

THE EU–ACP ECONOMIC PARTNERSHIP
AGREEMENTS AND THE ‘DEVELOPMENT
QUESTION’: CONSTRAINTS AND
OPPORTUNITIES POSED BY ARTICLE XXIV AND
SPECIAL AND DIFFERENTIAL TREATMENT
PROVISIONS OF THE WTO

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ABSTRACT

This article argues that Article XXIV and special and differential treatment (SDT) provisions of the WTO present a number of constraints and opportunities to the design and scope of the proposed economic partnership agreements between the European Union (EU) and African, Caribbean and Pacific (ACP) countries. It examines the negotiating positions of both sides to argue that were the EU’s position to prevail, ACP and other developing countries would likely suffer an ‘erosion of the development principles’ embedded within the WTO. It is shown that the differences between the two groups over the desirability and/or applicability of negotiating free trade agreements between developed and developing countries under the ‘strict’ jurisdiction of Article XXIV, and of negotiating agreements on services and the ‘Singapore Issues’, amount to a contestation over the principles of reciprocity and SDT within the WTO, and of the scope of the WTO.

INTRODUCTION

It is argued in this article that the differences over the *design* and *scope* (the constitutive features, legally and economically) of the proposed economic partnership agreements (EPAs) between the European Union (EU) and six regional groupings of African, Caribbean and Pacific (ACP) countries constitute a contestation over (i) the scope of the WTO and (ii) the interpretation and applicability of reciprocity and special and differential treatment (SDT) in Free Trade Agreements (FTAs) between developing and developed countries. These differences revolve around the desirability of

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negotiating agreements on services and the ‘Singapore Issues’ (investment, competition policy, government procurement, and trade facilitation) and the ‘degree of reciprocity’ and SDT *inherent* in the provisions of GATT Article XXIV.

It shall be shown that the legal clauses to which both sides bank their claims are ambiguous and that the EU’s *literal* (textual) approach to interpretation of WTO laws is both legally problematic and relatively developmentally restrictive compared to the ACP’s teleological approach to interpretation—a holistic examination involving textual, contextual and case law analyses of specific WTO Agreements, and assessment of the objects and purposes of the WTO. It is argued that were the EU’s negotiating position to prevail, ACP and other developing countries would likely suffer an ‘erosion of the development principles’ embedded within the WTO.

Critics of SDT and FTAs would counter that were the ACP’s position to prevail, the WTO would likely suffer a (further) ‘erosion of the non-discrimination’ or the ‘most favoured nation’ (MFN) principle, not only as a result of the addition of yet more FTAs to the global trading system, but also due to the ‘expansive’ SDT provisions that ACP countries are seeking under Article XXIV.¹ This is a legitimate counterargument, but due to limitations of scope and space, this article will not address it explicitly, beyond (i) examining related criticisms that the EU levels against the developmental capabilities of SDT in general and its own preferential trade arrangements in particular, and (ii) the economic theory underpinning the ‘MFN principle erosion’ proposition—that a non-discriminatory trade regime enhances global welfare.² This article confines itself to the arguments put forth by both parties and complimentary and/or competing scholarly positions. Although both parties draw on broader arguments relating to the concepts of reciprocity and SDT, evidentially, as both of them would like to enter into some form of FTAs, they do not question whether FTAs facilitate or act as stumbling blocks to multilateralism, and whether they enhance global welfare. A broad discussion on the ‘erosion of the MFN principle’ would have to consider such questions. For the purposes of this article, the counterpoint to the ‘MFN principle erosion’, that is, ‘developmental principles erosion’, is the more relevant question to explicitly address.

ACP countries constitute some of the world’s poorest countries. Forty of them (out of a total of 77) are classified as least developed countries (LDCs).

¹ For more on the concept of the ‘erosion of the MFN principle’, see Jagdish Bhagwati *et al.*, ‘The Future of the WTO: Addressing Institutional Challenges in the New Millennium’, Report by the Consultative Board to the Director-General Supachai Panitchpakdi Geneva, WTO (2004).

² Bernard Hoekman and Susan Prowse, ‘Economic Responses to Preference Erosion: From Trade as Aid to Aid for Trade’, Paper presented at the symposium ‘Preferences Erosion: Impacts and Policy Responses’ Geneva, June 13–14 (2005).

If EPAs were to be conceived under a restrictive interpretation of Article XXIV and given that the EU is the world's largest trading partner of many of the ACP countries, many of the SDT provisions for poor countries within the WTO would be of little practical use to the very countries that need them the most. Contrary to the conventional view, it shall be shown that SDT is not a *zero-sum game*—both theory and empirical evidence suggests that it can and has been globally efficient (i.e. beneficial to both developed and developing countries). This renders the question as to whether or not it contributes to the 'erosion of the MFN principle' relatively inconsequential from a development perspective.

Different types of legal approaches and economic arguments tend to favour particular interests. Despite convergence in the rhetoric between the parties that EPAs must be 'development oriented', perceived economic advantages and epistemic inclinations underpin the preferences for particular approaches and arguments advanced to justify different *designs* and *scope* of EPAs. For the EU, given that it is the most advanced and sophisticated Regional Trade Agreement (RTA) in the world and that of the 162 RTAs that existed in the world by 2005, it was directly involved in 40 and indirectly in another 40,³ its preference for textual approaches to WTO Law especially Article XXIV, supports a strategy that appears to be one of expanding its market access gains in ACP markets (in both trade and services) whilst limiting the number of concessions it may be asked to make to developing countries by holding onto the already legally binding SDT provisions within the WTO. For the ACP, the strategy behind a teleological interpretation seems underpinned by the need to (i) draw on or expand SDT gains set in the objectives and principles of the GATT/WTO (ii) increase or preserve the SDT gains already secured (i.e. through the Enabling Clause), and to reduce the costs of any adjustment measures that they ultimately have to undertake to comply with whatever relevant WTO rules they have to comply with to secure some form of WTO compatible FTAs.

Superficially, this pursuit of partisan national interests in trade negotiations should not be a matter of great concern; after all, these are voluntary trade negotiations between sovereign governments. It can be argued that no country need accept the negotiated outcomes if it deems them counter to its national interests—an argument the EU repeatedly makes. But the world is not a perfect place and trade negotiations and outcomes are hardly ever simple. Powerful countries are often more able to press for the adoption of rules and procedures that favour them, with weak ones often obliged to compromise rather than pull out of negotiations. 'Thus, there may be circumstances in which a country may emerge worse off from a round

³ Jean-Christopher Maur, 'Exporting Europe's Trade Policy', 28 *The World Economy* (2005) 1565–90.

of negotiations, yet to find it has no choice but to accept the worsened status'.⁴ This is a likely scenario in EPAs, as ACP countries would be reluctant to jeopardize their relationships with the EU. The Cotonou Partnership Agreement (CPA) between the EU and ACP countries, which provides for the negotiations of EPAs, is not just a trade regime; it is also an aid and political cooperation agreement. ACP countries would be reluctant to put the aid component of it in jeopardy—in spite of the separation of the two components (i.e. the aid cooperation agreement is not conditional on ACP countries signing on to EPAs). Moreover, as the EU continues to sign FTAs with more and more countries, ACP countries might rightly fear that if they do not sign an FTA with the EU, they may suffer significant 'preference erosion' or diminished value of the preferential gains from their trade with the EU.

A particular reason why some developing countries may be seeking trade agreements with their larger developed partners is that they are losing the preferential access to those markets they previously enjoyed, for instance when being excluded from GSP schemes. Another reason may be that the developed country in question is negotiating preferential agreements with other developing countries or that competitors continue to qualify for inclusion under GSP. Governments may simply fear exclusion from markets, and regard participation in RTAs as an insurance policy against being placed at a competitive disadvantage through discriminatory policies.⁵

This was the reality that confronted ACP countries when the Lomé Conventions that had governed their trade with the EU became vulnerable to legal challenges at the inception of the WTO in the mid 1990s, as discussed in Section II.

Following the Vienna Convention of interpretation of treaties, this article adopts a teleological approach to interpretation of WTO laws. Additionally, theoretical and empirical rebuttals are made to some of the core legal and economic arguments put forward by the EU, either in defence of a 'strict' interpretation of Article XXIV, or as criticism of the developmental utilities of SDT provisions. A combination of these approaches is shown to allow for greater flexibility in designing more development-oriented EPAs than the EU's *literal* approach to WTO laws and partial economic arguments.

The rest of this article is organized as follows. Section I introduces the negotiating positions and the basic provisions of the Cotonou Partnership Agreement. Section II discusses the factors behind the collapse of the Lomé Conventions and the differences between Lomé and the proposed EPAs. Section III examines the legal and economic claims and counterclaims

⁴ Andrew Brown and Robert Stern, 'Concepts of Fairness in the Global Trading System', University of Michigan, Ann Arbor, IPC Working Paper No 13 (2006) at 2.

⁵ Alexander Keck and Low Patrick, 'Special and Differential Treatment in the WTO: Why, When and How?', WTO, Washington DC, Staff Working Paper ERSD-2004-03 (2004) at 12.

regarding the desirability and/or interpretation of Article XXIV, and the place and degree of SDT in North-South RTAs, under the jurisdiction of Article XXIV. Section IV concludes.

I. Provisions of the Cotonou Partnership Agreement (CPA) and the basic negotiating positions

EPAs seek to create at least 6 FTAs between the EU and regional groupings of ACP countries by January 2008, replacing the Lomé Conventions that have governed EU-ACP trade since 1975. The Lomé Conventions were a *special* form of the EU's Generalized System of Preferences (GSP) for ACP countries. It put ACP countries at the top of the pyramid of preferences granted by the EU to developing countries⁶ from 1975 to 2001, when they were replaced by the Cotonou Partnership Agreement (CPA).⁷ A temporary WTO Waiver granted until 31 December 2007 allows the CPA to extend most of the Lomé provisions in the interim period. Although negotiations commenced in September 2002, substantive deliberations on the *scope* and *design* of EPAs only started in late 2006. Even before the negotiations began, it was clear that the trade regime proposed in the CPA would depart from the Lomé Conventions in two fundamental respects. Firstly, whereas the Lomé Conventions were non-reciprocal preferential market access agreements in favour of ACP countries, the trade regime proposed under the CPA seeks 'reciprocity' in EU-ACP trade. This places the new arrangements under the jurisdiction of GATT Article XXIV whereas the Lomé Conventions were under the jurisdiction of the Enabling Clause. Secondly, unlike Lomé, the new trade regime seeks agreements on services and the Singapore Issues, which (services) would also bring it under the jurisdiction of GATS (General Agreement on Trade in Services) Article V.

