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Disputing Trade Preferences at the WTO Dispute Settlement Body: Revisiting the EC/ACP Sugar Preferences*

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While the benefits of preferential trade agreements granted by the European Communities to the ACP countries have been lauded, the efficiency of such preferences in achieving the underpinning objectives of the preferences has also been contested in some quarters. Whenever multilateral trade negotiations move towards reducing most-favoured-nation tariffs, countries benefiting from trade preferences are concerned over the impact the reductions will have on such preferences. The debates over the value of preferences seem recently to have intensified due to a number of complaints brought before the WTO dispute settlement system that challenge the legality of the preferences or other measures linked to the preferences. Though it places some emphasis on the Appellate Body rulings in the case *EC – Tariff Preferences*, this article examines primarily, in light of the relevant GATT/WTO provisions and the EC's sugar reform proposals, the implications the Dispute Settlement Body's (DSB's) report in *European Communities – Export Subsidies on Sugar* will have for the EC/ACP sugar preferences.

Keywords: Appellate Body, dispute settlement, Enabling Clause, panel, Sugar Protocol, trade preferences, WTO

Introduction

The dawn of the twenty-first century has mooted a number of disputes before the World Trade Organization's Dispute Settlement Body that have ultimately touched the non-reciprocal trade arrangements made between the European Communities and certain developing countries. Like virtually all developed countries, the EC has granted tariff preferences, by way of a Generalised System of Preferences (GSP), to some developing countries and the African, Caribbean and Pacific (ACP) group of states. These non-reciprocal schemes seem to be generating a number of concerns among other, non-preference-receiving, developing countries. In April 2004, India successfully challenged before the WTO Dispute Settlement Body the criteria the European Communities adopted in granting preferences to certain Latin American and Caribbean countries and Pakistan[1] on the basis of the fight against illicit drug production and trafficking (the Drug Arrangements).[2] And in May 2005, the Appellate Body upheld the panel findings in favour of the three appellants, Brazil, Thailand and Australia, that the EC has been granting export subsidies to sugar exports under the EC sugar regime (ACP/India preferential quotas form part of the EC sugar regime) in excess of the EC Schedule of Commitments to the WTO.[3]

Though it is hard to refute the fact that preferential trade arrangements are a deviation from one of the underpinning principles of the multilateral trading system, the most-favoured-nation principle, they are still an essential part of the system and have generated significant economic benefits for the preference-receiving developing countries.[4] This explains why the ACP countries, parties to the EC/ACP Sugar Protocol, overwhelmingly supported the EC at both the panel and the appeal stages, as third parties and as third participants respectively, in the *EC – Sugar Subsidies* case. The threat of further dispute seems to have culminated in a number of reform proposals by the EC Commission effectively aimed at reducing the prices of ACP white sugar.[5] The ACP parties to the Sugar Protocol have termed these proposals "unacceptable". Against this background, this article seeks to examine in the context of the WTO agreements the legal and economic ramifications surrounding the EC/ACP Sugar Protocol as well as its compatibility with the relevant GATT/WTO provisions. On the basis of the panel reasoning and recommendations in the *EC – Sugar Subsidies* case, this article also examines the legal effect of a panel suggestion and what a probable liberalisation of the EC sugar market would mean to EC sugar producers, the ACP countries and ultimately other developing countries like Brazil and Thailand.

This article is divided into seven sections. Before an assessment in section II of the Sugar Protocol in the context of the EC/ACP Cotonou Agreement of 2000, section

I first analyses the origin of the Sugar Protocol. Section III proceeds with a short overview of the EC Common Market Organisation for Sugar (CMO Sugar, or the EU sugar regime), while section IV addresses the compatibility of the EC/ACP sugar preferences with the relevant GATT/WTO provisions. Next, the article addresses the jurisdiction of WTO dispute settlement panels and the Appellate Body (AB) to hear matters relating to non-reciprocal schemes in general and the Enabling Clause (in the context of the *EC – Sugar Subsidies* dispute) in particular (section V). The article then turns in section VI to another substantive question – the importance of DSB suggestions in WTO law – with reference to the suggestions of the panel in the *EC – Sugar Subsidies* dispute. Section VII makes some concluding remarks.

I. Origins of the EU/ACP Sugar Protocol

The origins of the EU/ACP Sugar Protocol lie in the UK-negotiated Accession Protocol to the European Economic Community (EEC) of 1974. In 1951, Britain had entered into an agreement with the Commonwealth territories to maintain a sustainable supply of sugar by the Commonwealth states to the UK; this was known as the Commonwealth Sugar Agreement (CSA). The CSA was a formalization of the sugar trading relationship that existed between the trading partners prior to this period. The objectives of the CSA were stated as follows:

> This Agreement is formalized from the general understanding that has been reached between the parties on the terms and conditions arrived at to have a long-term agreement to supplying sugar to the United Kingdom, for developing the production of sugar in the Commonwealth countries and for the orderly marketing of that sugar.

Under the CSA, the concepts of irreducible import quotas and negotiated price were established, and in 1968 the concept of indefinite duration was incorporated into the CSA.

As the UK, Denmark and Ireland joined the EEC in 1974, many Commonwealth countries from the African, Caribbean and Pacific (ACP) group, which had just gained their independence, were eager to establish a cooperative relationship with the newly enlarged European Community, with the trade in sugar being a major component of such a relationship. Prior to accession, however, the UK, had already tabled a proposal to the original six members of the EC. The proposal sought to safeguard the UK's existing CSA.[6] The European Commission acknowledged the proposal in 1970 but suggested that further discussions on implementation between the enlarged Community and the developing Commonwealth countries that were parties to the CSA should be held in 1975.[7] Thus, the accession of the UK to the EEC was accompanied by the incorporation of the CSA into the European sugar regime.[8]

II. The EU/ACP Sugar Protocol in the Context of the Cotonou Agreement

The negotiation between the EEC and the ACP started in Brussels on 25 July 1973 and ended in February 1975 with an agreement concluded in Lomé-Togo (the Lomé Convention) between the enlarged Community and the ACP states. The Sugar Protocol, which was a separately negotiated package, entered into force on 28 February 1975 pending the entry into force of the Lomé Convention. Though it appears there were slight modifications to the CSA, the main features underpinning the annexed Sugar Protocol (guarantees of duration, remunerative prices and export quotas) amounted to a direct transfer of what was contained in the CSA.[9] As the Lomé Convention was transformed into the Cotonou Agreement in 2000 with the signing of a new Economic Partnership between the EU and the ACP, the EU/ACP Sugar Protocol continued to exist and is now annexed to Annex V of the Cotonou Agreement.[10] For the sake of clarity it is important to point out that, though annexed to the Cotonou Agreement, the Sugar Protocol has a separate legal regime from the overall agreement.[11] Its attachment to the Cotonou Agreement seems to be justified for the most part by administrative reasons. Furthermore, as part of the objectives of trade preferences, the contracting parties to the Sugar Protocol as well as to the Cotonou Agreement principally aim at reducing and eventually eradicating poverty in the 77 ACP countries.[12] The partnership agreement also aims at gradually integrating all the ACP states into the global economy, forming a framework for new partnerships for trade and investment.

III. The Common Market Organisation for Sugar (CMO Sugar)

The Sugar Protocol and the EC/India sugar preferences are managed within the context of the Common Market Organisation for sugar (CMO Sugar, also referred to as the EU sugar regime). The CMO Sugar is a rather complex system that, among other things, seeks to grant developing countries preferential access to the Community market and also aims to ensure considerably high guaranteed prices to EU domestic sugar processors.[13] Under the CMO Sugar, each member state is allocated a production quota; these quotas are then qualified for the EU intervention price support guarantee. The member states in turn allocate their individual quotas to sugar processors, who give beet delivery rights to individual farmers.[14] All sugar production beyond the quotas' limit is exempted from the guaranteed price support,[15] and the excess supply under the quotas is exported to the world market (supported by export subsidies).[16] With the high prices of sugar in the internal market, the EU has adopted a high degree of protection in order to prevent a massive influx of cheap sugar from the

world market. Thus, non-preferential sugar is simply not profitable in the internal market. Pursuant to Article 3 of the EU/ACP Sugar Protocol, ACP countries can benefit from a restricted preferential market access category known as "preferential sugar".[17] Since trade under the Sugar Protocol is managed within the context of the CMO Sugar, the preferential quotas specified in the protocol are eligible for re-export subsidies provided under the EU sugar regime

Furthermore, still within the context of the CMO Sugar, the maximum supply needs (MSN) concept seems to have extended the amount of sugar imported from the ACP countries within the understanding of the protocol. The MSN, which was first introduced in the Community in 1986 when Portugal acceded to the EU, further allows ACP countries and India to export raw cane sugar into the EU for roughly 85 percent of the Sugar Protocol price. The overall quantity of MSN sugar amounts to 1,779,000 tonnes per year. In order to attain this amount, the maximum supply needs are met first through the import of the ACP/Indian quantity and second through the Finnish quota of 85,463 tonnes. The remaining quota is therefore placed under the special preferential sugar category, under which the ACP countries may export raw cane sugar to the EU. The price of the imported raw sugar in the context of the special arrangement is calculated by deducting €81 per tonne from the guaranteed price under the Sugar Protocol.

IV. Compatibility of the EU/ACP Sugar Agreement with the Relevant GATT/WTO Provisions

As pointed out above, though the Sugar Protocol was negotiated separately from the Lomé/Cotonou Agreement, it is inscribed as part of the Cotonou Agreement.[18] Thus, its rationale is based on the Generalised Scheme of Preferences (GSP), which originated in 1964 in the United Nations Conference on Trade and Development (UNCTAD). The GSP aims at promoting tariff-free imports or lower tariff rates for imports into developed countries from least-developed and developing countries. Since the idea of preferences enshrined in the GSP was inconsistent with the GATT Article I MFN principle, it needed a legal exception to MFN. The waiver, which was granted in 1971 for a period of ten years, supposedly expired in 1981.[19] However, during the 1979 Tokyo Round negotiations, the contracting parties adopted a declaration (or decision) that explicitly allowed the industrialised countries to accord differential and more favourable treatment to the developing countries without according such treatment to the developed countries, not withstanding the MFN clause.[20] The 1979 declaration enacted on the basis of the GATT contracting parties' decision on "differential and more favourable treatment, reciprocity and fuller

participation of developing countries" and popularly known as the Enabling Clause is seen as perpetuating the authority of the GSP.

