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

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A THESIS SUBMITTED IN PARTIAL FULFILMENT OF THE REQUIREMENTS
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This thesis is dedicated to the loving memory of my beloved mother,

Nadine Geneviève Linguet

(03 January 1967- 09 April 1991)
ABSTRACT

This thesis critically examines the increasing complexity and diversity of market access issues for agricultural food products from developing countries (DCs) to the European Union (EU). Agriculture is the sector which receives the most protection from the EU and the trade-distorting measures, employed by the EU to protect its own agricultural market, affect opportunities for DCs in agricultural food trade. These measures are also opposed to the World Trade Organisation’s (WTO) objective of a “fairer and more open multilateral trading system” between the WTO member countries.

The EU post-colonial history with African, Caribbean and Pacific (ACP) countries has also influenced the rules enforced by the EU for the import of certain agricultural commodities. However this relationship, as well as the operation of the EU’s Common Agricultural Policy, has been subject to a number of sustained attacks as a result of WTO commitments. Therefore, this thesis will conduct an examination of the EU’s legal obligations under the WTO and their impact on agricultural food trade.

The continuing change in EU market access conditions, subject to the legal trade rules established by the WTO, requires an in-depth analysis in order to inform DCs as to how to adapt to these changes as they take place. In this context, the thesis examines the legal trade relationship to date between the EU and the Caribbean region of the ACP Group, which has been selected as the case study, within the “Fortress Europe” of agriculture. Two commodities, sugar and bananas, will be given particular attention in the thesis because of their high sensitivity in agricultural trade and the level of contention that these provoke between the EU and DCs in international trade disputes. This is evidenced by the number of cases and the length of disputes brought within the General Agreement on Tariffs and Trade (GATT) and the WTO. As these commodities are of crucial importance to particular DCs, the thesis focuses its analysis on the perspective and experience of two developing Caribbean countries in particular, Guyana and Jamaica.
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DELIBRATION

I hereby declare that I am the author of this thesis; that it is my own work, and that it has not previously been accepted for a higher degree.

Signed: ____________________________  Date: ____________

Vanessa Constant LaForce
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<tr>
<td>AASM</td>
<td>Associated African States and Madagascar</td>
</tr>
<tr>
<td>AB</td>
<td>Appellate Body</td>
</tr>
<tr>
<td>ACP</td>
<td>African, Caribbean and Pacific countries</td>
</tr>
<tr>
<td>ACS</td>
<td>Association of Caribbean States</td>
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<tr>
<td>ACWL</td>
<td>Advisory Centre on WTO Law</td>
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<tr>
<td>ADI</td>
<td>Acceptable Daily Intake</td>
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<td>AMS</td>
<td>Accompanying Measures for Sugar Protocol Countries</td>
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<td>Agreement on Agriculture</td>
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<td>BFA</td>
<td>Banana Framework Agreement</td>
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<td>Banana Protocol</td>
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<td>BSE</td>
<td>Bovine Spongiform Encephalopathy</td>
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<td>BTN</td>
<td>Brussels Tariff Nomenclature</td>
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<td>CAP</td>
<td>Common Agricultural Policy</td>
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<td>CARICOM</td>
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<td>CARIFORUM</td>
<td>Caribbean Forum of ACP States</td>
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<td>CARIFTA</td>
<td>Caribbean Free Trade Association</td>
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<td>CBEA</td>
<td>Caribbean Banana Exporters Association</td>
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<td>CCC</td>
<td>Community Customs Code</td>
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<td>Common Commercial Policy</td>
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<td>CFP</td>
<td>Common Fisheries Policy</td>
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<td>CJEU</td>
<td>Court of Justice of the European Union</td>
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<td>CMO</td>
<td>Common Market Organisation</td>
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<td>CMOB</td>
<td>Common Market Organisation for Bananas</td>
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<td>CN</td>
<td>Combined Nomenclature</td>
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<tr>
<td>Codex</td>
<td>Codex Alimentarius Commission</td>
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<tr>
<td>COMTD</td>
<td>Committee on Trade and Development</td>
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<td>CPPC</td>
<td>Control Points and Compliance Criteria</td>
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<td>Abbreviation</td>
<td>Full Form</td>
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<td>CRIP</td>
<td>Caribbean Regional Indicative Programme</td>
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<td>Caribbean Regional Negotiating Machinery</td>
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<tr>
<td>CSME</td>
<td>Caribbean Single Market and Economy</td>
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<td>CU</td>
<td>Customs Union</td>
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<td>DCI</td>
<td>Development Cooperation Instrument</td>
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<td>Developing Countries</td>
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<td>DDA</td>
<td>Doha Development Agenda</td>
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<td>DOMs</td>
<td>Départements d’Outre Mer</td>
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<td>DSB</td>
<td>Dispute Settlement Body</td>
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<td>Dispute Settlement System</td>
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<td>Dispute Settlement Understanding</td>
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<td>EBA</td>
<td>Everything But Arms</td>
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<td>ECU</td>
<td>European Currency Unit</td>
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<td>European Food Safety Authority</td>
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<tr>
<td>EFTA</td>
<td>European Free Trade Association</td>
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<tr>
<td>EMAAs</td>
<td>Euro-Mediterranean Association Agreements</td>
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<tr>
<td>EMFTA</td>
<td>Euro-Mediterranean Free Trade Area</td>
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<tr>
<td>EMP</td>
<td>Euro-Mediterranean Partnership</td>
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<tr>
<td>EMS</td>
<td>European Monetary System</td>
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<tr>
<td>EP</td>
<td>European Parliament</td>
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<tr>
<td>EPA</td>
<td>Economic Partnership Agreement</td>
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<td>EPS</td>
<td>Entry Price System</td>
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<td>EU</td>
<td>European Union</td>
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<td>FAO</td>
<td>Food and Agricultural Organisation</td>
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<tr>
<td>F&amp;V</td>
<td>Fruits and Vegetables</td>
</tr>
<tr>
<td>FTA</td>
<td>Free Trade Agreement</td>
</tr>
<tr>
<td>GAEC</td>
<td>Good agricultural and environmental condition</td>
</tr>
<tr>
<td>GAP</td>
<td>Good Agricultural Practice</td>
</tr>
<tr>
<td>GATT</td>
<td>General Agreement on Tariffs and Trade</td>
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<tr>
<td>GDP</td>
<td>Gross Domestic Product</td>
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<tr>
<td>GFL</td>
<td>General Food Law</td>
</tr>
<tr>
<td>Abbreviation</td>
<td>Full Form</td>
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<tr>
<td>GNI</td>
<td>Gross National Income</td>
</tr>
<tr>
<td>GSP</td>
<td>Generalised System of Preferences</td>
</tr>
<tr>
<td>GuySuCo</td>
<td>Guyana Sugar Corporation</td>
</tr>
<tr>
<td>HS</td>
<td>Harmonized Commodity Description and Coding System</td>
</tr>
<tr>
<td>IFA</td>
<td>Integrated Farm Insurance Standard</td>
</tr>
<tr>
<td>ILO</td>
<td>International Labour Organization</td>
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<tr>
<td>IMF</td>
<td>International Monetary Fund</td>
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<tr>
<td>IPPC</td>
<td>International Plant Protection Convention</td>
</tr>
<tr>
<td>JMD</td>
<td>Jamaican Dollar</td>
</tr>
<tr>
<td>LDCs</td>
<td>Least Developed Countries</td>
</tr>
<tr>
<td>LT</td>
<td>Lisbon Treaty</td>
</tr>
<tr>
<td>MCC</td>
<td>Modernised Customs Code</td>
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<tr>
<td>MFN</td>
<td>Most Favoured Nation</td>
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<tr>
<td>MM</td>
<td>Monitoring Mechanism</td>
</tr>
<tr>
<td>MRL</td>
<td>Maximum Residue Level</td>
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<tr>
<td>MS</td>
<td>Member States of the European Union</td>
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<tr>
<td>NIP</td>
<td>National Indicative Programmes</td>
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<tr>
<td>NT</td>
<td>National treatment</td>
</tr>
<tr>
<td>OECD</td>
<td>Organisation for Economic Co-operation and Development</td>
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<tr>
<td>OECS</td>
<td>Organisation of Eastern Caribbean States</td>
</tr>
<tr>
<td>OCTs</td>
<td>Overseas Countries and Territories</td>
</tr>
<tr>
<td>OIE</td>
<td>Office International des Epizooties (World Organisation for Animal Health)</td>
</tr>
<tr>
<td>PhD</td>
<td>Doctorate in Philosophy</td>
</tr>
<tr>
<td>PPP</td>
<td>Plant Protection Product</td>
</tr>
<tr>
<td>PTAs</td>
<td>Preferential Trade Arrangements</td>
</tr>
<tr>
<td>RASFF</td>
<td>Rapid Alert System for Food and Feed</td>
</tr>
<tr>
<td>RoO</td>
<td>Rules of Origin</td>
</tr>
<tr>
<td>RPTF</td>
<td>Regional Preparatory Task Force</td>
</tr>
<tr>
<td>RTA</td>
<td>Regional Trade Agreement</td>
</tr>
<tr>
<td>SAPS</td>
<td>Single Area Payment Scheme</td>
</tr>
<tr>
<td>SCM</td>
<td>Subsidies and Countervailing Measures</td>
</tr>
<tr>
<td>SDT</td>
<td>Special and Differential Treatment</td>
</tr>
<tr>
<td>SFA</td>
<td>Special Framework of Assistance</td>
</tr>
<tr>
<td>Abbreviation</td>
<td>Full Form</td>
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<td>--------------</td>
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<tr>
<td>SSA</td>
<td>Special System of Assistance</td>
</tr>
<tr>
<td>SP</td>
<td>Sugar Protocol</td>
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<tr>
<td>SPS</td>
<td>Sanitary and Phytosanitary measures</td>
</tr>
<tr>
<td>SPtS</td>
<td>Single Payment Scheme</td>
</tr>
<tr>
<td>STDF</td>
<td>Standards and Trade and Development Facility</td>
</tr>
<tr>
<td>Taric</td>
<td>Integrated Tariff of the European Communities</td>
</tr>
<tr>
<td>TEU</td>
<td>Treaty on European Union</td>
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<tr>
<td>TFEU</td>
<td>Treaty on the Functioning of the European Union</td>
</tr>
<tr>
<td>TRIMs</td>
<td>Agreement on Trade-Related Investment Measures</td>
</tr>
<tr>
<td>TRQ</td>
<td>Tariff-Rate Quotas</td>
</tr>
<tr>
<td>UBC</td>
<td>United Brands Company</td>
</tr>
<tr>
<td>UK</td>
<td>United Kingdom</td>
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<tr>
<td>UN</td>
<td>United Nations</td>
</tr>
<tr>
<td>UNCTAD</td>
<td>United Nations Conference on Trade and Development</td>
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<td>US</td>
<td>United States</td>
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<tr>
<td>USD</td>
<td>United States Dollar</td>
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<tr>
<td>WCO</td>
<td>World Customs Organisation</td>
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<td>WHO</td>
<td>World Health Organisation</td>
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<tr>
<td>WTO</td>
<td>World Trade Organisation</td>
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</tbody>
</table>
Chapter 1 – Introduction

1. Introduction

The issue of trade in agriculture merits an in-depth examination. Agriculture has caused controversy in trade negotiations at both the General Agreement on Tariffs and Trade (GATT) and the World Trade Organisation (WTO) level. Under Article 20 of the WTO Agreement on Agriculture (AoA), members of the WTO agreed to continue trade negotiations in order to achieve "the long-term objective of substantial progressive reductions in support and protection."\(^1\) Accordingly, a third WTO Ministerial Conference was held between 30 November and 3 December 1999 in Seattle, Washington. The aim of this meeting was to devise a programme for the new "Millennium Round" of trade negotiations. This round followed the eighth GATT multilateral trade negotiations, referred to as the "Uruguay Round," which resulted in the GATT 1994 and the establishment of the WTO. However, the meeting was unsuccessful due to insurmountable differences between countries and a failure to agree on an agenda for the negotiations.

Following the collapse of the Millennium Round of trade negotiations, the latest phase of multilateral trade negotiations, referred to as the "Doha Round", officially began at the fourth WTO Ministerial Conference held in Doha, Qatar in November 2001. These negotiations are pursued under the Doha Development Agenda\(^2\) and are still, at the time of writing, ongoing. This reflects the sensitivity of the agriculture sector. Conflicting issues between developed and developing countries over agricultural import rules have again contributed substantially to the collapse

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\(^1\) Article 20 of the WTO Agreement on Agriculture, adopted 15 April 1994.
Chapter 1 – Introduction

of the Doha Round talks in July 2008, thereby evidencing again the importance of agricultural protectionism for WTO members. There is no doubt that differences over agricultural protectionism in developed countries will continue to influence the development of international trade debates as well as the rules that apply to agriculture. It is therefore for this purpose that the thesis intends to examine the increasing complexity and diversity of market access issues for agricultural products from DCs to the European Union (EU), as successor to the European Community (EC) post the Lisbon Treaty.

During the course of writing this thesis, the Lisbon Treaty was signed by the EU Member States (MS) on 13th December 2007 and came into force on 1st December 2009. The Treaty replaced the previous Treaty establishing the European Community (EC Treaty or TEC) and the previous Treaty on European Union. As a result of this, the EC Treaty became the Treaty on the Functioning of the European Union (TFEU) and the previous Treaty on European Union was replaced by a new Treaty on European Union (TEU). The Lisbon Treaty abolished the three-pillar structure of the EU— the European Community pillar, the Common Foreign and Security pillar and the Police and Judicial Co-operation in Criminal Matters pillar. Article 1 TEU post Lisbon provides that “the Union shall replace and succeed the European Community.” As a result of this, reference is no longer being made to the earlier entities of European Community or Community Law. Reference is now exclusively made to the European Union (or Union) and European Union law (or

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3 The Lisbon Treaty replaced the draft Treaty establishing a Constitution for Europe which would merge the EC and EU Treaties into a single text. The European Constitution failed to enter into force because it was rejected by the peoples of France and The Netherlands in 2005.
4 The Common Foreign and Security Policy remains an intergovernmental area.
5 Article 1 of the consolidated version of the Treaty on European Union (TEU), OJ C 83 of 30.3.2010.
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Union law). The EU has now a single legal personality, thereby becoming "indisputably an actor under international law." In addition to this, the official name of the European Court of Justice was changed to the Court of Justice of the European Union (CJEU). The Court of First Instance is now known as the General Court. Consequently, in order to facilitate the reading of this thesis, the terms CJEU and General Court as well as EU and Union will be used throughout, even where reference is made to the earlier entities of the European Community or its predecessor, the European Economic Community.

Both agriculture and trade in agricultural products were included in the EU common market in 1957 leading to the establishment of the Common Agricultural Policy (CAP) in 1962. Most writers have long acknowledged that, since the establishment of the European Union CAP, agriculture has been a politically sensitive sector for the EU and consequently has received a high level of protection. The EU has employed a variety of trade-distorting practices to protect its own agricultural market which have affected the opportunities for developing countries (DCs) in agricultural trade. The EU agricultural protection measures include high tariffs, which are considered traditional trade barriers and export subsidies, as well as high internal farm support measures, which are referred to as "non-tariff barriers." These measures have helped the EU to protect its own agricultural sector, resulting in what many writers have termed the impenetrable

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6 Ibid, at Article 47.
Chapter 1 – Introduction

“Fortress Europe.” These measures have been detrimental to the global trading system and had a severe impact on the world’s poorest countries. They are also opposed to the objective of “free trade” within the WTO.

Nevertheless, the EU is also considered to be the largest trading partner of DCs and the main destination for their agricultural commodities. Agricultural products play a “significant role” in the export trade of DCs and agriculture is considered an important sector for the economic development and poverty reduction of many DCs. Around 75 percent of the world’s poorest people live in rural areas, and are wholly or partly dependent on agriculture as a key economic activity. Although the role of agriculture in countries’ development varies across regions, it should be noted that throughout the developing world, it represents around 9 percent of Gross Domestic Product (GDP) and provides more than half of the total employment. Accordingly, many DCs specialise in producing agricultural products in which they enjoy a comparative advantage. Their export specialisation is concentrated on a few tropical raw products such as sugar, coffee, cotton and fruit and vegetables, notably bananas.

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14 Ibid.
15 Ibid.
16 Ibid.
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Hence, to enhance trade in products of interest to DCs and to facilitate access to the EU market, the EU provides some DCs with reduced tariffs under regional or bilateral free trade agreements, commonly referred to as Preferential Trade Arrangements (PTAs.) These aim to promote DCs’ industrialisation and to accelerate their economic growth. The EU’s ability to enter into international trade agreements is provided by Article 207 TFEU. This article provides for the implementation of the EU’s Common Commercial Policy which was introduced to “form the external dimension of the creation of the [EU] Common Market.” The EU has an important network of PTAs with DCs under which they receive special tariffs rates for agricultural products. However not all DCs enjoy the same tariff concessions. The concessions depend on which products the countries export and the system under which the products are exported. A significant cleavage has developed between the countries sharing colonial links with the EU, and therefore which have special preferential arrangements, and the remainder of the world’s DCs which must operate outwith these schemes, thereby creating unfair competition between DCs. These issues have come to light in the context of the international trade rules set up by the WTO, which are analysed further in Chapter 3 of this thesis. As a member of the WTO, the EU trade policy is now fundamentally based on the WTO rules-based multilateral trading system, the primary purpose of which is to establish a “more open world trading environment.” This has lead to extensive reforms to the CAP, discussed further in

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20 The EU is the largest member of the WTO with its 27 Member States which are individually members of the WTO.
Chapter 2 of this thesis, and forcing the EU to make its PTAs with the African, Caribbean and Pacific (ACP) countries compatible with the WTO rules.

This thesis is using the WTO definition of agriculture provided in Annex 1(1)(i) of the WTO AoA. The WTO definition of agricultural products is narrower than that used by the EU CAP. Article 38(1) TFEU defines agricultural products as “the products of the soil, of stockfarming and of fisheries and products of first-stage processing directly related to these products.” This article also provides that the term “agricultural” subsumes fisheries. In contrast, the commodities covered by the WTO AoA are defined as Harmonized System (HS) Chapters 1-24, less fish and fish products. The reference to HS, which is examined in detail in Chapter 4 of this thesis, is the Harmonised System of Classification provided under the International Convention on the Harmonized Commodity Description and Coding System developed by the World Customs Organisation (WCO). The HS has replaced the older Brussels Tariff Nomenclature system which originated from the Nomenclature Convention of 1950. Over 200 countries currently apply the HS system to classify imports and exports products.

Agriculture is a vast sector which comprises a large variety of commodities. This includes food, fibres, and fuels, as well as raw materials such as bamboo. This thesis has as its focus agricultural food commodities in the form of unprocessed

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22 Article 38(1) of the consolidated version of the Treaty on the Functioning of the European Union (TFEU), OJ C 83 of 30.3.2010.
23 The WCO was formerly known as the Customs Co-operation Council.
26 This includes for example cotton and wool.
raw products. The focus on these products is important because it is considered that food products comprise nearly 80 percent of the total of international trade in agricultural goods.\textsuperscript{27} Agricultural food products are to be understood as to mean those that can be ingested by humans, including for instance, cereals as well as fruit and vegetables.

In light of the issues previously mentioned, this thesis argues that DCs are discriminated against by the EU provisions on agriculture and agricultural food trade. In order to research this point, this thesis critically examines the legal trade relationship between the EU and the Caribbean region of the ACP group within what has been called the "Fortress Europe" of agriculture. This thesis specifically analyses the rules enforced by the EU for the import of sugar and bananas and it focuses on the experience of two developing Caribbean countries, Guyana and Jamaica. Sugar and bananas are both Caribbean countries’ traditional and sensitive products, and hence are of economic and social importance for these countries. There are no other significant commodities exported to the EU market. However, exports of tropical fruit and vegetables represent possible developmental opportunities for these countries, but this in itself throws up its own legal problems, which will be examined in Chapter 6 of this thesis. Indeed, while these commodities are not covered by the CAP and therefore are not in competition with EU products, their exports are affected by the sanitary and phytosanitary requirements imposed by the EU.

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2. Post-colonial theory

The EU maintains post-colonial relations with Caribbean countries of the ACP Group and increases their trade opportunities to the protected EU agricultural market under the current Cotonou Agreement. This agreement, which will be examined in Chapter 5 of this thesis, has replaced the unilateral trading arrangements provided under the previous Lomé Conventions. The Caribbean region has experienced the impact of European colonisation, slavery and the plantation system. Hence all Caribbean countries share the same historical experiences. In light of these colonial ties, some aspects of post-colonial theory have been applied to this thesis.

The term “post-colonial” can be interpreted in a multitude of ways, with some of these varying widely. First, the term is commonly said to refer to the period following the end of colonialism, and is therefore only concerned with the historical period. The term “post-colonial” was first used in the early 1970s, in political theory, to “describe the predicament of nations which had thrown off the yoke of European empires after World War Two.” Indeed Farrell is of the view that the post-colonial period is characterised by the “dismantling of structures of [European] colonial control,” which started in the late 1950s, and reached a peak during the 1960s. The “decline and dissolution” of these structures is considered to represent a “remarkable historical moment, as country after country gained

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independence from the colonizing powers.\textsuperscript{32} The use of the term "post-colonial" is therefore justified by the fact that "so many millions now live in the world formed by decolonization."\textsuperscript{33}

However, it must be noted that this term has also been applied to different periods of history, geographical regions, and cultural identities,\textsuperscript{34} thereby complicating the simple historical period based model of post-colonial theory. The historical period linked to the term "post-colonial" has been broadened in order to refer to different kinds of oppressions suffered historically, which occurred before the start of the European colonial empires and after their end.\textsuperscript{35} The theory has also been used to address "the histories and current predicaments of 'internally colonized' cultures within the nation state in the 'developed' world."\textsuperscript{36} In 1975 for example, Hechter analysed the "continuing colonial relationship of subordination of the 'peripheral' nations of Scotland, Wales and Ireland by the English 'centre.'"\textsuperscript{37} San Juan is also of the view that this concept goes beyond "the cultural or literary phenomenon" of countries which have experienced colonisation.\textsuperscript{38} He is of the view that such a relation of "conqueror and conquered" is universal.\textsuperscript{39} This model of post-colonialism has been criticised for instance by Ahmad because they render the term "colonialism" a "trans-historical thing" and this would render the term "post-colonial" "analytically useless."\textsuperscript{40}

\textsuperscript{33} Ibid., p 1.
\textsuperscript{36} Op. cit. footnote no 64, p 9.
\textsuperscript{38} San Juan, Beyond Postcolonial Theory, New York: St Martin's Press, 1998, p 2.
\textsuperscript{39} Ibid., p 2.
Moreover, the term “post-colonial” has been used to locate “a specifically anti- or post-colonial discursive purchase in culture.”\textsuperscript{41} In such a sense, post-colonial theory is considered along with theories such as feminism and psychoanalysis, as a “major critical discourse in the humanities.”\textsuperscript{42} The term is thus used to describe “all the culture affected by the imperial process from the moment of colonization to the present day.”\textsuperscript{43} Accordingly, Prasad points out that the aim of this theory is to develop “a radical critique of colonialism/imperialism and neo-colonialism.”\textsuperscript{44} In other words, applying this theory means “an attempt to investigate the complex and deeply fraught dynamics of modern Western colonialism and anti-colonial resistance, and the ongoing significance of the colonial encounter for people’s lives both in the West and the non-West.”\textsuperscript{45} Accordingly, in the view of Prasad, post-colonialism is “grounded in the belief that justice and human freedom are indivisible, and that achieving true freedom and justice requires a genuine global decolonization at political, economic, and cultural levels.”\textsuperscript{46} Childs and Williams therefore point out that texts referred as “post-colonial” will be anti-colonial which “reject the premises of colonialist intervention”, thereby going “beyond” colonialism and its ideologies.\textsuperscript{47}

The term colonialism is not to be confused with imperialism. The former “involves the actual physical conquest, occupation, and administration of the territory of one

\textsuperscript{44} Ibid., p 5.
\textsuperscript{45} Ibid., p 7.
country by another." Imperialism on the other hand is considered as an “exercise of economic and political power by one country over another that may or may not involve direct occupation." For instance, the British and French empires both possessed a significant number of overseas territories spread over different continents, and were thus mostly colonial empires, while the existing brand of “American imperialism” is not considered to be colonial. Rather than trying to conquer and occupy countries, it is argued that the “American imperialism” seeks to expand its empire through controlling economic and financial institutions which possess great power, including the WTO, the World Bank and the International Monetary Fund (IMF). Nonetheless, the terms colonialism and imperialism have sometimes been used interchangeably. In contrast to the two aforementioned concepts, the term neo-colonialism is used in order to refer to “formal political independence of almost all of the erstwhile colonies of Europe.”

In light of the different claims with regard to the term “post-colonial”, what is to be considered as properly or truly post-colonial remains unclear. However it is not the aim of this thesis to analyse the EU-Caribbean trade relationship as a pattern of domination and subjugation. It is also not the aim of this thesis to provide a critique of colonisation or to try to “decolonise the mind” of the people previously colonised. Therefore the literary/cultural style of post-colonial theory will not be applied in this thesis. Rather, the thesis will mainly use the term as an indicator in the chronology of the process of decolonisation – a synonym to the period of

49 Ibid., p 5.
50 Ibid., p 5.
51 See for instance Ibid.
52 Ibid., p 6.
Chapter 1 – Introduction

history which followed independence in former colonies. Given this focus, the departure period-based model of post-colonial theory should be the dismantling of the European colonial empires because they are considered to represent "an unprecedented phenomenon, and one with global repercussions in the contemporary world."  

3. Definition of developing country

The terminology of "developing country" is of importance for the purpose of this thesis. However, it must be noted that there is no legal or globally accepted definition of the terms "developing country" and "developed country." A developing country is usually deemed to have a low level of social and economic development, as opposed to a developed country which is assumed to allow "all its citizens to enjoy a free and healthy life in a safe environment." The distinction between developed and developing countries depends on the criteria applied by the relevant international organisations. The WTO does not provide a definition of these terms, and allows the members to decide for themselves to which category they will belong. However, the WTO does designate LDCs in accordance with the list established by the UN which currently totals 48 countries.

The LDCs are considered to be the "poorest and weakest segment of the international community." Although the population of the 48 LDCs represent

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54 Ibid., p 2.
56 http://www.wto.org/english/tratop_e/devel_e/dlwho_e.htm
58 Ibid.
around 12 percent of world population, these countries’ share of world trade is low. The share of global GDP for these countries represents less than 2 percent and they account for about 1 percent of world trade in goods. These countries suffer from “weak human and institutional capacities, low and unequally distributed income and scarcity of domestic financial resources.” These countries depend on a few primary commodities as a main source of revenue and are therefore “highly vulnerable” to price fluctuations and shocks in world markets.

In order to be considered as an LDC, a country must satisfy the three criteria set out by the Economic and Social Council of the UN. First there is the low-income criterion, which is based on a per capita gross national income (GNI). The second criterion is the “Human Assets Index” which is based on the nutrition, health, education and adult literacy rate of the population. Finally, the third criterion is the “Economic Vulnerability Index” of the country, which takes into account several factors, such as its merchandise export concentration, its population size and its share of agriculture, forestry and fisheries in its GDP. In addition, according to the UN, “since the fundamental meaning of the LDCs category, i.e. the recognition of structural handicaps, excludes large economies, the population must not exceed 75 million.” In light of the above, LDCs, (to include in the context of the Caribbean region, Haiti) as classified by the UN, will be excluded from this thesis.

59 Ibid.
60 Ibid.
61 Ibid.
62 Ibid.
63 Ibid.
64 Ibid.
Chapter 1 – Introduction

Many other international organisations, such as the World Bank\(^{65}\) or the IMF,\(^{66}\) use strictly numerical classifications in order to make a difference between the terms of “developed country” and “developing country.” The World Bank categorises countries by income, by using the GNI per capita as the main criterion and thus refers to low-income and middle-income economies as developing.\(^{67}\) Nevertheless, the World Bank recognises the limitations of its criteria, and notes that “the use of the term is convenient; it is not intended to imply that all economies in the group are experiencing similar development or that other economies have reached a preferred or final stage of development. Classification by income does not necessarily reflect development status.”\(^{68}\)

On the other hand, according to the UN Statistics Division, “there is no established convention for the designation of ‘developed’ and ‘developing’ countries or areas in the United Nations system.”\(^{69}\) It observes that these terms are only “intended for statistical convenience and do not necessarily express a judgment about the stage reached by a particular country or area in the development process.”\(^{70}\) The UN classifies the United States (US), the EU and Japan as being “developed,” whereas it considers the Latin America and the Caribbean regions to be developing.\(^{71}\) However, given the gap in development between DCs, this thesis does not claim to cover all DCs but only the market issues which may affect most DCs’ unprocessed agricultural food products.

\(^{65}\) http://www.worldbank.org/
\(^{66}\) http://www.imf.org/external/index.htm
\(^{68}\) Ibid.
\(^{69}\) Op. cit. footnote no 47.
4. Introduction to the EU Common Agricultural Policy

Interventionist and protectionist measures in agriculture within the EU started even before the introduction of the CAP, which unifies the agricultural policy of the current 27 MS of the EU. Bureau and Matthews recognize three waves of EU protectionism in agriculture. First, there were important protection measures in the grain sector within the MS, which followed from the competition in grains, dairy products and meat from the newly settled areas of North America and Oceania, associated with the revolution in transportation and refrigeration during the last quarter of the nineteenth century. Second, during the depressed inter-war period (1918-1939), importers and exporters adopted or intensified interventionist and protectionist measures in agriculture. The third wave occurred as a consequence of the Second World War, which led to Western Europe being deficient in most food products. This post-war shortage was in the minds of the drafters of the Treaty of Rome signed in 1957.

The Treaty of Rome, and particularly its Article 2, provided that the main task of the EU was to create a common market. It also required the extension of the common market to “agriculture and trade in agriculture” and this had to be “accompanied by the establishment of a common agricultural policy.” So the

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74 Gardner said that “Most of the men who constructed the CAP were old enough to remember the First World War when Germany and its allies were brought close to starvation by Allied blockade.” See: Gardner, B., European agriculture: policies, production and trade London, Routledge, 1996, p 15.
76 Ibid. at Art 38.
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economic policies of the then nine MS\textsuperscript{77} had to be harmonized in order to become one.\textsuperscript{78} The CAP was therefore established in 1962. The CAP is the largest policy of the EU in terms of budgetary expenditure. It represents around 42.5 percent of the EU annual budget.\textsuperscript{79} Jack points out that in light of the provisions and particularly of the then Article 2 and 3 of the Treaty of Rome, the objectives of the CAP would be essentially economic and political.\textsuperscript{80} These objectives are now set out in Article 39(1) TFEU, and include increasing agricultural productivity, ensuring a fair standard of living for farmers, stabilising markets, assuring the availability of supplies and guaranteeing reasonable prices to consumers.\textsuperscript{81} As a consequence, the early CAP focused mainly on increasing domestic agricultural production\textsuperscript{82} "in order to reduce levels of imported produce, thereby safeguarding valuable foreign exchange reserves."\textsuperscript{83} The CAP became therefore a "system of support of farmers’ incomes mainly through support of market prices\textsuperscript{84} with certain elements of direct aid to incomes,"\textsuperscript{85} which helped to change the EU trade profile "from a net importer of agricultural produce\textsuperscript{86} into a major net exporter."\textsuperscript{87}

\textsuperscript{77} France, West Germany, Italy, the Netherlands, Belgium, Luxembourg, United Kingdom, Ireland and Denmark.
\textsuperscript{79} European Commission, "The European Union budget at a glance", Luxembourg, June 2010.
\textsuperscript{81} Op. cit. footnote no 22 at Article 39(1) (ex Article 33(1) EC Treaty).
\textsuperscript{82} Article 33(1) (a) EC Treaty.
\textsuperscript{83} Op. cit. footnote no 110, p 45.
\textsuperscript{84} This market intervention mechanism was at that time financed by the European Agricultural Guarantee and Guidance Fund, more often called by the French acronym FEOGA established by Council Regulation (EEC) No 25 of 4 April 1962 on the financing of the common agricultural policy, OJ 30, 20.04.1962, p 991-993.
\textsuperscript{86} This includes cereals, sugar, dairy products and beef.
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Direct farm income was given in line with the then Article 33(1)(b) EC Treaty which stated that the CAP shall “ensure a fair standard living” for farmers by increasing their earnings.\(^8\) Farmers’ income depended therefore upon their production levels. It is worth noting that Article 33(1) EC Treaty aimed also at protecting consumers.\(^9\) However, in the case of *Beus*, the CJEU stated that the objectives of the CAP established in Article 33(1) which were for “the protection of agricultural producers as well as of consumers, cannot all be realised simultaneously and in full.”\(^{10}\) Regardless, there ought to be a balance between farmers and consumers interests. Grant is of the view that the implicit central objective of the CAP was “to make farmers better off so that a reactionary and discontented peasantry would not disrupt progress towards European unity.”\(^{11}\) He goes on to point out that the social stability of rural areas was extremely important during the negotiations leading to the establishment of the common market. For instance France’s interest was to “ensure that its farmers secured outlets for their produce in Germany.”\(^{12}\) Therefore it is clear that from the beginning, farmers and their role in food production were the first priority for the MS.

The increase in production, as a result of direct subsidies, resulted in “uncontrollable overproduction causing agricultural supplies to increase faster than demand.”\(^{13}\) Consequently, this has led to important export subsidies which have resulted in “dumping” of cheap agricultural produce on world markets, thereby

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8. Article 33 (1)(b) EC Treaty (now Article 39(1)(b) TFEU).
9. Ibid. at Article 33 (1) (e).
12. Ibid., p 63.
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particularly affecting agricultural markets in the developing world.\textsuperscript{94} The EU’s CAP measures that protected farmers at the expense of DCs were widely criticized. The “Fortress Europe” of agriculture was considered to be closed to DCs’ exports and to undermine the local producers’ trading opportunities.\textsuperscript{95}

The EU’s CAP affected its agricultural trade with DCs and was very successful until the MacSharry reforms in 1992 which “essentially concentrated on increasing competitiveness by compensating necessary price cuts with direct income payments to European producers of agricultural products.”\textsuperscript{96} The 1992 reforms as well as the successive CAP reforms have been made in order to make the CAP a more market oriented policy.\textsuperscript{97} The extent to which this has been made will be analysed in depth in Chapter 2 of this thesis. While the CAP has, since 1999, evolved into a two pillar structure, the discussion in this thesis will be limited to the first CAP pillar. The latter covers the mechanisms of domestic support which include market prices and farmers’ incomes. They account for the bulk of EU CAP expenditure\textsuperscript{98} and have been the most criticised instruments of the CAP. The second CAP pillar comprises payments for rural development measures in the EU and is therefore not relevant to EU external relations.

\textsuperscript{94} Ibid.


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5. Introduction to the agricultural trade rules in the WTO

There is a clear link between the CAP reforms and the ongoing GATT/WTO trade negotiations. Hence, the focus on the WTO in this thesis is important. The WTO is the only global organisation providing a “common institutional framework for the conduct of trade relations among its Members,”99 and making international trade rules binding on all members.100 The WTO system thus ensures a “fairer and more open multilateral trading system” between countries.101 The WTO was established in 1995 and replaced the GATT as an international organisation. Nevertheless, GATT 1994 and its predecessor, GATT 1947, remain within the WTO’s framework for trade in goods. GATT 1994, as an update of GATT 1947, is “legally distinct” from the latter.102 GATT 1994 resulted from the Uruguay Round of Multilateral Trade Negotiations which was launched pursuant to the Ministerial Declaration adopted at Punta del Este (Uruguay) on 20 September 1986. These negotiations closed in April 1994 in Marrakech (Morocco) with the signature of the final agreements. These agreements include inter alia the WTO AoA, the Agreement on the Application of Sanitary and Phytosanitary Measures (“SPS Agreement”), referred to in Chapter 4 and discussed further in Chapter 6 of this thesis, the Agreement on Subsidies and Countervailing Measures (“SCM Agreement”),103 as well as the Understanding on Rules and Procedures Governing the Settlement of Disputes (“Dispute Settlement Understanding” or “DSU”).104

The WTO’s procedure for settling trade disputes between WTO members under

100 Ibid. at Article 2(2).
101 Ibid. at Preamble (2).
102 Ibid. at Article 2(4).
103 The WTO AoA, the SPS Agreement and the SCM Agreement are contained in Annex 1A of the Agreement establishing the World Trade Organisation.
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the DSU, as analysed in Chapter 3 of this thesis, is an important mechanism within the WTO. It clarifies the provisions of the GATT/WTO agreements, and gives assurance that “the rights and obligations of members under the covered agreements” are respected and protected.\(^{105}\) However, the effectiveness of the system is undermined by the weak aspects of the remedies and sanctions offered to WTO members.\(^{106}\) The limitations of the DSU process need to be examined because the DSU is the only system of dispute resolution available to DCs to denounce unfair trade rules applied by developed members of the WTO. Each EU MS, together with the EU, have all signed up to the aforementioned WTO agreements, as well as GATT 1994, which are all referred to as “Multilateral Trade Agreements.”\(^{107}\) These agreements are all of relevance to international trade in goods,\(^{108}\) and each will be covered in different chapters of this thesis.

The AoA and the SPS Agreement, which will be examined in Chapters 3 and 6 respectively, are the most important agreements under the WTO that impact on agricultural trade. Because SPS requirements can serve as market access barriers, the SPS Agreement was established at the international level in order to “minimize their negative effects on trade.”\(^{109}\) The SPS Agreement authorises WTO member countries to establish their own human, animal health (sanitary) and plant health (phytosanitary) measures,\(^{110}\) provided that they are applied in line with the aims and conditions of the Agreement.

\(^{105}\) Art 3(2) of the Understanding on Rules and Procedures Governing the Settlement of Disputes, adopted 15 April 1994.
\(^{108}\) Ibid. at Article 2(2).
\(^{110}\) Ibid. at Article 2(1).
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On the other hand, since agriculture was largely exempt from the GATT rules, the conclusion of the WTO AoA in 1994 has “considerably strengthened the GATT rules on agriculture.”\textsuperscript{111} This agreement has brought for the first time “specific disciplines into global agriculture trade.”\textsuperscript{112} It establishes rules in three areas of agricultural policy, referred to as the three “pillars” of agricultural support.\textsuperscript{113} These are namely market access, domestic support and export subsidies. In light of this, the AoA therefore recognises that there are different ways to protect farmers. The three elements of the AoA have had an impact on the EU CAP measures, although it was the AoA rules on direct domestic support which have had the “greatest and most direct impact in the short term.”\textsuperscript{114} Under the WTO AoA, signatories have committed themselves to reduce agricultural support and protection and to continue to negotiate for further reductions, as provided by Article 20 of the WTO AoA. These negotiations are now part of the WTO Doha Round of multilateral trade negotiations which are currently ongoing.

DCs form a large percentage of the WTO membership and are classified as such by self-selection. The preamble to the Agreement Establishing the World Trade Organisation (the “WTO Agreement”) recognises sustainable economic development as a central objective of the WTO and states that DCs’ economic development’s needs should be met from international trade.\textsuperscript{115} With this aim, members are encouraged to liberalise trade in order to achieve this objective. With

\textsuperscript{113} The pillars established the states of play in the Uruguay Round trade negotiations.
\textsuperscript{115} Op. cit. footnote 129 at Preamble (2).
trade and development being important criteria in the WTO, the current WTO Doha Round of negotiations focuses particularly on the needs of DCs within the WTO. In order to take into account the special development needs of DCs and facilitate their integration into the world trading system,\textsuperscript{116} the WTO agreements contain special provisions which provide differential and more favourable treatment for DCs in respect of their commitments under the WTO agreements. However it must be noted that this concept of "special and differential treatment" (SDT), was totally missing during the formation of the GATT. Despite the fact that eleven of the original twenty-three signatories of the GATT 1947 were DCs,\textsuperscript{117} they were not formally recognised as a group and their development situation was not taken into account.\textsuperscript{118} Accordingly, their rights and obligations were not covered by any special provisions or exceptions, and their claim for an increase of market access for agricultural products, which are of particular interest to them, was "largely ignored."\textsuperscript{119} These products on the contrary have always been more and more protected in developed countries since the formation of GATT/WTO.\textsuperscript{120}

Such a differentiation between countries would be in conflict with the fundamental principles of most-favoured-nation (MFN) principle and the national treatment (NT) principle established in Articles 1 and 3 of GATT 1947.\textsuperscript{121} In line with these


\textsuperscript{117} The United States of Brazil, Burma (Myanmar), Ceylon (Sri Lanka), the Republic of Chile, the Republic of China, the Republic of Cuba, India, Lebanon, Pakistan, Southern Rhodesia (Zimbabwe), Syria. See: WTO, "Background Document for High-Level Symposium on trade and Development", Geneva, 17-18 March 1999.

\textsuperscript{118} Op. cit. footnote no 82.

\textsuperscript{119} Ismail, F. "Rediscovering the Role of Developing Countries in GATT before the Doha Round", The Law and Development Review, 2008, 1(1) pp 50-72, p 50.

\textsuperscript{120} Ibid., p 50.

\textsuperscript{121} In accordance with the MFN principle, WTO members cannot discriminate between their trading partners. Under the NT principle, foreigners and locals must be treated equally. Hence, discrimination between imported products and domestic products is prohibited.
principles, the GATT contracting parties confirmed the necessity of “reciprocal and mutually advantageous arrangements,” and stressed the importance of “the elimination of discriminatory treatment in international commerce.”\textsuperscript{122} The two pillars of SDT are the principle of non-reciprocity which was introduced at the end of the GATT Kennedy Round in 1964, and the establishment of preferential market access for DCs which developed over a period of time, from the early 1970s onwards, with the inception of the Generalised System of Preferences (GSP). Under the GSP, developed countries offer non-negotiated, and therefore unilateral preferential tariff treatment to products imported from DCs. The EU GSP, which was implemented for the first time in 1971, will be examined in Chapter 5 of this thesis.

The concept of SDT was reinforced with the WTO’s Doha Round trade negotiations. The importance of SDT provisions was emphasized in the “Doha Ministerial Declaration,” which reaffirmed that they are an “integral part of the WTO Agreements.”\textsuperscript{123} Accordingly, the Ministers agreed to review the SDT provisions with the aim of “strengthening them and making them more precise, effective and operational.”\textsuperscript{124} There are different forms of SDT in the WTO agreements which will be analysed in depth in Chapter 3 of this thesis. These include the modulation of commitments and trade preferences, with the latter being of particular importance for the purpose of the thesis. Indeed, a significant proportion of DCs enjoy preferential access to developed countries’ agricultural

\textsuperscript{122} Preamble (2) of GATT 1947.
\textsuperscript{123} Op. cit. footnote no 2 at para 44.
\textsuperscript{124} Ibid., para 44.
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markets.125 According to economists, the most important objective of trade preferences is to “create the necessary stimulus to promote trade from developing countries”126 and therefore restrain protectionism.127 The latter has been broadly defined by Regan as “regulation adopted for the purpose of improving the competitive position of some group of domestic economic actors vis-à-vis their foreign competitors.”128 As a rule-based system fighting against protectionism, the WTO allows the establishment of PTAs. Article XXIV of GATT and the so-called Enabling Clause of 1979 establish the rules and conditions for establishing such arrangements in the area of trade in goods.129 The Enabling Clause, which will be examined in detail in Chapter 3 of this thesis, is the WTO legal basis for the GSP.

GATT Article XXIV, which will be also examined in further detail in Chapter 3 of this thesis, permits the establishment of customs unions, free trade areas and interim agreements, with the latter leading to the formation of a custom union or a free trade area.130 Under these arrangements, tariff barriers on trade and other restrictive measures must be reduced or eliminated between the constituent countries of the bloc.131 However, in contrast to a free trade area, members of a custom union, such as the EU, apply a common external tariff. Up to September 2009, the WTO has been notified of the existence of 452 regional trade agreements.

128 Ibid., p 962.
130 Op. cit. footnote no 152 at Article XXIV (5).
131 Ibid. at Article XXIV (5)(a) and (b).
agreements, \(^\text{132}\) 261 of which are currently in force. Of these, 160 were notified under GATT Article XXIV and 28 under the Enabling Clause. \(^\text{133}\) Matsushita et al. point out that the WTO received large notification of the PTAs mainly after 1993 with the EU being a “champion” in establishing PTAs. \(^\text{134}\)

6. Introduction to the EU trade regime vis-à-vis the ACP Caribbean region

Following the accession of the UK to the EU in 1973 and in order to include the Commonwealth countries, \(^\text{135}\) the EU signed on 28th February 1975 in Lomé, Togo, a Convention with ACP countries. \(^\text{136}\) The aim of this first Lomé Convention (Lomé I) was to promote trade between the ACP States and the EU, taking into consideration the varying levels of development in each of the ACP countries and particularly, the “need to secure additional benefits” in respect of their trade, to allow for an increase in trade, and to “improve” the access conditions under which the products could reach the EU’s internal market. \(^\text{137}\) Accordingly, the Convention comprised \textit{inter alia} a system of development aid and non-reciprocal trade preferences. Lomé I, which expired in 1980, has been renegotiated and revised three times. \(^\text{138}\) Under the successive Lomé Conventions, which were colonial in origin, the EU offered its former ACP colonies non-reciprocal duty- and quota-free access for their export of primary products, with the exception of products subject to the EU CAP, in order to help their economic development and social

\(^{132}\) Notification of PTAs to the WTO is required under Article 4 of the Enabling Clause.

\(^{133}\) The WTO’s Committee on Regional Trade Agreements, Draft Report (2009) of the Committee on Regional Trade Agreements to the General Council, WT/REG/W/53, 01/10/2009, para. 4.


\(^{137}\) Ibid. at Article 1.

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progress.\textsuperscript{139} Trade development has been a key objective in the four Lomé Conventions. It was considered by both the ACP countries and the EU that the Lomé Conventions aimed to enable the ACP States to "achieve the stability, profitability and sustained growth of their economies."\textsuperscript{140} In pursuit of this aim, the EU committed itself to "implement a system for guaranteeing the stabilization of earnings from exports by the ACP States to the [EU] of certain products on which their economies are dependent and which are affected by fluctuations in price and/or quantity."\textsuperscript{141} Accordingly, the EU was giving ACP countries more preferential treatment than other countries for their exports of products covered by the CAP. Selected traditional ACP suppliers of bananas, rum, sugar and beef were granted preferential market access under the special commodities protocols provided in conjunction with the four Lomé Conventions. These protocols have all been established in order to "accommodate the then UK Commonwealth preferences" on the UK's accession to the EU.\textsuperscript{142} The countries benefiting from these protocols were mainly part of the Commonwealth Caribbean.

