⁷² *Op. cit.* footnote no 13 at Preamble (8).

Differential Treatment provisions,⁷³ was in contradiction with the GATT MFN principle.⁷⁴ As discussed in Chapter 3 of this thesis, this MFN principle requires equal treatment between all GATT/WTO members with regard to the imposition of customs duties on imports. There is therefore no doubt that the EU's commitments towards ACP banana suppliers under the CMO in bananas were in direct contradiction to the EU's GATT/WTO obligation to achieve "the fullest liberalization of trade in tropical agricultural products."⁷⁵ This situation has resulted in strong reactions from the Latin American countries, supported by the US, in 1995, acting on behalf its multinational bananas firms.

4. The WTO dispute on bananas

Legal action at the WTO against the EU CMOB started in September 1995, when the US and three Latin American countries, Guatemala, Honduras and Mexico, requested consultations with the EU with regard to its banana regime.⁷⁶ The most significant allegations brought by these countries were that the provisions of the 1993 CMOB were illegal under GATT 1994 and the Agreement on Import Licensing Procedures (The Licensing Agreement). They particularly challenged the conformity of the CMOB provisions with the MFN principle, the EU obligations regarding the imposition of quantitative import restrictions, and the EU's compliance with the WTO rules on import licensing.⁷⁷

⁷³ As discussed in Chapter 3 of this thesis.

⁷⁴ Preferences given to ACP countries were not legally justified by the Enabling Clause or GATT Article XXIV.

⁷⁵ Preamble (5) of the WTO Agreement on Agriculture.

⁷⁶ WTO, *European Communities-Regime for the Importation, Sale and Distribution of Bananas*, Request for Consultations by Guatemala, Honduras, Mexico and the United States, WT/DS16/1, 4 October 1995.

⁷⁷ The complainants referred to Articles I, II, III, X and XIII of the GATT 1994, Articles 1 and 3 of the Agreement on Import Licensing Procedures and Articles II, XVI.

Consultations with the EU were terminated with the accession of the then world's largest banana exporter, Ecuador, to the WTO in January 1996. In February 1996, Ecuador, together with the four aforementioned complainants, lodged a joint complaint against the EU CMOB, and requested new consultations with the EU.⁷⁸ The joint request repeated the same legal grounds previously brought in the 1995 request. It must also be noted that the complainants also relied on two other WTO Agreements, namely the Agreement on Agriculture (AoA) and the Agreement on Trade-Related Investment Measures ("TRIMs Agreement").

However, attempts to reach mutually acceptable solutions were fruitless and in April 1996, the complaining parties reported that the consultation stage had "failed to settle the dispute."⁷⁹ As a consequence, they required the establishment of a panel in order to examine their allegations, and rule against the legality of the 1999 CMOB.⁸⁰ The panel was established in May 1996 and the case became to be known as *EC-Bananas III*.⁸¹

The first interesting issue raised in the case was whether the US had sufficient legal interest to bring the case at the WTO. The US involvement in the dispute was strongly criticised by the EU. In its view, the US "had no legal right or no legal or material interest in the case," since it had only a "token production of bananas" and

⁷⁸ WTO, *European Communities-Regime for the Importation, sale and Distribution of Bananas*, Request for Consultations by Ecuador, Guatemala, Honduras, Mexico and the United States, WT/DS27/1, 12 February 1996.

⁷⁹ WTO, *European Communities-Regime for the Importation, Sale and Distribution of Bananas*, Request for the Establishment of a Panel, WT/DS27/6, 12 April 1996.

⁸⁰ *Ibid.*

⁸¹ WTO, *European Communities-Regime for the Importation, Sale and Distribution of Bananas*, Constitution of the Panel established at the request of Ecuador, Guatemala, Honduras and the United States, Communication by the DSB Chairman, WT/DS27/7, 7 June 1996.

it did not export bananas to the EU.⁸² In response to these allegations, the US argued that it had a “significant commercial interest” in the case, as it produced bananas in Hawaii and Puerto Rico, both areas falling within the US customs territory. Although banana production on these islands is minimal, the US pointed out that the Hawaii banana producers alleged that their ability to produce and export bananas was harmed by the low world banana prices, caused by the EU CMOB. The US went on to point out that the measures of the EU CMOB were “constraining” the import, delivery, and distribution flexibility of two US large companies, Chiquita and Dole Foods.⁸³ It has been argued by some commentators that the US decision to join in the WTO complaint was heavily influenced by the powerful lobbying efforts of Chiquita.⁸⁴

According to the WTO Panel, it is to be assumed that since the US’ internal market could be “directly and indirectly” affected by the EU CMOB’s impact on world supplies and prices, “it would have an interest in a determination” of whether the EU regime complied with the WTO rules. Consequently, the panel held that “a Member’s potential interest in trade in goods [...] and its interest in a determination of rights and obligations under the WTO Agreement,” constitute each a right to bring a complaint before a WTO panel.⁸⁵ Significantly, it was pointed out that the panel also took “a fairly positivist approach” to WTO law⁸⁶

⁸² WTO, *European Communities-Regime for the Importation, Sale and Distribution of Bananas*, Complaint by the United States, Report of the Panel, WT/DS27/R/USA, 22 May 1997, para. 2.2

⁸³ *Ibid.* at para. 2.23

⁸⁴ Alter, K. J and Meunier, S., “Nested and overlapping regimes in the transatlantic banana trade dispute”, *Journal of European Public Policy*, 2006, 13(3), pp. 362-382, p 369.

⁸⁵ *Op. cit.* footnote no 82 at para. 7.50.

⁸⁶ *Op. cit.* footnote no 71, p 666.

insofar as it established that the provisions of the DSU do not oblige a Member to have a “legal interest” in order to bring a claim before the panel.⁸⁷

4.1 Arguments of the parties

The complainants focused on three elements of the EU CMOB, namely the tariff structure, the quota allocations and the import licensing system.

4.1.1 Tariff issues

The discriminatory tariffs of the EU banana import regime were challenged by the complaining parties. They argued that tariffs applied under the tariff quota system were set according to whether bananas were imported from non ACP-third countries or non-traditional ACP countries. The complainants pointed out, relying on previous GATT panel reports, that such a difference “on the basis of foreign source” was considered a direct breach of the general MFN principle of GATT Article 1(1). It was held by the GATT panel in 1981 that the application of different import tariffs cannot be justified on the grounds of “geographical factors,” “cultivation methods,” or other factors linked to the end-product.⁸⁸ In addition, they pointed out that in both the *EEC -Bananas I* and *II* cases, the GATT panel found the preferential tariffs treatment granted to ACP countries to be in breach of GATT Article I(1).⁸⁹

⁸⁷ Op. cit. footnote no 82 at para. 7.49.

⁸⁸ GATT, *Spain-Tariff Treatment of Unroasted Coffee*, report of the panel adopted on 11 June 1981, BISD 28S/102, para. 4.6.

⁸⁹ GATT, *EEC-Member States' Import Regimes for Bananas*, Report of the Panel, 3 June 1993, DS32/R, para. 375 and GATT, *EEC- Import Regime for Bananas*, Report of the Panel, 11 February 1994, DS38/R, para. 155

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In response to this, the EU pointed out that in 1994, it had obtained a waiver for the Lomé IV Convention, and that its obligations under provisions of GATT I(1) were waived until 29 February 2000.⁹⁰ Accordingly, the waiver had authorised the EU to continue granting preferential access to its market for ACP countries' products under the umbrella of the Lomé provisions, "without being required to extend the same preferential treatment to like products of any other contracting party."⁹¹ This provision, in itself, provided an exception to the general MFN rule. The EU further claimed that the waiver also extended to "any measure necessary to permit it to fulfil its obligations under the Lomé Convention to provide preferential treatment [to products imported from ACP countries]."⁹² As a consequence, the EU argued that it was legally allowed to continue its trade development strategy in respect of ACP countries, through enforcing the provisions of the Fourth Lomé Convention and the attached BP.⁹³

The interpretation of the Lomé waiver has therefore been the subject of critical debate between the complaining parties and the EU. The complainants disagreed with the EU's explanations, arguing that its interpretation of the waiver was too broad and thereby incorrect. They based their argument on the *Sugar Headnote* case, where the GATT panel established that since waivers of the obligations under GATT Article I are "granted according to Article XXV:5 only in 'exceptional circumstances', [...]their terms and conditions consequently have to be interpreted

⁹⁰ The EU requested this waiver following the ruling of the GATT panel report in *EEC-Bananas II*.

⁹¹ GATT, "the Fourth ACP-EEC Convention of Lomé," decision of 9 December 1994, L/7604, para. 1.

⁹² *Op. cit.* footnote no 82 at para. 4.44.

⁹³ *Ibid.* at para. 4.44.

narrowly.”⁹⁴ Accordingly, they assumed that “the waiver did not apply to all measures that the [EU] might adopt under the Lomé Convention’s objectives.”⁹⁵

The complainants further focused on tariff preferences given to non-traditional ACP bananas.⁹⁶ They pointed out that since Article 1 of the BP provides for a special treatment solely in favour of traditional ACP countries, the EU had “no special obligations with respect to [non-traditional ACP bananas exports].”⁹⁷ Consequently, the Lomé waiver could not apply to non-traditional ACP tariff preferences.⁹⁸ The EU replied that the duty-free treatment granted to non-traditional ACP countries was not indeed provided in the BP. Nevertheless, such a treatment was given in accordance with Article 168(2)(a)(ii) of the Lomé IV Convention which also fell under the Lomé waiver.⁹⁹

The complainant parties then focused on the EU tariff rates which applied particularly to third-countries’ bananas. In their view, the two tariff rates imposed on non-ACP-third bananas violated the EU’s “long-standing GATT-bound tariff of 20 percent *ad valorem* for the product.”¹⁰⁰ They based their argument on GATT Article II which requires WTO Members to “accord to the commerce of the other contracting parties treatment no less favourable than that provided for in the

⁹⁴ GATT, *United States – Restrictions on the Importation of Sugar and Sugar-Containing Products Applied under the 1955 Waiver and under the Headnote to the Schedule of Tariff Concessions*, Report of the Panel adopted 7 November 1990, BISD 37S/228, para 5.9.

⁹⁵ *Op. cit.* footnote no 82 at para 4.52.

⁹⁶ Preferential access for traditional ACP countries was not an issue in the dispute.

⁹⁷ *Op. cit.* footnote no 82 at para. 4.70 and para 4.73.

⁹⁸ *Ibid.* at para. 4.90.

⁹⁹ *Ibid.* at para 4.87. Article 168(2)(a)(ii) of the Lomé Convention provides that the EU “shall take the necessary measures to ensure more favourable treatment than they granted to third countries benefiting from the most-favoured-nation clause for the same product.” According to the EU this provision includes also bananas.

¹⁰⁰ *Ibid.* at para 4.7.

appropriate Part of the appropriate Schedule annexed to this Agreement.”¹⁰¹ They pointed out that the *EC-Bananas II* GATT panel found that the tariffs structure for bananas from third countries was in breach of GATT Article II. According to the GATT panel, the specific nature of these tariffs had “led to the levying of a duty on imports of bananas whose *ad valorem* equivalent was, either actually or potentially, higher than 20 percent *ad valorem*.”¹⁰² However, the EU argued that because the conclusions of the report have never been accepted or endorsed, “no authority whatsoever” emanates from them.¹⁰³

4.1.2 Allocation issues

In addition to the above issues relating to the tariff structure, the complainants claimed that the EU applied “differential volume restrictions by source” among banana suppliers, which were inconsistent with GATT Article XIII(1).¹⁰⁴ The latter provision prohibits the application of quantitative restrictions on products imported from contracting parties, “unless the importation of the like product of all third countries [...] is “similarly prohibited or restricted.”¹⁰⁵ The complainants’ arguments refer to quotas allocated to ACP countries, third-countries and Latin American countries signatories of the Banana Framework Agreement (BFA).¹⁰⁶ The BFA was signed in 1994 between the EU and four Latin American countries, namely Colombia, Costa Rica, Nicaragua and Venezuela, in order to settle the

¹⁰¹ GATT Article II(1)(a).

¹⁰² GATT, *EEC- Import Regime for Bananas*, Report of the Panel, 11 February 1994, DS38/R, para. 134.

¹⁰³ Op. cit. footnote no 82 at para 4.98.

¹⁰⁴ Ibid. at paras 4.217 and 4.218.

¹⁰⁵ GATT Article XIII(1).

¹⁰⁶ The BFA was laid down in Council Regulation (EC) No 3290/94 of 22 December 1994 on the adjustments and transitional arrangements required in the agriculture sector in order to implement the agreements concluded during the Uruguay Round of multilateral trade negotiations, OJ L 349, 31.12.1994.

dispute over the EU's banana regime in GATT.¹⁰⁷ It allocated these countries an annual import quota of 2.1 million tonnes for 1994 and 2.2 million tonnes for 1995.¹⁰⁸ The complainants argued that such “volume discrimination by source” had not been justified by the EU.¹⁰⁹ However, according to the EU, because these two import regimes were separate from each other and “legally justified on a different basis,” the claim for discrimination could not apply.¹¹⁰

The complainants argued further that the EU granted to favoured suppliers import volumes that “greatly exceeded the shares of trade they would be expected to obtain in the absence of restrictions,” thereby conflicting with GATT Article XIII(2).¹¹¹ The latter requires instead a distribution of trade in a product “approaching as closely as possible the shares” which GATT contracting parties could have been expected to obtain in the absence of such import restrictions. According to the complainants, the EU could have met this requirement by distributing its market in line with the provisions of Article XIII(2)(d). This latter provision provides that in allocating quotas among suppliers an agreement must be sought with all parties substantially interested in supplying the same product. Alternatively, quotas must be allocated according to “the proportions, supplied by such contracting parties during a previous representative period, of the total quantity or value of imports of the product.” The complaining parties pointed out that the EU has allocated quotas to specific categories of suppliers which “did not

¹⁰⁷ Op. cit. footnote no 19.

¹⁰⁸ “Framework Agreement on Bananas”, Annex to Part I, Section I-B (tariff quotas) in Schedule LXXX- European Communities.

