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# The Trade and Development Policy of the European Union

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## Abstract

*This article examines the EU's trade and development policy from the 1950s to the present day. From its origins in France's demand that the EEC join in its colonial enterprise, this policy has grown to embrace all developing countries in a complex patchwork of trade preferences. However, it would be wrong to see this status quo as the natural evolution of an early interest in assisting developing countries. Rather, the EU's system of trade preferences represents a compromise between its desire to protect the economic interests of the erstwhile colonies and the demands of non-privileged developing countries for improved access to European markets. From a development perspective, this produces anomalies. Even today, via more favourable rules of origin, Sudan trades on better terms with the EU than Laos. However, as this article seeks to demonstrate, due largely to enforceable WTO rules, the EU is now coming to adopt principle – the actual needs of developing countries – over history as the basis for its future trade and development policy.*

## 1 Introduction

From the outset, the vision for the European project included a role for developing countries. In his speech of 9 May 1950, entitled 'A United States of Europe', Robert Schuman said that:

*This production [of coal and steel] will be offered to the world as a whole without distinction or exception, with the aim of contributing to raising living standards and to promoting peaceful achievements. Europe, with new means at her disposal, will be able to pursue the realisation of one of her essential tasks: the development of the African Continent.<sup>1</sup>*

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<sup>1</sup> Schuman, 'A United States of Europe', reprinted in *Selection of Texts Concerning Institutional Matters of the Community from 1950 to 1982* (1982), 47–48; available at: [www.ena.lu?lang=2&doc=613](http://www.ena.lu?lang=2&doc=613). Interestingly, the italicized sentence (and only this sentence) is omitted from the text of the speech reproduced on the EU website at [http://europa.eu/abc/symbols/9-may/decl\\_en.htm](http://europa.eu/abc/symbols/9-may/decl_en.htm).

This objective did not find any expression in the 1952 European Coal and Steel Community (ECSC) Treaty, but the 1957 European Economic Community (EEC) Treaty, using an uncannily similar terminology, listed as one of the Community's activities 'the association of the overseas countries and territories in order to increase trade and to promote jointly economic and social development'.<sup>2</sup> In the last 50 years, this 'association', originally comprised of mainly French African dependencies, has become a 'partnership' with a vastly increased number of independent countries, and has seen itself flanked by a variety of other trade arrangements for developing countries. Nonetheless, special privileges for historically linked countries are still a prominent feature of the European Union's trade and development policy. Even today Samoa and Sudan enjoy better access to the EU market (by virtue of more generous rules of origin) than Laos and Cambodia.

This selectivity in the EU's trade and development policy has come under pressure in recent years. This is in part the result of more strictly enforced World Trade Organization (WTO) rules, which tend to disfavour discriminatory trading policies. It is also due to a gradual change in the justification offered for the EU's policy. The primacy once given to historical links is increasingly being replaced by a focus on the actual development needs of beneficiary countries.<sup>3</sup> Thus the Constitutional Treaty for Europe promises that in its external policies the EU will 'encourage the integration of *all* countries into the world economy' and 'ensure consistency between the different areas of its external action and between these and its other policies'.<sup>4</sup> Even the 2005 EU Strategy for Africa, a necessarily limited programme, gives its principal objective as 'promoting the achievement of the UN Millennium Development Goals (MDGs) in Africa'.<sup>5</sup> Finally, the EU's historical approach is coming under pressure in the context of the WTO Doha Development Agenda, where developing countries are demanding results from the multilateral trading system.

Taken together, these factors have led to ongoing reforms to the EU's trade and development policy, in areas ranging from its Common Agricultural Policy, its Generalized System of Preferences for developing countries, its preferential rules of origin, and the Economic Partnership Agreements (EPAs) foreseen to replace the trade arrangements set out in the 2000 Cotonou Agreement. The main challenge for the EU is how to achieve a trade and development policy that meets three conditions: it must be justified in terms of economic needs, it must be WTO compatible, and it must be sensitive to the needs of those countries which have become dependent on historical preferences.

<sup>2</sup> Art. 3(k) EEC Treaty; now Art. 3(s) EC.

<sup>3</sup> For an explanation based on changes in the EU's membership see Lesage and Kerremans, 'The Political Dynamics Behind US and EU Trade Initiatives Towards the Least Developed Countries', in G. Faber and J. Orbie, *European Union Trade Politics and Development: Everything But Arms Unravelling* (2007).

<sup>4</sup> Art. III-193(2)(e) (emphasis added) and Art. III-193(3) para 2 TCE.

<sup>5</sup> European Commission, *EU Strategy for Africa: Towards a Euro-African Pact to Accelerate Africa's Development*, COM(2005)489 final, 12 Oct. 2005, 3.

## 2 Origins

### A The French Union

The EU's trade and development policy has its origins in the French Union, an entity established after the war with the aim of placing the French Empire on a more modern footing.<sup>6</sup> The French Union had a common currency, high tariffs, guaranteed internal prices and, not surprisingly, a high degree of internal trade. In 1958, the French Union accounted for 37.5 per cent of French exports and 27.6 per cent of French imports,<sup>7</sup> and around seven per cent of the French population was involved in the colonial trade.<sup>8</sup> A number of traditional French industries were almost completely dependent on colonial markets. Eighty per cent of French exports of processed groundnut oil, refined sugar, cotton textiles and soap, and over 50 per cent of French exports of silks, clothing, cement and metal goods went to the colonies.<sup>9</sup>

Nonetheless, even if the colonies were good for certain French industries, it was not so clear that they were good for France as a whole.<sup>10</sup> In the immediate term, exports from the colonies were in decline, due to saturated French markets and declining world commodity prices,<sup>11</sup> and it was becoming expensive for France to make up the shortfall in colonial revenue, as it had been accustomed to do. In the longer term, changes in the structure of French industry also left the colonies in a weak situation. For France, imports of basic manufacturing materials were becoming available more cheaply from non-colonial sources,<sup>12</sup> and the colonies were also becoming much less important as markets for newer French industries. In higher value sectors of transport equipment, chemicals and manufactured goods, it was other developed countries, and Germany in particular, that were the natural export markets.<sup>13</sup>

<sup>6</sup> The French Union was established in the French Constitution of 27 Oct. 1946. The French Union included France (and its overseas departments), the African colonies (on which see *infra* note 24), a North African group, and an Indo-Chinese group. In the Constitution of 4 Oct. 1958 the French Union was reconfigured as the 'French Community'.

<sup>7</sup> J.P. Agarwal, *Die Assoziierung der überseeischen Staaten und Gebiet mit der Europäischen Wirtschaftsgemeinschaft und die Auswirkung dieser Assoziierung auf die Ausfuhr der nichtassozierten Entwicklungsländer in diese Gemeinschaft* (1966), 9, based on OECD figures; cf figures for 1954 in T. Hayter, *French Aid* (1966), 61.

<sup>8</sup> Ndongko, 'The Economic Origins of the Association of Some African States with the European Economic Community', 16 *African Studies Review* (1973) 219, at 225 n. 2, quoting P Moussa, *L'économie de la Zone Franc* (1960).

<sup>9</sup> Fieldhouse, 'The Economics of French Empire', 27 *Journal of African History* (1986) 169, at 170.

<sup>10</sup> F. Lynch, *France and the International Economy: from Vichy to the Treaty of Rome* (1997), 199. This was also recognized in the Jeanneney Report, commissioned in 1963 by the French Government, which distinguished between economic and 'real' (mainly humanitarian) reasons for continuing the association: *La politique de coopération avec les pays en voie de développement*, Rapport de la Commission d'Étude instituée par le décret du 12 mars 1963, remis au Gouvernement le 18 juillet 1963 (the 'Jeanneney Report'). An abridged translation is available as Overseas Development Institute, *French Aid: The Jeanneney Report* (1964).

<sup>11</sup> C. Cosgrove Twitchett, *Europe and Africa: From Association to Partnership* (1978), 10; Agarwal, *supra* note 7, at 9–11; Hayter, *supra* note 7, at 73–77.

<sup>12</sup> Fieldhouse, *supra* note 9, at 170.

<sup>13</sup> Comment by Lucia Coppolaro. For discussion of the economic importance of European regionalism at the time see L. Coppolaro, *The United States of America and the European Economic Community in the GATT Negotiations of the Kennedy Round (1962–1967)* (PhD Dissertation, EUI, 2006), at 74–83.