The protocol on ACP sugar and the protocol on bananas have been of particular significance to the economies of the Commonwealth Caribbean countries. However, the provisions of these protocols were not comparable. Under the Sugar Protocol (SP), the EU promised to buy specific quantities of cane sugar from ACP countries at guaranteed prices, and ACP countries undertook to deliver the agreed quantities.\textsuperscript{143} The SP provided for a list of 20 ACP beneficiaries with the

\textsuperscript{139} Op. cit. footnote no 166 at Preamble (3) and Article 2(1).
\textsuperscript{140} Ibid. at Article 16.
\textsuperscript{141} Ibid. at Article 16.
\textsuperscript{143} Article 1(1) of Protocol No 3 on ACP sugar.
corresponding specific sugar quotas to be imported.\textsuperscript{144} Jamaica and Guyana were both beneficiaries of the SP. As provided by Article 1(2) of the SP, in the event of serious disturbances in the EU sugar sector, the EU could not apply safeguard measures as permitted under the WTO AoA,\textsuperscript{145} in order to reduce the agreed quantities set out in the SP.\textsuperscript{146} While the Lomé Convention had to be renegotiated before the end of its expiration period, the SP had a separate legal existence.\textsuperscript{147} It was concluded for an indefinite period and had to remain in force even after the expiry of each Lomé Convention.\textsuperscript{148} Article 10 of the SP provided that the protocol may be denounced by the EU or ACP countries, subject to two years’ notice being given.\textsuperscript{149}

In contrast, the Banana Protocol (BP) had no contractual provisions on guaranteed prices or obligations to purchase bananas from ACP countries. Instead, it contained a general obligation which was legally binding on the EU, to safeguard market access for ACP banana producers.\textsuperscript{150} Indeed, under this protocol the EU promised that with regard to ACP exports to the EU market, “no ACP state shall be placed, as regards access to its traditional [EU] markets and its advantages on those markets, in a less favourable situation than in the past or at present.”\textsuperscript{151} However, the BP did not contain a list of beneficiary countries. Jamaica has been a traditional exporter of bananas to the EU market and benefited from preferential market access under the BP. However, it must be noted that Guyana is not an export-

\textsuperscript{144} Ibid. at Article 3.  
\textsuperscript{145} Op. cit. footnote no 1 at Article 5.  
\textsuperscript{146} Op. cit. footnote no 173 at Article 1(2).  
\textsuperscript{148} Op. cit. footnote no 173 at Article 1(1) and Article 10.  
\textsuperscript{149} Ibid. at Article 10.  
\textsuperscript{151} Article 1 of Protocol 6 on bananas of Lomé I, Protocol 4 of Lomé II, Protocol 4 of Lomé III and Protocol 5 on bananas of Lomé IV.
oriented banana producer. It does have areas of banana plantation and cultivation but the output is consumed locally and destined for the local, regional and extra-regional markets.

The EU preferential trade arrangements provided to ACP sugar and bananas producers were completed by the protectionist measures under the EU Common Customs Tariff framework (CCT), which imposed high import tariffs on products of EU and ACP’s interests. The EU, as a custom union, has set up an external CCT in 1968 which harmonises national tariffs applied to products imported into the EU from non-members countries. The customs rates are decided upon annually by the Council of the EU based on a proposal from the Commission. There is a close relationship between the EU’s trade and development policy and its customs law. Therefore, Chapter 4 of this thesis examines the legal structure of the import of agricultural commodities into the EU market. This chapter will particularly focus on the EU CCT and import rules for agricultural commodities subject to the CAP.

7. The changing EU-ACP trade regime

The historical trade relationship between the EU and the ACP Group had to be reformed in light of the WTO rules, as examined in Chapter 3 of this thesis. The EU negotiated the Cotonou Agreement, which was then signed on 23 June 2000, with subsequent revisions being made to the original text in 2005 and 2010.

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154 Ibid. at Article 31.
155 Agreement amending for the second time the Partnership Agreement between the members of the African, Caribbean and Pacific Group of States, of the one part, and the European Community and its Member States, of the other part, signed in Cotonou on 23 June 2000, as first amended in
order to be compatible with WTO trade rules, the trade arrangements set out in the Cotonou Agreement have been replaced since 2008 by Economic Partnership Agreements (EPAs), which are examined in Chapter 5 of this thesis. The EPAs are designed as free trade agreements which comply with GATT Article XXIV and provide for reciprocal duty-free access between the members of the trade area. Therefore, ACP countries continue to receive preferential access to the EU market, but the EU had to convert the previous system of unilateral trade preferences into reciprocal ones. The only comprehensive or “full” EPA\textsuperscript{156} signed so far is with the Caribbean region which will be analysed in depth in Chapter 7 of this thesis. The EPA was signed on 15\textsuperscript{th} October 2008 at Barbados between the EU and the Caribbean Forum of Caribbean States (CARIFORUM). The CARIFORUM, which was established in 1992, comprises the members of the CARICOM and the Dominican Republic.\textsuperscript{157} CARICOM, which will be examined in detail in Chapter 7 of this thesis, is a regional organisation established by the Treaty of Chaguaramas. The Treaty was signed on 4\textsuperscript{th} July 1973 by the Governments of four British Commonwealth Caribbean countries—Barbados, Guyana, Jamaica and Trinidad and Tobago—in order to “elaborate an effective regime by establishing and utilising institutions designed to enhance the economic, social and cultural development of their peoples.”\textsuperscript{158} CARICOM currently comprises 15 members including Suriname, as a Dutch-speaking country, and Haiti, a French-speaking island.\textsuperscript{159}

These countries are also all signatories of the Cotonou Agreement. It must be noted...
that while Cuba has been a member of the CARIFORUM since 2001, it has remained outside the EPA negotiations, as it did not sign the Cotonou Agreement. Montserrat which is also a member of CARICOM did not sign the EPA, as it is not independent, and remains a British overseas territory and hence outwith the EU.

The EU has signed interim EPAs with the other six ACP regions, namely West Africa, Eastern and Southern Africa (ESA), East African Community (EAC), Central Africa, Southern African Development Community (SADC) and the Pacific. In contrast to full EPAs, interim EPAs cover only trade in goods. In line with GATT Article XXIV, the interim EPAs shall include a plan and schedule for the formation of a free-trade area within a reasonable period of time.

In the context of EPAs as well as the EU internal reforms in sugar and bananas examined in Chapters 8 and 9 of this thesis, the SP was denounced by the EU in 2007 and then dismantled in 2009. In addition, the original BP was replaced by a second protocol. However, the provisions of this protocol have been weakened. There are now no provisions dealing with ACP market access to the EU. Consequently, the EU is not legally committed to continue to provide preferential market access for bananas from ACP countries. As a result of this, all ACP countries, as well as all LDCs now receive duty and quota free access to the EU.

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160 All 15 members of the Economic Community of West Africa (ECOWAS) and Mauritania.
161 Comoros, Djibouti, Eritrea, Ethiopia, Madagascar, Malawi, Mauritius, Seychelles, Sudan, Zambia and Zimbabwe.
162 Burundi, Kenya, Rwanda, Uganda and Tanzania.
163 All six members of the Economic Community of Central African States (CEMAC), plus the Democratic Republic of Congo and Sao Tomé and Principe.
164 Angola, Botswana, Lesotho, Namibia, Mozambique, Swaziland and South Africa.
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sugar and bananas market. These issues will be discussed in detail in Chapters 8 and 9 of this thesis. Among Caribbean countries of the ACP Group benefitting from the SP, Guyana and Jamaica were granted the highest sugar quotas for export to the EU.\textsuperscript{166} These two countries rely on cane sugar exports to the EU and have long benefited from preferential access under the SP, which has been crucial for the development of their sugar sector.\textsuperscript{167}

In light of the erosion of trade preferences for ACP countries, diversifying towards the export of non-traditional crops such as exotic fresh fruits, other than bananas and vegetables can be a possible development opportunity for Caribbean countries.\textsuperscript{168} These commodities, which are not produced in EU countries, are not covered by the CAP. Consequently, they are not competing products, and Caribbean countries have a clear comparative advantage in exporting these products to the EU market. However, DCs are confronted with meeting food safety measures applied by EU legislation, along with standards imposed by the private sector. The strictness of these measures can affect DCs' ability to access the EU market, and ultimately restrict their effective participation in international trade. Using the example of tropical fruits, Chapter 6 of this thesis will examine the difficulties that DCs are facing with the variety of food safety standards established within the EU market.

8. Introduction to the EU banana and sugar regime

Bananas are the most traded fruit in the world, with the EU being the “largest consumer and importer of bananas in the world.”169 Prior to 1993 and in light of the history of colonialism, some EU MS, such as France and the UK, imported bananas solely from their former colonies in order to guarantee these countries a market for their products.170 ACP bananas countries were given duty-free access for specific quantities of bananas to these markets. In accordance with the creation of the Single European Market in 1993, the EU has established a Common Market Organisation for Bananas (CMOB) under Council Regulation 404/93.171 The EU CMOB regime which will be examined in detail in Chapter 9 of this thesis, establishes a single market for bananas, thereby replacing the previous different national banana market policies in the EU MS. The CMOB permits the EU market to be supplied with bananas of “uniform and satisfactory quality” at “profitable prices guaranteeing an adequate income for producers” while maintaining a balance between the different sources of supply.172 The CMOB covers fresh or dried bananas, excluding plantains, as well as frozen bananas and processed products from bananas.173 The EU CMOB is based on the use of import tariffs, the special safeguard provisions permitted under the WTO AoA,174 export subsidies, production quotas and a guaranteed minimum price.

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172 Op. cit. footnote no 201 at Preambles (3), (4) and (10).
173 Ibid. at Article 1(2).
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The EU produces a small quantity of bananas in its outermost regions situated in tropical or sub-tropical areas. In addition to its own banana production, the EU has two separate import systems for bananas, subject to differing import treatment which will be examined in Chapter 9 of this thesis. The EU banana regime, which developed in light of the Lomé commitments, discriminated in favour of ACP countries at the expense of other banana-exporting Latin American countries. The EU CMOB consisted of a duty-free quota for bananas from ACP countries, and imposed a tariff-quota system to the imports of all other imported bananas, mainly from Latin American countries. Bananas produced in Latin America are referred to as “dollar bananas” because these bananas are owned and controlled by US multinational companies.

Prior to the 1993 banana regime, all EU MS, with the exception of Germany, were giving duty-free access to bananas imported from ACP countries, whereas “dollar bananas” were facing a common customs tariff of 20 percent.\(^{175}\) Germany was not bound to former colonies and was mainly importing bananas from Latin American countries which had “modern and cost-efficient banana industries.”\(^{176}\) As will be further discussed in Chapter 9 of this thesis, Germany was thus opposed to the provisions of the 1993 CMOB which restricted market access of all non ACP bananas.

The division between the EU former colonies and MFN DCs has led to strong reactions from DCs, as well as from some EU MS, against the 1993 EU CMOB. Consequently trade in bananas has swiftly become a thorny issue leading in 1995

\(^{176}\) Op. cit. footnote no 200, p 165.
to what was referred to as the "greatest challenge" to the EU banana regime within the WTO, which is examined in detail in Chapter 9 of this thesis.  

Sugar is considered to be one of the most highly trade-distorted agricultural commodities of the world. It has been one of the last heavily subsidized and protected agricultural sectors in the EU, and has avoided extensive CAP reforms up until 2006. Sugar became fully integrated into the CAP in 1968 when the EU established a common policy regime for sugar, referred to as the common organisation of the market (CMO) in sugar. Products covered under the CMO in sugar are raw and white sugar, as well as two liquid substitutes for sugar, isuglucose and insulin syrup. In order to protect EU sugar producers from external competition, the CMO in sugar comprised a complex system of market management tools. These include the use of import tariffs, export subsidies, production quotas and guaranteed prices. Sugar is considered the key example of the EU's preferential trade relations with DCs, and was only imported under preferential trade agreements from ACP countries, as well as India, subject to quotas. As a result, the EU became the second largest sugar importer. The high profile dispute concerning aspects of the EU sugar regime was challenged by Brazil, Australia and Thailand. This will be examined in Chapter 8 of this thesis.

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178 Huan-Niemi, E., "The impact of further tariff reduction on the EU sugar sector in the forthcoming multilateral round", Agricultural and Food Science in Finland, 2003, 12(3-4), pp. 147-154, p 149.
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The chapter will also provide an analysis of the EU’s sugar regime before and after the 2006 reforms.\(^\text{182}\)

It must be noted that trade in sugar and bananas within the EU market are also subject to the rules on competition provided, post-Lisbon, in Articles 101 and 102 TFEU. These rules, which regulate the operation of the EU MS’ national markets, ensure that “all agreements between undertaking, decisions by associations of undertaking and concerted practices” do not restrict or distort competition and trade between the MS.\(^\text{183}\) Equally, an undertaking in a dominant position is also prohibited from abusing of that position within the common market in such way that it may affect trade between the MS.\(^\text{184}\) Accordingly, the competition rules ensure that the operation of undertakings within the internal market do not impede the EU principle of free movement of goods. Since these rules are only concerned with trade between the EU MS, all of which are developed countries, the issue of competition law will be excluded from the scope of this thesis.

9. Introduction to the EU preferential trade arrangements

One of the objectives of the WTO is to ensure that DCs secure a proper share in the growth of international trade proportionate to their economic development needs.\(^\text{185}\) Hence, as discussed above, the WTO provides that developed countries are allowed to grant preferential tariff treatment to DCs. The EU, along with the US, is one of the largest traders in the world and an important user of trade

\(^{182}\) European Communities- Export subsidies on sugar: request for consultations by Australia, 1 October 2002 (WT/DS265/1), request by Brazil, 1 October 2002 (WT/DS266/1) and request by Thailand, 20 March 2003 (WT/DS283/1).


\(^{184}\) Ibid. at Article 102.

\(^{185}\) Op. cit. footnote no 129 at Preamble (2).
preferences. The EU PTAs with DCs are major exceptions to the general system of import rules which the EU normally operates, and hence are another key trade policy issue for the agri-food sector in DCs. Therefore, Chapter 5 of this thesis addresses the issue of preferential and non-preferential trade arrangements through the examination of three legal trade arrangements between the EU and DCs and in particular the trade concessions granted to these countries. The chapter will exclude PTAs established between DCs, the so-called "south-south cooperation," which are formed to promote the development of DCs. Chapter 5 will make a comparative analysis between trade preferences offered under the EU GSP scheme, under the Cotonou Agreement and those granted to Mediterranean countries under the Euro-Mediterranean agreements.

The EU offers non-reciprocal tariff reductions to all DCs under the GSP of the Enabling Clause in order to increase trade opportunities and market access of these countries.\(^{186}\) The EU GSP is only open to countries listed under the scheme. The GSP covers all manufactured exports but remains restrictive with regards to imports of agricultural commodities falling under the CAP. The GSP scheme comprises three different preferential arrangements.\(^{187}\) First, there is the general GSP arrangement, which is currently open to 176 DCs. Second, there is the GSP+, which is a special incentive arrangement for sustainable and good governance.\(^{188}\) The GSP+ provides additional tariff reductions to GSP beneficiary countries.


\(^{188}\) Ibid. at Article 8.
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considered as vulnerable and which ratify and implement international conventions, listed by the EU for sustainable development and good governance.

Third, there is the “Everything But Arms” (EBA) arrangement which was introduced in 2001 for the LDCs, as recognised by the UN.\textsuperscript{189} The LDCs are the only GSP countries enjoying full trade liberalisation for products covered by the CAP. Since LDCs are not the subject matter of this thesis, the discussion will focus on the general GSP arrangement and the GSP+, and will not go into the EBA in any great detail.

Moreover, the EU has signed free trade agreements with other DCs which give them preferential access to the EU protected market. ACP countries, being the main focus of this thesis, are also the beneficiaries of the GSP scheme, but they are given more favourable treatment under the EPAs, signed pursuant to the Cotonou Agreement. Accordingly, since 1\textsuperscript{st} January 2008, ACP countries that have signed interim EPAs have been granted duty- and quota-free access to the EU market. These agreements will be examined in Chapters 5 and 7 of this thesis.

Finally, the EU maintains special economic and political relations with its Mediterranean neighbours under the Euro-Mediterranean Partnership. The EU had concluded bilateral Association Agreements with Mediterranean countries providing for reciprocal trade preferences. Under these agreements, Mediterranean countries receive duty-free access for manufactured goods and tariff reductions for exports of agricultural food products. The aim of concluding these agreements is to

\textsuperscript{189} Council Regulation (EC) No 416/2001 of 28 February 2001 amending Regulation (EC) No 2820/98 applying a multiannual scheme of generalised tariff preferences for the period 1 July 1999 to 31 December 2001 so as to extend duty-free access without any quantitative restrictions to products originating in the least developed countries, OJ L 60, 1.3.2001.
create the Euro-Mediterranean Free Trade Area (EMFTA) consisting of trade liberalisation in goods and services between the EU and its Mediterranean partners, as well as between Mediterranean countries themselves. This preferential trading relationship maintained by the EU is important and could indirectly have an impact on the ACP EPAs.

Each EU preferential trade arrangement also contains its own rules of origin (RoO). These rules are applied in order to determine the origin of a product that benefits from tariff preferences. This system aims to prevent countries from using the country benefitting from preferential import tariff as a transit to obtain duty-free or reduced tariff entry. These rules require that “goods re-exported from one member country to another without duty must have been substantially produced or processed within the re-exporting country.” RoO imposed on unprocessed agricultural commodities “concern whether a product is wholly obtained, whether it contains certain inputs or whether certain inputs make up a certain part of the price.” The main difference between RoO applied in PTAs lies in the cumulation of origin system which allows goods which have originated in one country to obtain the origin of another participating country in which they are further processed or altered. These rules vary from one scheme to another. While this thesis has as its focus primary agricultural food products, the issue of preferential and non-preferential RoO which particularly affect DCs exporting processed foods will also be analysed for the purpose of comparing the operation of the three aforementioned schemes.

190 Achterbosch, T., van Tongeren, F. And de Bruin, S., “Trade preferences for developing countries”, Agricultural Economics Institute (LEI), 2003, p 20.
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10. The reforms brought by the Lisbon Treaty

On 1<sup>st</sup> December 2009, the Lisbon Treaty (LT) entered into force and has brought important institutional changes within the EU and altered the distribution of responsibility over EU policies. The LT has also brought important changes to the EU CAP. The CAP is given a legal base in Article 38 TFEU,\(^{194}\) which, for the first time, also explicitly refers to the EU common fisheries policy. The LT did not alter the general objectives of the CAP, as previously mentioned, which are essentially economic, political and market-related. The main changes brought to the EU agricultural policy, as analysed in depth in Chapter 2 of this thesis, are twofold. The responsibility for decision-making in this area, which has always been exclusively granted to the EU, is now shared between both the EU and the MS. MS are therefore allowed to create their own agricultural laws, applying for the first time the concept of subsidiarity, pursuant to Article 5 TEU post-Lisbon.

Moreover, the LT has also extended the ordinary legislative procedure to agriculture in Article 43 of the TFEU. It specifically states that the European Parliament (EP) and the Council shall now jointly “establish the common organisation of agricultural markets and the other provisions necessary for the pursuit of the objectives of the common agricultural policy.”\(^{195}\) Before Lisbon the EP was only able to offer advice, while the Council was solely responsible for determining the main contents of the CAP.\(^{196}\) The LT makes, therefore, for the first time, the EP a co-legislator with the Council of the EU in the area. The EP is now able to amend, approve or reject EU agricultural laws jointly with the Council. The LT gives the EP the opportunity to extend further its prerogatives to agriculture.


\(^{195}\) Ibid., Article 43.

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and it establishes a formal influence of the EP in all legislative policy decisions in the area. The EP is the only directly elected EU institution, and it represents the people of the EU. In light of this, any final agricultural laws will reflect the citizens' views. The LT also gives the EP authority with regard to the allocation of money to the EU agricultural policy and powers over international agricultural trade agreements. These internal changes are likely to have a consequential impact on DCs' export of agricultural food products to the EU, potentially allowing the EP and MS, pressured by consumers and farmers' opinions, to reinforce the EU's protectionist agriculture policy. These two impacts of the LT to the CAP will be analysed in Chapter 2 of this thesis, with a further discussion to follow in the concluding chapter.

11. Research questions

The central aim of this study is the analysis of the relevant rules of both the EU legal order and those of the WTO relevant to trade in agricultural products. Special emphasis is on the situation of developing countries and their agricultural trade relationships with the EU. The following questions will receive particular attention:

- Are the rules that apply to agricultural trade between the EU and the Caribbean countries regarding sugar and bananas compliant with WTO disciplines?
- Are these rules, whether WTO compliant or not, unfair or discriminatory?
- Are further changes to the WTO legal order for trade in bananas and sugar required, and if so what recommendations can be made to improve agricultural trade in these products?
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- To what extent can the resolution of these trade challenges be achieved solely by means of changes in the relevant legal instruments?
- To what extent is an interdisciplinary approach required, and if so what would this entail?

12. Methodology

12.1 Sugar and Bananas

In order to address the research questions, two particular agricultural food commodities have been selected, namely sugar and bananas, because they have been among the most trade-distorted commodities in the world. The EU has been involved in several disputes with DCs in GATT and WTO, and has lost all of them. Trade in banana particularly, has led to a protracted dispute between the EU on one side, and Latin American countries and the US on the other until 2009. This dispute, which became to be known as “the banana war,” posed “considerable threats to the international trading system.” The cases themselves, as well as the consequences of losing them, will be developed in Chapters 8 and 9 of this thesis.

For the purpose of this thesis, “sugar” refers to raw sugar extracted from sugar beet and sugar cane. This is common sugar which is usually referred to as sucrose or

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197 The banana dispute: European Communities- Regime for the Importation, Sale and Distribution of bananas complaints by Ecuador, Guatemala, Honduras, Mexico and the United States- (WT/DS27). The sugar dispute: European Communities–Export subsidies on sugar (WT/DS265).

198 The US has a particular interest, economically, in the dispute because a large proportion of companies which are responsible for Latin American banana exports have headquarters in the US. See Chacon-Cascante, A. and Crespi, J.M. “Historical Overview of the European Banana Import Policy”, Agronomía Costarricense, 2006, 30(2), pp. 111-127, p 115.

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“table sugar.” Excluded therefore from the scope of the thesis will be the trade in more highly processed sugars, such as fructose or glucose, together with the growing trade in bio-fuel refined from sugar beet and sugar cane, which are not covered by the WTO AoA. “Bananas” refer to internationally traded fresh bananas commonly consumed as dessert. Varieties of bananas, such as dried bananas or plantains, will not form part of the discussion in this thesis. Fresh bananas are products that DCs are especially good at producing and in the production of which they have the greatest comparative advantage.

12.2 The Caribbean region

The EU post-colonial history with African, Caribbean and Pacific countries have influenced the rules enforced by the EU for the import of bananas and sugar. Given that Caribbean countries, as former colonies of the EU MS and members of the ACP Group, have in particular a high degree of dependence on preferential access to the EU for sugar and bananas, the Caribbean region was selected as the case study for this thesis. The term “Caribbean” for the purpose of this thesis represents the countries which are considered to be part of the region politically. This encompasses the islands in the Caribbean Sea as well as the countries situated on the mainland of Central America (Belize) and South America (French Guiana, Suriname and Guyana). The Caribbean region is a large area with a diversity of countries, populations and economies. They share, however, similar vulnerabilities to natural disasters, such as hurricanes, and economic shocks. These countries also face common socio-economic challenges. These include fragile economies, which

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are largely based on a limited range of primary products, a high rate of poverty, youth unemployment and those who have been forced to relocate or migrate.\textsuperscript{201} In addition to this, Caribbean countries are also confronted with political problems resulting from ethnic tensions, criminality, drug-related crime and armed violence, all of which affect the security and stability within the Caribbean region.\textsuperscript{202} All of these internal and external issues represent serious constraints to the development of Caribbean countries.

The Caribbean region\textsuperscript{203} consists of different categories of countries. First it includes fifteen Caribbean countries members of the ACP Group. The ACP Group of States was established as an organisation in 1975 by the Georgetown Agreement.\textsuperscript{204} The ACP Group comprises 79 independent countries, the majority of which are former European colonies.\textsuperscript{205} It is organised on a geographical basis, namely Central Africa, East Africa, Southern Africa, West Africa, the Caribbean and the Pacific.\textsuperscript{206} The ACP Group aims \textit{inter alia} to “ensure the realisation of the objectives of the ACP-[EU] Partnership Agreements.”\textsuperscript{207} These objectives include

\textsuperscript{202} Ibid., p 13.
\textsuperscript{203} See map of the Caribbean region in Annex I.
\textsuperscript{204} The Georgetown Agreement 1975, as amended by Decision No. 1/LXXVIII/03 of the 78th Session of the Council of Ministers, Brussels, 27 and 28 November 2003. ACP/27/005/00 Rev.16 [Final Version].
\textsuperscript{206} Op. cit. footnote no 33 at Article 1(4).
\textsuperscript{207} Ibid. at Article 2(a).
in particular, “the eradication of poverty, sustainable development and the smooth and gradual integration of ACP States into the world economy.”

Secondly, the Caribbean region includes seven Overseas Countries and Territories (OCTs) of the United Kingdom (UK) and the Netherlands. The OCTs, as listed in Annex II of the Lisbon Treaty, are constitutionally linked to four EU MS, namely Denmark, France, the UK and the Netherlands. However, these countries are not part of the EU and hence not subject to EU law. In accordance with Article 198 TFEU, these “non-European countries” have an “associated” status with the EU which aims to “promote [their] economic and social development” and to create “close economic relations between them and the Union as a whole.”

Finally, the Caribbean region also comprises French Guiana, Guadeloupe and Martinique which are the Départements d’Outre-Mer (DOMs) of France. While being geographically separated from the European continent, the French DOMs, are considered as “outermost regions” which form an integral part of France and thus of the EU. The EU currently has nine outermost regions which are identified in Article 349 and 355(1) of the TFEU. These are Guadeloupe, French Guiana, Martinique, Saint-Barthélémy, Saint-Martin, Réunion, the Azores, Madeira and the Canary Islands, of which the first five are situated in the Caribbean. Since all of

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208 Ibid. at Article 1(4).
209 Anguilla, British Virgin Islands, Cayman Islands, Montserrat and Turks and Caicos Islands.
210 Aruba and the Netherlands Antilles.
212 Ibid. at Article 198.
213 French overseas department.
these regions are part of the EU, they are subject to EU law and the nationals are considered as EU citizens.

Therefore discussion in this thesis will be limited to the Caribbean region of the ACP Group which encompasses the UK Commonwealth Caribbean countries and other countries in the Caribbean region which have obtained full sovereign independence. The term "Commonwealth" was officially used at the first Caribbean Heads of Government Conference which was organised by the Prime Minister of Trinidad and Tobago in July 1973.215 Governments of Anglophone nations use this term as part of their official terminology in order to refer to an "economic and potentially a political reality" rather than to a geographical concept.216

12.3 The case of Guyana and Jamaica

The Caribbean region of the ACP Group is a large area with a diversity of cultures and economies. It comprises both DCs and one Least-Developed Country, Haiti, as recognised by the United Nations (UN).217 Equally, the role of sugar and bananas in Caribbean economies is not uniform across the region and varies from one country to another. While this thesis focuses on the Caribbean region as a whole, special attention will be given to two non- Least-Developed Countries (LDCs) ACP Caribbean states, namely Guyana and Jamaica.218 These countries have been selected as case studies because they are important producers within the Caribbean

216 Ibid., p 201.
217 http://www.un.org/
region of the commodities being examined herein, and have long benefited from preferential access for these products to the EU market. This will be further developed in Chapters 8 and 9 of this thesis.

Guyana is situated in the north of South America and is the only English-speaking country in the continent.\textsuperscript{219} This country is historically and politically regarded as part of the Caribbean region.\textsuperscript{220} Indeed Guyana is a founding member of the Caribbean Community (CARICOM), which will be examined in detail in Chapter 7 of this thesis, and is home to the CARICOM Secretariat. Agriculture is an important sector for Guyana’s society and economy. The sector has accounted in 2008 for 16.6 percent of Guyana’s GDP.\textsuperscript{221} Sugar is the dominant commodity in agricultural production and export of the country.\textsuperscript{222} In 2007, exports of raw sugar represented 19.2 percent of total agricultural exports.\textsuperscript{223} Guyana obtained independence from the UK on the 26\textsuperscript{th} May 1966.

The Caribbean island of Jamaica, which also has an Anglophone population and obtained independence from the UK on the 6\textsuperscript{th} August 1962, has a diversified economic profile. The services sector represents the highest annual contribution to GDP in Jamaica. In 2009, the sector contributed to 76.3 percent of Jamaica’s GDP.\textsuperscript{224} In contrast, the agricultural sector’s “contribution to the overall economy

\textsuperscript{222} Ibid., p 56.
\textsuperscript{223} Ibid., p 56.
has declined steadily over time due to natural disasters and external shocks. In 2009 it accounted for around 5 percent of Jamaica’s GDP. However, since agriculture plays an important role in poverty reduction and employment, it is considered a “sensitive sector.” The most important agricultural commodities are sugarcane, coffee and citrus. Bananas were also an important traditional export crops, but since 2008, Jamaica has ceased its exports of bananas to the EU. This issue will be examined in detail in Chapter 9 of this thesis.

As will be illustrated in this thesis, the relationship between the EU and the Caribbean region of the ACP Group has been under pressure in the context of the continuous changing of EU market access conditions, which are subject to the legal trade rules established by the WTO, and will impact on the preferential access to the EU market given to the Caribbean countries. This issue is in need of in-depth analysis in order to properly inform the strategic policies of Caribbean countries, which need to be adopted in order to adapt to these changes as they take place. In order to draw appropriate conclusions, the impact of the changing of EU market access conditions on Jamaica and Guyana’s socio-economic situation will be discussed. Data used for the case studies in Chapter 8 and 9 of this thesis was drawn from a variety of documentary sources, to include study reports, government publications and other official publications.

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226 Ibid., p 60.
227 Ibid., para 16.
12.4 Doctrinal legal research

As the EU clearly operates on the basis of the rule of law, law has been chosen as the most appropriate discipline with which to address the aforementioned research questions. Hence a doctrinal legal approach is taken in order to conduct this study. The method of doctrinal research also referred as "black-letter" law approach, consists of examining legislation, case law and other legal texts which constitute legal authorities. It therefore gives prominence to the examination of legal rules, principles or doctrines. While this methodology dominates academic law and legal education, it is considered to construct "the legal context narrowly," and to present "the legal system as a body of rules which can be studied in isolation from the broader societal context of the legal system by the exegesis of authoritative texts." Nevertheless, it is clear that such an approach to legal research makes significant contributions to the continuity, consistency and certainty of law.

13. Conclusion

This introductory chapter has highlighted significant issues that will form the focus of this thesis. One of the main reflections on the present discussion is the complexity of the EU relationship with DCs with regard to trade in agricultural commodities. It was highlighted that the EU colonial histories with ACP countries has been an important aspect of the evolution of the EU's trade in agricultural commodities. The EU has adopted a protectionist regime vis-à-vis ACP countries with regard to agricultural commodities against other countries through *inter alia* the conclusion of successive trade agreements. Caribbean countries have been, among all the ACP countries, to particularly invest in producing particular cash

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crops such as bananas and sugar, selected as case studies in this thesis, in order to benefit from the high EU internal prices. While exporting these products has helped them respond to the socio-economic needs of their countries, it is clear that reliance on such sectors is the product of what Scott refers to as a "colonized mind."\textsuperscript{230}

This thesis focuses specifically on the international dimension of the legal framework of the CAP. The rules operated by the EU concerning the importation of agricultural food products from ACP countries, as well as the operation of the CAP, were, and will continue to be affected by the legal trade rules established by the WTO. It will be interesting to see how the EU will maintain a close trade relationship with the ACP countries in the future. The thesis makes an original contribution to knowledge by critically analysing the legal framework for the trade in sugar and bananas from the Caribbean region of the ACP Group to the EU – an area which was not previously studied. A focused and detailed analysis of this is of immediate relevance to Caribbean countries, for future strategic policy planning, as they react to the evolution of the EU's CAP provisions.

It is acknowledged that many of the topics which will be covered in this thesis could merit a PhD in themselves. However, examination of these topics, and their impact on the focus of this particular thesis was limited given the time and space constraints. The ACP Group of States is not a uniform region. Consequently, the findings of this thesis may not be transferable to other countries in the Caribbean region or to the other ACP regions covered by the Cotonou Agreement. Therefore

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further research ought to be undertaken in respect of the other sugar and banana producing countries in these regions. Equally, in order to get a full grasp of the issues which will be examined, other matters outwith the scope of this PhD should be taken into account. These include, for example, the examination of the full range of countries and commodities in the Caribbean region, as well as relevant economic and political matters.
Chapter 2 – Reforms of the EU Common Agricultural Policy

Chapter 2  
Reforms of the EU Common Agricultural Policy

1. Introduction

Agriculture is a key policy area within the European Union (EU). Both agriculture and trade in agricultural products were included in the common market in 1957, leading to the establishment of the Common Agricultural Policy (CAP) in 1962. Since then, EU governments have always sought to protect their agricultural markets, mainly through intervention prices and direct support to farmers. The EU has thus been classified as one of the top “users” of domestic farm support policies which are a “source of market and trade distortions.” This has affected, in particular, developing countries’ market access to the EU for agricultural products.

The CAP is now divided into two pillars. The mechanisms of domestic support which include market prices and farmers’ incomes fall under the “first pillar” of the CAP. The second CAP pillar comprises payments for rural development measures. The first and second CAP pillars are currently funded by the European Agricultural Guarantee Fund and the European Agricultural Fund for Rural Development, respectively. The mechanisms of domestic support of the CAP first pillar have been the most criticised instruments of the CAP. They have helped

1 The CAP is given a legal base in Article 38 of the Treaty on the Functioning of the European Union (TFEU), OJ C 83, 30.3.2010.
4 These funds were created by Council Regulation (EC) 1290/2005 of 21 June 2005 on the financing of the common agricultural policy OJ L 209/1, 11.08.2005. They have replaced on 1 January 2007 the Guidance and Guarantee Sections of the European Agricultural Guidance and Guarantee Fund.
change the EU trade profile “from a net importer of agricultural produce into a
major net exporter.” It is this writer’s view that this practice is in contradiction
with the EU’s stated intentions in its relationships with developing countries
(DCs). This chapter will focus on the first pillar of the CAP. Given that the second
CAP pillar focuses solely on rural development of the EU Member States (MS), it
is of limited relevance to the area of EU external relations. Hence, the CAP pillar II
will not be tackled. Other issues arising from the trade relationship between the EU
and DCs will be dealt with in Chapters 5, 8 and 9 of this thesis.

There is a clear link between the CAP reforms and World Trade Organisation
(WTO) negotiations in practice. The EU’s CAP has had to be restructured to meet
WTO legal requirements under the WTO Agreement on Agriculture (AoA) on
domestic support, market access and export subsidisation. These issues will be
examined in Chapter 3 of this thesis. Although all of these issues have had an
impact on the CAP, it must be noted that it is the domestic support measures “that
have had the greatest, and most direct, impact in the short term.” Domestic
support, insofar as it boosts domestic EU production, leads to greater surpluses and
exports, a move accentuated by export subsidisation, both of which can drive down
world prices. The international pressure at the multilateral negotiations under the
Uruguay Round on the EU to reform its agricultural policy has led the “new” CAP
to rely heavily on direct payments to farmers, thereby moving away from trade
distorting subsidies that are linked to production. It is therefore of importance to

analyse the extent to which the EU’s WTO legal obligations regarding domestic
support have altered the trade distortions in agricultural commodities, and the
consequences of market access for DCs to the EU market. It is for this purpose that
this chapter successively examines the evolving reforms of the CAP in its first
pillar, from MacSharry to the present day provisions, resulting from the 2008 CAP
“Health Check.”

The Lisbon Treaty (LT) which entered into force on 1st December 2009, has also
brought important changes to the EU agricultural policy, which is now a shared,
rather than an exclusive, competence policy area. The major changes made by the
LT to the CAP will be examined in the second part of this chapter. However, since
the LT provisions are new, these will not be taken into account in the context of the
examination of the reforms of the CAP from 1992 to 2008.

2. The 1992 reforms
EU farmers are amongst the most productive in the world. According to the
Commission, the EU safeguarded them by upholding three basic principles. These
were “common prices, common financing and the Community preference”
principles, which according to the Commission “have become the golden rule of
the CAP.” The principle on the unification of prices for commodities throughout
the EU was established in order to create a single agricultural market allowing
agricultural commodities to move freely within the EU. In general, each product

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7 Commission of the European Communities, Our farming future, Luxembourg: Office for Official
8 Ibid.
received "the price of the country where the product was most expensive." This was made in order to "prevent farmers in any one country from having to accept cuts." In light of the financial solidarity principle or "common financing" of the CAP, farmers, and particularly the more productive and developed farmers, were receiving support "proportionate to the quantity produced." Farmers were not receiving this money directly from the MS but via the EU budget.

The then "Community preference" principle provided by the original Article 44(2) of the Treaty of Rome implied that EU agricultural products should be favoured over foreign imports through common customs tariffs (CCT). The CCT will be examined in Chapter 4 of this thesis. The instruments used therefore were the imposition of import duties or levies on imported goods "to keep out price-competition produce from elsewhere in the world." The marketing of EU products was thus facilitated. Another tool used to protect the internal market was the payments of subsidies to EU exporters "to get rid of the surplus produce." This system encouraged the export of agricultural products and depressed world market prices. The Commission declared that the annual increase in the EU’s exports of agricultural food products meant that the level of exports had exceeded

15 Article 44(2) stated that: “Minimum prices shall neither cause a reduction of the trade existing between Member States when this Treaty enters into force or form an obstacle to progressive expansion of this trade. Minimum prices shall not be applied so as to form an obstacle to the development of a natural preference between Member States.” 25 March 1957, Not published in the EU Official Journal.
18 Ibid., p 6.
the level at which such goods had been imported since 1973.\textsuperscript{19} This has inevitably restricted EU agricultural market access for third countries' products.

Despite the fact that the EU was aware of the consequences of domestic farm support on trade, MS were reluctant to undertake any fundamental reform of the CAP, in particular, France, which was the "most important economic actor in European agriculture."\textsuperscript{20} In 1992, the then EU Commissioner for Agriculture, Ray MacSharry, proposed the first major reform to the CAP, the so-called "MacSharry reforms."\textsuperscript{21} These reforms have been fully implemented from 1996,\textsuperscript{22} and launched a new process under which farm support was transferred from the product to the producer. Support prices, the main instrument of the CAP, were reduced for crop and livestock production, and a direct income support to farmers was created instead in compensation for price cuts. It is worth noting that while price support was substantially reduced to make agricultural products "more competitive both within the [Union] and on world markets,"\textsuperscript{23} it was still kept in place.

The above reforms led to a reduction of intervention prices in cereal by 29 percent, and by 15 percent, over three years, in the beef sector.\textsuperscript{24} In the cereal sector, where the EU was the third most important producer,\textsuperscript{25} the intervention price was cut

\textsuperscript{19} Commission of the European Communities., \textit{A common agricultural policy for the 1990s}, 5th ed. Luxembourg, Office for Official Publications of the European Communities, 1989, p 37.
\textsuperscript{20} Op. cit. footnote no 17, p 62.
\textsuperscript{21} The MacSharry amendments were agreed on at Blair House in November 1992.
\textsuperscript{22} The full implementation of MacSharry reforms began in 1996, following a three-year transition period.
\textsuperscript{24} Op. cit. footnote no 6, p 191.
progressively: 117 ECU per tonne in the 1993/94 marketing year, then 108 ECU per tonne for the 1994/95 marketing year and finally 100 ECU per tonne from the 1995/96 marketing year onwards.\textsuperscript{26} Despite this nominal reduction, farmers generously received, in return, direct area payments “for arable crops grown by all except small farmers,”\textsuperscript{27} calculated by multiplying the surface area by a fixed yield, and a headage payment for livestock production.\textsuperscript{28} Indeed, in order to meet reductions in support prices, a basic amount of compensatory payment for the resulting loss of income was fixed. In the cereal sector, this amount was fixed at 25 ECU in the 1993/94 marketing year and increased to 45 ECU per tonne from the 1995/96 marketing year onwards.\textsuperscript{29} McMahon points out that despite the fact that the original Commission’s reform proposals called for a 40 percent reduction in cereal prices, the final figure was 29 percent.\textsuperscript{30} The reforms also called for a differential treatment of producers according to farm size, under which “the larger and more developed farmers should rely more or less exclusively on the market.”\textsuperscript{31} This measure has not however been adopted.

On the other hand, a range of significant measures built on the compensatory payments also accompanied this reform. These accompanying measures have been described by O’Neill as “the most novel aspects of the 1992 reforms”\textsuperscript{32} and were particularly in the interest of farmers. They introduced an early retirement scheme

\textsuperscript{27} Op. cit. footnote no 6, p 191.
\textsuperscript{28} Ibid., p 191.
\textsuperscript{32} Op. cit. footnote no 6, p 191.
for farmers over the age of 55, an agri-environmental scheme as well as an afforestation aid for farmland in order to “encourage the protection of the environment, the landscape and natural resources.” In light of these measures, it is believed that the role of the farmer in the countryside has evolved from a “producer of foodstuffs” to a “sort of gardener,” “useful in developing and conserving rural areas.” Jacques Delors, president of the European Commission in 1992, stated that the CAP’s reform was “in the interests of European farmers...As far as possible, it will enable farmers, who also can ensure the development of our countryside, to remain on the land as producers rather than as guardians of nature.” Accordingly, the 1992 reforms did not modify the fundamental principles of the CAP as regards to the importance of EU farmers.

The reform of the CAP in 1992 was considered at that time as being “the most significant development in the field of agriculture,” mainly because of the changes that appeared in relation to farm financial support. The introduction of a direct compensation program combined with accompanying measures have “initiated a shift from non-transparent consumer subsidies to more transparent taxpayer subsidies.” Despite this, it is argued that the 1992 CAP reforms did not have a significant impact on the distribution of support. In contrast, the use of direct payments introduced by the MacSharry reforms in the cereals, oilseeds and

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protein sectors, as well as in the beef sector to compensate farmers, was high and increasing in the EU.\textsuperscript{40} Hence, there was still a "strong link between most direct payments and output or factors of production,"\textsuperscript{41} leading to the practice of "dumping."\textsuperscript{42} It is also to be assumed that the 1992 reforms were not an extensive reform of the CAP, as they excluded, for example, the sugar and the dairy sectors,\textsuperscript{43} which are also of importance for DCs.\textsuperscript{44} As a consequence, Atkin argued that the 1992 reforms "have not addressed the distortions the CAP creates."\textsuperscript{45} Consequently, the above reforms were strengthened by the 1999 reforms, which were made pursuant to the Agenda 2000 programme.

3. The 1999 CAP reforms

In 1997, the Commission published its proposals for further reforms of the CAP under which it required additional support price cuts for cereals and beef, and an increase of direct payments, which had been introduced in 1992, for farmers affected by these cuts.\textsuperscript{46} An overall agreement on Agenda 2000 was reached in March 1999 by the Berlin European Council after intense "discussion between MS on the scope of the reform of the CAP."\textsuperscript{47} As a result of these reforms, the CAP has also been redesigned into a two pillar structure in order to introduce a "multi-

\begin{itemize}
\item \textsuperscript{40} Ibid., p 2.
\item \textsuperscript{41} Ibid., p 2.
\item \textsuperscript{42} Article 2 of the Agreement on the Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 considers that a product is dumped when it is "introduced into the commerce of another country at less than its normal value, if the export price of the product exported from one country to another is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country." BISD 26S/171.
\item \textsuperscript{44} Op. cit. footnote no 9, p 15.
\item \textsuperscript{45} Atkin, M., Snouts in the Trough: European Farmers the Common Agricultural Policy and the Public Purse, Woodhead Publishing Ltd., 1993. Quoted by McMahon in Ibid., p 16.
\item \textsuperscript{46} European Commission, "Agenda 2000: For a stronger and wider Union" COM(97) 2000 final, 16 July 1997.
\item \textsuperscript{47} Op. cit. footnote no 9, p 18.
\end{itemize}
faceted concept of agriculture, to which a strong rural development policy was integral.\textsuperscript{48} Payments made towards agriculture under the first pillar of the CAP were decreased and transferred to the rural development policy, which now forms the second CAP pillar.

Important changes were proposed with regard to price support reduction. In the arable crop sector, the Commission proposed a price reduction of 20 percent over one year but this was later extended to two years.\textsuperscript{49} In the beef sector, the price reduction was to be 20 percent rather than the 30 percent advocated by the Commission.\textsuperscript{50} The European Council welcomed this agreement as it aimed to “ensure that agriculture is multifunctional, sustainable, competitive and spread throughout Europe.”\textsuperscript{51} However, despite this “welcome,” McMahon argues that various changes were made to the agreement.\textsuperscript{52} The intervention price for cereals was to be reduced by 20 percent and was, instead reduced by 15 percent, with the base rate of compulsory set aside to be fixed at 10 percent for all of the 2000-2006 period.\textsuperscript{53} Therefore, as was the situation in 1992, the Commission’s proposals were not totally followed, with the interest of EU farmers being prioritised instead.

In addition, in order to enhance the MacSharry reforms, the Council and the Commission were also requested to pursue additional savings in order to ensure that “average annual agriculture expenditure over the period 2000-2006 would not

\textsuperscript{49} Op. cit. footnote no 9, p 18.
\textsuperscript{50} Ibid., p 18.
\textsuperscript{52} Op. cit. footnote no 9, p 19.
\textsuperscript{53} Ibid., p 19.
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exceed 40.5 billion Euros.54 Accordingly, Agenda 2000 extended the scope of the 1992 reforms to the milk sector,55 and included for the first time a reduction in intervention prices for dairy products. However, as McMahon pointed out, savings on quotas in the dairy sector were not to enter into force until the 2005/2006 marketing year. The milk quota regime was also extended to 2008. As a consequence, he argues that the political agreement on the Agenda 2000 package was “less ambitious than the original proposals of the Commission” under which the interest of farmers was even then of great important for the EU.56

As discussed in Chapter 3 of this thesis, WTO Members committed, under the WTO AoA, to reduce their trade-distorting supports and particularly those classified under the “amber box.” However, Article 6 of the WTO AoA provides also that payments can be exempt from this commitment if they are made as direct payments to farmers under production-limiting programmes.57 These direct payments are classified as “blue box” supports, with no spending limits established. This possibility was of particular importance to the EU which, since the MacSharry reforms, provided compensatory or direct payments for price cuts made under the CAP reforms. Moreover, compensating direct payments started in 1992 were enhanced in the 1999 reforms, thereby increasing spending on the blue box.58

54 Ibid., p 19.
57 Article 6(5) (a) of the AoA.
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The view of the EU on this box was really positive as it stated that “the market orientation of producer decisions [had] been significantly improved.”\(^59\) “Blue box” aids have been described by the then Agricultural Commissioner Franz Fischler, as “a decisive component of the CAP,”\(^60\) as they were less trade distorting than intervention prices. He went on to point out that as these aids were essential for EU farmers and that the EU would resist to any changes of the blue box status.\(^61\)

Accordingly, the EU proposed to maintain the concept of the blue box as a “useful” instrument for further reform of domestic policies, “in the direction set by the WTO.”\(^62\) Nevertheless, in relation to the need for further reforms of domestic policies, the EU mentioned that “it [did] not call into question the trade impact of amber boxes measures and the need for further reduction commitments on such measures.”\(^63\)

While compensation payments are considered as “less” trade distorting, it is important to note that they are still adding distortion to trade in agricultural commodities, thereby affecting DCs access to the EU market. It is argued that this genuine reallocation of support to EU farmers from the most trade distorting “amber box” into the “blue box” was made in order to “avoid mandated reductions.”\(^64\) The transfer from market price support to direct payments did not decrease the level of subsidies which has increased from 30.536 million Euros in

\(^59\) WTO, “European Communities proposal: the Blue Box and other support measures to agriculture”, G/AG/NG/W/17, 28 June 2000, para 5.
\(^60\) Dr. Franz Fischler, “The European model of agriculture-facing the WTO acid test,” CEA Congress Verona, SPEECH/99/117, 24 September 1999.
\(^63\) Ibid., para 6.
1991 to 39.876 million Euros by 1999.\textsuperscript{65} There is also no certainty that these direct payments were not linked to production. Accordingly, it can be said that the shift from one box to another, without any reduction in the level of payments, only changed the form of domestic support, making the trade distortion which was being created by domestic subsidies less apparent. This practice has been referred to by Koning to as a movement “from open dumping to disguise dumping,”\textsuperscript{66} under which the “[EU] continues to export large volumes below its own cost of production.”\textsuperscript{67} Consequently, it can be said that the 1992 and 1999 CAP reforms did not effectively alter the trade distortions in agricultural commodities, leaving the problems encountered by DCs in accessing the EU agricultural market unresolved.