¹⁰⁹ Op. cit. footnote no 82 at para 4.218.

¹¹⁰ Ibid. at para. 4.220 These two regimes according to the EU are: the preferential regime for traditional ACP bananas and a regime for all other bananas. paras 4.16 and 4.17.

¹¹¹ Ibid. at para. 4.9. GATT Article XIII (2) requires that a distribution of trade in a product approach “as closely as possible the shares which the various contracting parties might be expected to obtain in the absence of such restrictions.”

reflect commercial or historical patterns” and left other countries which are considerably interested in exporting bananas to the EU, such as Ecuador, without quotas.¹¹²

In response to this, the EU claimed that because the 1993 CMOB comprised two different regimes, the GATT Article XIII could not apply. With respect to ACP countries, the EU pointed out that they were allocated traditional quantities according to their “best ever” exports, up until and including the year 1990. According to the EU, the notion of “best ever” export performance has been given a broad interpretation in order to be consistent with the EU development policy towards ACP countries.¹¹³ It further pointed out that the quota of 2 million tonnes originally given to imports from non-traditional ACP bananas and non-ACP third countries was set in line with “the average yearly imports during the 1989-1991.”¹¹⁴

The complainants further challenged the reallocation of “short-fall” provided in paragraph 4 of the BFA. They alleged that the possibility given to the four Latin American countries to transfer their quotas among themselves was inconsistent with the provisions of Article XIII GATT,¹¹⁵ because this advantage was not offered to other tariff quota supplying countries.¹¹⁶ However the EU disagreed with these claims, arguing that the transfer of unused quotas fell under the GATT requirement that “no conditions or formalities shall be imposed which would prevent any contracting party from utilizing fully the share of any such total

¹¹² Ibid. at para 4.113.

¹¹³ Ibid. at para 4.131.

¹¹⁴ Ibid. at para 4.136.

¹¹⁵ Op. cit. footnote no 108 at Paragraph 4.

¹¹⁶ Op. cit. footnote no 82 at para 4.241.

quantity or value which has been allotted to it [...].”¹¹⁷ The EU went on to point out that the “others” suppliers category disposed already of “the widest possibility” of quota transfer.¹¹⁸ Consequently, the EU considered that there was no violation of GATT Article XIII(2)(d).

4.1.3 Import licensing issues

Finally, the whole functioning of the licensing system has led to strong criticism from the complaining parties. In their view, the import licensing system applied to Latin American banana suppliers was “highly complex,” and had led to “highly unfavourable conditions of competition” when contrasted with the “simple” arrangements applied to traditional ACP bananas.¹¹⁹ In addition, because no limitations were imposed on EU internal bananas sales or distribution, the complainants alleged that the EU tariff quota licensing scheme was “discriminatory and unfair” against Latin American bananas.¹²⁰ They continued to point out that such discrimination, associated with “the overwhelming onerous requirements” of the system, have “restricted and distorted trade.” The countries also argue that it has created “unnecessary administrative burdens” for these countries, thereby violating *inter alia* GATT Article I(1) and the Licensing Agreement.¹²¹ They were therefore of the view that the system applied to Latin American bananas amounted to “a non-tariff barrier to trade.”¹²²

¹¹⁷ GATT Article XIII(2)(d).

¹¹⁸ Op. cit. footnote no 82 at para 4.243.

¹¹⁹ Ibid. at para. 4.11.

¹²⁰ Ibid. at para. 4.250 and 4.251.

¹²¹ Ibid. at para. 4.250 and 4.251.

¹²² Ibid. at para. 4.249.

The complainants further challenged the Category B operator criteria and pointed out that despite the fact that these were found to be in breach of Articles I and III of GATT¹²³ by the *EC-Bananas II* panel, the EU had continued to use them under the CMOB.¹²⁴ According to the panel, the 30 percent of the tariff quota allocated to operators was based on bananas which had been purchased from domestic or traditional ACP sources during the preceding period. Accordingly, operators were encouraged to purchase more ACP and EU bananas if they wanted to “increase their future share of bananas which would benefit from the tariff quota.”¹²⁵

In response to this, the EU argued that the Licensing Agreement clearly states in Article 1(1) that its scope was to “regulate all the procedures, others than customs operations, prior to the importation.”¹²⁶ It indicated that there were no provisions within this Agreement providing for its application also to situations where “no import restriction was applied at the border.”¹²⁷ The EU pointed out, relying on the *EC-Bananas II* panel, that since a tariff quota was not an “import restriction,” the Licensing Agreement could not apply to the EU banana tariff quotas.¹²⁸ Furthermore the EU argued that, since a “licensing system could not be considered by any means as an advantage, favour, privilege or immunity,” it could not fall under the provisions of GATT Article I(1).¹²⁹

¹²³ As discussed in Chapter 3 of this thesis, GATT Article III requires an equal treatment between imported and domestic products. This article therefore prohibits the application of internal taxes and charges on imported products “so as to afford protection to domestic production.”

¹²⁴ Op. cit. footnote no 82 at para 4.363.

¹²⁵ Op. cit. footnote 102 at para 144.

¹²⁶ Op. cit. footnote no 82 at para. 4.255.

¹²⁷ Ibid. at para. 4.255.

¹²⁸ Ibid. at para 4.254 and 4.273.

¹²⁹ Ibid. at para 4.281.

With regard to the Category B eligibility criteria, the EU argued that the complainants have failed to prove that they have “affected [...] the internal [EU] distribution of bananas” and that they have resulted in “operator[s] involved in trade in Latin American bananas [...] losing market share.”¹³⁰ It demonstrated, in contrast, the statistics showed that “these companies were actually increasing their market share of the primary import of ACP bananas and in marketing [EU] bananas.”¹³¹ Consequently the EU argued that the complainants’ allegations as well as the conclusions of the panel report in the *EC-Bananas II* were “totally unfounded.”¹³²

4.2 The WTO Panel decision

In light of the “unprecedented number” of issues raised in this dispute and the number of members involved, the WTO panel has recognised the *EC-Bananas III* as an “exceedingly complex” case, which resulted in “a long report” comprising “an unprecedented number of findings.”¹³³ With regard to the complaints of the parties, the panel decided to focus its findings on three separate issues; the quotas allocated to all banana suppliers, the tariff issues, and the EU licensing procedures for bananas. It must be noted that, the Panel started its reasoning by concluding that despite their differences in quality, size, taste or point of origin, all bananas are ‘like’ products for purposes of GATT Articles I, III, X and XIII.¹³⁴

¹³⁰ Ibid. at para 4.394 and 4.395.

¹³¹ Ibid. at para 4.395.

¹³² Ibid. at para 4.395.

¹³³ Ibid. at paras. 7.1 and 7.399.

¹³⁴ Ibid. at para 7.63.

4.2.1 Allocation issues

The WTO Panel has found that the EU's tariff quota allocations applied a differential treatment of bananas between WTO Members, thereby breaching the requirements of GATT Article XIII(1) for two reasons. Firstly, quotas were allocated whether by agreement and by assignment to some ACP countries, and to Latin American countries signatories of the BFA that did not have a substantial interest in supplying bananas to the EU, whereas such shares were not allocated to the rest of Latin America countries. Secondly, the BFA countries were the only countries which benefited from the possibility to reallocate their tariff quota shares among themselves.¹³⁵ However, the Panel agreed with the EU's claim on the scope of the Lomé waiver, and ruled that the waiver also covered the EU's obligations under GATT Article XIII. The panel considered that it was important to give "real effect" to the waiver, and that there was a "close relationship" between both GATT Articles I and XIII(1), as they both prohibit discrimination treatment between WTO Members.¹³⁶ Therefore it concluded that the EU was allowed to give "shares of its banana tariff quota to specific traditional ACP banana supplying countries in an amount not exceeding their pre-1991 best-ever exports to the [EU]."¹³⁷

4.2.2 Tariff issues

With regard to the concerns raised by the complaining parties in relation to the EU bananas tariffs, the panel confirmed that they did not challenge the tariff preferences granted to traditional ACP bananas, but those given to non-traditional ACP bananas.¹³⁸ The panel ruled that since bananas are "like" products, EU's

¹³⁵ Ibid. at paras 7.89 and 7.90.

¹³⁶ Ibid. at para 7.106 and 7.107.

¹³⁷ Ibid. at paras 7.110 and 7.107.

¹³⁸ Ibid. at para 7.131.

preferential tariffs for non-traditional ACP bananas should be found inconsistent with the non-discrimination obligations provided in GATT Article I(1). However, it recognised that these obligations have been waived by the Lomé waiver, which therefore permitted the EU to continue to give preferential treatment to non-traditional ACP bananas.¹³⁹

4.2.3 Import licensing issues

In addressing the complainants' claims regarding the EU import licensing procedures, the panel clarified some important points. First, it was of the view that Article 1(1) of the Licensing Agreement does not explicitly include, or for that matter, exclude, licences for quotas.¹⁴⁰ However, the panel also pointed out that footnote 1 of this Article clearly states that administrative procedures, including those referred to as "licensing," are covered by the Licensing Agreement.¹⁴¹ Therefore, the panel regarded the provisions of the Licensing Agreement as applying to licensing procedures for tariff quotas.¹⁴² On this basis, it also decided to examine whether the EU's import licensing procedures for bananas were falling under the provisions of GATT 1994, the Licensing Agreement and also the TRIMs Agreement. The panel found that in accordance with the WTO General Interpretative Note,¹⁴³ there were obligations within the provisions of the Licensing Agreement, and those of the TRIMs Agreement, conflicting with those stipulated in GATT 1994. Consequently, the panel stated that GATT 1994, the Licensing

¹³⁹ Ibid. at para 7.136.

¹⁴⁰ This Article defines "import licensing" as "administrative procedures used for the operation of import licensing regimes [...]"

¹⁴¹ Op. cit. footnote no 82 at para 7.147.

¹⁴² Ibid. at para 7.156.

¹⁴³ The General Interpretative Note to Annex 1A of the Agreement Establishing the WTO provides that when a conflict arises between a provision of the GATT 1994 and a provision of another Multilateral Trade Agreement in Annex 1A to the WTO Agreement, the provision of the other agreement will prevail to the extent of the conflict.

Agreement, as well as the TRIMs Agreement, were all deemed to apply to the EU's import licensing regime.¹⁴⁴ Finally, the Panel considered that traditional ACP licensing procedures, as well as non-traditional ACP and third-country licensing procedures, constituted one single licensing regime. In the view of the panel, if it was possible for WTO Members to “create separate regimes for imports of like products based on origin,” it would “defeat [...] the object and purpose of the [GATT] non-discrimination provisions.”¹⁴⁵ It pointed out further that while WTO Members are allowed to create import licensing regimes that contained particular “technical aspects,” “the measures for implementing a preferential tariff permitted under WTO rules should not” lead to the creation of non-tariff preferences “in addition to the tariff preference.”¹⁴⁶

With regard to the claims made against the allocation of 30 percent of the licenses to Category B operators, the WTO panel considered that the “design, architecture, and structure” of the EU measure providing for such allocation was applied “so as to afford protection to [EU] producers.”¹⁴⁷ In addition, the panel noted that since the rules concerning operator categories remained unchanged since the *EC-Bananas II* panel rulings, it decided to adopt these rulings as its own findings.¹⁴⁸ As a consequence, the general application of operator category rules, with regard to third-country and non-traditional ACP bananas, as well as the 30 percent allocation of import licenses to Category B operators, were found to be in breach of both GATT Article III(4) and Article I(1).¹⁴⁹ It should be noted that the Panel

¹⁴⁴ Op. cit. footnote no 82 at para 7.163.

¹⁴⁵ Ibid. at para 7.165.

¹⁴⁶ Ibid. at para 7.166.

¹⁴⁷ Ibid. at para 7.181.

¹⁴⁸ Ibid. at para 180.

¹⁴⁹ Ibid. at paras 7.182 and 7.195.

also decided to interpret the Lomé waiver narrowly, and found that the waiver did not cover the EU's obligations under Article I(1) in respect of the licensing procedures.¹⁵⁰

To conclude, the WTO panel upheld most of the claims from the US and the Latin American countries and ruled against several aspects of the 1993 CMOB. The CMOB of the current EU was found in violation with a number of provisions *inter alia* GATT Articles I(1), III(4), XIII(1) and Article 1(3) of the Licensing Agreement. Accordingly, the Panel recommended that the DSB request the EU to change its import regime for bananas in order to make it conform to its obligations under the aforementioned GATT and WTO agreements.¹⁵¹

Following the EU's appeal of the Panel decision,¹⁵² the WTO Appellate Body (AB) issued a report in September 1997, which reaffirmed the panel's ruling. However the WTO AB disagreed with the panel's finding that the Lomé waiver could cover GATT Article XIII with respect to the EU's allocation of quota shares to traditional ACP banana suppliers. According to the AB, because waivers provide an exception to the general non-discrimination rule, the extent of their coverage should be interpreted "with great care."¹⁵³ It pointed out that when the Lomé waiver was negotiated, WTO Members narrowed its scope by replacing the word "foreseen" by "required" in "preferential treatment foreseen by the Lomé

¹⁵⁰ Ibid. at para 7.204. The panel decided to follow the panel report on the *Sugar Headnote* case previously mentioned (Op. cit. footnote no 94).

¹⁵¹ Ibid. at para. 9.2.

¹⁵² WTO, *European Communities-Regime for the Importation, Sale and Distribution of Bananas*, Notification of an Appeal by the European Communities under paragraph 4 of Article 16 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), WT/DS27/9, 13 June 1997.

¹⁵³ WTO, *European Communities-Regime for the Importation, Sale and Distribution of Bananas*, Report of the Appellate Body, WT/DS27/AB/R, 9 September 1997, para 185.