Article 7 of the first Lomé Convention, (Lomé 1) established the principle of non-reciprocity in EU-ACP trade thus: 'In view of their present development needs, the ACP shall not be required, for the duration of this Convention, to assume, in respect of imports of products originating in the Community, obligations corresponding to the commitments entered into by the Community in respect of imports of the products originating in the ACP States'.⁸ This principle was included in the successive Lomé Conventions. In contrast, Articles 36.1 and 37.7 of the CPA introduce the principle of reciprocity in EU-ACP trade. Article 36.1 (on modalities) states that 'the Parties agree to conclude new World Trade organization (WTO) compatible

⁶ Abou Abass, 'The Cotonou Trade Regime and WTO Law', 10 *European Law Journal* (2004) at 439.

⁷ In the same year that the EU introduced an arguably more favourable GSP scheme for least developed countries (LDCs) called Everything But Arms (EBAs).

⁸ Abass, above n 6 at 441.

trading agreements, removing progressively barriers to trade between them and enhancing cooperation in all areas relevant to trade’.

Nonetheless, despite introducing the principle of reciprocity in EU–ACP trade, the CPA provides for SDT for all ACP countries. Article 35.5 states that the ‘Parties reaffirm their attachment to ensuring special and differential treatment for all ACP countries and to maintaining special treatment for ACP LDCs and to taking due account of the vulnerability of small, landlocked and island countries’, whilst Article 37.7 of CPA states that: ‘Negotiations shall take account of the level of development and the socio-economic impact of trade measures on ACP countries, and their capacity to adapt and adjust their economies to the liberalization process. Negotiations will therefore be flexible as possible in establishing the duration of a sufficient transitional period, the final product coverage, taking into account sensitive sectors, and the degree of asymmetry in terms of timetable for tariff dismantlement, while remaining in conformity with WTO rules then prevailing.’ Article 41.2 underlines the ‘need for special and differential treatment to ACP suppliers of services’.

This inherent tension within the CPA, reflecting the tension inherent within the WTO between the principle of reciprocity and SDT is at the heart of the differences between the EU and the ACP over the desirability, applicability, and interpretation of ‘reciprocity’ (embedded within Article XXIV) and SDT provisions (both *inherent* in Article XXIV and in broader WTO Agreements). These differences reflect divergent perspectives over *what type of EPAs would be appropriate for achieving ACP development objectives; how such EPAs should be designed and implemented, and what should constitute their proper scope and depth* under (prevailing) WTO rules.⁹ Basically, the two negotiating positions can be summed up thus. For the EU, being FTAs, EPAs fall within the jurisdiction of Article XXIV. This article sets out the requirements for FTAs and customs unions (CUs) as encompassing elimination of duties and other restrictive regulations of commerce on ‘substantially all trade’ between the parties, within a ‘reasonable length of time’.¹⁰ Interpretation of these provisions is subject to much controversy (Section III). In a number of FTAs, ‘substantially all trade’ has been defined as ranging from 86 to 90%, (average of the trade between the partners or coverage of tariff lines) whilst ‘*reasonable length of time*’ has been defined as ranging from 10 to 18 years.¹¹ In the EPA negotiations, the EU initially proposed a figure of more than 90%¹² whilst allowing some provision

⁹ Overseas Development Institute (ODI), ‘The “Development Dimension”: Matching Problems and Solutions’, ODI, London, Briefing Paper (2006).

¹⁰ WTO, ‘General Agreements on Tariffs and Trade: Article XXIV.’ http://www.wto.org/english/tratop_e/region_e/regatt_e.htm#gatt (1995).

¹¹ For instance, Trade and Development Cooperation Agreement (TDCA) between the EU and South Africa, NAFTA and the US–Australia FTA.

¹² ACP/EC, ‘ACP EC Negotiations, Joint Report on the all ACP-EC Phase of EPA Negotiations’, ACP/00/118/Rev 1, ACP Secretariat, Brussels (2003) at 3.

for 'asymmetrical liberalization'—that is, the possibility of ACP countries making tariff cuts on under 90% of their traded products over a slightly longer period of time, provided the EU makes slightly deeper cuts (over 90%) within 10 years.¹³ The EU would also like to conclude agreements on services and the 'Singapore Issues'.

ACP countries were quick to voice objections (i) to the desirability or applicability of 'reciprocity' in trade relations between developed and developing countries, (ii) to this particular interpretation of Article XXIV, (iii) to the notion that Article XXIV has enough 'inherent' flexibility to accommodate development needs in North-South FTAs (i.e. something substantially more than the EU's provision for 'asymmetrical liberalization'), and (iv) to the inclusion of services and the 'Singapore Issues' in the negotiations.¹⁴ ACP countries view the EU's textual interpretation of Article XXIV as too restrictive and detrimental to their long-term developmental objectives.¹⁵ They invoke legal and economic arguments regarding 'developmental principles' dating back to the origins of GATT to argue that (i) due to financial, trade, and development needs of developing countries, developed countries should not seek reciprocity in their trade with developing countries and (ii) in order for North-South FTAs to accommodate these needs, there needs to be 'additional' flexibility or explicit *de jure* SDT provisions for developing countries in Article XXIV.¹⁶ Additionally, they do not feel obligated under both the CPA and the WTO to conclude agreements on services and the Singapore Issues. On the former, they argue that negotiations will have to wait until they have developed the capacity to handle the MFN rule in the services sector, and on the latter, they cite the failed WTO Cancun Ministerial Conference to argue that these issues neither fall within the scope of the WTO nor are developmentally beneficial if negotiated within the WTO framework. The EU contends that it is a matter of when, rather than if, negotiations on these issues begin, arguing that agreements on these would be developmentally beneficial.¹⁷

¹³ Sanoussi Bilal and Rampa Fransesco, 'Alternative (to) EPAs: Possible Scenarios for the Future ACP Trade Relations with the EU', ECDPM, Economic Management Report, No 11 (2006).

¹⁴ See ACP, 'ACP Guidelines for the Negotiations of the Economic Partnership Agreements', Sustainable Economic Development Department, ACP/61/056/02, ACP Secretariat, Brussels (2002) and also ACP, 'ACP-EU Negotiations of Economic Partnership Agreements: Areas of Convergence and Divergence', ACP/61/113/03 Rev. 1, ACP Secretariat, Brussels (2003).

¹⁵ *Ibid.*, at 3. See also Government of Mauritius, 'Non Paper II on Negotiations of Economic Partnership Agreements', 17th May 2002 and WTO, 'Submission on Regional Trade Agreements', Paper by the ACP Group of States, Negotiating Group on Rules, TN/RL/W/155, 28 April 2004.

¹⁶ See WTO above n 10.

¹⁷ See ACP/EC above n 12.

II. THE COLLAPSE OF THE LOMÉ CONVENTIONS AND THE SEARCH FOR WTO COMPATIBLE AGREEMENTS

The most robust case for the fall of the Lomé Conventions is a legal one. In a complaint lodged by Latin American States over the compatibility of the EU's regime for banana imports in the mid 1990s, the Dispute Settlement Body (DSB) of the WTO found the EU–Lomé preferential regime for bananas incompatible with WTO Law. This made the entire Lomé preferential scheme vulnerable to further legal challenge at the WTO.¹⁸ The DSB ruling capped nearly 30 years of criticism of the 'special' nature of the Lomé Scheme. It was limited to ACP countries, thus excluding other developing countries at similar levels of development. Consequently, it came to be viewed as arbitrarily discriminating against developing countries, contrary to the GATT rules establishing the GSP. The 'special' nature of ACP countries that warranted an additional margin of preference could not be readily made. The ACP is an amorphous group of countries. The Caribbean countries here are almost three times as wealthy as their African counterparts, and the average African country ranks about 30 places lower than the average Caribbean country in the Human Development Index.¹⁹ The only thing they have in common is that virtually all of them are former colonies of European powers. This provided an insufficient criterion for special preferences under GATT/WTO rules—as India's challenge to another EU's 'special' scheme—GSP drug related preferences scheme in 2002 would later show. In that case, a WTO Panel ruled that the phrase 'developing countries' in paragraphs 2(a) and 3(c) of the *Enabling Clause* refers to *all* developing countries or developing countries as a group²⁰, and therefore the *Enabling Clause* does not authorize differences in preferences except those contemplated by the United Nations Conference on Trade and Development (UNCTAD) negotiators. Although an Appellate Body of the WTO later reversed the Panel's ruling, it nevertheless upheld that 'identical tariff treatment must be available to all GSP beneficiaries with the 'development, financial or trade' need to which the differential treatment is intended to respond'.²¹

It was within a similar legal context that the Latin American States lodged their complaint against the EU bananas imports regime in 1993. A GATT Special Group (SG) ruled that the EU's banana imports regime was incompatible with GATT rules. However, this ruling was not enforced as the 'GATT regime did not have the necessary instruments to effectively impose

¹⁸ See Abass, above n 6.

¹⁹ Bjornskov Christian and Krivonos Ekaterina, 'From Lome to Cotonou: The New EU-ACP Agreement', Danish Institute of Agricultural and Fisheries Economics, Working Paper No 14 (2001) at 4.

²⁰ Gene Grossman and Alan Sykes, 'A Preference for Development: The Law and Economics of GSP', 4 *World Trade Review* 41 (2005) at 50.

²¹ *Ibid*, at 52.

its law over the will of the contracting parties and... generally speaking, its law was only common to industrialized countries and, could not therefore be invoked against the majority of ACP countries'.²² All that changed when GATT was transformed into the WTO in 1995. Not only can the WTO enforce its law, but a majority of its members are developing countries. Under the new regime, the EU-ACP group had to take notice of legal challenges against aspects of the Lomé preferences. As a measure of how the legal landscape had changed with the founding of the WTO, a number of Latin American States blocked the granting of a temporary waiver extending the otherwise illegal Lomé preferences in the interim period several times, insisting on a definitive resolution of the EU bananas regime before endorsing any waiver extending the Lomé provisions.²³

As shall be shown in the following sections, more than legal factors were at play in the falling out of favour of the Lomé scheme.