And yet, despite these economic considerations, it was politically inconceivable for France to abandon its colonies. This was not just for humanitarian reasons, as one might understand these in a modern sense, but rather thanks to the notion of ‘Eurafrica’, according to which France and its territories formed a cultural unity.<sup>14</sup> Thus could Michel Debré, the future French Prime Minister, claim that:

France is not only a European territory, she is not only a European nation; she is also an African nation, a musliman power, and her citizens embrace not only many religions but many races. The French Union forms a whole, a single legal conception.<sup>15</sup>

For political reasons, an economically sustainable solution needed to be found that would protect the colonial relationship. Fortunately, such a solution came to hand in the form of the European Economic Community. France saw that if the colonies could be brought into this arrangement, they could gain an enlarged and protected export market for their products, and (with luck) France might additionally be able to shift the direct financial burden of maintaining them to its new European partners. This idea was obviously more attractive to France than to the other European partners in this project, and so France put forward a number of propositions to win them over. It suggested broadening the scope of association to include some (but not all) of their territories,<sup>16</sup> it offered new colonial export markets for Community exports, and, though less convincingly, it attempted issue linkage, claiming that new competition from Germany would leave it unable to afford the colonies.<sup>17</sup> Somewhat unbelievably, France even tried to sell its new partners the notion of ‘Eurafrica’, with Premier Mollet claiming at one point that:

Algeria [is the] foundation of the large Franco-African whole [*ensemble francoafricain*] of a new type, based on a community of cultural, economic, strategic, and political interests, which is in preparation. More than a Franco-African whole, it is a Euro-African whole [*ensemble eurafricain*] which we must talk about. ... It is Europe in its entirety which will be called to aid in the development of Africa, and it is Eurafrica which can become tomorrow one of the essential factors in world politics.<sup>18</sup>

These arguments in favour of association were met with a certain degree of scepticism. The advantages of new market access in the colonies seemed minor, given that a number of these colonies were in any case required under international treaties to trade

<sup>14</sup> See, generally, Martin, ‘Africa and the Ideology of Eurafrica: Neo-Colonialism or Pan-Africanism?’, 20 *Journal of Modern African Studies* (1982) 221 and Kawasaki, ‘Origins of the Concept of the “Eurafrican Community”’, available at: [www.kasei.ac.jp/library/kiyou/2000/2.KAWASAKI.pdf](http://www.kasei.ac.jp/library/kiyou/2000/2.KAWASAKI.pdf). Economically, ‘Eurafrica’ was understood to be based on a division between cheap land and labour in Africa and skills and capital in Europe: Martin, *supra*, at 222. E. Grilli, *The European Community and the Developing Countries* (1994), at 332–333, notes the tension between this view and the notions of development expressed in the EEC Treaty.

<sup>15</sup> *Assemblée ad hoc: Debats*, 10 Mar. 1953, at 510; quoted in Cosgrove Twitchett, *supra* note 11, at 5.

<sup>16</sup> The proposed association included the two Belgian territories, Italian Somaliland (due for independence in 1960) and Netherlands New Guinea, but not the Netherlands Antilles, whose petroleum refining industry (based on Venezuelan crude oil) competed with French production. See W. Gorrell Barnes, *Europe and the Developing World: Association under Part IV of the Treaty of Rome* (1967), at 25, and *infra* note 87.

<sup>17</sup> Statement on 20 Dec. 1956 by French Premier Mollet, *Marchés Tropicaux du Monde*, 29 Dec. 1956, 3422 (trans. Kawasaki) in Kawasaki, *supra* note 14, at 23.

<sup>18</sup> *Le Monde*, 11 Jan. 1957, 7 (trans. Kawasaki) in Kawasaki, *supra* note 14, at 23.

on a non-discriminatory basis<sup>19</sup> and that French interests would most likely continue to be protected under unregulated marketing arrangements.<sup>20</sup> Moreover, the costs appeared significant. Belgium took 40 per cent of its tropical products from its colonies, but the others would be forced to abandon their traditional (and cheaper) suppliers of these products.<sup>21</sup> The additional suggestion that the other 'Five' should pay financial aid to support the French Empire was also widely derided, and it did not go unnoticed that any such aid would effectively be a subsidy to the French Algerian war. Not surprisingly, of the 'Five' only Belgium supported the French proposal. Germany and the Netherlands were vigorously opposed, and Luxemburg and Italy were no more than lukewarm.<sup>22</sup>

Despite these objections, France won the day, though not so much through force of argument as through determined negotiating tactics. The emergence of the French demand for association at the very last of negotiations on the EEC Treaty in May 1956 was sudden and unexpected, and when France made it clear that this was a deal-breaker, the other 'Five' had little choice. Agreement was reached on 20 February 1957, and the Treaty of Rome, signed a month later, essentially reflected French demands.<sup>23</sup>

## B *The Treaty of Rome*

As mentioned, Article 3 of the Treaty of Rome describes one of the 'activities' of the European Economic Community as 'the association of the overseas countries and territories',<sup>24</sup> in order to increase trade and to promote jointly economic and social development'.<sup>25</sup> The aims of association were described as follows:

<sup>19</sup> Belgian Congo, Rwanda-Burundi, French Equatorial Africa (by virtue of the 1883 Congo Basin Treaties) and Togo, Cameroon and Italian Somaliland (by virtue of Trusteeship Agreements) were bound to trade on a non-discriminatory basis.

<sup>20</sup> See E. Becher, *Das Assoziierungsverhältnis zur Europäischen Wirtschaftsgemeinschaft* (PhD dissertation, Freie Universität Berlin, 1963), at 213. History proved this to be correct: even with colonial non-discrimination obligations for Community imports from 1960 to 1969 the share of the other five Member States grew from 21% to just 25%: Kreinin, 'Some Economic Consequences of Reverse Preferences', 11 *JCMS* (1973) 161, at 171. A cultural explanation for the dominance of French exports is also given by Soper, 'A Note on European Trade with Africa', 67 *African Affairs* (1968) 144, at 146. See also *infra* note 37.

<sup>21</sup> Germany imported only 3% of its tropical products (coffee, cocoa and bananas) from the colonies and the remainder largely from Brazil and Ghana, and the Netherlands, Luxemburg, and Italy were in a similar situation: Wells, 'The EEC and Trade with Developing Countries', 4 *JCMS* (1965) 150, at 157.

<sup>22</sup> The plan was set out in a joint Franco-Belgian memorandum of 11 Oct. 1956: R. Lemaignen, *L'Europe au berceau* (1964), at 20; cited in Cosgrove Twitchett, *supra* note 11, at 11.

<sup>23</sup> The Spaak Report on the EEC, submitted on 21 Apr. 1956, made no mention at all of Africa, and it was only on 29 May 1956, the first day of the Venice Conference of Foreign Ministers, at which this Report was considered by the EEC Foreign Ministers, that France demanded association. The story is retold by several authors, including Cosgrove Twitchett, *supra* note 11, at 7–9.

<sup>24</sup> Annex IV to the EEC Treaty lists these as: French West Africa (eight territories: Senegal, French Sudan (now Mali), French Guinea (now Guinea), Ivory Coast, Dahomey (now Benin), Mauritania, Niger and Upper Volta (now Burkina Faso)); French Equatorial Africa (four territories: Middle Congo, Ubangui-Sari, Chad and Gabon); French Togoland; Belgian dependent territories (two territories: Belgian Congo, Rwanda-Burundi); Italian territory (Somaliland); Netherlands dependent territory (New Guinea); other French dependencies (St Pierre and Miquelon, the Comoros Archipelago, Madagascar and dependencies, French Somaliland, New Caledonia and dependencies, French settlements in Oceania, Southern and Antarctic Territories).

<sup>25</sup> Art. 3(k) EEC Treaty; now Art. 3(s) EC. It is notable that the 'tasks' of the EEC in Art. 2 EEC Treaty are focused on domestic matters.

The Member States agree to associate with the Community the non-European countries and territories which have special relations with Belgium, France, Italy and the Netherlands. These countries and territories (hereinafter called the 'countries and territories') are listed in Annex IV to this Treaty.

The purpose of association shall be to promote the economic and social development of the countries and territories and to establish close economic relations between them and the Community as a whole.

In accordance with the principles set out in the Preamble to this Treaty, association shall serve primarily to further the interests and prosperity of the inhabitants of these countries and territories in order to lead them to the economic, social and cultural development to which they aspire.<sup>26</sup>

The obligations were set out in Part IV of the Treaty, which created the 'association' on a permanent basis, and the more sensitive obligations were set out (for precisely this reason) in an Implementing Convention limited to five years' duration.<sup>27</sup> The core provisions concerned free trade between the respective territories, investment,<sup>28</sup> and development aid.

