The normative dynamism of the European Community regarding technical barriers to trade and its impact on the WTO and the EPAs[*]

Introduction

If there is any area where the European Community shows real dynamism, both within the Community bodies and the bodies of its Member States, it is that of the drafting of standards to ensure the consolidation of the internal market and the protection of European consumers. Consumer protection is enshrined in Title XIV of the Treaty of Rome establishing the European Community. Article 153 of this Treaty states that "*In order to promote the interests of consumers and to ensure a high level of consumer protection, the Community shall contribute to protecting the health, safety and economic interests of consumers …*". This normative framework is enhanced by the measures that Member States may adopt for the protection of human health or safety, animal life and health, plants and the environment. Paragraph 4 of Article 153 also allows Member States to adopt more stringent protective measures than those adopted by the Commission, provided the latter is notified of them and the said measures remain compatible with the Treaty.

These measures remain legal as long as they contribute to the consolidation of the internal market and do not constitute any unnecessary hindrance to trade between, first of all, the parties to the Treaty of Rome and secondly, between the Community and other third countries. This is where the European Communities quite often encounter difficulties regarding their multilateral commitments in the framework of the WTO, as well as their bilateral trade in a narrower context, especially with their free-trade partners. This is because, very often, the process of formulating, adopting or applying the technical regulations or standards governing goods sold on the Community markets is so complex that trading partners are not consulted and, as a result, these health, safety and environmental protection measures become technical barriers to trade.

One of the permanent objectives of the multilateral trading system is to lay a foundation for safety and predictability for all actors by formulating rules and procedures by which all the Member States should abide. It has become patently obvious that the technical regulations, standards and conformity assessment procedures adopted by the European Communities have become an obstacle course for many partners due to their complexity and multiplicity, making it difficult for most exporters from third countries in general, and ACP States in particular, to follow. Moreover, this course is also a grueling one since the Community directives are generally ahead of those established by the International Standards Institutions.

At the end of this marathon, the European Community's partners find themselves on shaky ground due to the regular amendments made to adapt these standards to technological developments in the relevant area so as to ensure the protection of consumer health and safety and the environment. In the final analysis, this process effectively cripples access to the Community market for exports from countries with very limited technological capacity such as the ACP States, to the extent that the European offer of duty- and quota-free access in the framework of the negotiations for the Economic Partnership Agreements (EPAs) which bind the European Community to ACP regional integration organizations, seems unattainable, since the "European conformity" label remains difficult to achieve. Countries with very low

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technological capacity like the ACP States will therefore find themselves excluded from high value-added manufacturing networks due to the continuous development of technical standards unless they open up to delocalized European companies which bring the necessary technology and conformity label with them. .

They are, therefore, logically restricted to exporting raw, unprocessed or semi-processed products their situation of resignation being further worsened by the tariff escalation process that affects these commodities at every stage of pre-export processing. Relaxing these norms and standards, in which Europe plays a leadership role, is therefore an indispensable condition which goes hand in hand with the planned integration of the ACP States into the multilateral trading system and the opportunity for their exporters to benefit from the EPAs. It is in this regard that the EPAs, as an instrument for facilitating the smooth integration of the ACP countries into the global trade networks, play a truly important role. The only way the ACP countries could benefit more from the challenges posed by the technical barriers to trade would be if the European Community, supported by other donors and specialized institutions, provided significant and unconditional technical assistance, as well as sustainable support for human and infrastructural capacity building in the ACP countries in this field.

This analysis aims to consider possible answers to the questions asked by many observers in the ACP countries, including:
- What characterizes the European rules governing technical norms and standards in relation to multilateral and other extra-community directives?
- what are the factors that might complicate the access of exports from EU partners to the Community market, more especially from ACP States?
- what practical measures could be envisaged in ACP countries, either independently, or in partnership with the EU, so that the European offer of complete duty- and quota-free access to the ACP States in the framework of the EPAs is moves from its virtual state into the full reach of ACP exporters?

I. The multilateral environment of technical regulations and European standards

A. EU Technical Regulations and Standards and the WTO

A critical look at the place and role of the European Communities in the multilateral trading system by way of its trade policy review at the WTO, the last session having been held in Geneva from 6 to 8 April 2009, certainly revealed the strengths and the advantages of this major player in international trade[1] (world leader in the trade in goods with a 17% share ; the global leader in the trade in services ; the leading importer of energy and finally the leading supplier (50 % of the world stocks) and at the same time the leading beneficiary (40%) of foreign direct investment flows). However, the review exercise also showed up the many constraints stemming from the EU's process of internal market consolidation and of the harmonization of the Community directives and its rights and obligations as a player in the multilateral trading system.

[1] *See " EC Trade Policy Review", WTO Secretariat Report, WT/TPR/S/214 of 2 March 2009, page vii, Paragraph 4.*

And it is as an actor in the multilateral trading system, that the impact of the European Communities' standards on free trade as promoted by the WTO is most seriously felt for they can lead to the temporary suspension of access of exports from EC trading partners to the Community market, or lead to them being completely overthrown. A new directive or Community regulation, whether based on the need to ensure a more effective preservation of health and/or the safety of European consumers, improve the quality of products, enhance the internal harmonization of standards, or even to establish new pro-environmental standards can, in certain cases, have adverse effects on EU's trading partners.