4. The Fischler Reforms

On 10\textsuperscript{th} July 2002, the Fischler led EU Agricultural Commission, released a CAP reform proposal, which was based on the midterm review of Agenda 2000, in the arable, beef and dairy sectors.\textsuperscript{68} The CAP reforms agreement was agreed in Luxembourg on 26\textsuperscript{th} June 2003, although it is argued that the agreement represented a “watered down version of the Commission’s original proposals.”\textsuperscript{69} In line with the MacSharry and 1999 reforms, the intervention prices for major commodities in the mid-term review were maintained, but at lower prices. For instance, in the cereal sector, the intervention prices were maintained, but the


\textsuperscript{67} Ibid., p 9.


\textsuperscript{69} Editor, “CAP reform at last,” EU Focus, 2003, 126, pp 2-5, p 2.
monthly increments was reduced by half. Again, farmers receive high direct payments as compensation resulting from these changes.

It is considered that EU farm subsidies related to production encouraged "ugly, intensive, industrial farming." Therefore, under the 2003 CAP reforms it was proposed to eliminate the link between direct payments and the volume of production in what Wickman called "strategic goods." These included cereal, beef, sheep, oil seed, and rice. The amount of taxpayer's money paid remained the same, but it would increasingly be directed towards the second pillar of the CAP, and accordingly "away from intensive farming." As a result of this reform, Regulation (EC) No 1782/2003, establishing the rules for direct support schemes, was implemented, making direct decoupled payments to farmers which had previously been granted by the hectare and/or head of livestock. Three additional regulations were also adopted by the Commission in the implementation of the CAP Reform.

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This new system of direct payments, known as the single payment scheme (SPtS), was described as “an income support for farmers,” and was based on the 2000, 2001 and 2002 historical payments received by farmers. The introduction of the SPtS and the decoupling support had been considered as “essential elements in the process of reforming the [CAP] aimed at moving away from a policy of price and production support to a policy of farmer income support.” Therefore under the new policy, EU farmers are, to some extent, “free” to produce what the market wants and do not receive the payment according to the volumes of agricultural products produced.

In order to receive the above income support payments, farmers must respect animal and plant health, environmental, food safety and animal welfare standards, as well as the requirement to keep all farmland in good agricultural and environmental condition (GAEC). This is the so-called “cross-compliance” requirement leading to reductions or withdrawal of direct support in the case of non-compliance. By implementing the obligation of cross-compliance, the EU intends to move towards sustainable agriculture, although it was pointed out that this requirement was mainly “a political decision to convince the EU public that

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76 The SPtS is sometimes refereed to as the “single farm income payment”.
78 Ibid. at Article 38.
83 Ibid. at Article 6.
farmers are getting support for doing something in return."84 Direct payments were also reduced by way of "modulation"85 or top slicing, for bigger farms in order to finance and reinforce the second pillar of the CAP, with the aim of improving the environment, food safety and the rural scenery.86

The EU had the ability to stay within the WTO domestic support rules and commitments by reforming its CAP in such a way that it can meet the WTO "green box" criteria, discussed in Chapter 3 of this thesis.87 Direct payments given under the "green box" measures were also sheltered by the peace clause, also covered in Chapter 3 of this thesis, thereby allowing the EU to maintain compensatory payments as part of the CAP without being unfairly challenged by other members of the WTO.88 However, it must be noted that the SPtS did not contain all direct payments. The 2003 CAP reforms provided for a broad range of options giving the MS the possibility of deciding which subsidies to decouple or not, and when to start the decoupling.89

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85 Modulation refers to the transfer of funds from the first pillar of the CAP to the second pillar of the CAP. This system was introduced with the 1999 reforms as a voluntary mechanism. It was made mandatory with the 2003 reforms and extended in the CAP “Health Check” of 2008. See Op. cit. footnote no 68.
4.1 The option of “partial decoupling”

In order to avoid the abandonment of production, EU MS could decide to retain a degree of coupling in a number of commodity sectors.\(^90\) As a consequence, some supports were not fully decoupled and MS could continue to make direct payments linked to production. 25 percent of direct payments for arable crops and 40 percent of durum wheat could stay linked to production.\(^91\) MS could also continue to couple up to 50 percent of the premiums for sheep and goats.\(^92\) In the beef sector, they could retain up to 100 percent of the suckler cow premium plus 40 percent of the slaughter premium, or alternatively they could either keep up to 100 percent of the slaughter premium, or 75 percent of the special male premium.\(^93\) Cardwell and Rodgers pointed out that this decoupling derogation had not been exercised in the same way by all MS.\(^94\) For instance, no partial decoupling was made in England in 2005, while in Italy up to 142,491,000 Euros could be linked to arable crop production.\(^95\) In addition, specific aid schemes were also granted to farmers if MS decided to implement them. These support schemes were maintained for various products and were either linked to the area under crops, or to production.\(^96\)

\(^{90}\) Op. cit. footnote no 74 at Preamble (3).
\(^{91}\) Ibid. at Article 66.
\(^{92}\) Ibid. at Article 67.
\(^{93}\) Ibid. at Article 68.
\(^{96}\) These included for instance, quality premium for durum wheat, protein crop premium, area aid for rice, nuts, crops, seeds, starch potatoes and dairy premiums. See Op. cit. footnote no 74 at Articles 72 to 143.
4.2 Delay of implementation

With the option to delay implementation granted under Article 71 of Regulation (EC) No 1782/2003, it was pointed out that MS had the possibility to retain “substantial coupled support for up to two years.”\(^{97}\) The SPtS was in principle applicable as from 1 January 2005, but MS could delay implementation at either 1 January 2006 or 1 January 2007,\(^{98}\) in order to take into account their “agricultural specific conditions.”\(^{99}\) This advantage has been taken by Finland, France, Greece, the Netherlands and Spain which implemented the SPtS in 2006. Malta and Slovenia chose to implement the SPtS in 2007.\(^{100}\)

4.3 Methods of application of the SPtS

It must be noted that MS could also choose between a complex system of models in order to calculate the reference amounts of EU farmers’ direct payments. Firstly, payments made under the 2003 reforms could be based on direct payments received in the past for each product.\(^{101}\) As previously mentioned, Article 38 of Regulation (EC) No 1782/2003 provides that the period 2000-2002 should be the historical reference period used as a basis for the calculation of aid.\(^{102}\) However, Cardwell and Rodgers argue that this reference period “involves considerable updating from, for example, the 1989-91 period which had earlier applied for arable area payments made to cereals producers.”\(^{103}\) Therefore the link between farm subsidies and production endures because “payment can be based on the type

\(^{98}\) Op. cit. footnote no 74 at Article 71(1).
\(^{99}\) Ibid. at Preamble (33).
\(^{100}\) European Commission, “Overview of the implementation of direct payments under the CAP in Member States”, Directorate-General for Agriculture and Rural Development, Brussels, 2008.
\(^{101}\) Op. cit. footnote no 74 at Article 37(1).
\(^{102}\) Ibid. at Article 38.
\(^{103}\) Op. cit. footnote no 94, p 824.
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or volume of production in the base period itself.”\textsuperscript{104} It is worth noting that in light of the historic model, it is argued that only the largest and most productive farm owners receive the “lion’s share of these payments,”\textsuperscript{105} such as big businessmen with vast fields of sugar beet in northern France.\textsuperscript{106} The historic model has been chosen by Austria, Belgium, Spain, France, Greece, Ireland, Italy, the Netherlands, Portugal and the United Kingdom (UK) devolved administrations of Scotland and Wales.\textsuperscript{107}

Secondly, the reference amounts can be calculated on a regional and not on an individual basis.\textsuperscript{108} Unlike the previous model, payments under this model are based upon a regional average per hectare and all farmers in the region receive the same aid per hectare, on a flat-rate basis.\textsuperscript{109} Cardwell points out that this model is simple but “works harshly against farmers who had an established pattern of high receipts.”\textsuperscript{110} This is probably the reason why this option has not been adopted by the EU MS.\textsuperscript{111}

Lastly, MS could choose the hybrid model, which is a mix between the “historical” model and the “regional” model.\textsuperscript{112} The implementation of the hybrid model had varied over time and some MS have decided to implement it in a “static” or

\textsuperscript{104} Ibid., p 824.
\textsuperscript{106} Op. cit. footnote no 71.
\textsuperscript{107} Op. cit. footnote no 5.
\textsuperscript{108} Op. cit. footnote no 74 at Article 58.
\textsuperscript{109} Ibid. at Article 59.
\textsuperscript{111} England, Malta and Slovenia are the only countries which implemented this model.
\textsuperscript{112} Op. cit. footnote no 5, p 95.
"dynamic" form. The static hybrid model was for instance implemented in Luxembourg, Sweden and Northern Ireland, while Germany, Denmark, Finland and England applied the “dynamic hybrid” model. In light of these different implementing provisions, especially with regards to the implementation within the UK, Cardwell is of the view that they were capable of “generating distortions in competition.”

In order to take into account accession of the new MS to the EU, a transitional simplified scheme referred to as “the Single Area Payment Scheme” (SAPS) was established, for the purpose of granting direct payments to farmers in these countries based on area. The new MS were given the choice of implementing the SPtS or the SAPS. Payment under the SAPS was made once a year and the funds were calculated by dividing the annual financial envelope, established by the Commission, by the agricultural area of each new MS. Payments could not exceed the national ceilings set out in Annex II of the Act of Accession of the countries. The new MS had the possibility to complement direct support with national direct payments, provided that the total of these payments did “not exceed the level of direct support the farmer would be entitled to receive under the corresponding EU scheme then applicable to the Member States in the [Union] as

113 The “dynamic” hybrid model is defined as a “model that changes gradually over the period, for example, moving from a historical-based scheme toward a flat-rate payment.” The “static” hybrid model is defined as a “model which does not change in subsequent years, that is, not dynamic.” See: Ibid., p 95.
115 Ibid., p 470.
116 Documents concerning the accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic to the European Union, OJ L 236, 23.09.2003.
117 The SAPS has been implemented by ten of the twelve new Member States: Bulgaria, Cyprus, Estonia, Hungary, Latvia, Lithuania, Poland, Romania, Slovakia and the Czech Republic. Malta and Slovenia decided to implement the SPtS system in 2007.
119 Ibid. at Annex II.
constituted on 30 April 2004.”

The SAPS was initially supposed to apply until 2008, but following the CAP “Health Check,” examined below, it will remain in force until the end of 2013.

4.4 “Recoupling” of the single farm payments

There was another option offered to MS under the SPtS which according to Cardwell affected its rigour and simplicity. In accordance with Article 69 of Regulation (EC) No 1782/2003, an additional payment can be granted to farmers for specific types of farming in order to protect or enhance the environment or to improve the quality and marketing of agricultural products. To make this additional payment MS could retain up to 10 percent of the component of national ceilings referring to in Article 41 of Regulation (EC) No 1782/2003. Cardwell is of the view that this option given to MS has been made in order to promote “the more ‘multifunctional’ facets of agriculture.” This system has been used in several sectors by Finland, Greece, Italy, Portugal, Spain, Slovenia, Sweden, and the UK.

The Commission pointed out that the mid-term review was a “stocktaking and improvement” of the 1999 reforms process. However, it is important to note that the 1999 and 2003 reforms were difficult to achieve especially due to the role of

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120 Ibid. at Annex II.
121 Ibid. at Annex II.
125 Ibid. at Article 69.
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the most active politicians, the French, who tried to de-activate them. Cardwell points out that this is particularly linked to the influence of the French agricultural lobby, the “Comité des Organisations Professionelles Agricoles.” France was also the largest recipient of CAP funds, with Euros 9 billion a year in farm subsidies, whereas the active farmers represented only 4 percent of the French population. In light of French resistance to reform, the British Prime Minister Tony Blair pointed out the hypocrisy of France towards DCs. Indeed, it has been reported that during a Council meeting in October 2002 which dealt with CAP funding up to 2013, the then British Prime Minister argued that it was impossible for former French President, Jacques Chirac, to “defend the [CAP] and then claim to be a supporter of aid to Africa.” Tony Blair added that "failing to reform the CAP means being responsible for the starvation of the world’s poor.”

According to the then EU Commissioner Fischler, the CAP had largely moved away from the trade distorting support system and was a more “trade-friendly policy, particularly as regards its effects on developing countries.” Despite this, it is argued that because of the above flexibilities offered to MS, “the systems of support [could not] be considered fully decoupled” and that decoupled payments could not “guarantee that production will not occur, hence the dilution of the

133 Ibid.
principle.” Accordingly, the SPtS remained not being fully decoupled and still enabled EU farmers to “compete unfairly with DCs.”

5. Other agricultural sectors

5.1 The Common Market Organisation for sugar

It must be noted that the sugar sector, considered as “the sector which time forgot,” was still not reformed under the 2003 CAP reform. The EU support system for sugar, comprising of price supports, export subsidies, import barriers by high tariffs and sugar production quotas, has been “criticised for its price-distorting impact on world markets,” but remained unchanged for 40 years. Therefore, in order to meet WTO commitments, a reform of the EU sugar sector was adopted in February 2006 with the aim to control overproduction, thereby reducing the trade-distorting effects of the CAP. The reform went into effect in July of the same year. The reforms provided for two important changes. The guaranteed minimum sugar price was cut by 36 percent and farmers were compensated for the consequent loss of income through direct payments, which are to be incorporated into the SPtS. The 2006 reforms also created a temporary

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142 Ibid.
fund, for “the restructuring of the sugar industry in the [Union].” The restructuring fund offered sugar producers with the lowest productivity, “an important economic incentive” to give up their sugar quota production assigned, during four marketing years. The Common Market Organisation (CMO) for sugar and the reforms in the sector are analysed in depth in Chapter 8 of this thesis.

5.2 The single Common Market Organisation

In order to simplify the CAP and to increase the EU competitiveness on the world market, the previous 21 CMOs have been collapsed into one single CMO which entered into force on July 1, 2008. The CMOs have been important instruments of the CAP. They have governed production and trade of agricultural products and set the conditions for exports and imports with DCs. They were intended to “stabilise the market, increase agricultural productivity and guarantee a stable income for farmers.” Most importantly they aimed to reach the then three interlinked basic principles of the CAP, discussed at the beginning of this chapter. The post 2008 single CMO is viewed as an “essential” element of the Commission’s strategy to “streamline and simplify” the CAP, since it combines the

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144 Ibid. at Preamble (5) and Article 3.
146 The CMOs covered about 90 percent of the agricultural production in Europe. Each CMO was providing for a set of measures for specific commodities.
149 Ibid., p 3.
previous 21 Council Regulations into a “comprehensive single regulation.” However, it was argued that the implementation of a single CMO would lead to a deregulation of European agriculture because it might be “difficult” for one common market organisation to address “the specificities that are linked to different products.”

6. The 2008 “CAP Health Check”

In light of the complexity of the CAP, the European Commission adopted, on 20 November 2007, a Communication on “Preparing the Health Check of the CAP reform” with the aim of assessing the implementation of the 2003 CAP reforms. The Commission raised concerns over whether the current market instruments were still valid or “whether they simply slow down the ability of EU agriculture to respond to market signals.” On the 20th November 2008, the EU agricultural ministers reached a political agreement on the so-called “Health Check” of the CAP. The “CAP Health Check” did not imply a fundamental reform of the CAP, but provided instead for “the possibility of further adjustments in line with market and other developments.” Accordingly, the “Health Check” aimed to pursue three objectives: to simplify the SPtS, making it more effective and efficient, to modernize agricultural market support instruments tools in order to improve market orientation and lastly, to respond to new challenges of fighting climate change, the protection of biodiversity, water management and bio-energy. It was

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153 Ibid., p 6.
155 Ibid.
therefore considered that the CAP Health Check would “further break the link between direct payments and production.”

6.1 Direct payments

While the CAP Health Check cuts further the link between direct payments and production, it still allows MS to exclude certain payments from the SPtS scheme. Pursuant to Article 63 of Regulation (EC) 73/2009, all coupled support schemes referred to in Annex XI had to be transferred into the SPtS from 2010. Full decoupling of schemes was, for example, made for arable crops, olive groves and hops. However, seeds, beef and veal payments, except the suckler cow premium, are to be decoupled from 2012 at the latest in order to “adjust to the new support arrangements.” MS can still maintain the link between subsidies to the level of production for the suckler cow, goatmeat and sheepmeat sectors. Such a possibility was considered “necessary” in order to support economies in regions which do not offer economic diversification. In addition to this, MS can also decide to partially couple the fruit and vegetable payments until 2012, within the limits provided by Article 54 of the regulation.

6.2 The funding of special measures

Under the 2003 CAP reforms, MS had the possibility to retain up to 10 percent of national ceilings per sector in order to support farming systems with environmental benefits or improving the quality and marketing of agricultural products in that

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158 Ibid. at Preamble (33).
159 Ibid. at Article 51(1) and 111.
160 Ibid. at Preamble (34).
161 Ibid. at Article 51 (1).
sector.\textsuperscript{162} While MS already spend a large amount of money on direct farm payments,\textsuperscript{163} this possibility is maintained by the CAP Health Check in order to fund the targeted issues of Article 68 of Regulation (EC) 73/2009.\textsuperscript{164} MS can for instance grant support, which can be coupled to production, to the dairy, beef and veal, sheep meat and goat meat, and rice sectors, in order to help farmers in disadvantaged regions or in environmentally sensitive areas.\textsuperscript{165} In such a case, MS are only authorised to use 3.5 percent of their national ceilings.\textsuperscript{166} Despite these restrictive spending limits, these measures can still allow for the reintroduction of coupled support, especially in the dairy sector, which has been completely decoupled since 2007. There is no doubt that the current Article 68 of Regulation (EC) 73/2009 pursues legitimate objectives within the first pillar of the CAP. However affording such flexibility to MS, in order to address these issues, could also potentially lead to support that could be used in a trade distorting way.

6.3 Simplification of the cross-compliance

The provisions on cross-compliance are “essential” elements of the CAP.\textsuperscript{167} They make payments to farmers under the CAP’s two pillars subject to the compliance of farmers with GAEC conditions laid down by the MS, in order to limit soil erosion, maintain soil organic matter as well as soil structure, and ensure a minimum level of land maintenance.\textsuperscript{168} Farmers must also comply with the EU standards in force relating to public, animal and plant health, and to the

\textsuperscript{162} Ibid. at Article 69. This system has been used in several sectors by Finland, Greece, Italy, Portugal, Spain, Slovenia, Sweden, and the United Kingdom.
\textsuperscript{164} Op. cit. footnote no 122 at Article 69(1).
\textsuperscript{165} Ibid. at Article 68(1)(b).
\textsuperscript{166} Ibid. at Article 69(4).
\textsuperscript{168} Op. cit. footnote no 122 at Annex III.
environment and animal welfare. In order to “improve the control and sanction aspects” of cross-compliance, it was decided, under the CAP Health Check, to reassess the scope of cross-compliance, and unnecessary obligations not relevant to farming activities were to be withdrawn. For instance, requirements related to certain articles of the Wild Birds Directive and Habitats Directive, and rules on identification and registration of cattle have been removed as they are covered by a separate requirement.

6.4 Improving market orientation

In order to modernise the market support instruments under the CAP Health Check, the European Commission proposed important changes to the remaining price support measures in the arable, livestock and dairy sectors. The last elements of the supply control mechanisms have been either reduced or removed to allow farmers to “respond to market signals” by producing what the market wants. Public intervention for pig meat has been abolished. Intervention purchases for common wheat, beef, butter and skimmed milk powder have been maintained, but have to be made by way of a tender procedure. For instance, intervention for common wheat will take place at the price of 101.31/tonne, up to 3

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169 A list of the statutory management requirements are provided in Annex II of Council Regulation (EC) No 73/2009.
174 Ibid.
175 Ibid., p 8.
177 Ibid. at Article 4.
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million tonnes and beyond that, intervention will be done by way of tender.\textsuperscript{178} Intervention levels for these products have also been limited. They have, for instance, been set at a zero level for durum wheat because the market prices were significantly above the intervention price.\textsuperscript{179} Public intervention in agriculture can significantly influence price formation and it was seen in the past as an important instrument of the CAP. Today its role has changed. It only provides a "safety net," which should only be used in cases of "market disruptions and facilitating farmers' response to market conditions."\textsuperscript{180}

Moreover, earlier land set-aside obligations are now considered to be obsolete, and are therefore removed from the CAP framework.\textsuperscript{181} Countries have the possibility to use cross-compliance as a compensation of the environmental effects of ending the set-aside regime. Given that some set-aside is deemed to have "reduced the average use of fertilisers and pesticides and thus total emissions from EU agriculture,"\textsuperscript{182} it is argued that the abolition of set-aside will threaten biodiversity.\textsuperscript{183}

6.5 Measures to tackle new challenges

In order to assist tackling the new challenges posed, such as climate change and water management, the Commission is of the view that rural development and cross-compliance measures are the way forward.\textsuperscript{184} With this in mind, the CAP

\textsuperscript{178} Ibid. at Article 4.
\textsuperscript{179} Ibid. at Preamble 3.
\textsuperscript{180} Ibid. at Preamble 3.
\textsuperscript{181} Farmers were obliged under Article 107 of Regulation (EC) No 1782/2003 to set-aside 10 percent of their land each year.
\textsuperscript{183} Ibid.
\textsuperscript{184} Op. cit. footnote no 152.
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Health Check reinforced spending under the second pillar of the CAP. Under the 2003 CAP reforms, the modulation for MS started in 2005 with a rate of 3 percent and increasing to 4 percent and to 5 percent from 2007 onwards until 2012.\textsuperscript{185} Following the CAP Health Check, the rate of compulsory modulation is to be increased by 10 percent in 2012 and applied to direct payments exceeding 5000 Euros per year.\textsuperscript{186} Higher farm payments, above 300 000 Euros, are to be reduced further by an additional 4 percent of the basic modulation.\textsuperscript{187} This modulation will create extra revenue for supporting rural development programmes, under the CAP Pillar II.\textsuperscript{188} However, it is to be noted that MS are also guaranteed to receive back, up to 80 percent of the unspent rural development money.\textsuperscript{189} As MS can decide how to use the rural development money it was argued that this possibility could also lead to the re-nationalisation of the CAP.\textsuperscript{190} This issue could be further complicated with the CAP being now a shared competence rather than an exclusive competence policy area following the entry in force of the Lisbon Treaty in 2009.\textsuperscript{191}

\textsuperscript{185} Op. cit. footnote no 74 at Article 10.
\textsuperscript{186} Op. cit. footnote no 122 at Article 7(1). The modulation for the 2011 year was set at 9 percent.
\textsuperscript{187} Ibid. at Article 7(2).
\textsuperscript{188} Ibid. at Article 9(1). Under the 2007-2013 financial framework, the rural development policy has been allocated EUR 96 519 million, after transfer from the EAGF. See Op. cit. footnote no 163.
\textsuperscript{189} Op. cit. footnote no 122 at Article 9(2).
\textsuperscript{190} Op. cit. footnote no 84, p 5.
\textsuperscript{191} Op. cit. footnote no 1 at Article 4(2).
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7.1 Exclusive competence

The EU agricultural policy, as one of the most important EU policies, has been under supranational power since its creation. However, the LT has limited such total control and now requires the EU to share this competence with its MS. When the EU is given exclusive competence in particular areas, MS must give up their power entirely to the Union which is then given full authority to act. MS cannot legislate or adopt any legally binding acts unless they are explicitly allowed to do so by the Union or when they have to implement the provisions of EU legislation.192 MS thus have a limited capacity to act even where the EU has not acted in these areas. By virtue of the doctrine of pre-emption, which “denotes the actual degree to which national law will be set aside by [Union] legislation,”193 there is in these areas, a “field pre-emption” by the Union which excludes MS law from certain areas of legislation occupied by EU law. All national laws will be considered invalid “even when such measures are not contrary to, or do not obstruct the objectives of [Union] legislation in any way.”194 “Field pre-emption” along with “rule pre-emption” and “obstacle pre-emption” have been identified by Schutze as the three types of relationships between the EU and national law within a regulatory area.195

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192 Ibid, at Article 2(1).
Given the domineering aspect of such competence, the LT does not give any new exclusive powers to the EU but confirms its pre-existing powers. The EU continues to be the sole responsible for decision-making in the customs union, EU competition rules, monetary policy for the euro MS, and the common commercial policy.\(^{196}\) However, in contrast to the pre-Lisbon situation, the EU only retains exclusive competence over "the conservation of marine biological resources under the common fisheries policy" and no longer over the entire Common Fisheries Policy (CFP).\(^{197}\) The LT has thus reduced the EU power and returned some responsibilities to MS in relation to both the CFP and CAP areas.

In the case of the pre-Lisbon CAP, the exclusive competence category was granted to only one authority, the EU. This model subordinated the EU MS and has been characterised as "the hallmark of dual federalism."\(^{198}\) Despite this, such a model was justified within EU law by the Court of Justice of the European Union (CJEU) in 1975, when its opinion was required on the exclusive nature of the EU's powers for the common commercial policy (CCP). The CJEU argued that giving powers to MS, in an area of the common market such as the CCP would compromise the "effective defence of the common interests of the [Union]."\(^{199}\) According to the CJEU, the institutional framework of the EU could be distorted if MS were given the possibility to "adopt positions which differ from those which the [Union] intends to adopt."\(^{200}\)

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\(^{196}\) Op. cit. footnote 1 at Article 3(1).
\(^{197}\) Ibid at Article 3(1).
\(^{200}\) Ibid. at para 2.
7.2 Shared competence

While MS need the EU's authorisation to act in areas within the exclusive competence of the EU, even when the Union has not legislated, Article 2(2) of the Treaty on the Functioning of the European Union (TFEU) provides that MS may legislate and adopt legally binding acts in areas of shared competence when the EU has not exercised, or has ceased to exercise its competence. While the latter refers to a subordination relationship, actors under the co-operative federalism are seen as "co-equals." Therefore, instead of having the existence of one authority, the legislative power is shared between the EU and the MS.

The CJEU established the conditions of shared competence in 1988 during an action brought by the Commission. The latter declared that the UK's prohibition of the use of vehicles not equipped with dim-dip lighting devices, was in breach of the then Council Directive 76/756/EEC which did not impose such a requirement. The CJEU held that MS cannot "unilaterally" impose additional requirements not provided by the EU on manufacturers who had already complied with EU law. For that reason, the UK was held to be in breach of its obligations.

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203 Ibid., p 3.
under EU law.\textsuperscript{207} The CJEU’s decision was in line with the EU’s aim to abolish both internal and international trade barriers resulting from “differences in national provisions” through the unification of national law.\textsuperscript{208} As a consequence, the MS are not precluded from enacting their own legislation in areas of shared competence. The only caveat is that such legislation must be consistent with current EU law.

Despite the default legal condition, it is worth noting that in some fields of shared competence, MS are allowed to impose more restrictive requirements.\textsuperscript{209} This is for instance provided in the area of consumer protection where MS are allowed to maintain or adopt “more stringent protective measures” than established by the Union, in order to protect \textit{inter alia}, consumers’ safety and health.\textsuperscript{210} Such permission should be understood in situations where EU measures, which are supposed to “supplement” national action,\textsuperscript{211} do not safeguard consumer interests that were formerly protected by the law of MS. In such a case, MS “must apply as a minimum” the EU measures but can, “if they consider it necessary” to protect public health, maintain their domestic rules, even when stricter than EU law.\textsuperscript{212} This is of particular relevance to this thesis in the context of food safety requirements, discussed further in Chapter 6.

\textsuperscript{207} Ibid. at para. 13.
\textsuperscript{208} See Article 21(2)(e) of the Treaty on European Union (TEU) post-Lisbon, OJ C 83, 30.3.2010 and Op. cit. footnote no 1 at Article 34.
\textsuperscript{209} Such practice is commonly referred to as ‘gold-plating’ and defined by the European Commission as when Member States are “exceeding the requirements of EU legislation when transposing Directives into national law” see European Commission, “Review of the ‘Small Business Act’ for Europe”, Brussels, 23.2.2011, COM(2011) 78 final, page 7. The typical example of ‘gold-plating’ is the UK over implementation of the EU money laundering directives, particularly with regard to the UK definition of predicate offence.
\textsuperscript{210} Op. cit. footnote no 1 at Article 169(4).
\textsuperscript{211} Ibid. at Article 169(2) (b).
Chapter 2 – Reforms of the EU Common Agricultural Policy

Given that MS, post-Lisbon now also have legal competences with regard to agriculture, they would be able to formulate and implement national legislation and policy in this area, in line with the conditions set out in Article 2(2) TFEU. This would have potential implications for the close interrelationship between farming and food safety standards, which could be reinforced with the implementation of new national laws effectively restricting the EU market for DCs’ agricultural food imports. In addition, it must be noted that the LT further limits the exercise of EU actions in areas where it does not have exclusive competence through the principle of subsidiarity. Thus, EU actions in the agricultural area would have to be justified against this principle enshrined in the post-Lisbon Article 5 Treaty on European Union (TEU).

7.3 The application of the subsidiarity principle

As agriculture falls under the shared competence category of the LT, the principle of subsidiarity applies, permitting the EU to act in this area. This fundamental principle of the EU is of particular importance to the Union’s decision-making process. Described as a principle of “democratic structuring,” the principle of subsidiarity regulates the distribution of legal competences between MS and the Union by imposing the circumstances in which the EU could act. The principle was initially introduced in 1992, into the Treaty of Maastricht, in response to fears of centralised power, and is used as a way to restrict the “powers of the central unit.”

Pursuant to Article 5(3) TEU post-Lisbon, the Union is clearly authorised to intervene into national, local and regional decisions only if MS action is insufficient to achieve the objectives of the proposed action. In such a case the action is considered to be better accomplished at the EU level. This article prevents the centralisation of legislative authority, and requires the Union to act only when necessary. Article 5 TEU is strengthened by a LT Protocol on the application of the principle of subsidiarity, which provides that all Union’s institutions must ensure “constant respect” for the subsidiarity principle. This rule is particularly significant for institutions with important legislative competences, namely the Council, the EP and the Commission. In addition, the protocol introduced a new procedure, giving for the first time the power to national parliaments to enforce the subsidiarity principle. Therefore, the Commission is now required to send its draft legislative acts to national parliaments at the same time as these are sent to the Union legislators – the Council and the European Parliament (EP).

7.4 The role of the European Parliament

7.4.1 The European Parliament as a co-legislator in the CAP

An important change brought about by the LT in the area of agriculture is the introduction of the ordinary legislative procedure (hereafter the “procedure”), which significantly strengthens the role of the EP in this policy area. This procedure has been operating since 1993 as the predominant procedure for

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216 Ibid, at Article 1 of Protocol (No 2) on the application of the principles of subsidiarity and proportionality.
218 Article 2 of Protocol (No 1) on the role of National Parliaments in the European Union.
decision-making within the EU.\textsuperscript{219} It involves both the Council of the EU and the EP, as the principal legislative bodies of the EU which must jointly adopt a regulation, directive or decision on a proposal from the Commission.\textsuperscript{220}

Prior the entry into force of the LT, the powers of the EP in the area of agriculture were limited. The previous Article 37(2) EC required only a consultation of the EP on agricultural matters, and the Commission and Council had no obligation to follow the EP’s opinions. The consultation procedure extremely limited the EP’s authority within the EU decision-making. Aside from using its “power to delay” by failing to deliver its opinion, the EP had no official legislative powers to influence EU agriculture legislative outcomes.\textsuperscript{221} While the Council was under no obligation to follow the EP’s opinions it was however required to receive it before adopting any legislation. Non-compliance with such a condition would render the measure void.\textsuperscript{222}

The LT has for the first time increased the powers of the EP in the agricultural area and provides that the EP is now a co-legislator with regards to measures relating to “the common organisation of agricultural markets and the other provisions necessary for the pursuit of the objectives of the common agricultural policy.”\textsuperscript{223} However, Article 43(3) TFEU excludes from the application of the procedure, measures on fixing prices, levies, aid and quantitative limitations in agriculture.

\textsuperscript{219} The ordinary legislative procedure was introduced with the Maastricht Treaty 1992 under Article 189b (now Article 294 TFEU) and was referred to as the “co-decision procedure.” It increased the legislative powers of the European Parliament to fifteen areas.

\textsuperscript{220} Op. cit. footnote no 1 at Article 289(1).


\textsuperscript{222} See Case 138/79 \textit{Roquette Frères v Council} [1980] ECR 3333, para. 33

\textsuperscript{223} Op. cit. footnote no 1 at Article 43.
which continue to remain under the Council’s responsibility. In accordance with the ordinary legislative procedure, as set out in Article 294 TFEU, the EP now plays an equal role with the Council in EU legislation on agricultural matters. The now EP exercises legislative powers ‘jointly’ with the Council, which therefore means that the Commission and Council are now bound by the EP’s opinions.

7.4.2 The European Parliament as a budgetary authority

In addition to the application of the ordinary legislative procedure to the agricultural policy, the LT increased the EP’s powers with regard to the adoption of the EU agricultural budget and international agreements. In accordance with a special legislative procedure, Article 310(1) TFEU provides that the EP and the Council must now establish together the entire Union’s annual budget. Prior to the LT, EU budgetary matters were subject to the consultation procedure, and the EP was only able to give non-binding opinions to proposed agricultural spending. The EU budget was divided into two categories: compulsory, representing the major part of the EU budget, and non-compulsory expenditure. Agriculture fell under the compulsory expenditure category. Final decisions on compulsory expenditure proposals were made by the Council, after consultation of the EP. The LT abolished the distinction between compulsory and non-compulsory expenditure, making agriculture fall within the full EU’s budget. Now, in accordance with Article 314 TFEU, the EP can either accept the draft budget, or amend it, by a

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majority of the votes cast.\textsuperscript{226} If the Council and the EP cannot reach a compromise agreement at the end of the procedure, the Commission must submit a new draft budget. The joint text will however be definitely adopted in cases where the EP approves it, and the Council rejects it.\textsuperscript{227} Given this, it can be argued that the budgetary procedure, which is subject to very strict deadlines, is an amended version of the ordinary legislative procedure. While the latter requires both the EP and Council to agree on a text in order to be adopted, the former can lead to the adoption of a budgetary text if the EP “approves [it] whilst the Council rejects it.”\textsuperscript{228} As a consequence, the EP has now a joint decision on direct income support to farmers, rural development and market-related support. It could also impose an agricultural budget on the EU, against the will of the Council, but which would be subject to the EU MS approval of the level of total expenditure.

7.4.3 The role of the European Parliament in international agricultural trade agreements

Under Article 218 TFEU, the consent of the EP\textsuperscript{229} is required for the conclusion of international agreements between the Union and third countries.\textsuperscript{230} The consent procedure, formerly known as the “assent procedure,” was introduced for the first time by the Single European Act of 1986. The procedure requires the Council to act on a legislative proposal put forward by the Commission and approved by the EP, in respect of the following types of agreement: association agreements concluded with third countries,\textsuperscript{231} agreements with important budgetary

\textsuperscript{226} Op. cit. footnote no 1 at Article 231.
\textsuperscript{227} Ibid. at Article 314(7)(d).
\textsuperscript{228} Ibid. at Article 314(7)(d).
\textsuperscript{229} This procedure is a special legislative procedure provided in Article 289(2).
\textsuperscript{230} Ibid. at Article 218(6).
\textsuperscript{231} Ibid. at Article 217.
implications for the Union,\textsuperscript{232} and agreements covering areas falling under the ordinary legislative procedure.\textsuperscript{233}

While the consent procedure extends the EP's legislative power, it remains distinct from the ordinary legislative procedure as examined above. Indeed the consent requirement is only triggered following the signing of the agreement, and requires the EP to either accept or reject the proposal in its entirety.\textsuperscript{234} The draft proposal presented to the EP represents the outcome of negotiations, which remain the prerogative of both the Council and the Commission.\textsuperscript{235} It is therefore implicit that the procedure excludes any democratic debate during the negotiation process. Accordingly the consent procedure provides no mechanism for the resolution of discord in the event of disagreement between the Council and the EP. It only calls on the EP to register simply a “yes or no” vote, with no legal way for the EP to amend the content of the proposal. It is argued therefore that such a constraint on the EP’s powers prevents it from influencing the content of any agreements.

In the context of international agreements, Article 218 TFEU has thus mirrored the co-legislator and budgetary role of the EP in agricultural policy. As a consequence, the EP would have to approve any future agricultural trade agreements between the Union and DCs before these could be adopted. Populist views with regard to the protection of domestic EU agriculture, and/or the price of food, will therefore have

\textsuperscript{232} Ibid, at Article 218(6) (a) (iv). There are several factors to be taken into account in order to assess the financial importance which an agreement has for the Union. These include for instance, the spread of expenditure under an agreement over several years and “the comparison of the expenditure under an agreement with the amount of the appropriations designed to finance the Community’s external operations” See Case C-189/97 Parliament v Council [1999] ECR I-4741.

\textsuperscript{233} Op. cit. footnote no 1 at Article 218(6) (a) (i), (iv).

\textsuperscript{234} Article 231 TFEU provides that the proposal must be adopted by a majority of members.

\textsuperscript{235} Ibid, at Article 218(2) to (4).
an increasingly greater impact on the EU’s relations with DCs in the area of agriculture.

8. Conclusion

As can be seen from the developments outlined in this chapter, the emphasis of the CAP has changed over the years. The EU’s CAP has caused controversy at the WTO level, particularly as a result of the difference between agricultural and non-agricultural commodities in the EU’s relations with DCs. Hence, there is no doubt that these will remain if such a difference is retained. However, recent CAP reforms have had a significant change on the instruments used to achieve the objectives of the CAP. The main policy mechanisms through which the EU has reformed the CAP are decoupling, modulation and cross-compliance. The 2003 reforms have led to a clear demarcation between direct payments and production through the implementation of the SPtS, which has since become the “dominant form of farm income support in the EU.”236 Coupled domestic subsidies still formed a large part of the post 2003 mid-term review approach to agriculture. However, the CAP “Health Check” agreed in 2008, aiming at simplifying and modernising the CAP has provided for further market orientation improvements.

The CAP has also evolved into a new policy structure in order to address new challenges such as climate change and food safety and quality. In furtherance of this aim, more funding from the SPtS was switched to Pillar 2. The CAP has thus moved from a highly protectionist model to a more market-oriented policy, thereby giving DCs more opportunity to export their products. On the external trade front,

EU agricultural market access is determined by import tariffs, which have replaced variable import levies, as well as other import charges applicable such as tariff quotas, administered by a system of licences, tariff preferences and emergency safeguard measures which will be covered in Chapter 4 of this thesis.

EU spending on agricultural support measures has been fixed until 2013. The CAP is thus due to be reformed again soon. The Commission published in 2010 its proposals with regard to a further simple framework for the CAP after 2013.\textsuperscript{237} A set of legislative proposals have been published in October 2011. The draft proposals must now be adopted by the Council and the EP. The extent of the future CAP changes and their impact on DCs’ access to the EU market are yet to be seen.

The EP pointed out in July 2010, in an own-initiative report on the CAP after 2013 that the CAP post-2013 has to meet the “socio-economic needs” and must thus “ensure it has the tools to compete on world markets.”\textsuperscript{238} As a consequence, any willingness of the Commission to introduce radical changes to the CAP will probably be blocked by the EP, which will have no choice but to “serve the interests of EU farmers.”\textsuperscript{239} There will be an analysis of possible future developments in relation to the CAP in the final chapter of this thesis.

\textsuperscript{238} European Parliament resolution of 8 July 2010 on the future of the Common agricultural Policy after 2013, Strasbourg, (2009/2236 (INI)).
\textsuperscript{239} Ibid.
Chapter 3 - The WTO agricultural trade rules and developing countries

Chapter 3  WTO agricultural trade rules and developing countries

1. Introduction

The reforms of the European Union's Common Agricultural Policy (CAP) analysed in Chapter 2 of this thesis need to be fully understood in the context of the rules on agriculture established by the World Trade Organisation (WTO). These rules are mainly contained in the WTO Agreement on Agriculture (AoA), which came into force in 1995 and provides for "specific binding commitments" in "market access, domestic support and export competition."\(^1\) The Member States of the WTO began to implement the commitments contained within the schedules of the AoA over a six year period, from 1995 to 2001.

This WTO AoA, along with both the General Agreement on Tariffs and Trade (GATT) 1947 and the updated GATT 1994, are annexed to the Agreement establishing the World Trade Organisation (or the WTO Agreement),\(^2\) of which the first and the latter two agreements resulted from the Uruguay Round negotiations which ran from 1986 to 1994. The WTO AoA provided in Article 20 that negotiations in the agricultural area would start again "one year before the end of the implementation period" of the AoA in order to "make substantial progressive reductions in support and protection resulting in fundamental reform" of agricultural trade.\(^3\) The first phase of these negotiations began in March 2000 and ended in March 2001. The second phase of the multilateral agricultural trade negotiations opened at the end of March 2001. On 14\(^{th}\) November 2001, the "Doha

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\(^1\) Preamble (4) of the WTO Agreement on Agriculture, adopted 15 April 1994.
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Ministerial Declaration was adopted at the Fourth Ministerial Conference in Doha, Qatar, providing for “the mandate for negotiations on a range of subjects,” thereby refocusing the negotiations. Since the “majority of WTO members are developing countries,” WTO members agreed to “place their needs and interests at the heart of the Work Programme adopted in this Declaration” and to “continue to make positive efforts designed to ensure that [these countries], secure a share in the growth of world trade commensurate with the needs of their economic development.” The current Doha Development Round trade negotiations pursued under the Doha Development Agenda have still not, at the time of writing, been concluded.

In order to emphasize the disadvantages faced by developing countries (DCs) within the world trade system, the WTO agreements contain “special and differential treatment” (SDT) provisions. These provisions give DCs special rights as well as giving them the possibility to be treated differently from developed countries because of their special development needs. The cornerstone of this system is that it recognises that DCs’ needs have to be taken into account in order to facilitate their integration into the multilateral trading system. This chapter will

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therefore analyse the forms and implementation of SDT in the WTO AoA and in its supporting agreements.

It must be noted that the development of these provisions was conducted under the continuing influence of the end of colonialism. When GATT 1947 was being drafted, most DCs were still under the control of the United States (US) and European colonial empires, and continued to be so for some years after. Consequently, it is argued that the interests for many DCs were “spoken for” or “represented” by their colonisers during the early GATT trade rounds of negotiations. While subordinating peoples from the third world, it is also pointed out that developed or colonial countries considered the GATT as their “property,” and believed that “they did not have to accommodate the interests of the rest of the world.” Consequently, while the original twenty-three contracting parties were composed of countries with different levels of economic development, there was no distinction made between the contracting parties, as this would contravene the GATT fundamental principle of non-discrimination in international trade. The first aspect of this principle of non-discrimination is found in Article 1 of the GATT agreement which provides that with respect to trade in goods, contracting parties must grant the same “advantage, favour, privilege or immunity” to all their trading partners. This principle is referred as the “most favoured nation” (MFN) treatment. The second aspect of the non-discrimination principle is the “national treatment”

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13 Ibid., p 55.
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principle (NT) which prohibits discrimination between imported and domestic products.\textsuperscript{14} However, it must be noted that the failed Havana Charter contained a section dealing with “economic development and reconstruction.”\textsuperscript{15} Article 13 of this section authorised contracting parties to use protective measures as “special governmental assistance” in order to “promote the establishment, development or reconstruction of particular industries or branches of agriculture.”\textsuperscript{16}

With GATT 1947 calling for “reciprocal and mutually advantageous arrangements” and the “elimination of discriminatory treatment in international commerce,”\textsuperscript{17} countries with a lower level of economic development were participating in all fields of GATT activities as “equal partners.”\textsuperscript{18} In line with the reciprocity requirement, considered as a “major obstacle” for DCs,\textsuperscript{19} all contracting parties were committed to the same obligations.\textsuperscript{20} The GATT 1947 only recognised two categories of contracting parties: the “developed contracting parties” and the “less-developed contracting parties.” The latter term was intended to include all countries which were not considered to be “developed.” The updated GATT 1994 relies heavily on GATT 1947\textsuperscript{21} and replaced these terms with reference being made to “developing country Members” and “developed country Members.”\textsuperscript{22} The WTO Agreement provides further clarification and refers to the “least-developed”

\begin{itemize}
\item \textsuperscript{14} Article III of the General Agreement on Tariffs and Trade 1947, Geneva, July 1986.
\item \textsuperscript{15} The Havana Charter was to establish the International Trade Organisation, “of which the GATT agreement was to form part.” The Charter failed due to the failure of the Congress of the United States to ratify it.
\item \textsuperscript{16} Article 13 of the Havana Charter was entitled “Governmental assistance to Economic Development and Reconstruction.”
\item \textsuperscript{17} Op. cit. footnote no 14 at Preamble (4).
\item \textsuperscript{18} Op. cit. footnote no 10, p 50.
\item \textsuperscript{19} Ibid., p 57.
\item \textsuperscript{21} Article 1 of General Agreement on Tariffs and Trade 1994.
\item \textsuperscript{22} Ibid. at Article 2(a).
\end{itemize}
among DCs, thereby distinguishing for the first time between DCs and the least-developed countries (LDCs) within the WTO provisions. LDCs are considered as those listed as such by the United Nations (UN). As explained in Chapter 1 of this thesis, LDCs are not the subject matter of this thesis. The following discussion will therefore focus on the DCs and will not go into the LDCs situation in any great detail.

In light of the gap in competitiveness between the developed and the less-developed contracting parties under GATT 1947, the less-developed contracting parties have attempted to advance change within the GATT, with the main objective being that of differential treatment from other, developed, contracting parties. This has led to the revision of GATT 1947 by way of a series of trade negotiation rounds. It is for this purpose that this chapter will analyse the evolution of development provisions within the GATT and the WTO which assist with integrating DCs and LDCs into the international trading system.

2. The GATT review session (1954-55)

The special development needs of DCs as a group, heretofore unacknowledged, was recognised and taken into account by GATT Article XVIII entitled “Government Assistance to Economic Development,” which had been redrafted to better reflect this aim during the GATT Review Session in late 1954 / early 1955. During this session, DCs argued in particular that their needs in the area of agriculture were still not being accommodated as this sector had been excluded from the remit of the GATT and because agricultural products were not exempted

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from the ban on quantitative restrictions. It is therefore possible to say that the revision of GATT Article XVIII was the first emergence of the so-called “special and differential treatment” concept. In accordance with the new provisions of this article, countries with an economy that can only “support low standards of living” and are in “the early stages of development,” are allowed to “modify or withdraw” scheduled tariff concessions. This is in order to “promote the establishment of a particular industry” and thereby effect the “raising the general standard of living of its people.” However, these countries may need to consult GATT contracting parties affected by the withdrawal or modification of the tariff concession.

Furthermore, in order to reflect the possible balance of payments instability that DCs may face, they are given additional flexibility for the use of quantitative restrictions on imports. However, it must be noted that this exception is not made without specific conditions. GATT Article XVIII (9) provides that these restrictions must not exceed those necessary to prevent or stop “serious decline” in the country’s monetary reserves, and the monetary reserves of the country must also be inadequate. The respect of this requirement was highlighted in the post-WTO case of India- Quantitative Restrictions, in which the US challenged India’s quantitative restrictions on the importation of agriculture, textile and industrial products. The dispute arose following India’s proposal to phase out its

27 Ibid. at Article XVIII(7)(a).
28 Ibid. at Article XVIII(5).
29 Ibid. at Article XVIII (2).
30 Ibid. at Article XVIII (9)(a)(b).
quantitative restrictions over a seven-year period whereas the US argued that this could be made over a shorter period. The WTO Panel found that India did not have inadequate reserves and it was not facing or threatened with a serious decline in its monetary reserves within the meaning of GATT Article XVIII (9). As a consequence, India was over protecting itself and it could not maintain its balance-of-payments measures.