As far as trade was concerned, the association built on the system of market access established for the EEC Member States in the EEC Treaty, which sought to achieve internal free trade within the EEC over a transitional period of 12 years by gradually reducing duties and quantitative restrictions.<sup>29</sup> The reduction in quantitative restrictions was to be achieved by a prohibition on new quantitative restrictions<sup>30</sup> and a staged increase in restriction-free quotas, a 100 per cent quota being equivalent to the complete elimination of quantitative restrictions.<sup>31</sup>

This system was largely transposed to trade between the Member States and the overseas territories.<sup>32</sup> On the EEC side, all of these obligations were applied to trade

<sup>26</sup> With the addition of the UK to the list of Member States in para. 1, and the change in cross-reference from Annex IV to Annex II, this provision (now numbered Art. 182) is exactly the same in the current version of the EC Treaty.

<sup>27</sup> The Implementing Convention (IC) was provided for in Art. 136 EEC and was included at German insistence. Its duration was limited for a number of reasons: the political future of the territories was uncertain (Italian Somaliland was due for independence in 1960; and Cameroon, Togo and Rwanda-Burundi were under nominal UN jurisdiction: Cosgrove Twitchett, *supra* note 11, at 19). It was also unrealistic to expect continuing development aid commitments; and the entirely experimental nature of the system suggested that there should be a sunset clause on the proposed arrangements: *ibid.*, at 17.

<sup>28</sup> Part IV set up the principle of the mutual right of establishment between the Member States and the territories (Art. 132(5) EEC) though to be implemented gradually (Art. 8 IC). This principle was introduced at the insistence of Germany, which hoped thereby to break into the colonial markets: Cosgrove Twitchett, *supra* note 11, at 24–25. Part IV also established the principle of free movement of OCT workers in the Member States, to be governed by later agreement between the Member States (Art. 135 EEC). No such agreement eventuated and the subject was abandoned. See Gorrell Barnes, *supra* note 16, at 14.

<sup>29</sup> Arts 13 and 14 EEC (duties) and Arts 32–33 EEC (quotas); Art. 8(1) EEC (transitional period).

<sup>30</sup> Arts 30 and 34 EEC.

<sup>31</sup> Arts 31–35 EEC.

<sup>32</sup> Though see *infra* note 71 for the non-transposition of obligations on internal taxes. For a very useful discussion, see UN Economic Commission for Africa, *The Impact of Western European Integration on African Trade and Development*, A/CN.14/72, 7 Dec. 1960.

with the overseas territories.<sup>33</sup> On the other side, the territories (except those bound to trade on a non-discriminatory basis)<sup>34</sup> were to reduce duties<sup>35</sup> and open up quotas for EEC imports according to the standard transitional timetable,<sup>36</sup> but, by implication, were still permitted to impose quantitative restrictions on non-quota imports. This was significant, as it was primarily by these means that the position of French products in the associates' market would be secured.<sup>37</sup> There were also some obligations with respect to inter-territory trade: here duties but not quantitative restrictions were to be reduced.<sup>38</sup> Finally, there was provision for infant industry protection: the territories could impose 'customs duties which meet the needs of their development and industrialisation or produce revenue for their budgets'.<sup>39</sup> This exception (which was reproduced in the two later Yaoundé Conventions)<sup>40</sup> was controversial within the GATT, but in fact it was only once invoked during the life of these three instruments.<sup>41</sup>

This arrangement was completed by a protectionist EEC Common External Tariff (CET), which imposed high tariffs on products of interest to the associates. These included coffee and cocoa, to the disadvantage of Brazil, Colombia, Ghana, Nigeria and Uganda, and bananas, to the disadvantage of Ecuador, Honduras and Costa Rica. To lessen the blow, some EEC Member States were permitted to import reduced-duty products from third countries. Italy and the Benelux countries were permitted to import a quota of reduced-duty coffee and Germany was permitted to import its traditional quantities of duty-free bananas.<sup>42</sup> In many cases, these tariffs were lower than the former French tariff but still higher than the average of the rates actually applied by all EEC Members.<sup>43</sup>

These privileged arrangements did not apply to all of the territories with which the Community Member States had special links, in particular, the North African members of the French Union. But these territories were not wholly abandoned: a so-called 'Morocco

<sup>33</sup> Arts 9 IC, 133(1) EEC (duties), and 10 IC (quotas). As the Implementing Convention was for a shorter period (5 years) than the transitional period (12 years), Art. 14 IC provided that the quotas in existence after 5 years would remain in effect after its expiry.

<sup>34</sup> Art. 133(4) EEC. These are listed *supra* at note 19.

<sup>35</sup> In Case C-260/90, *Le Plat v. French Polynesia* [1992] ECR I-643, para. 15, the ECJ interpreted the term 'duties' in this provision to include measures of equivalent effect.

<sup>36</sup> Arts 9 IC and 133(2) EEC (duties), and Art. 11 IC (quotas). See also Art. 14 IC.

<sup>37</sup> Becher, *supra* note 20, at 212-215.

<sup>38</sup> Art. 133(2) EEC.

<sup>39</sup> Art. 133(3) EEC.

<sup>40</sup> Art. 3(2)(2) and Prot. 1 Art. 4 Yaoundé I and Art. 3(2) and Prot. 2 Yaoundé II.

<sup>41</sup> Senegal imposed customs duties (and quotas) in 1960 in response to a loss of market in Mali which were unauthorized but not contested: A. Rivkin, *Africa and the European Common Market: A Perspective* (2nd edn., 1966), at 9 n. 3. Concerning the non-invocation of this provision in Yaoundé I see Convention of Association between the European Economic Community and the Associated African and Malagasy States - Questions and Replies, GATT Doc L/3425, 12 Aug. 1970, 11, and concerning its non-invocation in Yaoundé II see Biennial Report on the Association between the European Economic Community and the African and Malagasy States - Communication from the Parties to the Agreement, GATT Doc L/3792, 24 Jan. 1973, 1.

<sup>42</sup> Art. 15 IC and Protocols on bananas and coffee.

<sup>43</sup> See *infra* note 99.

Protocol' provided for the continuation of existing market access (limited to individual Member States) to Surinam and the Netherlands Antilles (Netherlands), Libya and Somaliland (Italy), and Morocco, Tunisia, Vietnam, Cambodia, Laos, and the New Hebrides (France). All of these were also named in Declarations of Intent on eventual association.

### C *The Yaoundé Conventions*

Only a few years after the entry into force of the EEC Treaty, most of the African territories covered by Part IV declared independence. Guinea was the first to do so in 1958,<sup>44</sup> followed in January 1959 by Senegal and Mali, and the process was complete by 1962.<sup>45</sup> Reflecting their new status, in 1963 a new five-year international agreement, the Yaoundé Convention, was concluded between all of these countries,<sup>46</sup> except for Guinea,<sup>47</sup> and this was followed by the five-year Yaoundé II Convention in 1969. For the remaining dependent territories, Part IV continued to apply and a Decision was taken providing for more or less the same benefits as under the Yaoundé Convention.<sup>48</sup>

The most important difference between these treaties and Part IV was institutional. Befitting a treaty between independent countries, the Yaoundé Conventions were adorned with an Association Council, an Association Committee, a Parliamentary Conference and a Court of Arbitration. But the significance of these institutions was more cosmetic than real. The political institutions had little to decide, as most of the important matters were regulated in the treaty,<sup>49</sup> and the power differential between the EEC and the associates made it unlikely that recourse would often be had to the judicial tribunal – an impression borne out by the complete inactivity of this institution over the last 40 years. On substantive matters, two Yaoundé Conventions continued the main themes of Part IV of the EEC Treaty. At German and Dutch insistence,<sup>50</sup>

<sup>44</sup> Guinea refused to join the French Community on 28 Sept. 1958. In response, France abandoned the country, leaving it without even light bulbs and telephone wire: T. Hayter, *French Aid* (1966), at 30.

<sup>45</sup> Except for the French Somali Coast.

<sup>46</sup> These countries (known as the African and Malagasy States) were Burundi (formerly part of Rwanda-Burundi), Cameroon, Central African Republic, Chad, Democratic Republic of Congo, Congo (Brazzaville), Dahomey (now Benin), Gabon, Ivory Coast, Madagascar, Mali (formerly part of French Sudan), Mauritania (formerly part of French Sudan), Niger, Rwanda, Senegal, Somalia, Togo, Upper Volta (now Burkina Faso). Mauritius joined Yaoundé II in 1973; see *infra* note 93.