Convention.”¹⁵⁴ It therefore decided that the Lomé waiver should only apply to the provisions which were explicitly referred to or mentioned in the waiver. Hence, since GATT Article XIII is not clearly mentioned in the waiver, it cannot be included within the scope of the waiver’s application. In accordance with this restrictive and literal reading of the Lomé waiver, the AB concluded that the panel has “erred in law” in interpreting the scope of the Lomé waiver.¹⁵⁵ Consequently, the EU was required to provide the same quota arrangements to both ACP and non-ACP bananas, but was nevertheless entitled to continue to give preferential access to traditional and non-traditional ACP bananas.¹⁵⁶

As a result of the AB report, the 1993 CMOB was, once again, found to be inconsistent with GATT/WTO rules. The EU was required to bring its banana regime into conformity with its international obligations and therefore unlike the GATT rulings, the EU now had no choice but to accept the WTO decision.¹⁵⁷

5. The New CMO in bananas

5.1 The “tariff-only” import regime

In response to the WTO challenges, the EU issued in 1998 Council Regulation (EEC) No 1637/98 and Commission Regulation (EC) No 2362/98 that revised the 1994 CMOB.¹⁵⁸ However, with the EU banana regime under strict scrutiny by the

¹⁵⁴ Ibid. at para 186.

¹⁵⁵ Ibid. at paras 183 and 188.

¹⁵⁶ Ibid. at para 178, para 255(i).

¹⁵⁷ The DSB adopted both Panel and Appellate Body reports on 25 September 1997: WTO, *European Communities-Regime for the Importation, Sale and Distribution of Bananas*, Appellate Body Report and Panel Reports- Action by the Dispute Settlement Body, WT/DS27/12, 10 October 1997.

¹⁵⁸ Council Regulation (EC) No 1637/98 of 20 July 1998 amending Regulation (EEC) No 404 on the common organisation of the market in bananas, OJ L 210, 28.7.1998; Commission Regulation (EC) No 2362/98 of 28 October 1998 laying down detailed rules for the implementation of Council

other WTO Members, the reform did not meet all the requirements of the WTO AB ruling, and the regulations were found to be still inconsistent with the EU's obligations.¹⁵⁹ Consequently, in April 2001, the EU reached a “mutually satisfactory” understanding with the US and Ecuador to resolve the bananas dispute.¹⁶⁰ The EU committed itself to introduce a tariff-only system for imports of bananas before 1 January 2006.¹⁶¹ However, in order to prepare ACP countries for the new regime, a transitional tariff quota system was applied from January 2002 to December 2005. The transitional tariff-only system was implemented by Commission Regulation (EC) No 896/2001 of 7 May 2001, Council Regulation (EC) No 2587/2001 of 19 December 2001 and Council Regulation (EC) No 349/2002 of 25 February 2002.¹⁶² During this period, three tariff-rate quotas were opened to banana imports according to whether they originated from all third-countries, or from ACP countries. Each year, a quota of 2,200,000 tonnes, designated as “quota A”, and an additional quota of 453 000, called “quota B”, were opened by the EU to all third countries and subject to a tariff duty of EUR 75 per tonne. In line with the general 2001 “Doha waiver”, referred to in Chapter 5 of

Regulation (EEC) No 404 on the common organisation of the market in bananas, OJ L 293, 31.10.1998.

¹⁵⁹ WTO, *European Communities-Regime for the Importation, Sale and Distribution of Bananas*, Recourse to article 21.5 by Ecuador, Report of the Panel, WT/DS27/RW/ECU, 12 April 1999.

¹⁶⁰ Ecuador was recognised as the principal supplier in the banana negotiations made pursuant GATT Article XXVIII on the modification of schedules.

¹⁶¹ Notification of Mutually Agreed Solution, *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/58, 2 July 2001.

¹⁶² - Commission Regulation (EC) No 896/2001 of 7 May 2001 laying down detailed rules for applying Council Regulation (EEC) No 404/93 as regards the arrangements for importing bananas into the Community, OJ L 126, 8.5.2001.

- Council Regulation (EC) No 2587/2001 of 19 December 2001 amending Regulation (EEC) No 404/93 on the common organisation of the market in bananas, OJ L 345, 29.12.2001.

- Commission Regulation (EC) No 349/2002 of 25 February 2002 amending Regulation (EC) No 896/2001 laying down detailed rules for applying Council Regulation (EEC) No 404/93 as regards the arrangements for importing bananas into the Community, OJ L 55/17, 26.2.2002.

this thesis, ACP countries continued to enter the EU banana market duty-free.¹⁶³ In order to “ensure access for a specific quantity of bananas” from ACP countries, and thereby protecting their economy, an autonomous “quota C” was fixed at 750 000 tonnes, and opened exclusively to them. In order to legally reserve this quota to ACP countries, the EU was granted a second waiver, the “Article XIII Doha waiver”, which covered its obligations under GATT Article XIII(1) and (2) until 31 December 2005.¹⁶⁴ Since the quota system was operated on a “first come, first served” basis,¹⁶⁵ the distinction between traditional and non-traditional ACP suppliers disappeared, and all ACP bananas benefitted from a zero duty rate.¹⁶⁶ Bananas imported from ACP countries, and third- countries outside the agreed quota, were subject to a tariff preference of EUR 300 and EUR 680 per tonne respectively.¹⁶⁷

Quotas were distributed to “traditional” and “non-traditional” operators¹⁶⁸ on the basis of historical references, using imports made during 1994, 1995 and 1996, as the reference period.¹⁶⁹ In accordance with Article 1 of Commission Regulation (EC) 349/2002,¹⁷⁰ “traditional” and “non-traditional” operators were distributed

¹⁶³ Article 18(1) and (2) of Council Regulation (EC) No 2587/2001 of 19 December 2001 amending Regulation (EEC) No 404/93 on the common organisation of the market in bananas, OJ L 345, 29.12.2001.

¹⁶⁴ WTO, “European Communities-transition regime for the EC autonomous tariff rate quotas on imports of bananas,” WT/MIN(01)/16, Ministerial conference, fourth session, Doha, 9-14 November 2001, 14 November 2001.

¹⁶⁵ Op. cit. footnote no 20.

¹⁶⁶ Op. cit. footnote no 163 at Article 18(3).

¹⁶⁷ Ibid. at Article 18(4).

¹⁶⁸ “Traditional” operators are defined as economic agents who have purchased a minimum quantity of 250 tonnes originating in third countries in any one year of the reference period. Article 3(1) of Commission Regulation (EC) No 896/2001 of 7 May 2001 laying down detailed rules for applying Council Regulation (EEC) No 404/93 as regards the arrangements for importing bananas into the Community, OJ L 126, 8.5.2001.

¹⁶⁹ Ibid. at Article 4.

¹⁷⁰ Commission Regulation (EC) No 349/2002 of 25 February 2002 amending Regulation (EC) No 896/2001 laying down detailed rules for applying Council Regulation (EEC) No 404/93 as regards the arrangements for importing bananas into the Community, OJ L 55/17, 26.2.2002.

import licences for 83 percent and 17 percent of quota A and B, respectively.¹⁷¹

With regard to “quota C”, import licences for 89 percent of the quota were allocated to “traditional operators,” and “non-traditional operators” received licences for the remaining 11 percent.¹⁷²

The proposed tariff-only regime did not contain a definitive tariff schedule and agreeing on a MFN tariff level “has become a long process for the EU.”¹⁷³ In 2004 the EU Commission proposed opening WTO negotiations with the relevant producer countries on the new tariff rate.¹⁷⁴ However, the then EU Commissioner Franz Fischler also pointed out that while these negotiations aimed to replace “the complex quota system by a simple tariff system,” any change would relate to the import system and “not the level of protection.”¹⁷⁵ The then EU Commissioner for Trade, Pascal Lamy, for his part, noted that the EU will comply with its WTO obligations, but it will also “pay [...] particular attention to the situation of ACP countries and safeguarding the interests of EU producers.”¹⁷⁶ Accordingly, the EU originally proposed in January 2005 a single MFN tariff rate of EUR 230 tonne.¹⁷⁷ However, in accordance with the Annex to the “Doha waiver”, the Latin American countries requested arbitration. The WTO arbitration panel examined the proposed tariff and concluded in August 2005 that it would not maintain a “total market

¹⁷¹ “Traditional operators A/B” were those who carried out the minimum quantity of primary imports of ‘third-country’ and/or ‘non-traditional ACP’ bananas. Op. cit. footnote no 168 at Article 3(2).

¹⁷² “Traditional operators C” are those who have carried out the minimum quantity of primary imports of “traditional ACP bananas.” Ibid. at Article 3(3).

¹⁷³ Op. cit. footnote no 38, p 125.

¹⁷⁴ European Commission, “Banana imports: Commission proposed to open tariff-only negotiations,” Brussels, EUR/NR 90/04, 2 June 2004.

¹⁷⁵ Ibid.

¹⁷⁶ Ibid.

¹⁷⁷ WTO, Article XXVIII: 5 Negotiations, Schedule CXL – European Communities, Addendum, (G/SECRET/22/Add.1), 1 February 2005.

access for MFN banana suppliers.”¹⁷⁸ As a result, the EU proposed to lower the MFN tariff to EUR 187 per tonne, and to grant duty-free access to ACP countries up to 775,000 tonnes. However, the proposal was appealed for the second time by the Latin American countries and the arbitrator found again that the revised proposal did not satisfy the requirement to “at least maintain[...] total market access for MFN banana suppliers.”¹⁷⁹

After a long consultation process, the EU finally issued Council Regulation (EC) No 1964/2005,¹⁸⁰ which implemented the tariff-only regime from 1 January 2006, thereby officially replacing the transitional tariff-rate quota. The regulation imposed a high MFN tariff of EUR 176 per tonne on third-countries bananas,¹⁸¹ thereby providing “a level of protection and trade as close as possible to the system of tariff-rate quotas of the transitional period.”¹⁸² ACP countries, in contrast, continued to receive an autonomous tariff quota of 775 000 tonnes, free of customs duties, until the end of the Doha waiver in 2007.¹⁸³

The new regime was welcomed by the then EU commissioner for Agriculture and Rural Development, Mariann Fischer Boel, who believed that the banana import regime was now “fair and balanced” for all developing countries. She went on to

¹⁷⁸ WTO, “European Communities-The ACP-EC Partnership Agreement-recourse to Arbitration pursuant to the Decision of 14 November 2001, award of the arbitrator,” WT/L/616, 1 August 2005, para 94.

¹⁷⁹ WTO, “European Communities-The ACP-EC Partnership Agreement- second recourse to Arbitration pursuant to the Decision of 14 November 2001, award of the arbitrator,” WT/L/625, 27 October 2005, para 127.

¹⁸⁰ Council Regulation (EC) No 1964/2005 of 29 November 2005 on the tariff rates for bananas, OJ L 316, 2.12.2005.

¹⁸¹ Ibid. at Article 1.

¹⁸² Guyomard, H. and Le Mouel, C., “The New Banana Import Regime in the European Union: A Quantitative Assessment”, *The Estey Centre Journal of international Law and Trade Policy*, 2003, 4(2) pp. 143-161, p 147.

¹⁸³ Op. cit. footnote no 180 at Article 1.

point out that the EU would “fully maintain access for Latin American producers while continuing to take into account EU and ACP producers.”¹⁸⁴ However, issues remained with regard to the MFN tariff level for bananas. ACP countries criticised the MFN tariff as being too low, whereas in the view of Latin American countries, it remained too high.¹⁸⁵

Consequently, the Latin American countries challenged the revised EU banana regime and requested the establishment of a panel, pursuant to Article 21(5) of the WTO Dispute Settlement Understanding (DSU), with regard to the inconsistency of the EU’s 2006 regime with the DSU rulings and recommendations.¹⁸⁶ Two WTO panels were composed in June and August 2007.¹⁸⁷ In 2008, both panels found that the set MFN tariff of EUR 176 and the preferential tariff quota reserved to ACP countries were inconsistent with GATT Articles I, II and XIII.¹⁸⁸ In the view of the panels, the MFN tariff was in excess of the previous EUR 75 tariff, thereby resulting in “a treatment for the commerce of bananas from MFN countries that [was] less favourable than that provided for in Part I of the European

¹⁸⁴ EU Press Release, “European Union adopts new ‘tariff-only’ import regime for bananas from 1 January 2006,” Brussels, IP/05/1493, 29 November 2005.

¹⁸⁵ ACP-EU Joint Parliamentary Assembly Bureau, “Fact-Finding mission to Suriname, Saint-Vincent and Saint Lucia, 29 May-3 June 2008”, 24 March 2009, p 8.

¹⁸⁶ - WTO, *European Communities- Regime for the importation, sale and distribution of bananas*, recourse to Article 21.5 of the DSU by Ecuador, Request for the Establishment of a Panel, WT/DS27/80, 26 February 2007.

- WTO, *European Communities- Regime for the importation, sale and distribution of bananas*, recourse to Article 21.5 of the DSU by the United States, Request for the Establishment of a Panel, WT/DS27/83, 2 July 2007.

¹⁸⁷ - WTO, *European Communities- Regime for the importation, sale and distribution of bananas*, recourse to Article 21.5 of the DSU by Ecuador, Constitution of the Panel, WT/DS27/82, 18 June 2007.

- WTO, *European Communities- Regime for the importation, sale and distribution of bananas*, recourse to Article 21.5 of the DSU by the United States, constitution of the Panel, WT/DS27/84, 13 August 2007.

¹⁸⁸ - WTO, *European Communities- Regime for the importation, sale and distribution of bananas*, recourse to Article 21.5 of the DSU by Ecuador, Report of the Panel, WT/DS27/RW2/ECU, 7 April 2008, para 8.2.

- WTO, *European Communities- Regime for the importation, sale and distribution of bananas*, recourse to Article 21.5 of the DSU by the United States, Report of the Panel, 19 May 2008, WT/DS27/RW/USA, para 8.3.