What is significant about the EU's penultimate trade policy review of 2007 and that of April 2009 is the increase the number and scope of concerns relating to technical barriers to trade obstacles attributed to the European Communities. About 25% of the 1600 questions asked by the WTO members dealt with sanitary and phytosanitary measures and EU's technical barriers to trade; this percentage jumps to 55% i.e. nearly 900 questions when you examine the EU's overall regulations that have implications for third-country exports to the Community market. This illustrates the extent of the difficulties that the rest of the world can encounter in their bid to access the Community's market for agricultural and manufactured products. So, why do the technical regulations and other regulatory measures adopted by the EC authorities, often with a view to enhancing the regulation of the internal market, incur the disapproval of the other WTO members?

Our hypothesis, based on observations made by the WTO members of the Committee on Technical Barriers to Trade (TBT), is that the European Communities very often establish norms and standards which go beyond the requisite parameters for guaranteeing the life and health of consumers and the protection of the environment. If this is the case, then the communities are disrupting the balance articulated by the WTO Agreement on Technical Barriers to Trade which establishes the multilateral framework for formulating these standards. Other members also report on the violation of the rules and procedures of the TBT Agreement regarding the adoption of new directives by the Communities. In fact, the TBT Agreement defines the framework in which WTO members may institute technical regulations and norms (including directives on packaging, marking and labelling) relating to agricultural and industrial products, as well as the procedures to be followed in order to assess conformity to technical rules and norms. Article 2 Paragraph 2 of the TBT Agreement is the cornerstone of this entire structure[2].

The objectives of the European directives as notified to the WTO in 2007 and 2008[3] revolved around protection of health, safety, the environment, harmonization of Member States' regulations, promotion of a healthy lifestyle, prevention of misleading practices, animal health and welfare; protection of the legitimate interests of producers; and ensuring the smooth functioning of the internal market. A Note from the WTO Secretariat[4] giving an overview of specific trade concerns (issues linked to specific measures- technical regulations, standards or conformity assessment procedures applied by other members) raised at the TBT Committee

[2] *"Members shall ensure that technical regulations are not prepared, adopted or applied with a view to or with the effect of creating unnecessary obstacles to international trade. For this purpose, technical regulations shall not be more trade-restrictive than necessary to fulfill a legitimate objective; taking account of the risks non-fulfillment would create. Such legitimate objectives are, inter alia: national security requirements; the prevention of deceptive practices; protection of human health or safety, animal or plant life or health, or the environment. In assessing such risks, relevant elements of consideration are, inter alia: available scientific and technical information related to processing technology or intended end-uses of products"*.

[3] *Under the TBT Agreement, the EC and its Member States from 1st January 2007 to 30 September 2008 notified the TBT Committee of the 140 new measures (see Paragraph 72 of the WTO Secretariat's Report during the Review of the Trade Policy of the European Communities, WT/TPR/S/214 of 2 March 2009)*

[4] *Note from the Secretariat, Specific Trade Concerns raised at the TBT Committee,G/TBT/GEN/74/Rev.1 of 18 Feb. 2009*

between 1995 and 2008 reveals that the measures applied by the European Communities, followed by the United States, are those that have been discussed the most.

Considering the 33 new specific trade concerns raised by the Member States in 2008 at the TBT Committee, the European Community wins the *Palme d'Or* with 10 new trade concerns denounced by a total of 38 Member States. They are followed by the United States and China respectively, with 5 specific trade concerns each. The Members' concerns which touched not only on the substance, but also on the form and procedural aspects of the new directives, highlighted most of the time that the EC:
- had lacked transparency (e.g: Directive 2002/96/CE relating to Waste Electrical and Electronic Equipment or WEEE);
- had created unnecessary barriers to trade (e.g.: REACH regulation; Regulations concerning certain grape and wine-making products);
- had not given them ample time for the necessary adaptation or that it was necessary to set reasonable deadlines (e.g.: Directive 67/458/CEE of the 31st ATP on hazardous chemical substances).

As regards the European directives, some members pointed out, that:
- they were complicated (e.g.: REACH regulation);
- the EC did not produce any scientific proof in support of the new standards (e.g.: Directive 67/458/EEC of 31st ATP on hazardous chemicals);
- different criteria exist among the EC Member States (e.g.: Regulation on toys);
- There were differences in the Interpretation of texts among the EC Member States (e.g.: REACH Regulation);
- There was discrimination (e.g. regulation concerning certain wine-making products)
- There was need for additional information (e.g.: regulation on the characteristics of construction materials regarding their reaction to fire);
- The trial procedures were found to be restrictive (e.g. EuP Directive on eco-design requirements for energy-driven products);
- There was need for technical assistance, or in some cases, special and differential treatment (e.g.: technical regulation on production and labelling of organic products; EuP Directive on eco-design requirements for energy-driven products).

On the chapter on *non-discrimination,* the same agreement specifies that nothing could prevent any country from taking any necessary measures, at the levels considered appropriate, to ensure the quality of its exports, or the protection of human and animal health and life, the preservation of plant life or the protection of the environment, or the prevention of misleading practices, provided they are not applied in such a way as to constitute instruments of arbitrary or unjustifiable discrimination between countries where the same conditions exist, or a disguised restriction on international trade, and are also in conformity with the provisions of this Agreement.[5]

The construction of, and desire to harmonize the internal market through policies common to all the members were accompanied by an increase in the number of measures such as the regulations governing packaging, labelling and conformity assessment procedures. Even if the legitimate objective remained, as the case may be, the opening of the free trade area, protection of health, the environment, or human safety, it has been observed, however, that

[5] *Article 2.1 of the TBT Agreement " Members shall ensure that in respect of technical regulations, products imported from the territory of any Member shall be accorded treatment no less favourable than that accorded to like products of national origin and to like products originating in any other country".*

the directives contested before the TBT Committee by the other members were perceived as protectionist measures aimed at protecting the domestic market and promoting local industries.