In order to promote a specific industry, DCs are also able to use any measures that are not consistent with other GATT provisions, provided that they notify other contracting parties of these measures. It must be noted that while the provisions of the revised Article XVIII address the needs of DCs in multilateral trade negotiations, their benefits were limited because of high tariffs imposed by developed contracting parties on agri-food imports from less-developed contracting parties.

3. The Kennedy Round (1964-67) and the Tokyo Round (1973-79)

3.1 Part IV of the GATT

Following the GATT Review Session, the Kennedy Round of trade negotiations was launched in 1964 in Geneva. In light of these negotiations, a protocol, subsequently, known as “Part IV of the GATT,” was adopted by the GATT contracting parties in order to further recognize and take into account the special

32 Ibid.
33 Ibid, at paras. 5.180 and 5.184.
34 Ibid, at para 6.2. The findings of the Panel were confirmed on appeal by the Appellate Body. See WTO Appellate Body Report, WT/DS90/AB/R, adopted 22 September 1999, para.153.
35 Op. cit. footnote no 14 at Article XVIII, section C.
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economic needs of DCs in multilateral trade negotiations.\textsuperscript{37} This protocol contains three new articles dealing with trade and development issues. First, GATT Article XXXVI recognises that many DCs remain dependent on the export of “a limited range of primary products,” and that “there is a need for positive effort” to improve market access for these products.\textsuperscript{38} Consequently, in accordance with GATT Article XXXVII, the developed contracting parties are committed to “the fullest extent possible” to “accord high priority to the reduction and elimination of barriers to products currently or potentially of particular export interest to less-developed countries.”\textsuperscript{39} However, it must be noted that many of these products, such as sugar or bananas, are also sensitive agricultural products for developed countries, and therefore are highly protected by domestic measures.\textsuperscript{40} This has resulted in trade disputes over the European Union (EU) sugar and banana regimes, examined in Chapters 8 and 9 of this thesis.

At last, in order to further the objectives of GATT Article XXXVI, contracting parties are required to take “joint action” in accordance with the set of guidelines given in GATT XXXVIII.\textsuperscript{41} This was confirmed by the GATT Panel in the case of European Communities-Refunds on Exports of sugar, where Brazil, as a developing country, argued that the EU had breached Article XXXVIII by maintaining its sugar subsidy system, resulting in increased EU exports of sugar and reduction of imports, and by refusing afterwards to “accept any form of

\textsuperscript{37} This protocol was adopted after a Special Session in Geneva of the Contracting Parties on the 17\textsuperscript{th} November to 8\textsuperscript{th} February 1965.

\textsuperscript{38} Op. cit. footnote no 14 at Article XXXVI (3) and (4).

\textsuperscript{39} Ibid, at Article XXXVII (1)(a).


\textsuperscript{41} Contracting parties are for instance required to take action through international arrangements to “provide improved and acceptable conditions of access to world markets for primary products of particular interest to less-developed contracting parties” Op. cit. footnote no 14 at Article XXXVIII(2)(a).
discipline" under the International Sugar Agreement of 1977.\textsuperscript{42} According to the GATT Panel, the EU's use of subsidies has "inevitably reduced the effects of the efforts" made by DCs.\textsuperscript{43} Consequently, the Panel held that the EU had "not collaborated jointly with other contracting parties to further the principles and objectives set forth in Article XXXVI, in conformity with the guidelines given in Article XXXVIII."\textsuperscript{44}

In addition, the protocol asserts the principle of "non-reciprocity" in trade relations between developed and less-developed contracting parties. This principle is clearly formulated in paragraph 8 of Article XXXVI, which states that "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 countries."\textsuperscript{45} The meaning of "do not expect reciprocity" has been clarified to be understood and implies that "the less-developed contracting parties should not be expected, in the course of trade negotiations, to make contributions which are inconsistent with their individual development, financial and trade needs, taking into consideration past trade developments."\textsuperscript{46}

In light of the above, it is possible to say, therefore, that the insertion of Part IV into GATT was a big step forward for DCs. The principle of non-reciprocity, as one of the core pillars of the SDT, emphasizes the complexity of a trading system under which some countries are trading with partners at a different level of

\textsuperscript{42} GATT Panel Report, \textit{European Communities-Refunds on Exports of Sugar}, Complaint by Brazil ("EC-Sugar Exports (Brazil)"), L/5011, adopted 10 November 1980, BISD 27S/69. para 2.22.
\textsuperscript{43} Ibid, at para. (h).
\textsuperscript{44} Ibid. at para. (h).
\textsuperscript{45} Op. cit. footnote no 14 at Article XXXVI (8).
\textsuperscript{46} Ibid. at Annex I, ad Article XXXVI (8).
development, and thus need to be given a fairer position in the game. As a consequence, Ismail points out that, provisions of Part IV of GATT, and particularly Article XXXVIII, created “the basis for preferences for [DCs], both between developed and [DCs] and between [DCs] themselves.”

3.2 The Enabling Clause

GATT Article XXXVIII refers to the Second Session of the United Nations Conference on Trade and Development (UNCTAD II) agreement on the creation of preferential market access for DCs exports, which is generally referred to as the Generalized System of Preferences (GSP). Its aims are “to increase the export earnings of [DCs], promote their industrialization and accelerate their rates of economic growth.” However, as the concept of preferential tariff treatment goes against the MFN obligation of GATT 47 Article I, a waiver of this article was adopted by the GATT Parties in 1971. This legalized the UNCTAD resolution on GSP within the GATT Framework. This waiver described the GSP as a “system of generalized, non-reciprocal and non-discriminatory preferences beneficial to the [DCs]” and permitted “developed contracting parties ... to accord preferential tariff treatment to products originating in [DCs]” for a period of ten years.

48 The creation of a non-reciprocal system of tariff preferences in favour of the developing countries was presented in 1964 by the Secretary-General Raul Prebisch of the first United Nations Conference on Trade and Development (UNCTAD). This concept was formalised in UNCTAD II Conference in 1968 when it adopted the Generalised System of Preferences. Resolution 21 (II), in, Final Act and Report of UNCTAD II, Annex 1 (United Nations, New York, 1968).
52 Ibid. at Para. (a).
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However, this GATT waiver was only for the stated period of ten years, hence the preferential market access was not secured yet for DCs. It was only after the Tokyo Round of Trade Negotiations\(^53\) that the waiver became permanent with the adoption in 1979 of the “Decision on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries” Agreement, commonly known as the “Enabling Clause.”\(^54\) Since then, developed contracting parties can establish GSP schemes granting tariff preferences to DCs without breaching the GATT Agreement. Australia, Canada, the EU, Japan and the USA are among the current thirteen GSP preferences-giving countries.\(^55\) These GSP schemes are diverse in terms of product coverage and depth of tariff cuts, depending on particular sensitivities to the GSP donors.\(^56\) The EU’s GSP regime will be examined in Chapter 5 of this thesis.


While the “Enabling Clause” placed the SDT concept “at the heart of the GATT legal system,”\(^57\) developed countries were still using measures to protect their agricultural market, thereby affecting DCs’ access. As a consequence, two years after the end of the Tokyo Round, a new round was launched in 1986 at Punta del Este, Uruguay. In this new round it was recognised that “products of interest to DCs, especially in agriculture were not adequately addressed in the previous


The Uruguay Round of multilateral trade negotiations were based around three elements, namely domestic support, market access and export subsidisation. The negotiations resulted in the formation of the WTO and the adoption of the WTO Agreement on Agriculture (AoA) in 1995. This agreement covers agricultural products found in Chapters 1 to 24 of the Harmonised Commodity Description and Coding System (HS) of the World Customs Organisation. The HS, which is further discussed in Chapter 4 of this thesis, came into force on 1st January 1988 with the aim to harmonise world wide customs and trade procedures. The WTO AoA does not cover fish and fish products. Article 21 of the WTO AoA provides that it will take priority over “the provisions of GATT 1994 and of other Multilateral Trade Agreements in Annex 1A to the WTO Agreement.”

The WTO AoA establishes “specific binding commitments” within the three areas of domestic support, market access and export subsidisation, with the long-term objective of establishing “a fair and market-oriented agricultural trading system.” Consequently, these commitments are considered the “starting point” for the continuation of further negotiations as stated in Article 20 of the WTO AoA. Such further negotiations in agricultural trade resumed in 2000. The negotiations are now in their twelfth year. The AoA recognises the “particular needs and conditions” of DCs, and reaffirms that SDT treatment for DCs is “an integral element” of the Uruguay Round negotiations. It also recognises that market access for agriculture products is of particular interest to DCs, and should be improved by

60 Ibid. at Annex 1(1).
61 Ibid. at Article 21.
62 Ibid. at Preamble (2).
developed countries. Accordingly, SDT treatment has become an integral part of the AoA and the numbers of SDT provisions have increased. These provisions have been classified by the WTO Committee on Trade and Development (COMTD) into six main groups. The first group includes provisions aiming at increasing DCs’ trade opportunities. The second group consists of provisions that require WTO members to safeguard DCs’ trade interests. The third category contains provisions that give DCs a certain degree of flexibility for the implementation of their commitments, action, and use of policy instruments. The fourth group encompasses provisions allowing longer time periods to DCs for implementing WTO agreements and commitments. The fifth and sixth group covers respectively provisions with regard to technical assistance to DCs, and additional provisions relating specifically to LDCs. Each SDT group will be considered in the following section. However, since this thesis relates only to DCs, the provisions pertaining specifically to LDCs will not be covered.

The concept of SDT was then emphasized in the current Doha Development Round negotiations. In Doha, WTO members agreed to review all SDT provisions “with a view to strengthening them and making them more precise, effective and operational.” In this aim, the WTO COMTD was instructed to identify mandatory SDT provisions and those that are “non-binding” in character. Accordingly, the WTO COMTD secretariat has made a classification between

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64 Op. cit. footnote no 1 at Preamble (6).
65 There are currently 155 SDT provisions.
66 http://www.wto.org/english/tratop_e/develop_e/d3ctte_e.htm
mandatory and non-mandatory SDT provisions. Mandatory provisions contain the word “shall,” whereas those that are non-mandatory contain the word “should.”\textsuperscript{70} However, there is also a problem with the enforceability of mandatory provisions, given the asymmetry of power between developing and developed countries or blocks at the WTO. DCs are of the view that even provisions that are apparently mandatory are \textit{de facto} non-binding because “they may allow considerable flexibility in their implementation.”\textsuperscript{71} Consequently, it is argued that “developing countries may have got less than they bargained for.”\textsuperscript{72}

5. Forms and implementation of SDT in the WTO Agreements

5.1 Provisions aimed at increasing the trade opportunities of developing country Members

There are at least fourteen SDT provisions relating to the increase of trade opportunities through market access for DCs. They are found in Part IV of GATT 1994, the Enabling Clause, and the WTO AoA. As mentioned previously, Part IV of GATT and the Enabling Clause have been introduced following revisions made to GATT 1947 in order to encourage an increase of trade opportunities in products of export interest to DCs. These provisions were carried forward into the GATT 1994 and remain in force under the WTO agreements. However, it must be noted that some of these provisions have been classified as “non-mandatory” by the WTO COMTD.\textsuperscript{73} For instance, while the WTO AoA provides in its preamble that


\textsuperscript{72} Op. cit. footnote no 40 at page 449.

\textsuperscript{73} Op. cit. footnote no 70.
developed countries, in implementing their commitments to market access, "would take fully into account the particular needs and conditions for developing countries,"\textsuperscript{74} the WTO COMTD points out that the use of the word "would" instead of "shall" shows that this preamble does not set out a mandatory obligation. It is instead only a text of objectives and principles.\textsuperscript{75} Furthermore, it is pointed out that several SDT provisions contained in Part IV of GATT 94 also "fall short of binding, enforceable obligations."\textsuperscript{76} According to the WTO COMTD, Article XXXVI paragraphs 2 to 5 include agreed objectives and principles, but they contain the formulation "there is need for/to" which "do not in themselves, mandate specific action."\textsuperscript{77}

Lastly, another important SDT implementation issue is the preferential treatment permitted under the "Enabling Clause." Since its introduction, the Enabling Clause has showed several weaknesses which remain unchanged under the WTO. The Enabling Clause states that developed countries "may accord differential and more favourable treatment to developing countries, without according such treatment to other contracting parties."\textsuperscript{78} The words used are seen as non-mandatory\textsuperscript{79} and as the WTO COMTD noted, this provision "confers rights and is not meant to impose obligations."\textsuperscript{80} This is in line with the "Agreed Conclusions" adopted by UNCTAD concerning the legal status of the GSP, which provides that the grant of tariff preferences "does not constitute a binding commitment and that they are temporary in nature"; and "it does not in any way prevent (i) their subsequent withdrawal in

\textsuperscript{74} Op. cit. footnote no 1 at Preamble (5).
\textsuperscript{76} Op. cit. footnote no 40, p 448.
\textsuperscript{77} Op. cit. footnote no 75.
\textsuperscript{78} Op. cit. footnote no 54 at Paragraph 1.
\textsuperscript{79} Op. cit. footnote no 71.
\textsuperscript{80} Op. cit. footnote no 75, p 5.
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whole or in part;” or (ii) “the subsequent reduction of tariffs [...]”81 As a consequence, developed countries are not obliged to grant tariff preferences to DCs under the GSP.

Furthermore, it must be noted that tariff preferences granted under the GSP have a unilateral character. Accordingly, developed countries can “unilaterally modify, expand or limit” these preferences.82 The voluntary and unilateral character of the GSP is critised by Fritz who argues that this limits the usefulness of the preferences as “the beneficiaries are kept in a permanent state of insecurity as to the extent and the duration of the preferences.”83 It is clear that the non-binding and unilateral aspects of the GSP prevent DCs having a legal recourse against the withdrawal of their preferences. However, when countries decide to grant tariff preferences to DCs, GSP preferences will be subject to WTO rules and procedures.84 Accordingly, the legality of these schemes can be challenged if they do not comply with the conditions set out by the Enabling Clause. It is believed that DCs may fear to take on such action as they can be threatened with the withdrawal of their preferential tariff benefits or foreign aid.85 Nottage points out that disputes brought against GSP schemes are extremely rare and that the EC-

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Tariff Preferences case,

examined in Chapter 5 of this thesis, and the European Communities– Measures Affecting Soluble Coffee case

are the only examples.

5.2 Safeguarding the interests of developing countries

The WTO agreements contain several provisions which call on developed country WTO members to safeguard the interests of DCs. Among these provisions more than half of them are supposed to be mandatory as they contain “shall” formulations. However, some of them remain non-binding in fact. An example of this is Article 10(1) of the WTO Agreement on the Application of Sanitary and Phytosanitary Measures (the “WTO SPS Agreement”).

This Agreement is contained in Annex 1A of the Agreement Establishing the World Trade Organisation and is referred to in Article 14 of the WTO AoA. The SPS agreement ensures that the application of “measures necessary to protect human, animal or plant life or health” by the Member States of the WTO do not “constitute a disguised restriction on international trade.” Accordingly, this agreement is of particular importance in the area of global trade in agricultural food commodities. The WTO SPS Agreement will be examined in detail in Chapter 6 of this thesis.

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87 European Communities - Measures Affecting Soluble Coffee - Request for Consultations by Brazil. WT/DS209/1, 12 October 2000.
91 Article 14 of the WTO AoA provides that “Members agree to give effect to the Agreement on the Application of Sanitary and Phytosanitary Measures.”
92 Op. cit. footnote no 90 at Preamble (1) and Article 2(3).
Article 10(1) of the WTO SPS Agreement provides that when preparing and applying SPS measures, WTO members must take into account "the special needs of developing country Members," in that they are "highly dependent in agricultural production and exports." It is believed that the problem with the provisions of this article is the difficulty in proving that the interests of DCs have not been addressed before the implementation of the developed countries' measures.

In the EC- Approval and Marketing of Biotech Products case, the WTO panel concluded that Argentina has failed to demonstrate that the EU has acted "inconsistently with its obligations under Article 10.1 of the SPS Agreement." The Panel considered that the expression "take account of" should be understood as to "consider along with other factors before reaching a decision." Accordingly, the WTO panel is of the view that Article 10(1) "does not prescribe a specific result to be achieved." In the view of the WTO panel "the absence of a reference to developing country needs in the text of [a developed country's] approval legislation does not demonstrate that that legislation itself fails to take account of these needs." It therefore considered that pointing "the absence in [a developed country's] approval legislation of a reference to the needs of developing country Members" was not "sufficient for the purposes of establishing a claim under

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93 Ibid. at Article 10(1).
96 Op. cit. footnote no 94. This case concerned certain measures taken by the EU and its member States affecting imports of agricultural and food imports from Argentina.
97 Ibid. at para 7.1627.
100 Ibid. at para 7.1623.
Article 10.1. Nevertheless, if it is found in a dispute that the developed country's measure is inconsistent with the requirement of this article, the WTO Panel or Appellate Board “shall recommend that the Member concerned bring the measure into conformity with that agreement.”

The WTO Anti-Dumping Agreement contains also a clause which seems mandatory but yet de-facto non-binding. This clause requires developed countries to “give special regard” to the situation of DCs and explore also “the possible constructive remedies” prior the application of anti-dumping measures. However, it is argued that there is no obligation upon developed countries to provide such alternative remedies. As a consequence in spite of being classified as mandatory provisions, those SDT are in fact expressed in “broad hortatory (‘best endeavours’) terminology.”

5.3 Flexibility of commitments, of action, and use of policy instruments

Most provisions relating to the flexibility of commitments are found in the WTO AoA and the Agreement on Subsidies and Countervailing Measures (“SCM Agreement”). The latter agreement relates to government or public support measures and covers all goods sectors, including agriculture. In accordance with Article 3 of the SCM Agreement, export subsidies and subsidies which give...
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preference to domestic products are prohibited,\textsuperscript{109} unless such subsidies are specified in the Agreement on Agriculture.

Under these provisions DCs are not totally exempt from the WTO rules, rather they have lesser obligations to assume. As previously mentioned, the WTO AoA establishes legally binding commitments for WTO members in the areas of market access, export subsidies and domestic support. Accordingly, it would be possible for DCs to challenge any WTO member which fails to comply with the AoA.\textsuperscript{110} With regards to market access, DCs are given, under the AoA, lesser tariff reduction commitments than developed countries. They were required to reduce their tariffs on average by 24 percent over a ten-year period beginning in 1995, whereas developed countries had to reduce theirs on the average by 36 percent over a six year-period. In order to reduce tariffs, the system of tariffication was seen as “an important step forward” under the WTO AoA.\textsuperscript{111} Under this concept, all non-tariff market protection measures, such as quotas, have to be “converted into ordinary customs duties.”\textsuperscript{112} However it is argued that average agricultural tariffs applied by most developed countries are “higher than applied tariffs for non-agricultural products,” thereby restricting trade for DCs.\textsuperscript{113} This practice applied by developed countries has been termed “dirty tariffication” which is defined as “the use, during the tariffication process, of artificially high domestic prices and artificially-low world market prices in order to set a particular tariff at a level

\textsuperscript{109} Ibid. at Article 3(1).
\textsuperscript{110} Op. cit. footnote no 71.
\textsuperscript{112} Op. cit. footnote no 1 at Article 4(2).
\textsuperscript{113} Op. cit. footnote no 111, p 36.
higher than it should be."\textsuperscript{114} This practice results in an irregular tariffs structure and peak tariffs on sensitive products for DCs.\textsuperscript{115}

In addition to the above, WTO members were also required to reduce their export subsidy commitments during the six-year implementation period of the AoA. Most governments which deploy subsidies are developed countries whereas governments from many DCs are not in a sufficiently strong economic position to subsidise their exporters.\textsuperscript{116} Accordingly, DCs have to reduce their value and volume of subsidies by 24 and 14 percent, respectively, over a period of 10 years.\textsuperscript{117} In contrast, developed countries have had to reduce their volume of subsidies by 21 percent and their value of subsidies by 36 over 6 years. Fritz points out that in spite of these commitments, subsidies are still authorised by the AoA if “the prescribed reduction commitments for the products in question had been accepted and if this has been noted in the country-specific list of commitments.”\textsuperscript{118} This possibility is particularly used by the EU and “enable[s] European exporters to offer dumping prices,” thus depressing world market prices with a severe impact on DCs’ exports.\textsuperscript{119}

DCs are also granted lower levels of obligations under the WTO AoA with regard to domestic support. Domestic support is defined as support measures “expressed in monetary terms, provided for an agricultural product in favour of the

\begin{itemize}
\item \textsuperscript{115} Op. cit. footnote no 71, p 19.
\item \textsuperscript{116} Ibid.
\item \textsuperscript{117} Op. cit. footnote no 1 at Articles 8, 9, 10, 11.
\item \textsuperscript{118} Op. cit. footnote no 71, p 20.
\item \textsuperscript{119} Ibid., p 20.
\end{itemize}
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According to Brink, domestic support provisions are one of the three WTO AoA pillars,\textsuperscript{121} which were inserted as a result of the Haberler Committee Report\textsuperscript{122} of 1958.\textsuperscript{123} Measures that “directly encourage home production”\textsuperscript{124} were considered in the Haberler Report as being one of the three elements of agricultural protection,\textsuperscript{125} as they maintain “the net reward to the farmer above the level which would correspond to the price at which he can sell his product.”\textsuperscript{126} This report refers to what the AoA classified in 1994 as market price support and direct payments to producers through subsidies, which are the two groups of domestic support measures.

These subsidies are important elements of agricultural protection and are thus classified into three “boxes” according to their level of trade distorting effects. The “amber box” contains payments directly linked to production quantities and measures to support prices, so therefore includes all measures distorting production and trade.\textsuperscript{127} The “blue box” is, according to Stevenson and Filippi, “an Amber box with conditions.”\textsuperscript{128} It contains direct payments made under production-limiting programs which must be “(i) based on fixed area and yields; or (ii) made on 85 percent or less of the base level of production; or (iii) on a fixed number of

\textsuperscript{120} Op. cit. footnote no 1 at Article 1(a).
\textsuperscript{121} The other two pillars are: market access and export subsidies.
\textsuperscript{124} Ibid., p 2.
\textsuperscript{125} The two other elements identified in the report are: “measures that directly discourage imports” and “measures that directly encourage exports.” See Ibid., p 2.
\textsuperscript{126} Op. cit. footnote no 122, para. 236.
\textsuperscript{127} Op. cit. footnote no 1 at Article 6.
livestock head." These payments are partially decoupled from production, and are considered less trade distorting than the Amber box, and are therefore exempt from reduction commitments.

Lastly the "green box" covers support measures which have "no, or at most minimal, trade-distorting effects or effects on production." This includes decoupled income supports that do not involve transfers from consumers and which do not have the effect of providing price support to producers. It must be noted that in 2000, DCs expressed their concerns about farm subsidies classified as trade distorting and which were simply shifted to the green box. They argued that spending on the green box "masks huge supports that continue to be provided by [developed] countries." The decoupled payments of the WTO green box are supposed to be, as classified by the Organisation for Economic Co-operation and Development (OECD), to be "effectively fully decoupled" payments, which require that "production (or trade) not differ from the level that would have occurred in the absence of that measure." However, Cardwell and Rodgers argue that this "fundamental requirement" of "have no, or at most minimal, trade-distorting effects or effects on production" is unclear, and lacks precision as to whether it is a free-standing obligation or not. This is in line with the case of

130 Ibid. at Article 6 (5)(b).
131 Ibid. at Annex 2(1).
132 Ibid. at Annex 2(1) (a) and (b).
134 Ibid.
135 http://www.oecd.org/home/0,2987,en_2649_201185_1_1_1_1_1_1,00.html
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*United States- Subsidies on Upland Cotton*, where Brazil claimed that US breached the WTO SCM Agreement. Here the ruling in that case was that “the Panel does not decide whether the fundamental requirement in paragraph 1 of Annex 2 is a freestanding obligation or not.” In the view of Cardwell and Rodgers this fundamental requirement also lacks clarity as there is “no indication of the basis for quantifying the effects of support for the purposes of ascertaining whether its trade-distorting effects are more than ‘minimal’.”

In light of this classification, only the “amber box” was subject to reduction commitments. DCs had to reduce their domestic support measures by 13.3 percent over 10 years, while developed countries had to reduce theirs by 20 percent over 6 years. The WTO AoA also provides DCs with greater flexibility with regard to their own domestic support, as they do not have to reduce domestic support measures which are “an integral part of their development programmes.” Brink is of the view that the “Peace Clause” contained in Article 13 of the WTO AoA was “an incentive for some [WTO members] to meet the green box criteria.” In accordance with Article 13 of the WTO AoA, countries using domestic and export subsidies which comply with the AoA rules were protected from being challenged under the WTO SCM Agreement, and under the legal provisions of the GATT 1994, even if they undermined a country’s export performance. The “Peace Clause” which was implemented for a period of nine years expired in 2003,

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141 Op. cit. footnote no 1 at Article 6(2).
142 Ibid. at Article 13 entitled “Due Restraint” and is also known as the “Peace Clause.”
thereby making the provisions of the SCM Agreement applicable to agricultural trade. It is worth noting that the WTO Understanding on Rules and Procedures Governing the Settlement of Disputes ("Dispute Settlement Understanding" or DSU)\textsuperscript{145} establishes a "binding, automatic, and legalised dispute settlement system to enforce WTO rules."\textsuperscript{146} Despite this, it is pointed out that the "Peace Clause" was "structured to limit the application of various potential remedies against subsidies under the WTO agreements."\textsuperscript{147} The WTO Dispute Settlement Understanding is examined further below.

In 2003, Brazil, commenting on the trade barriers to agricultural goods, declared that they "harm DCs by denying them market opportunities," and that domestic and export subsidies in developed countries also depress "prices and incomes throughout the world, cut into the export earnings of competitive exporters and increase food insecurity in developing countries."\textsuperscript{148} The Dominican Republic also argued that agricultural export earnings in the country had declined significantly since 1997, affecting the Dominican economy, mainly because of "the falling international prices in the main export items, due to subsidies and distortions."\textsuperscript{149} DCs, were therefore calling for the "removal of all kinds of

\textsuperscript{147} Ibid. p 373.
subsidies on agricultural products.\textsuperscript{150} However, the WTO AoA continues, instead, to require their reduction, instead of their elimination.

5.4 Transitional time periods

In order to take into account the needs of DCs, the WTO allows them a longer time period to comply with their obligations. In 2001, the WTO COMTD identified 18 provisions relating to transitional time periods.\textsuperscript{151} For instance, the WTO AoA allowed up to ten years to DCs to implement their reduction commitments. Developed countries were given six years.\textsuperscript{152} In addition, the WTO SPS Agreement provides that the SPS Committee may grant to DCs "specified, time-limited exceptions in whole or in part from obligations under this Agreement."\textsuperscript{153} It may seem that such a flexibility was an important step towards taking into account DCs’ insufficient capacities. However, Cottier is of the view that this transitional period “merely reflects the need to build capacities and to allow [time] for structural adjustment."\textsuperscript{154} There is a wide economic development gap between developed countries and DCs. There is therefore no doubt that DCs have to face significant implementation and adjustment costs, as well as the high protectionism policy in agricultural market applied in developed countries, or trading blocs, such as the EU. The implementation delay granted is not unlimited, which implies that at the end of the delay, DCs would be subject to the same rights and obligations as the developed countries, and there would be “full reciprocity.”\textsuperscript{155}

\textsuperscript{152} Op. cit. footnote no 1 at Article 15(2).
\textsuperscript{153} Op. cit. footnote no 90 at Article 10(3).
5.5 Technical assistance

Given the important number of DCs members, there are 14 SDT provisions which aim to assist them “to adjust to WTO rules and disciplines, implement obligations and exercise the rights of membership.” These provisions also support DCs’ building capacity and hence help DCs participate more fully in the global trading system. DCs receive assistance directly from developed country WTO Members or from the technical cooperation programme of the WTO Secretariat. The objective of this technical cooperation is “to help build the necessary institutions and to train officials.”

Since all SDT provisions relating to technical assistance contain the word “shall,” they have been classified by the WTO COMTD as mandatory. An example of such provisions is Article 9 of the WTO SPS Agreement which states that “Members agree to facilitate the provision of technical assistance to (...) developing country Members, either bilaterally or through the appropriate international organizations.” Such assistance covers several areas such as processing technologies, research and infrastructure to allow DCs “to achieve the appropriate level of sanitary or phytosanitary protection in their export markets.” Accordingly, developed countries are required to provide technical assistance “as will permit the developing country Member to maintain and expand its market

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158 Assistance is mainly conducted through training sessions, workshops and seminars on WTO law and practice.
161 Op. cit. footnote no 90 at Article 9(1).
162 Ibid. at Article 9(1).
access opportunities” for their agricultural commodities. However, it is believed that these provisions are instead expressed in the form of “best endeavour clause.” It is argued that since developed countries cannot be compelled by DCs to provide assistance, these provisions are limited in their binding character, hence “theoretically mandatory.”

Technical assistance is provided by the WTO as well as other multilateral institutions, such as United Nations Conference on Trade and Development (UNCTAD), the International Trade Centre, the International Monetary Fund, the United Nations Food and Agricultural Organisation (FAO), and the World Bank. While these institutions do not necessarily coordinate their activities, it must be noted that several of them participate in some assistance projects and initiatives such as the Standards and Trade and Development Facility (STDF). The STDF aims to provide support to DCs’ SPS capacity building, thereby helping them to improve their participation in international food trade.

6. WTO rules on Regional Trade Agreements

As already explained previously, by virtue of the MFN principle, the rules established under the WTO Agreements are to apply equally to all WTO members,

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163 Ibid. at Article 9(2).
166 http://unctad.org/en/Pages/Home.aspx
167 http://www.intracen.org/
169 http://www.fao.org/
170 http://www.worldbank.org/
171 http://www.standardsfacility.org/en/index.htm. The STDF is a joint initiative of the FAO, the World Bank, the World Health Organization, the World Organization for Animal Health and the WTO. Other participants include the ITC and UNCTAD.
unless specific exemptions are provided. This principle prevents trade discrimination between WTO members by requiring that any special favour made to any one member be extended to all other WTO members. However, the WTO permits the establishment of regional trade agreements (RTAs) in accordance with GATT Article XXIV, thereby constituting an exception to the MFN principle. This article distinguishes between free trade areas and customs unions (CUs).173 Paragraph 8 of Article XXIV states that a customs union means “the substitution of a single customs territory for two or more customs territories so that duties and other restrictive regulations of commerce are eliminated with respect to substantially all the trade between the constituent territories of the union or at least with respect to substantially all the trade in products originating in such territories.”174 Within a customs union, such as the post Lisbon European Union, members apply a common external tariff.

On the other hand, a free-trade area is defined by the same GATT Article XXIV paragraph 8 as “a group of two or more customs territories in which the duties and other restrictive regulations of commerce are eliminated on substantially all the trade between the constituent territories in products originating in such territories.”175 Within a free-trade area trade must be duty-free, but members can impose their own tariffs on imports from countries outside the group. It must be noted that in light of both definitions given, the main rule required by GATT Article XXIV is the reduction or the elimination of duties and other trade barriers on substantially all sectors of trade in the group if a customs union or free-trade

175 Ibid. at Article XXIV (8)(b).
area is created. This article also provides that the formation of such free-trade areas or customs unions should not impose non-members with “higher and more restrictive” trade rules than was the case before the group was established.  

The role of RTAs “in promoting the liberalization and expansion of trade and in fostering development” was recognised within the WTO Doha Declaration. Hence, trade preferences have a special value for many DCs. However, RTAs have to be bound in a WTO schedule to be part of enforceable WTO law. The WTO provides that the Dispute Settlement System (DSS), examined below, serves “to preserve the rights and obligations of Members under the covered agreements,” these agreements include the Agreement Establishing the World Trade Organisation, the Multilateral Trade Agreements and the Plurilateral Trade Agreements. The unfortunate corollary to this rule is that DCs involved in RTAs outside the covered agreements cannot use the WTO DSS to determine their rights and obligations under these agreements or to clarify the provisions of these agreements.

7. Developing countries and the WTO Dispute Settlement System

7.1 The WTO Dispute Settlement System

Since 1995, the WTO Dispute Settlement System (DSS), pursuant to the DSU, superseded the DSS of GATT 1947. The WTO DSU provides that the WTO DSS

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176 Ibid. at Article XXIV (5).
180 Ibid. at Appendix 1.
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is “a central element in providing security and predictability to the multilateral trading system.”

It aims to “preserve the rights and obligations” of WTO members under the WTO multilateral agreements, and to “clarify the existing provisions of those agreements (...)” Promptness in resolving disputes and the security of “a positive solution to a dispute” are also identified as additional objectives of the DSS. The Dispute Settlement Body, (the “DSB”) was set up to “administer” the rules and procedures of the DSU. Accordingly, the DSB is authorised to “establish panels, adopt panel and Appellate Body reports, maintain surveillance of implementation of rulings and recommendations, and authorize suspension of concessions and other obligations” of the WTO agreements. However, as will be further developed below, these measures have a limited impact. The DSB is required, in accordance with Article 21 DSU, to keep the losing party “under surveillance” until it complies with the rulings and recommendations of the DSB. However, such surveillance does not guarantee that the unsuccessful party will comply with the rulings of the DSB. The only requirement imposed by Article 21 DSU on the losing member during the compliance period, is to provide regular “status reports” in writing of its progress at each meeting scheduled by the DSB to discuss the matter.

Equally, the authorisation of suspension of concessions and obligations also adversely affects DCs and it is also clear that the weaker countries cannot “punish”

183 Ibid. at Article 3(2).
184 Ibid. at Article 3(3) and (7).
185 Ibid. at Article 2(1).
186 Ibid. at Article 2(1).
a more powerful country. It was only when the US backed the Latin American countries, which were exporting “dollar bananas”\textsuperscript{188} during the banana trade war between the EU and the US, and the US applied retaliatory “carousel sanctions” against the EU, that the EU economy suffered. The US was authorised on 19\textsuperscript{th} April 1999 by the WTO DSB to suspend the application of tariff concessions on a list of products imported from the EU, which represented an amount of USD191.4 million.\textsuperscript{189}

The drafting of the WTO DSU was made in order to review the old GATT dispute settlement process and to make it stronger.\textsuperscript{190} The dispute settlement provisions under GATT 1947 were limited to Article XXII on “consultation” and Article XXIII on “nullification or impairment.” However, the GATT DSS had several weaknesses. For instance, it was possible for any party to block the process at any stage, and no deadlines were given for the settlement process such as the duration of consultations.\textsuperscript{191} This issue was particularly observed in EU cases of non-compliance involving mainly bananas and beef hormones.\textsuperscript{192} WTO rules, for their part, provide that the panel’s report can only be rejected by consensus in the DSB, thereby making impossible for one WTO member to block the adoption of a WTO


\textsuperscript{189} WTO, Dispute Settlement Body 19 April 1999, “Minutes of meeting held in the Centre William Rappard on 19 April 1999,” WT/DSB/M/59, 3 June 1999.


\textsuperscript{191} Ibid.

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decision.\textsuperscript{193} In addition, in accordance with Article 22 of the DSU temporary
compensation and temporary retaliatory measures, such as the suspension of
concessions, can be taken against the country that does not comply with the WTO
decision.\textsuperscript{194} Accordingly, it is now difficult for a WTO member to ignore a WTO
ruling.

7.2 Developing Countries' participation in the WTO dispute settlement system
Since the WTO DSS is deemed to be a "barometer of its normative framework, an
examiner of national compliance, and a constitutional guarantor of membership
rights and duties,"\textsuperscript{195} the effective participation of DCs in the system is considered
of extreme importance.\textsuperscript{196} DCs are generally considered to be actively involved in
the WTO DSS.\textsuperscript{197} However, it is pointed out that involvement and participation of
DCs in the DSS is not always made on a voluntary basis.\textsuperscript{198} It is argued that since
the DSS is compulsory, when DCs are brought to the system as respondents, they
are left with "little choice" but to participate.\textsuperscript{199} Moreover, even when DCs
participate as "complainants," Korea, Brazil, India, South Africa, and China are the
countries identified as "the frequent users" of the DSS among the wealthiest of the
DCs. It is also believed that voluntary participation of DCs in the DSS is
undermined by the "weak" system of remedies offered by the DSS together with
the high costs of access to the DSS and the DCs' lack of specialist legal
knowledge.\textsuperscript{200}

\textsuperscript{194} Ibid. at Article 22.
\textsuperscript{195} Qureshi, A. H., "Participation of developing Countries in the WTO dispute settlement system,”
\textsuperscript{196} Ibid.
\textsuperscript{197} Ibid. footnote no 192.
\textsuperscript{198} Ibid.
\textsuperscript{199} Ibid.
\textsuperscript{200} Op. cit. footnote no 85.
7.2.1 Remedies under the dispute settlement system

While the DSU makes compensation and retaliation available for non-compliance with recommendations and rulings of the DSB, these measures are only to be applied for a temporary period.\textsuperscript{201} These measures are not to be seen as forms of "punishment," analogous to those applied in criminal law. Instead, they aim to encourage a WTO party to remove any illegal measure and adjust its law with the WTO rules.\textsuperscript{202} The purpose of these measures was confirmed by the WTO arbitrators in the case of EC-Bananas III who held that "the authorization to suspend concessions or other obligations is a temporary measure pending full implementation by the Member concerned."\textsuperscript{203}

Moreover, it must be noted that compensation is not retroactive and deals only with delays in implementation of the DSB's rulings. Accordingly, it does not have to be seen as a remedy as applied in the case of breach of contract in ordinary commercial law. The party which suffered from the inconsistent measure will not receive any compensation for damages caused by the other member's non-compliance. Instead the complaining party will receive "alternative market access until the lack of market access that was complained about can be provided."\textsuperscript{204}

In accordance with Article 22(2) of the DSU, the non-complying party can voluntarily decide to enter into negotiations with any party to the dispute in order to discuss and "mutually" agree on the scope and implementation of the

\textsuperscript{201} Op. cit. footnote no 102 at Article 22(1) and (8).
\textsuperscript{203} WTO, \textit{European Communities -Regime for the Importation, sale and distribution of bananas}, recourse to arbitration by the European Communities under Article 22.6 of the DSU, WT/DS27/ARB, 9 April 1999, para 6.3.
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compensation. Accordingly, the consent of the non-complying country must be obtained.\textsuperscript{205} If the parties fail to agree on a satisfactory compensation within 30 days from the expiry of the reasonable period of time, the DSB must authorise the complaining party to take retaliatory measures against the non-complying party.\textsuperscript{206} However, Bronckers and Van den Broek are of the view that by restricting imports from the non-compliant party, the winning complainant party can hurt its own industrial users, local importers as well as its consumers.\textsuperscript{207} This would particularly affect the economic development of the country which is a food importer and therefore its position in the world market. Therefore, undoubtedly the use of these measures would penalize DCs instead of punishing the non-complying developed country.\textsuperscript{208} This may not even be noticed by the developed country. The application of such a sanction by DCs against developed countries is not credible. It is clear that DCs which have smaller and weaker economies cannot really apply sufficient pressure to developed countries.\textsuperscript{209}

This situation was experienced by Ecuador in the WTO case brought against the EU’s banana regime, which is examined in Chapter 9 of this thesis. In this case, Ecuador was given the permission to cross-retaliate against the EU which continued to maintain non-compliant measures. However, according to the WTO arbitrators “given the difficulties and the specific circumstances of this case which involves a developing country Member, it could be that Ecuador may find itself in

\textsuperscript{205} Op. cit. footnote no 102 at Article 22(2).
\textsuperscript{206} Ibid. at Article 22(6).
\textsuperscript{208} Ibid., p 104.
\textsuperscript{209} This situation could possible not concern Brazil, China, India and South Africa. They are called the “new Quad” countries as they are largest economy market among DCs. See Op. cit. footnote no 207, p 104.
a situation where it is not realistic or possible for it to implement the suspension authorized by the DSB (...)". In light of this decision, Hodu and Herran are of the opinion that some DCs are “worse off” by implementing retaliations. In their view the non-compliant party, particularly if it is a developed country, is in a better position since it will be able to “get away with the WTO inconsistent policy at practically no cost.” In light of DCs’ lack of retaliation power, the less wealthy of them will avoid bringing disputes before the DSB.

7.2.2 Lack of expertise and Financial resources

The DSU includes several provisions to take DCs’ special needs into account. These provisions have been classified by Roessler into two categories. The first category relates to the implementation of “the generally-applicable principles” in cases involving DCs. For instance, in accordance with Article 8(10) of the DSU, DCs involved in a dispute with a developed country, can request at the panel stage at least one panellist from a developing country WTO member. This provision therefore ensures an equal treatment between developed and DCs. The second group of provisions sets out criteria and procedures applicable exclusively to DCs. An example of this is Article 21(2) of the DSU which provides that “particular attention should be paid to matters affecting the interests of [DCs] with

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210 WTO, European Communities - Regime for the importation, sale and distribution of bananas - recourse to arbitration by the EC under Article 22.6 of the DSU, Decision by the Arbitrators, WT/DS27/ARB/ECU, 24 March 2000, para 177.
212 Ibid., p. 18.
213 Ibid., p. 18.
215 Ibid.
218 Ibid.
respect to measures which have been subject to dispute settlement.\textsuperscript{219} However, it is argued that the effectiveness of these measures is limited because, unlike the EU or the US, many DCs experience a lack of national legal expertise in international trade law, thereby leading to inequality within the DSS.\textsuperscript{220} Relying on a statement from a representative from a Southeast Asian member,\textsuperscript{221} Shaffer points out that “most DCs have only one or two lawyers (if any) to address WTO matters,” so “diplomatic postings have generally been filled by non-lawyers.”\textsuperscript{222} In addition, it is believed that the costs of litigating disputes in the WTO have increased exponentially in recent years and DCs cannot cope with these costs because of “their small trade shares and government budgets.”\textsuperscript{223} The lack of legal knowledge, together with a lack of financial resources, have affected the effective participation of DCs within the WTO DSS. It has been observed that many DCs, and particularly those in sub-Saharan Africa, have remained “bystanders.”\textsuperscript{224}

Moreover, Read notes that DCs initiated only 34 percent of the 235 cases brought to the WTO DSU between 1995 and 2001.\textsuperscript{225} Accordingly, the SDT provisions provided in the DSU have been of “very limited value” to DCs.\textsuperscript{226}

In order to help DCs defend their rights as effectively as developed countries, DCs can seek “additional legal advice and assistance” from the experts of the WTO Secretariat.\textsuperscript{227} However, it must be noted that the role of the qualified legal expert

\begin{footnotes}
\item[222] Ibid.
\item[223] Op. cit. footnote no 49.
\item[224] Op. cit. footnote no 190, p 27.
\item[226] Op. cit. footnote no 190, p 27.
\end{footnotes}
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from the WTO technical cooperation services is to provide assistance only “in respect of dispute settlement” and “in a manner ensuring the continued impartiality of the Secretariat.” Accordingly, it is pointed out that DCs cannot be legally advised before a dispute is initiated, and they cannot use the legal expert as a lawyer in legal proceeding against another WTO member.

In light of these limitations, DCs had to seek legal assistance from the Advisory Centre on WTO Law (ACWL) which is an intergovernmental organisation independent from the WTO having legal personality. The ACWL was set up in 2001 in order to provide DCs, including LDCs and countries with economies in transition that are members of the WTO, with “legal training, support and advice on WTO law and dispute settlement procedures.” The ACWL comprises eleven developed country members and thirty DCs members. WTO members considered as LDCs according to the definition of the UN, are entitled to the services of the ACWL without having to become members of the ACWL. At the time of writing, the only member of the ACWL from the Caribbean region of the ACP Group is the Dominican Republic.

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228 Ibid. at Article 27(2).
231 ACWL website: http://www.acwl.ch/e/index_e.aspx (Accessed 05/03/2009) See also Article 10(1) of the Agreement establishing the Advisory Centre on WTO Law. The Agreement was signed on 1 December 1999 by 29 countries at the WTO Ministerial Meeting in Seattle, Washington. It entered in force on 15 July 2001.
232 Article 2(1) of the Agreement establishing the Advisory Centre on WTO Law.
233 Australia, Canada, Denmark, Finland, Ireland, Italy, the Netherlands, Norway, Sweden, Switzerland, the United Kingdom.
235 The services of the ACWL are currently available to 43 LDCs.
The ACWL is co-financed by both DCs and developed members of the ACWL, with the latter providing most of the funding. Each member of the ACWL has paid a “one-time” contribution to the ACWL’s endowment fund and/or annual contributions during the first five years of operation of the ACWL. LDCs are not required to contribute to the ACWL’s Endowment Fund. It must be noted that while developed countries can become members of the ACWL, they are not entitled to its services. They can only become members for the purpose of contributing to the ACWL services.

The members of the ACWL recognise that “the credibility and acceptability of the WTO dispute settlement procedures can only be ensured if all members of the WTO can effectively participate in it.” Consequently, the ACWL is also jointly administered by developed, developing and least-developed ACWL’s members. The institutions of the ACWL are the General Assembly, the Management Board and the Executive Director. The General Assembly is the “highest decision-making body.” It evaluates the performance of the ACWL and approves the annual budget proposed by the Management Board. The General Assembly is composed of the representatives of the ACWL’s members and the representatives of the LDCs that are entitled to the services of the Centre. The Management Board is responsible for the “efficient and effective operation” of the ACWL.

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237 Op. cit. footnote no 232 at Article 6(2). The scales of contributions are fixed in Annex I and II of the Agreement establishing the ACWL.
238 Ibid, at Preamble (4).
241 Ibid. at Article 3(1).
242 Ibid. at Article 3(5).
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ACWL members nominate three board members for appointment, developed ACWL members nominate two members and LDCs nominate one representative.\textsuperscript{243} The Executive Director of the ACWL serves \textit{ex officio} on the Management Board, it manages the “day-to-day operations” of the ACWL and represents the Centre externally.\textsuperscript{244} In light of the institutional structure of the ACWL, DCs are therefore considered to be “equal negotiating partners.”\textsuperscript{245} This therefore ensures that their voices are “heard and listened to” in the WTO DSS, thereby enhancing the effectiveness of the system.\textsuperscript{246}

DCs that are members of the ACWL receive legal advice for free, up to a maximum number of hours, whereas non-members countries are subject to an hourly rate charge.\textsuperscript{247} Fees imposed on non-ACWL’s members vary according to services rendered and the country’s level of development.\textsuperscript{248} Accordingly, the ACWL divides DCs into three categories “A”, “B” and “C”, based on their share of world trade and income per capita.\textsuperscript{249} Category A members are considered as high income countries with a share in world trade of more than 1.5 percent. Category B members have a share of world trade between 0.15 and 1.5 percent and are therefore considered as upper middle countries. ACWL’s members falling under Category C have a share in world trade less than 0.15 percent.\textsuperscript{250} This classification also determines the DCs’ contribution to the Endowment Fund. The maximum of hours is determined by the Management Board of the ACWL but it

\textsuperscript{243} Op. cit. footnote no 234.
\textsuperscript{244} Op. cit. footnote no 232 at Article 3(4) and (6).
\textsuperscript{246} Ibid., p 66.
\textsuperscript{247} Op. cit. footnote no 232 at Article 5(2).
\textsuperscript{248} The schedule of fees is established in Annex IV of the Agreement establishing the ACWL.
\textsuperscript{249} The list of DCs members of the ACWL is established in Annex II of the Agreement establishing the ACWL. Least developed countries, are listed in Annex III of the Agreement.
\textsuperscript{250} Op. cit. footnote no 232 at Annex II.
has decided not to impose a maximum number of hours. Accordingly, all legal opinions for ACWL’s members are currently provided free of charge.\(^{251}\)

In accordance with Article 2 (2) of the Agreement establishing the Advisory centre on WTO Law, the ACWL provides legal opinions on WTO Law. In light of the strict mandate of the ACWL, it must be noted that countries do not receive advice on “negotiating strategies or other political issues that arise from WTO Membership.”\(^{252}\) Moreover, countries cannot receive ACWL’s opinions on “legal issues that arise exclusively under the domestic law of a Member of the WTO or under a regional or bilateral trade agreement.”\(^{253}\) Advice given by the ACWL on WTO law is divided into three categories.\(^{254}\) First, countries are given advice on legal issues arising in WTO decision making and negotiations. It is pointed out that this legal advice “enhance the capacity” of these countries “to pursue their interests within the complex institutional framework of the WTO and to become active participants in WTO bodies.”\(^{255}\) Second, countries are given legal opinions on the measures they are taking. These opinions help them apply trade policy measures in line with WTO law, thereby avoiding “unnecessary disputes.”\(^{256}\) Lastly, the ACWL provides legal advice on measures implemented by other WTO Members that DCs consider challenging under the WTO DSS. The legal advice given allow DCs to “assess the chances of prevailing in a dispute settlement proceeding.”\(^{257}\)

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\(^{253}\) Ibid. at, p 69.