Communities' Schedule.”¹⁸⁹ In addition, the preferential tariff quota granted to ACP banana countries was considered “an advantage” for them, which was “not accorded to like bananas originating in non-ACP WTO Members,” thereby breaching GATT Article I(1).¹⁹⁰ The findings of both Panels were upheld by the WTO AB on 26 November 2008.¹⁹¹ The reports of the WTO Panels and the AB were adopted by the DSB in December 2008, thereby obliging the EU to rebind its banana duty at a lower rate.¹⁹²

The dispute over the banana trade finally ended on 15th December 2009 with the conclusion of the Geneva Agreement on Trade in Bananas, between the EU and the Latin America banana suppliers, on the future EU trading regime for bananas.¹⁹³ Under this agreement, the EU has agreed to progressively reduce the previous MFN tariff rate on bananas, from EUR 176 per tonne to EUR 114 per tonne, from December 2009 to January 2017.¹⁹⁴ Accordingly, the EU agreed to maintain an “MFN tariff-only regime for the importation of bananas.”¹⁹⁵ The first tariff of EUR 148 per tonne, which was also the biggest tariff cut, took place from the 15th December 2009 to 31 December 2010, and applied retroactively to all

¹⁸⁹ WTO, WT/DS27/RW2/ECU, 7 April 2008, para 7.504.

¹⁹⁰ WTO report of the Panel, WT/DS27/RW2/ECU, 7 April 2008, para 8.2 (a) and WTO Report of the Panel, WT/DS27/RW/USA, 19 May 2008, para 8.3 (a).

¹⁹¹ WTO, *European Communities- Regime for the importation, sale and distribution of bananas*, second recourse to Article 21.5 of the DSU by Ecuador, WT/DS27/AB/RW2/ECU and the United States, WT/DS27/AB/RW/USA, 26 November 2008, para 478.

¹⁹² WTO, *European Communities- Regime for the importation, sale and distribution of bananas*, second recourse to Article 21.5 of the DSU by Ecuador and the United States, Appellate Body Report and Panel Report pursuant to Article 21.5 of the DSU, Action by the Dispute Settlement Body, WT/DS27/94, 17 December 2008 and WT/DS27/95, 6 January 2009.

¹⁹³ The Geneva Agreement on Trade in Bananas, communication from Brazil, Colombia, Costa Rica, Ecuador, European Union, Guatemala, Honduras, Mexico, Nicaragua, Panama, Peru and the Bolivarian Republic of Venezuela.” WT/L/784, 2009. The Agreement was published in the Official Journal of the EU in 2010 (OJ L 141, 9.6.2010).

¹⁹⁴ *Ibid.* at Article 3(a).

¹⁹⁵ *Ibid.* at Article 3(c).

signatories upon signature of the agreement.¹⁹⁶ The tariff rate is then to reduce annually from January 2011 for six years.¹⁹⁷ However, the agreement provides further that if a consensus on the new terms for global trade in agriculture is not been reached in the Doha Round negotiations by the 31st December 2013, the EU will delay the tariff cuts up to a two year period, and freeze the tariff level at EUR 132 per tonne. Then as from January 2016, irrespective of whether the Doha Round has been concluded or not, the tariff rate should be set at EUR 127 per tonne, and should continue to decrease each year at the agreed rates, until it reaches EUR 114 per tonne in 2019.¹⁹⁸ In return, the Latin American banana producers undertook not to take any further action with respect to the pending disputes and claims against the EU banana trade regime. They also agreed that these tariffs constituted the final results, and thus no additional cuts would be sought during the Doha Round negotiations.¹⁹⁹ The conflict between the EU and the US was also settled, with an agreement under which the EU reaffirmed its tariff reduction obligations, and its commitment to maintaining a MFN tariff-only regime for the importation of bananas.²⁰⁰

5.2 The rules within the EU market

In line with the new imports arrangements, the EU reformed the internal aspects of the CMOB. According to the Commission, there was a need to particularly focus on aid granted to EU producers. In its view, they were “artificially isolated from

¹⁹⁶ Ibid. at Footnote 1.

¹⁹⁷ EUR 143 per tonne, EUR 136 per tonne, EUR 132 per tonne, EUR 127 per tonne, EUR 122 per tonne, EUR 117 per tonne, EUR 114 per tonne. Ibid. at Article 3(a).

¹⁹⁸ Ibid. at Article 3(b).

¹⁹⁹ Ibid. at Articles 6 and 7.

²⁰⁰ Agreement on trade in bananas between the European Union and the United States of America, OJ L 141, 9.6.2010.

the market trends since the aid automatically compensates for price changes.”²⁰¹ Therefore, given the “small proportion of the total [Union] production concerned,” the compensatory aid for bananas produced within the EU regions, other than for the outermost regions of the EU, was abolished in January 2007.²⁰² As a replacement, compensatory aid scheme was transferred to the single payment scheme (SPtS),²⁰³ as discussed in Chapter 3 of this thesis. Payments made under the SPtS are no longer linked to production and are classified within the WTO “green box” as support measures, as they have “no, or at most minimal, trade-distorting effects or effects on production.”²⁰⁴ In the context of bananas, EU MS had to establish reference amounts on the basis of the 2000, 2001 and 2002 representative period and non-discriminatory criteria.²⁰⁵ The national ceilings for EU MS as provided in Article 41 of Council Regulation (EC) No 1782/2003, were fixed in accordance with Council Regulation (EC) No 2013/2006.²⁰⁶

With regard to bananas produced in the outermost regions, the financial support provided to producers under the CMOB was transferred to the POSEI programmes.²⁰⁷ These programmes were established in the 1990s, and relate

²⁰¹ European Commission, “Proposal for a Council Regulation amending Regulation (EEC) No 404/93, (EC) No 1782/2003 and (EC) No 247/2006 as regards the banana sector,” Brussels, 20.9.2006, COM (2006) 489 final. p 2.

²⁰² Preamble (8) of Council Regulation (EC) No 2013/2006 of 19 December 2006 amending Regulation (EEC) No 404/93, (EC) No 1782/2003 and (EC) No 247/2006 as regards the banana sector, OJ L 384/13, 29.12.2006.

²⁰³ Council Regulation (EC) No 1782/2003 of 29 September 2003 establishing common rules for direct support schemes under the common agricultural policy and establishing certain support schemes for farmers and amending Regulations (EEC) No 2019/93, (EC) No 1452/2001, (EC) No 1453/2001, (EC) No 1454/2001, (EC) No 1868/94, (EC) No 1251/1999, (EC) No 1254/1999, OJ L 270, 21.10.2003

²⁰⁴ Op. cit. footnote no 75 at Annexe 2.

²⁰⁵ Op. cit. footnote no 202 at Preamble (8) and Article 2.

²⁰⁶ Ibid. at Annex VIII.

²⁰⁷ From French “Programme d’Options Spécifiques à l’Eloignement et l’Insularité” (Programme of Options Specifically Relating to Remoteness and Insularity).

specifically to the remote and insular nature of the outermost regions.²⁰⁸ The POSEI system was reformed by Council Regulation (EC) 247/2006²⁰⁹ and Commission Regulation (EC) 793/2006.²¹⁰ It includes specific measures to “ensure the continuity and the development of local lines of agricultural production in each outermost region.”²¹¹ These measures take into account the specific challenges faced by these regions as a result of their geographical location and economic difficulties.²¹² The financing of the POSEI programmes, which includes the French overseas departments, the Azores and Madeira and the Canary Islands, must not exceed EUR 84.7 million, EUR 77.3 million and EUR 127.3 million respectively.²¹³ Consequently, the POSEI is now “the only market support instrument for bananas in the outermost regions.”²¹⁴ The POSEI programmes have been considered “very effective” for the banana export sectors in Guadeloupe, Martinique and the Canary Islands, the regions of the EU which produce the greatest volume of bananas.²¹⁵ Nevertheless, given the outermost regions’ small scale of production, it can be said that the impact of the POSEI programmes on the global trade of banana would be negligible. In 2010, 657 155 tonnes of bananas

²⁰⁸ The POSEI system comprises the POSEIDOM for the French Overseas Department established by Council Regulation (EEC) 3763/91 OJ L 356, 24.12.1991, the POSEICAN for the Canary Islands established by Council Regulation (EEC) 1601/92 OJ L 173, 27.6.1992 and the POSEIMA for the Azores and Madeira established by Council Regulation (EEC) 1600/92, OJ L 173, 27.6.1992.

²⁰⁹ Council Regulation (EC) No 247/2006 of 30 January 2006 laying down specific measures for agriculture in the outermost regions of the Union, OJ L 42, 14.2.2006.

²¹⁰ Commission Regulation (EC) No 793/2006 of 12 April 2006 laying down certain detailed rules for applying Council Regulation (EC) 247/2006 laying down specific measures for agriculture in the outermost regions of the Union, OJ L 145, 31.5.2006.

²¹¹ Op. cit. footnote no 209 at Article 10.

²¹² Ibid. at Article 1.

²¹³ Ibid. at Article 23(1).

²¹⁴ Op. cit. footnote no 201, p 3.

²¹⁵ Report from the Commission to the European Parliament and the Council, “First report on the impact of the POSEI reform of 2006”, COM (2010) 501 final, Brussels, 24.9.2010, p 8.

were produced in the EU outermost regions whereas the EU imported the same year a total of 4 491 116 of bananas from MFN and ACP countries.²¹⁶

6. The implications for ACP Caribbean countries

6.1 Bananas and ACP Caribbean countries

ACP Caribbean countries currently involved in the banana export trade include Belize, the Dominican Republic, Jamaica, Suriname and the Windward Islands of Dominica, Grenada, Saint Lucia and Saint Vincent and the Grenadines.²¹⁷ Representatives of these countries' exporting companies formed the Caribbean Banana Exporters Association, which works towards the protection of the Caribbean banana trade against external "threats."²¹⁸

As mentioned earlier in this chapter, these countries (with the exception of the Dominican Republic)²¹⁹ constituted the main exporters among ACP traditional suppliers under the Lomé Convention. In the early 1990s, the banana industry accounted for about 20 percent of the Windward Islands and Belize's GDP, but this has declined to less than 5 percent of GDP in recent years due to "competition from African ACP countries."²²⁰ "Uncertainty" with regard to the status of the EU banana regime has also been a contributing factor.²²¹ Caribbean banana exports

²¹⁶ Op. cit. footnote no 10.

²¹⁷ Op. cit. footnote no 3.

²¹⁸ Ibid.

²¹⁹ Dominican Republic was a non-traditional ACP supplier of bananas.

²²⁰ Op. cit. footnote no 2, p 86.

²²¹ Ibid., p 86.

also account for a small part of the world banana exports. In 2000, for instance, these represented 2.41 percent of global banana exports.²²²

Nevertheless, bananas remain an important “source of income and export earnings” to several countries in the Caribbean Forum of ACP States (CARIFORUM).²²³ The banana industry is particularly significant for the economies of the former British Caribbean colonies of the Windward Islands, where it accounts for “over half of all export earning.”²²⁴ The Windward Islands banana trade developed during the 1950s, following a reduction in sugar production, but also to “challenge” the dominant position of Jamaican bananas within the UK market.²²⁵ Between 1997 and 2002, bananas held a high share in total merchandise exports for these countries. Bananas from Saint Lucia, Dominica, Saint Vincent and the Grenadines and Belize, accounted for 42 percent, 24 percent, 18 percent and 10 percent of total national exports, respectively.²²⁶ During the same period the majority, and for some countries the total, of their bananas were shipped to the protected EU banana market. For instance, the EU imported 35 percent and 21 percent of Saint Lucia and Dominica’s banana total exports respectively.²²⁷ Consequently, there is no doubt that economies of these islands are almost completely reliant on the EU market.

²²² UNCTAD, “Major developments and recent trends in international banana marketing structures”, UNCTAD/DITC/COM/2003/1, 2003, p 19.

²²³ Gillson, I., Hewitt, A. and Page, S., “Forthcoming Changes in the EU Banana/Sugar Markets: A Menu of Options for an Effective EU Transitional Package”, Overseas Development Institute, 2005, p. 12.

²²⁴ Op. cit. footnote no 3.

²²⁵ Op. cit. footnote no 11, p 56.

²²⁶ Op. cit. footnote no 223, p 12.

²²⁷ Ibid., p 13.

6.1.1 Jamaica's Banana Industry

Bananas are one of Jamaica's traditional export crops. Jamaican banana production for export is primarily confined in the parishes of St James, Portland and St Mary, due to their particular soil and weather conditions which are favourable to banana production.²²⁸ Jamaica was one of the first Caribbean islands to establish a banana export industry.²²⁹ It has since then become the main Caribbean banana supplier to the UK.²³⁰ Bananas became Jamaica's second largest cash crop, after sugar, thereby making an important contribution to Jamaica's foreign exchange earnings.²³¹

Jamaica, which has long benefited from the BP, remained an important banana-exporting country within the Caribbean region. The Jamaica Producers Group Ltd. is the country's major banana exporter.²³² The company operates the two largest farms in Jamaica, the Eastern Banana Estates in St. Thomas and the St. Mary Banana Estates, which between them account for over 90 percent of total exports.²³³ However, banana production in Jamaica has been in constant decline since 1998. Production fell from 62,338 tonnes in 1998 to 39,936 tonnes in 2003.²³⁴ Exports of bananas have also decreased.

²²⁸ Jamaica Gleaner, "Communities feeling impact from banana sector decline," 2006, [Online] Available from: <http://jamaica-gleaner.com/gleaner/20060403/business/business2.html> (Accessed 23/11/2011).

²²⁹ Jostling, T., *Banana Wars: The Anatomy of a Trade Dispute*, Cambridge, MA, USA: CABI Publishing, 2003, p 123.

²³⁰ *Ibid.*, p 123.

²³¹ *Op. cit.* footnote no 3.

²³² Jamaica Producers Group Ltd. website, available from: <http://www.jpjamaica.com/> (Accessed 20/11/2011).

²³³ Jamaica Producers group Limited, Annual Report 2008. Available from: <http://www.jpjamaica.com/> (Accessed 20/11/2011).

²³⁴ WTO, "Trade Policy Review: Jamaica," Report by the Secretariat, WT/TPR/S/139, 11 October 2004, p 91.