B. Europe's hegemony in the preparation of international standards

The most notable feature of European directives as regards the international dynamics of development of technical regulations and standards is Europe's leadership role in this area since its technical regulations and norms are always in keeping with its technological development.[6] In this way, Europe, which is at the forefront of technological innovation, will establish new standards that will serve as the benchmarks for the future work of the international standardization bodies[7]. According to the 2005 WTO *World Trade Report*, while the International Organization for Standardization (IOS) has 15 000 published standards, *PERINORM*, the consortium of European standardization organizations possesses 650 000 standards (national, regional and international) gathered mostly from various components of the private sector which pave the way for future standards.

Europe's trading partners therefore have to deal with a partner who keeps drawing them into a constantly shifting landscape and exerting pressure on international standards owing to its high innovating capacity and drive. As a result, the European Communities remain far ahead of the rest of the world in the formulation of technical regulations, standards and conformity assessment, which makes their leadership in this area virtually indisputable.

One patent example is the REACH[8] Directive (CE/1907/2006) adopted by the European Parliament and Council concerning the Registration, Evaluation, and Authorisation of Chemicals manufactured or imported into the Union. Having entered into force on 1st June 2007, this directive applies to all substances: those used in industrial processes, as well as cleaning products, paints, textiles, furniture and electrical appliances. In adopting this directive which it wants to make an international standard, the EU Parliament is becoming an international legislative body on chemicals sold worldwide. The impact of this directive is such that the United States, Japan, China and South Korea are on the verge of adopting it, the objective being to set up a data bank for sharing information on the composition of marketed chemical substances.

Any economic operator wishing to export to the EU market or to re-export after processing substances imported from the EU with a chemical compound must meet the standards prescribed by this directive. Specialist inspectors trained at the European Chemicals Agency (ECHA) are now being trained to prohibit the sale of undeclared chemical substances. Given the institutional and transposition difficulties that a country like Switzerland with a large chemical industry (CIBA, Roche, Novartis or Clariant) is experiencing with this Directive, we can only imagine the potential obstacles facing the economic operators of third countries and developing nations like the ACP States which would like to continue trading with Europe in this sector.

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[6] *As a reminder, the current work of the European organizations for standardization is geared towards the preparation of new standards in the field of technology, notably information, nanotechnologies, bio products, or ecological labeled products, identification of radio frequencies.*

[7] *Standardization is the fact of establishing industrial norms and standards, i.e. a common and documented referential for harmonizing the activity of a sector. It is carried out by specialized bodies, which are most often state corporations or, organizations created by professionals of a given sector of activity.*

[8] *Registration, Evaluation and Restriction of Chemicals (REACH). Its aim is to ensure the safety of the citizens and the free circulation on the internal market.*

The TBT Agreement specifies, for all WTO members, the **procedures** (deadlines for notification, consultations, entry into force) **relevant to** the preparation and formulation of norms governing those standards which the EC itself does not always respect. The most obvious example is the directive relating to the "harmonization of the legislative, legal and administrative provisions governing the classification, packaging and labelling of hazardous substances".[9] The 31st amendment to this directive denounced by 21 Member States comes immediately after another Community directive (the REACH Directive raised protests from 30 WTO members) which is the second most controversial standardization project presented before the WTO TBT Committee since 2008.

The ACP nickel-exporting countries joined the other WTO members to point out the difficulties posed by this 31st Adaptation to Technical Progress of the Directive and requested its withdrawal during the TBT Committee meeting of 18 and 19 March 2009[10]. The 31st draft amendment entails the classification of 117 components of nickel as hazardous based on the presumption of the toxicological effects of the products. The other WTO members felt that the EC had not shown any scientific proof to justify banning these 117 nickel compounds. The nickel industry has provided the EC with various data on the various compounds to challenge the allegations.

Faced with the EC's determination, many WTO members noted that the European Communities might seek derogation from Article 2.2 of the TBT Agreement because they were not taking into account "the scientific and technical data available" or "the intended end product use". In so doing, they were violating the internationally recognized procedures and had not fully examined any contrary scientific evidence. Consequently, there was also a violation of the obligation that technical regulations "should not be more restrictive on trade than is necessary to fulfill a legitimate objective". With the adoption of the 31st ATP, we are heading towards serious commercial repercussions for the nickel producers and users.

The EC also violated the rules of procedure because the timetable drawn up for the adoption of the 31st ATP does not allow ample time to hold consultations (60 days after notification) with the other members, much less, as provided for in Art.2.9 of the TBT Agreement, a constructive examination by the TBT Committee. Finally, the members concerned, under the impression that the EC wanted to present them with a "fait accompli", in violation of the TBT Agreement, requested the withdrawal of the 31st adaptation.

In response to the other members, the EC pointed out during the second discussion on the 31st adaptation that they would withdraw the draft directive if the protesting WTO members provided proof that the 117 nickel compounds were not hazardous to the health and life of European consumers. Meanwhile, they would maintain the adoption of this amendment to the directive in the interest of the European consumer. This is only an illustration of the EC's firm determination to protect the life and health of their consumers even if it means standing all alone against everyone else.