<sup>47</sup> The legal basis of the Yaoundé I Convention was a matter of some dispute. France sought continuity, and (supported by the European Commission) argued that Part IV could continue as the legal basis, while others considered the association provision, Art. 238 (now Art. 310), to be more appropriate. The debate is discussed in van Benthem van den Bergh, 'The New Convention of Association with African States', 1 *CML Rev* (1963) 156, at 163; Feld, 'The Association Agreements of the European Communities: A Comparative Analysis', 19 *Int'l Org* (1965) 223; and Sciolla-Lagrange, 'The Preferential Areas Associated with the European Economic Community', in D. Thompson (ed.), *The Expansion of World Trade: Legal Problems and Techniques* (1965), at 43.

<sup>48</sup> Council Dec. 349/64 [1964] JO 93 1472.

<sup>49</sup> Feld, *supra* note 47, at 243, considers these institutions weaker than those in the Greece and Turkey association agreements and considers their main function to be psychological, in 'bolster[ing] the self-respect and confidence of the African members'.

<sup>50</sup> This was a French concession in exchange for continuation of the association. See Van Benthem van den Bergh, *supra* note 47, at 162–164.



the external tariff was reduced on imports of tropical products,<sup>51</sup> and the associates were compensated by immediate duty-free access on the same products.<sup>52</sup> With one major exception, all other products continued to benefit from continuing intra-EEC liberalization,<sup>53</sup> which was completed, ahead of schedule, in 1966.<sup>54</sup>

The exception concerned products covered by the newly established Common Agricultural Policy (CAP), which was designed to protect Community agricultural producers. In Yaoundé I the Community undertook 'to take the interests of the Associated States into consideration',<sup>55</sup> while in Yaoundé II, it made the somewhat different promise that 'treatment which the Community applies to these products shall be more favourable than the general treatment applied to like products originating in third countries' unless 'the economic situation of the Community so justifies'.<sup>56</sup> In practice, the associates continued to receive a measure of preferential treatment, ranging from equivalent treatment to Member State products to reductions on the 'variable levies' charged at the border.

On the other side, there was also – at least in theory – a strong measure of liberalization. Under Yaoundé I the associates continued to reduce duties and open quotas for EEC products<sup>57</sup> and undertook to abolish all quantitative restrictions within four years.<sup>58</sup> Yaoundé II contained full obligations to eliminate duties and quantitative restrictions.<sup>59</sup> As under Part IV of the EEC Treaty, trade restrictions for development reasons were permitted, and now allowed for both quotas and duties for this purpose.<sup>60</sup> In fact, such trade restrictions were barely applied during the course of these treaties.<sup>61</sup> One change from Part IV was that the Yaoundé Conventions abandoned

<sup>51</sup> For figures see GATT Doc L/3425, *supra* note 41, Annex III. Duties on tea and tropical hardwoods were suspended by the EEC (and the UK) on 1 Jan. 1964; see Gorrell Barnes, *supra* note 16, at 17. The German banana quota was retained; Italy and the Benelux countries (gradually in the latter case) lost their duty-free coffee quota.

<sup>52</sup> The products concerned were pineapples, coconut, coffee, tea, uncrushed pepper, vanilla, uncrushed cloves, unground nutmeg, and cocoa beans. See Art. 2(2) and Annex Yaoundé I.

<sup>53</sup> Arts 2(1) (duties) and 5(1) (quantitative restrictions) Yaoundé I. Yaoundé II, which was signed 3 years later in 1969, contained simple prohibitions on duties and quantitative restrictions: Arts 2(1) (duties) and 6(1) (quantitative restrictions).

<sup>54</sup> Council Dec. 66/532 (the 'Acceleration Decision') [1966] JO 165 2971.

<sup>55</sup> Art. 11(1) Yaoundé I.

<sup>56</sup> Prot. 1 Art. 1 Yaoundé II.

<sup>57</sup> The timetables were slowed slightly: see Art. 2 and Prot. 1 (duties) and Art. 6(1) and Prot. 2 (quantitative restrictions) Yaoundé I.

<sup>58</sup> Art. 5(1) Yaoundé I.

<sup>59</sup> Arts 3(1) (duties) and 7(1) (quantitative restrictions) Yaoundé II. By 1965, 13 of the 18 associates had removed all duties on EEC imports: Report of the Working Party on EEC/Association of African and Malagasy States and of Non-European Territories, GATT Doc L/2441, 3 June 1965, para. 5.

<sup>60</sup> Art. 6(3) Yaoundé I; Art. 7(2) Yaoundé II.

<sup>61</sup> Duties were not applied, and, while quotas were occasionally applied, this was only on insignificant trade: see GATT Doc L/3425, *supra* note 41, at 11 and GATT Doc L/3792, *supra* note 41, at 1–3 (up to 1973).

the obligation to liberalize trade among the associates,<sup>62</sup> this being recast as a permission to form Yaoundé-compatible regional trade agreements.<sup>63</sup>

### D Reciprocity

One of the striking features of these trade arrangements was their reciprocity in trade liberalization. In modern times, reciprocity in trade relations is justified on both economic and political economy grounds: put simply, it benefits the country granting the trade concessions, and it additionally gives this country a means of extracting trade concessions from the other party (which should of course be granting concessions in its own interest).<sup>64</sup> At the time of the Yaoundé Conventions, however, the main reasons given for reciprocity were ideological. First, it was said that only with mutual obligations could Africa negotiate as an ‘equal’ with Europe; second, that these obligations went ‘beyond’ mere contractual relations; and third, that these obligations were essential to ensure that Africa did not fall under the sway of a (non-French) economic power. These arguments were advanced not just by France, but also by Francophone Africa, and by Senegal in particular. One British official at the time, after a conversation with a French diplomat, described the French attachment to these concepts as ‘theological’.<sup>65</sup> There was, however, also a practical effect to these preferences, which was to benefit the (mainly) French exporters, who tended to be monopolists, and therefore able to keep prices high despite their low export costs. Even with reverse preferences, prices were on average substantially higher in the associated countries than in comparable countries that did not grant preferences to European producers.<sup>66</sup> But aside from France and Francophone Africa, the concept of reciprocity was not a popular one, and, as will be described shortly, this came to have implications for its continuation in later arrangements.

Reciprocity under the Yaoundé Conventions (and under Part IV of the EEC Treaty) was also theological in another way: it was a concept hard to identify in practice. With minor exceptions, trade between the Community and the associates did not involve products competitive in their respective markets (a fact that is also reflected in the fact that their safeguards clauses<sup>67</sup> were never invoked).<sup>68</sup> This meant that it was possible for both sides to impose high non-discriminatory taxes on these products without harming domestic

<sup>62</sup> Intra-territory trade was insignificant to begin with, and it is questionable (as always) whether the absence of liberalization was a major factor in its failure to develop. It increased from just 1% in 1960 to 6% in 1969: Kreinin, *supra* note 20, at 171. On the other hand, Grilli, *supra* note 14, at 147–148, considers that this hindered the economic development in the associates, a view borne out by modern regional initiatives.

<sup>63</sup> Arts 8 and 9 Yaoundé I permitted Yaoundé-consistent agreements between the associates; and Arts 12–14 Yaoundé II permitted agreements between the associates as well as Yaoundé-consistent agreements between these and other countries.

<sup>64</sup> Additional arguments apply in the context of regional trade agreements, which necessarily harm third countries. See *infra* at text to note 292.

<sup>65</sup> This summary and the anecdote are taken from A. Milward, *Politics and Economics in the History of the European Union* (2005), at 97.

<sup>66</sup> Kreinin, *supra* note 20, at 167.

<sup>67</sup> Art. 13 Yaoundé I and Art. 16 Yaoundé II. There was no equivalent clause under the EEC Treaty.

<sup>68</sup> GATT Doc L/3425, *supra* note 41, at 15 (for Yaoundé I) and Young, ‘Association with the EEC: Economic Aspects of the Trade Relationship’, 11 *JCMS* (1972) 120, at 122 (up to 1972).

production. And both sides did this: the associates adopted a practice of applying 'revenue' duties on imports from all sources, including from the Community,<sup>69</sup> and the Community Member States imposed high taxes on tropical products. The revenue implications for the associates are clear, but even for a number of Community Member States they were significant: for example, in 1958 Germany's internal tax on coffee, which was four times its customs duty, accounted for 2 per cent of government revenue.<sup>70</sup>

So long as they were non-discriminatory, such taxes were not illegal on the side either of the Member States<sup>71</sup> or the associates.<sup>72</sup> However, politically they posed a problem. While the Community was relatively relaxed about the revenue duties imposed by the associates, this feeling was not mutual.<sup>73</sup> In Yaoundé I the associates managed to extract from the Community a declaration of intent to investigate means of increasing consumption of associate products,<sup>74</sup> but they were unsuccessful in having this statement of goodwill repeated in Yaoundé II.<sup>75</sup>

## E *The EDF and Trade*

One major limb of association was the establishment of a European Development Fund (EDF) to disburse funds to the overseas countries and territories. The initial sum

<sup>69</sup> P.N.C. Okigbo, *Africa and the Common Market* (1967), at 32–36.