\(^{255}\) Ibid., p 3.

\(^{256}\) Ibid., p 3.

\(^{257}\) Ibid., p 3.
Since 2001, the ACWL has provided DCs and LDCs over 900 legal opinions. In 2010, the ACWL has provided a total of 206 legal opinions. 94 of these opinions concerned legal issues arising in WTO decision making and negotiations, 64 opinions were given to members seeking advice about their own measures and 48 legal opinions concerned measures implemented by other WTO members.\textsuperscript{258}\footnote{Ibid., p 5.} Most legal opinions were provided to category B and C members. They requested 25 and 57 percent of all legal opinions, respectively.\textsuperscript{259}\footnote{Ibid., p 7.} Accordingly, DCs with a lower income are the most in need of the ACWL's legal services. The ACWL's legal services given to DCs have clearly helped DCs increase litigation under the WTO dispute settlement system. Bown and McCulloch point out that since the establishment of the ACWL, countries which have used the WTO DSS have been making greater use of the system, using the ACWL to represent them.\textsuperscript{260}\footnote{Bown, C., and McCulloch, R., “Developing countries, dispute settlement, and the advisory centre on WTO law,” Policy Research Working Paper no 5168, the World Bank, 2010, p 4 and p 17.} Between 2001 and 2008, “developed countries initiated only 80 disputes compared to the 73 initiations by developing country complainants.”\textsuperscript{261}\footnote{Ibid., p 16.} Chad was the only country which had never previously been involved in the DSU to use ACWL legal services in litigation.\textsuperscript{262}\footnote{Chad was a third party in United States-subsidies on Upland Cotton (DS267) dispute initiated by Brazil in 2002.}

In addition, the ACWL's staff provides countries support in WTO dispute settlement procedures.\textsuperscript{263}\footnote{Op. cit. footnote no 232 at Article 2(1).} Countries, whether as complainants, respondents or third parties, are assisted at “all stages of the WTO's regular panel and Appellate Body
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proceedings.264 The ACWL provides support with regard to *inter alia* initial assessment and preparation of the case, as well as drafting consultations requests and drafting questions or answers to questions in preparation for consultations.265 When the ACWL assist countries in these procedures, it works in “partnership” with these countries.266 This ensures that “the requesting party is not only assisted in the short run, but that it will also benefit from the learning experience resulting from the working method used by the Centre.”267 Members are charged an hourly fee, which is considered to be “modest,” for dispute settlement support.268 The fees are set out in Annex IV of the Agreement Establishing the Advisory Centre on WTO Law.269 Since 2001, the ACWL has provided assistance to its members and LDCs in 38 WTO dispute settlement procedures.270 Among ACWL members, countries of category B and C have been the most beneficiary of the ACWL’s dispute settlement support. 50 and 46 percent of the total number of cases was requested by B and C category members, respectively. Requests from LDCs constituted the remaining 4 percent.271 For instance, the ACWL has provided support to Colombia as a third participant in the case of *European Communities- Regime for the importation, sale and distribution of bananas*.272 It assisted Thailand, as the complainant in *European Communities-Export Subsidies on Sugar*.273 It also assisted India as the complainant in *European Communities-

265 Ibid.
269 The fees for Category A, B and C members are of USD 200, USD150, USD100, respectively.
271 Ibid., p 9.
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Conditions for the granting of Tariff Preferences to Developing Countries.274

These cases are examined in Chapters 5, 8 and 9 of this thesis.

In 2011, the WTO Director-General Pascal Lamy stated that the services of the ACWL have made a “valuable contribution to the effectiveness” of the WTO DSS.275 However, limits on the mandate of the ACWL with regards to providing legal advice remains the ACWL system’s main weakness since it prevents DCs from participating fully in the WTO DSS. Accordingly, it is believed that the mandate of the ACWL should be extended.276 Despite this, there is no doubt that the numbers provided above prove that many DCs have “successfully” used the services of the ACWL, thereby enhancing their “knowledge and expertise” about WTO Law.277 Consequently, it can be said that the ACWL has contributed to the effective participation of DCs in the WTO DSS.

8. Conclusion

There is no doubt that the WTO has made clear efforts to integrate DCs into the multilateral trading system. The SDT provisions introduced under the GATT, but developed further at the WTO level, have been designed to address the particular development situation and needs of DCs.278 The study of these provisions is important given that their implementation is solely justified by the difference between developed and developing countries, which was not addressed during the formation of the GATT. They aim to increase “market access for products of

277 Ibid., p 79.
interests” to DCs, such as agricultural commodities, hence making a clear link between trade and development. With development being a core element of the WTO’s work, SDT provisions are currently being reviewed under the Doha Round negotiations in order to strengthen them and make them “more precise, effective and operational.” Several proposals for discussion were put forward by DCs. Amongst these was the proposal to “negotiate a Monitoring Mechanism (MM) for effective monitoring of [SDT] provisions.” However, negotiations on the mechanism have not yet concluded, as WTO members “continue to have divergent views” on the future elements of the MM.

The Doha Round negotiations started in 2001 and have not been concluded yet. A draft text on agricultural imports was presented in 2008 as part of the “July 2008 package,” in an effort to conclude the Doha Round. However, negotiations collapsed following WTO members’ failure to reach a compromise. The modalities for agriculture were revised and presented in December 2008 as a draft text in order to continue future discussions. The text aims to form the basis of a potential final agreement that would increase market access for agricultural products, and reduce or eliminate export subsidies and domestic support measures. The extent to which trade in agricultural products will be liberalised will thus result from the final outcomes of the negotiations which were expected by 2012.

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279 Ibid., p 63.
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December 2011, the WTO ministers acknowledged that the Doha Development Agenda negotiations were “at an impasse”285 because of the differences of opinion over the ten categories of issues identified in the 2008 draft “modalities” text.286 In light of this, in the view of the WTO ministers, it is unlikely that the current WTO round of negotiations will be concluded in the near future.287 Ministers remain however committed to advance negotiations in agriculture.288 Despite this breakdown, the WTO dispute settlement system would still allow DCs, assisted by the ACWL, to seek further access to agricultural markets.289

288 Ibid.
Chapter 4 - EU customs tariff and import rules

1. Introduction

In order to understand the operation of the European Union (EU) legal trade relationship with the Caribbean countries of the African Caribbean and Pacific (ACP) Group, it is necessary to have an overview of the legal framework of EU customs tariff and the various common import measures which have an impact on trade into the EU in agricultural food products. In accordance with Article 28 of the Treaty on the Functioning of the European Union (TFEU) the EU, as a customs union, applies a Common Customs Tariff (CCT) to imports coming from non-Member States (MS). It must be noted that the customs union is an area over which the EU has exclusive competence. Consequently, as discussed earlier in Chapter 2 of this thesis, the EU MS are not permitted to pass national laws in this area. The CCT, as the foundation of the EU Common Commercial Policy, has harmonised national tariffs vis-à-vis third countries, thereby presenting "a single external trading face." In this chapter, the operation of the CCT will be examined. Most EU customs provisions are contained in the Community Customs Code (CCC). The EU’s customs rules consist then of the CCC but also of the provisions adopted at the Union level or nationally to implement them. The tariff classification system of goods used by the EU follows the Harmonized Commodity

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1 This term has been explained in Chapter 3 of this thesis.
3 Ibid at Article 3.
4 Article 207 of the TFEU provides that the CCP must be “based on uniform principles, particularly with regard to changes in tariff rates, the conclusion of tariff and trade agreements relating to trade in goods [...]”
7 Ibid at Article 1.
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Description and Coding System developed by the World Customs Organization (WCO). Formerly known as the Customs Co-operation Council, the WCO is the “only intergovernmental organisation” with the sole focus being on Customs matters.\(^8\) The WTO cooperates also with the WCO in relation to the classification of the goods.\(^9\) The WCO’s Harmonized System (HS) is currently used by 206 countries, including the Caribbean countries.\(^10\) The operation of the HS will be discussed further below. Furthermore, the EU gives preferential tariff treatment to specific third countries under international trading arrangements and agreements. They are dealt with in the following chapter of this thesis. The tariff measures contained in these arrangements are provided along with the CCT.

Since external trade is considered of “paramount importance” for the EU,\(^11\) the CCC provides that “customs formalities and controls should be abolished or at least kept to a minimum.”\(^12\) However, it must be noted that pursuant to the Common Agricultural Policy (CAP), the EU imposes high import duties and other measures on imported agricultural food commodities, thereby affecting the EU trade relationship with developing countries (DCs). It is not the aim of this chapter to analyse every element of the EU customs law. This chapter will only examine the customs procedures and rules applicable in respect of trade in sugar and bananas, the key commodities selected for study in this thesis. These include tariff barriers, the inward processing arrangements and the rules of origin (RoO). Also of

\(^8\) World Customs Organization website: http://www.wcoomd.org/home_about_us.htm (accessed 08/01/2012).
\(^12\) Ibid at preamble (6).
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relevance are the sanitary and phytosanitary (SPS) measures imposed by the EU which can have an impact on the entry into the EU market of agricultural food products.

2. The Community Customs Code

The CCC, established by Council Regulation (EC) No 2913/92, is an important element of EU customs law. It compiles the general rules and procedures which ensure the implementation of the CCT and other relevant measures applicable in respect of trade in goods between the EU and third countries. The CCC provides that it must cover the CAP and take into account the requirements of the policy. The operation of the CAP is considered in Chapter 2 of this thesis. Since the introduction of the CCC, its provisions have been subject to three rounds of amendments. In 2005, the Commission has argued that the CCC was “out of date” and that it “has not kept pace with either the radical changes to the environment in which international trade is conducted, […], or with the changing focus of customs work.” Against this background, the Commission also adopted in 2005 a proposal for a modernised customs code (MCC) that will reinforce “efficient customs clearance” and “increase security and safety at the [EU] external border,” thereby resulting in the facilitation of international trade. The MCC

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13 Ibid.
14 Ibid at preamble (3).
15 Ibid at preamble (3) and Article 1.
18 Ibid., p 2 and 3.
Chapter 4 - EU customs tariff and import rules

entered into force in 2008 and contain fewer articles than the previous CCC.\textsuperscript{19} It includes measures that would reduce customs costs and delays when crossing the external EU borders. An example of this is Article 4(12) of the MCC which has reduced the number of customs procedures from eight to three.\textsuperscript{20} However since the implementing measures of the MCC still need to be adopted, the current CCC and its implementing rules continue to apply.\textsuperscript{21}

The CCC provides that “duties legally owed where a customs debt is incurred shall be based on the Customs Tariff of the [EU].”\textsuperscript{22} Accordingly, the CCT is considered the main element of the EU customs union as far as its relations with third countries are concerned.\textsuperscript{23} The CCT was applied since 1\textsuperscript{st} July 1968 by Council Regulation (EEC) 950/68,\textsuperscript{24} with the aim of bringing “about equalization of the charges borne at the external frontiers of the [Union] by products imported from non-member countries, in order to ensure that trade with such countries is not diverted [...].”\textsuperscript{25} The Council has been given the power to fix and also to “alter and suspend”\textsuperscript{26} the CCT import duties, on a proposal from the Commission.\textsuperscript{27} In accordance with Article 29 of the TFEU, when imported products have paid customs duties and relevant charges and complied with other import formalities,

\begin{flushleft}
\textsuperscript{20} The customs procedures provided in Article 4(12) of the modernised customs code are: release for free circulation, special procedures and export.
\textsuperscript{22} Op. cit. footnote no 6 at Article 20(1).
\textsuperscript{25} Case C-125/94, Aprile v Amministrazione Delle Finanze Dello Stato, [1995] ECR I-2919, paragraph 32.
\textsuperscript{26} Op. cit. footnote no 5, p 35.
\textsuperscript{27} Op. cit. footnote no 2 at Article 31.
\end{flushleft}
they have to be considered “in free circulation in a Member State.” Consequently, these products obtain the customs status of EU goods.

The CCT is composed of several elements. These include, the Combined Nomenclature (CN), which “describes the goods to which a specified rate of duty is applied.” It was introduced for the first time in Council Regulation (EEC) No 2658/87 of 23 July 1987, with a view to facilitating “the gathering” of statistical data of the EU international trade. The CN is established on the basis of the harmonised system of the WCO which is discussed further below. The CCT comprises also the relevant rates of duty and other charges applicable to goods covered by the CN, as well as the tariff measures included in the EU common arrangements with specific third countries or the tariff measures found in the “Integrated Tariff of the European Communities” (Taric). The Taric system which creates further subdivisions to the CN, is “designed to show the rules which apply to a specific product on importation into the customs territory.” It was established by the Commission pursuant to Article 2 of Regulation (EEC) No 2658/87, on the basis of the CN, in order to deal with specific EU measures which could not be dealt with in the framework of the CN itself. These elements are

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28 Ibid at Article 29.
35 Op. cit. footnote no 31 at preamble (11) and Article 2. An example of such measure is the EU Generalised System of Preferences which will be analysed in Chapter 5 of this thesis.
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examined further below. In order to impose a tariff duty or any other customs measures on goods imported within the EU, three fundamental elements must be taken into account. Firstly, in order to comply with all import formalities, the nature of the good must be "adequately" classified in the CN. Secondly, since the level of customs tariff applicable on one particular product varies according to its country of origin, the origin of the goods must be identified. There are two types of RoO, non-preferential and preferential RoO. Non-preferential RoO apply to the most-favoured-nation (MFN) trade and are regulated by the WTO Agreement on Rules of Origin which establish clear rules with regard to the application of non-preferential RoO. A “Common Declaration with Regard to Preferential Rules of Origin” is annexed to the WTO Agreement. However, the legal status of this document remains unclear. The EU rules on non-preferential RoO are contained in the CCC and “follow closely” those established by the WTO Agreement on Rules of Origin. With regards to preferential RoO, the EU’s RoO differs between the preferential schemes. In addition, the EU establishes a system of cumulation for RoO which may vary from scheme to scheme. Finally, since most EU customs duties are assessed on an ad valorem basis, the value of the good must be determined. However, ad valorem rates do not apply to agricultural products as defined by the WTO. They are subject to a specific duty based on the quantity of

36 Import duties are defined as “customs duties and charges having an effect equivalent to customs duties payable on the importation of goods.” Op. cit. footnote no 6 at Article 4 (10).
39 Ibid, p 300.
40 This will be analysed in Chapter 5 of this thesis.
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the product and many of them are also subject to tariff quotas.\textsuperscript{43} Accordingly, the \textit{ad valorem} customs duties will not be examined in this chapter.

3. The classification of goods

In order to apply relevant customs duties and other customs measures such as quantitative restrictions or preferential tariff treatment,\textsuperscript{44} to imported commodities, the “features and properties” of the goods must be classified.\textsuperscript{45} The tariff classification covers any kind of good and is based on the relevant customs nomenclature.\textsuperscript{46}

3.1 The combined nomenclature

The CN was established as a system for designating goods in order to “meet, at one and the same time,” the requirements of both the CCT and of the external trade statistics of the EU, as well as the EU common policies pertaining to the importation of goods.\textsuperscript{47} The regulation provides that the Harmonized System nomenclature of the WCO, to which the EU is a party, must be the basis of the CN.\textsuperscript{48} The WCO’s Harmonized System (HS) is provided under the International Convention on the Harmonized Commodity Description and Coding System, which entered into force within the EU on 1\textsuperscript{st} January 1988.\textsuperscript{49} The HS has replaced

\textsuperscript{43} Ibid at para. 2.
\textsuperscript{44} A “favourable tariff treatment” is considered by the Community Customs Code as “a reduction in or suspension of an import duty.” Op. cit. footnote no 6 at Article 21(2).
\textsuperscript{45} Op. cit. footnote no 6 at Article 20(6).
\textsuperscript{46} Op. cit. footnote no 6 at Article 20(6).
\textsuperscript{47} Op. cit. footnote no 31 at Article 1 (1). The CN is contained in Annex I of Regulation which is annually updated by the Commission. (Article 1(3) of Regulation (EC) No 2658/87, as amended)
\textsuperscript{48} Op. cit. footnote no 31 at preamble (8).
\textsuperscript{49} The Convention was concluded on 14 June 1983 at Brussels, as amended by the Protocol of Amendment to the International Convention on the Harmonized Commodity Description and Coding System of 24 June 1986. The HS entered into force in the EU pursuant to Council Decision 87/369/EEC of 7 April 1987 concerning the conclusion of the International Convention on the
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the Brussels Tariff Nomenclature (BTN) which originated from the Brussels Convention on Nomenclature for the Classification of Goods in Customs Tariffs of 15 December 1950 (the Nomenclature Convention). The BTN was the basis of the first CN in the EU. It was contained in the Annex of Regulation (EEC) 950/68 and was administered by the then Customs Co-operation Council, now known as the WCO. The HS aims to facilitate international trade through “the harmonization of Customs and trade procedures, and the non-documentary trade data interchange in connection with such procedures.” Hence, the members of the WCO are required to use the HS in respect of their customs tariffs and statistical nomenclatures.

In light of the above, the CN consists of the nomenclature of the HS which is supplemented by the EU subdivisions to that nomenclature, referred to as “CN subheadings,” as well as of preliminary provisions, additional section or chapter notes, and footnotes relating to CN subheadings. The CN has an eight-digit code number to identify a product. The first six digits of the code are those of the HS, whereas the other numbers identify the CN subheadings which are “00” if there are not further subdivisions of CN heading or subheading. A ninth digit must be reserved for the use of the MS for national statistical subdivisions. The CN is

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53 In these cases, the EU subdivisions specify a corresponding rate of duty. Op. cit. footnote no 31 at Article 1(2) (b).
54 Ibid at Article 1(2).
55 Ibid at Article 3(1)(b).
56 Ibid at Article 3(2).
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divided into four columns. The first and second column contains the CN code and provides a description of the goods, respectively. Column 3 contains the conventional rates of duty applicable. The last column sets the supplementary statistical unit which refers to a unit of measurement such as volume, length, which needs to be indicated in the customs return if applicable.

3.2 The TARIC

The Taric is a multilingual online customs tariff database used by the Commission and the MS for the application of EU measures with regards to the importation of goods. The aim of the Taric is twofold. It is designed to secure the uniform application by all MS of all EU measures relating to imports. It also shows third countries all the rules to be followed when exporting products to the EU. Accordingly, the Taric comprises the provisions of both the HS and the CN. It also includes the provisions of EU legislation which specifically relate to tariffs, commercial and agricultural rules. These include the rates of customs duty and other import charges applicable such as tariff quotas, tariff preferences, suspension of duties, additional duties, import prohibitions and restrictions as well as anti-dumping and countervailing measures.

Although the Commission, assisted by the Customs Code Committee,\(^{62}\) is responsible for the “establishment, update, management and dissemination” of the Taric,\(^{63}\) the latter is not to be considered as a “piece of legislation.”\(^{64}\) Indeed, the Taric does have as its legal basis the aforementioned regulation, but it is designed as “an instrument for practical use and information” which does not itself have a legal status.\(^{65}\) Nevertheless, the Taric codes and additional codes have to be used in respect of goods imported from third countries.\(^{66}\) The Taric code numbers include the above referred eight-digit code number of the CN, the ninth digit reserved for the use of the MS for national statistical subdivisions as well as the tenth and eleventh digit which identify the Taric subheadings.\(^{67}\) Accordingly, the ninth, tenth and eleventh codes are unique and different to the HS system.\(^{68}\)

4. The origin of goods

As previously stated, the application of customs duties and other charges to the importation of products requires the identification of the origin of the goods.\(^{69}\) In 1977, the Court of Justice of the European Union (CJEU) recalled that defining the concept of origin of goods was considered “an indispensable means of ensuring the uniform application of the Common Customs Tariff, of quantitative restrictions and of all other measures adopted, in relation to the importation or exportation of

\(^{62}\) The Customs Code Committee was established by the Community Customs Code of 1992.
\(^{64}\) Op. cit. footnote no 60.
\(^{67}\) Ibid at Article 3(3).
\(^{68}\) Ibid at Article 3(4). This article provides that exceptionally, an additional Taric code of four digits “may be used for the application of specific [EU] measures which are not coded, or not entirely coded, at the 10\(^{th}\) and 11\(^{th}\) digit level.”
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goods, by the [Union] or by the Member States. Accordingly, in order to determine the origin of goods which will enter the EU market, the CCC distinguishes between non-preferential origin and preferential origin of goods.

4.1 Non-preferential origin

The CCC provides that "goods wholly obtained in a country" or produced in that country are considered originating therein. Such goods are defined and listed in Article 23(2) of the CCC. It must be noted that this list has been removed in the MCC. The latter has simplified and shortened the provisions of Article 23 of the CCC. In its Article 36(1), the MCC simply provides that "goods wholly obtained in a single country or territory shall be regarded as having their origin in that country or territory." Moreover, the CCC considers also goods produced in more than one country and provides that in such a case, goods are regarded as originating in the country where "they underwent their last substantial processing or working." The CCC provides further that this process or operation needs to be "economically justified" and take place "in an undertaking equipped for that purpose and resulting in the manufacture of a new product or representing an important stage of manufacture."

4.2 Preferential origin

The CCC provides that the rules on preferential origin of goods are to be contained in the preferential trade agreements concluded between the EU and certain

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71 Op. cit. footnote no 6 at Article 23(1).
74 Ibid at Article 24.
countries or group of countries. With regards to EU preferential trade arrangements which grant unilateral preferential tariff access in respect of third countries, the RoO have been established in accordance with the committee procedure. The preferential rules of origin contained in these arrangements must lay down “the conditions governing acquisition of origin,” which goods must fulfill in order to benefit from the preferential tariff treatment provided in the arrangements. However, the preferential RoO are further complicated by a system of cumulation of origin, which “permits products originating in one country to gain the origin of the country in which they are processed or added without complying with the rules governing sufficient working or processing.” Raw sugar and fresh bananas imported into the EU market are unprocessed products and are therefore not affected by the rules on cumulation of origin. As stated in the first chapter of this thesis, the subject matter of this thesis is unprocessed agricultural food products and it excludes processed and semi-processed products. Despite this, the rules on cumulation of origin will be examined in Chapter 5 of this thesis order to compare the three selected preferential EU trade arrangements and agreements with DCs. Accordingly, Chapter 5 of this thesis will deal with the rules governing preferential origin and cumulation of origin in relation to the Euro-Mediterranean Agreement and the Cotonou Agreement which are two bilateral agreements, and the Generalized System of Preferences, selected as an example of EU arrangement providing for unilateral measures to DCs.

75 Ibid at Article 27(a).
76 Ibid at Article 27(b).
77 Ibid at Article 27.
5. The customs duties

The CCT applies customs duties at broadly differing rates. The rates vary between different products, and they may also vary in respect of the same product. However, according to the CJEU, the EU principle of legal certainty requires that “rules imposing charges on the taxpayer must be clear and precise, so that he may know without ambiguity what are his rights and obligations and may take steps accordingly.”79 Accordingly, EU legal provisions that apply customs duties must follow that fundamental principle.

Furthermore, the rates of duty provided by the CCT are of different types. They are “conventional” duties when, unless the context requires otherwise, they are applicable to goods imported from any third country, as well as to goods from countries which are members of the General Agreement on Tariffs and Trade (GATT), or those with which the EU has concluded agreements containing the MFN tariff clause.80 In light of this, the conventional duties are usually considered “the only relevant duties.”81 In contrast, the “autonomous” duties are applicable when they are lower than the conventional duties.82 However, they are “frequently considerably higher than the conventional duties.”83 The autonomous duties are shown by means of a footnote in column 3 of the CN. It must be noted that the autonomous and conventional duties provided in the CCT do not apply “where special autonomous customs duties are provided for in respect of goods originating in certain countries or where preferential customs duties are applicable in

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pursuance of agreements.” Council Regulation 861/2010 provides further that MS may apply customs duties other than those of the CCT where the imposition of these additional duties is “justifiable” under EU law.

Customs duties may be either imposed on specific products or imposed on an *ad valorem basis*, which is a duty based on the value of the product. When the duties in column 3 of the CN are expressed in percentage, they are imposed *ad valorem*. Sugar and bananas, the two commodities examined as case studies later in this thesis, are not affected by the *ad valorem* duties. However, as with many other imported agricultural food products, they are subject to specific duties which are charges based on weight. These charges can be expressed as Euros per kg/net or as Euros per tonne/net. As will be examined in Chapters 8 and 9 of this thesis, bananas are currently subject to an MFN import duty of EUR 143 per 1000kg/net. In contrast, the rates for raw sugar vary according to whether raw sugar is imported for refining purpose or not.

It must be noted that sometimes the total duty payable on some agricultural goods can be a combination of both *ad valorem* and specific customs duty. Some goods, presented in the form of an assortment, are also chargeable with an “agricultural component” where the symbol “EA” appears. This component is fixed in accordance with Annex 1 to Council Regulation No 861/2010. An additional

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85 Ibid at Annex I, Part I, section I (B)(3).
86 Ibid at Annex I, Part I, section I (B)(4).
87 Import duties imposed of sugar for refining: EUR 33,9 per 100kg/net and other: 41,9 per 100kg/net.
duty set out in Annex 1 is imposed in the sugar sector.\textsuperscript{90} This duty affects only certain forms of sugar falling within the category of sugar confectionary, which either contains or does not contain cocoa. Accordingly, the agricultural component, as well as the additional duty, does not apply to raw cane or beet sugar.

In 1980, it was held by the CJEU that "at the present stage of integration, where Member States essentially retain their powers in monetary matters, recourse to the mechanism of specific duties in the Common Customs Tariff will inevitably lead to certain differences in the incidence of the duties charged."\textsuperscript{91} Accordingly, in order to ensure that specific duties are uniformly applied throughout the EU, the duties are expressed in Euros.\textsuperscript{92} This term was introduced in accordance with Council Regulation (EC) 1103/97 and replaced earlier references to the "European Currency Unit" (ECU) in EU legal instruments.\textsuperscript{93} However, given that some MS do not participate in the euro zone,\textsuperscript{94} Article 18 of the CCC, provides that the value of the euro in national currencies to be applied "for the purpose of determining the tariff classification of goods and import duties" for these countries, is to be fixed monthly and set out in the CCT.\textsuperscript{95}

\textsuperscript{90} Ibid at Annex I, Part I, section I (B)(6).
\textsuperscript{91} Case 248/80 Kommanditgesellschaft in Firma Gebrüder Glunz v Hauptzollamt Hamburg-Waltershof, [1982] ECR 197, para 22.
\textsuperscript{92} Op. cit. footnote no 5, p 37.
\textsuperscript{93} Article 2(1) of Council Regulation EC) 1103/97 of 17 June 1997 on certain provisions relating to the introduction of the euro, OJ L 162, 19.6.1997. This article provides further that the rate of one euro corresponds to one ECU.
\textsuperscript{94} Bulgaria, the Czech Republic, Denmark, Hungary, Latvia, Lithuania, Poland, Romania, Sweden and the United Kingdom.
\textsuperscript{95} Op. cit. footnote no 6 at Art 18(1). This article needs to be read in conjunction with Regulation (EEC) No 2658/87, as amended, part I, section I, point C(3).
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The ECU was created on 1st January 1979 within the framework of the European Monetary System (EMS) and particularly for the purposes of the European Monetary Cooperation Fund. The ECU was not a “true currency.” It was defined as “a basket of Member States’ currencies” containing the sum of fixed, but adjustable amounts of all the MS’ currencies. As a pillar of the EMS, the ECU had different purposes. It was used inter alia as a “numeraire” in the exchange rate mechanism and as a means of settlement between the monetary authorities of the MS. The value and composition of the ECU was identical to that of its precursor the European Unit of Account which was introduced as the “first basket-type unit of account” in 1975 in order to calculate the amounts of aid mentioned in Article 42 of the ACP-EEC Convention of Lomé. The ECU has replaced the European Unit of Account in 1979 and became in 1982 the “third

97 The EMS was established in March 1979 in order to “establish a greater measure of monetary stability in the [EU].” The EMS was established in accordance with the Resolution of European Council of 5 December 1978 on the establishment of the European Monetary System (EMS) and related matters, Brussels, 5 December 1978, Bull. EC 12-1978, point 1.1.11. This resolution lays down the structure of the EMS. The operating procedures of the EMS were laid down in the Agreement of 13th March 1979 between the central banks of the Member States of the European Economic Community laying down the operating procedures for the European Monetary System.
98 The European Monetary Cooperation Fund was established in 1973 by Regulation (EEC) No 907/73 of the Council of 3 April 1973 establishing a European Monetary Cooperation Fund in order to “facilitate[e] both the concertation necessary for the smooth operation of the exchange arrangements introduced in the [EU] and for the settlement of the positions resulting from interventions in [EU] currencies.” OJ L 089, 05.04.1973
100 The composition of the ECU was to be reviewed periodically. See the Resolution of European Council of 5 December 1978 on the establishment of the European Monetary System (EMS) and related matters, Brussels, 5 December 1978, Bull. EC 12-1978, point 1.1.11.
102 Op. cit. footnote no 100 at point 1.1.11.
most widely used currency in the Eurobond market.\textsuperscript{105} The introduction of the EMS also resulted in the use of the ECU for the purposes of the CAP. Therefore, until the introduction of the euro in 1999 and in accordance with Council Regulation (EEC) No 652/79,\textsuperscript{106} the so-called "green ECU"\textsuperscript{107} had replaced the previous "unit(s) of account" used in the agricultural sector since 9\textsuperscript{th} April 1979.\textsuperscript{108}

It must be noted that the level of customs duties may be affected by the application of safeguard or surveillance measures on imported CAP products, as laid down in Council Regulation (EC) No 260/2009.\textsuperscript{109} In accordance with Article 11 of the regulation, the import of goods from third countries may be subject to "retrospective," or "prior" surveillance of imports, when market trends in a product "threatens to cause injury" to EU producers, and where the interest of the EU requires such a surveillance.\textsuperscript{110} The decision to introduce such scrutiny is taken by the Commission at the request of a MS.\textsuperscript{111} Accordingly, surveillance measures will only be used with regard to products imported into the MS concerned. Products under prior scrutiny can be put into free circulation provided that it is accompanied by a surveillance document valid throughout the EU.\textsuperscript{112} The competent authority of the MS should issue this document free of charge, for any quantity requested.\textsuperscript{113}

\textsuperscript{105} Op. cit. footnote no 99, p 484.
\textsuperscript{106} The ECU was introduced in the agricultural sector by Council Regulation (EEC) No 652/79 of 29 March 1979 on the impact of the European Monetary System on the common agricultural policy, OJ L 84, 4.4.1979.
\textsuperscript{107} Ackrill, R., The Common Agricultural Policy, Sheffield Academic Press, Sheffield, 2000, p 60
\textsuperscript{108} Op. cit. footnote no 106 at Article 2 and 5.
\textsuperscript{110} Ibid at Article 11(1).
\textsuperscript{111} Ibid at Article 11(3) to be read in conjunction with Article 16(6) of the same regulation.
\textsuperscript{112} Ibid at Article 12(1) and (3).
\textsuperscript{113} Ibid at Article 12(1).
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However, if import trends suggest the need for safeguard measures, the Commission can decide to launch an investigation\textsuperscript{114} in order to establish whether the import of the product concerned is “causing or threatening to cause serious injury” to the position of EU producers of a similar commodity.\textsuperscript{115} The investigation must examine the volume of imports, the price of the imports, the consequent impact on EU producers, as well as any other factors, other than trends, in imports that impair EU producers.\textsuperscript{116} Following the investigation procedure, the Commission can either decide to terminate the investigation or to apply safeguard measures. It must be noted that the investigation procedure does not prevent the Commission from using provisional safeguard measures in critical circumstances. In that case, the level of customs duty will either be increased, or a duty will be introduced for products imported duty-free. These provisional measures should only apply for a maximum period of 200 days.\textsuperscript{117}

Safeguard measures can immediately be used when goods are imported in “such [great] quantities and /or such terms or conditions as to cause, or threaten to cause, serious injury” to EU producers.\textsuperscript{118} However, these two conditions must be cumulative with regard to imports from members of the WTO.\textsuperscript{119} When these conditions are met the Commission may “limit the period of validity of surveillance documents,” or impose an import authorisation procedure, thereby changing the import duty rules.\textsuperscript{120} For instance, the Commission can decide to

\textsuperscript{114}The investigation is initiated following consultations held at the requests of the EU Member States or on the Commission’s own initiative. See Ibid at Article 3 and 6.
\textsuperscript{115}Ibid at Article 2 and 5.
\textsuperscript{116}Ibid at Article 10.
\textsuperscript{117}Ibid at Article 8(1) and (2).
\textsuperscript{118}Ibid at Article 16(1).
\textsuperscript{119}Ibid at Article 16(2).
\textsuperscript{120}Ibid at Article 16(1)(a) and (b).
establish a quota system, provided that the latter takes into account “the desirability of maintaining, as far as possible, traditional trade flows,” and the quantity of goods imported under agreements concluded before the application of the safeguard measure.\textsuperscript{121} Moreover, the Commission is required to set the quota above the average level of imports during the last three representative years. However, the regulation provides that goods imported from a WTO member state classified as a DC should not be subject to a safeguard measure when the following conditions are fulfilled. Article 19 of Council Regulation (EC) No 260/2009 provides that the DC must not hold more than 3 percent share in the total of the EU imports of the same commodity.\textsuperscript{122} Equally, all DCs holding a share less than 3 percent of the EU’s imports of this particular commodity must not account collectively for more than 9 percent of total EU’s imports of this commodity.\textsuperscript{123} The safeguard measures must only be applied for a maximum of four years, including for the duration of the provisional measures.

6. The administration of tariff quotas

Although the EU does not normally apply quantitative restrictions on the importation of products,\textsuperscript{124} some agricultural food commodities and certain importing DCs are subject to tariff quotas or ceilings. In accordance with Article 20 of the CCC, quotas are applicable in respect of preferential tariff measures contained in an agreement between the EU and a third country, or they can also be derived from autonomous EU measures.\textsuperscript{125} These “conventional” and

\textsuperscript{121} Ibid at Article 16(3).
\textsuperscript{122} Ibid at Article 19.
\textsuperscript{123} Ibid at Article 19.
\textsuperscript{124} This is in line with GATT Article XI which requires the elimination of quantitative restrictions on the importation of any product from a GATT member.
\textsuperscript{125} Op. cit. footnote no 6 at Article 20(5).
“autonomous” quotas are administered in accordance with the procedure laid down in Council Regulation (EC) 717/2008. However, the regulation provides that it does not apply to the administration of quotas in relation to agricultural products listed in Annex I to the TFEU or to other products that are governed by separate arrangements between the EU and third countries which provide for specific quota administration.

The quota regime is administered by the Commission which is assisted by a committee. The Commission must publish a notice announcing the opening of quotas in the Official Journal. The notice must include the allocation method that was used, the conditions to be met by licence applications as well as submission time limit and “a list of the competent national authorities to which they must be sent.” In accordance with Article 2 of Regulation 717/2008, quotas must be allocated to applicants “as soon as possible” after they have been opened, and they can be allocated in tranches. Furthermore, the administration of tariff quotas may also be made by one or a combination of the three methods of allocation provided in Article 2 of Regulation 717/2008. The first method is based on traditional trade flows, whereas the second one is based on the order in which applications are submitted. This is the ‘first come, first served’ method. The last method is based on quantities requested by the applicants, using the ‘simultaneous examination’ procedure. The regulation requires the redistribution of quantities

127 Ibid at Article 1(2).
128 Ibid at Article 22(1).
129 Ibid at Article 3.
130 Ibid at Article 2(1).
131 Ibid at Article 2(2).
that have not been allocated, assigned or used. Regulation No 717/2008 provides for specific rules in respect of the three methods, which are examined below. The quantities must be redistributed in time to allow them to be used before the end of the quota period.\textsuperscript{133}

The administration of quotas is based on a system of licences which are issued by the MS to the various applicants to which quotas applications are made. Import licences authorise the import of agricultural products which are subject to quotas and are valid throughout the EU, unless otherwise specified.\textsuperscript{134} Accordingly, when the quota is set, products subject to quotas are released into free circulation within the EU market on the presentation of these import licenses.\textsuperscript{135} Licences are valid for a period of four months.\textsuperscript{136} It must be noted that when the method used is based on the ‘first come, first served’ principle, the import licences must be issued by the MS “immediately on verification of the [EU] balance of quota available.”\textsuperscript{137} In other cases the MS have 10 days, after receiving notification from the Commission, to issue import licences.\textsuperscript{138}

6.1 Method based on traditional trade flows

When this method of quota allocation is used, one part of the quota has to be reserved for traditional importers,\textsuperscript{139} and the other part must be set aside for other

\textsuperscript{133} Ibid at Article 2(5).
\textsuperscript{134} Ibid at Article 17(1). Import licences can be limited to one of several regions of the EU and are therefore valid only in these regions.
\textsuperscript{135} Op. cit. footnote no 126 at Article 2(6).
\textsuperscript{136} Ibid at Article 17(2).
\textsuperscript{137} Ibid at Article 15(1).
\textsuperscript{138} Ibid at Article 15(2).
\textsuperscript{139} Traditional importers are those who are able to show that in the previous “reference period,” they have imported into the EU quota agricultural products covered by the quota. Ibid at Article 6(2).
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importers.140 Traditional importers are required to provide evidence of their imports during the reference period141 in order to qualify for the part of the quota reserved for them. They must enclose with their licence applications a certified copy of the original of the entry for free circulation. This document must be “made out in the name of the importer concerned or, where applicable, that of the operator whose activities they have taken over.”142 Applicants may also enclose equivalent evidence as established by the Commission.143 In accordance with Article 8 of Regulation 717/2008, MS are required to inform the Commission of the number and the aggregate amount of the import applications, broken down into those from traditional importers and other importers. MS must also communicate “the amount of the previous imports carried by the applicants during the reference period” to the Commission.144 All this information is subsequently examined by the Commission which then establishes the quantitative criteria according to which traditional importers’ applications are to be met.

Applications are considered to be met “in full” where “aggregate applications are equal to or less than the amount set aside for traditional importers.”145 In contrast, applications are to be met on a “pro rata” basis where aggregate applications exceed the amount set aside for traditional importers. The pro rata rate is calculated in accordance with each applicant’s share of the total reference imports.146 The

140 Ibid at Article 6(1).
143 Ibid at Article 8.
144 Ibid at Article 9 (a).
145 Ibid at Article 9 (b).
regulation provides that where this criterion would result in allocating applicants with quantities above what they have applied for, the excess quota is to be reassigned in accordance with the specified procedure established in Article 14 of the regulation.\textsuperscript{147} At last, the part of the quota reserved for non-traditional importers is allocated in accordance with the ‘first come, first served’ method.\textsuperscript{148} This method must also be used when no applications are received from traditional importers and that the Commission needs to allocate the quantities concerned among applicants.\textsuperscript{149}

### 6.2 The ‘first come, first served’ method

This method is based on the order in which applications are submitted. When quotas are administered by this method, the Commission must determine the quantity to which operators are entitled to receive on making an application until the quota is exhausted. This quantity is to be the same for all operators. In setting that quantity, allowance must be made for “the need to assign economically significant quantities” of the product concerned.\textsuperscript{150} Licence-holders who can prove that they have used their quota may submit a new licence application.\textsuperscript{151}

### 6.3 Quotas administered according to the quantities requested

The use of this method requires the competent authorities of the MS to inform the Commission of the licence applications they have received in conformity with

\textsuperscript{147} Ibid at Article 9 (c).
\textsuperscript{148} Ibid at Article 10.
\textsuperscript{149} Ibid at Article 11.
\textsuperscript{150} Ibid at Article 12(1).
\textsuperscript{151} Ibid at Article 12(3).
certain deadlines and requisite conditions. The information given by the authorities must specify the number of applicants and the aggregate quantities applied for. Then, within the required deadline, the Commission needs to examine the information received and determine the quantity of the quota or tranches for which import licences are to be issued. The applications are met in full where aggregate licence applications are equal to, or less than the quantity of the quota. However, where applications exceed the quantity of the quota, they are to be met on a pro rata basis, in proportion to the amounts applied for.

The EU tariff quota system has been particularly relevant in respect of both sugar and banana imports. As will be discussed in Chapters 8 and 9 of this thesis, the EU has in the past, opened and provided for the application of tariff quotas bound in GATT for these two products. With regard to bananas, the EU distinguished between banana imports from traditional ACP countries, imports from non-traditional ACP countries, and imports from non-ACP third countries. Bananas from MFN countries were subject to a high import tariff. Tariff quotas on sugar were administered to ACP countries according to the “traditional or new arrival trade flows” method. As a result of the WTO disputes, analysed in Chapters 8 and 9 of this thesis, sugar and bananas have been fully liberalised, since 2009 and 2006 respectively, and are now imported duty and quota free from all ACP

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152 Ibid at Article 13(1). These deadlines and conditions must be established in accordance with the procedure provided in Article 22(2) of Regulation (EC) No 717/2008.
153 Ibid at Article 13(1).
154 The deadline must be set in accordance with the procedure laid down in Article 22(2) of Regulation (EEC) No 2913/92.
156 Ibid at Article 13(3)(4).
157 See Chapter 9 of this thesis.
countries. MFN tariffs for bananas have been significantly reduced, whereas the EU continues to maintain a high tariff for sugar imports.

7. The inward processing arrangements

Inward processing is deemed a customs procedure of “considerable economic importance” to the EU. The CJEU highlighted that the objective of this procedure is to ensure that EU undertakings which import raw products from third countries are not “put at a disadvantage” when these products are processed for export outside the EU market. These undertakings are therefore given the possibility to acquire raw products under the same conditions applicable to non EU MS. Therefore, in accordance with this procedure, imported products which are intended for re-export from the EU market in the form of “compensating products” can be “processed on the premises of a customs warehouse,” without being charged import duties or other commercial policy measures. The operation of such inward processing relief arrangements is referred to as the “suspension system.”

The CCC provides that the inward processing procedure can be operated by way of a “drawback system.” This system gives to EU operators a repayment or remission of the import duties applicable on goods released for free circulation if these goods are exported goods outside the EU in the form of “compensating

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161 Compensating products refer to “all products resulting from processing operations” carried out under the inward processing. See Op. cit. footnote no 6 at Article 114(2) (d).
162 Ibid at Article 114(1)(a).
163 Ibid at Article 114(2)(a).
164 Ibid at Article 114(2)(b).
products." This system can apply to all goods except when, at the time the declaration of release into free circulation is accepted, imported goods are subject to quantitative import restrictions, a tariff quota measure, an agricultural levy or any other import charges provided under the CAP or are subject to an export refund. In order to use the inward processing procedure, the person who carries out processing operations, or who arranges for them to be carried out, needs to request an authorization which is then issued by the customs authorities.  

The grant of this authorization is conditional upon meeting the three administrative and economic criteria provided in Article 117 of the CCC. Firstly, the customs authorities can only grant this authorization to persons established within the EU. Secondly, since compensating products are all the products resulting from the processing operations, the customs authorities must be able to identify the proportion of products that have been obtained from the processing of goods imported by the EU operators. Finally, the inward processing procedure has to help create “the most favourable conditions for the export or re-export of compensating products, provided that the essential interests of [Union] producers are not adversely affected.” The inward processing procedure is of particular importance for the sugar sector. Regulation (EC) No 318/2006 on the common organisation of the market in sugar, provides that import duties must be suspended on raw cane sugar imported from ACP countries in order to ensure “an adequate

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165 Ibid at Article 114 (1) (b).
166 Ibid at Article 124(1) and (2).
167 Ibid at Article 85 and 116.
168 Ibid at Article 117 (a).
169 Ibid at Article 114 (2) (d).
170 Ibid at Article 117 (b).
171 Ibid at Article 117 (c).
172 These countries are listed in Annex VI of Regulation (EC) No 318/2006.
supply” for the undertakings specialised solely on the refining of imported cane sugar.  

8. Sanitary and phytosanitary measures in the agricultural sector

The above examination of fiscal structures operated at the EU borders needs to be complemented by the EU SPS measures as a further import obligation, which are of particular relevance in the context of agricultural food commodities. In order to ensure that imported products within the EU market do not undermine public health and safety, they are also subject to EU food safety and agricultural health (sanitary and phytosanitary - SPS) measures. The requirement for imported agricultural food products to meet such SPS provisions is a relevant issue in the context of trade with third countries. The WTO Agreement on the Application of Sanitary and Phytosanitary Measures (the SPS Agreement), which will be examined further in Chapter 6 of this thesis, is of particular relevance in this context. The WTO SPS Agreement recognises that DCs can have “special difficulties” meeting such measures imposed by the EU, and hence accessing the EU market.  

The agreement provides that it applies to all SPS measures imposed by the WTO members which may, “directly or indirectly, affect international trade.” Accordingly, as a member of the WTO, the EU health and safety measures applied to imported products must be consistent with the provisions of the WTO SPS Agreement. The EU “plant health regime” set out in Council Directive 2000/29/EC, requires that consignments of plants and plant products from third countries are to be accompanied by phytosanitary certificates issued by

173 Ibid at Article 29(4).
175 Ibid at Article 1(1).
176 Ibid at Article 1(1).
Chapter 4 – EU customs tariff and import rules

the National Plant Protection Organisation of the exporting country. The certificates must be issued in conformity with the standards established in the International Plant Protection Convention (IPPC) of 1951 concluded at the United Nations Food and Agricultural Organisation (FAO). As provided in Council Directive 2002/89/EC, the EU is required under Article 4 of the WTO SPS Agreement to “recognise, under certain conditions, the equivalence of phytosanitary measures of other Parties to that Agreement.” The procedures for such recognition are set out in Directive 2000/29/EC.

The IPPC has been established as an international plant health agreement with the aim to secure “common and effective action to prevent the spread and introduction of pests of plants and plant products, and to promote appropriate measures for their control.” The IPPC was revised for the second time in 1997 in order to bring it into line with the WTO SPS Agreement as well as “to ensure consistency with the new system for drafting International Standards in the IPPC framework and to allow Member Organisations of the FAO to become a Contracting Party to it.”

The WTO SPS Agreement identifies the IPPC as a reference for developing

178 https://www.ippc.int/
179 http://www.fao.org/
182 Article 1(1) of the International Plant Protection Convention (as amended by the FAO Conference at its Twentieth Session (November 1979) and at its Twenty-ninth Session (November 1997)). The text of the Convention is available at: https://www.ippc.int/ (accessed 24/03/2012).