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[9] *Directive 67/548/ EEC of 27 June 1967 whose draft amendment for the 31st time is contained in Directive 2008/58/CE of 28 August 2008.*

[10] *Submission by the African, Caribbean and Pacific Group of States to the TBT Committee on notification GT/TBT/N/EEC/212 on Nickel classifications in the 31st ATP to dangerous substances directive, G/TBT/W/307 of 17 March 2009*

II. Multiple European structures for the formulation and implementation of technical regulations, norms and standards and their impact on ACP countries

A. Proliferation and multiple interpretations of Community norms and standards

The European normative environment reveals a **proliferation** of norms and standards, especially the co-existence of the norms and standards defined by Community institutions particularly directives and regulations, Member State institutions and, in certain cases, infra-state standardization institutions. Some of these national or local norms are, according to the fields, stricter or more restrictive than the Community standards. Interpretations of Community Standards may also vary from one country to another, which may be considered a proliferation of standards on the Community market.

Thus, 27 national institutions for standardization co-exist with six supra-national institutions recognized by the European Commission (Directive 98/34) which, as regards norms, are: the European Committee for Standards (ICT) and the European Committee for Electro-technical Standardization (CENELEC) ; as regards standardization, the European Telecommunications Standards Institute (ETSI) and ECMA (European Computer Manufacturers Association); and in the area of logistics, the European Article Numbering-Uniform Code Council (EAN, UPC, GS1). Each of these European institutions for standardization has its own internal procedures.

Directive 98/34 specifies that the Commission is vested with the power to propose legislation relating to standards and technical norms at the Community level and to assess their impact. It requests European institutions such as ICT or CENELEC to prepare the said standards. It must be pointed out that 80% of the work of the European Standardization bodies is carried out at the request of manufacturers and other stakeholders. The standardization process in the trade in services is still very limited compared to the trade in goods, owing to the highly heterogeneous nature of services. Consequently, only 20% of their work is commissioned by the European Commission and EFTA (European Free Trade Association). Nearly 30% of the standards developed by the ICT are identical to ISO norms whereas for CENELEC that figure stands at 60%.

There are two types of approaches to the normative development of standards applicable to European products. First of all, there are the "old approach" directives in which the Commission formulated very detailed and specific technical requirements. Then, there are the "new approach" directives where the Commission formulates only the essential requirements to meet the objectives of protecting health, safety and the environment, leaving the details of the technical characteristics of the products to the various national committees and other stakeholders, although it specifies the procedures to be followed in fulfilling these essential requirements[11]. Once adopted, these standards must be published.

It must also be pointed out that in spite of the efforts made at the Community level to establish a Community framework for conformity assessment and norms, there is still a **proliferation of national conformity assessment bodies** which render this activity less predictable for foreign partners. So, each country possesses its own governmental, non-governmental and regional standardization structures even if there is at least a central

[11] *The "old approach" directives apply to motor vehicle engines, chemical and pharmaceutical products, cosmetics, Legal Metrology textiles, labelling of shoes, classification of wood, crystal glass. The " new approach" »directives cover, among other things, mechanical measuring and weighing instruments, low voltage equipment electro-magnetic compatibility, toys, machines, lifts, medical equipment ,cable installations, construction products, personal protective equipment,, Radio and Telecommunications Terminal Equipment, etc.*

coordinating body. Their activity is to develop, coordinate, promulgate, revise, amend, re-publish or interpret the norms.

On 9 July 2008, Decision No. 768/2008 of the EU Council and Parliament established a new common framework for marketing products commonly known as the "New Legislative framework" to streamline the conformity assessment process[12]. As a general rule, this framework concerns reference principles and rules to harmonize standards for product marketing. This new framework establishes the rules and a set of procedures for conformity assessment. This new framework remains horizontal, nonetheless, and is not aimed at any specific sector. From this standpoint, it does not establish any sectoral priorities regarding conformity assessment. However, every time a sectoral legislation is revised or newly established, it is noted that the applicable conformity assessment procedure was selected from the various modules provided for in the new legislative framework.

B. Impact on ACP countries

The **mass of technical rules and regulations** generated in the framework of the New Approach Directives, which nonetheless leave the option of specifying conditions regarding health, safety and environment protection to the national committees of the European Union Member States, together with the various conformity assessment procedures effectively transform the myriad of policies into a **Kafkaesque labyrinth** for ACP economic operators. In order to maintain their export potential on the Community market, ACP economic operators must mobilise considerable resources to adapt their products to the technical norms in effect on the targeted EU Member State market. The real challenge for ACP businesses lies in meeting the administrative and institutional constraints so as to take advantage of the opportunities offered by the extensive Community market. Some economic operators claim that the adaptation costs far outweigh those generated by the conformity assessment. They also have to factor in the costs related to acquiring information since relevant information is not always readily available to the ACP economic operators. In fact, European standards and procedures are so complex that the European Commission's DG Enterprise and Industry regularly organises information seminars for European operators, even though specialised information portals have been set up.