In 2004, export per volume was estimated at 27,657 tonnes and fell to 11,560 tonnes in 2005. After a sharp rise in 2006, the production then decreased again to 17,391 tonnes in 2007.²³⁵ According to the Jamaican authorities, such a decrease was due to the “inability of some farmers” to comply with stricter standards imposed “by export markets as well as increased domestic demand.”²³⁶ Between 15 and 20 percent of banana produced are sold on the domestic market.²³⁷ This is equivalent to 100, 000 tonnes of bananas which are locally consumed yearly as “green fruit, ripe fruit, and [...] chips.”²³⁸ Given those numbers, the Jamaican Minister of Agriculture is of the view that the domestic market is the “major market for banana production” on the island.²³⁹ Nevertheless, the banana industry continued to provide employment opportunities in Jamaica. Banana production employed around 6,000 people.²⁴⁰ Consequently, it was considered to be a source of between 5 and 10 percent of total employment in the island.²⁴¹

However, in August 2008, Jamaica was severely hit by a tropical storm, Gustav, for the fourth time since the 2004 Hurricane Ivan. The Jamaican Ministry of Agriculture reported losses in the local agricultural sector amounting to 1.6 billion Jamaican dollars (JMD).²⁴² In the banana sector, the passage of the storm has destroyed 79 percent of Jamaica’s banana industry. Bananas crops at the Eastern

²³⁵ Agriculture Task Force, (2009) “Vision 2030 Jamaica- National Development Plan: Final Draft Agricultural Sector Plan,” p 8 available from: <http://www.vision2030.gov.jm/MTF/tabid/74/Default.aspx> (Accessed 23/11/2011).

²³⁶ Op. cit. footnote no 234, p 32, para 12.

²³⁷ “Statement to the house of representatives by Dr the honourable Christopher Tufton, Minister of Agriculture on the post Tropical Storm Gustav Banana Industry situation,” 23 September 2008 [Online] Available from: <http://www.moa.gov.jm/> (Accessed 20/11/2011).

²³⁸ Op. cit. footnote no 223, p 92, footnote 4.

²³⁹ Op. cit. footnote no 237.

²⁴⁰ Op. cit. footnote no 223, p 93, para. 15.

²⁴¹ Op. cit. footnote no 3.

²⁴² Ministry of Agriculture, Government of Jamaica, “Post-Gustav damage to the Agricultural sector stands at \$1.3 billion”, 9 September 2008 [Online] Available from: www.moa.gov.jm/news/data/post%20gustav%20damage.pdf (Accessed 20/11/2011).

Banana Estates in St Thomas and at the St Mary Banana Estates were destroyed by 95 percent and 60 percent, respectively.²⁴³ Such damage amounted to a total loss of JMD 505.5 million and led to high restructuring costs.²⁴⁴ This loss is a clear increase of the JMD 479.1 million loss incurred the previous year, following the damage caused by Hurricane Dean.²⁴⁵ Consequently, the Jamaica Producers Group did not export bananas. In addition to this, the company pointed out that the competitiveness of their banana exports have been affected by the reduction of preferential treatment in the UK market. Accordingly, the company concluded that the restructuring charges could not be justified in that context. In the face of these challenges, the company believed that growing bananas as an export crop was “simply uneconomic.” As a consequence, it made the “painful” decision in 2008 to stop exports to the EU and to close the Eastern Banana Estates.²⁴⁶ This decision has resulted in the loss of 460 jobs.²⁴⁷ The Jamaican Group has retained St Mary Banana Estates for a diversification towards banana chips and other tropical snacks originating from root crops.²⁴⁸ However, the lands in St Thomas are now being used for sugar production.

6.1.2 Guyana’s Banana Industry

As was discussed in Chapter 8 of this thesis, sugar is a crucial commodity sector for the economy of Guyana, and one of its most dynamic exports. In contrast, bananas are considered “locally-grown non-traditional crops” in Guyana, and the

²⁴³ Op. cit. footnote no 237.

²⁴⁴ Op. cit. footnote no 242.

²⁴⁵ Jamaica Producers group Limited, Annual Report 2007, p 4 [Online] Available from: <http://www.jpjamaica.com/> (Accessed 20/11/2011).

²⁴⁶ Op. cit. footnote no 233.

²⁴⁷ Op. cit. footnote no 237.

²⁴⁸ Jamaica Producers Group Limited, Annual Report 2010, p. 4 Available from: <http://www.jpjamaica.com/> (Accessed 04/07/2012).

economy of the country does not depend on bananas exports.²⁴⁹ Bananas are ranked 9th amongst the 20 most important food and agricultural commodities produced there, with a total volume of 6,385 tonnes in 2009.²⁵⁰ A small quantity of Guyanese bananas are exported to other countries in the region, such as Barbados, and further afield to Canada. In 2002, Canada imported a total of 5 tonnes from Guyana.²⁵¹ However, Guyana is considered to be “neither a banana republic nor a banana island,” in that banana production and the export of bananas to intra-regional and extra-regional markets do not play a significant role in the economy of Guyana.²⁵² Consequently, Guyana as a non banana exporting country has therefore not benefitted from preferential access to the EU banana market. In 2009, the Government of Guyana recalled that their economy continues to depend “predominantly” on sugar.²⁵³

6.2 The Implications for Jamaica and Guyana

The export banana industry is important for the economies of many ACP countries. This is why ACP representatives argued in 2008 that MFN tariff cuts proposed by the EU were “unacceptable.” They recalled that bananas constitute “one of the major instruments of development and a powerful factor in the regional integration process and in their fight against poverty.” In their view, these tariffs would “deal a lethal blow to the ACP banana industry,” and put the ACP banana production in an “irreversible jeopardy,” since they would give Latin-American producers “undue

²⁴⁹ Government Information Agency, “Exporting non-traditional produce”, 2003, GINA, p. 2 [Online] Available from: www.gina.gov.gy/gina_pub/nontradercrops.pdf (Accessed 23/11/2011).

²⁵⁰ FAOSTAT, 2009.

²⁵¹ Op. cit. footnote 249, p 2.

²⁵² Hewitt, A. P., “Guyana, Sugar and EBA: Case-study of a country which is not quite Least Developed”, paper presented at *Regulatory Framework of Globalisation*, Barcelona, 2001, p 3.

²⁵³ WTO, “Trade Policy Review: Guyana”, Record of the Meeting, WT/TPR/M/218, 6 August 2009, para 8.

advantage” on the EU market, at the expense of ACP countries. Consequently, they believe that all chances for ACP countries to participate in the multilateral trade system would be ruined.²⁵⁴ Given the discussion in this chapter, and the research conducted, it is this author’s view that ACP concerns are well-founded and the predicted impact is not exaggerated. Caribbean countries, in particular, are high-cost producers. Many of them do not have an infrastructure adapted to be competitive on the market level. The post-colonial preferences favoured by the EU, which discriminated against lower-cost Latin American producers,²⁵⁵ were an effective protection against this lack of competitiveness. Caribbean countries will not be able to compete in the world economy without preferential protection.

Banana exports to the EU have played a major role in the economy of Caribbean countries. This is particularly true for Jamaica, which has long benefited from the BP, and was considered “a major producer and exporter of bananas.”²⁵⁶ Jamaican bananas were, until 2008, one of the most important crops within its agricultural sector. They made a significant contribution to the Jamaican economy, and provided “significant employment in rural areas.”²⁵⁷ The Jamaican authorities immediately expressed concerns over the resolution of the WTO banana dispute, discussed earlier in this chapter. In their view its finding will undermine the ability for Jamaica to compete in the EU banana market, thereby reducing the margin of preference on Jamaican bananas, when compared with “the more efficient Latin

²⁵⁴ The Secretariat of the African, Caribbean and Pacific Group of states, “ACP opposes new WTO proposal on bananas”, Brussels, 17 July 2008, [Online] Available from: http://www.acpsec.org/en/press_releases/bananas_17-7-08_e.html (Accessed 23/11/2011).

²⁵⁵ McMahon, J.A., “‘The longstanding banana saga’ – towards an acceptable solution: Part 2”, *International Trade Law & Regulation*, 2006, 12(1), pp. 14-20, p 19.

²⁵⁶ Economic Commission for Latin America and the Caribbean, “Impact of changes in the European Union import regimes for sugar, banana and rice on selected CARICOM countries,” ECLAC, 2008, p 3.

²⁵⁷ WTO, “Trade Policy Review: Jamaica,” Report by the Secretariat, WT/TPR/S/242, 7 December 2010, p 61, para. 8.

American producers.”²⁵⁸ Today, the impact of natural disasters coupled with the conditions for accessing the EU banana market, mean that Jamaican bananas are no longer an important export crop. In contrast, Guyana does not export bananas to the EU.

Since the disagreement over the MFN banana tariffs has only been resolved recently, it is difficult to fully evaluate the real consequences, going forward, for Caribbean countries. What is certain is that, for the reasons previously explained, Guyana and Jamaica will not be affected by the future banana market conditions. However, the situation will be different for other banana-producing Caribbean countries, and particularly for the most vulnerable producers in the Windwards Islands. This group comprises the four independent islands of Dominica, Grenada, St. Lucia and St. Vincent and the Grenadines. The Windwards Islands are generally considered to be “inefficient” banana producers.²⁵⁹ This is because they have higher production costs than others due to their climate, a limited area of agricultural land on which to grow the bananas and a labour market which demands better working conditions, such as high wages.²⁶⁰ The 2006 tariff-only regime, which sets an MFN tariff of EUR 176 per tonne of bananas, has enabled Latin American countries to increase their exports by about 11 percent.²⁶¹ Given that the EU already imports more from Latin America countries than from the Caribbean, there is no doubt that further reductions in MFN tariffs will allow Latin America to further increase their share of banana exports to the EU market.²⁶²

²⁵⁸ *Ibid.*, p 18, para 31.

²⁵⁹ Mlachila, M, Cashin, P. and Haines, C., “Caribbean Bananas: The Macroeconomic Impact of trade preference Erosion,” IMF Working Paper, WP/10/59, 2010, p 9.

²⁶⁰ *Ibid.*, p 9.

²⁶¹ *Op. cit.* footnote no 256.

²⁶² *Op. cit.* footnote no 24, p 8.

Consequently, such a competition with cheaper dollar bananas could either displace the exports of most Caribbean countries, or lead to further closure of Caribbean banana factories.

Bananas remain one of the main crops produced by the Jamaican agricultural sector. In 2009 bananas were ranked 7th among the 20 most important food and agricultural commodities produced in Jamaica, with a quantity level estimated at 89, 312 tonnes.²⁶³ However, since 2008, the Jamaican government policy has been focused on developing a strategy for Jamaica’s banana industry and “to chart a sustainable future based on the domestic market and targeted export markets.”²⁶⁴ Accordingly, banana production now supplies the local market for direct consumption, and the regional snack operations for processing higher value banana products in banana chips and other snacks under the “St. Mary’s” brand.²⁶⁵ In light of the current EU market access conditions for fresh bananas, there is no doubt that Jamaica has had to explore other export opportunities. Diversifying towards processed food products will help Jamaica to continue its banana production and to provide jobs. This will also promote economic growth and enhance the competitiveness of the Jamaican banana industry.

The Jamaican Producer Group company believes that since natural snack products have “mass market appeal,” they will be able to offer very competitive pricing for these products, and intend to use “Caribbean based tropical snack business” as an important platform for growth.²⁶⁶ This will however require appropriate financial

²⁶³ Op. cit. footnote no 250.

²⁶⁴ Op. cit. footnote no 235, p 8.

²⁶⁵ Ibid., p 8.

²⁶⁶ Op. cit. footnote no 233.

support to assist the banana factories to improve their current food processing technology. This will be particularly crucial for Jamaica if it seeks to promote exports of its processed products to the EU market and world wide. Therefore, the EU support which is to be given to Jamaica will be essential. It must be noted that although Jamaica is no longer an export-oriented banana producer, it will still benefit from support under the BAM programme to help its strategic plans for Jamaica's banana sector. The island is expected to receive USD 51.94 million in grants for support from the EU.²⁶⁷

7. Conclusion

The EU post-colonial histories have influenced the rules operated by the EU for the import of bananas, the rules themselves being selective and discriminatory among DCs. However these rules as well as the operation of the EU's Common Agricultural Policy (CAP) have also in turn been affected by the legal trade rules established by the WTO. Since 1993, the EU's banana import regime has been challenged several times under the WTO international trading rules. This has led to a long running dispute between the two sides of the Atlantic over the banana trade, thereby showing that the world banana market is highly distorted, and leaving DCs in a weak position. In order to comply with the WTO trade rules, the EU ended its complex combination of quotas and tariffs for banana imports. In its place since 2006, a tariff-only banana import regime has been implemented, forcing all banana suppliers, protected and non-protected, to compete "solely on the basis of tariff differences."²⁶⁸

²⁶⁷ Op. cit. footnote no 257, p 102.

²⁶⁸ Op. cit. footnote no 38, p 125.

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The EU banana import regime, as it stands today, is consistent with the EU's GATT 1994 and WTO obligations. This is further confirmed by the Geneva Agreement on Trade in Bananas, between the EU and the Latin America banana suppliers, and the Agreement signed between the EU and the US, which ended the long-standing conflict over bananas. These agreements now meet the claims of the Latin America countries and the US regarding the level of MFN banana tariffs, and both parties have agreed to end the dispute. In addition to this, as discussed earlier in this chapter, since 1 January 2007 EU banana producers have received direct decoupled payments under the SPtS, thereby shifting support payments under the CAP, from the product to the producer.²⁶⁹ In light of these elements, and given that the EU continues to comply with its commitments, the EU banana import regime should now be free from future challenges.

There is no doubt that the EU has maintained market access for ACP Caribbean bananas under the Economic Partnership Agreement (EPA), which was concluded in 2008 between the EU and the CARIFORUM. As was discussed in detail in Chapter 7 of this thesis, Caribbean countries are given duty and quota free access to the EU banana market under the EU-CARIFORUM EPA. However, the new banana import regime has also altered market access conditions for Caribbean bananas, and marginalised the position of traditional Caribbean banana suppliers on the EU banana market because they must now compete with both ACP and non-ACP banana suppliers. In the case of ACP countries, the duty and quota free status offered to bananas under EPAs since 2008 will particularly benefit African banana suppliers. This is largely because these have had, and continue to have, a high

²⁶⁹ Op. cit. footnote no 202 at Article 2.