<sup>70</sup> For coffee the German import duty was \$0.238/kg and the internal tax \$0.904/kg; Third Progress Report of Committee III on Expansion of Trade, GATT Doc L/1162, 27 Apr. 1960, at 12.

<sup>71</sup> Art. 132(1) EEC stated as an 'objective' that 'Member States shall apply to their trade with the countries and territories the same treatment as they accord each other pursuant to this Treaty'. Art. 95 EEC, prohibiting discriminatory internal taxation within the EEC, did not apply to products from the associates. However, such taxation would have been caught by an interpretation of 'duties' to include 'measures of equivalent effect', as in *Le Plat*, *supra* note 35.

<sup>72</sup> The Yaoundé Conventions may have softened this obligation to permit even discriminatory internal taxation. These contained clauses under which the parties agreed to 'refrain' from discrimination in internal taxation measures (Art. 14 Yaoundé I; Art. 5(2) Yaoundé II), thus implying that it would have been permitted. In fact, no facially discriminatory taxation was imposed: see e.g., GATT Doc L/2441, *supra* note 59, at para. 8, where, quoting their non-discriminatory nature, the associates essentially disregarded a question whether fiscal duties should be notified and (if not necessary for development purposes) reduced in accordance with the Yaoundé Convention. On the question whether such taxes amounted to an 'other restrictive regulation of commerce' within the meaning of Art. XXIV GATT see *infra* note 102.

<sup>73</sup> This was also an issue at the multilateral level, and was one of the matters proposed for reform in the Haberler Report: R. Campos, G. Haberler, J. Meade, and J. Tinbergen, *Trends in International Trade: A Report by a Panel of Experts* (19 Oct. 1958). Formal legal declarations on the issue include para. 4(c) of the Declaration on Promotion of the Trade of Less-Developed Countries, Annex to Meeting of Ministers, Conclusions adopted on 30 Nov. 1961, GATT Doc L/1657, 1 Dec. 1961, and Art. XXXVII(1)(c)(i) of GATT 1947, signed on 8 Feb. 1965 and in force on 27 June 1966. A GATT Programme of Action proposed in 1963, and agreed by all Contracting Parties except the EEC, included an undertaking that 'industrialized countries shall progressively reduce internal charges and revenue duties on products wholly or mainly produced in less developed countries with a view to their elimination by 31 December 1965'. See GATT Contracting Parties, Measures for the Expansion of Trade of Developing Countries as a Means of Furthering their Economic Development – Conclusions Adopted on 21 May 1963 on Item I of the Agenda, GATT Doc MIN(63)7, 22 May 1963, para. 1(iv).

<sup>74</sup> Yaoundé I. Declaration VIII.

<sup>75</sup> See M. Lister, *The European Community and the Developing World: The Role of the Lomé Convention* (1988), at 52.

in Part IV was \$581.25m<sup>76</sup> and was to be collected and spent over five years, in annually increasing amounts.<sup>77</sup> The fund was intended to be spent on public investments (in particular hospitals and educational facilities) and other ‘economic’ investments<sup>78</sup> and indeed the bulk of the fund was spent on social institutions; only 18 per cent went to agricultural production.<sup>79</sup> This began to change with the Second EDF under Yaoundé II. The amount was increased to \$730m,<sup>80</sup> and the additional amount was expressly understood as compensation for declining preferential margins on duties and the abolition of French price support (*surprix*).<sup>81</sup> In total, one third of this fund was now spent on support for agricultural production. This was with the specific aim of adapting subsidized products to world prices as well as for commodity price stabilization.<sup>82</sup> Yaoundé II endowed the Third EDF with \$900m and in general terms continued the same theme.<sup>83</sup>

### 3 International Reactions

To assist the associates, it was intended that the EEC’s Common External Tariff (CET) would divert trade from non-associated to associated countries. However this arrangement may have worked for individual products, it did not improve total trade with the associates. Part of this was for contextual reasons. In the decade following the establishment of the EEC, developing countries as a group became less important.<sup>84</sup>

<sup>76</sup> In 1958 units of account equalled the US dollar. This was worth \$3.9bn in 2005 dollars; which compares to €13.5bn under the current arrangements in the Cotonou Agreement: see the conversion table at [http://oregonstate.edu/Dept/pol\\_sci/fac/sahr/cv2005.pdf](http://oregonstate.edu/Dept/pol_sci/fac/sahr/cv2005.pdf). Germany and France each contributed \$200m to a \$581.25m fund of which around 90% went to French territories, and while the others received the remainder of the funds for their territories, this fell short of their contributions. The others also made a loss: Belgium contributed \$70m for a return of \$30m; the Netherlands \$70m for a return of \$35m; Italy \$40m for a return of \$5m and Luxembourg \$1.5m for a return of zero: Arts 1 and 3 and Annexes A and B of the Implementing Convention to the EEC Treaty.

<sup>77</sup> The first payment was to be 10%; the final payment 38.5%. Decisions on spending were to be made by the Commission, though with oversight by the Council, acting by specially weighted qualified majority voting. Because of the contribution ratio, Art. 7 IC provided for a different voting system from that in Art. 148.

<sup>78</sup> Art. 3 IC.

<sup>79</sup> 45% was spent on transport and communications; 10% on water and public building and housing; 9% on health, and 17% on education: Okigbo, *supra* note 69, at 40, Table 2.

<sup>80</sup> \$620m of this amount consisted of grants; the remainder comprised repayable loans.

<sup>81</sup> Even with the absolute increase the Second EDF fell significantly short of this goal: Pearson and Schmidt, ‘Alms for AAMS: A Larger Flow?’, 3 *JCMS* (1964) 74, at 81.

<sup>82</sup> Art. 17(c) and (d) and Prot. 5 Yaoundé I. The intention was to apply world prices for coconut, palm oil, cotton, and gum arabic from 1963–1964; for rice, sugar, and oil seeds on commencement of the Common Agricultural Policy; for groundnuts by 1964–1965; and for coffee by 1967. This did not occur as foreseen, as detailed in Rivkin, *supra* note 41, at 29–30.

<sup>83</sup> Zartman, ‘Europe and Africa: Decolonization or Dependency’, 54 *Foreign Affairs* (1976) 325, at 330. For discussion of the negotiations see Zartman, ‘The EEC’s New Deal with Africa: What the Africans Wanted, What the Europeans Offered, the Meaning of the New Yaounde Convention’, 15 *Africa Report* (1970) 28.

<sup>84</sup> From 1958 to 1967 the developing country share of EEC imports declined from 42% to 38% and their share of exports from 38% to just 27%: European Commission, ‘The External Trade of the European Community 1958–1967’, *Current Notes on the European Community*, No. 5 (1969), Annex I, reprinted in M. Holland, *The European Union and the Third World* (2002), at 30.

But even compared with developing countries and, more significantly, other African countries, associate trade with the Community declined. From 1958 to 1967 the associates' share of EEC imports declined from 5.6 per cent to 4.2 per cent, compared with an increase in the share of non-associate Africa from 9.4 per cent to 10.3 per cent.<sup>85</sup> In this sense, even in its early years, the EEC's policy was not having the desired effect.

Regardless of the reality, the perception of non-associated developing countries was that they were suffering from the Community's special preferences for the associated countries, as indeed they were intended to suffer. This produced various reactions. Some countries were permitted, and willing, to join in similar or identical trade arrangements. Others sought to attack the legality of the EEC's arrangements within the GATT or to change the rules of the game. All of these efforts had a significant effect on the architecture of the EEC's trade and development policies.

### A Comparable Arrangements

Some non-associate countries were able, and even encouraged, to seek similar arrangements to those available to the associates.<sup>86</sup> From the beginning, the EEC Treaty was accompanied by Declarations of Intent providing that the Member States would propose to the independent countries of the Franc area, Libya, Italian Somaliland, Surinam and the Netherlands Antilles (those covered by the 'Morocco Protocol') 'the opening of negotiations with a view to concluding conventions for economic association with the Community'. In part, this came to fruition. The Dutch territories became associated under Part IV in 1962 and 1964,<sup>87</sup> while Morocco and Tunisia concluded separate association agreements in 1969.<sup>88</sup>

Additional expansion of the EEC's association followed the UK's early negotiations for accession to the Community.<sup>89</sup> Further to an in-principle agreement in 1961, the EEC Council issued a Declaration of Intent in 1963, at the time of the signing of the Yaoundé Convention, which foresaw either accession to this agreement or independent association to any country 'which has an economic structure and production comparable to those of the Associated States'.<sup>90</sup> Pursuant to this Declaration, association

<sup>85</sup> *Ibid.*, at 30–31. A detailed picture comparing trade in tropical products from 1958 to 1963 is set out in Agarwal, *supra* note 7, ch. 7. By contrast, Aitken and Obutelewicz, 'A Cross-sectional Study of EEC Trade with the Association of African Countries', 58 *Review of Economics and Statistics* (1976) 425, emphasise the effectiveness of the preferences.