It is important to point out here that the Enabling Clause in itself is not a waiver, for the simple reasons that it does not refer to GATT Article XXV:5 on waivers nor is it included in the list of waivers enumerated in the footnote to paragraph 1(b)(iv) of "the language of Annex 1A incorporating the GATT 1994 into the WTO Agreement".[21] Nevertheless, as part of the "other decisions of the CONTRACTING PARTIES" within the meaning of paragraph 1(b)(iv), the Enabling Clause entered the WTO *acquis*.[22] In spite of the MFN requirements under GATT Article I, paragraph 1 of the Enabling Clause provides a green light for GATT/WTO Members to accord trade preferences to developing countries without necessarily extending such preferences to other GATT/WTO Members.[23] Thus, the Enabling Clause represents a deviation from the MFN principle that underpins the world trading system.[24] The then director-general of the GATT confirmed this view in his report at the conclusion of the Tokyo Round Agreement. He observed that

> [t]he Enabling Clause meets a fundamental concern of developing countries by introducing differential and more favourable treatment as an integral part of the GATT system, no longer requiring waivers from the GATT. It also provides the perspective against which the participation of developing countries in the trading system may be seen.[25]

While the granting of such specific preferences has been much lauded by the preference-receiving countries, the preferences are also a source of much contention within the ranks of non-preference-receiving countries. Non-preference-receiving developing countries argue that the granting of specific preferences leads to trade diversions, while some of the preference-giving Members say the preference giving is part of the commitments of the WTO Members.[26] It is against this background that, in response to complaints filed by Australia, Brazil and Thailand in *European Community – Export Subsidies on Sugar,*[27] the EC argued before the panel that the complainants' challenge of the EC re-export of subsidized ACP/India-equivalent sugar is wrong and tantamount to a challenge of the commitments of WTO Members that were agreed upon during the Uruguay Round of multilateral trade negotiations (MTNs).[28] Neither the panel nor the AB (though they did not expressly state so) found this argument a justification for the EC's WTO-inconsistent measures at issue.

With regard to the supportive treaty provisions for the Sugar Protocol, Article 13 of Annex V to the Cotonou Agreement states as follows:

> [I]n accordance with Article 25 of the ACP/EEC Convention of Lomé signed on 28 February 1975 and with protocol 3 annexed thereto, the Community has undertaken for an indefinite period … to purchase and

> import, at guaranteed prices, specific quantities of cane sugar, raw or white, which originates in the ACP states producing and exporting cane sugar and which those states have undertaken to deliver to it.[29]

Article 13 may be deviated from by any of the parties to the treaty only when the other parties have validly consented to such deviation. Thus, the EU may reduce the ACP quotas only if all the ACP states that are parties to the protocol consent to such reduction.[30] In reaffirming this commitment the EU has enacted a series of regulations ensuring that the protocol quantities are irreducible even in cases where the Community has to reduce other production quotas on the basis of its WTO commitments.[31] Other economic factors in the EU may lead to the modification of the Cotonou Agreement, but the affirmative, irreducible nature of the quotas under the protocol maintains the indefinite nature of the Sugar Protocol that the ACP states had sought to secure. As part of the three guarantees inscribed in the protocol, Article 13 also includes the concept of "guaranteed prices" for the purchase of ACP sugar. These prices, however, have to be negotiated annually between the EU and the ACP states that are signatories to the protocol "within the price range obtaining in the Community, taking into account all relevant economic factors".[32] All these factors seem to have provided a certain degree of legal assurance to the ACP sugar exporting countries.[33]

Turning back to the relationship between the protocol and the relevant WTO provisions, the Sugar Protocol as literally part of the Cotonou Agreement was based on the concept developed by the GATT contracting parties under the 1971 GSP and now the Enabling Clause.[34] Perhaps merely for academic purposes, one may start now to contemplate whether a different waiver pursuant to WTO Charter Article IX:3 and GATT Article XXV:5 may need to be applied for, for the survival of the EU/ACP Sugar Protocol in the context of the WTO upon a probable termination of the Cotonou Agreement by December 2007.[35] To be sure, preferences granted on the basis of the Cotonou Agreement are supported by a waiver decision. But the sugar preferences prescribed in the Sugar Protocol do not seem to contain any specific waiver for the purpose of the GATT Article I MFN provision. Assuming that the Sugar Protocol fulfils the WTO non-reciprocal trade conditions only on the basis of the waiver applied for in the context of the Cotonou Agreement,[36] certainly a request for such a waiver would be necessary to save the protocol from a WTO MFN challenge.[37] This is also supported by the fact that in the Cotonou waiver decision there is a clear understanding that the termination of the preferential rights under the Cotonou Agreement will at the same time terminate the waiver decision.[38] Alternatively, taking the same arguments from the perspective of the Enabling Clause, which is an exception to the WTO binding principle,[39] the argument may be rather directed toward

re-notifying the WTO General Council of the continuance of the protocol as required by paragraph 4 of the Enabling Clause, in spite of the termination of the Cotonou Agreement.

V. Jurisdiction of the WTO Dispute Settlement Panel and Appellate Body in the Context of the Protocol

A. Dispute settlement approach in relation to similar non-reciprocal schemes

As noted in the foregoing section, both the panels and the AB have clarified certain conditions that must be met by a preference-giving WTO Member in order for non-reciprocal trade arrangements to be justifiable under the Enabling Clause. Similarly, the AB in one of its first sensitive reports pointed out that in view of the requirements of the provisions of Article IX of the WTO Agreement and the GATT Waivers Understanding, waivers must be subject to "strict disciplines".[40] By contrast, before 1994, preferential trade agreements were of limited effect in the GATT.[41] Preferences within the framework of the Enabling Clause may be challenged before the panel if they do not sufficiently pass the test of non-discrimination or objectivity. This concern has been manifested in a number of disputes between some non-preference-receiving developing countries and the preference-giving countries. Maybe, due to the increased competitiveness of global markets and the "success story" of preferential arrangements, developing countries that do not receive preferences are now becoming more worried about the negative impacts of non-reciprocal schemes.[42]

In the first of such cases, during the Doha Ministerial Conference, Thailand and the Philippines threatened to stay out of the consensus if the EC rejected their request to accord the import of their canned tuna similar treatments as those given under the preferential arrangements for ACP canned tuna.[43] The EC agreed to enter into consultations with Thailand and the Philippines to consider the matter. After three consultations, held in Brussels (December 2001), Manila (January 2002) and Bangkok (April 2002), no mutually agreed solution was reached. The parties then agreed to refer the matter to the director-general of the WTO as provided for under Dispute Settlement Understanding (DSU) Article 5.6.[44] As a result of the mediation (done under the auspices of an appointee of the director-general), the EC disregarded the call by the ACP group not to change its position towards Thailand and the Philippines and issued a quota rate for the two countries as well as Indonesia.[45]

The action of these countries clearly demonstrates that the benefit of preferential schemes may gradually erode, as the countries that do not receive preferences may continue to challenge the preference-giving criteria.[46] Eventually, the most badly

affected countries will be those poor countries that depend very much for their export earnings on the products to which preferences are accorded.[47]

Again, in *EC – Tariff Preferences*, India successfully argued that the special tariff preferences granted by the EC to a number of developing countries on the basis of the fight against illicit drug production and trafficking was in contravention of the GATT Article I.1 MFN provisions.[48] Since it is an established fact that non-reciprocal schemes are a deviation from the GATT MFN provisions, a party may not sufficiently make a case against a non-reciprocal scheme by arguing loosely that because a particular preferential scheme is inconsistent with the MFN provisions, it is in contravention of the WTO rules: to be challenged, such a scheme must also be inconsistent with the provisions of the Enabling Clause. In the view put forward in the Appellate Body report in the *EC – Tariff Preferences* case, the Enabling Clause is fundamental in achieving the development objective of the multilateral trading system.[49] The role of the Enabling Clause in this respect has so far remained prominent on the agenda of the WTO in the different rounds of trade negotiations. Thus, in making reference to previous cases, the AB took the view that

> [t]he history and objective of the Enabling Clause lead us to agree with the European Communities (footnote omitted) that Members are *encouraged* to deviate from Article I in the pursuit of "differential and more favourable treatment" for developing countries. This deviation, however, is encouraged only to the extent that it complies with the series of requirements set out in the Enabling Clause, requirements that we find to be more extensive than more typical defences such as those found in Article XX.[50]

It is true that from the requirements of the Enabling Clause as pointed out by the Appellate Body, the selection of the countries to benefit from a preferential scheme must be based on objectivity. The difficulty here may be that while it may be easy for a developing country that does not receive preferences to successfully challenge a particular non-reciprocal scheme like the Drug Arrangements on the ground of objectivity as required by the Enabling Clause,[51] it may not be easy at the same time to successfully prove that a particular scheme is discriminatory because the conditions attached to it are unrelated to the receiving countries' development, financial or trade needs. Therefore, the mere fact that some developing countries do not receive the preferences is insufficient to find a violation. This means the benefits of non-reciprocal schemes may as a general rule be available to all developing countries but not readily provided to all developing countries. This is plausible from the understanding of the Appellate Body's reasoning, since objective criteria may be based on the location of the developing countries at issue and/or on the existence of a

common problem the preferences are destined to take care of (as with the Drug Arrangements).[52]