Meeting the standards required for affixing the **CE (European conformity) marking** is a problem for ACP exporters. Article 30 of Decision No.768/2008/EC of the European Parliament and of the Council of 9 July 2008, which defines the criteria for accreditation and market surveillance relating to the marketing of products, sets out the attendant rules. The CE marking is the only obligatory conformity marking indicating that a product conforms to the applicable requirements of the harmonisation legislation relevant to the given sector.[13] The CE marking was created to guarantee conformity among European products so as to eliminate

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[12] *Conformity assessment is an activity which aims to determine whether a product or some other object meets the requirements set out in a given specification. Here, the term "specification" refers to a standard or a technical description of the characteristics that a given object should possess. These objects may be products (including services as well), procedures, agencies, persons or systems (management, for example). Consequently, conformity assessment is the « demonstration that the specific requirements concerning a product, process, person or a system are met*.

[13] *Under the New Approach Directives, a manufacturer wishing to place a product on the Community market must assume responsibility for conformity to Community legislation. Member States are not authorised to restrict the marketing of CE marked products unless there is proof that the relevant directives have not been respected. Market surveillance is carried out by the national authorities and involves conformity checks and corrective measures for lack of conformity, including fines for forged or false declarations.*

barriers to the free movement of goods due to the difference in standards from one country to another, thereby enabling a better contribution to the single market, while providing access to the largest number of producers possible. In order to use the CE marking, the technical requirements defined in the standards and guides based on the relevant legislation applicable to the product in question must be respected. The affixing of the label indicates that a manufacturer has met the technical requirements of the relevant Community harmonisation legislation in respect of a particular product. Before placing a product on the market, distributors must check whether it bears the CE marking, if it is accompanied by all the required documents in a language that is easily understood by consumers and other final users of the Member State in which the product is to be marketed, and that the manufacturer and importer have respected the regulatory requirements.

But how can you affix the CE marking if you do not have sufficient information on the technical directives relating to the product in question? Article 5.1**.**1 of the TBT Agreement stipulates that "conformity assessment procedures are prepared, adopted and applied so as to grant access for suppliers of like products originating in the territories of other Members under conditions no less favourable than those accorded to suppliers of like products of national origin or originating in any other country, in a comparable situation; access entails suppliers' right to an assessment of conformity under the rules of the procedure, including, when foreseen by this procedure, the possibility to have conformity assessment activities undertaken at the site of facilities and to receive the mark of the system."

ACP countries also face the problem of concluding **mutual recognition agreements regarding conformity assessment procedures** with the European Communities. Article 6.3 of the TBT Agreement states that: "Members are encouraged, at the request of other Members, to be willing to enter into negotiations for the conclusion of agreements for the mutual recognition of results of each other's conformity assessment procedures. Members may require that such agreements fulfill the criteria of paragraph 1 and give mutual satisfaction regarding their potential for facilitating trade in the products concerned."

The Communities claim that conformity assessment bodies in third countries may participate in the Community's assessment activities through Mutual Recognition Agreements (MRAs). Indeed, it was in that spirit that the European Communities negotiated MRAs with Australia, Canada, Israel, Japan, New Zealand, Switzerland and the United States. Brazil subsequently asked, in Question No. 34 to the European Communities, whether during the trade policy review, the Communities intended to negotiate similar mutual recognition agreements with developing countries. The written response to the question was clear: *it was not in the EC's plans to negotiate Mutual Recognition Agreements with developing countries.*[14]

III. Technical Obstacles to Trade: continuity and discrepancies in the EPAs

The following observations are based on a comparative study of the chapters dedicated to Technical Barriers to Trade in three EPAs, namely:

- Interim Agreement with a view to an EPA between Central Africa on one hand and the European Community and its Member States, on the other (2009/152/EC), published in the Official Journal of the European Union (L 57/2 on 28 February 2009;

[14] *See REPLIES Trade Policy Review, European Communities, 6 - 8 April 2009. Compilation provided by the WTO.*

- Stepping stone EPA between Côte d'Ivoire, on one hand, and the European Community and its Member States, on the other (2008/EC/CI of 26 November 2008); and
- Economic Partnership Agreement between the CARIFORUM States, on one hand, and the European Community and its member States, on the other **(**2008/805/EC) published in the Official Journal of the European Union (L 289/I/3) on 30 October 2008.

Legal analysis of these three Agreements reveals elements of continuity with regard to the objectives targeted by the EPAs, as well as a number of discrepancies based on the level of sensitivity attached to the issue of technical barriers to trade by the different ACP regions or countries concerned. The disparities in the treatment of technical barriers to trade in the three EPAs, which have been concluded by and between one single party, the European Community, and the ACP regions or countries, are not due to any oversight. For example, the solutions proposed in the Central Africa EPA, in response to the countries' needs in the areas of technical assistance and capacity building, are not always appropriate to their situation. We note, for instance, that the CARIFORUM EPA provides for the creation of centres of expertise to assess goods in view of their access to the Community market (Article 51.**2**b), while no such structures are expressly mentioned in the Central Africa EPA.

Regarding the structure of the three EPAs, in accordance with WTO-agreed practice, care has been taken in the CARIFORUM-EC EPA to separate the provisions relating to technical barriers to trade (Chap. 6) from those on sanitary and phytosanitary measures (Chap. 7).[15] However, in the Central Africa-EC and the Côte d'Ivoire-EC EPAs, one single chapter entitled "Technical Obstacles to Trade and Sanitary and Phytosanitary Measures,"[16] regroups a set of general provisions relating to those important disciplines.