<sup>86</sup> In Europe's immediate region, association agreements were concluded at this time with Greece ([1963] 26 JO 293) and Turkey ([1964] 217 JO 3687).

<sup>87</sup> Petroleum from the Netherlands Antilles was admitted free of charge but subject to safeguards (customs duties): see Prot. 64/534/EEC [1964] JO 150, 2416.

<sup>88</sup> EEC–Morocco association agreement [1969] JO L197/3 and EEC–Tunisia association agreement [1969] JO L198/3.

<sup>89</sup> Milward, *supra* note 65, at 87.

<sup>90</sup> Council Declaration of Intent [1963] JO 2866/63. Pinder, 'The Community and the Developing Countries: Associates and Outsiders', 12 *JCMS* (1973) 53, at 57. These options were reflected in Art. 58 of the Yaoundé Convention, which provided that, in the event of accession, the advantages of the existing associates would not be affected, and that, in the event of independent association, there would be consultation (though no guarantees were given that the advantages of the existing associates would be maintained).

agreements were concluded over the next decade with Nigeria<sup>91</sup> and the East African Community (EAC), comprising Tanzania, Uganda and Kenya.<sup>92</sup> In addition, thanks to closer links to francophone Africa, its interest in market access for manufactured products and financial aid, Mauritius acceded to Yaoundé II in 1973.<sup>93</sup>

The negotiations with the EAC and Nigeria proceeded with difficulty as these countries objected to the notion of reciprocity in trade liberalization, which they had not been obliged to grant under the Commonwealth Preference System.<sup>94</sup> The compromise with these countries was to retain the principle of reciprocity in principle, but to eviscerate it in practice. Reciprocal preferences under both the Nigeria agreement and the Arusha agreement applied to only 15 per cent of the value of imports from the EEC, and a lesser proportion of their imports as a whole.<sup>95</sup> The Nigeria agreement was also novel in that Nigeria expressly agreed not to reduce its external tariff on products to which it granted the EC preferences.<sup>96</sup>

## B *GATT Reviews*

Countries not permitted or unwilling to conclude association agreements with the EEC were left with no alternative but to try to protect their interests using the multi-lateral process. One of these processes involved the GATT Working Parties established to examine new regional trade agreements (free trade areas and customs unions) concluded by GATT Contracting Parties.<sup>97</sup> The role of these Working Parties was to examine these agreements for their consistency with Article XXIV GATT, which, in summary, imposes two conditions: under Article XXIV:5 regional trade agreements must not raise barriers to trade with third countries, and under Article XXIV:8 regional trade agreements must eliminate all restrictive regulations of commerce on substantially all the trade between them. So long as these rules are complied with, there is no restriction on the trade diversion from third countries that almost inevitably results from a regional trade agreement.

<sup>91</sup> Lagos Agreement, 5 ILM (1966) 828. This agreement was never ratified, due initially to French opposition to ratification during the Biafran war, and subsequently because Nigeria lost interest: Gruhn, 'The Lome Convention: Inching Towards Interdependence?', 30 *Int'l Org* (1976) 241, at 245. For a full discussion of the agreement see Okigbo, *supra* note 69, ch. 6.

<sup>92</sup> Arusha Agreement, 8 ILM (1968) 741. For discussion see Gorrell Barnes, *supra* note 16, at 27–32.

<sup>93</sup> Association Agreement concerning the accession of Mauritius to the Yaoundé Convention [1973] OJ L288/2. See Akinrinade, 'Associates and Associates: the Failure of Commonwealth Bridge-Building, 1971–3', 27 *J Modern African Studies* (1989) 177, at 178.

<sup>94</sup> Zartman, 'Europe and Africa', *supra* note 83, at 330, n. 1.

<sup>95</sup> Okigbo, *supra* note 69, at 136 (on Nigeria agreement) and Ghai, 'The Association Agreement between the European Economic Community and the Partner States of the East African Community', 12 *JCMS* (1973) 78, at 98 (on EAC agreement).

<sup>96</sup> In a Declaration, set out in Annex IX, Nigeria promises that '[i]n respect to the products contained in the schedule annexed to Protocol No 2, the tariff advantages reserved for the Member States over third countries will not be reduced as long as the Agreement remains in force'.

<sup>97</sup> By 1958 the six EEC Member States were all GATT Contracting Parties (Belgium, the Netherlands, Luxembourg and France on its foundation in 1948, Italy in 1950, and Germany in 1951). The role of GATT Working Parties has since 1995 been assumed by the Committee on Regional Trade Agreements. Of around 300 notified agreements, only one (between the Czech and Slovak Republics) has ever positively been approved.

Part IV of the EEC Treaty was reviewed in 1958 by a Working Party consisting of France and the Netherlands (for the EEC) and Brazil, Ceylon, Chile, Dominican Republic, Ghana, Greece, India, Indonesia, Pakistan, Rhodesia, Nyasaland, the United Kingdom and the United States. As might be expected, the two EEC Member States defended the EEC position. However, almost all other members of the Working Party considered that the arrangement was inconsistent with Article XXIV (Greece and the United States abstained).<sup>98</sup> Their criticisms were essentially threefold: first, that the ability for the territories to increase duties for development needs meant that duties were not eliminated on 'substantially all the trade' between the parties; second, that the association essentially amounted to an illegitimate extension of the historical preferences under Article I:2 GATT; and third, that the high EEC common external tariff would result in trade diversion.<sup>99</sup> In fact, none of these reasons is particularly compelling. The EEC countered the first complaint by noting that such duties would only be levied on an 'insubstantial' amount of trade, while the other two were legally irrelevant. The resulting stalemate was resolved by an agreement, suggested by the United States, that questions of law should be set aside, and that any future problems could be resolved with the consultation mechanism in Article XXII, which provides for trade compensation for any losses.<sup>100</sup>

The EEC went through the same notification procedure with Yaoundé I and II, with a similar result.<sup>101</sup> The main legal objections raised in the Working Party on Yaoundé I concerned its limited duration, the possibility of the Associated States raising duties for development needs, and the absence of a plan for eliminating trade barriers between the parties (though this is difficult to understand, as the Convention did set out such a plan). There were few significant criticisms in the Working Party on Yaoundé II, except for the views of one member that the fiscal duties applied by the associates amounted to 'other restrictive regulations on commerce' that were required to be eliminated under Article XXIV.<sup>102</sup>

<sup>98</sup> Working Party on the Association of Overseas Territories with the European Economic Community, Report to the Intersessional Committee, GATT Doc L/805, 3 Apr. 1958, para. 12, n. 1.

<sup>99</sup> The Working Party also criticized the EEC's use of 'legal rates' (or 'bound rates') rather than actually applied rates as a basis for determining CET duties on tropical products. They claimed that this 'could only have been either to raise more revenue or to give an even greater margin of preference for the protection of the AOTs' and that 'since revenue could always be safeguarded by introducing internal taxes it was clear to them that the object was to increase the preferential margin'. See *ibid.*, para. 52. The legality of the use of bound rates in such circumstances was undecided until the 1994 WTO Understanding on Art. XXIV GATT, where it was agreed that the applied rates should be used. It has been suggested that the main purpose of these objections was to influence the tariff level of List G items and to inhibit the EEC from applying any non-tariff barriers. See Gorrell Barnes, *supra* note 16, at 12.

<sup>100</sup> K. Kock, *International Trade Policy and the GATT 1947–1967* (1969), at 129. See also Coppolaro, *supra* note 13, at 26–33.

<sup>101</sup> GATT Doc L/2441, *supra* note 59, (on Yaoundé I) and Report of the Working Party on Convention of Association between the European Economic Community and the African and Malagasy States, GATT Doc L/3465, 20 Nov. 1970 (on Yaoundé II).

<sup>102</sup> See GATT Doc L/3465, *supra* note 101, para. 7 (and EEC reply at para. 8). The same member considered that it would be more appropriate for trade relations between the EEC and the associates to take place under the newly agreed GSP system (*ibid.*, at para. 7).