B. In the context of the Sugar Protocol

As noted above, an appraisal of the drafting history and the conditions attached to the Sugar Protocol clearly square it into the scope of what the Appellate Body in *EC – Tariff Preferences* described as development needs common to a certain number of developing countries.[53] Thus, the non-reciprocal preferences accorded in the framework of the Sugar Protocol are particularly useful for the improvement and progressive development through trade in sugar of the economies of the ACP signatories to the protocol. Although no dispute has so far been brought before the panel by another ACP country not party to the Sugar Protocol to contest its legality or objectivity, there seem to be quite a number of ACP countries that are sugar producers and not parties to the protocol.[54] Thus, although all ACP countries are basically parties to the Cotonou Agreement, not all of these countries benefit from the preferences granted in the context of the Sugar Protocol.[55] A likely implication of this is that within the ACP group of states, there may still be a level of polarization on the current negotiations on non-reciprocal schemes and the Economic Partnership Agreement (EPA) with the EU. However, this is not very important here, as some of those ACP countries that produce sugar seem to do so for home consumption or at most for South-South trade.[56] Sugar may form only a very minimal part of the economy of these countries. The minimal importance of sugar to some of these economies renders the sugar sector a less viable sector through which to foster the greater economic development that is the apparent objective of the sugar preferences. One of the objectives of the protocol is to safeguard the interests of the ACP countries whose economies rely to a considerable extent on the export of a primary product like sugar.[57] The situation is radically different for other developing, non-ACP countries that export sugar but that are parties neither to the Sugar Protocol nor to a particular non-reciprocal sugar scheme with the EC.

C. The EC – Sugar Subsidies dispute

On 11 July 2003, Australia, Brazil and Thailand requested the establishment of a WTO dispute settlement panel to challenge the export subsidies granted under the EU sugar regime.[58] The complainants claimed that the EU provides export subsidies in excess of its reduction commitment levels specified in section II of part IV of its schedule of commitments (Schedule CXL – European Communities) to the WTO. The complainants all directed their claims toward EC Council regulation no. 1260/2001 of 19 June 2001 and other subsequent measures relating to the EC sugar regime.

Subsequently these three complaints were consolidated, which meant they would be heard by a single panel. Specifically, the basis for the complaints hinged on two important issues.

First, the complainants alleged that the high prices charged by the EC for the quotas of so-called A and B sugars cross-subsidise the export of C sugar. Hence, C sugar is exported to the world market below its total cost of production.

The second aspect of the complaints is directly linked to the EU/ACP Sugar Protocol, and it will be the focus here. The complainants here claimed that the respondent grants export subsidies to an amount of white sugar ostensibly equivalent to the quantity of raw sugar that the EC imports under its preferential schemes.[59] The complainants also alleged that the exclusion of these subsidies from the calculation of the total amount of EC export subsidies for sugar is unjustified. Thus, all these subsidies put together exceed the EC export subsidies reduction commitments and as such are inconsistent with the relevant provisions under the Agreement on Agriculture, the Subsidies and Countervailing Measures Agreement (SCM Agreement) and the GATT 1994.[60]

The panel exercised judicial economy regarding the claim under the SCM Agreement Article 3.[61] The WTO dispute settlement report hinges on two important provisions under the Agreement on Agriculture that it considers the EC to have breached. The AB upheld the panel finding that by providing subsidies to the export of "ACP/India-equivalent sugar" since 1995, the EC has acted inconsistently with Article 9.1(a) of the Agreement on Agriculture.[62] Hence, the export subsidies provided by the EC to the ACP/India-equivalent sugar are export subsidies contingent on export performance, which according to Article 9.1(a) of the Agreement on Agriculture are subject to reduction commitments.

The DSB further held that by indirectly financing the export of C sugar the EC has acted inconsistently with the provisions of Article 9.1(c) of the Agreement on Agriculture.[63] Having breached Article 9.1(a and c), the EC has acted inconsistently with its commitments under articles 3.3 and 8 of the Agreement on Agriculture, the panel concluded.

In view of the EC argument that Footnote 1 to its schedule of commitments to the WTO (which refers to the ACP/India-equivalent sugar) should be regarded as a second component of its commitment level, the AB upheld the panel finding that Footnote 1 "does not indicate" a limitation on export subsidies for sugar to 1.6 million tonnes.[64] Therefore, Footnote 1 is a "unilateral statement" and does not have any legal effect in relation to the fact that the EC is not making any reduction commitment.[65]

However, a footnote to a provision of a convention may, as the other provisions, be considered valid and binding on the contracting parties if the latter during the negotiation of the convention gave their consents[66] to the insertion of the footnote as a component of the overall commitments or as a further clarification to the provision therein. Bearing this in mind, the treaty interpretation rules in the Vienna Convention on the Law of Treaties effectively apply in the interpretation of footnotes to conventions.[67] Conversely, as a general rule, lack of objection to or silence with regard to the inclusion of a particular clause or footnote that has not been validly negotiated and agreed upon by the contracting parties to the treaty does not automatically amount to acceptance.[68] Following this approach, the panel agreed with the complainants that their consistent objection to the inclusion of Footnote 1 during the negotiations in the Uruguay Round implied that the complainants did not accept Footnote 1 of the EC Schedule of Commitments as a subsequent deviation from the Agreement on Agriculture by the EC.[69] As a consequence, an assumption in favour of the EC's arguments on Footnote 1 to their schedule of commitments would constitute a deviation from the Uruguay Round–negotiated tariff concessions.[70] From the rulings of the DSB here, it appears that even if Footnote 1 were to be given legal effects as requested by the EC, such legal effects would be a concession of a unilateral nature in favour of the ACP/India sugar.[71]

D. Relationship between domestic supports and export subsidies

On the other hand, Article 9.1(c) does not permit

> [p]ayments on the export of agricultural products that are financed by virtue of government action, whether or not a charge on the public account is involved, including payments that are financed from the proceeds of a levy imposed on the agricultural product concerned or on an agricultural product from which the exported product is derived.

Interestingly, the European Communities, "supported" by Canada as a third participant, submitted at the appeal stage that the panel findings "on the export" within the meaning of Article 9.1(c) failed to make a sufficient distinction between the disciplines on domestic support and on export subsidies, and would "allow virtually any form of domestic support to be characterised as an export subsidy".[72] In addressing this issue the AB recalled its previous rulings in *Canada – Dairy* (Article 21.5 – New Zealand and US, para. 89), where it observed "that economic effects of WTO-consistent domestic support may 'spill over' to benefit export production … in circumstances where agricultural products result from a single line of production that does not distinguish between production destined for the domestic market and

production destined for the export market".[73] Following this reasoning, the AB rejected the EC's argument. The AB held that the subsidised production and export of C sugar is not an incidental effect of the domestic support system, but a direct consequence of the EC sugar regime. According to the AB, the EC's argument that the panel's finding blurs the distinction between domestic support and export subsidies cannot stand, because the EC sugar regime requires the exportation of C sugar, and prices obtained from C sugar in the world market are significantly below the total average cost of production in the EC.[74]

Contrary to the EC's argument, the AB interpretation seems to throw more light on the boundary between "domestic support" and "export subsidies" as recognised under the Agreement on Agriculture. In comparison to past AB rulings in, for instance, *Canada – Dairy,* Article 21.5,[75] the AB's explanation clarifies its scope of jurisprudence under Article 9.1(c) of the Agreement on Agriculture. In *Canada – Dairy,* Article 21.5 II, the AB made only a rather broad finding that could give the impression that the existence of domestic support for milk combined with below-cost export of milk imply that export subsidies were given.[76] Conversely, in *EC – Sugar Subsidies*, the AB seemed to be more specific in the sense that it based its findings of violation on a formal requirement by the government for the export of C sugar. This may set a positive precedent in the sense that a finding of violation under Article 9.1(c) needs a closer nexus between the subsidy and the export.

E. DSB report as a turning point in the sugar preferences

Among the nineteen ACP countries that are parties to the Sugar Protocol, about five receive significant earnings from sugar exports to the EU. None of these five sugar-dependent ACP countries is a least-developed country, so none will benefit from the new Everything But Arms (EBA) initiative.[77] ACP countries like Fiji, Guyana, Jamaica, Mauritius and Swaziland are not the cheapest producers of sugar and can only export sugar profitably through the preferential scheme. The sugar industry in Mauritius, for instance, depends almost entirely on preferential access for the export of sugar. Thus, the preferential sugar scheme appears to have resulted in these countries (especially the above-mentioned five) having a high degree of dependency on the export of raw sugar.

Whether the preferences associated with the EU/ACP Sugar Protocol/India quotas have been fully utilised by the beneficiaries or not, there is very little doubt that the DSB report marks a turning point for the EU/ACP sugar preferences.[78] The EC/ACP waiver had long been considered an authorization for the EC to depart from GATT Article I in pursuit of measures in favour of ACP countries. While the ACP countries and the LDCs are struggling in the current negotiation with the EC to protect their

interests under the sugar preferences,[79] the EC throughout the dispute linked its WTO-inconsistent measures to the sugar preferences. As a consequence, in order to respond to its WTO obligations, the European Commission has modified its July 2004 reform proposals to the council by introducing a more specific reform plan aimed at cutting down the prices of sugar within the EC by 39 percent.[80]

As pointed out above, both the ACP countries and the LDCs have vulnerable economies and are far less competitive than producers like Brazil and to a certain extent Thailand. While the LDCs have been guaranteed duty-free access, to be fully phased in by 2009 under the 2001 Everything But Arms (EBA) initiative, imports of sugar into the EU from ACP countries like Mauritius have been almost fourteen times more than those from Brazil. Therefore, while it is relevant for the EC to take certain measures to bring its sugar regime into conformity with its WTO obligations, from the point of view of the ACP countries and India any reform in this direction must be gradual and be intended not to distort the essential character of the sugar preferences. In this regard, some suggestions were made to the EC previously, at the panel stage, regarding the importance of respecting the sugar preferences in the course of any future implementation of measures following from the DSB rulings.