A. Continuity in the EPAs with regard to technical barriers to trade

The three EPAs all contain certain common elements which indicate a desire to conform to spirit of the WTO's Technical Barriers to Trade Agreement:

- the commitment on the part of all the parties to conform to their multilateral rights and obligations to facilitate trade in goods, increase their capacity to identify, prevent and eliminate barriers to trade (resulting from technical regulations, standards and conformity assessment procedures) so as to protect health, safety, consumers and the environment (Articles 36 and 37 of Côte d'Ivoire EPA; Articles 40 and 41 of Central Africa EPA; Articles 44 and 45 of CARIFORUM EPA);
- to exchange information on standards and/or technical regulations so as to facilitate product conformity with technical regulations, standards and assessment procedures to enable access to each others' markets (Article 41.3 of Côte d'Ivoire EPA; Article 49.5 of CARIFORUM EPA);
- to exchange information as quickly as possible on measures taken to prohibit or hinder the importation of any good to address a problem relating to health, safety or the environment (Article 41.2 of Côte d'Ivoire EPA; Article 49.4 of CARIFORUM EPA);

[15] See CARIFORUM-EC EPA, Chap. 6 and Chap. 7.
[16] See the Interim EPA between the European Communities and Central Africa, Chap. 4;5 and 16); and the Stepping stone EPA between Côte d'Ivoire and the European Communities, Chap. 4.

- regarding regional integration, to gradually adopt technical regulations, standards and conformity assessment procedures that are harmonised at the regional level (within 4 years for Central Africa) based on relevant international standards (Article 43.2b of Côte d'Ivoire EPA; Article 46.1 of Central Africa EPA; Article 47 of CARIFORUM EPA);
- to cooperate and share expertise, including information and training with a view to conforming to the European Communities' standards, regulations and metrology (Article 51.2 of CARIFORUM EPA; Article 43 of Côte d'Ivoire EPA);

- to exchange information on products with export potential so as to ensure that they meet the required technical regulations and norms to facilitate access to their respective markets (Article 49.5 of CARIFORUM EPA; Article 41.3 of Côte d'Ivoire EPA; Article 47a and b of Central Africa EPA).

Last but not least, the final provisions of all the EPAs contain a general exception clause specifying that the provisions of the Agreement should not be construed as preventing the adoption or enforcement by the parties of measures that "are necessary to protect human animal or plant life or health."

There are, therefore, several nuances from one EPA to another which constitute a variable geometry with regard to the commitments, rights and obligations relating to technical barriers to trade between the European Communities and the ACP parties. The legal disparities in the treatment of technical barriers to trade from one EPA to another no doubt arise from the variables related to the negotiation process, the level of regional integration, and sensitivity to the TBT issue in the ACP regions concerned.

B. Disparity in the treatment of TBTs in the different EPAs

First of all, regarding transparency, which is the keystone of any process aimed at eliminating technical barriers to trade: while Article 48 of the CARIFORUM EPA stipulates that "the Parties shall endeavour to inform each other at an early stage of proposals to modify or introduce technical regulations and standards that are especially relevant to trade between the Parties," – which indicates the Caribbean negotiators' familiarity with the Community's winding process of creating TBT standards so that they could anticipate the consequences, propose amendments that take into account their interest or prepare to adapt to them. The Côte d'Ivoire EPA (Art. 41.6) is less specific, stating only that "the Parties agree to cooperate with a view to rapidly alerting each other when new regional rules might have an impact on mutual trade." Furthermore, Article 49.3 of the CARIFORUM EPA states that should such a situation arise, "the Parties shall inform and consult each other as early as possible, with a view to reaching a mutually agreed solution."

It is interesting to note that Article 45 (paras. 2 and 3) of the Central Africa EPA indicates that there is no provision for an early warning regarding amendments to regulations or standards. Indeed it seems that the multilateral practice is to be applied whereby the parties are obliged under the SPS and TBT agreements to inform each other of any amendments to the relevant standards and technical regulations by means of the mechanisms provided for therein. The question therefore is: What approach would Central Africa adopt should a draft European regulation prevent access to the Community market in respect of any given sector? What can be done, over and above simple information, to ensure that the interests and constraints of CEMAC economic operators are taken into account, for example? Indeed, it must be

underscored that the issuing of a Community directive is the final consequence of a very long-winded process involving various parties: Member States, the Commission, the Parliament, and interventions by legal experts, lobbyists, various interest groups, each trying to uphold its own interests.

Therefore, a Community directive is most often the result of intra-Community compromises which do not leave much time or space for extra-Community input. The Member States prefer to pay the price of retaliatory measures, as noted in the case of the long, drawn-out battle with the US over hormone-treated American beef. However, as a general rule, the Community bodies are usually reluctant to relaunch the long, laborious process of internal consultations for amendments when a directive has reached its final stage.

This is why the ACP advocates the setting up of an *all-ACP early-warning mechanism on TBTs* to reduce the issuing of directives that would destroy the already few access opportunities for ACP exports on the Community market. It was in that same spirit that the ACP countries considered it advisable to submit to the highest joint trade authority, the Joint ACP-EU Ministerial Trade Committee, which met in Brussels on 7 May 2009, the issue of the host of regulations, legislative proposals and other Community measures which would all effectively nullify the benefits the ACP countries could derive from duty-free, quota-free access to the Community market. Article 12[17] of the Cotonou Agreement, which recommends that consultations be held with the ACP side whenever the Community intends to take a measure that might affect the interests of the ACP States has, up to now, had little effect. This is due to the fact that the EC consults the ACP States well after decisions have been taken, in violation of the provisions of that article. The ACP side is of the opinion that it should be involved in the consultations from the initial stage so that the ACP Group's interests could be taken into account. In response to that concern, the European Commissioner for Trade, Baroness Ashton, has acknowledged that it is an important issue for which solutions should be found. She has promised to consider ways and means to improve the consultation mechanism and report on the matter at the next meeting of the Joint Ministerial Trade Committee.[18]