III. LEGAL CLAIMS AND COUNTERCLAIMS REGARDING THE DESIRABILITY AND/OR INTERPRETATION OF ARTICLE XXIV IN NORTH-SOUTH RTAS

Unsurprisingly, the EU and ACP countries are divided over (i) the desirability and/applicability of reciprocity in EPAs (under Article XXIV) (ii) the interpretation of Article XXIV, and (iii) the interpretation of SDT provisions in FTAs between developed and developing countries. Article XXIV and the collective SDT are both two of the most serious derogations from the founding principle of non-discrimination in GATT/WTO as enunciated in Article 1 (MFN clause) and Article 111 (on National Treatment), and two of the most ambiguous and controversial articles of the GATT/WTO. This section focuses on Article XXIV, the SDT provisions inherent within it and the evolution of its counterpart Article—the Enabling Clause which has governed South-South RTAs. The next will narrowly focus on SDT and the development question within the WTO.

Article XXIV has been the subject of confusion since its inception in 1947. There are those like the EU, who find it 'extremely elastic'; those like the ACP who find it 'complex', ambiguous' and 'vague'²⁴ and those who want it written differently.²⁵ Scholars and WTO Member States cannot bring themselves to agree on its exact specifications, let alone its origins, object, and purpose. In the GATT's entire history, for example, only one working

²² Abass, above n 6 at 442.

²³ Francis Matambalya and Susanna Wolf, 'The Cotonou Agreement and the Challenges of Making the New EU-ACP Trade Regime WTO Compatible', 35 *Journal of World Trade* 123 (2001).

²⁴ F.A. Haight, 'Customs Unions and Free Trade Areas Under GATT: A Reappraisal', 6 *Journal of World Trade Law* 391 (1972).

²⁵ Bonapas Ongulo and Ito Taisuke, 'In Defence of the ACP Submission on Special and Differential Treatment in GATT Article XXIV', ECDPM Discussion Paper 67, ECDPM, Maastricht (2005).

party determined that an RTA (between Czech and Slovak republics) had satisfied Article XXIV, although none was found to be incompatible with it.²⁶ Since the establishment of the WTO, Member States have been unable to reach consensus on the format, and the substance, of the reports on any of the examinations entrusted to the WTO's Committee on Regional Trade Agreements (CRTA), which verifies the compliance of RTAs with the relevant WTO provisions.²⁷ Most notably, despite the fact that the EU was the first RTA to be notified to the GATT/WTO, 'no agreement was reached on the compatibility of the Treaty of Rome... with Article XXIV'.²⁸

A historical analysis of the origins of Article XXIV and permissive past practices within the GATT/WTO do not suggest that it was designed for North-South FTAs.²⁹ Conventional opinion has it that the origins of Article XXIV can be traced to US aspirations to promote European integration and to persuade developing countries to endorse the Havana Charter. The Draft Charter put forward by the US recognized only CUs as exceptions to the MFN rule.³⁰ The concept of FTAs where 'two or more developing countries might be prepared to abolish all trade barriers among themselves though not wishing to construct a common external tariff towards the rest of the world'³¹ was first introduced by developing countries in 1947, in order to avoid the potentially developmentally costly principle of non-discrimination/reciprocity, and the strict rules governing CUs. 'Developing countries... needed schemes more flexible than CUs because they regarded these as very poor measures for preferential treatment due to their strict conditions'.³² The European participants supported this concept because they regarded it as an extension of the bilateral preferential trade arrangements that had been widespread in Europe before the Second World War.³³

This explanation has recently been shown to be incomplete. Using archival evidence Kerry Chase shows that many of the ambiguous provisions of Article XXIV (i.e. the substantially all trade requirement and the transitional time period) can be traced to a trade treaty secretly reached between the US

²⁶ Kerry Chase, 'Multilateralism Compromised: The Mysterious Origins of GATT Article XXIV', 5 *World Trade Review* 1 (2006).

²⁷ T.N. Srinivasan, 'Nondiscrimination in the GATT/WTO: Was There Anything to Begin with and is There Anything Left?', 4 *World Trade Review* 69 (2005) at 82.

²⁸ *Ibid.*, at 81.

²⁹ See Akiko Yanai, 'Legal Frameworks for North-South RTAs Under the WTO System', APEC Study Center, Working Paper Series 03/04 -No 6 (2004) and Mitsuo Matsushita, 'Legal Aspects of Free Trade Agreements in the Context of Article XXIV of the GATT 1994' in Mitsuo Matsushita and Dukgeun Ahm (eds), *WTO and East Asia: New Perspectives*, (London: Cameron, 2004).

³⁰ Yanai, above n 29 at 3.

³¹ Haight, above n 24 at 393.

³² Yanai, above n 30.

³³ Matsushita, above n 29 at 500.

and Canada that was ultimately never signed but that influenced US negotiators in crafting Article XXIV.³⁴ The secretive trade deal influenced the crafting of three particularly contentious aspects of Article XXIV, based on the three goals that the US wanted to achieve in relation to getting political approval of the deal:

First, they wanted the free trade area exemption to include interim agreements, so that free trade would not have to be established immediately. Second, they wanted a provision that free trade areas only had to eliminate customs restrictions on 'substantially all' trade—not all trade—so that protection for sensitive items could be retained. Third, they wanted to ensure that clauses banning tariff increases against third countries applied only at the time a free trade area was formed, and did not operate indefinitely.³⁵

Chase concludes that the 'strategy worked exactly as intended: the United States was able to broker a compromise to allow leeway for free trade areas, but still turn back sweeping exceptions for new preferential arrangements that developing nations wanted'.³⁶ From the outset then, Article XXIV fell short of meeting the development objectives of developing countries — allowing for preferential arrangements with significant degrees of non-reciprocity/flexibility to facilitate development-oriented measures. As the ACP Group argues,³⁷ the existing provisions of Article XXIV do not take into account developmental aspects of FTAs between countries with significant differences in levels of development largely because it was negotiated at a time in history when there existed very few (if not no) North-South RTAs.

The US success in thwarting developing countries' efforts to have sweeping exceptions for preferential arrangements in respect of FTAs under Article XXIV had far reaching implications, which has come back to haunt the multilateral trading system. It gave rise to two sets of rules governing FTAs: Article XXIV came to govern North-North FTAs and any FTAs involving a developed country, and from the 1970s onwards, the Enabling Clause came to govern South-South FTAs. Having lost the flexibility they needed from Article XXIV, developing countries generally opted out of trade agreements that would involve the strict jurisdiction of Article XXIV until fundamental changes in the global trade environment forced many of them to consider participating in North-South FTAs. Chief among these was the increasing interest in regionalism, and increasing erosion of preferences as a result of multilateral and unilateral tariff

³⁴ Chase, above n 26.

³⁵ *Ibid.*, at 15.

³⁶ *Ibid.*

³⁷ WTO, 'Submission on Regional Trade Agreements', Paper by the ACP Group of States, Negotiating Group on Rules, TN/RL/W/155 28 April (2004).

reductions. To arrest the problems of erosion of preferences and trade diversion, a number of relatively advanced developing countries (for example, Mexico and South Africa) started to consider North–South FTAs from the early 1990s. Whether or not these have been developmentally successful is beyond the scope of this article. What is pertinent to this article is the reason why South–South FTAs were included in the Enabling Clause and not in Article XXIV; why GATS Article 5 makes a distinction between North–North and North–South economic integration agreements and provides explicit SDT provisions for developing countries in North–South agreements, and the implications of this for basing EPAs under the jurisdiction of the current provisions of Article XXIV.

The principle of reciprocity or non-discrimination which became the cornerstone of GATT was based on the principle of sovereign equality under international law, which in turn was predicated on the assumption that nation states had identical abilities.³⁸ Article 1 of GATT or MFN treatment transposed equality under international law into the economic field.³⁹ From the mid 1950s through the 1970s, developing countries challenged this assumption, arguing that it took no cognizance of inequality between nations as a result of different stages of development. This was the birth of the concept of SDT from which the Enabling Clause would later emerge. SDT was based on the argument that ‘equal treatment could secure equality only among identical parties’⁴⁰ and that only SDT could mitigate the negative effects of economic asymmetries between the developed and developing countries. It was universally agreed that ‘the operation of a MFN clause is not an adequate or expedient means of ensuring that international trade becomes an instrument of progress, especially for the benefit of the developing countries’.⁴¹

In the context of RTAs, rather than adopt absolute and general rules, GATT members recognized the need to apply different criteria to each case.⁴² Thus, paragraph 2(c) of the Enabling Clause came to govern South–South RTAs by allowing preferential trade in goods among developing countries without the need to fulfil all the ‘strict’ conditions of Article XXIV, which came to govern North–North RTAs.⁴³ The acceptance of the view that reciprocity and non-discrimination between developed and developing countries in international trade might not be beneficial to the development needs of developing countries first gave rise to the first SDT provision—Article VXIII—which came with the original GATT in 1947 and

³⁸ See Yanai, above n 29 at 8.

³⁹ Eector Espiell, ‘The Most-Favoured-Nation Clause: Its Present Significance in GATT’, 5 *Journal of World Trade Law* 29 (1971) at 35.

⁴⁰ See Yanai, above n 38.

⁴¹ Espiell, above n 39 at 29.

⁴² *Ibid.*, at 38.