VI. Legal Obligations Stemming from WTO Dispute Settlement Body Suggestions

Pursuant to DSU Article 19.1, sentence 2, "[i]n addition to its recommendations, the panel or Appellate Body may suggest ways in which the Member concerned could implement the recommendations." Once the Dispute Settlement Body concludes that a particular measure is inconsistent with the WTO Agreement or any of its annexes, there is an international law obligation stemming from the recommendations that follow to withdraw the offending measure.[81] In a traditional international law sense, there are a variety of ways to deal with breaches of international commitments. In the context of the WTO treaty system, it is understood that if a Member fails to bring the WTO-inconsistent measure into compliance with the DSB report within a reasonable period of time, such Member shall if so requested, and no later than the expiry of the reasonable period of time, enter into negotiation with the party having invoked the dispute settlement procedures, with a view to developing mutually acceptable compensation.[82] Compliance is thus the priority of the system.

If there is a failure to comply with the recommendations within the reasonable period of time and a further failure to reach a mutually agreed compensatory settlement, the injured state may make a request to the DSB for the last-resort remedy, which is retaliation ("suspension of concessions" in the language of the DSU).[83] Though the importance of the DSB's suggestions for implementation should not be

underestimated, this opportunity to retaliate seems to apply only to the extent that the Member has failed to comply with the recommendations: it does not appear to extend to the case where a Member has failed to comply with the panel's or AB's suggestions for implementation. If in the course of implementing the recommendations and rulings of the DSB, the implementing Member devises its own approach, it may be out of the question for the winning state to complain that the implementing Member did not follow the panel's or AB's suggestions.

It appears, then, that WTO Members are rather free to accept or not accept a particular suggestion made by a panel or AB. The use of the words "may" and "could" in Article 19.1, sentence 2 of the DSU suggests that panels are not obliged to make suggestions. Even if the nature of the case persuades them to make suggestions, their suggestions are not binding upon WTO Members.[84] By implication, Australia, Brazil and Thailand may be more interested in seeing that the EC brings its measures into conformity with the relevant provisions mentioned in the recommendations of the panel than in ensuring that the EC in doing so has followed the specific suggestions made by the panel.[85]

As the suggestions were made with the interests of the ACP countries and India in mind, it would be up to them to see that the suggestions are implemented. This presently appears difficult, given the nature of WTO dispute settlement procedures, since the ACP countries and India were only third parties in the dispute[86] and, further, were on the side of the implementing Member – the EC.

With very few exceptions, the only limit on a Member's discretion to adopt a particular approach to bringing a contested measure into conformity with the recommendations and rulings of the panel or AB instead of following a particular DSB suggestion may stem from the principle of good faith.[87] In this respect, good faith is an obligatory standard of performance for parties to an international convention and a guiding principle in interpreting their obligations,[88] as the Appellate Body has consistently pointed out in its reports.[89] On the other hand, there seems to be no particular provision in the DSU obliging WTO Members to follow the panel or AB suggestions in complying with a recommendation. They are encouraged not to consider dispute settlement per se as a contentious act but rather to participate in a particular dispute faithfully and abide by the panel or AB recommendations and suggestions in good faith.[90]

Though the actual legal effect of a preamble of a particular treaty is sometimes highly contested, a preamble may nevertheless be a guiding force in certain circumstances in ascertaining the object and purpose of a particular convention. A preamble usually contains the common considerations and shared principles of the

contracting parties.[91] This same view was held by the Appellate Body in *EC – Tariff Preferences*.[92] This interpretation means that, framed in a general context, a preamble could be construed as a spring-board of a particular treaty. In this respect, the preamble to the Agreement on Agriculture could be seen as a useful instrument in guiding the EC's relationship with the ACP countries. It states that

> [i]n implementing their commitments on market access, developed-country Members would take fully into account the particular needs and conditions of developing-country Members by providing for a greater improvement of opportunities and terms of access for agricultural products of particular interest to these Members, including the fullest liberalization of trade in tropical agricultural products as agreed at the Mid-Term Review.[93]

A scrutiny of the panel suggestions

In view of the fact that WTO dispute settlement suggestions may be relevant with regard to implementation of particular rulings and recommendations, the following suggestions were directed to the EC at the panel stage:

> [i]n bringing its export of sugar into conformity with its obligations under Articles 3.3 and 8 of the *Agreement on Agriculture*, the European Communities consider measures to bring its production of sugar more into line with its domestic consumption whilst fully respecting its international commitments with respect to imports, including its commitments to developing countries.[94]

While it may be difficult to argue in favour of a *stricto sensu* legal obligation upon the EC to respect these suggestions, viewed from the arguments raised above the EC is generally required to follow both the DSB recommendations and suggestions in good faith. This latter argument takes support from the shared thesis that good faith provides a standard of conduct to be pursued by WTO Members in the organization and implementation of their commitments.[95] However, a contrary argument may be that, even if the panel suggestions were to be given effect, they are vague.[96] In effect, from a *stricto sensu* legal perspective, the EC has the discretionary power to "consider measures to bring its production of sugar more in line with … its commitments to developing countries" when bringing its sugar regime into conformity with the DSB recommendations. Nevertheless, the Enabling Clause, which is the very basis for non-reciprocal schemes, could be understood as one of the instruments forming part of the GATT 1994, based on the fact that it is one of the decisions of the contracting parties to the GATT 1947 referred to in paragraph 1(b)(iv) of the same language of Annex 1A of the GATT 1994.[97] But it appears there have been long-standing arguments supporting the fact that the Enabling Clause was only invented as a legal basis for future voluntary measures that might affect WTO Members.[98]

A. The EU sugar reform proposals

It is estimated that the benefits accruing to the ACP countries from the preferential scheme could amount to about €500 million per year compared to earnings available in the world market,[99] with the lion's share of these benefits accruing to the major five sugar-dependent ACP countries (Fiji, Guyana, Jamaica, Mauritius and Swaziland). This explains why they responded vigorously against the 2004 EU Commission reform proposals to drastically reduce the guaranteed price for the import of ACP/Indian preferential sugar.[100]

Already anticipating the probable outcome of the panel rulings in the *EC – Sugar Subsidies* dispute, the EC in its 2004 reform proposal sought to reduce the prices of white sugar originating in ACP countries/India and also to dismantle the intervention mechanism contained in the EU sugar regime.[101] And in June 2005 the EC proposed, among other things, a 39 percent cut in its sugar prices.[102] Though not exhaustively, the EC proposal seems to be a relevant move towards establishing an initial framework for the implementation of the DSB recommendations. The ACP countries on the other hand are of the view that the Sugar Protocol is an inter-states contract that amounts to a treaty within the meaning of Article 2(a) of the Vienna Convention on the Law of Treaties (VCLT).[103] Hence, even before the final report of the DSB was adopted, the ACP countries had concurred that they have fully met their own obligations under the Sugar Protocol by exporting an unaltered amount of 1.3 million tonnes of sugar per annum since the date of entering into force of the protocol (1975).[104] If this claim holds it may lend support to the idea of legitimate expectations accruing under the protocol to the ACP countries.[105] The principle of legitimate expectations focuses on the contractual relationship of parties and their respective rights, looking to the receiver's view of the agreement rather than merely to the "plain meaning" of the words that supposedly indicates the mutual will of the parties.[106] If this holds for the Sugar Protocol, the EC may be stopped by the international law principle of *pacta sunt servanda* from entering into measures that would prematurely terminate their international law obligations stemming from the EU/ACP sugar agreement.[107]

Whether or not from the EC's perspective reducing the prices of raw sugar from its preference-receiving developing-country partners may be the best option for complying with the WTO dispute settlement recommendations without hurting its own domestic sugar producers, the current WTO negotiations on agriculture under the Doha mandate seem to recognise that in implementing their tariff-reduction commitments, Members must duly take into account the maintenance "to the maximum extent technically feasible, the nominal margins of tariff preferences and

other terms and conditions of preferential arrangements they accord to their developing-country partners".[108]

Furthermore, still within the framework of the Doha Development Agenda, the WTO Committee on Agriculture has recently acknowledged that, in areas of long-standing non-reciprocal schemes between developed and developing countries, covering at least 20 percent of the total merchandise export of the beneficiaries, a grace period of eight years may be taken to fully put into place tariff reduction measures that would lead to full erosion of such preferences. Consequently, since one line of opinion suggests that preference-giving in the context of the WTO is rather optional,[109] it appears there may be more persuasive arguments from the EC's perspective to comply with its legal obligation stemming from articles 3.3 and 8 of the Agreement on Agriculture, as recommended by the DSB, than to comply with the view expressed in paragraph 16 of the Harbinson text.[110]

B. Liberalisation of the market in sugar

The WTO agreements establish a shared vision of improving the economic welfare of the citizens of the community of nations through improved trade. This is done through tariff cuts and dismantling of other restrictive trade practices. Framing this in the context of the WTO DSU remedies, some opinions still hold that instead of allowing someone to "shoot himself in the foot" by retaliating singly, some different approach could be adopted. Thus, if the EC were to liberalise its sugar market, all the price support, the quota system as well as quantitative and tariff protection, would be abolished. This would seem a plausible option for free traders and would also seem plausible in the context of recitals 3 and 4 of the preamble to the WTO Charter. On the other hand, it would be rather far from working to the advantage of the EC sugar producers and the major ACP sugar producers, as only very few competitive exporters such as Brazil would sell sugar in the EC market.