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international sanitary and phytosanitary measures.\textsuperscript{184} The revised IPPC text was approved by Resolution 12/97 of the FAO Conference in November 1997 and came into force on 2 October 2005.\textsuperscript{185} Moreover, fresh fruits and vegetables are, as a general rule, subject to controls on pesticide residue levels in order to ensure that they comply with the allowable Maximum Residue Limits.\textsuperscript{186} Compliance with food hygiene and other sanitary requirements imposed by the EU is also relevant in regard to food imports into the EU. It has been reported on several occasions that spiders were found in boxes of bananas which were then supplied to supermarkets.\textsuperscript{187} Moreover, the use of packaging such as wooden crates may also create problems with infestation. The EU sanitary provisions are underpinned by standards developed by international organizations, namely the WTO, World Health Organisation\textsuperscript{188} and the FAO. In addition to the requirements provided in EU legislation, the private sector has developed its own quality and safety standards. These additional private standards requirements imposed upon third countries exporters also affect DCs food exports into the EU market. The SPS provisions which have been developed at the EU level and by the private sector for inspections of agricultural food products as well as their interaction with the WTO SPS Agreement will be analysed in depth in Chapter 6 of this thesis.

9. Conclusion

This chapter has considered the CCT, as it governs trade between the EU MS and third countries. It is a key component in actually getting DCs agricultural commodities over the EU external (goods) frontier, and into the EU market. As can be seen from the above examination, the EU applies unilateral tariffs and other charges on products falling under the CAP in order to secure the competitiveness of EU producers. The rates of tariffs, together with the application of tariff quotas to these commodities, have caused considerable controversy at the WTO level. The issues which arise from this WTO level controversy will be examined in Chapters 8 and 9 of this thesis in the context of sugar and bananas. These chapters will particularly be focused on the EU protectionist measures applied to sugar and bananas originating from third countries. In addition, given that many DCs benefit from preferential trading arrangements for agricultural commodities covered by the CAP, the CCT does not affect all DCs in the same way. Accordingly, the protectionist nature of the CCT needs to be contrasted with the EU preferential trade regimes in order to obtain an accurate understanding on its effect on market access. These latter issues will be examined further in Chapter 5 of this thesis.
Chapter 5 – The EU’s preferential trade arrangements

Chapter 5 The European Union’s preferential trade arrangements

1. Introduction

Trade is considered to be "one of the most effective tools to boost and accelerate growth in developing countries." Despite equal treatment being one of the fundamental principles of the world trade system, World Trade Organization (WTO) members are allowed to discriminate among trade partners, by way of customs unions or free trade areas, with the European Union (EU) being described as being "one of the most enthusiastic users in the world of free-trade areas and customs unions." This exception is in keeping with the EU’s commitments, along with other developed countries, to give differential and more favourable treatment to developing countries (DCs) in order to improve their trade interests. Agricultural food products are major commodities in developing countries’ foreign exchange and allow for an important increase in their finance in order to meet their rural development objectives and thus reduce poverty. In order to increase DCs’ trade opportunities, WTO members are therefore allowed to provide them with preferential trade arrangements. Trade preferences offered by the EU to DCs are essentially divided into two categories. The first category is the Generalized System of Preferences (GSP) permitted by the so-called "Enabling Clause" of the General Agreement on Tariffs and Trade (GATT), which was examined in Chapter 3 of this thesis. The GSP is available to all DCs and provides for non-reciprocal

2 Article I(1) of General Agreement on Tariffs and Trade 1994.
3 See Article XXIV of GATT 1947 which was covered in Chapter 3 of this thesis.
preferential market access.\(^6\) The scheme is currently restricted to 176 eligible countries and territories.\(^7\)

The second group comprises the bilateral and regional free trade agreements, which provide better market access to selected beneficiaries countries.\(^8\) The Cotonou Agreement is one such regional example, which operates between the African-Caribbean and Pacific (ACP) countries and the EU.\(^9\) Under the Cotonou Agreement, the EU maintains post-colonial relations with a large number of ACP countries. In accordance with this Agreement, the EU has signed free trade agreements, referred to as “Economic Partnership Agreements” (EPAs) with the ACP Countries. The Caribbean region was the first area of the ACP to sign an EPA with the EU in 2008.

The EU maintains also special economic relations with its developing Mediterranean neighbours under the Euro-Mediterranean Partnership (EMP). The EMP aims to establish a Euro-Mediterranean Free Trade Area through the conclusion of bilateral free trade agreements, referred to as Euro-Mediterranean Association Agreements. These are agreed between the EU and its Mediterranean partners. This preferential trading relationship could have an impact on the ACP EPAs and so merits further examination.

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\(^9\) The ACP group consists of 79 countries.
In 2009, products benefitting from the GSP preferences represented around 9 percent of EU total imports, valued at EUR 60 billion.\textsuperscript{10} The figure was 7.1 percent of the total value of EU imports for EU Member States (MS) importing under the Euro-Mediterranean Association Agreements (worth EUR 105 billion) and 4.5 percent for those importing from ACP countries (EUR 54 billion).\textsuperscript{11} In contrast to the DCs which benefit only from the GSP scheme, ACP and Mediterranean third countries have historical, economic, cultural and geographical links with the EU and therefore enjoy better tariff reductions for the export of their goods to the EU market. In the agricultural sector, GSP countries are thus only in a preferential situation to countries trading with the EU on the basis of the general provisions of “most favoured nation” (MFN) status. ACP countries signatories to the Cotonou Agreement were in a better position than any DCs and particularly in exporting “sensitive” products, such as sugar and bananas, to the protected EU agricultural market.\textsuperscript{12} However, with the trade provisions of this agreement expiring on 31 December 2007, this special relation has been significantly altered, which has led to severe consequences for these countries, and this will be analysed further in subsequent chapters of this thesis.

The European Commission is of the opinion that EU trade policy aims to facilitate market access to the EU for DCs under preferential access arrangements.\textsuperscript{13}


Chapter 5 – The EU’s preferential trade arrangements

However, McQueen, in the context of all countries exporting products to the EU market, refers to the system of preferential trade treatment as a “pyramid of privilege,” where the most preferred countries are at the top, and those which obtain only WTO based MFN treatment are at the bottom of that pyramid. DCs are generally covered by the GSP scheme and in addition, the EU offers significantly superior preferences to particular countries which opt to conclude bilateral contractual agreements with the EU. These countries receive better market access conditions than countries without such agreements, but agree to be bound by certain obligations towards the EU. These agreements serve to provide mutually beneficial treatment, as opposed to the GSP scheme, which only provides for unilateral preferences.

Therefore, this chapter provides an analysis of the EU trade relations with DCs under the Cotonou Agreement, the EMP and the EU GSP scheme, through a comparison and contrast of the three systems’ trade conditions. The rules of origin (RoO) are divided into two distinct groups, preferential and non-preferential RoO, which is also of importance in this chapter. The main issue lies in the system of cumulative RoO, which, as seen from Chapter 4 of this thesis, differ considerably between the EU schemes. Therefore, this chapter includes an analysis of the issue of cumulative and non-cumulative RoO under the three aforementioned preferential trade systems.

2. The EU’s Generalized System of Preferences

The EU maintains a complex web of non-reciprocal tariff preferences under the GSP of the “Enabling Clause.”15 This special treatment, under which goods from DCs can access the EU market through reduced tariffs, is intended to contribute to the “eradication of poverty and the promotion of sustainable development and good governance in the developing countries.”16 In 1971, the EU put into effect the first GSP scheme for a period of ten years.17 It was open only to the DCs listed in the scheme.18 Many of these beneficiary countries had colonial ties with the EU MS,19 hence the scheme facilitated both DCs, and Least-Developed Countries (LDCs), access to the EU market through either reduced or zero tariff for certain products, and enhanced therefore the participation of DCs in world trade which was a key factor in their own economic and social development. As discussed in Chapter 1 of this thesis, LDCs are not the focus of this thesis. Therefore, the following discussion will focus on the perspective of DCs and there will be no extensive exploration of the situation of LDCs.

The EU GSP scheme is based on the EU common commercial policy,20 which allows tariff preferences for DCs, in order to serve development-policy objectives.21 The GSP scheme covers all manufactured exports, and some agricultural commodities which are exported from DCs. The list of products included in the scheme is provided in Annex II of the GSP Regulation. Only 16

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16 Op. cit. footnote no 7 at Preamble (2).
18 Ibid. at Article 1(2).
percent of the 45 percent of agricultural products covered by the GSP scheme enter
the EU market duty-free.\textsuperscript{22} The GSP scheme is divided into three different
categories of benefits. First, there is the "general arrangement" which grants a
standard preferential treatment to all beneficiary countries of the GSP scheme.\textsuperscript{23}
Second, there exists the "Special Incentive Arrangement for Sustainable
Development and Good Governance,"\textsuperscript{24} referred to as the GSP+,
which supplements the general arrangement. The GSP+ is offered to the countries that
already benefit from the general arrangement, and give an additional margin of
preference to those granted under the general arrangement, in return for sustainable
development and good governance undertakings.\textsuperscript{25}

Thirdly, the 'Everything But Arms' (EBA) is a special arrangement for the LDCs, as recognised by the United
Nations (UN).\textsuperscript{26} The EBA is the only arrangement providing for duty and quota
free access to the EU market for all products from Chapters 1 to 97 of the
Harmonised System\textsuperscript{27} except for arms and armaments.\textsuperscript{28} The EU has also extended
duty and quota free access for sugar from 1st October 2009\textsuperscript{29} and for bananas from
1st January 2006\textsuperscript{30} to all LDCs under the EBA trade preferences regime. The LDCs
are thus the only countries enjoying full liberalisation of their products. These
arrangements are successively examined with the exception of the EBA pertaining
to LDCs excluded from this thesis.

\textsuperscript{22} Op. cit. footnote no 10, p 86.
\textsuperscript{23} There are currently 113 beneficiary countries.
\textsuperscript{24} Op. cit. footnote no 7 at Article 1(2). The Beneficiary countries are Armenia, Azerbaijan, Bolivia,
Colombia, Costa Rica, Ecuador, Georgia, Guatemala, Honduras, Mongolia, Nicaragua, Panama,
Peru, Paraguay, El Salvador and Venezuela.
\textsuperscript{25} Ibid, at Article 7(1).
\textsuperscript{26} Ibid, at Article 11.
\textsuperscript{27} The Harmonised System was covered in Chapter 4 of this thesis.
\textsuperscript{28} Op. cit. footnote no 7 Article 11 (1).
\textsuperscript{29} Ibid. at Article 11(3).
\textsuperscript{30} Article 6(2) of Council Regulation (EC) No 416/2001 of 28 February 2001 amending Regulation
(EC) No 2820/98 applying a multiannual scheme of generalised tariff preferences for the period 1
July 1999 to 31 December 2001 so as to extend duty-free access without any quantitative
restrictions to products originating in the least developed countries, OJ L 60/43, 1.3.2001.
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The EU GSP scheme is implemented in cycles of ten years,\(^\text{31}\) by means of successive regulations. The current GSP Regulation (EC) No 732/2008 applied from the 1\(^{\text{st}}\) January 2009 to the 31\(^{\text{st}}\) December 2011.\(^\text{32}\) The period of application of the regulation was delayed until 31\(^{\text{st}}\) December 2013 via a “roll-over” regulation, in order to ensure the continuity of the scheme, while the ‘next Regulation’ is proposed and then adopted.\(^\text{33}\) On 10\(^{\text{th}}\) May 2011 the European Commission adopted a proposal for a new regulation which will set the new GSP rules from 1\(^{\text{st}}\) January 2014.\(^\text{34}\) The objective of the new scheme is to enhance its effectiveness through “greater simplicity, predictability and better targeting of the EU GSP scheme.”\(^\text{35}\) In this aim, the EU has \textit{inter alia} “decided to focus the GSP preferences on the countries most in need.”\(^\text{36}\) This has resulted in an important reduction of the GSP beneficiary countries. The Commission’s proposal is accompanied by the list of potential beneficiary countries and territories under each arrangement. There are now only 85 countries and territories that could benefit from the general arrangement under the GSP scheme.\(^\text{37}\) The list of countries eligible for the GSP+ will be established after the countries have made a request to this effect.\(^\text{38}\) The draft proposal must now be adopted by the EU co-legislators – the Council of the EU and the European Parliament.

\(^{31}\) The current scheme runs from 2006 to 2015. The European Commission sets out the guiding principles for the application of the scheme during that period in its communication on “Developing countries, international trade and sustainable development: the function of the Community’s generalised system of preferences (GSP) for the ten-year period from 2006 to 2015”, COM (2004) 461 final, Brussels, 7.7.2004.


\(^{35}\) Ibid.

\(^{36}\) Ibid.

\(^{37}\) Ibid. at Annex II.

\(^{38}\) Ibid, at Article 10.
Chapter 5 – The EU’s preferential trade arrangements

The EU unilaterally offers GSP tariff reductions to DCs without entering into contractual commitments and decides on the rules that guide their allocation. Consequently, the trade conditions, which will be examined below, contained in the GSP scheme cannot be negotiated by the beneficiaries. This diminishes the value of the preferences and keeps the beneficiary countries “in a permanent state of insecurity as to the extent and the duration of the preferences.”\(^\text{39}\) Furthermore, in light of the non-mandatory nature of the Enabling Clause, examined in Chapter 3 of this thesis, there is no obligation on the EU to grant tariff preferences to DCs under the GSP. Accordingly, there is no legal recourse for DCs against the withdrawal or changes of their preferences as these are firmly entrenched in the EU GSP Regulation. The EU and other developed countries establishing unilateral preferential tariff treatment under the Enabling Clause are nevertheless expected to observe the trade preferences requirements, which must be “generalized, non-reciprocal and non-discriminatory preferences beneficial to the developing countries.”\(^\text{40}\) Since these terms have not been explained under the Enabling Clause, it was for the WTO case law to make their legal meaning clear. The first legal explanation of the Enabling Clause and the GSP programme itself was made in 2004 in *European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries.*\(^\text{41}\) This is fully examined below.

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Chapter 5 – The EU’s preferential trade arrangements

2.1 The general arrangement

Under the general arrangement of the GSP scheme, beneficiary countries are granted reduced tariffs for agricultural products, and zero tariff access for industrial products to the EU market. The differentiation of treatment which has been established between these sectors is, according to O’Neill, relying on Driessen and Waer, in line with “the protectionist nature of the [EU]’s [Common Agricultural Policy] (CAP).” This issue was dealt with in Chapter 2 of this thesis. The CAP, which was considered “responsible for major distortions in global production and trade,” was focused on increasing EU domestic agricultural productivity, thereby adversely affecting the EU GSP scheme in 1971, which resulted in a limiting of the agricultural food products thereby covered.

Thus, under the GSP scheme, the EU unilaterally selects agricultural commodities eligible for preferential treatment. This excludes some commodities, which happens to be of particular importance for DCs, but which are also covered by the CAP for internal EU production. They are therefore considered as EU sensitive products. As such, neither cane nor beet sugar, nor fresh bananas, are included in the list of products under the general arrangement and the GSP+. This can be explained by the fact that sugar produced by these countries are in competition with beet sugar produced within the EU which has traditionally been considered as a sensitive product. There is also no doubt that such restrictions are in line with the

46 Article 33(1)(a) EC Treaty (now Article 39 TFEU).
market access provisions for ACP sugar in the Cotonou Agreement. This will be discussed in this Chapter and examined further in Chapters 7 and 8 of this thesis. While the EU is not a big producer of bananas, it has operated a protective import regime from ACP countries. The EU banana regime will be examined in Chapters 9 of this thesis. As previously mentioned, duty and quota free access for sugar and fresh bananas to the EU market is granted to LDCs which benefit from the EBA scheme.

The 6244 products covered under the general arrangement are classified in two categories according to whether “they are more or less likely to disturb the market” within the EU. Products classified as being “sensitive,” and which are highly protected within the EU, benefit from a partial tariff reduction of 3.5 percentage points below the normal MFN tariff rates. For instance, the entry price for processed tomatoes, classified as sensitive products, is set at 10.9 percent against the MFN rate of 14.40 percent. In addition, where only specific duties apply to sensitive products, they receive a 30 percent of reduction in the MFN duty. Sweet potatoes for instance are imported at 6.4 EUR/100kg under the MFN rate. Under the GSP, they benefit from the preferential rate of 4.4 EUR/100

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51 This single category replaces the three categories of very sensitive, sensitive and semi-sensitive products established under the previous GSP scheme.
52 Op. cit. footnote no 7 at Article 6(2).
55 Sweet potatoes, fresh, chilled, frozen or dried, whether or not sliced or in the form of pellets, other than fresh and whole and intended for human consumption (CN Code 0714 20 90 00).
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kg.56 “Non-sensitive” products, in contrast, are granted duty-free access to the EU market,57 except for agricultural commodities, which are limited to the ad valorem duty.58 Despite the classification operated under the GSP scheme being less open for DCs’ export of agri-food to the EU, it must be noted that this practice is in line with the WTO law, as no uniformity in tariff rates reduction is required under the Enabling Clause.

Nevertheless, not all DCs are affected in the same way in the context of the export of agricultural products into the EU. A significant divide has emerged between EU former colonies, which have special preferential arrangements, and the balance of the worlds DCs, which remain outside these schemes. ACP countries’ products, for instance, are also affected by the EU’s CAP, and are restricted on a case-by-case basis.59 Most of ACP’s products covered by the CAP have been limited by quotas or small tariff reductions.60 However, some of them, which are also of importance for DCs outside the Cotonou Agreement, have long been covered by special agreements.61

57 Op. cit. footnote no 7 at Article 6(1).
58 Ibid, at Article 6(1).
61 This is for instance the case of sugar and bananas covered in Chapters 8 and 9 of this thesis, respectively.
2.2 The GSP+ special arrangement

The GSP+ covers 6336 products, and is available to countries which already benefit from the general arrangement. To these countries, it offers additional tariff preferences on all products listed in Annex II of Regulation (EC) No 732/2008. The GSP+ replaces the three special arrangement schemes in the previous GSP cycle, namely the GSP Labour, GSP Environment and GSP Drugs. However, this more generous preferences scheme is only available to vulnerable countries, with special development needs, meeting “sustainable development and good governance” criteria. In order to be eligible for the GSP+ additional tariff preferences, a country must fulfill the three criteria provided in Article 8(1) of the Regulation. It must be first considered as being “vulnerable.” A country is considered as ‘vulnerable’ in terms of its economy and lack of exports diversification, and must therefore fall within the strict criteria laid down in Article 8(2). In light of these requirements, DCs with larger economies, and sufficiently diversified in their exports, such as Brazil or India, are therefore excluded from the GSP+ benefits. On 12th December 2009, the European Commission published the

64 Based on countries respecting International Labor Organization conventions on labour rights. Beneficiary countries were granted additional tariff preferences for “sensitive” products.
65 Based on countries respecting environmental protection. Beneficiary countries were granted additional tariff preferences for imports of products from tropical forests that are classified as “sensitive” under the general GSP.
68 Ibid, at Article 8(1)(c).
69 Article 8(2) provides that a vulnerable country must (a) not be classified by the World Bank as a high-income country during three consecutive years, and of which the five largest sections of its GSP-covered imports into the [EU] represent more than 75 percent in value of its total GSP covered imports; and (b) of which the GSP-covered imports into the [EU] represent less than 1 percent in value of the total GSP-covered imports into the [EU].
16 GSP+ beneficiaries. These were Armenia, Azerbaijan, Bolivia, Colombia, Costa Rica, Ecuador, Georgia, Guatemala, Honduras, Sri Lanka, Mongolia, Nicaragua, Peru, Paraguay, El Salvador and Venezuela.\textsuperscript{71} In 2010, the GSP+ tariff preferences were withdrawn in respect of Sri Lanka,\textsuperscript{72} while Panama joined the scheme in the same year.\textsuperscript{73} Secondly, a GSP+ country must ratify and effectively implements all of the 27 international conventions relating to core human and labour rights, and the environment and good governance principles listed in Annex III of the GSP Regulation.\textsuperscript{74} Finally, the GSP+ country must also undertake to maintain the ratification and implementation of these conventions, and accept regular monitoring and review by the EU of their implementation.\textsuperscript{75}

The above conditions linked to the GSP scheme have been strongly criticized. Healy, for example, argues that these requirements are more in line with “serving the interests of the donor country rather than responding to genuine concerns in the beneficiary country.”\textsuperscript{76} These conditions have also been qualified as “veiled protectionism” under a Financial Times editorial, which argued that “the


\textsuperscript{73} Commission Decision of 9 June 2010 on the beneficiary countries which qualify for the special incentive arrangement for sustainable development and good governance for the period from 1 July to 31 December 2011, as provided in Council regulation (EC) No 732/2008, OJ L 142/10, 10.6.2010

\textsuperscript{74} Op. cit. footnote no 7 at Article 8(1)(a).

\textsuperscript{75} Ibid, at Article 8(1)(b).

manipulation of trade privileges, whether by the carrot of access or the stick of tariffs, should rarely be used to achieve non-trade goals." It also pointed out that “trade agreements should not be a lever for rich countries to force other governments to implement unrelated policies, however symbolic." Nevertheless, in the viewpoint of the European Commission, the GSP+ is a “concrete incentive for developing countries to promote best practice in key areas and support sustainable development policies.” It also recognizes that such requirements under the scheme are in line with the WTO Appellate Body decision in EC-tariff preferences which held that under the Enabling Clause, the EU is not obliged to offer tariff preferences to all DCs and therefore some DCs can be treated differently with better tariff treatment. Such high standards of behaviour as prerequisites for additional tariff preferences and thus for better market access to the EU have been qualified by Bartels as being the ‘positive’ conditions of the GSP.

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78 Ibid., p 9.
2.2.1 The conformity of the GSP+ with the WTO rules in light of the EC-tariff preferences case

The EC-tariff preferences dispute against the legality of the EU GSP+ granting greater tariff preferences had important implications on the conditions imposed by developed countries under the GSP. The case law clarified for the first time the legal interpretation of the Enabling Clause, and raised the issue of the type of discrimination allowed towards developing countries. The pertinent facts are as follows. On 6 December 2002, India requested that the WTO Dispute Settlement Body (DSB) establish a panel to examine and consider the validity with WTO law of the conditions under which the EU was granting more generous tariff rates to DCs. This was being done under Council Regulation 2501/2001 of December 2001. This regulation was applying a scheme of GSP for the period from 1 January 2001 to 21 December 2004. India particularly challenged the EU GSP drug arrangements granting duty-free market access to a closed list of 12 DCs fighting against drug production and trafficking. India claimed that the drug arrangements were incompatible with the MFN requirement of GATT 1994 and not justified by the Enabling Clause, being an exception to the MFN principle. According to India, the EU had failed to demonstrate that the so-called GSP Drugs

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82 European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries, Request for the Establishment of a Panel by India, 9 December 2002, 9 December 2002 (WT/DS246/4).
87 Ibid.
88 The twelve beneficiary countries were Bolivia, Columbia, Costa Rica, Ecuador, El Salvador, Guatemala, Honduras, Nicaragua, Pakistan, Panama, Peru and Venezuela.
89 WTO Panel, European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries, WT/DS246/R, adopted 1 December 2003, para. 1.5.
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regime was “non-discriminatory” within the meaning of paragraph 2(a) of the Enabling Clause or was justifiable under Article XX (b) of GATT 1994.\textsuperscript{90}

2.2.2 Decision of the WTO DSB ruling

In December 2003, the WTO Panel ruled in India’s favour that the EU GSP drug regime violated the MFN principle and was not justified under the Enabling Clause.\textsuperscript{91} The Panel’s findings were appealed against by the EU and the WTO Appellate Body (AB) which delivered a new report in April 2004, confirming the ruling in favour of India and held that the EU “has failed to prove the Drug Arrangements meet the requirement in footnote 3 that they be “non-discriminatory.”\textsuperscript{92} The AB rulings were made in accordance to two factors. First the AB argued that the “closed list” of beneficiaries under the Drug Arrangements “[could not] ensure that the preferences under the Drug Arrangements [were] available to all GSP beneficiaries suffering from illicit drug production and trafficking.”\textsuperscript{93} The AB secondly argued that the Drug regime contained “no criteria or standards to provide a basis for distinguishing beneficiaries under the Drug Arrangements from other GSP beneficiaries.”\textsuperscript{94}

However, despite confirming the Panel’s decision, the AB modified the panel’s findings in interpreting the term “non-discriminatory” in footnote 3 of paragraph 2(a) of the Enabling Clause.\textsuperscript{95} The AB held that in granting different preferences to different DCs, GSP donor countries are compelled, based on the term ‘non-

\textsuperscript{90} Ibid, at paras 4.179 and 4.211. Article XX (b) of GATT 1994 allows for discrimination between countries on the ground of human, animal or plant life or health protection.

\textsuperscript{91} Ibid, at paras 7.60 and 7.177.

\textsuperscript{92} Op. cit. footnote no 41 at para 189.

\textsuperscript{93} Ibid, para 187.

\textsuperscript{94} Ibid, para 188.

\textsuperscript{95} Ibid, paras 7.195-7.236.
discriminatory', to guarantee that "identical treatment is available to all similarly-situated GSP beneficiaries."\textsuperscript{96} These GSP beneficiaries are described as "all [countries] that have the 'development, financial and trade needs' to which the treatment in question is intended to respond."\textsuperscript{97} Despite this practice being unfair for countries left outside the GSP+, the AB found that differentiation between GSP beneficiaries could be consistent with the provisions of the Enabling Clause if based on their "development, financial [or] trade needs."\textsuperscript{98} Nevertheless, the AB pointed out that these criteria must be assessed according to an "objective" standard such as for instance "broad–based recognition of a particular need, set out in the WTO Agreement or in multilateral instruments adopted by international organizations."\textsuperscript{99}

Therefore, the EU promulgated a Regulation in 2005\textsuperscript{100} in order to comply with the DSB rulings for the period from 1 January 2006 to 31 December 2008.\textsuperscript{101} Nevertheless, India was still not convinced about the compatibility of the "new" EU Regulation with WTO law, and particularly with the DSB' rulings and recommendations. It argued that the GSP+ did not seem to be based on "objective" criteria such as required by the AB\textsuperscript{102} and was designed to "benefit pre-selected countries" which had previously benefited from the Drug Arrangements.\textsuperscript{103} India also called on all DCs to recognise that the GSP scheme imposes the EU's needs

\textsuperscript{96} Ibid, para 173.
\textsuperscript{97} Ibid, para 173.
\textsuperscript{98} Ibid, paras 164 and 165. See also paras 156, 162, 167, 173.
\textsuperscript{99} Ibid, para 163.
\textsuperscript{101} Ibid, at Recital (2).
\textsuperscript{102} Op. cit. footnote no 41 at para 163.
\textsuperscript{103} WTO, Minutes of Meeting of the Dispute Settlement Body Held in the Centre William Rappard on 20 July 2005, WT/DSB/M/194, 26 August 2005, para 34.
that specific human rights or environment or labour conventions be respected by DCs,” rather than “responding positively to DCs’ development, financial and trade needs” as required by the AB in 2004. Given India’s query, it can be argued that there is a gap between the non-trade related issues requirements under the GSP+, and the EU’s values on sustainable development. The Conventions listed under the GSP+ must be ratified and effectively implemented by DCs in order to qualify for greater tariff rates. However at the time of writing, two EU MS, namely Italy and Malta, have not yet ratified the Stockholm Convention on Persistent Organic Pollutants currently listed in the GSP+. India held that it reserved its right to return to this matter in the future, as necessary. In the meantime, despite these issues, the EU GSP+ remains unchanged.

2.3 Exclusion provisions from the GSP scheme

2.3.1 The graduation measure and the safeguard clause

Pursuant to both Articles 3 and 20 of the GSP regulation, the EU unilaterally removes from the GSP scheme a beneficiary country that is both “classified by the World Bank as a high-income country during three consecutive years,” and

104 Ibid. at para. 35.
108 Either the country as a whole is excluded or only particular sectors imported from this country are excluded.
which becomes competitive in one or more product groups. In this case, the EU considers that the beneficiary country is sufficiently developed and integrated into the international trading system. The removal of tariff preferences refers to the so-called ‘graduation’ measures introduced at the 1981 renewal of the GSP scheme, and is considered on a yearly basis. In 2006, nine countries were graduated from the GSP scheme namely, Algeria, Brazil, China, India, Indonesia, Malaysia, Russia, Thailand and South Africa, for a specific product section or sections, but not for agricultural products. Under the new 2009-2011 regulation applying the GSP scheme, Vietnam was graduated and preferences have been re-established (‘de-graduation’) for products from countries graduated in 2006 except for Brazil, China and Malaysia. By losing its preferences, the country will have to comply with the Common Customs Tariff (CCT) duties.

In addition to this, the EU also excludes countries from the GSP scheme for administrative reasons. This is stated in Article 3(2) which provides that a GSP country must be removed from the list of beneficiary countries when it “benefits from a preferential trade agreement with the EU which covers all the

110 Article 3(1) stipulates that “a GSP beneficiary country shall be removed from the scheme when the value of imports for the five largest sections of its GSP-covered imports to the EU represent less than 75 percent of the total GSP-covered imports of the beneficiary country to the EU.”

111 Op. cit. footnote no 7 at Preamble (20). This process affects only agri-food products exported under the GSP or GSP+.


113 The products graduated from Vietnam are non-agricultural food products.


preferences” granted by the GSP scheme to that country. These preferential trade agreements would include, for example, the ACP countries that have signed an EPA with the EU, or Latin American countries which have concluded a bilateral agreement with the EU. Depending on the terms of the preferential trade agreement, the countries may have no CCT duties to pay.

All EU PTAs contain a standard safeguard clause providing for protective provisions that can be implemented by the EU when increased quantities of products imported cause, or threaten to cause, serious disturbances to the common market. Under the GSP scheme, the EU can decide to reintroduce custom duties on GSP beneficiaries’ imported products, which “cause, or threaten to cause serious difficulties to [an EU] producer of like or directly competing products.” This clause applies to both GSP, and GSP+ beneficiaries, which increased the volume of their exports by at least 20 percent as compared with the previous calendar year.

2.3.2 Temporary withdrawal for infractions of certain conditions

All trade arrangements with the EU contain a withdrawal clause, referred as a “negative conditionality,” allowing the EU to remove, suspend or limit trade preferences of a beneficiary country in breach of certain conditions. The respect of human rights and other fundamental values inspiring the external actions of the EU have been included into EU trade agreements concluded with third countries.

118 Ibid. at Article 20(1).
119 Ibid. at Article 20(8)(b).
120 Referred to as such by Bartels in Op. cit. footnote no 81, p 508.
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allowing for trade restrictions in case of violations.\textsuperscript{121} These trade sanctions against DCs, described as a “method of punishment,”\textsuperscript{122} are applied pursuant to the specific objectives of the EU’s foreign actions,\textsuperscript{123} and have thus become an important tool of the EU’s external policy.\textsuperscript{124} Despite these requirements going beyond traditional WTO free trade agreements (FTAs),\textsuperscript{125} European values have \textit{de facto} been accepted by the EU trade partners, which are left with no other option but to comply with them in order to receive tariff preferences.

Accordingly, the EU can temporarily withdraw any GSP arrangements granted to a beneficiary country for infractions identified in Articles 15 and 16 of the GSP Regulation.\textsuperscript{126} These infractions include, for instance, serious and systematic violation of the principles recognized in the core UN/ILO Conventions on human and labour rights, listed in Part A of Annex III of the GSP Regulation,\textsuperscript{127} and serious shortcomings in customs controls on the export or transit of drugs, or the failure to comply with international conventions on money-laundering.\textsuperscript{128}

An example of the above is the EU suspension of all tariff preferences granted to the Union of Myanmar in 1997 “because of its use of forced labour.”\textsuperscript{129} The Republic of Belarus suffered a similar fate in 2006 due to “violations of the

\begin{itemize}
\item \textsuperscript{121} Op. cit. footnote no 20 at Article 215 TFEU.
\item \textsuperscript{122} Switzer, S., “Environmental protection and the generalized system of preferences: a legal and appropriate linkage?,” \textit{I.C.L.Q.}, 2008, 57(1), pp. 113-147, p 115.
\item \textsuperscript{123} The objectives are laid down in Article 21(2) of the Treaty on European Union (TEU) post-Lisbon, OJ C 83 of 30.3.2010.
\item \textsuperscript{124} Council of the European Union, “Basic Principles on the Use of Restrictive Measures (Sanctions)”, Brussels, 7 June 2004.
\item \textsuperscript{126} Op. cit. footnote no 7.
\item \textsuperscript{127} Annex III provides for a list of 16 core human and labour rights UN/ILO Conventions.
\item \textsuperscript{128} Op. cit. footnote no 7 at Article 15.
\item \textsuperscript{129} Council Regulation (EC) 552/97 temporarily withdrawing access to generalized tariff preferences from the Union Myanmar [1997] OJ L 85/8.
\end{itemize}
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freedom of association and of the right to collective bargaining in Belarus." The
former EU Trade Commissioner Peter Mandelson declared that the decision of
withdrawal of the GSP trade preferences from Belarus is “a test case of our
collective commitment to the promotion of workers rights as an integral part of our
trade policy.” As the reasons for GSP+ suspensions still persist, the European
Commission noted that temporary withdrawal of tariff preferences originating in
these countries was maintained under the 2008 EU Regulation. At the time of
writing, the temporary withdrawal of tariff preferences for products imported from
Myanmar and Belarus continues. During the withdrawal, the normal common
customs duties are reintroduced. Despite the strict conditions imposed by the
GSP+, Switzer recalls that they must be read in line with the Enabling Clause,
which contains no provisions “to the effect that the grant of preferences must be
‘unconditional’.”

Furthermore, pursuant to Article 18(2) of Council Regulation (EC) No
980/2005, the Commission launched an investigation in May 2008 in respect of
El Salvador’s effective implementation of the International Labour Organization
(ILO) Convention No 87 on the freedom of Association and Protection of the

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withdrawing access to generalized tariff preferences from the Republic of Belarus, OJ L 405/35,
131 Peter Mandelson, “Trade policy and decent work,” speech delivered to a conference on Trade
and Decent Work in Brussels on 5 December 2006, SPEECH/06/779.
132 The period of suspension cannot normally exceed six months. However, Article 16(5) of Council
Regulation (EC) No 732/2008 states that “on conclusion of the period, the Commission can decide
either to terminate the suspension to extend the period of suspension in accordance.”
133 Op. cit. footnote no 7 at Preamble (23).
Right to Organize.\textsuperscript{137} However, on 27 May 2009 El Salvador adopted an amendment to Article 47 of the El Salvadoran Constitution addressing the incompatibility with ILO Convention No 87 removing the inconsistency between the national legislation of El Salvador and ILO Convention No 87. The temporary withdrawal of El Salvador from GSP+ could not be justified and the country will continue to benefit from the GSP+ tariff preferences.\textsuperscript{138}

In addition to the above, on the 14\textsuperscript{th} October 2008, the European Commission decided to investigate whether the national legislation of Sri Lanka incorporating three UN human rights conventions was effectively implemented.\textsuperscript{139} These three conventions being, the International Covenant on Civil and Political Rights, the Convention against Torture and the Convention on the Rights of the Child, are among the 27 international conventions which must be respected by GSP+ beneficiaries. As a result of the investigation, the report of the Commission concluded that Sri Lanka has failed to implement effectively the three human rights convention and the legislation incorporating the obligations under these Conventions during the period covered by the investigation.\textsuperscript{140} Sri Lanka was therefore in breach of its GSP+ commitments. After consulting with the EU MS, the Commission has adopted on 15\textsuperscript{th} December 2009, a proposal recommending


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the provisional suspension the GSP+ preferences granted to Sri Lanka. Following the Commission’s proposal, Sri Lanka’s GSP+ tariff preferences were temporarily withdrawn as from August 2010.

3. The EU’s trade relationship with ACP countries

In contrast to the EU GSP scheme available to all DCs, the Cotonou Agreement has a regional scope, and is only granted to ACP countries, also called the “ACP Group of States.” The ACP Group was created by the Georgetown Agreement concluded in Guyana on 6 June 1975, and the group has its own institutions and decision-making processes. This group consists of 79 countries that are also signatories of the Cotonou Agreement binding them to the EU. Cuba is the only ACP country which did not sign the Cotonou Agreement. While the ACP countries are also eligible to trade with the EU under the EU’s GSP scheme, it has long been argued that the Cotonou Agreement creates more favourable trading conditions for the ACP countries, covering as it does, a broader range of products, offering wider tariff cuts and more favourable RoO. In particular, the new trading arrangements between the EU and ACP countries known as EPAs, mean that the EU provides since 2008 for duty and quota-free access for all ACP goods, with the sole exception of arms. In contrast, preferences granted for most agricultural

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143 The Georgetown Agreement on the Organization of the African, Caribbean and Pacific Group of States, 1975, as amended by Decision No. 1/LXXVIII/03 of the 78th Session of the Council of Ministers, Brussels, 27 and 28 November 2003. ACP/27/005/00 Rev.16 [Final Version].
products under the GSP scheme are available only in the form of tariff reductions. Therefore, it is clear that the ACP group is in a better position than those DCs which can only benefit from the GSP scheme.

The current EU trading regime with the ACP countries is the result of colonial ties between EU MS and their former colonies, and was based on established trade preferences from before the "birth of Europe itself as an organised regional entity." ACP countries were former colonies of the EU members, and in their first formation, were known as the Associated African States and Madagascar (AASM). Prior to UK accession to the EU these were predominantly West and Central Africa countries with ties to France. The first European Development Fund was established in 1959 in order to provide financial assistance mainly for infrastructure projects to these associated states. On 20th July 1963, the 18 AASM states and the EU MS signed the Yaoundé I Convention, which formalised their relationship. On 29th July 1969 they signed a second Yaoundé Convention, under which "agricultural imports were gaining greater preference..."
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in accessing the EU market than the non-Yaoundé countries.” After the United Kingdom’s accession to the EU in 1973 which “paved the way for the extension of the Europe-Africa cooperation to the [UK] Commonwealth countries, whether African, Caribbean or Pacific,” the Yaoundé Conventions, which had expired, were replaced by the Lomé Conventions which provided for “25 years of development cooperation between ACP countries and the EU.” The signature of the first Lomé Convention in 1975 “laid down the rules for cooperation between the 46 ACP countries and the then 9 [EU] Member States.” It should be noted that South Africa was not an original member of the ACP Group. It joined the ACP Group in April 1998 and by virtue of it being a wealthy country in comparison to the sub-Saharan Africa’s economies, it did not benefit from the Lomé trade preferences. On 11 October 1999, a separate free trade agreement was signed between the EU and South Africa.

The Lomé Conventions created the first sectoral agricultural programmes under which the ACP countries received non-reciprocal trade preferences. These were more oriented to agriculture than was the EU GSP scheme, which had essentially been seeking to promote industrialization in DCs. Therefore, while ACP countries were exporting their agri-food exports under significant liberal preferences, GSP countries, in contrast, were supposed to be “developing their

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159 Ibid.
industrial commodity preferences." Critically, the four commodities of bananas, beef, rum and sugar, were covered by special protocols annexed to the general convention, under which the EU "assumed special commitments to guarantee preferential treatment for these products." Thus, ACP countries have long received better market access than other DCs to the protected EU agricultural market, and in particular for sensitive products.

Trade preferences under Lomé and its ancillary special agreements were more advantageous that those offered under the more generally available GSP scheme. This led to criticism from non-ACP GSP countries, which claimed that the Lomé preferences were leading to discrimination amongst DCs. These countries argued the preferences did not fall "within the original scope of GSP objectives and principles." This was confirmed during the "Banana dispute" at the WTO, which dealt with the ACP special trade regime for bananas. This matter will be examined in depth in Chapter 9 of this thesis. Here the WTO Dispute Settlement Body, confirmed the Appellate Body Report, and ruled that the fourth Lomé Convention was not compatible with the GATT/WTO rules. It held that the provisions of this Convention "discriminated other exporters of this commodity

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162 Ibid., p 293.
163 The banana protocol (Protocol 5), the beef and veal protocol (Protocol 7) the rum protocol (Protocol 6) and the sugar protocol (Protocol 8) of Lomé IV.
166 Ibid., p 35.
167 European Communities- Regime for the Importation, Sale and Distribution of bananas complaints by Ecuador, Guatemala, Honduras, Mexico and the United States- Report of the Panel (22 May 1997), WT/DS27/R/ECU.
168 European Communities- Regime for the Importation, Sale and Distribution of bananas complaints by Ecuador, Guatemala, Honduras, Mexico and the United States- Report of the Appellate Body (9 September 1997), WT/DS27/AB/R.
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from other countries.” In order to comply with the WTO obligations, the successor to the fourth Lomé Convention, what was to become the Cotonou Agreement, needed to replace both the system of unilateral trade preferences and the commodity protocols.

The EU and the then 71 ACP countries negotiated the Cotonou Agreement on the 3rd February 2000 providing for a preparatory period under which the Lomé system of non-reciprocal trade preferences was to be maintained. The purpose of this was to “facilitate” the shift to the system of reciprocity under the new trading arrangements. At the end of this period, reciprocal FTAs were to be concluded and were scheduled to enter into force in 2008. In November 2001, following the requests of the EU, which were supported by the ACP countries, the Fourth Ministerial Conference granted a waiver to the EU in respect of GATT 1994 Article I(1). This remained in effect until 31 December 2007 and allowed for more favourable treatment to ACP countries than that which was granted to DCs. This waiver, referred to as the “Doha waiver” was granted in accordance with Article IX (3) of the WTO Agreement. In line with this general waiver for the Cotonou Agreement, the EU legally maintained non-reciprocal trade preferences with the ACP group until 2008.

171 From 1 March 2000 to 31 December 2007.
173 Ibid. at Article 37(1).
175 Article I (1) of GATT refers to the Most- Favoured-Nation obligation.
176 WTO, Ministerial Conference, Fourth Session, Doha, 9-14 November 2001, “European Communities-The ACP-EC Partnership Agreement, Decision of 14 November 2001,” WT/MIN (01)/15, 14 November 2001. This legal waiver prevents the EU preferential arrangements provided to ACP countries from being challenged by others WTO members.

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3.1 The Cotonou Agreement

The Cotonou Agreement governs the current trade cooperation between the EU and the ACP countries, and was approved on behalf of the Union by Decision 2003/159.\(^{177}\) It was signed in Benin on 23 June 2000,\(^{178}\) with subsequent revisions made to the original text in 2005 and 2010.\(^{179}\) The Cotonou Agreement is in force for a period of 20 years\(^{180}\) and is based on three complementary pillars; development cooperation, economic and trade cooperation and the political dimension. As stipulated in its Article 1, the Cotonou system aims at the reduction and eradication of poverty “consistent with the objectives of sustainable development and the gradual integration of the ACP countries into the world economy.”\(^{181}\)

Unlike the EU GSP scheme, there is a contractual commitment under the Cotonou Agreement which is based on the principles of “strengthened partnership”, “political dialogue”, “development cooperation” and “economic and trade relations” between the EU and ACP countries.\(^{182}\) In the view of Kingah, the principle of “partnership” must be understood in the context of the “power

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\(^{180}\) Op. cit. footnote no 59 at Article 95(1).

\(^{181}\) Ibid. at Article 1.

\(^{182}\) Ibid. at Preamble (4).
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relations” within the EU-ACP\(^{183}\) when the relevant authorities “regularly engage in a comprehensive, balanced and deep political dialogue” in order to “exchange information, to foster mutual understanding, and to facilitate the establishment of agreed priorities and shared agendas.”\(^{184}\) Under the negotiation aspect, which links the ACP countries and the EU,\(^{185}\) the agreed preferences under the Cotonou Agreement are “contractual obligations that cannot be unilaterally modified by one of the parties.”\(^{186}\) The EU itself reaffirmed this principle in 2007 when the EU commissioners declared that their commitment to the provisions of the Cotonou Agreement is “stronger than ever” and that they will not break the agreements made.\(^{187}\)

The implementation of the Cotonou Agreement has had an important impact on the special regime granted to bananas, sugar, beef and veal and rum. The rum protocol was abandoned and the banana protocol was replaced by a second protocol, examined in Chapter 9 of this thesis, under which the EU is limited to “examine and where necessary take measures aimed at ensuring the continued viability of their banana export industries and the continuing outlet for their bananas on the Community market.”\(^{188}\) The EU continued both the beef and veal protocol\(^{189}\) as well as the sugar protocol (SP) under the Cotonou Agreement, but decided to end


\(^{189}\) Ibid. at Annex VI, Protocol 4 on beef and veal.
3.2 The Economic Partnership Agreements

In contrast to the previous agreements, the Cotonou Agreement has been drafted with the intention that the EU-ACP trade regime would be in full conformity with the WTO regulatory framework.\textsuperscript{190} While the Cotonou Agreement temporarily safeguarded the non-WTO compatible Lomé trade provisions, a chapter on “new trading arrangements” has also been incorporated under which “the Parties agree to conclude new WTO compatible trading arrangements, removing progressively barriers to trade between them and enhancing cooperation in all areas relevant to trade.”\textsuperscript{191} To this aim, the principle of non-reciprocity in EU-ACP trade previously established under Article 7 of Lomé I, was to be replaced by the principle of reciprocity to be fulfilled by both partners.\textsuperscript{192}

These new trade obligations between the EU and ACP countries are referred to as EPAs, and have been designed to operate as free trade agreements. Accordingly, ACP countries are now required to eliminate tariffs on imports from the EU. The EPAs provide for the new basis for regional agreements and cooperation. They intend to foster “the smooth and gradual integration of the ACP States into the world economy,”\textsuperscript{193} and to enable these countries to “play a full part in international trade.”\textsuperscript{194} With the objectives of EPAs clearly stated, the Cotonou Agreement provides that they must be achieved through a “true, strengthened and...

\textsuperscript{190} Ibid, at Article 34(4).
\textsuperscript{191} Ibid, at Articles 36 to 38.
\textsuperscript{192} Principle introduced by Articles 36(1) and 37(7) of the Cotonou Agreement of 2000.
\textsuperscript{193} Op. cit. footnote no 59 at Article 34(1).
\textsuperscript{194} Ibid. at Article 34(2).
strategic partnership." Given this formal relationship between the EU and the ACP countries, the EPAs are mutual agreements and their content cannot be the source of unilateral obligations from either the EU or the ACP countries. EPAs put members of the agreements in a better place than non-member DCs. However, with free trade being the main element of EPAs, trade agreements between the EU and ACP countries now comply with GATT Article XXIV, and thus could not be subject to challenge. The strict criteria regarding the formation and operation of free-trade areas covering the trade in goods were covered in Chapter 3 of this thesis.

Since September 2002, formal negotiations regarding EPAs have been ongoing between the EU in parallel with six ACP regions. These are the Caribbean, West Africa, East Africa, Central Africa, Southern Africa and the Pacific. This negotiating structure of EPAs with ACP regional groupings is in line with the Cotonou Agreement, which provides that economic and trade cooperation "shall build on regional integration initiatives of ACP States." The Cotonou Agreement provides further that regional integration is a "key instrument for the integration of ACP countries into the world economy," and is therefore a crucial component of the EPAs. As of yet, the only signed comprehensive or "full" EPA agreement is with the Caribbean, through the Caribbean Forum of ACP States (CARIFORUM).