⁴³ Yanai, above n 29 at 7.

was expanded and amended (as GATT Article XVIII: B) in the mid 1950s. It derogated from Article 1 (MFN clause/principle of non-discrimination), albeit under stringent conditions, to allow developing country members to modify certain GATT obligations, or withdraw from them, either to address balance of payments difficulties or to protect their infant industries.⁴⁴ This was quickly followed by Article XXVIII which introduced the principle of non-reciprocity by recognizing 'the needs of less developed countries for a more flexible use of tariff protection to assist their economic development and the special needs of these countries to maintain tariffs for revenue purposes'.⁴⁵ These provisions established the principle that some degree of legal freedom within the multilateral trading system was helpful to the development interests of developing countries.⁴⁶

Two land mark SDT related provisions, either expanding or providing greater legal weight to the initial SDT provisions were added to the GATT in the 1960s and 1970s. In 1964, Part VI (on Trade and Development) was added to the GATT Treaty of 1947. Article XXXVI: 8 of Part VI reaffirms the principle of non-reciprocity: 'The developed contracting parties do not expect reciprocity for commitments made by them in trade negotiations to reduce or remove tariffs and other barriers to the trade of less developed contracting parties'. The many commitments of Part VI were still not binding and in 1979, a more legally binding and permanent SDT provision came about through the permanent ministerial decision on the Differential and More Favorable Treatment, Reciprocity and Fuller Participation of Developing Countries or for short, the Enabling Clause. The Enabling Clause exempts GSP schemes from GATT Article 1. The Enabling Clause legalized derogations from the MFN obligations in favour of developing countries, creating a permanent legal basis for SDT in favour of developing countries.

Until the early 1990s, there were hardly any North-South RTAs and the problem was not readily evident. As the number of actual and proposed North-South RTAs increases however, developing countries are seeking the application of Part VI and other SDT provisions to North-South RTAs or Article XXIV.⁴⁷ The EU's answer to this in the case of EPAs has been that Article XXIV has sufficient inherent flexibility to accommodate the development needs of developing countries.⁴⁸ 'The currently existing WTO rules call for a credible degree of market opening but at the same time offer

⁴⁴ Robert Hudec, *Developing Countries in the GATT Legal System* (London: Trade Policy Research Centre, 1987) at 28.

⁴⁵ *Ibid*, at 27.

⁴⁶ *Ibid*, at 28.

⁴⁷ In the EU bananas imports regime case, the WTO Dispute Settlement Body ruled that Part VI of GATT is not applicable in conjunction with Article XXIV.

⁴⁸ WTO, 'Submission on Regional Trade Agreements', Paper by the European Community and their Member States, Negotiating Group on Rules, TN/RL/W/14, 9 July 2002.

sufficiently large flexibilities. When determining the degree of market opening, development objectives and political sensitivities can already be taken fully into account'.⁴⁹ Despite the EU's claim that Article XXIV has enough inherent flexibility to accommodate the SDT needs of ACP countries, Article XXIV and the Uruguay Understanding on it have no explicit SDT provisions for developing countries.⁵⁰ This contrasts sharply with the counterpart Article V in GATS on North–South economic integration agreements. Article V: 3(a) of GATS provides flexibility for developing countries to meet conditions regarding substantial sectoral coverage and with respect to eliminating discriminatory measures in accordance with the level of development, whilst Article V: 3(b) explicitly differentiates between developed and developing countries by providing more favourable treatment to developing countries.⁵¹

The EU's claim that Article XXIV has sufficient inherent flexibility seems premised on what the ACP⁵² has called *de facto* flexibility—'some flexibility inherent in the current provisions of GATT Article XXIV resulting from the ambiguity in terminology and current pervasive practice in the application of the article'.⁵³ The ACP argues that such inherent *de facto* flexibility is neither secure in nature nor sufficient in scope and legal validity to provide the SDT they require. Thus, it cannot 'constitute nor substitute for legally binding, operational and effective S&D provisions'.⁵⁴ The ACP cites the WTO's Appellate Body finding on the *Turkey-Textiles* case which limited the legal enforceability and scope of existing *de facto* flexibility in Article XXIV.⁵⁵ It is partly for this reason that ACP countries are demanding explicitly defined additional flexibility as SDT within Article XXIV.

There is consensus that Article XXIV is ambiguous⁵⁶ and therefore its literal interpretation is problematic. Following the Vienna Convention on the interpretation of treaties, a holistic interpretation of Article XXIV is therefore necessary. This should consider the text of the article, its historical context, WTO case law and the objects and purposes of the WTO, not necessarily in a particular sequence or hierarchical manner, for the consideration of these

⁴⁹ *Ibid.*, s6.

⁵⁰ Teresa Thorp, 'Regional Implications for the ACP-EU Economic Partnership Agreements', *The Global Trade Negotiations*, Center for International Development, Harvard (2003), www.cid.harvard.edu/cidtrade/index.html (visited 2 November 2006, p 6).

⁵¹ See Matsushita, above n 33 at 49.

⁵² WTO, 'Submission on Regional Trade Agreements', Paper by the ACP Group of States, Negotiating Group on Rules, TN/RL/W/155 28 April (2004) 67.

⁵³ See Ongulo and Ito, above n 25 at 3.

⁵⁴ WTO, above n 52.

⁵⁵ 'Appellate Body Report, Turkey – Restrictions on Imports of Textiles and Clothing Products (Turkey-Textiles)', WT/DS34/AB/R, 22 October 1999.

⁵⁶ see WTO, above n 10 at 20.

materials is a neutral process.⁵⁷ Such a holistic interpretation is likely to bolster the ACP's case for explicit provisions or *de jure* SDT for developing countries in North-South FTAs, by drawing upon, among others, the objects and purposes of the WTO and on a myriad of SDT provisions within the WTO (see Section III.B for a detailed discussion on development and SDT). The validity of the applicability and/or desirability of particular provisions of Article XXIV to North-South FTAs cannot be determined without a consideration of SDT principles not only inherent/de facto within Article XXIV, but also within the WTO at large.

The preambles to GATT and the Marrakech Treaty that established the WTO and more recent WTO Ministerial Meetings put the development objective at the heart of the GATT/WTO. The Preamble to GATT 1947 emphasized the objective of 'raising the standard of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, developing the full use of the resources of the world and expanding the production and exchange of goods'⁵⁸ whilst the preamble to the WTO Agreement recognizes the 'need for positive efforts designed to ensure that developing countries, and especially the least developed among them, secure a share in the growth in international trade commensurate with the needs of their economic development'.⁵⁹

A. Economic arguments in favour of EPAs construed under strict provisions of Article XXIV

The EU also makes the case for Article XXIV and the Singapore Issues on development grounds. The EU's most aggressive argument has been that its model of EPAs is not simply a legal fix, it is also a solution to ACP development problems. The EU's preference for EPAs under tight jurisdiction of Article XXIV rests on its implicit criticism of SDT and its explicit criticism of its own Lomé Conventions. Given that up to 2001 (when the EBA Initiative was introduced), the Lomé conventions sat at the apex of the EU's pyramid of preferences, the EU's criticism of this scheme can also be seen as a general criticism of its entire GSP scheme.

The EU likes to hold up the Lomé Conventions as a case study in the failure of preferential trade arrangements as instruments for development. It points to the declining share of ACP in global trade as evidence that the Lomé preferences failed to integrate ACP countries into the global economy. In 1975, the ACP accounted for over 6% of the EU's trade with the rest of the world. Currently, it accounts for less than 3%. ACP's share of trade with

⁵⁷ Asif Qureshi, 'Interpreting WTO Agreements for the Development Objective', Paper Presented at the ICTSD Conference, Making the WTO Dispute Settlement System Work for Developing and Least Developed Countries, Switzerland, Geneva, 7th February 2003, 6.

⁵⁸ GATT, 'The Results of the Uruguay Round of Multilateral Trade Negotiations: The Legal Texts', GATT Secretariat, Geneva (1994) 486.

⁵⁹ *Ibid.*, at 6.

the rest of the world has also fallen over the same period.⁶⁰ The EU views these dismal figures as partly reflecting the failure of the Lomé preferences. The EU attributes the failure of the non-reciprocal schemes to the adverse economic and political incentives they generate in beneficiary economies. That is, they create or bolster domestic ‘protectionist’ constituencies or interest groups that hinder potentially efficient economic liberalization.⁶¹ Grossman and Sykes point out that preferences may lead to distortions in investment decisions by shifting resources to sectors that are eligible for preferential treatment which could lead to over-investment in these sectors at the expense of others.⁶²

A considerable number of scholars⁶³ consider this a valid argument but make the point that this criticism of inward-looking policies does not demonstrate that protectionist measures, ‘as part of an array of domestic policies, are ineffective in contributing to the development of emerging countries. The recognition of the value of protection in fostering the establishment of new industries has a long tradition’.⁶⁴ This article compliments this position by arguing that the perceived failure of the Lomé preferences and Quad GSP schemes in general, constitutes an inadequate basis for concluding that SDT provisions do not favour developmental outcomes. Critical accounts of the schemes such as those levelled by the EU ignore a significant number of factors that account for their limited successes (GSP schemes are loosely used as proxies for ‘non-reciprocity’ and/or ‘SDT’ here).

It would be erroneous to claim that all preferential schemes have failed. As evidenced by the ‘graduation’ of countries such as South Korea, Singapore, Malaysia, and Hong Kong from US and EU GSPs, some developing countries, sectors and products did benefit from some schemes.⁶⁵ Even among the ACP group, countries such as Mauritius and Botswana

⁶⁰ See ODI, above n 9.

⁶¹ Czaglar Ozden and Reinhardt Eric, ‘The Perversity of Preferences: GSP and Developing Country Trade Policies, 1976–2000’, World Bank Working Paper, The World Bank, 2955 (2003).

⁶² See Grossman and Sykes, above n 20 at 6.

⁶³ See Ajit Singh and S. Chakravarty, ‘The Desirable Forms of Economic Openness in the South’, WIDER, Helsinki (1988), Ajit Singh, ‘Foreign Direct Investment and International Agreements: A South Perspective’, South Centre, Geneva (2001), Ajit Singh, ‘Elements of a New Paradigm on Special and Differential Treatment’, Paper prepared for the Joint ICTSD-GP International Dialogue, 6–7 May, Chavannes-de-Bogis, Switzerland (2003) and Brown and Stern, above n 4 at 17, and Donald Reagan, ‘What Are Trade Agreements For? Two Conflicting Stories Told by Economists, With a Lesson for Lawyers’, 9 JIEL 951; (2006).

⁶⁴ Brown and Stern, above n 4 at 17.