This form of liberalisation would favour time-honoured classical economic theory, which purports that allowing market forces or competition to be the moderators of international trade is less damaging to worldwide welfare than objecting to foreign competitors.[111] The liberal view of world political economy is more sophisticated than many of its followers allege.[112] Though at some risk of blurring dichotomies between followers of this school of thought, a rather encompassing liberalism provides thoughtful arguments designed to show how world prosperity can be improved through international trade.[113]

Conversely, in the July 2004 reform proposal, the Commission sought to merge the A and B sugar quotas into one quota and to eventually reduce the level of total sugar quotas within the internal market. In order to prevent an eventual influx of sugar

into the internal market from cheap external sugar producers like Brazil, Thailand, etc., the reform also sought to cut down the intervention price support and to reduce the prices of sugar within the EU.[114] While the reform proposal seems to give an overview of what sort of measures likely would be taken in the EU sugar sector, it is important to point out that the outcomes of both the Doha negotiations and the EPA negotiations with the ACP countries are not without relevance in defining the future of EU/ACP and the WTO relationships.

VII. Conclusion

It is worthwhile now to make some concluding remarks on the subject of preferential agreements in general, and the future of the EU/ACP sugar preferences in particular, in the context of the GATT/WTO agreements.

From a systemic point of view, the Enabling Clause was concluded in the framework of the GSP programme and as an instrument forms part of the GATT 1994, though it has been suggested that such preferences could be voluntary in nature. Despite the limitations and all the lacunae that may be associated with the EC GSP programme, the province of GSP in its wider context needs to be considered in the framework of its empirical value. Hence, squaring this view into the EU/ACP/India sugar preferences would mean that from a multilateral perspective, while the EC is under an obligation to adjust its sugar regime to be consistent with the WTO DSB rulings, the EC also has a stake in making sure that its policy should conform with at least two of the three basic guarantees enshrined in the Sugar Protocol, namely, the "agreed quantity of white sugar equivalent" to be imported from the ACP countries (1.3 million tonnes a year) and the proviso that it be imported at a "guaranteed price".[115] The third guarantee, on indefinite period, is also of non-negligible relevance. Meanwhile, Article 36(4) of the Cotonou Agreement recognises the special legal status of the protocol; these principles have also been recognised as the very legal foundation of the EU/ACP Sugar Protocol.

However, the importance of reforming the sugar regime to the EC and the complainants cannot be undermined. A profound reform may also be of significant domestic interest to countries like Brazil and Thailand, which produce sugar cheaply. Certainly, the benefits of a reform that may conform with the WTO DSB rulings and at the same time alter the nature of the long-standing EC/ACP sugar preferences should be balanced with the negative impacts that such reform might have on the ACP countries that rely almost exclusively on the earnings generated through the sugar preferences to support their economies. Such considerations indicate the importance

of a comprehensive negotiation in the context of the Doha mandate, encompassing all interested parties.

Table 1 EU/ACP Sugar Quotas and Production

Country	EU/ACP sugar protocol agreed quantities (tonnes w.s.e)	SPS 2001/02 basic allocation (tonnes w.s.e)	Normal annual production (tonnes tel quel)
Barbados	50,312.4	2,841.2	70,000
Belize	40,348.8	4,985.2	122,000
Congo	10,186.1	2,519.2	43,000
Cộte d'Ivoire	10,186.1	10,000.0	155,000
Fiji	165,348.3	19,181.8	450,000
Guyana	159,410.1	19,931.7	300.000
Jamaica	118,696.0	15,926.8	230,000
Kenya	0.0	11,023.4	480,000
Madagascar	10,760.0	2,550.0	100,000
Malawi	20,824.4	10,000.0	200,000
Mauritius	491,030.5	41,980.1	650,000
St Kitts Nevis	15,590.9	1,831.3	25,000
Swaziland	117,844.5	30,000.0	474,000
Tanzania	10,186.1	2,485.9	120,000
Trinidad & Tobago	43,751.0	5,592.2	120,000
Zambia	0.0	12,731.5	200,000
Zimbabwe	30,224.8	25,000.0	600,000
Total	1,294,700.0	218,581.0	4,339,000

Source: ACP sugar web site at www.acpsugar.org (last visited 17.11.2004).

Note: Footnote 1 to the EC Schedule of Commitments to the WTO states that its reduction commitment of 1,273,500 tonnes/annum starting from the year 2000 "does not include exports of sugar of ACP and Indian origin on which the Community is not making any reduction commitments. The average of export in the period 1986 to 1990 amounted to 1.6 mio t."

Endnotes

* I am grateful for the useful comments from Professor Matti Heimonen, Professor Roberto Rios, Dr. Mathias Hartwig and Mr. Kristian Siikavirta. The views expressed in this article are those of the author and do not necessarily represent those of the institutions with which the author is associated. The author can be contacted through hodu.ngangjoh@helsinki.fi

1. The Drug Arrangements provided for in EC regulation no. 2501/2001 of 10 December 2001 covered the period of 1 January 2002 to December 2004. The arrangements provided tariff preferences to combat drug trafficking to the following twelve countries: Bolivia, Colombia, Costa Rica, Ecuador, El Salvador, Guatemala, Honduras, Nicaragua, Pakistan, Panama, Peru and Venezuela.
2. Appellate Body report, *European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries* (*EC – Tariff Preferences*), WT/DS246/AB/R, (adopted 20 April 2004).
3. Appellate Body report, *European Communities – Export Subsidies on Sugar,* WT/DS265/AB/R, WT/DS266/AB/R, WT/DS283/AB/R (adopted 19 May 2005), paras. 290 and 300. The EC Schedule of Commitments to the WTO for subsidized export sugar is set out in section II of part IV of the EC Schedule CXL as 1,273,500 tonnes from the year 2000 and beyond. According to the EC in this case, Footnote 1 to this schedule allows it additional export subsidies equivalent to ACP/Indian quotas; the complainants do not agree with this interpretation. The Appellate Body also upheld the panel findings in this respect (see paras. 186-188).
4. Usually, the WTO follows the UN practice by allowing countries to "self select" themselves in order to acquire developing-country status; however, for the purpose of the GSP, it is up to the preference-granting developed country to determine whether a country is "developing" or not. In a conventional sense, the term may be used to denote relatively poor groups of countries sharing similar features such as small gross national product (GNP) compared to major players in the world trading system, high average trade barriers, concentrated exports in terms of products and trading partners and a high level of economic and political dependence on industrialized countries. See the characterization by Henrik Horn and Petros C. Mavroidis in "Remedies in the WTO Dispute Settlement System and Developing Country Interests" (Institute for International Economic Studies, Stockholm University Centre for Economic Policy Research, mimeo, 11 April 1999).
5. The first of these was a reform proposal by the Commission to the Council and European Parliament in July 2004 titled Brussels, COM (2004) 499 final (dated 14 July 2004); more recently, on 22 June 2005, the Commission put forward a specific proposal on the Common Market Organisation for Sugar (IP/05/776, Brussels, 22 June 2005).
6. This proposal was later enshrined in protocol 22 annexed to the Treaty of Accession of the UK to the EEC.
7. The text of protocol 22 reads as follows: "The Community will have as its firm purpose the safeguarding of the interests of all the countries referred to in this protocol whose economies depend to a considerable extent on the export of primary product and particularly of sugar. The question of sugar will be settled within this framework, bearing in mind with regards to export of sugar, the importance of this product for the economies of several of these countries and the Commonwealth countries in particular." See, for instance, articles 118 and 158 of the Act Concerning the Conditions of Accession and the Adjustment to the EC

Treaty of 22 January 1972, obtainable at http://www.eurotreaties.com/ukaccessionact.pdf (last visited 10 September 2004).

8. This was incorporated into protocol 22 of the UK Treaty of Accession to the EEC. It is important to point out that the method of implementation of the sugar agreement with the developing ACP countries was further developed by the EC Commission taking into account the basic principle enshrined in the CSA (i.e., bearing in mind the importance of sugar to the economies of the ACP countries).
9. This was in fulfilment of the wishes of the developing Commonwealth sugar exporting countries, as they had struggled over years to retain these features. These three guarantees are now found in Article 1.1 of the Sugar Protocol.
10. It is also worth noting that before the Cotonou Agreement, subsequent negotiations had led to further phases of the Lomé Convention (Lomé I-1975, Lomé II-1980, Lomé III-1984 and Lomé IV-1989; Lomé IV *bis* in 1995 amended Lomé IV).
11. Apart from the three guarantees, which distinguish the protocol from the Cotonou Agreement, the EC may adopt safeguard measures on other products dealt with under the Cotonou Agreement (Article 10 of the Cotonou Agreement) but may not apply such safeguard measures under the Sugar Protocol (Article 1.2 of the protocol). Furthermore, the protocol is carried out under the management of the EC sugar regime. On the other hand, Annex V, protocol 1, Title V, Article 38.1 of the Cotonou Agreement also provides for the possibility of a request for derogation from the provisions of the Cotonou Agreement by an ACP country. However, such derogation can only be granted if it would not cause prejudice to an established Community industry.
12. See table 1 for country-by-country distribution of the sugar quotas.
13. According the March 2004 Oxfam briefing paper, currently, the guaranteed price paid to sugar processors has been estimated at €632/tonne compared with a world market price of €157/tonne.
14. See "Council Regulation (EC) no. 1260/2001 of 19 June 2001on the common organisation of the markets in the sugar sector," *Official Journal of the European Communities (OJ)* (30 June 2001).
15. This falls within the "C" categorisation as currently exists in the quota system. Since C sugar is not consumed within the EC, it is then exported to the world market.
16. The export subsidy sugar is funded not directly from the EU budget but by a production levy charged on all quotas of A and B sugar.
17. Preferential sugar was supplemented by another category called special preferential sugar (SPS). SPS is based on the concept of maximum supply needs (MSN), which are met through the EU/ACP Sugar Protocol (1,294,700 tonnes) and India (10,000 tonnes) quota systems and supplies from Finland (85,463 tonnes quota).
18. See Article 1 of the EU/ACP Sugar Protocol.
19. For analyses of the waiver decision, see Hector Gros Espiell, "GATT: Accommodating Generalized Preferences," *Journal of World Trade Law (JWTL)* vol. 8 (1974): 341-363; John H. Jackson, *The World Trading System, Law and*

Policy of International Economic Relations, Second edition (Cambridge: MIT Press, 2000), 322-324.