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share in the EU market.²⁷⁰ In 2009 Cameroon and the Ivory Coast ranked 13th and 12th respectively, among the top 20 banana exporting countries in the world, whereas the Dominican Republic was the only CARIFORUM country ranked in that scale, holding 14th place.²⁷¹ It is also important to note that the EU also extended duty and quota free bananas access to Least Developed Countries (LDCs) under the “Everything But Arms” arrangement, which was discussed in Chapter 5 of this thesis.²⁷² From January 2006, as a result, all LDCs banana suppliers, irrespective of origin, entered the EU banana market duty and quota free. There is no doubt that current and future reductions in MFN tariffs will allow Latin American countries, which are the most efficient banana exporters in the world market, to increase their banana exports to the EU market.²⁷³ It should perhaps be noted at this point that in 2010, the EU finalised the negotiations for an EU-Central America Association Agreement, which includes dollar banana suppliers.²⁷⁴ At the time of writing, the agreement needs to be signed by the Council and ratified by the European Parliament in order to come into force. Also at the time of writing, the EU is still negotiating for an EU-Mercosur Free Trade Agreement, which includes large agricultural countries in Latin America.²⁷⁵ Consequently, it is to be assumed that the end of the banana dispute will increase further competition in the EU banana market and thereby undermine the value of the EU-CARIFORUM EPA. This may place the banana industry in the Caribbean under threat. Given the dependence of some Caribbean countries on the banana sector, this will lead to

²⁷⁰ See Op. cit. footnote no 1 at Graphs 1 and 2.

²⁷¹ Op. cit. footnote no 250.

²⁷² Article 6(2) of Council Regulation (EC) No 416/2001 of 28 February 2001 amending Regulation (EC) No 2820/98 applying a multiannual scheme of generalised tariff preferences for the period 1 July 1999 to 31 December 2001 so as to extend duty-free access without any quantitative restrictions to products originating in the least developed countries, OJ L 60/43, 1.3.2001.

²⁷³ Op. cit. footnote no 223, p 13.

²⁷⁴ The countries of the Central American region are Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua and Panama.

²⁷⁵ Argentina, Brazil, Paraguay and Uruguay.

serious social and economic dislocation, as is currently experienced by Jamaica. Accordingly, it is clear that the EU-CARIFORUM EPA has failed to secure, or improve, market access conditions for Caribbean bananas, and hence it has failed to protect the CARIFORUM position in the banana sector.²⁷⁶ Traditional Caribbean banana exporters could use funding under the BAM program for export diversification, or for the export of more high-value products derived from bananas. Nevertheless, there is no doubt that there will be less bananas coming onto the international market from the Caribbean countries.

Against this background, the treatment of bananas in the WTO Doha Development Agenda (DDA) negotiations will be significant. In the context of the ongoing negotiations at the WTO, and in parallel with the Geneva Agreement on Trade in Bananas, the EU, the ACP countries and the Latin American countries²⁷⁷ agreed on DDA treatment for Tropical Products and for Preference Erosion.²⁷⁸ They proposed to include within the text of the Doha Round agriculture modalities several changes. With regard to tropical products, they proposed deep tariff cuts. Tariffs will be reduced to zero for tariff lines with an *ad valorem* or *ad valorem* equivalent less than or equal to 20 percent. With regard to tariff lines with an *ad valorem* or *ad valorem* equivalent higher than 20 percent, they proposed to reduce duties by 80 percent.²⁷⁹ Tariffs for “preference erosion” products will be slowly reduced because of their significance for ACP countries. The EU and ACP

²⁷⁶ These aims were provided in the preamble, Article 42 and the joint declaration on bananas of the Economic Partnership Agreement between the CARIFORUM States, of the one part, and the European Community and its Member States, of the other part, OJ L 289, 30.10.2008.

²⁷⁷ These are Bolivia, Colombia, Costa Rica, Ecuador, Guatemala, Nicaragua, Panama, and Peru

²⁷⁸ Letter, from the European Union, the ACP countries, Bolivia, Colombia, Costa Rica, Ecuador, Guatemala, Nicaragua, Panama, and Peru conveying the text of a proposed DDA modality for the treatment of Tropical Products and for Preference Erosion, 15 December 2009.

²⁷⁹ *Ibid.* at Annex I (b) of “Tropical Product Modality” proposal for new paragraphs 147 and 148 of TN/AG/W/4/Rev.4.

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countries still need to present the tariff cuts plan to the WTO. Nevertheless, no reductions will be made following the first two years of the conclusion of the Doha Round. The proposals on tariff cuts will also need to take into account products designated as “sensitive,”²⁸⁰ but the Doha round of negotiations is still ongoing. The issue of the future of the EU and the WTO agricultural regime, of relevance to the Caribbean – EU trade in bananas, will be analysed further in the final chapter to this thesis.

²⁸⁰ Ibid. at Annex II of “Preference Erosion Modality” proposal for a new paragraph 149 of TN/AG/W/4/Rev.4.

Chapter 10 Conclusion

1. Introduction

This thesis has analysed the legal framework for trade in sugar and bananas from the Caribbean region of the African, Caribbean and Pacific (ACP) Group of States to the European Union (EU), a subject area which had not been studied previously and therefore the work completed herein makes an original contribution to knowledge. While the EU has long been criticised for being a “fortress” in the area of agriculture, it has offered better market access to developing countries (DCs) through preferential trade arrangements. Such discrimination is in line with the so-called “special and differential treatment” provisions (SDT) developed by the General Agreement on Tariffs and Trade (GATT), and further expanded by the World Trade Organisation (WTO), to account for the difficulties DCs’ face when attempting to participate in international trade. Consequently, EU agricultural protectionism does not have the same effect on every developing country.

During the course of this research it became apparent that the European post-colonial ties have been an important factor in the choice to discriminate between DCs. These ties have particularly been a decisive element in the trade relationship between the EU and the Caribbean region. All countries in the Caribbean region of the ACP Group have experienced colonial rule by a European country. Former colonisers include France, Spain, the Netherlands and the United Kingdom (UK). However, as stated at the outset, this thesis does not take an anti-colonial approach. Therefore the position of the EU in Caribbean countries and the extent to which these countries have experienced or continue to experience EU political and

economic, as well as social and cultural, oppression have not been addressed in this thesis. The term “post-colonial” has been used in this thesis as an indicator in the chronology of the process of decolonisation.

Caribbean countries do not have an infrastructure which permits them to be competitive at a market level but, because of these post-colonial ties, they have been favoured over other DCs which are low cost producers. In this thesis, the comparative analysis of the three main EU preferential trade arrangements with DCs, namely, the Generalised System of Preferences scheme (GSP), which is the most important non-reciprocal preference arrangement, the Cotonou Agreement and the Euro-Mediterranean Partnership (EMP) has demonstrated the way in which the EU has developed its relationship with DCs. The terms of these preferential schemes set them apart from each other specifically in relation to product coverage, their aim and the depth of tariff cuts they offer. The EU has secured its trade relationship with ACP countries through the Cotonou Agreement which is more favourable than the EU GSP scheme and the EMP.

The thesis has focused on the international dimension of the legal framework of the EU Common Agricultural Policy (CAP). In the past the CAP, which was directed at supporting production, has created conflict with other exporting countries. It has also created unfair competition for some DCs in several ways. While most tropical agricultural products produced in DCs are not “threatened by competition” from developed countries “nor do they face trade barriers in those countries,”¹ sugar and

¹ Mohan, S., “Reforming agricultural trade among developing countries”, *World Trade Review*, 2007, 6(3), pp 397-411, p 397.

bananas have been considered as “important exceptions.”² These products have faced high trade barriers from the EU and thus merited particular attention. Caribbean countries have received special privileges for sugar and banana exports, and obtained refuge in the fortress EU agricultural market.

It was highlighted in this thesis that bananas, a simple tropical fruit, have become a global issue and a source of dispute in international trade. The 1993 EU banana regime introduced a system of quotas and high tariffs in order to restrict market access for all non ACP bananas. The history of the banana dispute has been particularly long and complex. In light of the length of the WTO Panel and Appellate Body reports examined in Chapter 9 of this thesis, the number of participants and the length of the procedure, it can be assumed that the banana dispute has been an important issue at the GATT/WTO. The high profile dispute concerning aspects of the EU sugar regime challenged by Brazil, Australia and Thailand has also been examined in this thesis.

The EU sugar and banana policies were developed in light of the EU Lomé commitments together with the agricultural commodity protocols attached to it. The EU sugar and banana market were highly protected by import restrictions, quotas and tariffs, except for countries importing under preferential trade arrangements. Therefore countries not benefitting from preferential tariff access have faced important difficulties in exporting these products to the EU. However, the future of EU preferential treatment given to Caribbean countries, in particular the Sugar Protocol (SP) and Banana Protocol (BP), have been determined by

² Ibid., p 397.

demands of the WTO, of which the EU is now a member. Consequently, the operation of the EU's CAP has had to be restructured to meet the requirements of the WTO Agreement on Agriculture (AoA). Equally the rules of the WTO AoA, together with its interaction with its associated agreements, have affected and continue to affect the EU's rules for importing and exporting agricultural food products. The EU had reformed its sugar and bananas policies and thereby increased the level of access to its market for such products. The CAP is now a more market-oriented policy. However, the WTO rules have undermined the position of Caribbean countries within the EU agricultural market, particularly for sugar and bananas. The WTO has thus jeopardised the EU-Caribbean trade relationship, a relationship which is now derelict, and the EU has been unable to protect Caribbean countries from the erosion of their preferences.

Caribbean countries are small economies and they have been affected by the EU trade liberalisation in sugar and bananas. This has been demonstrated specifically by analysing the experience of two important traditional exporters to the EU, Guyana and Jamaica. They will experience a significant degree of export competition. This thesis has focused on the Caribbean region of the ACP Group and the findings may not be transferable to other ACP regions. Therefore further research ought to be undertaken in respect of the EU trade relationship with the African and Pacific regions of the ACP Group.

Due to constraints of time and space, this thesis has focused on select issues and some pertinent, yet peripheral, issues have been excluded. Further issues such as environmental law and intellectual property law both have a role to play in

completing the picture of the legal complexity of access to the EU market for agricultural food products. The subject of EU market access conditions is a complicated issue, but in order to view the full picture the possible legal challenges for DCs' exports of agricultural food products to the United States (US) should also be analysed in the same context. Further to this, the issues of climate change and food availability are also adding to the anxiety of DCs and therefore represent part of the bigger picture. These issues should be analysed by environmental experts rather than from the perspective of trade.

2. Recommendations

As outlined in Chapter 1 of this thesis, this research has examined the relevant rules of both the EU legal order and those of the WTO relevant to trade in agricultural products with a particular focus on the situation of developing countries. Hence, in light of the research questions posed in Chapter 1 of this thesis and which have been investigated in this thesis, the author makes the following proposals with regard to the law and policy relating to international trade in agricultural products.

- The EU's legal obligations under the WTO have had a clear impact on the EU's trade relationship with the Caribbean region of the ACP Group. Agricultural trade relations between the EU and Caribbean countries were originally formalised in a series of conventions and agreements beginning with the first Lomé Convention in 1975. The Sugar and Banana Protocols have been of particular importance for Caribbean countries. They have allowed the UK to continue its colonial and post-colonial trading

relationships with these countries after its accession to the EU. These commodity protocols both provided for legally binding commitments on the part of the EU which have been integrated into EU common banana and sugar policies. Beneficiary countries were given duty-free access for specific quantities of sugar and bananas.

- The arrangements of the Lomé Conventions have led to criticism from other non-ACP DCs left outside the scheme. The “Banana dispute” at the WTO, which has been examined in detail in Chapter 9 of this thesis, has confirmed that these non-reciprocal trade preferences could not be justified under GATT Article XXIV, which governs free trade areas and customs unions. The EU trade preferences were thus incompatible with the WTO rules. As a result, the EU was left with no other choice but to change its preferential access agreements with its former Caribbean colonies, in order to meet its legal obligations under the WTO. As examined in this thesis, the Economic Partnership Agreements (EPAs) are now key elements of the Cotonou Agreement. They have been designed as free trade agreements and thus provide for the first time for reciprocal duty and quota free access between the EU and ACP countries.
- It must be noted that reciprocity, as a core element of the EPA, is however an important issue for Caribbean countries. They will experience loss of fiscal revenues resulting from the elimination of tariffs on EU imports, which has the potential to significantly affect their economy. Nevertheless, as highlighted in this thesis, agriculture has once again been treated as an

exception. Under the EPA signed between the EU and the Caribbean Forum of ACP States (CARIFORUM), the most vital agricultural products for Caribbean countries, including sugar and bananas, continue to receive non-reciprocal preferential access to the EU market. As examined in this thesis, this exception is in line with GATT Article XXIV. Caribbean countries exporting bananas and sugar receive duty and quota free access to the EU market, albeit the EPA does not offer any treatment equivalent to that afforded under the sugar and banana protocols, as highlighted in this thesis.

- In light of the new EU-CARIFORUM EPA arrangements, it is clear that the EU and the Caribbean countries have managed to legally protect the duty-free preferences for agricultural commodities under GATT Article XXIV. So there is no doubt that the EU EPAs have to some extent maintained benefits equivalent to those granted under the previous Lomé Conventions, thereby continuing to discriminate legally against other DCs outside these arrangements such as Latin American countries.
- As examined in Chapter 7 of this thesis, the EU-CARIFORUM EPA goes beyond conventional free-trade agreements. It focuses on Caribbean countries' development, takes into account their socio-economic circumstances, and includes co-operation and assistance to help countries implement the Agreement. In light of this and the aforementioned elements, it can be said that EU-CARIFORUM EPA has been an overall success in

maintaining preferential access for Caribbean countries to the EU agricultural market.

- The EU had to regulate the banana and sugar trade in a way which was consistent with its obligations under GATT and WTO rules. The most significant change to the 1993 Common Market Organisation for Bananas (CMOB) was made in 2001 with the introduction of a transitional tariff-only regime, which came into full effect from 2006. In parallel, the EU committed to reduce the Most Favoured Nation (MFN) tariffs as a result of the Agreements signed between the EU and the US on one side, and between the EU and Latin American countries on the other. These agreements have resolved the banana dispute as they now meet the claims of the Latin American countries and the US regarding the level of MFN banana tariffs. Both Latin American countries and the US have agreed to end the dispute. On the other hand, the BP of the four Lomé Conventions has been replaced by a second protocol attached to the Cotonou Agreement. As highlighted in Chapter 9 of this thesis, the Cotonou Agreement has clearly weakened the wordings of the second BP when compared to the Lomé Conventions. There are now no provisions dealing with market access to the EU. Accordingly the EU is not legally committed to continue to provide preferential market access to ACP countries. In light of these developments no further changes to the EU and WTO legal order for trade in bananas are required.