⁶⁵ Grossman and Sykes, above n 20 at 45.

made significant gains under the Lomé preferences⁶⁶ with both moving from 'lower income countries' to 'upper middle income' countries within a generation.⁶⁷ However, just as it is flawed to attribute the lack of greater development outcomes in developing countries to the failure of trade preferences, so is it a bit of a stretch to attribute the successes of countries such as the 'East Asian Tigers' solely to their utilization of preferences. Certainly, these helped but in virtually all the successful cases, there were other more favourable economic and political 'fundamentals'.⁶⁸ Two types of counterarguments can be levelled at criticisms of preferential arrangements that they have not enhanced developmental outcomes. Firstly, this type of criticism implies a problematic unidirectional hypothesis that trade stimulates overall economic growth and development. This type of argument provokes general criticism of the correlation between trade and economic growth. Secondly, more specific counterarguments can be made to the accusations relating to the failure of Lomé preferences and GSP schemes.

The relationship between trade and growth has been shown to be complex, if not ambiguous.⁶⁹ Dani Rodrik has shown that there is little evidence that trade liberalization is correlated with economic growth, poverty reduction, or economic development.⁷⁰ Whilst no country has developed successfully by turning its back on international trade, none has developed by simply liberalizing its trade. The critical balance lies in each country adopting its own trade and investment policies and strategies, in line with its development needs. Others⁷¹ have shown that much of the literature on the interface between trade and economic growth/poverty reduction tends to adopt an excessively narrow focus (trade liberalization).⁷² They suggest that analysis of trade, economic growth, and poverty reduction needs to go beyond trade liberalization to include *inter alia*: the relationships between

⁶⁶ ODI, above n 9.

⁶⁷ Arvind Subramanian and Devesh Roy, 'Who Can Explain the Mauritania Miracle: Meade, Romer, Sachs or Rodrik?', IMF Working paper 01/116 (2001). See also David Lincoln, 'Beyond the Plantation: Mauritius in the Global Division of Labour', 44 *The Journal of Modern African Studies* 59 (2006). Also see World Bank <http://siteresources.worldbank.org/DATASTATISTICS/Resources/CLASS.XLS> (Visited 4 December 2006).

⁶⁸ Alice Amsden, *Asia's Next Giant* (Oxford: Oxford University Press, 1989).

⁶⁹ Jeffrey Sachs and Andrew Warner, 'Economic Reform and the Process of Global Integration', 1 *Brookings Papers on Economic Activity* 1 (1995). Dani Rodrik, 'The Global Governance of Trade as If Development Really Mattered', UNDP, New York (2001). See also Dani Rodrik and Francisco Rodriguez, 'Trade Policy and Economic Growth: A Skeptic's Guide to the Cross-Country Evidence', Centre for Economic Policy Research, Discussion Paper Series 2143 (1999).

⁷⁰ Dani Rodrik and Francisco Rodriguez, 'Trade Policy and Economic Growth: A skeptic's Guide to the cross-Country Evidence', Centre for Economic Policy Research, Discussion Paper Series 2143 (1999)

⁷¹ See Christian Freres and Andrew Mold, 'European Union Trade Policy and the Poor: Towards Improving the Poverty Impact of the GSP in Latin America', Working Paper, 02/04, EC-PREP (2004). Also UNCTAD, *The Least Developed Countries Report*, UNCTAD, Geneva (2004) and UNECA, 'Africa Economic Report', UNECA, New York (2004).

⁷² *Ibid.*

trade and inequality, trade and employment, bargaining power in global production chains and the distribution of gains from trade, the effects of trends in, and variability of terms of trade on poverty, the effects of primary commodity dependence, and the relationship between export and import instability and vulnerability. UNCTAD draws a similar conclusion. Trade liberalization plus enhanced market access does not necessarily equal poverty reduction: most poor countries undertook extensive trade liberalization in the 1990s, and also received some degree of preferential market access from developed countries but performed dismally in reducing poverty.⁷³

Whatever the correlation between trade and growth, there are more important factors which affect both trade and growth. Taking the example of Africa, a considerable number of scholars point out that given the structures of African economies little, if any, significant gains may be expected from essentially trade focused regional integration. They single out the high degree of non-complementarities of Africa's exports and imports as a major reason for the low intra-African trade. Paul Collier argues that new approaches to regional integration and cooperation in Africa should directly target overall economic growth by focusing on basic 'fundamentals': reduction of transaction costs, rapid accumulation of human and physical capital and maintenance of macro-economic stability.⁷⁴ Not long ago, the World Bank concluded that freight costs were far more restrictive barriers to African exports than tariffs.⁷⁵

Regarding more specific criticisms of the Lomé preferences and GSP schemes, Grossman and Sykes identify a number of flaws inherent in these schemes.⁷⁶ Firstly, contrary to conventional opinion that holds that these GSP schemes are 'non-reciprocal', Bartels,⁷⁷ Grossman and Sykes, and Hoekman and Prowse⁷⁸ demonstrate that developed country (i.e. Quad, OECD) GSP schemes contain significant elements of political conditionality or non-trade related actions required of beneficiary countries that constitute significant 'reciprocity'. In considering a country's eligibility for the US GSP for example, among others:

the president must also consider whether the country provides 'equitable and reasonable access to [its] markets and basic commodity resources' and 'adequate and effective protection of intellectual property rights', whether it has taken steps to reduce investment-distorting practices and barriers to

⁷³ See UNCTAD, above n 71.

⁷⁴ Paul Collier, 'Globalization: Implications for Africa', In X. Igbal and M. S. Khan (eds), *Trade Reform and Regional Integration in Africa* (Washington DC: IMF, 1998).

⁷⁵ World Bank, 'Southern African Sub-Regional Strategy' World Bank, Washington DC (1998).

⁷⁶ Grossman and Sykes, above n 20.

⁷⁷ Lorand Bartels, 'The WTO Enabling Clause and Positive Conditionality in the European Community's GSP Program', 6 *JIEL* 507 (2003).

⁷⁸ Hoekman and Prowse, above n 2 at 2.

trade in services, and whether it takes steps to afford internationally recognized worker rights.⁷⁹

Such reciprocity imposes significant costs on beneficiary countries. Examples of these include US requirements that beneficiaries support efforts to combat terrorism, accept arbitral awards in favour of US nationals, meet additional criteria relating to labour and environmental standards and worker rights (e.g. for African countries, see the African Growth and Opportunity Act—AGOA, for Latin American and some Asian countries, see the EU's special incentives on labour, environmental matters and efforts to combat drug trafficking.⁸⁰

Secondly, GSP schemes typically exclude 'import-sensitive' and 'competitive need' products from beneficiary countries. These are typically products that are deemed competitive with like products in tariff granting developed countries. Examples include: certain agricultural, textiles, apparel, footwear, and leather products. Sometimes, these happen to be the very products in which beneficiary countries have a comparative advantage. Moreover the 'graduation principle' of many GSPs in which preferences are withdrawn once signs of national, sectoral, or product successes are detected, result in situations where sectors or products critical to developing countries' prospects of development are the very ones where preferences will neither be granted nor sustained to allow for the sought after broader developmental objectives. Gains from preferences depend not only on their scope but also on the magnitude of prevailing trade restrictions. 'The value of preferences may be worth less than seems at first glance if items are included for which MFN tariffs are low, preference margins are small or exclusion from preferential access include tariff lines that attract high rates'.⁸¹ Hoekman and Prowse indicate that two-thirds of the major items Africa exports to Canada faced zero MFN tariffs even before the 2003 Canadian initiative in favour of LDCs whilst 69% of EU imports from Africa (by value) were items facing zero MFN duties even before the EU introduced its Everything But Arms (EBAs) scheme for LDCs.⁸²

Thirdly, all eligible products are subject to rules of origin, which come with significant compliance costs (paper work, bureaucratic red tape, documenting product origins). Cumbersome rules of origins and other limiting conditions generate such significant compliance costs to the extent that they either reduce the value of the preferences or they prevent developing countries from utilizing preferences in certain products. Some

⁷⁹ Grossman and Sykes, above n 20 at 44.

⁸⁰ Aaditya Matoo, Devesh Roy and Arvind Subramanian, 'The Africa Growth and Opportunity Act and its Rules of Origin: Generosity Undermined?', World Bank Policy Research Staff Working Paper, 2908, The World Bank, Washington DC (2002).

⁸¹ See Keck and Low, above n 5 at 11.

⁸² Hoekman and Prowse, above n 2 at 6.

estimates show that on average, documentary requirements alone for most GSPs imply costs of about 3–5% of the value of goods. This significantly reduces the benefits of preferences as it requires MFN tariffs to exceed 4% on average for preferences to be worthwhile.⁸³ A number of studies show that the utilization rate (or the ratio of imports receiving preferential treatment to the total imports that are eligible) under the US and EU GSP schemes has hardly ever been above 50%.⁸⁴ Matoo *et al.* show how these rules have constrained the utilization rates by South Africa and Mauritius of the US special Africa preferential scheme—the African Growth and Opportunity Act (AGOA). They estimate that nearly 90% of otherwise eligible exports from South Africa and Mauritius did not qualify for preferential treatment under AGOA’s rules of origin, which require for example, in the case of textiles that beneficiaries source their fabrics and yarns either from the US or from other African beneficiaries only.⁸⁵ UNCTAD⁸⁶ estimates that under the Quad’s GSP schemes, less than 40% of the covered imports entered the importing countries at the preferential rates. Brown and Stern⁸⁷ suggest that this was because either the exporters were unable to comply with stringent rules of origin or that they found the transaction costs of the certification process too costly, in relation to the saved preferential margin.

Lastly, the economic value of the GSP preferences to developing countries has been diminishing as a result of ‘preferences erosion’. Multilateral or unilateral tariff reductions by developed countries on products for which some developing countries enjoy preferential tariff treatment, leads to preferences erosion.

As a result of all these defects, ‘relatively few countries have been able to take significant, systematic advantage of preference schemes’.⁸⁸ The EU’s criticism of the Lomé preferences is thus partly hollow. This is the context within which the economic arguments put forth by both the EU and ACP countries in respect of *de jure* or *de facto* SDT provisions within Article XXIV must be seen. The differences in economic reasoning are significant as they relate not only to the objects and purpose of EPAs but also to the objects and purposes of the WTO. Article 34.1 of the CPA sets out the objective of EPAs as follows: ‘Economic and trade cooperation shall aim at fostering the smooth and gradual integration of the ACP States into the world economy, with due regard for their political choices and development priorities,

⁸³ Paul Brenton and Miriam Manchin, ‘Making EU Trade Agreements Work: The Role of Rules of Origin’, 26 *The World Economy* 755 (2003).