20. See GATT contracting parties' decision of 28 November 1979 in document L/4903, BISD 26S/203.
21. See Appellate Body report, *Japan – Taxes on Alcoholic Beverages (Japan – Alcoholic Beverages)*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R (adopted 1 November 1996), 14. Here, in adopting the phrase "the language of Annex 1A incorporating the GATT 1994 into the WTO Agreement", the AB observed that "paragraph 1(b)(iv) of the language of Annex 1A incorporating the GATT 1994 into the WTO Agreement brings the legal history and experience under the GATT 1947 into the realm of the WTO in a way that ensures continuity and consistency in a smooth transition from the GATT 1947 system."
22. This was acknowledged by the participants and third participants and clearly confirmed by the Appellate Body in *EC – Tariff Preferences*, WT/DS246/AB/R (adopted 20 April 2004), para. 90.
23. Such preferences are granted in accordance with the conditions of the GSP. See the decision of 28 November 1979 on differential and more favourable treatment reciprocity and fuller participation of developing countries (L/4903), para. 2.
24. "Exploring the linkage between the domestic policy environment and international trade," *World Trade Report* (WTO, 2004).
25. See "Report by the Director-General of GATT," in *The Tokyo Round of Multilateral Trade Negotiations* (GATT, 1979), vol. I, p. 99. See also Appellate Body report in *EC – Tariff Preferences*, WT/DS246/AB/R, para. 108, citing European Communities' appellant's submission, para. 25.
26. For instance, Thailand and the Philippines voiced their concern regarding the EU/ACP preferences during the Doha Ministerial Conference in November 2001. These two countries would only join the consensus when the EC promised to enter into consultation with them to consider the impact of the EU/ACP scheme on their canned tuna exports and a possible waiver of the ACP scheme for the two countries in this respect.
27. See documents WT/DS265/21, WT/DS266/21 and WT/DS283/2 of 11 July 2003.
28. See statement by the European Commission "WTO challenge against EU sugar will hurt developing countries," in document DN:IP/03/993 (Brussels, 10 July 2003).
29. Also stated in Article 1 of the EU/ACP Sugar Protocol.
30. Article 3.2 of the EU/ACP Sugar Protocol.
31. See, for instance, EU regulation no. 2038/1999 on the common organisation of the market in sugar.
32. Article 5.4 of the EU/ACP Sugar Protocol.
33. This legal certainty was originally reflected in Article 213 of the IVth Lomé Convention, which is now in the Cotonou Agreement. In the protocol itself, articles 1.1, 1.2 and 10 are also very revealing in this respect.
34. Though it has a different legal regime, the protocol is regarded to have been incorporated under the Lomé Convention purely for administrative purposes. With

the MFN provisions and trade preferences, Cottier argues that the WTO rules "reflect a policy of encouragement and containment of preferential trade." See Thomas Cottier, "The Challenge of Regionalization and Preferential Relations in World Trade Law and Policy," *European Foreign Affairs Review (EFAR)* 2(1996): 149-167.

35. Part 3, Title II, chapter 2, Article 37.5 of the Cotonou Agreement provides a transitional period for the existence of the non-reciprocal trade arrangements under the agreement till January 2008, during which a different negotiation on a reciprocal trade arrangement consistent with the WTO agreements would be entered into with those "… ACP countries which consider themselves in a position to do so, at the level they consider appropriate and in accordance with the procedure agreed by the ACP Group." For an analysis of this provision, see *The Cotonou Agreement: A User's Guide* (London: Commonwealth Secretariat, 2004), 184-187.
36. For the ACP/EC Partnership Agreement waiver decision taken during the Doha Ministerial Conference, see European Communities – The ACP-EC Partnership Agreement, Decision of 14 November 2001, WTO Ministerial Conference, Fourth Session, Doha 9-14 November 2001, WT/MIN(01)/15. As regards notification of preferential trade agreements, by January 2005, about 21 notifications had been made to the WTO on the basis of the Enabling Clause. See www.wto.org/english/tratop_e/region_e/region_e.htm
37. It is important to note that neither the GSP nor the Enabling Clause stated the criteria for considering a country a developing country for the purpose of the preferences. Rather, what can be understood from the provisions of Footnote 1 to paragraph 1 of the Enabling Clause is that developing countries by definition also mean developing territories. Considering the fact that the language of the preferential provisions does not make the granting of preferences obligatory upon the developed countries, the latter have a wider discretion in selecting the beneficiaries of the preferences.
38. In this regard, paragraph 1 of the ACP-EC Waiver Decision states, "… [A]rticle I, paragraph 1 of the General Agreement shall be waived, until 31 December 2007, to the extent necessary to permit the European Communities to provide preferential tariff treatment for products originating in ACP States as required by Article 36.3, Annex V and its Protocols of the ACP-EC Partnership Agreement (emphasis added), without being required to extend the same preferential treatment to like products of any other Member." See WT/MIN(01)/15. See also the Cotonou Agreement on the New Trading Arrangements, para. 36.
39. As part of the decisions of the contracting parties to the GATT 1947, referred to in paragraph 1(b)(iv) of the same language of Annex 1A of GATT 1994, the Enabling Clause could be considered as an affirmative defence that may be binding on all WTO Members once an operational GSP programme is challenged. This argument takes support from the ruling of the Appellate Body in the case *Japan – Taxes on Alcoholic Beverages* (*Japan – Alcoholic Beverages*) regarding a decision of the GATT 1947 contracting parties on adopting a particular dispute settlement report. WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R (adopted 1 November 1996), 13. See also the Appellate Body report in *United States – Tax*

Treatment For "Foreign Sales Corporations" (US – FSC) (adopted 20 March 2000), paras. 107-115. Furthermore, in *EC – Tariff Preferences*, the AB upheld the panel findings regarding the Enabling Clause as an exception but did not consider the notion of "positive" versus "exception" discussed at the panel stage. See paras. 90-99 of the AB report.

40. See Appellate Body report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R, paras. 179-188.
41. It is from this perspective that Cottier seems to support the idea that because the review of these preferences under the GATT was ineffective, it was difficult to challenge a particular preferential arrangement as being inconsistent with the GATT before the dispute settlement panel. See Cottier, 1996, 160-161.
42. For the level of utilisation of trade preferences, see Stefano Inama, "Trade Preferences and the World Trade Organization Negotiation on Market Access: Battling for Compensation of Erosion of GSP, ACP and Other Trade Preferences or Assessing and Improving Their Utilization and Value by Addressing Rules of Origin and Graduation," *JWT* vol. 37, issue 5(2003): 959-976 (hereinafter Inama, 2003).
43. Precisely, Thailand and the Philippines requested the EC to examine the extent to which their legitimate interests were being unduly impaired as a result of the implementation of the preferential treatment of canned tuna originating from ACP states.
44. Pursuant to DSU Article 5.6, the WTO director-general may, acting in an *ex officio* capacity, offer good offices, conciliation and mediation with the view of assisting Members to settle a dispute.
45. According to the mediator's recommended quota rate on canned tuna fish, Thailand was given 52 percent, the Philippines 36 percent and Indonesia 11 percent; 1 percent was given to other countries not benefiting from the EU/ACP preferences. See *Official Journal of the European Union (OJ)* L 141/1, 7.6.2003, EC Council regulation 975/2003 of 5 June 2003.
46. Viewed from paragraph 7 of the Enabling Clause, which speaks of the progressive development of the economies of the developing countries and the possibility "to participate more fully in the framework of rights and obligations under the General Agreement", one could only conclude that the negotiators seem to have intended a possible future graduation from receipt of preferences by developing countries. Nevertheless, this oblique language does not really give the exact requirements for such graduation. Conversely, taking into account the fact that the granting of preferences under the Enabling Clause has remained voluntary, developed-country Members such as the United States designed "competitive need formulas" in their own GSP programmes. Such a formula provides at least a threshold for graduation by the beneficiaries. For the United States' formula, see John H. Jackson, *The World Trading System: Law and Policy of International Economic Relations* (Cambridge: MIT Press, 2000), 322-327 (hereinafter Jackson, 2000). See also Inama, 2003.
47. This may only be contingent upon how much these countries have been able to utilize the non-reciprocal preferences at issue. For this, see Inama, ibid.

48. Appellate Body report, WT/DS246/AB/R. See preferential scheme in EC Council regulation no. 2501/2001 on "Drug Arrangements" of 10 December 2001.
49. Also noting the provisions of GATT 1994 Article XXXVI:3, the Appellate Body pointed out that the preamble to the WTO Agreement in a sense defines the object and purpose of the WTO Agreement by recognizing that "there is need for *positive efforts* designed to ensure that developing countries, especially the least developed among them, secure and share in the growth in international trade commensurate with the needs of their economic development." (footnote omitted) Appellate Body report, WT/DS246/AB/R, 36, para. 92.
50. WT/DS246/AB/R, 45, para. 111. Also relevant here is the Appellate Body ruling in *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R (adopted 25 September 1997), paras. 178-188.
51. Footnote 3 to the Enabling Clause is to the effect that the granting of preferences must be based on an objective assessment on a non-discriminatory basis. See a concise internet roundtable discussion on the ramifications of the Appellate Body's rulings in *EC – Tariff Preferences* in Steve Charnovitz and others, "The Appellate Body's GSP Decision," *World Trade Review* vol. 3 issue 2(2004): 239-265.
52. The Appellate Body seems to have introduced a new concept here, namely, so long as a all developing countries face a particular economic problem subject to which preferences are being granted to similar developing countries, there can be no successful complaint of violation of the Enabling Clause if the conditions attached to the preferences do not prevent the complainant state from applying for the preferences per se. See paras. 154, 155 and 156 of the Appellate Body's report, where the AB views availability as a proper criterion for determining violation rather than actual receipt of the preferences. In his comments on the Appellate Body rulings on the GSP case, Charnovitz (*WTR* 2004, 241) again highlighted an important issue raised by the Appellate Body's report, namely, the report leaves one with the impression that "a *GSP* preference condition will be WTO-legal only if it addresses a widely recognized need in a 'positive' manner and will be effective in alleviating the need." See AB report, WT/DS246/AB/R, at 66 and 68, paras. 164 and 169.
53. WT/DS246/AB/R, 65, para. 160.
54. By 2001, sugar production in Cameroon amounted to 50,000 tonnes, and Nigeria produced the same amount. Sugar processed from cane in Ethiopia amounted to 260,000 tonnes by 2001 (Ethiopia is a least-developed country and thus eligible for the EBA initiative). For Caribbean states, sugar processed from cane amounted to 110,000 tonnes by 2001 in Trinidad and Tobago and 440,000 tonnes in Dominican Republic. In the Pacific Islands, sugar processed from cane amounted to 45,000 tonnes in Papua New Guinea by 2001. It is important to note that all these countries are parties to the Cotonou Agreement, but none of them is a party to the Sugar Protocol. See statistics on World Centrifugal Sugar Production, 1996-2001, obtainable at http://www.fas.usda.gov/htp/sugar/2000/May/b&csi.pdf (last visited on 12 October 2004).