The second critical element is the imbalance in rights and obligations between the Central Africa party and the EC party which facilitates access for European goods to the CA market. Indeed, Article 46 of the Central Africa EPA is drafted in such a way that whether or not harmonised import conditions applicable to products originating in the EC exist in Central Africa, once a European product meets the national import conditions of any CEMAC State, it cannot be subject to any further restriction or administrative requirement for access to the markets of other signatory CEMAC States.[19] In other words, assuming that a product originating in the EC meets the manufacturing standards in effect in Europe, and given the institutional and standardisation inadequacies in most CEMAC Member States with regard to standards and conformity control, it is easy to see how the entire CEMAC domestic market

[17] *See Article 12, Cotonou Agreement.*

[18] *See the ACP Secretariat's Note concerning the 8th meeting of the Joint ACP-EU Ministerial Trade Committee held in Brussels on Thursday 7 May 2009 [ACP/61/27/09 Rev.1 of 22May 2009, p.2].*

[19] *Article 46.2 of CA EPA: "With a view to facilitating trade between the Parties and in conformity with Article 40, the signatory Central African States agree on the need to harmonise import conditions applicable to products originating in the territory of the EC Party when these products enter a signatory Central African State. Where national import conditions already exist at the time of this Agreement's entry into force, and pending the introduction of harmonised import conditions, the existing import conditions shall be implemented by the signatory Central African States on the basis that a product from the EC Party legally placed on the market of a signatory Central African State may also be legally placed on the market of all other signatory Central African States without any further restriction or administrative requirement."*

can become a reception zone for any European product, without the possibility of any CEMAC Member State being able to apply restrictions or administrative requirements. .

On the other hand, there is no mention anywhere of a similar obligation on the part of the EC in respect of CEMAC exports to the Community market. Indeed the EU Member States reserve the right to apply restrictions and administrative requirements in respect of the importation of products from third countries. The measures taken by Germany to *prohibit the importation, processing or place on the market of products derived from seals*[20] is but one example. In addition, among the problems encountered by the EC's trading partners and which were raised within the framework of "specific trade concerns" of the WTO TBT Committee is the existence of different criteria among the EC Member States according to which human and animal life and health are considered endangered. And even when a Community directive is issued, establishing rules to be applied by all, several countries have drawn the WTO Committee's attention to differences in the Member States' interpretation of Community directives that affect their exporters.

Article 46.2 therefore introduces an asymmetrical dimension to the treatment regarding access to the CEMAC market for products originating in the EC, and for products from CEMAC States to the Community market. As a result, the principle of equilibrium between the rights and obligations of the parties with regard to TBTs, which the EPA should be addressing, is in fact distorted. It is not surprising either to note that this provision is not contained in either the CARIFORUM or the Côte d'Ivoire EPA.

Building national and regional capacities with regard to standardisation and conformity assessment in order to meet regulatory and Community market requirements and, in particular with a view to achieving competitiveness, must, in our opinion, be an absolute priority in the TBT mechanism, if the market access capacity of ACP businesses is to be developed. This "horizontal" objective is not, however, treated is the same way in all the EPAs. While that objective is clearly provided for in Article 51.2c of the CARIFORUM EPA, and Article 43.2d of the Côte d'Ivoire EPA provides for capacity-building in all production sectors, it is limited to certain products in the Central Africa EPA.[21]

Examination of the provisions regarding the competent authorities for monitoring imports from ACP countries to the Community market indicates that no flexibility or special or more favourable treatment is applied to ACP exports despite those countries' slow development with regard to standards. It is invariably stated in the Appendices relating to Competent Authorities that the Member States of the European Community shall be responsible for monitoring the compliance of imports from the signatory ACP party with the <u>import conditions of the EC party</u>.

So why not make a general provision in all the EPAs for the development of centres of expertise to assess goods for the purpose of access onto the EC market, with the financial and technical support of the EC party, as was done by the Caribbean negotiators in their EPA?[22] That provision is all the more meaningful given the major disparities regarding technical regulations, standards and conformity assessment not only among ACP countries belonging to

[20] *See Notification G/TBT/N/DEU/5 and Add.1 in respect of Article 2.9.2.*
[21] *See Appendix IB of CA EPA: Priority products for export from the Central Africa party to the EC party: coffee, cocoa, spices (vanilla, pepper), fruit and nuts, vegetables, fish, fishery products and aquaculture products (fresh or processed) and timber.*
[22] *See Article 51.2.b of the Cariforum EPA.*

the same integration organisation, but also between the ACP countries and the European party. This is an area where not only mutualising intra-ACP energies is absolutely necessary, but, in particular, one where technical assistance from the European party is most indispensable.

Such a contribution from the EC, complemented by support from other development partners and specialised institutions, would have a decisive impact on developing the export potential and diversifying the economies of the ACP countries if the ultimate goal is to speed up their integration into the multilateral trade system. It is imperative that the ACP countries accede to the CE marking so as to turn around the gradual shrinking of the ACP share of the Community market, and enable the ACP countries to diversify their export markets. The ACP countries would do well to take a page from Asia's book. Indeed, one of the factors that contributed to Asia's commercial breakthrough was the delocalisation of European and American businesses which brought their standards with them. However, Asia's investment in R&D on standards and technical regulations also played a large part in increasing its share in the global manufactured goods market.