- The EU sugar sector which has been excluded in the past from the CAP reforms has affected the development of the less-competitive exporting countries. The radical EU sugar reforms of 2006 have, in particular, addressed the internal protective measures. The EU common organisation of the market (CMO) in sugar provides now for simple quota arrangements for EU producers and support prices were reduced within the EU market. EU sugar producers, as well as bananas producers, receive an income support under the Single Payment Scheme (SPtS), which is decoupled from production. There is no doubt that the EU sugar reform will prevent the dumping of sugar, thereby giving more trade opportunities for DCs exporting cane sugar. However, these internal reforms remain incomplete, and the EU still needs to address the high import tariffs for countries exporting sugar outside preferential trade agreements.³ Thus, lowering the EU import prices for sugar should thus be made in order to accelerate trade in this product.
- Moreover, in order to be in line with the reformed EU sugar market, the EU invoked its right under the Cotonou Agreement to denounce the SP, which ceased to apply with effect from 1st October 2009, thereby extending duty-free access to non-Protocol countries. All ACP sugar exporting countries are granted duty and quota free access to the EU market, subject to a transitional volume-safeguard mechanism. The EU has also decided to increase imports from non SP and BP countries. It has extended duty and

³ The EU's import duties are maintained at EUR 419 per tonne for white sugar and EUR 339 per tonne for raw beet and cane sugar. See Commission Regulation (EC) No 1006/2011 of 27 September 2011 amending Annex I to Council Regulation (EEC) No 2658/87 on the tariff and statistical and nomenclature and on the Common Customs Tariff, OJ L 282, 28.10.11, p 141.

quota free access to all Least Developed Countries (LDCs) as recognised by the United Nations, for bananas from 1st January 2006 and for sugar from 1st October 2009 under the “Everything But Arms” (EBA) arrangement of the GSP scheme.⁴ Under the EBA, LDCs export products duty and quota free except for arms and armaments.⁵ As already mentioned in Chapter 1 of this thesis, LDCs are outwith the scope of this thesis. However it would be interesting for future research to examine the extent to which Caribbean countries will be affected by competition from LDCs.

- As stated at the outset, this thesis has adopted a doctrinal legal approach. However, there is also a clear way for an interdisciplinary approach to similar research. Hence, it would be interesting to conduct comparable research that would combine different disciplines and involve considerations across international relations, politics and economics studies. Political aspects of international trade which influence the work of the states and international actors, for instance, are necessarily central to the study of decision-making processes. Consequently, combining law and politics would allow the gaining of deeper insights into the issues being investigated.

3. Consequences for Caribbean countries and future research

There is no doubt that the preferential access to the EU under EPAs is less restrictive than under Lomé Conventions given that now all ACP countries have

⁴ See Article 11(3) of Council Regulation (EC) No 732/2008 of 22 July 2008 applying a scheme of generalized system of preferences for the period from 1 January 2009 to 31 December 2011 and amending Regulations (EC) No 1933/2006 and Commission Regulation (EC) No 110/2006 and (EC) No 964/2007, OJ L 211.

⁵ *Ibid.*, at Article 11(1).

tariff and quota free access to the EU for almost all products. EU trade liberalisation in sugar and bananas has created and will create very interesting dynamics. Competition between Caribbean countries and other African and Pacific regions of the ACP Group will increase, and this will require further examination. Competition with African countries, particularly Cameroon and the Ivory Coast, which are important banana producers, may be fierce given that their production costs are low in comparison to those of Caribbean countries.⁶

ACP countries that exported under the SP and the BP in the past are expected to be the countries which will experience the most significant effects as a result of the new EU market access conditions. Competition will also increase between Caribbean countries which benefited from the commodity protocols and non-commodity protocol countries. This research has demonstrated that the EU sugar reforms and the end of the SP will affect sugar revenues of Caribbean countries which benefited from the SP. However, the consequences will differ from one country to another. Guyana and Jamaica, the countries examined in this thesis, will face the highest revenue losses as they held the highest quotas previously. Both Jamaica and Guyana's economies and societies will be affected.

As a result of the latest sugar reforms, EU sugar production has reduced and the world market price might increase. The EU will probably shift from being a net exporter to a net importer of sugar. This situation will, without any doubt, provide new opportunities for efficient producers, such as Brazil, India and Thailand. Among DCs, Brazil is a key player in global sugar markets and the greatest

⁶ McMahon, J.A., "The longstanding banana saga' – towards an acceptable solution: Part 2," *International Trade Law & Regulation*, 2006, 12(1), pp 14-20, p 16.

exporter of low-cost sugar. Accordingly, its sugar policy could have a major impact on world markets in the future. Brazil is also the world's largest producer of ethanol produced from sugarcane. It is clear that its sugar and ethanol production will have an impact on world prices. Indeed, if Brazil's production focuses on ethanol then the price of sugar will increase worldwide. If however it focuses on sugar production, prices will fall. Further research ought to be undertaken in this area.

In addition, the tariff-only import regime for bananas, applicable since 2006, as well as the conclusion in 2009 of the Geneva Agreement on Trade in Bananas, between the EU and the Latin America banana suppliers, and the Agreement between the US and the EU on the future EU trading regime for bananas, will result in an erosion of the level of Caribbean trade preferences. The reduced MFN tariffs for banana imports will allow low-cost Latin American producers,⁷ such as Colombia and Guatemala, to capture a larger share of the world market. In line with this, the recently concluded (and future) Association Agreements with free trade area components, as well as Free Trade Agreements between the EU and the Latin American region, which include dollar-bananas suppliers, will need to be examined. The collective effect of these agreements will probably lead to an increase of agricultural commodities being imported into the EU market. The EU-Latin American countries agricultural trade relationship and their possible impact on global trade will need to be examined. In light of Caribbean countries' dependence on banana exports, there is no doubt that the openness of the EU

⁷ Ibid., p 16.

banana market will increase competition from Latin America, with Caribbean countries therefore losing their market position.

Caribbean countries which are high-cost producers and do not have an infrastructure adapted to be competitive on the market level will not be able to survive in these competitive world market conditions without preferential protection. They would have to compete with other countries, and most importantly with the most efficient producers of sugar and bananas. Consequently, inefficient banana and sugar producers in the Caribbean may be forced out of business. Countries will probably cease sugar and banana production and stop exporting to the EU.

In light of all the aforementioned issues, it is clear that while the EU-CARIFORUM EPA has maintained trade preferences for Caribbean countries, it does not create additional market access for agricultural food commodities from Caribbean countries. Traditional suppliers of sugar and bananas are now more exposed to market forces. Consequently, the EU through the EU-CARIFORUM EPA has failed to secure market access for Caribbean bananas and sugar. An in-depth analysis of the EU-CARIFORUM negotiations, and of the views of Caribbean countries on the conclusion of the EPA, is outwith the scope of this thesis as this is a political issue. However, there is no doubt that these issues need to be analysed further as they could provide important indications for the future of Caribbean trade.

4. Solutions and future research

With the alteration of certain trade preferences, Caribbean countries of the ACP Group will face significant disruptions to their economy, challenges in adjusting to the new situation, but also key opportunities to make their economies more dynamic. Caribbean countries could, for instance, diversify out of traditional sugar and bananas industries and focus on non-traditional products suited to their climate such as tropical fruits. However, as highlighted in this thesis, such an option would need to take into consideration food safety standards and other Sanitary and Phytosanitary (SPS) standards imposed by EU legislation and the private sector. This is particularly important with regard to strict pesticides residues level, which is becoming an increasingly significant issue for DCs exporting fruit and vegetables.⁸ Caribbean countries would need both institutional and technical support from their governments, and from the EU, to meet EU SPS standards.

Another possible development for Caribbean countries would be the re-orientation towards high-value added banana and sugar products, thereby creating jobs, including high skilled jobs and providing economic opportunities for rural areas. With regard to bananas, the Caribbean could, for instance, diversify into exporting processed food products made from bananas, such as chips. Jamaica has recently opted for this course of action, producing chips for export to other Caribbean countries, and the EU market. In light of this, issues with regard to exporting processed food to the EU market, which were outwith the scope of this thesis, will need to be examined. For example, there are issues surrounding labelling, ingredients and packaging, as well as the rules of origin.

⁸ Roberts, D. and Unnevehr, L., "Resolving trade disputes arising from trends in food safety regulation: the role of the multilateral governance framework," *World T.R.*, 2005, 4(3), 469-497, p 470.

On the other hand, Caribbean countries can engage in trade in more highly processed products. They could continue growing sugar and bananas in order to produce and export ethanol,⁹ which is currently subject to high demand. An in-depth examination of this issue was outwith the scope of this thesis. Therefore, legal rules with regard to exporting ethanol to the EU would have to be examined. The industries of the Caribbean countries will need support from their government to deal with production costs. The necessary investment would have to be made in a timely way in order to ease the transition from the SP trading regime to the proposed bio-fuel focused economies. There is no doubt that such an option will help address climate change and energy problems. However despite having positive aspects, a shift to biofuels should also take into consideration current concerns raised about the socio-economic and environmental impacts of its production. These issues will prove problematic in the future and ought to be examined further, particularly from an environmental viewpoint. What is beyond doubt is that whichever option Caribbean countries choose, there will either be less raw sugar and bananas coming onto the global market from the Caribbean countries, or the Caribbean countries will still produce these products, gaining less foreign exchange earnings, and suffering severe economic and social shocks, which will have consequences for neighbouring countries.

In light of changing market access conditions, the importance of EU development support provisions, which assist Caribbean countries to diversify and/or reorient their exports as well as helping them implementing the EPA, will increase. As highlighted in this thesis, the EU continues to assist Caribbean countries through a

⁹ Both bananas and sugar can be used for ethanol production. For further discussion see for instance: Dhabekar, A. and Chandak, A., "Utilization of banana peels and beet waste for alcohol production," *Asiatic Journal of Biotechnology Resources*, 2010, 01(1), pp. 8-13.

range of financial measures. These include *inter alia* the European Development Fund, which is to be included within the EU budget from 2020,¹⁰ and the MS contributions to the EU Aid for Trade Strategy program. Further research on the EU financial assistance and aid support to Caribbean countries will need to be undertaken.

This thesis has shown that the EU agricultural market has clearly moved from a post-colonial to a globalised approach. In accordance with Article 21 of the Treaty on European Union (TEU) post-Lisbon, the EU seeks to develop international trade relations and build trade partnerships with third countries.¹¹ While doing so, the EU promises to “encourage the integration of all countries into the world economy, and to improve their market access to the EU, through the progressive abolition of trade restrictions.”¹² It can therefore be expected that the EU will be concluding more preferential trade agreements with DCs. As a result of the EPAs, the ACP Group of States has been divided into different regions. The EU-ACP relationship has been changed over time, and the ACP Group is no longer the main development partner of the EU. This is confirmed in the Lisbon Treaty which no longer makes reference to the EU’s special trade relationship with ACP countries.¹³

In light of this, it is perhaps a missed opportunity for Caribbean countries to ‘cut’ this post-colonial link with the EU and to start exploring new opportunities in other

¹⁰ European Commission, “Preparation of the multiannual financial framework regarding the financing of EU cooperation for African, Caribbean and Pacific States and Overseas Countries and Territories for the 2014-2020 period (11th European Development Fund)”, Brussels, 7.12.2011 COM (2011) 837 final.

¹¹ Article 21 TEU, consolidated versions of the Treaty on European Union, OJ C 83, 30.3.2010.

¹² Ibid. at Article 21(2)(e).

¹³ This was referred in Article 179(3) of the Treaty Establishing the European Community, OJ C 321E, 29.12.2006.

markets. They could develop their import/export activities within the Caribbean Community (CARICOM), which has evolved, since 2006, into a customs union similar to the EU. The CARICOM Single Market and Economy (CSME) currently provides for the free movement of goods, services and persons. Now it comprises thirteen participating members of CARICOM.¹⁴ This process remains incomplete and requires the implementation of a Single Economy. In light of this, it will be important for future research to examine the ongoing implementation of the CSME and the opportunities of further economic integration within the Caribbean region.

Moreover, there is no doubt that given the presence of the EU within the Caribbean region through the French *Départements d'Outre Mer* (DOMs), Caribbean countries could develop agricultural trade relationship with these French Caribbean regions. While being part of the EU, the French DOMs share the same culture and colonial experience as independent Caribbean countries. Moreover, Caribbean countries could also build/or reinforce trade paths with countries outside the Caribbean region and develop trade with Latin and Central American countries, including Brazil. It would be interesting to gain an in-depth analysis of such an intra-Caribbean trade and Caribbean-Latin American countries trade relationship, and further research should be undertaken in this area.

EU regulations on agriculture have had a clear impact on what Caribbean countries produce. However in order to promote economic growth, Caribbean countries could diversify out of the traditional industries and focus exclusively on exporting

¹⁴ The Bahamas and Haiti are currently remaining outside the CSME process. See <http://www.csmeonline.org/> (20/7/2011).

services, currently the main source of income in the Caribbean region.¹⁵ As highlighted in Chapter 7 of this thesis, Caribbean countries have a comparative advantage in the service sector, particularly in tourism. The EU-CARIFORUM EPA provides for trade liberalisation in goods as well as services, thereby giving Caribbean countries privileged access to the EU services market. Therefore it would be worthwhile to examine the commitments of Caribbean countries in liberalisation of trade in services.

This research is necessarily limited in scope. The Caribbean region of the ACP Group, which is the focus of this thesis, is not a homogenous group. In light of the difference in levels of economic development within the region further studies will need to be done with regard to other Caribbean countries. For instance, the Dominican Republic has not in the past benefited from the SP and BP, but is an important agri-food exporter within the Caribbean region.