55. Of the 77 ACP countries, only 19 of them are party to the Sugar Protocol. But more than this number seem to produce and export sugar.
56. They may still, however, be affected by the non-reciprocal scheme within the terms of the Sugar Protocol, at least in the context of a swing in world market prices for sugar. In the context of the WTO, it appears no rights are in question because paragraph 3 of the waiver decision provides for a situation of prompt consultation in case any WTO Member finds that the implementation of the preferences is unjustifiably prejudicing its own products.
57. This objective was evidence in Protocol 22 of the United Kingdom Treaty of Accession to the European Community.
58. See WT/DS265/21, WT/DS266/21 and WT/DS283/2 (all dated 11 July 2003).
59. These preferential schemes also include the India quotas.
60. The EC subsidies commitments to the WTO amount to 1,273,500 tonnes of sugar per annum, while its budgetary outlay commitments amount to 499.1 million per annum, in effect since the marketing year 2000/2001.
61. The Appellate Body reversed the panel's exercise of judicial economy as constituting false judicial economy and legal error. In referring to its previous rulings on judicial economy in both *Canada – Wheat* and *Australia – Salmon,* the Appellate Body held that "in declining to rule on the Complaining Parties' claims" the panel "precluded the possibility of a remedy being made available to the Complaining Parties, pursuant to Article 4.7 of the SCM Agreement, in the event of the Panel finding in favour of the Complaining Parties with respect to [these] claims … ." Appellate Body report, *European Communities – Export Subsidies on Sugar*, WT/DS262/AB/R, WT/DS266/AB/R, WT/DS283/AB/R (adopted 19 May 2005), para. 335.
62. Panel report, *European Communities – Export Subsidies on Sugar*, WT/DS266/R, WT/DS266/R, WT/DS283/R (panel report circulated on 15 October 2004), 197, para. 8.1(e).
63. WT/DS266/R, para. 8.1(f) and Appellate Body report, paras. 238-239 and 250.
64. Footnote 1 to the entry for sugar in the EC export subsidies commitments states, "Does not include export of sugar of ACP and Indian origin on which the Community is not making any reduction commitments. The average of export in the period 1986 to 1990 amounted to 1,6 mio t. (million tonnes)." Part IV section II of European Communities' Schedule CXL.
65. AB report, paras. 186-188.
66. In this case, consent can only be expressed by signature, exchange of instruments constituting a treaty, ratification, acceptance, approval or accession, etc. See, for instance, Vienna Convention on the Law of Treaties, articles 11-17, *United Nations Treaty Series (UNTS),* vol. 1155, p. 331.
67. See Appellate Body report, *EC – Sugar Subsidies*, para.167.
68. This view was endorsed by the Article 21.5 panel (EC) in the *EC – Bananas III* dispute (12 April 1999), para. 4.13.
69. According to the panel, "the fact that Australia knew and made public its knowledge that ACP/Indian sugar had not been made part of the reduction

commitments does not mean that Australia agreed with the situation." WT/DS266/R, 159, para. 7.210. See also the AB report, para. 174; DSU Article 3.2. Furthermore, a GATT panel in *EEC – Quantitative Restriction of Certain Products from Hong Kong* concluded that "it would be erroneous to interpret the fact that a measure has not been subject to Article XXIII over a number of years, as tantamount to its tacit acceptance by contracting parties." BISD 30S/129 (adopted 12 July 1983), 138, para. 28.

70. See, for instance, the AB report in *EC – Sugar Subsidies*, para.174.
71. This statement again seems difficult to grapple with, as one may ponder on how this could be a concession to ACP countries.
72. See AB report, para. 279.
73. Ibid.
74. Ibid., paras. 280-281. Though not directly the same, see the Appellate Body reasoning on domestic and export subsidies in *United States – Subsidies on Upland Cotton*, WT/DS267/AB/R (adopted 21 March 2005), paras. 574-577.
75. Appellate Body report, *Canada – Measures Affecting the Importation of Milk and the Exportation of Dairy Products* (*Canada – Dairy*), second recourse to Article 21.5 of the DSU by New Zealand and the United States, WT/DS103/AB/RW2, WT/DS113/AB/RW2 (adopted 17 January 2003).
76. See, for instance, ibid., paras. 144-148.
77. The EBA initiative, which was signed in October 2001, is designed, among other things, to finally enable the export of sugar from LDCs to the lucrative EU sugar market duty free and without any quota limitation.
78. For the level of utilization of preferences by preference-receiving countries, see Inama, 2003; Lorand Bartels, "The Enabling Clause and Positive Conditionality in the European Community's GSP Program," *JIEL* vol. 6, issue 2 (2003): 507-532.
79. Article 6 of the protocol permits the existence of an intervention agency or other agents appointed by the Community to purchase ACP sugar, but there is no provision in either the WTO Agreement or the Sugar Protocol permitting the granting of re-export subsidies to ACP-equivalent sugar by such an agency. It may be difficult to implement the intended Commission reform without dismantling such intervention agencies.
80. *OJ* IP/05/776, Brussels, 22 June 2005.
81. See, in this case, John H. Jackson, "International Law Status of WTO Dispute Settlement Reports: Obligation to Comply or Option to 'Buy Out'?" *American Journal of International Law (AJIL)* vol. 98(2004): 109-125; Joost Pauwelyn, "The Role of Public International Law in the WTO: How Far Can We Go?" *American Journal of International Law (AJIL)* 95(2001): 535-578. Though the Appellate Body has ruled that an adopted panel report does not in its entirety constitute "*other decisions* of the CONTRACTING PARTIES to GATT 1947" within the meaning of Annex 1A incorporating the GATT 1994 into the WTO Agreement, the international law nature of an adopted dispute settlement report cannot be undermined. See the Appellate Body report, *United States – Tax Treatment for "Foreign Sales Corporations*" (*US – FSC*), WT/DS108/AB/R (adopted 20 March 2000), para. 108.

82. DSU Article 22.2.
83. DSU Article 22.2.
84. With respect to prohibited subsidies, Article 4.7 of the SCM Agreement reinforces Article 19 by requiring the panel to recommend an immediate withdrawal of the prohibited measures at issue. See, for instance, Article 21.5 of the panel report *Australia – Subsidies Provided to Producers and Exporters of Automotive Leather* (*Australia – Leather*), WT/DS126/RW (adopted 11 February 2000); the panel report in *Brazil – Export Financing Programme for Aircraft* (*Brazil – Aircraft*), second recourse by Canada to Article 21.5 of the DSU, WT/DS46/RW/2, (adopted 23 August 2001); and most recently the panel report in *Korea – Measures Affecting Trade in Commercial Vessels* (*Korea – Vessels*), WT/DS273/R (final report circulated 7 March 2005), para. 8.5.
85. See panel recommendations in para. 8.5 of the panel report.
86. The panel suggestions to the EC in the *EC – Sugar Subsidies* case are not so specific as to warrant an automatic implementation. It would be unusual for the ACP countries and India to turn against the EC, since they acted as third parties on the side of the EC. On the extent to which third parties can go in the WTO dispute resolution, see Ngangjoh, *JWT* vol. 38, no. 5(October 2004): 757-772.
87. Article 3.10 of the DSU states that "the use of dispute settlement procedures should not be intended or considered as contentious acts and … if a dispute arises, all Members will engage in these procedures in good faith in an effort to resolve the dispute … ." Furthermore, Hoekman and Mavroidis have opined that "a suggestion by a panel creates an irrefutable presumption of legality" and under classical international law, a Member may be guided by the principle of good faith in respecting it. See Bernard Hoekman and Petros C. Mavroidis, "Policy Externalities and High-Tech Rivalry: Competition and Multilateral Cooperation Beyond the WTO," *Leiden Journal of International Law* 9(1996): 273-318.
88. See, for instance, Vienna Convention on the Law of Treaties, articles 26, 31 and 32.
89. See Appellate Body report, *United States – Continued Dumping and Subsidy Offset Act of 2000* (*Byrd Amendment*), WT/DS217/AB/R, WT/DS234/AB/R (adopted 27 January 2003), paras. 296-297. And for an in-depth discussion of the principle of good faith in WTO law, see Ngangjoh H. Yenkong, "*Pacta Sunt Servanda* and Complaints in the WTO Dispute Settlement," *Manchester Journal of International Economic Law* vol.1, issue 2(2004): 76-96.
90. See Article 3.10 of the DSU. It is also worth pointing out here that, while in the case of a non-violation complaint it is clearly stated (DSU Article 26.1) that the panel or AB may make a specific recommendation and suggestion for the withdrawal of a particular measure, neither the recommendation to withdraw nor the suggestion on how to withdraw is binding. However, in the case of violation complaint, such as the *EC – Sugar Subsidies* case, the DSU seems to be silent on the binding nature of a particular panel's suggestions.
91. Article 31.2 of the Vienna Convention on the Law of Treaties pays tribute to these shared principles by declaring a preamble to a treaty to be a relevant instrument when reading other provisions of the treaty. For potential content and importance

of a preamble to a convention, see Paul You, *Le Préambule des Traités Internationaux* (Fribourg, 1941). On the general questions of preamble, see Bernhardt Rudolf in *Encyclopedia of Public International Law*, vol. III (Max Planck Institute for Comparative Public Law and International Law, 1997), 1097-1098.