⁸⁴ UNCTAD, *Trade Preferences for LDCs: An Early Assessment of Benefits and Possible Improvements* (New York: UNCTAD, 2003) 16.

⁸⁵ Matoo, Roy and Subramanian, above n 80.

⁸⁶ UNCTAD, above n 84.

⁸⁷ Brown and Stern, above n at 4 16.

⁸⁸ Keck and Low, above n 5 at 11.

thereby promoting sustainable development and contributing to poverty eradication in the ACP countries.' Although there are no public disagreements over the interpretation of this objective, in its negotiating positions, the EU seems to focus on the first part of this objective (trade integration) whilst ACP countries seem to put more premium on the latter part (promoting sustainable development and contributing to poverty reduction). This is a fundamental point of difference which partly explains the differences between the EU and ACP over the need for 'additional' flexibility within Article XXIV. This distinction constitutes differences of epistemic inclinations, economic interests, and interpretations of the objects and purposes of the WTO.

The EU's inclination towards the trade integration component of the CPA is consistent with its overall epistemic orientation and view of the objects and purposes of the WTO. The EU's preference for trade integration suggests that it belongs to the group that in spite of the preambular paragraph of the WTO and at least 145 SDT provisions within the multilateral trading system⁸⁹ believes that the WTO is a trade rather than a development organization that should not be burdened by broad development concerns of which it has no comparative institutional advantage.⁹⁰ To the extent that this group accepts the developmental objectives of the WTO, they believe that trade liberalization and integration into the world economy is the best way for developing countries to achieve economic development. As Singh has argued, as far as this group, which includes the World Bank and the IMF is concerned, developing countries would be better off abandoning SDT altogether and integrating themselves quickly into the global economy. Proponents of this view regard SDT as ineffective and detrimental to market-oriented pro-competition reforms. They often point to (i) the rate of growth of post-war world trade that has been twice the rate of production, as indicating trade as the engine of growth and (ii) the failure of dirigiste policies in the former Eastern Europe and the successes of Japan and other East Asian Tigers, as showing the successes of greater openness and integration into the world economy. For them, 'the basic development philosophy of the WTO consists of two main elements: (i) trade liberalization and greater integration with the world economy and (ii) increasing the role of the market and diminishing that of the state'.⁹¹ ACP countries and a number

⁸⁹ Singh, above n at 6.

⁹⁰ Srinivasan, above n 27 and Andrew Mitchell, 'A Legal Principle of Special and Differential Treatment for WTO Disputes', 5 *World Trade Review* 445 (2006). The EU repeatedly argues that since the CPA is a trade and development/aid cooperation agreement, EPAs should concentrate on trade issues and the broader developmental questions should be handled on the development cooperation side—to which ACPs counter that the development provisions are not legally binding.

⁹¹ Ajit Singh, 'Elements of a New Paradigm on Special and Differential Treatment', Paper prepared for the Joint ICTSD-GP International Dialogue, May 6-7, Chavannes-de-Bogis, Switzerland (2003) 10.

of scholars object to this conception of the objects and purposes of both EPAs and the WTO. Section IV.B deals with the development question within the WTO. This section will handle the narrow point on the EU's conception of trade integration as the main object and purpose of both EPAs and the WTO, and whether trade integration equals development, or is even necessarily beneficial in its own narrow sense.

Trade integration is a necessary but not a sufficient condition for sustainable development or poverty alleviation. As the ODI has shown specifically with regard to ACP countries:

there is no obvious tendency for higher levels of trade integration among ACP countries to be associated with better growth performance . . . if EPAs are to be 'developmental' they need to do more than merely increase trade as a share of GDP. They also need to do more than just promote economic growth because there is a wide variation among the ACP in the rate at which growth translates into poverty reduction.⁹²

Singh and Chakravarty have shown that what matters is the concept of *strategic* rather than close integration with the world economy.⁹³ Singh and Chakravarty reject the view that the East Asian countries had a close integration with the world economy⁹⁴ and argue that the degree of their integration was *strategic* rather than close. Whilst they were export-oriented in the course of their industrialization, they also extensively employed a wide array of policy measures that were prima facie a violation of a number of WTO Agreements. These included selective and comprehensive import controls and other policy measures in the area of subsidies, trade related investment measures (TRIMs) and trade related intellectual property rights (TRIPs).⁹⁵ 'Clearly, Japan was using informal methods of controlling imports even well after it had become a leading world exporter of a whole range of manufactured products . . . Similarly, South Korea afforded protection to its fledgling car industry for nearly three decades, to reach a stage where it too became a major exporter of cars'.⁹⁶ A similar policy of selective openness to foreign direct investment was also employed by these countries.⁹⁷

The East Asian experiences have led Singh and Chakravarty to develop the concept of *strategic openness or integration*. Strategic integration enables a country to be open in areas where it is in its interests to do so, with the optimal degree of integration between countries varying 'depending on their

⁹² ODI, above n 9 at 3.

⁹³ Singh and Chakravarty, above n 63.

⁹⁴ See for example, World Bank, *The East Asian Miracle: Economic Growth and Public Policy*, (New York: Oxford University Press, 1993) and World Bank, *World Development Report: The Challenges of Development*, (New York: Oxford University Press, 1991).

⁹⁵ Singh, above n 91 at 14.

⁹⁶ *Ibid*, at 15.

⁹⁷ Amsden, above n 68.

previous history, level of economic development, the size of the country, their institutional development and on the nature of its comparative and competitive advantage'.⁹⁸ Economic openness is thus a multidimensional concept. 'A country can be open, or not so open, with respect to trade, migration, to educational, scientific and cultural exchange. There is no economic theory that suggests that a country needs to be open in all directions at all times'.⁹⁹ This is what ACP countries are asking for by seeking (i) additional flexibility for developing countries within Article XXIV, (ii) to exclude the Singapore Issues from the EPA negotiations, and (iii) delay negotiations on services. They want to be strategically open with respect to particular products, services, investment, competition policy, and public procurement.

The ACP's concern is that strict compliance with the current provisions of Article XXIV could have significant negative impact on their economies. Reciprocity has fundamental implications for the production structure and public revenues of ACP States. The effect of trade liberalization on poverty reduction critically depends on at least five factors: (i) how much poor people produce exported commodities and consume imports, (ii) the degree of labour mobility, (iii) the state of domestic industries, (iv) the state of income distribution, and (v) the presence of trade-related compensatory mechanisms.¹⁰⁰ Depending on these factors, trade liberalization can create winners and losers, aggravating or reducing income, regional, or gender disparities. A pro-poor trade liberalization strategy is one that ensures that winners' gains outweigh losers' losses. The experience of East Asian economies demonstrate that successful trade policies must be aligned with, rather than pursued in isolation from development strategies. Because reciprocity, and the EU's entire approach to EPAs is based on market driven premises for development,¹⁰¹ it is not clear that EPAs would be readily aligned with the development strategies of some ACP countries that may prefer alternative development premises (for example, 'managed' rather than 'free' trade).

The economic arguments thus far discussed should be put in the proper (legal) context of EPAs negotiations. It should be noted that whilst the EU's case against 'additional' flexibility is in part an argument against the utility of SDT provisions, the ACP case for *de jure* SDT provisions within Article XXIV, takes the utility of SDT as a prior and superior legal and economic fact that no longer needs agreement. 'It is thus not relevant for the purpose of WTO rules negotiations to consider empirically whether or not the flexibilities per se actually lead to economic development'.¹⁰² Re-opening

⁹⁸ Singh, above n 91 at 15.

⁹⁹ *Ibid.*

¹⁰⁰ UNECA, above n 71,

¹⁰¹ Bilal and Rampa, above n 25 at 69,

¹⁰² *Ibid.*, at 5,

this argument invites not only counterarguments such as the ones already discussed but also against the broader theoretical underpinnings of the EU's case for reciprocity, which although expressed within the narrow confines of Article XXIV, also obtains for the same concept within the broader WTO agreements—MFN principle or non-discrimination.

Thus, for the purposes of rounding off the argument on the economic robustness of the EU's case for EPAs under strict jurisdiction of Article XXIV, it is worth reiterating that the EU's economic argument—implicitly expressed in its two submissions to the WTO that North–South RTAs are beneficial to both developed and developing country parties¹⁰³ is based on a very narrow and problematic yardstick of economic efficiency or Pareto optimality. In international trade, this amounts to 'a utilitarian view of fairness, which says that so long as no country gains at the expense of any other, no country has rational grounds for resisting multilateral trade liberalization'.¹⁰⁴ Brown and Stern identify at least four problems with this criterion. Firstly, beyond a concern for the compensation of loser countries by winners, this criterion disregards the issue of distribution among countries of the welfare gains accrued from trade negotiations, a situation regarded by many as evading the fundamental question of 'fairness' in international trade.¹⁰⁵ Secondly, this criterion is based on static equilibrium analysis. It defines efficiency in terms of optimal resource allocation, rather than in terms of long term rate of growth in output. 'If efficiency is redefined to include the long term increase in output resulting from productivity growth and resource accumulation, the policy prescriptions derived from static analysis may not remain the same'.¹⁰⁶ Thirdly, the validity of this criterion even under its own limited terms is limited by the fact that it is derived from a theoretical model of a market economy that abstracts from many aspects of reality:

¹⁰³ WTO, above n 48 and 49.

¹⁰⁴ Brown and Stern, above n 4 at 5.

¹⁰⁵ A discussion of fairness in international trade is beyond the scope of this article, although it is related to the overall argument. Suffice it to say that generally speaking, developing countries have often sought *fairness of outcomes* from the GATT/WTO trading system whilst developed countries have always insisted on *fairness of processes* (For the developing countries' view on this see Amrita Narlikar, 'Fairness in International Trade Negotiations: Developing Countries in the GATT and WTO', *The World Economy*, doi:10.1111/j.1467-9701.2006.00833.2006). Srinivasan (above n 27 at 74) points to the developed country position that the signatories of GATT did not view non-discrimination as epitomizing a principle of justice or fairness in some well-defined sense, but rather they viewed it only as an instrument for achieving the broad objectives they hoped to achieve with the agreement. Narlikar gives the developing country view by arguing that under GATT, developing countries challenged the notion that equitable processes sufficed to produce equitable outcomes in a Nozickian sense, hence the argument underlying SDT that equality of treatment is equitable only among equals. Under the WTO, developing countries are now challenging the assumption that the decision-making processes of the WTO are equitable even under their own limited terms of fairness of process.