### C *The Principle of Non-reciprocity*

In addition to these direct challenges as potentially illegal free trade agreements, the EEC association arrangements came under indirect attack, mainly in the newly established UN Conference on Trade and Development (UNCTAD). This organization was born out of frustration with the GATT system's perceived inability to respond to developing country concerns. The underlying problem (as then believed) was that developed country demand for developing country commodities was less than developing country demand for developed country industrial goods.<sup>103</sup> This meant that developing countries simply had little to offer in trade negotiations, and they were consequently unable to win substantial concessions from developed countries.<sup>104</sup>

These concerns had not gone entirely unaddressed in the GATT. A special GATT committee was established in 1958 to examine the problem of trade expansion for developing countries,<sup>105</sup> and following its final report the GATT Contracting Parties issued a Declaration in December 1961 in which they agreed on the objective of reducing protection on products of interest to developing countries, including both raw materials and manufactures, and agreed further that 'contracting parties should adopt a "sympathetic attitude" on the question of reciprocity'.<sup>106</sup> The problem was that these fine words were not reflected in positive action. The EEC was the main opponent of these initiatives, and this primarily for the reason that a more general grant of preferences to developing countries would reduce the preferences available to its associates. This was made clear in 1963, when the EEC and its associates rejected an 'Action Plan', which among other things proposed the elimination of all tariffs on tropical products.<sup>107</sup> The EEC's argument was that only a managed market based on the level of development of the countries concerned could achieve 'the marked and rapid increase in the export earnings of the developing countries as a whole, which was the fundamental objective'.<sup>108</sup> This may have been true, but it does not explain why the EEC rejected the Action Plan, which was a partial step towards that objective.<sup>109</sup> It was more likely that the EEC was simply seeking a means of maintaining the preferential advantages of its associates.<sup>110</sup>

<sup>103</sup> This is the primary theme of the 'Prebisch Report', *Towards a New Trade Policy for Development: Report by the Secretary General of the Conference on Trade and Development* (1964).

<sup>104</sup> *Ibid.*, at 18.

<sup>105</sup> See *Expansion of International Trade*, Decision of 17 Nov. 1958, GATT Doc L/939, 27 Nov. 1958. See also Vingerhoets, 'The Kennedy Round and the Developing Countries', in F.A.M. Alting von Geusau, *Economic Relations after the Kennedy Round* (1969), at 48, 49.

<sup>106</sup> GATT Contracting Parties, *Declaration on Promotion of Trade of Less-Developed Countries*, GATT Doc L/1657, Annex, 1 Dec. 1961, at 5.

<sup>107</sup> See Meeting of Ministers, Measures for the Expansion of Trade of Developing Countries as a Means of Furthering their Economic Development. Conclusions Adopted on 21 May 1963 on Item I of the Agenda, GATT Doc MIN (63)7, 22 May 1963. See also the Resolution setting up an Action Committee to assist in the implementation of the Action Plan, GATT Doc MIN (63)8, 22 May 1963. The US was authorized under the Trade Expansion Act of 1962 to remove all duties on tropical products, but on condition that the EEC took adequate action. As this never happened, the US offer could not, by law, be realized: see Vingerhoets, *supra* note 105, at 56–57.

<sup>108</sup> GATT Doc MIN (63)7, *supra* note 107.

<sup>109</sup> Vingerhoets, *supra* note 105, at 51, describes the EEC reaction as 'illogical'.

<sup>110</sup> S. Weintraub, *Trade Preferences for Less Developed Countries: An Analysis of US Policy* (1966), at 131.



Somewhat different considerations applied in relation to the idea of granting non-reciprocal concessions on industrial products, which, similar to infant industry protection, was designed to drive industrialization in developing countries.<sup>111</sup> The idea of non-reciprocal concessions on industrial products had been considered to a limited extent within the GATT,<sup>112</sup> but formed the centrepiece of UNCTAD's first meeting in 1964.<sup>113</sup> Again, the EEC saw the introduction of generally available concessions as an attack on its system of association. This led to the so-called 'Brasseur Plan', named after a proposal by the Belgian Trade Minister,<sup>114</sup> which was supported by the EEC.<sup>115</sup> Brasseur proposed a system of managed markets, designed to avoid damage to developed countries while assisting where necessary uncompetitive developing country products, and supported by selective preferences negotiated individually with each beneficiary country. Brasseur courageously suggested that '[i]n this way, true non-discrimination would be brought about, for each developing country would be free to ask for the negotiations it thought useful'.<sup>116</sup> This interpretation of the principle of non-discrimination did not, however, win many supporters. The Brasseur Plan was rejected by other countries on the basis that it was open to political manipulation, would fragment the bargaining power of developing countries, would be impossible to negotiate, and would complicate the world trading system.<sup>117</sup>

An additional factor at UNCTAD I was that the United States objected to the principle of non-reciprocity in general, partly because of its adherence to the principle of non-discrimination (as conventionally understood) and partly for the practical reasons that this principle risked undermining the ongoing Kennedy Round of trade negotiations.<sup>118</sup> The result of this first Conference was that in 1964 UNCTAD adopted Principle 8, which proposed that developed countries grant non-reciprocal trade preferences to developing countries,<sup>119</sup> but with a negative vote from the United States

<sup>111</sup> In his inaugural report, the UNCTAD Secretary-General, Raúl Prebisch, argued in favour of such a system, which he considered temporary, and described as 'the logical extension of the infant industry argument': Prebisch Report, *supra* note 103, at 35. The Community's rationale is set out in European Commission, 'The EEC and Generalized Preferences in Favour of Semi-Finished and Manufactured Products Imported from the Developing Countries', Information Memo, Brussels, June 1971 (PP/500/71-A), at 5–7.

<sup>112</sup> GATT Doc MIN (63)7, *supra* note 107, para. 24.

<sup>113</sup> Prebisch Report, *supra* note 103, at 61.

<sup>114</sup> The Plan is outlined in the Statement by Mr Maurice Brasseur, in *Proceedings of the United Nations Conference on Trade and Development*, Policy Statements (1964), ii, 108–113.

<sup>115</sup> See Statement by Mr Jean Rey, Representative of the EEC, on 6 Apr. 1964, in *ibid.*, at 445.

<sup>116</sup> Statement by Brasseur, *supra* note 114, at 111.

<sup>117</sup> Huhs, 'Trade Preferences for Developing Countries: Options for Ordering International Economic and Political Relations', 20 *Stanford L Rev* (1968) 1150, at 1175.

<sup>118</sup> *Ibid.*, 1172; Scott, 'The United States Response to Common Market Trade Preferences and the Legality of the Import Surcharge', 39 *U Chicago L Rev* (1971) 177, at 195. The Kennedy Round opened on 4 May 1964 and concluded with a Final Act signed on 30 June 1967.

<sup>119</sup> *Proceedings of the United Nations Conference on Trade and Development*, Final Act and Report (1964), ii, Annex A.I.1 (General and Special Principles), at 20 n. 8. The principles to emerge from this meeting were: market access opportunities for developing countries (in the form of trade preferences and reductions in internal taxation), encouragement for commodity stabilization agreements, compensatory financing, and support for regional arrangements. For a summary see Metzger, 'Developments in the Law and Institutions of International Economic Relations: UNCTAD', 61 *AJIL* (1967) 756, at 760.

and an abstention from the EEC Member States.<sup>120</sup> They did, however, consent to the amendment of GATT in 1965 by the addition of a new Part IV ('Trade and Development'), which exhorted developed countries to reduce protection and to respect the principle of non-reciprocity in trade negotiations.<sup>121</sup>

As it turned out, the Kennedy Round was a serious disappointment for developing countries. The participants had promised initially 'to make cuts deeper than 50 per cent in, or to eliminate completely, duties on products of special interest to less-developed countries',<sup>122</sup> but in the end the average tariff reduction for products of interest to developing countries was only 20 per cent, compared with the average tariff reduction of 36 per cent.<sup>123</sup> With the Round concluded, and responding to lobbying by Latin American countries, the United States chose to reverse its previous policy on preferences for developing countries. It now saw a policy of generalized non-reciprocal preferences on industrial goods as an effective means of attacking the EEC's system of special preferences for its associates.<sup>124</sup>

This change of policy soon resulted in positive law. The second UNCTAD Conference in 1968 recognized 'the unanimous agreement in favour of the early establishment of a mutually acceptable system of generalized, non-reciprocal and non-discriminatory preferences which would be beneficial to the developing countries'<sup>125</sup> and set out the details in 'Agreed Conclusions' in 1970.<sup>126</sup> Within the GATT, these were implemented by a 1971 Decision waiving for 10 years the most-favoured nation obligation for developed countries wishing to grant tariff preferences to developing countries.<sup>127</sup> This was in turn incorporated by reference into the 1979 'Enabling Clause'.<sup>128</sup> In 1999, a WTO Decision additionally permitted developing countries to grant tariff preferences to

<sup>120</sup> In total 78 countries voted in favour, 11 voted against (all developed except for South Africa), and 23 countries abstained (all developed except Vietnam, Rwanda, Turkey, Uganda and Venezuela): see UNCTAD Final Act, *supra* note 119. Almost all the associated countries voted in favour of Principle 8, an approach also reflected in the Yaoundé II Convention, Protocol 4 of which provides that 'the provisions of the Convention, and in particular Article 3 thereof, do not conflict with the establishment of a general system of preferences and do not prevent the Associated States from participating therein'.