92. Here the Appellate Body held that for it to understand whether the Enabling Clause was intended to operate as an exception to GATT Article I.1, it was important to go back to the object and purpose of the Marrakesh Agreement Establishing the World Trade Organization, as found under the preamble of this agreement. See paras. 91-92 of the Appellate Body report.
93. Paragraph five of the preamble to the Agreement on Agriculture. However, it is also worth pointing out that in making its suggestions, the panel made mention of neither the preamble to the Agreement on Agriculture nor Article XXXVI:3 of the GATT 1994, which again recognizes the commitments of WTO Members in giving trade preferences to developing-country Members of the WTO in order to facilitate their economic development.
94. See 197-198, paras. 8.6-8.8 of the panel report.
95. See Appellate Body report, *United States – Continued Dumping and Subsidy Offset Act of 2000* (*Byrd Amendment*), WT/DS217/AB/R, WT/DS234/AB/R (adopted 27 January 2003), paras. 7.63-7.65.
96. An example of a more specific panel suggestion that was finally respected by the implementing Member is found in the case of *United States – Restrictions on Imports of Cotton and Man-Made Fibre Underwear*. In addition to its recommendations, the panel further suggested that "the United States bring the measure challenged by Costa Rica into compliance with US obligations under the ATC by immediately withdrawing the restriction imposed by the measure." WT/DS24/R (adopted 25 February 1997), 91, para. 8.3.
97. This issue was reviewed by the Appellate Body in *Japan – Taxes on Alcoholic Beverages* when considering the status of an adopted panel report. See WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, 12-13. Also, in the *GSP* case, the Appellate Body held that "the Enabling Clause expanded the authorization provided by the 1971 waiver Decision to cover additional preferential measures and made the authorization a permanent feature of the GATT. … Thus, Members reaffirm the significance of the Enabling Clause in 1994 with the incorporation of the Enabling Clause into the GATT 1994." Appellate Body report, WT/DS246/AB/R, para. 108. See also Appellate Body report, *United States – Tax Treatment for "Foreign Sales Corporations"* (*US – FSC*), WT/DS108/AB/R (adopted 20 March 2000), para. 108.
98. This view has been formerly pointed out by two of the main preference-givers, the United States and the European Communities. In a GATT Council meeting in 1981, the United States made a statement confirming the fact that any action taken pursuant to the GSP could not be subject to review by the GATT contracting parties nor any other dispute settlement forum within the context of the GATT. The European Communities also held a similar opinion. See GATT Council

minutes of the meeting held on 3 November 1981, C/M/152 (dated 21 December 1981).

99. A study by the Netherlands Economic Institute showed that with high EU sugar prices, a total income transfer to ACP countries through sugar preferences totalled 501.83 MECU during 1997/98 and an estimated 1,000 MECU between 1997/98 and 1999/2000. See Evaluation of the common organisation of the market in the sugar sector (Netherlands Economic Institute, September 2000).
100. See ACP Submission on the European Commission's Communication of 14 July 2004 Concerning the Reform of the EU Sugar Regime, obtainable from the web site of the Secretariat of the African, Caribbean Pacific group of states (ACP group), www.acpsec.org
101. Article 6 of the Sugar Protocol provides for the establishment of intervention agencies to assure the purchase of ACP sugar at the guaranteed price referred to in Article 5.3 of the protocol. Under the present sugar regime, the average weighted sugar price at which the EU sugar factory sells its sugar is estimated at €655/tonne, while the intervention price is €632/ton. The July proposal thus fixes the price at 36 percent lower (that is, €421/tonne). By seeking to eventually stop the refining aid, the proposal also lowers the price of raw sugar from the ACP countries/India to €329/tonne.
102. See *OJ* IP/05/776, Brussels, 22 June 2005.
103. A treaty here is defined as "an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation". Vienna Convention on the Law of Treaties, adopted 23 May 1969 by the United Nations Conference on the Law of Treaties. See *United Nations Treaty Series (UNTS)*, vol. 1155, p. 331. Though there is no concise definition of "developing country" under the WTO, there are certain broad-based development deficiencies that international organisations find common to the countries claiming developing-country status at the WTO. Taking this approach forward, the Appellate Body report in *EC – Tariff Preferences* seems even to recognise as sufficiently relevant any international instruments taking care of a widely recognised plight. Eventually, the ACP states may validly claim that an international treaty (with rights and obligations) falling within the meaning of VCLT Article 2(a) was concluded pursuant to the signing of the Sugar Protocol. For this reasoning, see, for instance, para. 163 of the Appellate Body's report.
104. See para. 4 of the official ACP response on EU Commission sugar regime proposals.
105. It is important to point out here that in the *India – Patent* case, the Appellate Body held that the principle of "legitimate expectations" or "reasonable expectations" can only be used as an interpretative standard before a panel or Appellate Body when the measure at issue concerns GATT articles III and XI in the context of violation complaints and GATT Article XXIII:1(b) for non-violation complaints. See Appellate Body report, *India – Patent Protection for Pharmaceutical and Agricultural Chemical Products* (complaint by United States), WT/DS50/AB/R (16 January 1998), paras. 36-42. In spite of this opinion,

the Appellate Body was of the view that the "legitimate expectations of the parties to the treaty are reflected in the language of the treaty itself." (para. 42)

106. Cottier and Schefer argue that "the principle of protection of legitimate expectations is a second, and equally important outgrowth of the doctrine of good faith." And an important element to support a claim that such expectations have been prematurely terminated is an expectation that an actor do or refrain from doing something: a legally valid reason to have had the expectation, and damage and causation between the action or inaction. See Thomas Cottier and Krista N. Schefer, "Good Faith and the Protection of Legitimate Expectations in the WTO," in *New Directions in International Economic Law. Essays in Honour of John H. Jackson,* ed. Marco Broncker and Reinhard Quick (The Hague: Kluwer Law International, 2000) chapter 4, 47-68.

107. As an umbrella agreement to the Sugar Protocol, Article 91 of the Cotonou Agreement states as follows: "No treaty, convention, agreement or arrangement of any kind between one or more Member States of the Community and one or more ACP States may impede the implementation of this Agreement."

108. See para. 16 of the Harbinson text, TN/AG/W/1/Rev.1.

109. The preamble to the GSP (now the Enabling Clause) states that the decision was taken "noting the statement of developed contracting parties that the grant of tariff preferences does not constitute a binding commitment and that they are temporary in nature." However, despite the fact that even the developing countries have on a number of occasions recognized the voluntary nature of preferential schemes (in this case, see GATT Council minutes of the meeting held on 14 May 1987, in C/M/209, 29 May 1987), they have also reiterated that the legal GATT framework under which such schemes have been authorized must be duly respected. Kele Onyejekwe has also argued that the framework on which the Enabling Clause was designed accords a certain degree of legal obligation on the part of developed countries to respect the preferences. Kele Onyejekwe, "International Law of Trade Preferences: Emanations from the European Union and the United States," *St Mary's Journal (SMJ)* 26(1995): 425, 436.

110. Paragraph 16 of the Harbinson text suggests that in implementing tariff-reduction commitments, Members "undertake to maintain to the maximum extent technically feasible, the nominal margins of tariff preferences and other terms and conditions of preferential arrangements they accord to their developing trading partners." Members further agree that, notwithstanding the provisions of paragraph 8 of the Harbinson text, tariff reductions affecting long-standing preferences of products of vital importance to the developing countries may be implemented over the period of eight years, instead of five years, by the developed-country partner concerned. TN/AG/W/1/Rev.1, also obtainable from the WTO web site at www.wto.org

111. Gomory and Baumol have argued for instance that though the famous Ricardian theory of competitive advantage has been widely attacked for its simplicity, it is very difficult to come up with an exact economic theory that will apply in all situations. In this respect, the major changes that have taken place in the world economy since David Ricardo's time show that "there are in fact inherent conflicts in international trade" that can only produce a welfare advantage for the

home country if it also considers measures in favour of its home industries, especially where two highly competitive economies are concerned. See Ralph E. Gomory and William J. Baumol, *Global Trade and Conflicting National Interests* (Cambridge: MIT Press, 2000).

112. Though liberalism has been heavily criticized as an allegedly naïve doctrine with utopian tendencies, one of the most classical vocal critics of liberalism – Carr – finds some positive aspects to a sophisticated liberalism and acknowledges a "real foundation for the Cobdenite view of international trade as a guarantee of international peace." See E. H. Carr, *Nationalism and After* (New York: Macmillan, 1945), 11.
113. Keohane argues that liberalism makes the positive argument that an open international economy based on rules of institutions and guided by state sovereignty promotes incentives for constitutional change that may lead to international peace. See Robert O. Keohane in *International Conflict and Global Economy,* ed. Edward D. Mansfield (Massachusetts: Edward Elgar, 2004), 165-168.
114. The reform rather introduces a new form of price called the "reference price", which will determine the following: minimum price of sugar beet producers, trigger level of private storage, level of border protection and the guarantee price under the ACP/Indian sugar preferences. See reform proposals at p. 3.
115. See table 1 for the quotas.