¹⁰⁶ Brown and Stern, above n 4 at 7.

Even when accepted on its own limited terms, it has to be qualified by the recognition that market failures take place... Further, still within its own terms of static equilibrium analysis, the criterion disregards the costs of adjustment to a new state of equilibrium that follow from trade liberalization. These can be of no small importance. It is one characteristic of many economies—especially of those in the process of development—that they suffer from major structural rigidities arising from poorly functioning markets and institutional deficiencies'.¹⁰⁷

Lastly, Brown & Stern argue that the utilitarian basis of this efficiency criterion—the greatest good for the greatest number—'is not compatible with forms of social cooperation entered into by equals for mutual advantage. All participants expect some benefit and none seek the greatest good of the greatest number'.¹⁰⁸

B. Contestation over the desirability and interpretation of special and differential treatment under Article XXIV

Despite the sceptical view of the EU and others about the utility of SDT provisions to development, SDT has long been an integral part of the rule-based multilateral trading system, dating back to the inception of GATT in 1947. It arose to fulfil the development objective, which has been a long-standing objective of the GATT/WTO—as demonstrated by both the preambular paragraphs to GATT and the WTO, and the Doha Ministerial Declaration of 2001. As aforementioned, there are at least 145 SDT provisions spread across different multilateral agreements—Multilateral Agreements on Trade in Goods; the General Agreement on Trade in Services; the Agreement on Trade Related aspects of Intellectual Property; the Understanding on Rules and Procedures Governing the Settlement of Disputes; and various WTO Ministerial decisions.¹⁰⁹

In spite of the centrality of the 'development principle' and the pervasiveness of SDT provisions in the GATT/WTO, 'the development dimension has neither been sufficiently articulated, nor coherently structured in the architecture of international trade agreements'.¹¹⁰ Most of the 145 SDT provisions are non-binding commitments and the entire SDT structure is neither sufficiently coherent to be of significant value as an independent principle in WTO dispute settlement mechanism, nor powerful enough

¹⁰⁷ Brown and Stern, above n 4 at 6–7.

¹⁰⁸ *Ibid*, at 8.

¹⁰⁹ Singh, above n 91 at 6.

¹¹⁰ Asif Qureshi, above n 57 at 2.

to ensure favourable development results to developing countries.¹¹¹ Ajit Singh¹¹² and Dani Rodrik¹¹³ are scathing in their attack of the WTO's developmental credentials. They argue that the rules of some WTO agreements are not only arguably anti-development, but also that the WTO lacks SDT provisions for developing countries to enable them deal with the developmental constraints imposed by the anti-developmental aspects of some WTO Agreements:

WTO rules on anti-dumping, subsidies and countervailing measures, agriculture, textiles, TRIMs and TRIPs are utterly devoid of any economic rationale beyond the mercantilist interests of a narrow set of powerful groups in the advanced industrial countries. The developmental pay-off of most of these requirements is hard to see.¹¹⁴

There are a number of divergent reasons for the lackluster history of SDT provisions in the GATT/WTO. Many of these can be traced to three interrelated 'original differences' between developed and developing countries at the formation of GATT: different epistemic and/or ideological visions of development, different power relationships, and different economic and geopolitical interests. Developed and developing countries not only had different ideas on what works for development, but there were significant asymmetries in diplomatic, political and economic powers between them, which influenced many of the outcomes of GATT/WTO rounds of negotiations. In order to create a rule-based multilateral trading system in which both parties could participate, compromises were made, most notably on the dual principles of reciprocity and non-reciprocity. This resulted in an uneasy, partly legally 'dualistic' multilateral trading system, underpinned by two economic logics; one for developed countries, another for developing ones.¹¹⁵

Led by the US, which initially drafted the proposals for the ITO, developed countries (in spite of the differences between the US and the European colonial powers such as Britain which had a system of imperial trade preferences) were generally more accommodating of the US vision of 'free trade' and economic liberalization not only as the solution to post-war economic but also to non-economic ones.¹¹⁶ A number of scholars have demonstrated that the multilateral ideal, built on the concepts of non-discrimination and reciprocity was a shared belief of post World War II US

¹¹¹ Andrew Mitchell, 'A Legal Principle of Special and Differential Treatment for WTO Disputes', 5 *World Trade Review* 445 (2006).

¹¹² Singh, above n 91.

¹¹³ Dani Rodrik, 'The Global Governance of Trade as If Development Really Mattered', UNDP, New York (2001).

¹¹⁴ *Ibid*, at 27.

¹¹⁵ See Michael Finger, 'A Diplomat's Economics: Reciprocity in the Uruguay Round of Negotiations', 4 *World Trade Review* 27 (2005).

¹¹⁶ Chase, above n 26.

policymakers. It served as a 'foundational architectural principle on the basis of which to reconstruct the postwar world... Multi-lateralism included a moral element in that it defined the terms of good citizenship in the world community: equality was conciliatory and fair; discrimination was offensive and disrespectful'.¹¹⁷

The US was eventually forced to make concessions on the principle of multilateralism (e.g. in accepting FTAs) either to obtain the endorsement of the British Commonwealth or out of its own self-interested motives, but it did not abandon the principle nor the economic logic behind it. This is evidenced by the pride of place that Articles 1 and 111 occupy as the foundational principles of GATT/WTO, and the consistent US resistance to developing country efforts to create more permanent and legally binding derogations from these articles. Due to colonialism, many developing countries were late entrants and rule takers rather than agenda setters in the international economic system. Thus, they were 'particularly strident in their call for global redistributive justice, across international organizations'¹¹⁸ including the GATT.

The concept of redistributive justice through global trade neither sat well with the more liberal trade principles of the GATT, (i.e. MFN) nor with the national interests of the already industrialized countries. Developed countries resisted the call to replace the mainstream GATT ideology of free trade with a focus on development or global redistributive justice.¹¹⁹ This not only underscores the impact of asymmetrical power relationships between the two groups of countries, but also the different ideological orientations that they brought with them to GATT. Narlikar argues that due to its commitment to liberalization, lack of balancing development provisions, 'the shenanigans of the consensus diplomacy of the Green Room' and negotiating formulae such as the Principal Supplier Principle, the one-member-one-vote GATT system was weighted against developing countries. Consequently, developing countries 'made few attempts to engage actively in the give-and-take of GATT negotiations, and instead tried to lobby for a change in the norms of the GATT to a qualified liberalization that involved notions of fairness emphasizing equitable outcomes rather than just equitable processes by institutionalizing preferential treatment for development purposes'.¹²⁰

By the early 1990s, developing countries had been forced to change tact, toning down on the notion of *fairness of outcomes* and moving towards accommodating the *fairness of process* concept (even whilst complaining that WTO processes were not fair to them). According to some scholars, this is

¹¹⁷ Ibid, at 12.

¹¹⁸ Amrita Narlikar, 'Fairness in International Trade Negotiations: Developing Countries in the GATT and WTO', *The World Economy*, doi:10.1111/j.1467-9701.2006.00833 (2006) at 1006.

¹¹⁹ Mitchell, above n 111 at 469.

¹²⁰ Narlikar, above n 118 at 1016.

reflected in their willingness to engage developed countries on an equal and reciprocal basis during the Grand Bargain of the Uruguay Round.¹²¹ These scholars point to ideational conversion of developing countries towards economic liberalization as a result of *inter alia*: the failures of central planning, the debt crisis, experience of East Asian economies with export oriented growth, and the emergence of export interests within developing countries that gave rise to domestic constituencies for trade liberalization. Others counter that this account neglects a number of influential factors that forced developing countries to change tact and accept negotiations on a reciprocal mutually advantageous basis.¹²² Developing countries did not necessarily undergo an ideational conversion regarding trade liberalization. Rather, (i) worsening power asymmetries (as a result of the economic difficulties that many of them underwent in the 1980s, and the end of the Cold War), (ii) the rise of the ‘neoliberal revolution’ in major industrial countries, (iii) developing countries’ own learning and adaptation to the workings of GATT, (iv) their limited successes with the *fairness of outcomes* agenda, (v) their increasing differentiation and divergent interests, (vi) the rapid growth of some developing countries in East Asia and Latin America which enhanced their capabilities in trade negotiations and changed the nature of their interests, (vii) increasing ‘preference erosion’, (viii) ‘realpolitik’ realization that the global trading system needed fixing and that developing countries could not influence it unless they were part of it, and (ix) the Single Undertaking of the Uruguay Round which unlike the code approach of the Tokyo Round, meant that all WTO members had to accept all agreements, combined to force the change in developing country tactics.¹²³

The EU–ACP contestation over EPAs shows that the three ‘original differences’ have not disappeared. ‘The challenge of the developing world today seems to be much more nuanced, which is based neither on an outright rejection of the reciprocal multilateralism of the WTO nor a wholesale acceptance of it’.¹²⁴ Developed and developing countries are still caught up in the dualistic set of logic that resulted from the compromises made on the question of reciprocity at the inception of GATT. As the EU’s position confirms, for developed countries the economic logic, which is underpinned by the MFN Clause and the notion of reciprocity remains that free trade is welfare enhancing for both developed and developing countries. Loosely speaking, this is what economists call the first theorem of neoclassical welfare economics, ‘that a global competitive market equilibrium

¹²¹ Bernard Hoekman and Michel Kosteci, *The Political Economy of the World Trading System: The WTO and Beyond* (Oxford: Oxford University Press, 2001).

¹²² Keck and Low, above n 5 at 4 and Narlikar, above n 118 at 1018.