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195 Ibid, at Article 35(1).
196 WTO rules on free trade areas (GATT XXIV) were covered in Chapter 2 of this thesis.
198 Ibid, at Article 35(2).
199 The 15 Caribbean countries, which opened EPA negotiations with the EU, were the members of the Caribbean Community and Dominican Republic. CARICOM and Dominican Republic concluded a FTA and are cooperating within the Caribbean Forum of ACP States. Cuba remains outside the EPA negotiations, as it did not sign the Cotonou Agreement.
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inter alia goods, services, trade-related rules and development cooperation.\textsuperscript{200} The African and Pacific regions have negotiated interim EPAs, providing for trade liberalisation schedules, but they do not include binding commitments for development cooperation.\textsuperscript{201} Interim EPAs have a very similar structure to full EPAs, but their scope and contents are different.\textsuperscript{202} In addition, the (possible) impact of EPAs on the development of ACP countries will vary between countries.

3.2.1 EU Tariff preferences

The EU has applied, as from the 1\textsuperscript{st} January 2008, the arrangements for products imported from the ACP Group of States provided for in agreements establishing, or leading to the establishment of EPAs.\textsuperscript{203} These arrangements are nevertheless subject to the agreements, either interim EPAs or full EPAs, negotiated between the EU and the ACP regions.\textsuperscript{204} Pursuant to Article 3 of Regulation (EC) No 1528/2007, the EU provides for duty and quota-free access for all ACP goods, with the exception of arms.\textsuperscript{205} This includes free market access in respect of the import of bananas. Given the particular sensitivity of the agricultural sector, rice and sugar were not fully liberalised immediately. Import duties on these products were gradually reduced, until their complete elimination in January 2010 for rice, and October 2009 for sugar.\textsuperscript{206} In addition to the phase in period for these products, Article 3(1) of the regulation provides further that duty free access for sugar and rice can still be subject to the transitional safeguard and surveillance

\textsuperscript{200} The other ACP countries or regions signed or are negotiating interim EPAs.

\textsuperscript{201} Binding development cooperation provisions and trade related issues such as services or environment will be included once interim EPAs become full EPAs. See Schroder, J., “Report on Development impact of Economic Partnership Agreements (EPAs),” European Parliament (2008/2170(INI), 2008, p 12.

\textsuperscript{202} Ibid., p 11.

\textsuperscript{203} Op. cit. footnote no 145.

\textsuperscript{204} Ibid. at Preamble (5).

\textsuperscript{205} Ibid. at Article 3(1).

\textsuperscript{206} Ibid. at Article 6 and 7.
mechanisms. As a rule the EU can also impose a safeguard measure to ACP countries products imported in such increased quantities that cause disturbances within the EU market. Despite this, given that all remaining quotas and tariff limitations on access to the EU market are removed, all ACP countries have now the same market access conditions. The most competitive ACP producers of bananas, sugar and rice are now able to export freely their products to the EU.

3.2.2 Special and Differential Treatment provisions

The introduction of reciprocity within the ACP-EU preferential trade implies potential costs to ACP countries, and there was a need for the parties to take into account the capacity and institutional needs of ACP countries. During the negotiations, the partners sought to include the maximum of flexibility in line with the WTO rules within the EPAs. Pursuant to Article 37(4) of the Cotonou Agreement, the EPAs must offer a flexible transitional period, and provide for the possibility to exclude products from trade liberalisation, which should take account “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 liberalisation process.” ACP countries comprise both DCs and LDCs and thus do not constitute a homogenous group. Therefore, it is to be noted that the content of each EPA, comprising product coverage, exclusion products, and timetable for tariff liberalisation, is different depending on the negotiations made with each ACP region.

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207 Ibid. at Article 9 and 10.
208 Ibid. at Article 12.
210 Ibid. at Article 37(4).
211 Ibid. at Article 37 (4).
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While the EU opened immediately its market to ACP countries products, not all ACP countries were required to provide free access to EU imports after 2008. ACP countries bound under interim EPAs have been given a longer transitional period with the possibility to open gradually their market to EU goods “within a reasonable length of time.” It was clarified that this reasonable period should be of 10 years maximum but this could be extended in “exceptional circumstances” and upon “full explanation.” In this case, any interim agreements must contain a “plan and schedule” for trade liberalisation. However, such approach to the period length was challenged by the ACP Group of States, which argued that the period should take into account the level of “trade, development and financial situation of developing countries” and therefore suggested a “not less than 18 years” transitional period. Despite of Lamy’s claim that “transition periods for ACP countries would range between ten to fifteen years,” ACP countries were finally given up to twenty-five years to open their market to EU products.

ACP countries export a few basic agri-food products which are also highly protected within the EU market. These products include mainly sugar, rice, fruits and vegetables (F&V) including bananas. In order to be compatible with the WTO rules, trade restrictions must be eliminated on “substantially all the trade” on goods

213 Article GATT XXIV(5)(c).
214 Understanding on the interpretation of Article XXIV of the General Agreement on Tariffs and Trade 1994, paragraph 3.
215 Ibid. at paragraph 3.
between the ACP countries and the EU. Based on this, it can be noted that the WTO does not require a total liberalisation of products, and therefore provides for the possibility to exclude some products from liberalisation. However, given the lack of precision from the WTO on what exactly constitutes “substantially,” it was for the partners to decide on an appropriate liberalisation figure. During the first phase of negotiations, the EU initially proposed 90 percent+ of trade liberalisation, but ACP countries were finally able to exclude about 20 percent of EU imports from the scope of liberalisation. Therefore, with the transitional period coupled with the exclusion of products from liberalisation process, ACP countries will be able to maintain protection on some of their most sensitive products. The selection of these products obviously depends on each county’s interests and priorities. Agricultural products excluded from trade liberalisation are generally important local products that are the dominant economic sectors, playing a crucial role in the country’s economy, living standards and rural development.

4. The EU’s trade relationship with Mediterranean countries

Another major preferential trading relationship maintained by the EU, and which indirectly could have an impact on the ACP Economic Partnership Agreements is the Euro-Mediterranean Partnership (EMP). The EMP is designed to evolve into a free trade area within the Mediterranean region, thereby liberalising trade between

219 GATT Article XXIV (8)(b).


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the EU and Mediterranean third countries. In contrast to the EU GSP scheme available to all DCs, the EMP, as indicated from its title, has a regional scope, and exclusively concerns Southern and Eastern Mediterranean third countries. The current EU’s trade regime with Mediterranean third countries, in the same way as ACP countries, is the result of colonial and commercial ties between EU MS and former colonies. However, it should be noted that Turkey, as a Mediterranean third country involved in the Euro-Mediterranean Partnership, has not been colonised by the European countries. It has, however, acted in the role of coloniser in respect of Greece, which was part of the Ottoman Empire, and which remained as one of its colonies until the Greek war of independence in 1821.

In the 1960s, agriculture and energy were the dominant Euro-Mediterranean trading sectors, with France being the key EU trading partner in the Mediterranean region.\textsuperscript{224} Exports from Mediterranean third countries to the EU were highly concentrated on unprocessed agricultural products. Unprocessed agricultural products were considered in particular to be a “vital source of export revenues” for Morocco and Tunisia.\textsuperscript{225} On the other hand, industrial and capital goods were imported into the region from the EU MS.\textsuperscript{226} The EU is still the main market for Mediterranean third countries agricultural products exports, with the main suppliers being Turkey, Morocco and Israel.\textsuperscript{227} Agricultural exports play a key role in the Mediterranean region in terms of GDP and labour.\textsuperscript{228} This is particularly the

\footnotesize
\begin{itemize}
  \item \textsuperscript{225} Ibid., p 26.
  \item \textsuperscript{226} Ibid., p 26.
  \item \textsuperscript{228} For instance, the Agricultural sector represents 14 percent of GDP and 12 percent of employment in Morocco. It represents 45 percent of GDP and 29 percent employment in Tunisia.
\end{itemize}
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case for Southern and Eastern Mediterranean third countries, which have, in general, a comparative advantage in F&V, olive oil and fish. Mediterranean third countries’ imports from the EU comprise mainly meat, dairy products, grains, sugar and vegetable oils. It is worth noting that some Mediterranean third countries, notably Israel, are well developed and have highly diversified economies. Ongoing armed conflict remains, however, an issue for many of these countries, as does the recent “Arab Spring.”

Preferential trade relations between the EU and Mediterranean third countries are framed by several policies dating back to the late 1960s when the EU signed bilateral “Association Agreements” with Israel, Morocco, Spain, Tunisia, and Turkey. This so-called “first generation of agreements” was followed by several other bilateral “Cooperation Agreements” concluded, within the Global Mediterranean Policy, with Israel in 1975, three Maghreb countries (Algeria, Morocco and Tunisia) in 1976 and with four Mashreq countries (Egypt, Jordan, Lebanon and Syria) in 1977. Turkey eventually entered into a Customs Union

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229 Fresh fruit and vegetables represented 42.7 percent of Mediterranean countries’ exports to the EU between 1997 and 1999. See Op. cit. footnote no 227, p 401.


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with the EU,\textsuperscript{237} and has, along with the European Free Trade Association (EFTA) arrangements,\textsuperscript{238} one of the closest trading relations of all non-EU countries with the EU.

The EU trade arrangements given to Mediterranean third countries were unilateral and concluded in order to reinforce and improve cooperation after the 1973 Yom Kippur War between Israel and its Arab neighbours following the Arab oil embargo.\textsuperscript{239} The Cooperation Agreements reflected the traditional EU approach of trade and aid, and had similar provisions for all beneficiaries. Mediterranean third countries were granted duty-free access for most of their industrial products,\textsuperscript{240} and were given tariff preferences for agricultural products, which were subject to the high EU protectionist CAP rules.\textsuperscript{241}

In 1995, the EMP, also known as the Barcelona Process, was launched pursuant to the Barcelona Declaration.\textsuperscript{242} While the initiative intended to maintain the “privileged nature of the links forged by neighbourhood and history,”\textsuperscript{243} it provided for reciprocal trade preferences within the Mediterranean region. In contrast to the previous situation, Mediterranean third countries were required to open their market for the first time to EU goods in order to maintain their

\textsuperscript{237} Decision No 1/95 of the EC-Turkey Association Council of 22 December 1995 on implementing the final phase of the Customs Union, OJ L 35, 13.02.1996.

\textsuperscript{238} The EFTA countries are Switzerland, Liechtenstein, Norway and Iceland.

\textsuperscript{239} Op. cit. footnote no 8, p 1418.

\textsuperscript{240} The EEC-Israel agreement was the only reciprocal agreement for industrial products. See Montanari, M., “The Barcelona Process and the Political Economy of Euro-Mediterranean Trade Integration,” JCMS, 2007, 45(5), pp. 1011-1040, p 1013.

\textsuperscript{241} Ibid., p 1013.

\textsuperscript{242} The Barcelona Declaration was adopted during the first Euro-Mediterranean Conference, 27 and 28 November 1995 (“the Barcelona Conference”). The Declaration was signed by the then 15 EU Member States and all the 12 invited Mediterranean partners from Middle East and North Africa: Algeria, Cyprus, Egypt, Israel, Jordan, Lebanon, Malta, Morocco, the Palestinian Territories, Syria, Tunisia, and Turkey.

preferential market access. Therefore, unlike the GSP, there is a contractual commitment under the EMP. Given that Mediterranean third countries, like ACP countries, are partners with the EU MS, their mutual concessions are negotiated and their content cannot be the source of unilateral obligations from the EU or Mediterranean third countries. However, Persson and Wilhelmsson point out that despite this similarity, ACP countries are still at the top of the “pyramid of privileges” with better market access arrangements for agricultural products covered by the CAP. \(^{244}\)

The EMP is considered to be an “ambitious” framework, \(^{245}\) since it broadly aims at creating an area of “dialogue, exchange and cooperation guaranteeing peace, stability and prosperity” in the Mediterranean basin, through political, economic and cultural measures. \(^{246}\) In order to establish such a comprehensive partnership, the signatories of the EMP\(^{247}\) agreed on the three partnership aspects of the EMP being “political and security,” “economic and financial” which aims to create a free trade area, and “social, cultural and human.”\(^{248}\) Given the establishment of these three pillars, the EMP is thus going beyond trade. The EU’s priority so as to establish security beyond its borders arise from both international or regional


\(^{247}\) The EMP comprises the 27 EU member states and 16 partner countries across the Southern Mediterranean, African and Middle Eastern namely, Albania, Algeria, Bosnia and Herzegovina, Croatia, Egypt, Israel, Jordan, Lebanon, Mauritania, Monaco, Montenegro, Morocco, the Palestinian Authority, Syria, Tunisia and Turkey. There are no contractual relations between the EU and Libya, which has therefore only an observer status in the EMP. Croatia and Turkey, are candidate countries to the EU; Albania, Bosnia and Herzegovina and Montenegro are potential candidates to the EU. Cyprus and Malta were originally included under the EMP but they became full members of the EU in 2004.

conflict and wars such as the tensions between Israel and the Palestinians which are "as old as the state of Israel."\textsuperscript{249}

The EMP was re-launched at the Paris Summit for the Mediterranean in 2008 as the "Barcelona Process: Union for the Mediterranean" or "Union for the Mediterranean."\textsuperscript{250} It welcomed four new members into the partnership framework, Bosnia and Herzegovina, Croatia, Monaco and Montenegro, "which have accepted the \textit{acquis} of the Barcelona Process."\textsuperscript{251} The aim of this re-launching was to "increase the potential for regional integration and cohesion"\textsuperscript{252} and six key projects were thus identified.\textsuperscript{253}

4.1 The European Union-Mediterranean FTA

The EMP provides for the creation of a WTO-consistent Euro-Mediterranean Free Trade Area (EMFTA), which engages trade liberalisation in goods and services between the EU and its Mediterranean partners. The EMFTA is being established through the conclusion of series of negotiated bilateral Association Agreements, known as Euro-Mediterranean Association Agreements (EMAAAs or EuroMed Association Agreements), between the EU and each Mediterranean partners of the EU,\textsuperscript{254} on the basis of Article 217 Treaty on the Functioning of the European

\textsuperscript{250} Joint Declaration of the Paris Summit for the Mediterranean, Paris, 13 July 2008.
\textsuperscript{251} Ibid.
\textsuperscript{252} Ibid.
\textsuperscript{253} These projects were selected by the Heads of State and Government in the Paris Declaration and include for instance the de-pollution of the Mediterranean Sea. See Ibid.
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Union (TFEU), and between the Euromed countries themselves. The EMAAs have thus replaced the previous non-reciprocal Cooperation agreements. The bilateral aspect of the system was implemented in order to take into account the economic differences between the Mediterranean partners given that the Mediterranean region, like the ACP group, is not a homogenous group. At the time of writing, the EU has concluded EuroMed Association Agreements with all Mediterranean countries that are part of the EMP, excluding Syria. Negotiations between the EU and Libya on a Framework Agreement, which began in November 2008, are still ongoing.

4.2 Trade preferences aspects for agri-food products

4.2.1 Tariff preferences

With open trade being a “key component” of the EMP framework, the EMAAs establish free trade in industrial goods and progressive liberalization of trade in agricultural products and services. While reciprocal liberalization for industrial trade follows the timetables negotiated between the partners, agricultural trade is


255 Article 217 TFEU provides that “the Union may conclude with one or more third countries or international organisations agreements establishing an association involving reciprocal rights and obligations, common action and special procedure.”


258 The negotiations between the EU and Syria for an EuroMed Association Agreement started on December 2008 but the signature of the agreement was suspended.

259 These negotiations were suspended following the events in Libya in 2011.


262 Op. cit. footnote no 243. Mediterranean third countries which are partners of the EU were given a transitional period of up to 12 years to liberalise their trade in non-agricultural goods.
only subject to “weak liberalisation” within the negotiated EMAAs.\textsuperscript{263} It is pointed out that the exclusion of agricultural food products from the free-trade area provisions are reflected in the Barcelona Declaration which implicitly constrains trade in agricultural products to “traditional trade flows”\textsuperscript{264} that must only be “progressively liberalized through reciprocal preferential access among the parties.”\textsuperscript{265} As a consequence, while Mediterranean partners enjoy duty- and quota-free access to the EU market for manufactured products, their exports of agri-food products are subject to preferential treatment before the completion of the free trade area.

In spite of the bilateral dimension of the EMAAs, all agreements have a very similar structure, although the magnitude of trade preferences can vary across the agreements.\textsuperscript{266} The EMAAs implement a complex policy instrument for agri-food products. Mediterranean third countries are given full or partial tariff concessions, with or without tariff-rate quotas (TRQ) limit, and increased tariff quotas for their agri-food products exports to the EU.\textsuperscript{267} Thus, although some Mediterranean third countries receive significant entry prices reductions, their preferences are generally restricted by TRQs. Despite this, depending on the mutual concessions between the partners, imports to the EU above the agreed quotas can be, in some cases, subject

\textsuperscript{263} Op. cit. footnote no 227, p 400.
\textsuperscript{264} Ibid., p 402. The Barcelona Declaration provides that “with a view to developing gradual free trade in this area: tariff and non-tariff barriers to trade in manufactured products will be progressively eliminated in accordance with timetables to be negotiated between the partners; taking as a starting point traditional trade flows, and as far as the various agricultural policies allow and with due respect to the results achieved within the GATT negotiations, trade in agricultural products will be progressively liberalized through reciprocal preferential access among the parties; trade in services including right of establishment will be progressively liberalized having due regard to the GATS agreement.”
\textsuperscript{265} Op. cit. footnote no 243.
\textsuperscript{266} Op. cit. footnote no 227, p 404.
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to tariff reductions.\textsuperscript{268} In addition, some Mediterranean partners have also negotiated significant entry prices reductions for some of their most important commodities, in addition to tariff preferences. This is for instance the case of fresh tomatoes and courgettes originating in Morocco.\textsuperscript{269}

4.2.2 Product coverage

Agricultural trade preferences granted to Mediterranean third countries are mainly restricted to typical products obtained in the Mediterranean region such as F&V, durum wheat and some meats.\textsuperscript{270} Fresh F&V are the main agri-food products exported to the EU\textsuperscript{271} and, largely, these comprise tomatoes, oranges, apples, potatoes and, olives.\textsuperscript{272} The majority of these products are exported to the EU under the Association Agreements.\textsuperscript{273} These products are not likely to affect the Caribbean region’s conditions of access to the EU market because Caribbean countries produce and export tropical fruits and vegetables products, most of which do not grow in a temperate climate. The EuroMed agreements signed with Algeria and Israel for instance, cover respectively 96.5 percent and 85.3 percent of F&V products.\textsuperscript{274} However, with trade in agriculture being a sensitive issue for both the EU and Mediterranean third countries,\textsuperscript{275} the partners agreed under the Association Agreements to exclude “sensitive” agricultural products from the liberalisation

\textsuperscript{269} Protocol 1, Article 2 of the EU-Morocco Association Agreement [1996] OJ L70, 18.3.2000
\textsuperscript{270} Op. cit. footnote no 227, p 404.
\textsuperscript{271} Op. cit. footnote no 230, p 599.
\textsuperscript{274} Ibid., p 601.
\textsuperscript{275} Op. cit. footnote no 125, p 560.
process. Such option was re-affirmed by the Council of the EU during the 10th Anniversary Euro-Mediterranean Summit, which declared that Euro-Mediterranean partners have the possibility to select a “number of exceptions and timetables for gradual and asymmetrical implementation, taking into account the differences and individual characteristics of the agricultural sector in different countries.”

4.2.3 Safeguard measures against “sensitive” products

All association agreements between the EU and its Mediterranean partners also provide for a standard safeguard clause, which can be applied by either party affected. This clause authorises contracting parties to take appropriate measures against any product imported, in case of serious injury and disturbances to domestic producers, directly competing products and to the agricultural sector.

An example of Mediterranean third countries’ products affected by the EU agricultural safeguard measure is F&V, which is also an EU sensitive product and is thus heavily affected by CAP provisions. The current EU single Common Market Organisation (CMO), which was examined in Chapter 2 of this thesis, provides for the application of an entry price system (EPS) for the F&V sector in order to avoid any disturbances within the EU market. The EPS is considered a “highly complex” system that protects EU producers from competition in the most sensitive of these products. The EPS applies only to 15 fruits and vegetables, namely tomatoes, cucumbers, artichokes, courgettes, fresh sweet oranges,

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clementines, mandarins, lemons, table grapes, apples, pears, apricots, cherries, peaches and plums. Accordingly, bananas are not affected by the entry price system.

Since, the F&V sector is the most dynamic within the Mediterranean region, Southern Mediterranean third countries argue that such provisions “clearly restrict their opportunities to export to the EU.” In line with the sensitivity of these products, Mediterranean third countries’ F&V exports are also subject to the EU’s seasonality of protection that alters tariffs over the year according to the European production calendar. During the relevant EU production season, a number of imported products are subject to high EU customs duties, which are somewhat lower in low/no production seasons, in order to avoid competition with EU products.

4.2.4 Other EU’s conditions

Apart from the previously mentioned entry price system for F&V, the EMAAs do not provide for specific agricultural safeguard clauses. However, in order to maintain trade preferences, Mediterranean third countries, as well as ACP countries, are required to strengthen democracy and respect for human rights which are considered as “essential aspects of partnership.” The infraction of such conditionality can lead to the suspension of a Mediterranean third country’s

285 Ibid., p 600.
287 The other requirements are a “sustainable and balanced economic and social development, measures to combat poverty and promotion of greater understanding between cultures” From: Op. cit. footnote no 243.
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trade benefits granted under the agreements. However, this sanction has yet to be applied “despite various calls to this effect by the European Parliament and others.”

5. Preferential Rules of Origin

RoO are applied in order to identify the final product’s originating status, and to determine the goods entitled to benefit from preferential treatment. This is in order to prevent “trade deflection” in order to avoid payment of customs duties. In the view of Bureau et al. the problem of RoO is less severe in the agri-food sector because DCs export mainly primary goods “not affected by the rules governing origins of components or intermediate inputs.” However, RoO may affect DCs exporting higher value processed foods, which have changed their Harmonised Commodity Description and Coding System (HS) classification, and must therefore respect the rules about processing or transformation in order to receive tariff preferences. These rules require the change of the goods’ tariff heading classification in their country of last processing and non-compliance would lead to the application of the MFN tariff. The three preferential schemes analysed above include all processed and semi-processed food although the list of processed food from ACP countries and Mediterranean third countries is more exhaustive. The focus of this thesis is, however, on unprocessed agricultural food products. The detail of how processed and semi-processed foods are treated is therefore outside

292 See Op. cit. footnote no 59 at Annex II to Protocol 1 concerning the definition of the concept of “originating products” and methods of administrative cooperation attached to Annex V.
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the ambit of this thesis. The EU GSP RoO do not form part of the GSP regulation and are found in Articles 66 to 97 and Annexes 14 to 18 and 21 of Regulation 2454/93. In order to determine the origin of products, Article 67 of the regulation states that products acquire origin if they are “wholly obtained” or they have “undergone sufficient working or processing” in a beneficiary country.

The main difference between GSP’s RoO and those applied by the Cotonou agreement lies in the cumulation of origin rule. Under the cumulation system, producers can “import materials from a specific country without undermining the origin of the product.” All EU’s preferential agreements provide for the most basic “bilateral” cumulation between the EU and the beneficiary country. This arrangement is commonly known as “donor country content” and is only available to originating products and materials. Beyond this, GSP countries may benefit from the so-called “partial” regional cumulation of origin, which is a form of “diagonal” cumulation but which exists only under the GSP scheme. It permits goods originating in a country member of a regional group but “worked or processed in another country of the same regional group,” to have the origin of the country where the last manufacture was completed.

However, it must be noted that “partial” regional cumulation is only allowed within three designated regional groups of GSP countries established under Article

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294 Ibid.
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72(3) of Regulation No 2454/93.\textsuperscript{299} In contrast to GSP countries, ACP countries, considered as one territory for the purposes of defining the concept of originating products,\textsuperscript{300} can also benefit from “diagonal” cumulation.\textsuperscript{301} The system of “diagonal” cumulation is available on a regional basis. It can involve more than two countries and requires that all partners have FTAs amongst themselves with identical RoOs.\textsuperscript{302} Under this arrangement, the product will have the “origin of the country where the last working or processing operation took place.”\textsuperscript{303} This allows for the export of higher value agricultural food commodities into the EU.

The RoO under the Cotonou agreement rely on those previously established by Lomé Conventions and unlike the GSP scheme, also permit “full cumulation,”\textsuperscript{304} taking place between all ACP countries, and can also include “imports from other ACPs or from the EU countries as originating in the ACP State.”\textsuperscript{305} Bartels notes that this system is the most advantageous, as “products which are the subject of processing do not themselves need to acquire originating status under the relevant rules.”\textsuperscript{306} In contrast to the other systems, countries benefiting from “full cumulation” can carry out working, or processing, on non-originating products “in the area formed by them.”\textsuperscript{307} Nilsson also observed that while ACP countries may

\textsuperscript{299} Group I: Brunei- Darussalam, Cambodia, Indonesia, Laos, Malaysia, Philippines, Singapore, Thailand, Vietnam; Group II: Bolivia, Colombia, Costa Rica, Ecuador, El Salvador, Guatemala, Honduras, Nicaragua, Panama, Peru, Venezuela; Group III: Bangladesh, Bhutan, India, Maldives, Nepal, Pakistan, Sri Lanka.


\textsuperscript{301} Ibid.

\textsuperscript{302} Ibid.

\textsuperscript{303} Ibid.

\textsuperscript{304} Op. cit. footnote no 145 at Article 6.


\textsuperscript{307} Op. cit. footnote no 300.
request “derogations”\textsuperscript{308} from the RoO, derogations from GSP rules are only granted to LDCs.\textsuperscript{309} The GSP’s RoO are currently under review with the aim of simplifying the rules by relaxing, for example, the conditions pertaining regional cumulation of origin.\textsuperscript{310} However, agricultural and processed agricultural products are not yet covered in the proposal, “as there is no agreement between the Commission services on these yet.”\textsuperscript{311}

In the case of Mediterranean third countries, all EMAAs contain lengthy and detailed RoO but are limited to bilateral cumulation between the EU and the Mediterranean third countries. The EuroMed Association Agreements signed between the EU and Algeria, Morocco and Tunisia\textsuperscript{312} are the only EMAAs which provide for full cumulation of origin between the countries signatories to these agreements. These countries apply diagonal cumulation with the other Mediterranean third countries which have been included into the Pan-Euro-Mediterranean cumulation of origin scheme. These other countries are Egypt, Israel, Jordan, Lebanon, Syria, Turkey, Palestine. This system of Pan-Euro-Mediterranean cumulation, previously called the pan-European cumulation,\textsuperscript{313} was originally limited to cumulation between the EU, the members of the European Free Trade Association\textsuperscript{314} and Turkey. It was then widened to the Mediterranean third countries by the “Pan-Euro-Mediterranean Protocol on Rules of Origin,”

\textsuperscript{308} “Derogation” is defined as a “temporary lessening or relaxation of the law or the rules, (...) allowing preferential treatment to be accorded to products which may not strictly satisfy the criteria for “originating products.”” See: Op. cit. footnote no 300.
\textsuperscript{309} Op. cit. footnote no 305, p 442.
\textsuperscript{310} Op. cit. footnote no 300.
\textsuperscript{311} Ibid.
\textsuperscript{312} See Algeria (Protocol 6 to the Euro-Mediterranean Agreement), Morocco (Protocol 4 to the Euro-Mediterranean Agreement), Tunisia (Protocol 4 to the Euro-Mediterranean Agreement)
\textsuperscript{313} The Pan-European cumulation system was created in 1997.
\textsuperscript{314} The European free Trade Association comprises Iceland, Liechtenstein, Norway and Switzerland.
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thereby harmonising RoO within the Euro-Mediterranean Free Trade Area. The Pan-Euro-Med cumulation system therefore embraces a large quantity of agreements, and provides for the use of diagonal cumulation among the pan-Euro-Med countries.

However, diagonal cumulation within the zone is subject to the “variable geometry” rule, which limits cumulation to countries applying FTAs that include a Pan-Euro-Med origin protocol between their members. Such a rule therefore excludes countries which have not concluded FTAs containing identical RoOs, with the other countries of the zone.

Given, this complex network of individual protocols on RoO, it was argued that it was difficult to manage the system of Pan-Euro-Mediterranean cumulation. The European Commission therefore proposed in 2005 to amend the current system, and to establish a single international instrument, replacing the current protocols on RoO within the zone, to which each individual preferential trade agreements within the zone would refer. This instrument should be entitled a “regional convention” and should be designed to “make the management of origin easier,” through a

315 This Protocol was endorsed by the Euromed Ministers during the 3rd Euro-Mediterranean Ministerial Trade Conference held in Palermo on 7 July 2003. See the Conclusions of the Euro-Mediterranean trade ministerial conference, Palermo (Italy), 7 July 2003.
317 See Commission notice concerning the date of application of the protocols on rules of origin providing for diagonal cumulation between the Community, Algeria, Egypt, Faeroe Islands, Iceland, Israel, Jordan, Lebanon, Morocco, Norway, Switzerland (including Liechtenstein), Syria, Tunisia, Turkey and West Bank and Gaza Strip, OJ C 219/19, 12.9.2009.
single set of rules on cumulation of origin. The Commission believes that this regional convention would thus enhance the integration between the contracting parties to various FTAs within the cumulation zone. The idea of such a regional Convention on Pan-Euro-Mediterranean preferential RoO was agreed by Euromed ministers, and a draft Convention was produced by the Pan-Euro-Med working group. The Convention has now, at the time of writing, to be signed on behalf of the European Union.

6. Conclusion
The EU uses its trade policy to help DCs to integrate into the world trading system. It seeks to improve EU market access for DCs agri-food products, through tariff reductions offered under preferential trade arrangements. However, not all countries benefit from the same degree of market access. While the GSP scheme is unilaterally granted by the EU, the Cotonou Agreement and the EMAAs are both bilateral contractual agreements. Signatory members are thereby ensured access to the EU market, and are considered as “partners.” Mutual commitments provided under these schemes are negotiated, whereas GSP countries have to accept the situation as presented to them by the EU. In the view of Keohane, “reciprocity is [...] often invoked as an appropriate standard of behavior which can produce cooperation among sovereign states.” However, he acknowledges that it could

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320 Ibid., p 11
321 Ibid., p 11
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also have some limitations in that it may be defined and interpreted differently by different states.

Both the EMAAs and the Cotonou Agreement provide wider product coverage, and better tariff reductions to sensitive agricultural food products, than the GSP scheme. Trade conditions, safeguard clauses and suspensions mechanisms contained in both the Cotonou Agreement and EMAAs are also less restrictive, and they offer more generous RoO with full cumulation of origin. Accordingly, there is no doubt that, as far as trade in agricultural commodities is concerned, EU preferences granted under the GSP system are less advantageous when compared to those granted to ACP and Mediterranean third countries.

In a parallel manner, the EU also uses its trade policy to promote its values, and all EU’s relations with DCs are informed by the need to respect human rights. However, as has been elaborated in this chapter, while such a condition for preferences is clearly stated in the three schemes, GSP countries seem to be more affected than either Mediterranean third countries or ACP countries. On one hand, the EU imposes as a pre-condition of the ratification of core international conventions on human rights for benefitting from additional tariff reductions under the GSP+ arrangement. On the other hand, GSP+ beneficiaries must promise to accept and comply fully with the monitoring and review mechanism envisaged in the conventions. In addition, while the EU will not hesitate to remove, on a temporary basis, preferences from any non-compliant GSP countries, it seems to shy away from applying economic sanctions to overcome the current issues
relating to human rights violations within the Mediterranean region.\textsuperscript{325} However, due to the recent uprisings in the Middle East, it remains to be seen how the incumbent regimes will deal with the EMP as it currently stands.

In contrast with GSP countries, the relationship between the EU and Mediterranean third countries is based on a “spirit of partnership,” in line with the Barcelona Declaration.\textsuperscript{326} The EU must engage in political dialogue with its Mediterranean partners with regard to human rights issues. The EU has strong links with Mediterranean third countries, and has more interest in this region than in the GSP countries as a whole. Therefore, it may be fair to say that the EU prefers to adopt a peaceful approach in preference to conflicting strategies with Mediterranean third countries. However, a similar mediation option should also be used instead of the coercion of GSP countries in order for the EU to be more consistent in its claim of ‘freer and fairer’ trade.\textsuperscript{327}

The above examination also revealed significant differences between the Cotonou Agreement and the EMP. The EMAAs and the Cotonou Agreement both have a historical basis. They both provide for deep tariff cuts, wide product coverage and are both broad frameworks of political, economic and social relations between the EU and its beneficiary countries. The EMP has both geographic and political dimensions to its inception. The EU’s priority is to secure its borders by ensuring stability within the region.\textsuperscript{328} Given this particular security ties under EMAAs, the


\textsuperscript{326} Op. cit. footnote no 243.

\textsuperscript{327} Op. cit. footnote no 123 at Article 3(5).

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EU relationship with Mediterranean third countries has been described as a “half-way house between Lomé [now Cotonou] and the EU.” Historically, ACP countries have always been the most privileged countries among DCs. They were followed by Mediterranean third countries, then GSP countries and lastly by MFN countries. This was confirmed when their Lomé preferences were challenged by other DCs and considered to be non-WTO compliant. The EU and ACP regions have now signed economic partnership agreements which create a free trade area between the EU and each ACP region. In accordance with these agreements, ACP countries receive duty and quota free access to the EU market for agri-food products. Consequently, trade restrictions between ACP countries and the EU have been removed. Despite these changes, and given that Mediterranean third countries do not enjoy free access to the EU market for agri-food products, ACP countries are still at the top of the EU’s pyramid of trade preferences in respect of the export of agri-food products. They are preceded only by countries which have concluded a customs union with the EU.

The above legal comparison between the GSP scheme, the Cotonou Agreement and the EMP has thus confirmed that important divergences exist between GSP countries on one hand, and the Cotonou Agreement and the EMP on the other. However, there is a gap between the degree of integration experience by GSP countries, ACP and Mediterranean third countries into the global market. This has deepened due to the non-trade related requirements of these different agreements, and the EU’s different ambitions for DCs. GSP countries, which do not have the

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possibility to trade under other more advantageous preferential arrangements, will continue to suffer from trade restrictions, unless they are being reoriented towards regional agreements. That would require the EU to develop even more regional trade groupings.
Chapter 6 - EU food safety measures

1. Introduction

The European Union’s health measures focusing on human or animal life or health (sanitary measures) or on plant life or health (phytosanitary measures) are an important aspect to the multifaceted policy area of trade in agricultural commodities and particularly for food products. In light of trade preferences erosion in sugar and bananas and with tariff barriers being “substantially” reduced for these products,¹ it is clear that tropical fruit and vegetables are becoming “important commodities for developing countries seeking to diversify exports.”²

However, as highlighted in Chapters 3 and 4 of this thesis, meeting food safety standards imposed by developed countries is an important issue for developing countries (DCs) which export food products to these markets. The strictness of the standards can affect DCs’ ability to access developed countries’ markets and ultimately restrict their effective participation in international trade. Therefore, this chapter examines the issues of exporting tropical fresh fruits to the European Union (EU) market.

Tropical fruits exports are considered “increasingly important for many developing economies.”³ Their production and export to the EU has grown rapidly during the past decade, in response to the high consumer demand for fresh produce, variety,

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¹ These issues are covered in Chapters 8 and 9 of this thesis.
and “healthiness.”

The increased export of off-season tropical produce has been facilitated by the rapid shipment of these products by improved sea and air transport. In light of the accelerated year-round demand for the delivery of fresh produce, international trade in fresh fruits is a “multibillion-dollar business,” and is particularly important for DCs’ foreign exchange and rural employment.

The EU is the “world’s largest multi-nation trading bloc” and is also the world’s largest import market for fresh tropical fruits. However, following several food crises during the past decades, the public’s confidence in the regulatory agencies ability to deal with food safety issues fell into severe decline, with consumers demanding safety assurances. Given the significant trade in food products around the world, there was a need for the EU public authorities, and for producers, to ensure the safety of these products, meeting the concerns of consumers.

The EU is aware that tropical fresh fruits can be important to a healthy diet. Global trade, however, also represents risks to human health and the environment, as a

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result of the use of plant protection products (PPPs),⁹ which are important for the commercial production of tropical fruits. PPPs are commonly known as pesticides used for agricultural purposes. Accordingly, biocides which are non-agricultural pesticides and hence not intended for plant use are outwith the scope of this chapter. Pesticides are a serious issue for food safety and environmental protection, as these toxic products leave residues in and on food, with serious impacts on both human health and the environment. This issue is of relevance to all agricultural food products and bears particular relevance to the context of international trade in tropical fruits. As a consequence, consumer demand for tropical fruits is associated at the same time with concerns about food safety. This has led to the imposition of new legislation, and the reinforcement of control systems within the EU.¹⁰ The EU, as a general rule, maintains a procedure to control the level of residue in fresh fruits when these are imported, and to assess the risk to consumers. EU legislation sets a Maximum Residue Level (MRL) of PPPs in fresh fruits products.¹¹ Such MRL has to respect the conditions established by the “Good Agricultural Practice” (GAP)¹² and the safety limit fixed by the “Acceptable Daily Intake” (ADI).¹³ EU


¹² The “Codex Alimentarius” establishes that “Good Agricultural Practice in the Use of Pesticides (GAP) includes the nationally authorized safe uses of pesticides under actual conditions necessary for effective and reliable pest control. It encompasses a range of levels of pesticide applications up to the highest authorised use, applied in a manner which leaves a residue which is the smallest amount practicable.” Source: Secretariat of the Joint FAO/WHO Food Standards Programme, “Codex Alimentarius Commission, procedural manual,” 19th ed., WHO/FAO, 2010, p 19.

¹³ Article 3(2)(j) of Regulation 396/2005 states that ‘acceptable daily intake’ means the “estimate of the amount of substances in food expressed on a body weight basis, that can be ingested daily over a lifetime, without appreciable risk to any consumer on the basis of all known facts at the time of evaluation, taking into account sensitive groups within the population (e.g. children and the unborn).”
food safety legislation must also take into account the international obligations laid down in the World Trade Organisation (WTO) Sanitary and Phytosanitary Agreement (the SPS Agreement), discussed in Chapters 3 and 4 of this thesis, and the international food safety standards contained in the Codex Alimentarius Commission (Codex). The Codex, meaning "food code" in Latin, is considered to be one of the SPS’s "three sisters," with the two other being the International Office of Epizootics and the International Plant Protection Convention (IPPC). The International Office of Epizootics, known by its French acronym "Office International des Epizooties" (OIE) was created by an "international agreement" signed in Paris on 24 January 1924, in order to deal with animal health and zoonoses. In 2003, the OIE became the World Organisation for Animal Health, but the OIE acronym remains unchanged. The IPCC, an international agreement focusing on plant health, has been discussed in Chapter 4 of this thesis.

The Codex is a set of rules created in the 1960s by the World Health Organisation (WHO) and the Food Agricultural Organisation (FAO), in order to ensure consumer's health and fair practice in international food trade. The Codex specialised committees, hosted by several of its members, deal with different areas, including pesticides residues and residues of veterinary drugs in food, food

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16 http://www.oie.int/
17 International Agreement for the creation of an Office International des Epizooties in Paris. The text of the agreement is available from the OIE website: http://www.oie.int/
18 https://www.ippe.int/
19 http://www.who.int/en/
20 http://www.fao.org/
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hygiene, additives and labelling, contaminants, methods of analysis and sampling, food import and export and certification systems.\textsuperscript{23}

In parallel with EU regulatory developments, the private sector has rapidly developed its own quality and safety standards, based on a combination of international and national regulations for pesticides and other food safety standards. One such example is the GlobalGAP system. GlobalGAP is examined in this chapter as it is considered to be an important standard affecting horticultural exports to the EU.\textsuperscript{24} GlobalGAP is an international private sector organisation which establishes voluntary standards for the certification of agri-food products worldwide. These standards cover both food production and food distribution processes,\textsuperscript{25} in order to give assurance that “food will not cause harm to the consumer when it is prepared and consumed according to its intended use.”\textsuperscript{26} It is clear that private companies establish and maintain their reputation in the marketplace by guaranteeing safe, high quality products.\textsuperscript{27} Therefore, some private standards are higher than those set at the regulatory level, and sometimes they go beyond food safety and quality standards, to include for instance, environmental, social, labour and ethics standards.\textsuperscript{28} Food safety has become a top priority for the

\textsuperscript{23} Op. cit. footnote no 12, p 185.
\textsuperscript{28} Op. cit. footnote no 25, p 2.
private sector, and it is thus believed that private standards are becoming the “predominant drivers of agri-food systems.”

Both standards and regulations seek to ensure public health and safety in relation to food by outlining how food should be produced, processed, and delivered to the consumer. They can also have an important impact on international trade, by encouraging consumer confidence in imported food, and thereby increasing economic growth. This is why their position within the governance structure of the food system is considered to be significant. However, despite having the same objective, private standards and public regulations in food safety differ from each other. Regulations, passed by the Council of the EU and the European Parliament constitute legal acts of the EU and as such, are an example of hard law. These are defined as having “general application, [...] binding in [their] entirety and directly applicable in all Member States.” Accordingly, EU regulations are legally enforceable throughout the EU. In contrast, standards have no legally binding force and therefore could be considered “soft law.” The WTO defines a standard as being a “document approved by a recognized body, that provides, for common and repeated use, rules, guidelines or characteristics for products or related processes and production methods, with which compliance is not mandatory.”

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32 Ibid.
34 Definition provided by the WTO in Annex 1, para 2 of the Agreement on Technical Barriers to Trade. There is no definition of this term under the WTO Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement).
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Consequently, if DCs want to export tropical fruits to the EU market, they must comply with public requirements and are free to observe those imposed by private companies. However, given the high proportion of fresh fruits sold in supermarkets, retailers are “increasingly powerful” actors in the food chain.\textsuperscript{35} Dependent suppliers have little or no option but to comply if they want to participate effectively in value chains. Therefore it has been observed that private standards can be \textit{de facto} mandatory for suppliers.\textsuperscript{36}

EU food safety and agricultural health measures affect all agricultural exports, regardless of their origin. This chapter examines the extent to which human health provisions established within the EU market constitute trade barriers, and thus affect DCs’ opportunities, which are diversifying away from traditional crops towards tropical fresh fruits exports, such as, in particular, Jamaica, and in the Caribbean in general. This chapter focuses on the EU human health measures for unprocessed fresh fruits imports. Accordingly, it should be noted that animal and plant life or health measures, except to the extent that they are prerequisites for fresh fruit imports, are outwith the scope of this discussion. EU import requirements for fruits and vegetables analysed here include food hygiene measures, and pesticides residues standards which are a significant subset of food safety standards.\textsuperscript{37}

\textsuperscript{36} WTO, Committee on Sanitary and Phytosanitary Measures, “Private voluntary standards and developing countries market access: preliminary results- Communication from OECD,” G/SPS/GEN/763, 27 February 2007.
\textsuperscript{37} The other subsets being for instance microbacteriological contamination (food born disease).
2. The importance of fresh fruits for developing countries

DCs are the main global producers and exporters of tropical fresh fruits. DCs are responsible for around 98 percent of the total production and export the bulk of this to developed countries. As a result, developed countries account for around 80 percent of global import trade in tropical fresh fruits. It is widely recognised that DCs are heavily dependent on tropical products, which form the backbone of their economies, and account for the “bulk” of their export earnings. These products provide opportunities for poverty alleviation, rural development and export diversification. Mangoes, pineapples, papayas, and avocados are the main tropical fruits produced worldwide and account for about “75 per cent of global fresh tropical fruit production.” The Caribbean and Latin America are among the most important tropical fresh fruit producing regions, accounting for 32 percent of global production and these countries export largely to the EU, as their primary export market.

Given this context, there is therefore a need for farmers in DCs to maintain successful production of tropical food products while combating significant tropical fruit pests, which damage both the quantity and quality of the crops. The use of agrochemicals is considered to be the easiest way for DCs to protect their crops, and thereby increase the production of food. Agrochemicals are of particular importance for countries affected by tropical or sub-tropical climatic conditions, where fruits are more frequently affected by pests and diseases which

42 Ibid.
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pose a risk to human, animal and/or plant health.44 Therefore, pesticides are applied in very high amounts on small farms and industrial plantations, such as banana plantations.45 Overuse of pesticides, however, or the abuse or misuse of these highly toxic PPPs can seriously contaminate soils, water, and fruits,46 with grave human health risks.47

It must be noted that the use of agrochemicals as a way to improve food security is used in both developed and DCs. However, in light of consumers’ concerns over pesticides residues, developed countries have chosen to move towards more natural pest control products, which are more expensive, but are deemed to be more ecologically friendly than chemical pesticides.48 In contrast, most DCs cannot afford the use of such alternative PPPs, due mainly to their limited access to foreign currency.49 Farmers will especially use chemicals, such as DDT,50 either because they are cheap or because their patents have expired.51 The issue of high pesticide residues in DCs is often linked to a lack of farmers training and awareness of their toxic effects.52 Moreover, there is the problem of pesticides containers, with missing or damage labels. In addition farmers are also usually using products provided with complex instructions, or instructions written in a

46 Ibid., p 688
47 For instance, in July 1985, almost two thousands people became ill after eating watermelons contaminated with the insecticide “aldicarb.” Six deaths and two stillbirths were also reported. Source: Cox, C., “Aldicarb,” Journal of pesticides reform, 1992, 12(2), pp. 31-35, p 33
50 Dichlorodiphenyltrichloroethane.
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foreign language. These problems are particularly frequent for the users of pesticides on small farms which provide the bulk of the country’s commodities exports, but who have also poor reading and writing skills. However, these farmers cannot rely on their own governments, who usually just implement a basic sanitary and phytosanitary control system, and are therefore unable to efficiently control health and safety practices with regard to pesticide application, or to check effectively the incidence of pesticide residues. The EU, on the other hand, is aware of this situation and this gives rise to concern for the safety of tropical fresh fruits produced in these countries for international export.

3. The EU legal framework for food safety

Following various food safety crisis in Europe between the 1980s and 1990s, such as the BSE crisis, EU Member States (MS) have tried to maintain food standards within their own market in order to ensure public health. In January 2000, a report entitled the “White Paper on Food Safety in the European Union” was published by the European Commission, with the aim of transforming EU food policy, in order to guarantee the “highest standards of food safety.” This report proposed a significant range of measures with regard to EU food law. This included the establishment of a new framework regulation for food safety, the General Food Law (GFL), and an EU framework of official controls of foodstuffs in the EU MS. The White Paper also suggested the creation of a European Food

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53 Ibid.
54 Ibid.
56 The Bovine Spongiform Encephalopathy (BSE) crisis is also known as the “mad cow disease.”
58 Ibid., p 3
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Authority in order to become a “food safety watchdog for Europe.”59 This key measure is analysed below. Given this new approach to food safety, this report is considered important, as it was a “significant response by the European Commission to a crisis in public confidence about food quality, standards and safety” and “an indication of the Commission’s thinking for the future.”60

The EU GFL of 200261 is deemed to be the “central legal foundation for food legislation.”62 It was ratified in order to harmonise food safety standards existing between MS,63 and to reinforce the principle of free movement of food within the EU. The regulation lays down the general principles and requirements of food law within the EU, which applies to “all stages of production, processing and distribution of food, and also feed produced for, or fed to, food-producing animals.”64 It established the European Food Safety Authority (EFSA) as an independent scientific point of reference in risk assessment,65 and created the Rapid Alert System for Food and Feed (RASFF) network.

In light of Article 3 GFL, the twofold objective of the EU food law is to govern food in general, and food safety, at both the EU and national level.66 This objective is further confirmed by Article 5 GFL, which states that food law shall ensure “a

59 Ibid., chapter 4.
65 Ibid. at Preamble (35).
66 Ibid at Article 3.
high level of protection of human life and health and the protection of consumers' interests, including fair practices in food trade, taking account of, where appropriate, the protection of animal health and welfare, plant health and the environment." In line with such requirement, the regulation clearly provides for what is considered to be a "safe" product. According to Article 11 GFL, food imported into the EU must comply with "the relevant requirements of food law", "the conditions recognised by the [EU] to be at least equivalent thereto" or "where a specific agreement exists between the [Union] and the exporting country, with requirements contained therein." When these specific conditions are met, a food product imported into the EU "shall be deemed to be safe." Thus, it can be said that the emergence of the General Food Law in 2002 provided for legal clarity in food safety.