VI. Conclusion and proposals

A partnership that builds the capacities in ACP countries in the area of standards to meet current trade challenges and to prepare for future competition is, in my view, the most valuable contribution that the Communities could provide the ACP countries under the EPAs. It must be borne in mind that the processing of raw materials and the exporting of competitive manufactured goods generate wealth. Trade in manufactured goods alone accounts for 70% of world trade and, since the industrial revolution, has become the primary factor in the unequal distribution of wealth in the world. Therefore, to trade with the Communities, it is not enough to simply have competitive factors of production; the economic operators in ACP countries must also be able to handle the disguised barriers to trade that the many directives constitute. Furthermore, national structures that provide information on standards must be effectively operational.

A recent WTO National Enquiry Points list[23] indicates that only two CEMAC Member States, namely Cameroon and Central African Republic, have so far communicated the contact information for their **national enquiry points**. National enquiry points, which are required under the TBT Agreement,[24] are intended to provide accurate information on market access conditions to economic operators in third countries. They also often serve as an interface with other enquiry points for obtaining information required by national economic operators. They are also a transparency link with regard to draft legislation prepared by third States so that amendments to drafts that may be against national rights and interests can be negotiated.

[23] *G/TBT/ENQ/3/rev.1 dated 11/03/ 2009*

[24] *Article 10.1 of the TBT Agreement stipulates that "Each Member shall ensure that an enquiry point exists which is able to answer all reasonable enquiries from other Members and interested parties in other Members as well as to provide the relevant documents regarding […] any technical regulations, […] and standards, […] any conformity assessment procedures adopted or proposed within its territory." Article10.3 furthermore stipulates that "Each Member shall take such reasonable measures as may be available to it to ensure that one or more enquiry points exist which are able to answer all reasonable enquiries from other Members and interested parties in other Members as well as to provide the relevant documents or information as to where they can be obtained […]."*

Consultation of the WTO **TBT Standards Code** Directory, which was published jointly by ISO and IEC (International Electrotechnical Commission) on 1 January 2009, revealed that no CEMAC country had yet notified its acceptance of the *Code of good practice for the preparation, adoption and application of standards* (Annex 3 of TBT Agreement). The purpose of the Code is not to illustrate trade-related technical directives with a view to their effective implementation at national level, but rather to obtain the full participation of national organisations wishing to contribute to the process of standards formulation at international level.

Adjusting one's national production structure to bring it in line with current economic and commercial trends requires the will to tackle the challenge posed by the plethora of technical regulations, standards and conformity assessment procedures. By not adhering to the "Code of good practice for the preparation, adoption and application of standards," ACP countries are, in essence, cutting themselves off from the normative development of standards and expertise sharing which can only lead to their exclusion from the world economy. Accepting the Code would facilitate the implementation of ISO/IEC international standards at national level.

This is why standards can, in fact, be considered a testing ground for our European partners' will to accompany the ACP countries in their efforts towards a harmonious integration into the multilateral trade system. That support should at least be based on the European party's obligations in terms of providing technical assistance and special and differential treatment, by virtue of the TBT Agreement,[25] since it is the developed partner working with a conglomeration of developing and least-developed countries that constitute the ACP Group.

In the initial phase, we propose that the ACP countries take advantage of the following:

- technical assistance and capacity building opportunities offered by the EC to ACP countries (Trade.com and Aid for Trade) to become familiar with European standards and norms;
- the Community's assistance to create ACP national and regional organisations for standards and conformity assessment where none exists, and financing for full participation in the work of the international standards organisations;
- the creation of productive synergies between ACP countries, the Communities and specialised agencies, such as UNIDO or UNDP, which have specific programmes on standards and norms;
- the Community's support to set up metrology infrastructure projects (legal metrology, as well as facilities for calibrating laboratory equipment that can be used to ensure traceability) so that products can be tested with equipment that is technically up-to-date;
- training and upgrading of skills in standardisation and conformity assessment structures to be in line with technological expansion in ACP businesses. Improvement of the institutional framework, infrastructures and personnel expertise could pave the way for mutual recognition agreements in the area of conformity assessment between ACP countries and the European Community, which is, at the moment, reluctant to conclude MRAs with developing countries. Such investments are unavoidable if the quality of the products exported by ACP countries is to improve.

[25] *See Articles 11 and 12 of the TBT Agreement on technical assistance and special and differential treatment of developing country members.*

With regard to access to the Community market, which is at the heart of ACP concerns, the TBT Agreement requires that Members take account of the special development, financial and trade needs of developing country Members, in the preparation and application of technical regulations, standards and conformity assessment procedures, with a view to ensuring that such technical regulations, standards and conformity assessment procedures do not create unnecessary obstacles to exports from developing.[26] Article 12.7 of the TBT Agreement further specifies that the technical regulations, standards and conformity assessment procedures thus prepared should "not create unnecessary obstacles to the expansion and diversification of exports from developing country Members." It is therefore up to the European Communities to honour the international commitments that they have agreed if the goal of the EPAs is indeed to stimulate development and facilitate access to the Community market for ACP exports. That can only come about if the development goals of the ACP countries remain the primary objective targeted by the implementation of the EPAs.

Achille BASSILEKIN
Geneva, 22 June 2009

[26] *Article 12, TBT Agreement.*