Moreover, the issue of the terminology of DCs was not covered in this thesis but can be examined in further studies from a socio-economic perspective. This term will also be a problem for lawyers because it is not clear and precise enough. It will thus be important for lawyers and legislation to undertake further research on the definition of “developing countries.”

¹⁵ World Bank, “Accelerating Trade and Integration in the Caribbean: Policy Options for sustained growth, Growth, and Poverty Reduction.”, Herndon, VA, USA: World Bank, 2009, p 8.

5. Issues with the CAP

5.1 The CAP post-Lisbon

In 2008, the Caribbean countries were required to liberalise their tariffs with respect to all goods imported from the EU for the first time. As such it was important to analyse the changes brought by the 2009 Lisbon Treaty (LT) to the EU CAP, and the implications of these changes for the EU-Caribbean trade relationship. There is no doubt that the LT has given the European Parliament (EP) and EU Member States (MS) important room to manoeuvre in respect of EU agricultural policy making. However, in light of the provisions of the EU-CARIFORUM EPA, there is little doubt that these internal changes will affect the EU's external trade relations with Caribbean countries in agricultural commodities. The EU and the Caribbean region are bound by a partnership agreement providing firm commitments on agriculture and trade related areas, which must be honoured by each party. The agreement further requires that any policy changes, particularly if these are likely to impact on Caribbean countries' export capacity, must be discussed and agreed upon by all partners within the established joint institutions. It is therefore important for Caribbean countries to maintain a constant dialogue with the EU on important issues, in order to ensure that their interests are properly taken into account.

Given that any future legislation in agriculture cannot be adopted without the prior consent of the EP, the Caribbean region would have to cooperate closely with the EP through the joint EU-CARIFORUM Parliamentary Committee, whose first meeting took place on 15-16 June 2011 in Brussels. It would be then for the EP to find a balance between EU citizens' interests and those of Caribbean countries.

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How well this will be achieved remains to be seen. However, there is a risk that such an effective discussion could be undermined by the institutional aspect of the Caribbean region. Unlike the EU, the Caribbean region does not have a joint elected parliament. It was for the parliaments of each of the CARIFORUM states to designate one representative to the Joint Parliamentary Committee. This could lead to longer discussions in order to take into account the challenges at both regional and national level. It would also be necessary, in order to make such dialogue effective, for each Caribbean country to provide clear information about their economic, development and political situation.

It seems unlikely that the EP would impede the development of the EU post-colonial ties with the Caribbean region, particularly since it gave its assent to the EU-CARIFORUM EPA on 25 March 2009. It stressed that the agreement “should be used to build a long-term relationship whereby trade supports development.”¹⁶ Caribbean countries, and any countries bound by such a contractual trade agreement with the EU, are thus protected from the possible effects of the LT. The changes instigated by the LT, associated with the CAP’s promotion of the safeguarding of farm incomes, a high level of protection for the environment and consumer health, could be detrimental for any DCs left outside such a formal agreement. These issues had, and continue to have, considerable implications for DCs.

¹⁶ EC-Cariforum States Economic Partnership Agreement, European Parliament resolution of 25 March 2009 on the Economic Partnership Agreement between the Cariforum States, of the one part, and the European Community and its Member States, of the other part, OJ C 117E, 6.5.2010.

5.2 Future CAP reforms

As referred to in Chapter 2 of this thesis, the EU's commitments made under the 2003 CAP reforms and the EU agricultural financial perspectives were set to last until 2013. In order to meet the Europe 2020 vision strategy,¹⁷ and against the background of the current Doha Round negotiations, there was a need for the EU to further simplify the CAP while maintaining the current CAP instruments. Faced with this situation, the EU Commission published its first proposals on the orientation of the "CAP towards 2020"¹⁸ in November 2010. In its Communication, the Commission stressed the importance of agriculture to the European economy and to society in general. Agriculture is thus tasked with ensuring food supply, contributing to the rural economy with the creation of local employment, and providing for environmental benefits.¹⁹ The Commission has proposed that the three objectives for the future CAP should be viable food production (objective 1), sustainable management of natural resources and climate action (objective 2) and balanced territorial development (objective 3). As such, the Commission does not intend to change the current two complementary pillar structure of the CAP. It proposes instead "a greener and more equitably distributed first pillar" and a second pillar that contributes to the competitiveness and innovation of agriculture, the environment and climate change.²⁰ The Commission proposes to redistribute, redesign and improve the objectives of current support in order to "add value and quality in spending."²¹

¹⁷ This strategy provides for three priorities: a smart, sustainable and inclusive economy growth in the EU. See European Communication, "Europe 2020: A strategy for smart, sustainable and inclusive growth", Brussels, COM(2010) 2020 final, 3.3.2010, p 6.

¹⁸ European Commission, "The CAP towards 2020: Meeting the food, natural resources and territorial challenges of the future," Brussels, 18.11.2010, COM(2010) 672 final.

¹⁹ Ibid., p 4.

²⁰ Ibid., p 3.

²¹ Ibid., p 8.

However, it must be noted that the future paths proposed by the Commission are articulated in very broad terms. The planned changes in the design of direct payments and market measures are unclear, and seem to be merely a continuation of the previous systems. Since the Commission does not provide any figures, it is difficult to have a clear view of the future framework of the post-2013 CAP. On 12th October 2011, the Commission presented a set of detailed legislative proposals on the post-2013 CAP.²² These proposals, and the potential future trajectory of the EU CAP, will need to be examined in future research in order to provide clarification with regard to the future development of the CAP.

The extent to which the future CAP reforms will further alter market distortions is not yet clear but this will be important, particularly in the context of the current Doha Round negotiations. Given the reforms made by the CAP “Health Check,” and the anticipated CAP reforms post-2013, it is unlikely that the EU could be challenged by DCs alone. However it is crucial for the EU to be more specific in

²² - European Commission, “Proposal for a regulation of the European Parliament and of the Council establishing a common organisation of the markets in agricultural products (Single CMO Regulation)” Brussels, 19.10.2011, COM(2011) 626 final/2. This document replaces the proposal COM(2011) 626 final, 12.10.2011.

- “Proposal for a regulation of the European Parliament and of the Council amending Council Regulation (EC) No 1234/2007 as regards the regime of the single payment scheme and support to vine-growers” Brussels, 12.10.2011, COM(2011) 631 final.

- “Proposal for a regulation of the European Parliament and of the Council amending Council Regulation (EC) No 79/2009 as regards the application of direct payments to farmers in respect of the year 2013”, Brussels, 12.10.2011, COM(2011) 630 final.

- “Proposal for a Council Regulation determining measures on fixing certain aids and refunds related to the common organisation of the markets in agricultural products,” Brussels, 12.10.2011, COM(2011) 629 final.

- “Proposal for a regulation of the European Parliament and of the Council on the financing, management and monitoring of the common agricultural policy”, Brussels, 19.10.2011, COM(2011) 628 final/2, replacing COM (2011) 628 final, 12.10.2011.

- “Proposal for a regulation of the European Parliament and of the Council on support for rural development by the European Agricultural Fund for Rural Development (EAFRD),” Brussels, 19.10.2011, COM(2011) 627 final/2, replacing COM (2011) 627 final, 12.10.2011.

- “Proposal for a regulation of the European Parliament and of the Council establishing rules for direct payments to farmers under support schemes within the framework of the common agricultural policy” Brussels, 19.10.2011, COM(2011) 625 final/2, replacing COM (2011) 625 final, 12.10.2011.

relation to domestic support in order to increase the chances of concluding the on-going Doha trade negotiations.

6. The WTO situation

The Doha Round negotiations which started in 2001 under Article 20 of the WTO Agreement on Agriculture, have still not been concluded. At the time of writing, the future of the Doha Round remains uncertain. The Chairman of the Trade Negotiations Committee reported that “the most realistic and practical way forward was to take small steps, gradually moving forward the parts of the Doha Round which were mature, and re-thinking those where greater differences remained.”²³ It is currently difficult to assess the future direction of the WTO in the area of agriculture. What can be anticipated, however, is the further trade liberalisation in respect of tropical products. The EU, the ACP countries and the Latin American countries²⁴ reached, in 2009, an agreement with regard to the treatment of tropical products to be included in the Doha Development Agenda for further negotiations.²⁵ Tropical products will be subject to deep tariff cuts although tariffs for “preference erosion” products will slowly be reduced because of their significance for ACP countries. The tariff cuts plan needs to be presented to the WTO by the EU and the ACP countries. There is no doubt that this will lead to further erosion of preferences, with the extent and impact of these cuts needing to take into account products, such as bananas, which represent a sensitive area of trade for Caribbean countries.

²³ WTO News, General Council, “Lamy: Members continue to explore opportunities for Doha progress”, 1-2 May 2012 [Online] Available from: http://www.wto.org/english/news_e/news12_e/gc_rpt_01may12_e.htm (Accessed 1/07/2012).

²⁴ These are Bolivia, Colombia, Costa Rica, Ecuador, Guatemala, Nicaragua, Panama, and Peru

²⁵ Letter from the European Union, the ACP countries, Bolivia, Colombia, Costa Rica, Ecuador, Guatemala, Nicaragua, Panama, and Peru conveying the text of a proposed DDA modality for the treatment of Tropical Products and for Preference Erosion, 15 December 2009.

Moreover, trade and development provisions have been core elements in the WTO round of trade negotiations. While GATT has failed to address the needs of DCs, the WTO rules, particularly those provided under the Agreement on Agriculture, have however increased market access for products of interest to DCs. Of particular interests, the SDT provisions afford special rights to DCs, and allow them to receive favourable treatment from developed countries. When SDT are enforced by developed WTO members, they are supposed to help DCs grow and become competitive in the agricultural sector. It is therefore clear that the WTO has strengthened the multilateral trading system. In line with the mandate of paragraph 44 of the Doha Ministerial Declaration, the WTO members have continued to strengthen and make the SDT “more precise, effective and operational.”²⁶ However, discussions on the proposals put forward by DCs have not yet concluded as WTO members cannot agree on the elements of these proposals.

Concluding the Doha Round negotiations is now crucial. In June 2012, the WTO Director-General Pascal Lamy raised concerns about the “alarming” rise in trade restrictions as a reaction to the global financial crisis in 2008.²⁷ Indeed, in order to combat the global crisis, some G-20 governments, and particularly those facing “difficult economic conditions domestically,” have been imposing restrictive import measures in order to protect their domestic industries.²⁸ There are 124 new

²⁶ Paragraph 44 of WTO, “Ministerial Declaration adopted on 14 November 2001”, Doha, 09-14 November 2001, WT/MIN(01)/DEC/1, 20 November 2001.

²⁷ WTO News, “Rise in trade restrictions now ‘alarming’, Lamy tells WTO ambassadors”, 7 June 2012 [Online] Available from: http://www.wto.org/english/news_e/sppl_e/sppl234_e.htm (Accessed 3/07/2012).

²⁸ WTO, “Report on G-20 Trade Measures (Mid-October 2011 to Mid-May 2012” 31 May 2012, p 1. [Online] Available from: http://www.wto.org/english/news_e/news12_e/g20_wto_report_may12_e.doc (Accessed 3/07/2012).

trade restrictive measures which have been recorded since mid-October 2011. These barriers include procedural or administrative actions, such as customs controls and import licences, which slow down the clearing of goods at borders, as well as tariff increases.²⁹ The trade coverage of the restrictive measures put in place since October 2008, excluding those that were terminated, is estimated to be almost 3 percent of world merchandise trade, and almost 4 percent of G-20 trade.³⁰ The products of the industrial sector have been the most affected by the G-20 trade import restrictive measures. From mid-October 2011 to mid-May 2012, these restrictions cover 92.3 percent of the industrial products, and this compares with a share of 7.7 percent of agricultural products. Most products affected within the agricultural sector are meat products.³¹ The share of G-20 restrictive import measures in the sugar sector is low, and represents 0.9 percent of the total of agricultural products affected.³² In light of this, the binding dispute settlement system of the WTO, which enforces the WTO agreements and commitments made by the WTO members, will be of particular importance for countries affected by these measures and seeking further access to the G-20 markets. It should be noted that the EU has not introduced any restrictive measures during this period. It has, instead, implemented measures to facilitate trade, for instance, through the reduction of import tariffs albeit on a temporary basis. With regard to sugar, the EU has opened a standing invitation to tender for the 2011/2012 marketing year for the import of certain quantities of raw sugar at reduced import tariffs in order to increase the supply to the internal market.³³ The future with regard to trade in

²⁹ Ibid., p 1-2.

³⁰ Ibid., p 2.

³¹ Ibid., p 6.

³² Ibid., p 6.

³³ Commission Implementing Regulation (EU) No 1239/2011 of 30 November 2011 opening a standing invitation to tender for the 2011/2012 marketing year for imports of sugar of CN code

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agricultural food products and particularly in sugar and bananas is as yet unclear. There are still many uncertainties surrounding the future trajectory of the EU CAP, the EU's external trade in agriculture, the future of EU sugar and banana imports from ACP countries and also the future development of the regulation of trade in agricultural commodities at the WTO level.

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Annex I: Map of the Caribbean region



Source: <http://eur-lex.europa.eu>, © European Union, 1995-2012.¹

¹ Permission to use this map has been granted by the European Commission.

Papers published from this thesis

1. Constant LaForce, V., "EU Preferential Agricultural Trade Agreements with Developing Countries: a comparison between the Euro-Mediterranean Partnership and the EU Generalised System of Preferences," *EU External Affairs Review*, 2011, Vol. 1 No. 0, pp. 71-93.
2. Constant LaForce, V., "The Lisbon Treaty and the EU agricultural policy: implications for Caribbean-EU agricultural trade relations," 2011, Conference proceedings, Digital Collection "Estudios Sobre Derecho y Bienestar Social" (Studies in Law and Social Welfare), ISBN: 978-84-9836-786-7.
3. Constant LaForce, V., "A comparison between the Cotonou Agreement and the EU Generalised System of Preferences: the case of sugar," *Journal of International Trade Law and Policy*, 2013, Vol. 12 No.1, pp. 42-67.