EU food law is based on the principle of risk analysis, which comprises a risk assessment, risk management and risk communication. These three interrelated elements ensure "effective, proportionate and targeted measures" in the protection of human health. Risk assessment refers to scientific advice and information analysis provided by the EFSA. The results of risk assessment are an essential basis in the decision-making process for food safety in the EU, and are referred to as "risk management." Risk management results must be used as a justification for refusing access of agri-food products within the EU market.

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67 Ibid, at Article 5.
68 Ibid, at Article 11.
69 Ibid, at Article 14(7).
70 Ibid, at Article 6 (1).
71 Ibid, at Preamble (17).
72 Ibid, at Article 6(2).
73 Ibid, at Article 6(3) and 3(12).
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4. EU food hygiene requirements

In order to prevent unsafe food entering the market, and to guarantee a high level of food safety and public health,\textsuperscript{74} the EU adopted in 2004 the so-called “Hygiene Package” for food. This package consists of three Regulations\textsuperscript{75} and two Directives.\textsuperscript{76} The package lays down strict hygiene rules for foodstuffs produced in the EU, and imported from non-EU countries. Thus, “suppliers must demonstrate on demand that they comply with the EU hygiene criteria for foods.”\textsuperscript{77} The Hygiene Package is underpinned by other EU legislation on food hygiene, including the General Food Law,\textsuperscript{78} Regulation (EC) No 882/2004\textsuperscript{79} and Regulation (EC) 2073/2005.\textsuperscript{80} Given the focus of the chapter, only the food hygiene conditions for food of non-animal origin imports are examined. These rules are provided by Regulation (EC) No 852/2004 (hereafter ‘the regulation’)\textsuperscript{81} that replaces and repeals Directive 93/43/EEC on the hygiene foodstuffs.\textsuperscript{82}

\textsuperscript{74} Op. cit. footnote no 61 at preamble (2).
\textsuperscript{77} Graffham, A., “EU legal requirements for imports of fruits and vegetables (a suppliers guide),” Fresh Insights no. 1, DFID/IIED/NRI, 2006.
\textsuperscript{78} Op. cit. footnote no 61.
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The regulation requires that imported food products meet the same high standards as food produced in the EU,\(^{83}\) and lays down specific hygiene requirements for food imported into the EU.\(^{84}\) Food hygiene is defined as "the measures and conditions necessary to control hazards and to ensure fitness for human consumption of a foodstuff taking into account its intended use."\(^{85}\) It must be noted that in contrast to the previous legislation,\(^{86}\) the regulation applies "to all stages of production, processing and distribution of food and to exports,"\(^{87}\) introducing for the first time the concept of ensuring food hygiene at every point on the food chain ("from farm to fork").

The EU hygiene rules are established as part of the relevant requirements of food law referred to in Article 11 GFL,\(^{88}\) which must be respected by exporting countries in order to guarantee food safety.\(^{89}\) In line with the GFL,\(^{90}\) the regulation clearly place legal responsibility for the safety of food on the food business operators,\(^{91}\) who must verify that the relevant requirements of the food laws are met.\(^{92}\) As a consequence, EU food business importers, and therefore suppliers from DCs would have to comply with the relevant food hygiene requirements laid down in Articles 3 to 6 of the regulation.

\(^{83}\) Op. cit. footnote no 81 at Article 1(1)(g).
\(^{84}\) Ibid., Preamble (21).
\(^{85}\) Ibid., Article 2 (1) (a).
\(^{86}\) Op. cit. footnote no 82 at Article 2. This article provided for hygiene rules that covered all stages only after primary production.
\(^{87}\) Op. cit. footnote no 81 at Article 1(1) (g).
\(^{88}\) Ibid. at Article 10.
\(^{90}\) Ibid. at Article 17.
\(^{91}\) Ibid. at Article 1(1) (a).
\(^{92}\) Ibid. at Article 17(1).
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There are several requirements imposed on DCs supplying tropical fruits to the EU market. They must ensure that foodstuffs meet the food hygiene requirements at all stages of the food chain. They have to respect the specific hygiene requirements provided for primary production and the post primary production processing. The hygiene rules applicable to primary production as defined in Article 3(17) GFL, are laid down in Part A of Annex I of the Regulation (EC) No 852/2004. These rules require third countries suppliers to ensure that food is protected against contamination arising from inter alia soil, water, fertilisers and PPPs. The regulation also establishes a list of specific measures to ensure hygienic production. These include, for instance, the obligation to take appropriate measures to “keep clean and, where necessary after cleaning, to disinfect, in appropriate manner, facilities, equipment, containers, crates, vehicles and vessels.”

Another example is the requirement for food business operators to “use plant protection products correctly as required by the relevant legislation,” and to “ensure that staff undergo training on health risks.” Contamination arising from PPPs is an important issue in food safety, and is therefore analysed in the next section of this chapter. When EU operators believe that a foodstuff is not safe, it must be withdrawn immediately from the market, and the competent authorities

94 Ibid. at Article 4(1) and Part A of Annex I.
95 Ibid. at Article 4(2) and Annex II.
97 Part A, point I (1) of Annex I also covers other associated operations with primary production such as “the transport, storage and handling of primary products at the place of production, provided that this does not substantially alter their nature.”
99 Ibid. at Annex I, Part A, II (5).
100 Ibid. at Annex I, Part A, II (5)(a).
101 Ibid. at Annex I, Part A, II (5)(d) and (h).
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should be informed.\textsuperscript{102} It is clear that this situation will therefore affect any future attempts made by DCs to export their products to the EU market.

5. Other health requirements

5.1 Phytosanitary measures to certify ‘plant health’

The import of fresh fruits and vegetables from third countries can introduce organisms (pests and diseases of plants) harmful to EU plants and plant products. Suppliers must therefore comply with the EU protective measures established by Directive 2000/29/EC.\textsuperscript{103} In line with Article 13(1) of the directive, third country’s consignments containing plants, plant products and other objects, listed in Part B of Annex V to the Directive, are subject to frequent phytosanitary inspections involving documentary, identity and plant health checks.\textsuperscript{104} Such meticulous inspections on entry into EU territory must determine that products imported are not contaminated by any harmful organisms, that each consignment is accompanied by a phytosanitary certificate, or phytosanitary certificate for re-export,\textsuperscript{105} and that the consignment contains the products covered by the certificate.\textsuperscript{106} The checking of the phytosanitary certificate is of particular importance for the EU, since it indicates that consignments of fruits and vegetables comply with the specified EU phytosanitary import requirements, and are to

\textsuperscript{102} Op. cit. footnote no 61 at Article 19(1).

\textsuperscript{103} Council Directive 2000/29/EC of 8 May 2000 on protective measures against the introduction into the Community of organisms harmful to plants or plant products and against their spread within the Community, OJ L 169, 10.7.2000.

\textsuperscript{104} Ibid. at Article 13a.


conform to "the certifying statement of the appropriate model certificate." 107 Phytosanitary certificates are thus issued in order to prove that consignments are free from serious pests and diseases. 108

When the above conditions are fulfilled and plant-health inspections give satisfactory results upon entry into the EU market, a plant passport is issued, which replaces the phytosanitary certificate, in order to ensure "free movement [within the EU] in the same way as EU products." 109 In contrast, in the case where the specific EU requirements are not fulfilled, several official measures provided in Article 13c (7) of the directive can be taken. One example, which is of particular importance for DCs, relates to the refusal of access into the EU territory of all or part of the consignment, leading to the cancellation of the phytosanitary certificate by the responsible official body. 110

5.2 The EU maximum residue levels for pesticides

As previously discussed, the use of pesticides, as hazardous chemical substances, is of significant importance in order to protect crops from pests and plant diseases and thus increase food productivity. The most common pesticides used in agriculture include herbicides, insecticides, rodenticide and fungicides. 111 Given the beneficial effects of PPPs on food production, their complete ban would be unthinkable. However, pesticides are also toxic in nature, and hence, can have serious consequences for the environment, and adversely affect human and animal

107 Op. cit. footnote no 105, p 144
108 A certificate is rejected when is deemed to be invalid or fraudulent. See Ibid., p 145.
110 Ibid. at Article 13c (7).
111 Those pesticides protect plants and plant products from harmful organisms such as weeds, insects, rodents and fungi. Source: Op. cit. footnote no 43, p 6883
health, through exposure to, or ingestion of, contaminated food. The EU has enacted important provisions governing the use of pesticides in agriculture, and regulating pesticides residues level in food.

While recognising the necessity of using PPPs to ensure food security, Regulation (EC) No 1107/2009 provides for rules regarding “the authorisation of plant protection products in commercial form, for their placing on the market, use and control within the EU.” It also provides rules for the approval of active substances, safeners and synergists contained in PPPs. The aim of the regulation is to ensure “a high level of protection of human, animal health and the environment (...) while improving agricultural production.” It does this by facilitation of the identification of PPPs and substances that “do not have any harmful effect on human or animal health or any unacceptable effects on the environment.” Accordingly, the regulation provides that “a plant protection product shall not be placed on the market or used unless it has been authorised.” It worth noting that despite the fact that the authorisation of PPPs is still the responsibility of individual EU member states, the product must comply with the authorisation conditions, as detailed in Article 29 of the regulation, in order to be

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112 Wilson, J. S. and Otsuki, T., “To spray or not to spray: pesticides, banana exports, and food safety,” Food Policy, 2004, 29(2), pp. 131-146
114 Ibid, at Article 1(2).
115 Ibid. at Article 1(3). This objective was recognised and confirmed in 2004 by the Court of Justice of the European Union (CJEU) in Case C-398/03 Gavrielides Oy [2004] ECR-I 0000. para 23
117 Ibid. at Article 28.
approved. For instance, such authorisation is subject to the approval decision of active substances, safeners and synergies included in the products.118

The use of crop protection products inevitably leaves residues in treated food products, and it is thus impossible to ensure food is 100 percent free of pesticides. As a consequence, EU Regulation (EC) No 396/2005 was enacted in 2005 in order to control pesticides residues level, and to guarantee human health safety.119 This regulation seeks to ensure acceptable levels of residues at the EU level in, or on, agri-food products for human health, by establishing a MRL of a pesticide legally permitted in food commodities.120 The EU regulation provides that setting the level of pesticide residues in food must be consistent with the GAP and the “Acceptable Daily Intake.”121 This is necessary in order to fully protect all categories of consumers, and particularly the more vulnerable such as the unborn and children.122 Shaw and Vannoort pointed out in 2002 that a GAP occurs when pesticides are applied to fruits and vegetables at the right time, and in conformity with the directions on the label.123 They believe that this process ensures that MRLs of pesticide residues are not exceeded.124

118 Ibid. at Article 29(1) (a). The approval of active substances, safeners and synergists is performed by the European Food Safety Authority and a Member State acting as a rapporteur for the EU based on scientific principles and expert advice. The approval criteria are detailed in Annex II of Regulation (EC) No 1107/2009.
120 Maximum residue levels are expressed as mg/kg and are defined as “the upper legal level of a concentration for a pesticide residue in or on food or feed set in accordance with this Regulation, based on good agricultural practice and the lowest consumer exposure necessary to protect vulnerable consumers.” See Op. cit. footnote no 11 at Article 3(2)(d).
121 Ibid at Article 3(2)(d).
122 Ibid at Article 3(2)(d).
124 Ibid.
In the past, the establishment of MRLs was a “shared responsibility of the Commission and the Member States,”
combining the harmonised EU provisions and the different national rules of the EU MS. The legislation established four
directives setting out residue levels for different types of food, with fruits and vegetables being covered under Directive 90/642/EEC
and Council Directive 76/895/EEC. This system was considered too complex as “different MRLs could apply to the same pesticide for the same crop in different Member States” with the possibility of creating barriers to trade.

The current EU harmonised legislative framework on pesticides residues applies to products listed in Annex I of Regulation (EC) No 396/2005. MRLs for those products are specified in Annexes II and III of the regulation, with the default MRL being 0.01 mg/kg. When the established limits are exceeded, food

130 Op. cit. footnote no 11 at Preamble (2).
products cannot enter the EU market.\footnote{Ibid. at Article 18.} The regulation separates “definitive” MRLs tolerances, established at EU level, from “temporary” but mandatory harmonised MRLs tolerances,\footnote{Temporary MRLs must be established for active substances for which EU MRLs have not yet been set. Those are based on existing national MRLs established by the Member States. Ibid at Article 22(1).} referring to those levels that still need to be considered.\footnote{Ibid. at Article 22(1). “Definitive” tolerances are listed in Annex II of Regulation (EC) No 396/2005 and “temporary” tolerances are listed in Annex III of Regulation (EC) No 396/2005.} These tolerances are science-based, and established in consultation of the consultation of the EFSA.\footnote{Ibid., at Preamble (6).}

There is a need to assess pesticide residue safety and risk potential, and it is argued that EU legislation on PPP residues is “a good example of the EU approach to the presence of undesired substances in food.”\footnote{Op. cit. footnote no 15, p 324.} However, it must be noted that despite taking into account scientific data to assess residues risks on consumers’ health, MRLs are not a toxicology parameter.\footnote{Ibid., p 325.} Toxicology refers to “the scientific study of the harmful effects of chemicals on living organisms: humans, animals, and plants.”\footnote{Blessing, A. (ed.), “Pesticide Toxicology: Evaluating Safety and Risk”, Purdue Pesticide Programs, Purdue University Cooperative Extension Service, 2001, p 4 [Online] Available from: http://www.ppp.purdue.edu/ (Accessed 12/12/2010).} Toxicology evaluations are conducted with experimental animals in order to evaluate the short and long term effect of exposure to a pesticide.\footnote{Ibid.} In light of this, MRLs are considered to be an indication of the misuse of a pesticide and not an actual risk to human health.\footnote{WTO, Committee on Sanitary and Phytosanitary Measures, “Questions and answers on the procedure to obtain import tolerances and the inclusion of active substances for plant protection uses in the European Communities list” Communication from the European Communities, G/SPS/GEN/55, 29 March 2005.} Given this, it is this author’s view that there is no guarantee that a fruit which contains pesticide residues over the established maximum level will represent a real danger to the
consumer. This is particularly so if the product is only occasionally consumed by
the individual in question. Indeed, people living in the same country and region do
not necessarily have the same dietary habits. Furthermore, there is no doubt that
some people will not be affected by residues either way. Despite this, when such
an excess over the MRL is identified, the EU member states' authorities are
immediately informed through the RASFF\textsuperscript{142} whenever there is immediate threat to
consumer safety and health.\textsuperscript{143} Such action can affect exporters when food
products consignments are rejected at the border or when products are withdrawn
from the importer's market.\textsuperscript{144}

6. The European Food Safety Authority

The EFSA was established in 2002 by the General Food Law,\textsuperscript{145} with the clear
mandate to provide the European Commission with scientific advice for the EU's
legislation and policies in all fields "with a direct or indirect impact on food
safety."\textsuperscript{146} It consists of four organs, the Management Board, the Executive
Director, the Advisory Forum and the Scientific Committee along with the
Scientific Panels.\textsuperscript{147} Each must act independently, with a high level of transparency
and all are subject to the requirements of confidentiality and communication.\textsuperscript{148}
Despite the principle of independence\textsuperscript{149} being essential to "ensure proper

\textsuperscript{142} Op. cit. footnote no 61 at Article 50.
\textsuperscript{143} Op. cit. footnote no 141.
\textsuperscript{144} See RASFF Annual Report 2008 [Online] Available from:
\textsuperscript{145} Op. cit. footnote no 61 at Article 22.
\textsuperscript{146} Ibid. at Article 22(2).
\textsuperscript{147} Ibid at Article 24.
\textsuperscript{148} Ibid at Articles 37, 38, 39, 40.
\textsuperscript{149} The term independence refers here to an EU body "with its own legal personality."
functioning of the agency,150 it should be noted that the Agency does not work in complete isolation and interacts with national scientific agencies, experts and institutions on many levels in charge of food safety.151 Such external support helps the Authority’s role in gathering and analysing information, both from within and outside Europe,152 to ensure a comprehensive European risk assessment.153 It is therefore responsible both for risk assessment and risk communication, with the EFSA’s Scientific Committee and its ten Panels exploring all stages of food production and supply,154 with the most important field, for the purpose of this chapter, being pesticides and their residues in primary food production.

The Authority’s mandate on risk communication is considered to be an important task of the Authority.155 Articles 22, 23 and 40 of the GFL make clear that the Authority must communicate its findings on food safety in an “open and transparent way,”156 to the public and any interested parties,157 by way of different communications tools.158 This requirement is in line with the principle of

154 The animal health and welfare Panel (AHAW), the Panel on food additives and nutrient sources added to food (ANS), the Panel on Biological hazards in relation to food safety and food-borne diseases (BIOHAZ), the Panel on food contact materials, enzymes, flavourings and processing aids (CEF), the Panel on contaminants in the food chain (CONTAM), the Panel on additives and products or substances used in animal feed (FEEDAP), the Genetically Modified Organisms Panel (GMO), the Panel on dietetic products, nutrition and allergies (NDA), the plant health Panel (PLH), the Panel on plant protection products and their residues (PPR). See: the European Food Safety Authority website, “Panels and Units” [Online] Available from: http://www.efsa.europa.eu/en/panels.htm (Accessed 12/12/2010).
157 Openness and transparency are fundamental aspects of the EFSA and enshrined in Articles 38 and 39 of Regulation (EC) No 178/2002.

These tools include participation in events and conferences. Source: the European Food Safety Authority website, “Risk communication” [Online] Available from:
transparency established in order to respect citizens’ fundamental right of access of EU institutions, bodies and offices’ documents.\textsuperscript{159} Citizens’ right to access EFSA documents is nevertheless limited by Article 39, which prevents consumers accessing scientific opinions deemed to be “confidential.”\textsuperscript{160} As a consequence, consumers cannot be fully aware of all scientific opinions on food safety. Through this mandate, the EFSA, as an expert on food safety issues, ensures its involvement in the progress of food safety in the EU, and in safeguarding consumer confidence.\textsuperscript{161}

It is worth noting that despite being an agency independent from other EU decision-making institutions, the EFSA was not granted any regulatory powers. Risk management has been excluded from the Agency’s scope for both traditional and practical reasons. The Commission pointed out that such a transfer of powers to an independent Authority would alter the EU institutional structure, and thus lead to a requirement to revise Treaty provisions.\textsuperscript{162} It was also believed that such exclusion from the EFSA’s tasks was made in order to avoid any conflict between the EFSA and the Commission.\textsuperscript{163} The EFSA is therefore limited to making recommendations, and informing on its risk assessment findings. However, it is possible to argue that the Authority is to some extent involved in risk management decisions, as it provides scientific support to the Commission, when requested, in the “interpretation and consideration of risk assessment opinions.”\textsuperscript{164}

\textsuperscript{159} Op. cit. footnote no 33 at Article 15(3). This principle is also found under Article 38 of Regulation (EC) No 178/2002.
\textsuperscript{160} Op. cit. footnote no 61 at Article 39.
\textsuperscript{161} See Op. cit. footnote no 158.
\textsuperscript{162} Op. cit. footnote no 37 at para. 33.
\textsuperscript{163} Op. cit. footnote no 155, p 337
\textsuperscript{164} Op. cit. footnote no 61 at Article 23 (c).
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Commission of the European Communities v CEVA Santé Animale SA and Pfizer Enterprises Sarl, it was acknowledged that such a scientific assessment must be considered and be taken into account by the Commission.165 It can be said that such a requirement is in line with the status of the Commission, which is not an expert in science, and would therefore not be able to provide its own scientific opinions. As a consequence, the EFSA, despite having the status of an advisory body, can influence the decision-making process, and the establishment of food safety control measures, by issuing reasoned scientific opinions to the Commission.

The EFSA’s Panel on Plant Protection Products and their Residues has a key role in the control of pesticides. It provides to the European Commission scientific advice and opinions on pesticides residues, and their potential danger to consumers’ health. This support from the EFSA is based on scientific information and data which is important for the adoption and implementation of effective legislation and policies.

7. Emergency measures

Following the food crisis during the 1990s, the Commission highlighted “the lack of consistency” of the EU regulatory framework for the adoption of safeguards measures in emergency situations.166 Accordingly, the “Emergency Measure” system was established in the General Food Law, providing for several measures to be taken by the Commission against food originating from third countries, when there is an identified serious risk to consumer health that cannot be controlled

165 Case C-198/03 Commission of the European Communities v CEVA Santé Animale SA and Pfizer Enterprises Sarl [2005] ECR I-6357
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adequately by the Members States’ measures.\textsuperscript{167} The emergency clause, which encompasses both food of animal and non-animal origin, provides for the suspension of imports or the possibility to impose special trade conditions.\textsuperscript{168}

A problem arises, however, when EU decision-makers are faced with scientific uncertainty regarding the nature or the extent of possible harmful effects of imported food on human health.\textsuperscript{169} In this case, the GFL provides that “provisional risk management measures” can be taken in order to “ensure the high level of health protection chosen” in the EU.\textsuperscript{170} This provision makes a clear reference to the precautionary principle, which was originally a legally binding principle in EU environmental law,\textsuperscript{171} before “spreading its wings into other areas of EU law that aim to protect human health.”\textsuperscript{172} The precautionary principle was examined in detail by the General Court in \textit{Pfizer Animal Health SA v. Council of the European Union}, which established the conditions regarding the application of the precautionary principle to EU law.\textsuperscript{173} The General Court ruled that “where there is scientific uncertainty as to the existence or extent of risks to human health, the [Union] institutions may, by reason of the precautionary principle, take protective measures without having to wait until the reality and seriousness of those risks become fully apparent.”\textsuperscript{174} These measures can be taken “although the reality and extent thereof have not been ‘fully’ demonstrated by conclusive scientific

\textsuperscript{167} Op. cit. footnote no 61 at Article 53(1).
\textsuperscript{168} Ibid at Article 53(1)(b).
\textsuperscript{170} Op. cit. footnote no 61 at Article 7(1).
\textsuperscript{172} Op. cit. footnote no 169, p 398
This decision of the Court allowed also justifying the incorporation of this principle into the General Food Law
\textsuperscript{174} Ibid at para 139.
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evidence.” However, these measures cannot be “based on” “a purely hypothetical approach to the risk, founded on mere conjecture which has not been scientifically verified,” and the risk must therefore “be adequately backed up by the scientific data available at the time when the measure was taken.”

The Court of Justice of the European Union (CJEU) and the General Court recognised the possibility to adopt protective measures under the precautionary principle in the area of food law. Thus, it appears that the emergency measures and the precautionary principle under the General Food Law are closely linked in order to ensure high food safety within the EU. However, the precautionary principle, referred to as a “provisional risk management tool”, has strongly been criticised, in the sense that it leaves the “door open” for institutions when adopting precautionary measures. The argument is that they will use these measures for political convenience rather than just being concerned about the scientific truth.

8. The WTO SPS Agreement

During the Uruguay Round trade negotiations, members of the General Agreement on Tariffs and Trade (GATT) believed that measures adopted to protect human, animal and plant health, often referred to as sanitary and phytosanitary measures, were used as barriers to international trade. There was therefore a need to clarify these rules. These negotiations led to the conclusion of the WTO Agreement on the

175 Ibid at para 144.
176 Ibid at para 143.
177 Ibid at para 144.
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Application of Sanitary and Phytosanitary Measures, or the SPS Agreement, which sets up “a multilateral framework of rules and disciplines to guide the development, adoption and enforcement of sanitary and phytosanitary measures, in order to minimize their negative effects on trade.”

The SPS Agreement authorizes member countries to establish their own human, animal health, and plant health measures, provided that they are applied only with this aim and in line with the conditions of the Agreement. The measures must also be based on science, or the so-called risk assessment, and they may not be unjustifiably discriminating, “nor constitute disguised barriers to international trade.” As a WTO member, the EU is bound by the WTO obligations provided by the SPS Agreement.

The SPS Agreement strongly encourages WTO members to harmonize their national measures on food safety with international standards, guidelines or recommendations. These are established by the Codex, as discussed above. The SPS Agreement which uses the Codex standards as the international benchmark provides that when national measures are consistent with these standards they are deemed to be “necessary” to protect human health and thus, they do not need to be scientifically justified. In line with this provision, Meulen

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184 Ibid at Article 2(1).

185 Ibid at Article 2(2) and (3).

186 Ibid at Article 3 (1).

187 Ibid at Annex A.

188 Ibid at Article 3(2).
and Velde point out that when a WTO member adopts stricter measures than the international standards, it will have to provide evidence on the necessity of such measures, based on science.189 This requirement was confirmed in the European Communities — Measures Concerning Meat and Meat Products (Hormones) WTO dispute.191 In 1996, the US and Canada filed two separate complaints against the EU prohibition of hormones in meat and the EU ban to its market of meat and meat products from derived from cattle treated with hormones.192 In 1998, the WTO Appellate Body, confirming most of the Panel’s findings, has found the EU measures to be inconsistent with the WTO-SPS Agreement as it was not based on risk assessment.193

It must be noted that if WTO members are advised to implement the Codex standards, there are not required to adopt them as they are not legally binding standards.194 However, it is still argued that their importance and their use are unquestionable. The Codex standards and the Codex’s guidance and advisory provisions significantly enhance the importance of the SPS Agreement, as they “represent models for national legislation on food,”195 and help to clarify the limits imposed by the EU law on national law.196 Therefore, it has been observed that “if a trade dispute arises, the WTO can sanction trade penalties against a country that

189 See also Ibid at Article 3(1) and (3) and Article 5.
192 Ibid.
195 Ibid., p 473.
196 For instance, in Case C-448/98 Guimont [2000] ECR I-10663, the CJEU finds that in the light of the Codex Alimentarius, the definition of “Emmenthal cheese” used in French legislation was against EU law. para 32 and 33.
cannot justify a more stringent, trade-restrictive requirement than that specified in the Codex.  

Moreover, the importance of international standards for food safety, and therefore of the Codex, are expressly recognised in the General Food Law which strongly encourages Member States to contribute to the development of these standards, to harmonise their measures on food safety with international standards, and to ensure that these “standards do not create unnecessary obstacles to exports from DCs.” The GFL also requires the consideration of international standards in the development or adaption of food law, where they exist, as long as they are in line with the level of protection pre-established within the EU. It is believed that this last requirement could be seen as an obligation “under EU law for both the Union and the member states to include standards like the Codex in national and community food legislation.” This is, for instance, reflected in the definition of food provided by the GFL itself, which is entirely founded on the Codex’s definition. Given this, Meulen and Velde point out that the application of the Article 5(3) obligation means “a boost for the legal position of Codex standards in Europe.”

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199 Ibid at Article 5(3).
201 The definition of ‘food’ is given by Article 2 of the GFL and the definition of ‘food’ from the Codex is found in Op. cit. footnote no 12.
9. Private food safety standards

Private standards in the food sector, often referred to as “voluntary standards”, have grown rapidly over the past 20 years and have increasingly established new food safety and quality standards at all levels of the food chain, in addition to those already imposed by national governments. In light of this rapid increase, Reardon and Farina pointed out that these standards responded to food safety concerns of consumers by filling in for missing government regulations, and assure both quality and safety in a “fiercely competitive market.” There is therefore no doubt that private standards create significant opportunities for trade, since they are key elements of buyers and suppliers reputation, and in maintaining consumer satisfaction. Nevertheless, private standards have no legal status, with exporters being free to decide whether or not to comply with them, and therefore whether to supply or not their products to the buyer requiring these standards.

Food product exporters have to meet these standards to benefit their business, although this only applies to a minority of suppliers. Thus, exporters must take into account the economic consequences of taking such decision. However, sometimes firms are left with little option but to comply if they want to do business. There are a wide range of international and national, and even regional, private standard-setting bodies. Some of these bodies specifically focus on food safety and quality issues, such as the British Retail Consortium, and others cover both food and non-food safety issues. This is for instance the case of GlobalGAP which is examined below.

9.1 The GlobalGAP certification model

Described as a “satellite navigation system”, GlobalGAP is a private sector organization, which covers both food safety and non-food safety issues, to include environmental protection requirements. Originally created by European retailers in 1997 as EurepGAP, it now comprises many large companies worldwide. Members of this organization comprises producers/suppliers, retailers, and associates members, such as certification bodies, which are all engaged in the standard-setting and decision making processes. GlobalGAP is committed to responding to consumer concerns on “food safety, environmental protection, worker health, safety and welfare and animal welfare.” In order to fulfill this commitment, GlobalGAP requirements include “intensive employee training, meticulous record keeping, frequent management reassessments of work methods and results, and annual on-farm inspections of work methods and paperwork by external auditors.” Failure to respect these requirements will result in GlobalGAP certification being denied or suspended. GlobalGAP seeks to change growers’ attitudes towards food production, by imposing a performance standard, with defined criteria to follow, in order to render production processes safe. Accordingly, GlobalGAP applies one standard, the Integrated Farm

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207 Associate members are not part of the decision-making process. See: Op. cit. footnote no 204.
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Insurance Standard (IFA), which is a pre-farm gate standard that addresses the entire agricultural production process of the product.212

9.2 Control Points and Compliance Criteria for fresh fruits and vegetables

GlobalGAP’s requirements are referred to as Control Points and Compliance Criteria (CPCC). CPCC pertaining to the production of fresh fruits and vegetables, encompass a mix of food safety, environmental and social standards.213 In light of consumers’ concern over chemical issues in food safety, GlobalGAP focuses principally on food contamination. However, the organization is also focusing on social and environmental issues in third countries, by controlling farmers working conditions, environmental contamination and management of biodiversity.214 Thus, following the EU example, GlobalGAP is also trying to implement its social and environmental values in DCs.215

The CPCC for fresh fruits and vegetables is divided into three sections. Under the “All Farm Base” section, referring to the general rules for all agricultural operations, GlobalGAP requires, for instance, proper training for workers who have to handle dangerous equipment, and training on hygiene management. GlobalGAP assesses the impact of farming activities on the environment, which are, according to the organization, “inseparably liked.”216 The second section refers

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214 Most of requirements relating to the environment and conservation are recommendations.
215 For instance, the EU grants under the EU Generalised System of Preferences (GSP), examined in Chapter 5 of this thesis, additional tariff rates reduction to DCs which adopt and implement the 27 international conventions relating to core human and labour rights, and the environment and good governance principles listed in Annex III of Council Regulation (EC) No 752/2008 of 22 July 2008, OJ L 211/4.
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to all “Crop Base” issues, under which the organization requires strong controls regarding the correct use, handling, and storage of plant protection products. The last section covers specifically fresh fruit and vegetables product details. Farmers have to fulfill its requirements referring to harvesting hygiene and produce handling hygiene. In order to do so, they are advised to keep clean anything that gets into direct contact with produce. The produce handling hygiene requirement applies only to produce packed into cartons, used for export, directly inside farm boundaries. In this situation, packing and storing conditions and the packaging materials should be hygienic. Each requirement is ranked into three levels of importance, leaving farmers with limited flexibility on some of them. These are the “major musts” which are the mandatory control points, the “minor musts”, and lastly the “recommendations” which are optional requirements and hence not compulsory. In order to obtain and maintain a GlobalGAP certification, fresh fruits producers must comply with all major requirements, and must meet at least 95 percent of the minor requirements.

9.3 Pesticides and Maximum Residue Levels standards

In order to participate in the GlobalGAP market, DCs exporting tropical fruits have to meet the organization’s CPCC in relation to pesticides. These requirements are usually in line with the EU legislation but some of them can be identified as

218 Op. cit. footnote no 213 at CPCC No 5 “produce handling hygiene”
221 GlobalGAP provides also numerous recommendations which are not compulsory but they still need to be considered during production planning. See: Op. cit. footnote no 209
extending beyond public controls.\textsuperscript{223} One such example is the "major must" GlobalGAP control point prohibiting the use of PPPs that has been banned by the EU on crops destined for sale in the EU.\textsuperscript{224} Such control imposes requirements on DCs, additional to those set out by EU Regulation 396/2005. The latter does not prohibit the use of banned pesticides in DCs on crops destined for the EU market. The regulation indicates that the usage of these pesticides could have been unauthorised in the EU for reasons other than public health reasons. Consequently, imported food products containing residues from banned pesticides, are allowed to enter the EU market if they meet the set MRLs.\textsuperscript{225} When farmers in third countries use unauthorised crop protection, traders can request an "import tolerance" for the food product exported.\textsuperscript{226} It is this writer's view that such a possibility reflects the contrasting climatic conditions between the EU and some DCs. This is particularly important for DCs which want to export tropical fruits, that are not produced within the EU. The EU can ban a PPP for environmental concerns that DCs use to destroy tropical crop-damaging pests not found in temperate zones.

Another example is the GlobalGAP requirement from the producer, or the producer's customer, to conduct an annual or more frequent analysis of PPP residues in all products.\textsuperscript{227} While such self-testing requirement by the producer is not established by the EU legislation, it is pointed that such residue testing is costly and cannot be avoid, even when the risk is minor and no chemical PPPs have been

\textsuperscript{224} Op. cit. footnote no 217 at CPCC 8.1.5.
\textsuperscript{225} Op. cit. footnote no 11 at Article 3(g).
\textsuperscript{226} Article 3 (g) of Regulation (EC) No 396/2005 states that "import tolerance" means an MRL set for imported products to meet the needs of international trade.
\textsuperscript{227} Op. cit. footnote no 213 at CPCC 8.6.2.
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Such requirements from GlobalGAP are considered as “very premature.” They impose much higher costs for analysis on farmers who have shifted from a monocropping farming pattern, to a mixed food crop system for organic production, which is currently in high demand. Given the volatility of commodity prices on the world market, diversified crop production systems are more profitable than monocropping. In addition, by growing organic fresh fruits, DCs contribute considerably to biodiversity, since organic agriculture should not involve the use of toxic chemical inputs. However, it seems that GlobalGAP, which claims to respond to public concern on environmental protection, favours monocropping, which tends to attract less diseases and pests, but causes significant damage to agri-biodiversity. Consequently, there is no doubt that private standards, which impose additional requirements and a greater financial burden, can increase trade barriers and therefore “decrease market size or limit the number of [developing countries’] firms participating.”

GlobalGAP published a revised version of the IFA standard in March 2011 that became obligatory from January 2012. Accordingly, the previous CPCC prohibiting the use of EU banned PPPs was removed from the new IFA. In addition, GlobalGAP maintained the self-testing requirement but has clarified its

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229 Op. cit. footnote no 223, p 32
232 Op. cit. footnote no 228, p 15
process. It only obliges producers who apply PPPs to assess annually the risk associated with their use in order to ensure compliance with the MRLs set by the importing country.\textsuperscript{234} Thus producers of organic products are exempt from this requirement. Depending on the assessment results, producers must also provide evidence of PPP residue analysis which must be done in accordance with the GlobalGAP guidelines. It is clear that these requirements will help DCs meeting the legal EU MRLs. However, they still exceed EU legislation, which does not require the importing country to perform such a risk assessment. The control of MRLs must be carried out by the established national programmes of the Member States which import products from third countries.\textsuperscript{235} Consequently, these strict requirements will continue to penalise users of PPPs.

10. The implications for developing countries’ tropical fruits exports

It is apparent that both public and private standards pursue legitimate and well-founded objectives, by seeking to ensure food safety for the public. However, maximum pesticides residues levels are seen as a “potentially major threat to the future development of trade” in non-traditional fruits.\textsuperscript{236} It must be noted that when pesticides residues exceed MRLs, consignments can be detained, rejected, or even destroyed by the EU MS’ authorities.\textsuperscript{237} The country or the supplier can be prohibited from the market, with a risk of a temporary or permanent ban on exports being imposed.\textsuperscript{238} DCs are also affected by the occasional changes in MRLs, which

\textsuperscript{234} GlobalGAP, “Control Points and Compliance Criteria– Integrated Farm Assurance, Crops Base”, 2011
can occur to prevent violations within the EU. An example of this occurred in 2001 when the EU imposed a significant reduction in the MRL for ethephon, a pesticide generally used for de-greening pineapples. Ghana in particular was affected, having had two shiploads of pineapples refused entry to the EU for violating the new MRL value for ethephon, not having been aware of the changes to the EU regulatory framework. The rejected fruits met the old MRL. As such, the consignments would have been accepted had they arrived at the EU border a few days earlier.

This situation raises the issue of the application of the proportionality principle in EU Law. This principle requires that the EU action must not “exceed what is necessary to achieve the objectives of the Treaties.” Accordingly, in pursuance of the set objectives, the EU must employ the measure which is the less restrictive for trade between the MS. While the application of the principle of proportionality ensures that the principle of free movement of goods within the EU is not undermined, there is no doubt that its application can also affect market access for imported products. Consequently, when applying the proportionality principle, the CJEU will examine whether the restrictive effects of the measures on intra-EU trade “are direct, indirect or purely speculative and whether those effects do not

241 Ibid., p 17
243 Op. cit. footnote no 33 at Article 28 TFEU.
impede the marketing of imported products more than the marketing of national products.”

It is clear that issues arising from violations of MRLs could damage the reputation of the exporting country, the supplier and the importer. This could also affect customer confidence. Caribbean suppliers of tropical fresh fruits may, as a consequence, lose EU market buyers, and may even risk being excluded from the EU market altogether. With their reputation at stake, DCs willing to participate in the value chain must comply with private standards for food safety and good production practices imposed by corporate buyers. However, in this author’s view, dual food safety requirements from public and private controls can spoil some DCs’ efforts to diversify into non-traditional tropical fresh fruits. This is, for instance, the case of Jamaica, which, as will be explained in Chapters 8 and 9 of this thesis, has been a traditional supplier of sugar and bananas to the EU. Its tropical climate also gives Jamaica particular advantages in the production of fresh fruits not found in Europe, such as papaya and mango, which are referred to as “ethnic food.” This is the case with papaya, which is a lucrative market opportunity for Jamaica, and is dominated by two major producer-exporters. In 1985, Jamaica’s Papaya industry started with about 30 acres of land being cultivated. Since then Jamaica’s position as a leading papaya exporter has grown considerably, with large exports to the UK. Although, its competitive position

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244 Case C-169/91 *Council of the City of Stoke-on-Trent and Norwich City Council v B & Q plc.* [1992] ECR 1-06635, para 15.
246 Op. cit. footnote no 236, p 2
247 Valley Fruit Co. Ltd. and Advance Farms Technologies Jamaica Ltd.
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cmpared to other papaya producing countries\textsuperscript{249} has been weakening due to ‘Mosaic’, a virus related to the ‘Ringspot’ virus causing disease of papaya and thereby limiting production,\textsuperscript{250} Jamaica is still an important producer of papaya.\textsuperscript{251}

Jamaica has tried to diversify into fresh fruits and vegetables, but such a shift has generally been disappointing.\textsuperscript{252} This problem has been explained by high competition in the export of tropical products with other suppliers, in Africa or Latin America, which sometimes do not face the same capacity weaknesses as Jamaica.\textsuperscript{253} These constraints were reinforced by Jamaica’s lack of technical and administrative arrangements to meet demanding SPS measures and requirements in the EU market. In general, small farmers, who provide the major part of the commodities for exports, use pesticides without receiving any training and are unaware of their appropriate use, including GAP, application procedures, and pre-harvest intervals.\textsuperscript{254} Limits on pesticides residues imposed by the EU and the private sector within the EU are thus an important issue for Jamaican exports of fresh fruits.

In June 2005, Saint Vincent and the Grenadines raised complaints at the WTO SPS Committee meeting about the SPS requirements imposed by the then EurepGAP (now GlobalGAP) for exporting bananas and various fresh fruits and vegetables to

\textsuperscript{249} Mexico and Brazil have emerged as the market leaders in 2003. See Op. cit. footnote no 236, p 44
\textsuperscript{250} Ibid.
\textsuperscript{251} Op. cit. footnote no 248.
\textsuperscript{253} Op. cit. footnote no 236.
\textsuperscript{254} Ibid., p 39.
supermarkets in the United Kingdom (UK).\(^{255}\) In their view, the now GlobalGAP requirements were higher than those provided by the UK government restricting international trade.\(^{256}\) From the viewpoint of the Caribbean island, private standards schemes present numerous challenges to small vulnerable economies.\(^{257}\) Jamaica also stated that it was facing the same problems with the then EurepGAP standards for fresh fruits and vegetable exports.\(^{258}\) These concerns were supported by other DCs.\(^{259}\)

Since then, the WTO SPS Committee has continued the discussion about the issue of private standards in regular meetings. In addition, an *ad hoc* working group of 30 interested WTO Members, including the EU, was formed. A number of countries from the working group highlighted a few opportunities for trade created by private standards. They are of the view that private standards can facilitate compliance with official requirements, and help improve the quality and safety of products.\(^{260}\) However, most WTO Members reiterate the negative impacts of private food standards on the export of their products.\(^{261}\) In the case of GlobalGAP standards, DCs point out that they are more stringent, and exceed those applied by international standards such as those established by Codex. For example, DCs


\(^{256}\) Ibid., para. 16

\(^{257}\) WTO, Committee on Sanitary and Phytosanitary Measures, “Private industry standards,” Communication from Saint Vincent and the Grenadines, G/SPS/GEN/766, 28 February 2007

\(^{258}\) Op. cit. footnote 255 at para. 17

\(^{259}\) Argentina, Ecuador, Mexico and Peru. See Ibid. at paras 19 and 20.


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indicate that GlobalGAP requires stricter monitoring and implementation mechanisms, and establishes lower MRLs than Codex.\textsuperscript{262}

In addition, DCs point out that GlobalGAP standards also exceed official national and import regulatory requirements for tropical fruits. For instance, they “treat in more detail some aspects of the banana growing process from sprouting of the plant up to the stage of processing for marketing.”\textsuperscript{265} DCs argue that overall, private standards restrict market access to the EU for their tropical fruits, “due to the rejection of goods and the increased cost of production and export processes.”\textsuperscript{264} The compliance cost with GlobalGAP is variable and in some cases double that of compliance with official standards.\textsuperscript{265} For example, it ranges from EUR 1,550 to EUR 3,600 a year for Costa Rica.\textsuperscript{266} This particularly affects smallholders, who provide the major part of tropical fruits for exports. They often lack the necessary financial and technical resources to meet the demanding standards, or to carry out the costly conformity assessments. This has resulted in the exclusion of smallholders from the supply chain.\textsuperscript{267}

The concerns raised by Saint Vincent and the Grenadines have not yet been resolved. Nevertheless, in order to deal with the identified negative effects of private SPS standards on agri-food exports, the working group has considered twelve possible actions for the SPS Committee and the WTO Members.\textsuperscript{268} The

\textsuperscript{264} WTO, “Questionnaire on SPS-related private standards: Dominican Republic,” 24 April 2009
\textsuperscript{265} Op. cit. footnote no 263.
\textsuperscript{266} Ibid.
\textsuperscript{267} WTO, “Questionnaire on SPS-related private standards: Colombia,” 20 February 2009.
\textsuperscript{268} WTO, “Possible actions for the SPS committee regarding SPS-related private standards,” G/SPS/W/247/Rev.3, 11 October 2010.
working group invited the SPS Committee to endorse six of these proposed actions upon which the Members reached an agreement. Firstly, they proposed that a clear definition of ‘SPS-related private standards’ should be developed by the SPS Committee, which should then limit any discussions to these. The second action suggests that the SPS Committee and the international standards, namely Codex, the World Organisation for Animal Health and the IPPC, exchange information about their work in the area. Thirdly, the group agreed that the Secretariat should inform the SPS Committee on relevant developments in other WTO fora linked to SPS issues. Fourthly, the working group recommends that Members communicate with the entities in their countries involved in private SPS standards. They should regularly exchange information about private SPS standards and about their own work on this issue. This action would help these private sector bodies understand the issues raised in the SPS Committee and the importance of rules established by the aforementioned international standards. The fifth action proposes that the SPS Committee works closely with the above mentioned international standards in order to “provide further clarity on this issue and promote the use of international standards.” Lastly, it is proposed that WTO Members exchange information related to private SPS standards in order to improve their understanding and awareness on how “these compare or relate to international standards and governmental regulations.”269

The implementation of the last proposed action has led to different opinions among the participant of the working group. Some members, such as the EU and the United States, believe that this action should not be part of the SPS Committee

discussions. Consequently, in March 2011, the SPS Committee agreed only on
the first five actions. The sixth proposed action and the other action proposals on
which the working group could not reach an agreement are still under
discussion.

11. Conclusion

Using the example of tropical fruits, this chapter has examined the difficulties that
DCs are facing with the variety of food safety standards established within the EU
market. The EU SPS measures are important requirements for the importation of
tropical fruit products from third countries. However, while the focus in Europe is
to maintain a low level of health risks related to food consumption, the main
concern generally within DCs is food security. The World Food Summit in 1996
defined food security as existing “when all people, at all times, have physical and
economic access to sufficient safe and nutritious food to meet their dietary needs
and food preferences for a healthy and active life”. Indeed, DCs are trying to
ensure food productivity in tropical climatic conditions conducive to the spread of
crop pests and plant diseases. The SPS requirements imposed by private and public
bodies will pose significant challenges for DCs which are trying to diversify and
extend their production beyond traditional crops. However, it is clear from the
discussions in the WTO SPS Committee that the increasing role of private
standards in international trade is the main issue for DCs and it has thus become a
top priority for such countries. The system of rules imposed by GlobalGAP is

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271 Ibid.
272 Achterbosch, T. and Tongeren, F. v., “Food safety measures and developing countries:
Literature overview,” LEI Agricultural Economics Research Institute, Working Paper, March,
2002, p 6
273 Food and Agricultural Organization of the United Nations (FAO), “Rome Declaration on World
Food Security”, World Food Summit, 13-17 November 1996, Rome, Italy.
widely criticised by DCs who argue that they exceed official import requirements. In the case of pesticides use and residues, GlobalGAP complements public controls by imposing higher and wider requirements than EU legislation. Implementing these requirements creates excessive financial burdens for both producers and exporters, who lack the necessary administrative, technical, financial and scientific capacity.\textsuperscript{274} Private standards are therefore significant barriers to DCs’ exports of tropical fruits and undermine their competitive position.

Since 2005, the WTO SPS Committee has become an important forum for DCs to discuss these issues. Arguably, the substantial amount of work undertaken in the SPS Committee and the \textit{ad hoc} working group has influenced the private sectors. GlobalGAP issued in 2011 a new IFA amending the strict requirements concerning MRLs. However, it is noteworthy that, while the organisation does not replace current EU legislation, it sets a minimum level of compliance in case of non-existent legislation or if existing laws are not strict enough.\textsuperscript{275} Accordingly, the new pesticide MRLs requirements set by GlobalGAP remain stricter than EU legislation.

In light of the current EU market access conditions for sugar and bananas, which will be examined in Chapters 8 and 9 of this thesis, DCs have a comparative advantage in producing tropical fruits, and improving their food safety performance should therefore be prioritised. In order to comply with private standards they will need focused improvements in their industry standards with appropriate investment and key staff training. However, these improvements also

\textsuperscript{274} Op. cit. footnote no 4, p 3.  
\textsuperscript{275} Op. cit. footnote no 212.
need to be made with the support of governmental regulatory reforms. These actions will help producers and exporters in DCs to meet the required standards, and improve the safety and quality of their products. In the long-term, this should help the EU private sector and EU consumers’ trust in the ability of DCs to produce safe food that meets both EU SPS regulations and private standards. Consequently, DCs’ ability to comply with complex and costly standards will depend on the strategic decisions currently being made by their governments, their ability to obtain strategic investment funds as well as the actions adopted by the WTO.