¹²³ *Ibid.*

¹²⁴ Narlikar, above n 118 at 1025.

under free trade... maximizes global welfare or more precisely, is a Pareto optimum'¹²⁵ situation. As aforementioned, economists would be quick to point out that whether or not this proposition is valid depends on the satisfaction of a number of difficult assumptions (e.g. perfectly competitive markets for factors, goods and services and zero production or consumption externalities.¹²⁶

For developing countries, the economic logic which underpins a number of SDT provisions, most notably the notion of non-reciprocity (GATT Articles XXVIII and XXXVI: 8), Part VI and the Enabling Clause, is that the trade needs of developing countries are substantially different from those of developed countries, hence the two types of economies should not be subject to the same trade rules.¹²⁷ A body of evidence that is often overlooked confers considerable merit to the economic rationale behind SDT. Ajit Singh¹²⁸ makes two points that challenge many of the sceptical views of SDT; most notably the notion that SDT is not a global public good (i.e. only benefits developing countries if at all). Firstly, he points to the beneficial use that the now developed countries (Western Europe, and Japan in particular) made of what was essentially SDT in terms of their trade relations with the US between 1950 and 1973:

In the short term, it [the US] dealt with its own huge balance-of-trade surplus and the European and Japanese deficits by foreign aid and military expenditures. In addition the United States abandoned the Bretton Woods goal of convertibility and encouraged European and Japanese trade protectionism and discrimination against the dollar. For example, the United States absorbed large volumes of Japanese exports while accepting Japanese restrictions against American exports. It supported the European Payments Union, an intra European clearance system which discriminated against the dollar... To encourage long term adjustment, the United States promoted European and Japanese trade competitiveness. Policies for economic controls on the defeated Axis countries were scrapped. Aid to Europe and Japan was designed to rebuild productive and export capacity. In the long run, it was expected that such European and Japanese recovery would benefit the United States by widening markets for American exports.¹²⁹

One can similarly argue that Western Europe's quick postwar recovery was globally welfare enhancing, as can be seen by the benefits, however modest, that the EU's GSP schemes (and aid) have accrued to East/Asian, ACP, and Latin American countries.

¹²⁵ Srinivasan, above n 27 at 75.

¹²⁶ Ibid, at 76.

¹²⁷ Mitchell, above n 111 at 446.

¹²⁸ Singh, above n 91.

¹²⁹ Spero J.E., *The Politics of International Relations* (London: George Allen and Unwin 1977) 37 quoted in Singh, above n 91 at 20, emphasis in the original.

Secondly, Singh¹³⁰ argues that some WTO Agreements contain provisions which constitute SDT in favour of developed countries. Examples of these include textile quotas, agricultural support schemes, TRIPs, TRIMs, and the notion of industrial policy implicit in the Agreement on Subsidies and Countervailing Measures:

Which does not prohibit government grants to private firms to promote R&D, or subsidies granted to disadvantaged regions, or those relating to new environmental laws. This rule again favours industrial policy requirements of advanced countries; many of the subsidies of interest from the perspective of industrial policy in DCs are ruled out, for example . . . those contingent on export performance, or those given for the use of domestic in preference to imported products.¹³¹

Sigh concludes that developed countries are mistaken in taking a narrow *zero-sum* view of SDT. He argues that as the post war US–Western-Europe trade relations show, a proper SDT architecture can serve the long-term interests of both developing and developed countries. Donald Reagan¹³² supports this position by showing that national regulation that is domestically rational (does not abuse national market power or create adverse domestic incentives, for example) is globally efficient and should not be restrained.

The theoretical and empirical evidence pointing to the global efficiency of SDT, challenges the developmental concerns behind the ‘MFN principle erosion’, and the idea of restricting additional flexibility in Article XXIV for fear of further eroding the principle of non-discrimination. If properly constituted SDT provisions provide *win-win* situations for both developed and developing countries, it matters little if it contributes to the ‘MFN principle erosion’. This brings us back to the intellectual foundations of the original compromises on the concept of non-discrimination. The founders of GATT recognized the limitations of the MFN principle and the utility of SDT and embedded both within the system. This is the logic that underpins the ACP’s case for SDT within EPAs—because of their asymmetries in levels of development, the EU and the ACP group of countries should not be subjected to the same trade rules.

The WTO handles asymmetries in levels of development in terms of SDT for developing countries in general, and specific groups of developing countries (LDCs) in particular.¹³³ As shown in Section I. of ‘Introduction’, the CPA which provides for the negotiations of EPAs, specifies SDT as

¹³⁰ Singh, above n 91.

¹³¹ *Ibid.*, at 9.

¹³² Donald Reagan, ‘What are Trade Agreements for? Two Conflicting Stories Told by Economists, With a Lesson for Lawyers’, 9 *JIEL* 951 (2006).

¹³³ Alex Borrmann, Harald Grobmann and Geog Koopmann, ‘The WTO Compatibility of the Economic Partnership Agreements Between the EU and ACP States’, Study Commissioned by the Hamburg Institute of International Economics for GTZ, Bonn, Germany (2005) 13.

an integral part of the EPA negotiations and design. In spite of these (SDT) provisions, there are divergences between the EU and ACP countries on the concrete formulations of these and other constitutive features of EPAs.

In their Cape Town Declaration of 2002, Submission to the WTO on the reform of Article XXIV¹³⁴ and individual regional negotiating positions¹³⁵ the ACP has attempted to specify constitutive features of 'developmentally friendly' EPAs in three not necessarily consistent ways. Firstly, they propose extending the 'reasonable length of time' and 'exceptional circumstances' clauses of Article XXIV into anything between 18 and 25 years.¹³⁶ Secondly, they seek an explicit revision of Article XXIV to obtain legal certainty for its flexible interpretation, which would allow for example, explicit lower thresholds and/or a favourable methodology for developing countries in determining criteria for 'substantially all trade'. Thirdly, they would like to introduce binding development 'thresholds' into the 'substantially all' trade clause or the liberalization schedule for developing countries in the implementation of North-South FTAs. Instead of basing liberalization schedules on pre-determined timeframes and product coverage, they would like them to be based on objectively verifiable development indicators.¹³⁷

In its first WTO submission on RTAs in July 2002,¹³⁸ the EU rejected all three proposals. Instead, the EU sought for clarification of already existing flexibilities within Article XXIV and the Enabling Clause:

The European Communities are of the view that the DDA negotiations on RTAs should aim to clarify the flexibilities already provided for within the existing framework of WTO rules. This is likely to involve further consideration of the relationship between GATT Article XXIV and the Enabling Clause, as well as examination of the extent to which WTO rules already take into account discrepancies in development levels between RTA parties.¹³⁹

Nevertheless, the EU acknowledged that aspects 'in respect of which such flexibilities might be appropriate include the length of the transitional period, the level of final trade coverage and the degree of asymmetry in terms of timetables for tariff reduction and elimination'.¹⁴⁰ Borrmann *et al.*¹⁴¹ argues that in resisting 'additional' flexibilities, the EU seeks to avoid a situation where EPAs with very long or open-ended

¹³⁴ WTO, above n 52.

¹³⁵ TRADES Centre, 'SADC and ESA Experiences in Negotiating EPAs with the EU', Conference Report, 7-8 September (2006).

¹³⁶ WTO, above n 52 and TRADES Centre above n 135.

¹³⁷ Bilal and Rampa, above n 25 and Borrmann *et al.*, above n 133 at 39.

¹³⁸ WTO, above n 48.

¹³⁹ *Ibid.*, at 72.

¹⁴⁰ *Ibid.*

¹⁴¹ *Ibid.*, at 35.

transitional phases effectively degenerate into non-reciprocal FTAs. Accordingly, the EU prefers binding, narrowly defined liberalization timetables, although it tolerates the idea that liberalization needs to be flexible and asymmetric, based on the specific situations of participating countries.¹⁴²

In its second Submission to the WTO¹⁴³ the EU moved a little closer to some of the ACP positions. It joined the ACP in arguing that WTO disciplines for RTAs are deficient in two ways:

Existing rules fail to create fair and equitable treatment between different types of RTAs based on their developmental impact and promotion of developing countries participation in world trade. For example, while preferential tariff and partial liberalization agreements among developing countries fall under the Enabling Clause, ambitious and full-fledged RTAs, such as Free Trade Agreements between developed and developing countries are subject to the stricter requirements of GATT Article XXIV. Yet, North-South RTAs have at least as high a development impact as any of those falling under the Enabling Clause, and it is difficult to see why the substantive requirements should be radically different.¹⁴⁴

In spite of this move towards convergence in economic logic with the ACP, the EU basically held firm to its core concern about the clarification of existing *de facto* flexibility: . . . ‘the European Communities believe that the DDA negotiations on RTAs should aim to clarify the flexibilities already provided within the existing WTO rules on RTAs, in order to give greater security to developing country parties to RTAs to ensure that the rules facilitate the necessary adjustments’.¹⁴⁵ The EU did move a bit closer to the ACP submission in respect of transitional period and SDT for least developed countries. The EU stated that it was open to consider ‘separate and differentiated, i.e. lower thresholds for developing countries and least developed countries, as proposed in the submission by the ACP countries’.¹⁴⁶ The EU argues that ‘longer transition periods might be necessary to facilitate market building and consolidation through gradual openness to trade in weak and vulnerable developing countries, taking into account their specific needs and constraints’.¹⁴⁷

¹⁴² ACP/EC above n 12, see also Peter Mandelson, ‘The ACP-EU Relationship in the Global Economy’, Speech held at the ACP-EU Ministerial Meeting in Brussels, 1 December (2004).

¹⁴³ WTO, ‘Submission on Regional Trade Agreements’, Paper by the European Community and their Member States, Negotiating Group on Rules, TN/RL/W/179, 12 May (2005).

¹⁴⁴ *Ibid.*, at 81.

¹⁴⁵ *Ibid.*

¹⁴⁶ *Ibid.*, at 81–82.

¹⁴⁷ *Ibid.*

III. CONCLUSION

This article has argued that the differences over the EPAs negotiations is essentially a proxy fight over the concepts of reciprocity and SDT within the WTO, and the scope of the WTO. Whether EPAs will be pro-development or not depends on their *design and scope*. It has shown that development-oriented EPAs will require not only innovations in their design and scope but also innovative interpretation of existing WTO rules or innovations to some of the existing WTO rules, most notably, Article XXIV and a wide array of other SDT provisions. The EU's economic and legal arguments in defence of its more conservative position have been shown to be theoretically and empirically weak and incomplete. In particular, this article has challenged the EU's conception of SDT as either not helpful to the development objectives of developing countries or as a *zero-sum* game, which only benefits developing countries. It has been shown that properly constituted SDT provisions can be globally efficient. Perception of SDT not as a *zero-sum* game but as a *win-win* situation might help in providing a more development-oriented compromise in the EPA negotiations.