<sup>121</sup> Part IV GATT was signed on 8 Feb. 1965 and entered into force on 27 June 1966. On the principle of non-reciprocity see Art. XXXVI:8 and Note Ad Art. XXVI:8 GATT, and also GATT Doc. COM.TD/W/37, at 9.

<sup>122</sup> Trade Negotiations Committee, Resolution adopted on 6 May 1964, TN.64/27, 11 May 1964.

<sup>123</sup> UNCTAD, *The Kennedy Round Estimated Effects on Tariff Barriers*, Report by the Secretary-General, UN Doc. TD/6/Rev. 1 (1968), at 17, Table 5. Even on industrial products the reduction was 28% for products of interest to developing countries compared to 38% overall.

<sup>124</sup> Huhs, *supra* note 117, at 1177–1183; Scott, *supra* note 118, at 195–200; Graham, 'The US Generalized System of Preferences for Developing Countries: International Innovation and the Art of the Possible', 72 *AJIL* (1978) 513, at 516–517.

<sup>125</sup> UNCTAD Resolution 21(II). On the initial attempt to reach a common scheme of preferences see Scott, *supra* note 118, at 195–200. This left a relic in the now-confusing terminology of a 'generalized system' of preferences.

<sup>126</sup> UNCTAD, Agreed Conclusions, UNCTAD Doc TD/B/AC.5/36 endorsed (in fact, 'noted') in Generalized System of Preferences, Decision 75(IV), adopted by the Trade and Development Board, UNCTAD Doc TD/B/330, Annex I, 12–13 Oct. 1970.

<sup>127</sup> Generalized System of Preferences, Decision of 25 June 1971, GATT Doc L/3545.

<sup>128</sup> Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries ('Enabling Clause'), Decision of 28 Nov. 1979, GATT Doc L/4903. The Enabling Clause now forms part of the GATT 1994.

least developed countries.<sup>129</sup> At present, all developed countries (and a number of developing countries) operate 'GSP programs' for developing and least developed countries.

## 4 The Community Response

The 1970s saw important changes to the Community's trade and development policy, largely in line with the newly developed UNCTAD principles. With respect to its associates (now expanded in numbers), the Community abandoned the principle of reciprocity; with respect to other developing countries it established a lesser scheme of non-reciprocal trade preferences; and with respect to its Mediterranean neighbours it concluded a number of preferential trade agreements. This basic structure of the Community's trade and development policy remained stable for 20 years, until it was unsettled by a series of WTO legal challenges.

### A *The Lomé Conventions and Cotonou Agreement*

Negotiations on a successor agreement to Yaoundé II began in 1973. These negotiations were strongly influenced by the addition of 21 Commonwealth countries<sup>130</sup> and six other African countries to the 19 Yaoundé associates.<sup>131</sup> The main flashpoint was the principle of reciprocity, which was initially defended by the EEC and a hard core of Yaoundé associates (especially Senegal) but strongly opposed by those joining the system.<sup>132</sup> The opposition was successful: the EEC soon abandoned the principle,<sup>133</sup> and the 1975 Lomé Convention enshrined the principle of non-reciprocal trade preferences.<sup>134</sup> This Convention was followed by three broadly similar Lomé Conventions entering into force in 1981, 1986, and in 1990, each time with a larger membership.<sup>135</sup> In 2000, these agreements were replaced by the Cotonou Agreement, which

<sup>129</sup> Preferential Tariff Treatment for Least-Developed Countries, Decision on Waiver, adopted on 15 June 1999, WT/L/304.

<sup>130</sup> The participation of these countries in the association was a direct result of UK accession to the EEC, and set out in Art. 1 of Prot. 22 of the UK Act of Accession (signed 22 Jan. 1972) [1972] OJ L73/177. The countries concerned were in Africa: Botswana, Gambia, Ghana, Kenya, Lesotho, Malawi, Nigeria, Sierra Leone, Swaziland, Tanzania, Uganda, and Zambia; in the Caribbean: Bahamas, Barbados, Grenada, Guyana, Jamaica, and Trinidad and Tobago; and in the Pacific: Fiji, Tonga, and Western Samoa.

<sup>131</sup> Ethiopia, Liberia, Sudan, Guinea, Equatorial Guinea, and Guinea-Bissau.

<sup>132</sup> Gruhn, *supra* note 91, at 251. Partly this was due to the practical fact that the proposed US GSP scheme excluded any developing country granting reciprocal preferences to developed countries: Graham, *supra* note 124, at 522 n. 33; Pinder, *supra* note 90, at 66. The rule still exists in 19 USC 2462(b)(2)(C).

<sup>133</sup> Gruhn, *supra* note 91, at 253.

<sup>134</sup> Lomé I Convention [1976] OJ L25/1, signed on 28 Feb. 1975, in force on 1 Apr. 1976. This was followed by the formal establishment of the 'ACP Group' in the Georgetown Agreement of 6 June 1975: available now at [www.acpsec.org/](http://www.acpsec.org/) as ACP/27/005/00, as amended 27–28 Nov. 2003. The ACP Group negotiated as a block for the later incarnations of the Lomé Convention. Cuba joined the ACP Group in 2000 but is not party to the Cotonou Agreement.

<sup>135</sup> Lomé II Convention [1980] OJ L347/1; Lomé III Convention [1986] OJ L86/3; Lomé IV Convention [1989] OJ L229/1, amended [1998] OJ L156/3.

has three pillars: two political and development pillars due to expire in 20 years, and a trade pillar, due to expire at the end of 2007.<sup>136</sup>

### *1 Market Access*

The market access provisions of the four Lomé Conventions and the Cotonou Agreement are relatively simple. In accordance with the principle of non-reciprocity, the ACP countries are under no obligation to offer reciprocal market access, except for treatment no less favourable than that offered to other non-developing countries.<sup>137</sup> On the other side, the EU grants ACP products full duty-free and quota-free access, except for products competitive with those falling under the Community's Common Agricultural Policy<sup>138</sup> for which the only obligation is that they be granted treatment more favourable than non-ACP products.<sup>139</sup> These obligations were subject to safeguards. The present clause provides that the Community may take 'appropriate measures' when imported products 'cause or threaten to cause serious injury to its domestic producers of like or directly competitive products or serious disturbances in any sector of the economy or difficulties which could bring about serious deterioration in the economic situation of a region'.<sup>140</sup> This is potentially an important provision, but it has virtually never been used.<sup>141</sup>

For certain commodities, the nature of the Community's preferential treatment was spelled out in special commodity protocols. A protocol on bananas in the four Lomé Conventions promised that '[a]s regards its exports of bananas to the EEC, no ACP State will be placed, as regards access to the markets and market advantages, in a less favourable situation than in the past or at present'.<sup>142</sup> In practice, this authorized certain EEC Member States (the United Kingdom and Italy) to restrict the importation

<sup>136</sup> Cotonou Agreement [2000] OJ L317/3, amended [2005] OJ L 287/1. In 2003, East Timor acceded to the Cotonou Agreement, bringing its total membership to 79.

<sup>137</sup> Arts 7 Lomé I; 9 Lomé II; 136 Lomé III; 174 Lomé IV; and Annex V, Art. 5 Cotonou.

<sup>138</sup> CAP products are (a) arable: cereals, sweet lupins, peas, field beans, animal feedstuffs, cotton, hops, sugar, fibre flax and hemp, olive oil, rice, dried fodder, flowers and live plants, tobacco, seed, honey, fruit and vegetables, seed flax, oilseed, silkworms, potatoes, wine; and (b) meat and dairy: beef and veal, milk and milk products, pig meat, poultry meat and eggs, sheep meat, and goat meat. The coverage of exceptions is somewhat broader: e.g., lychee juice is excluded on the basis that it could compete with orange juice: [http://agritrade.cta.int/market/executive\\_brief.htm](http://agritrade.cta.int/market/executive_brief.htm).

<sup>139</sup> Arts 2–3 Lomé I; 2–3 Lomé II; 130–131 Lomé III; 168–169 Lomé IV; Annex V, Arts 1–2 Cotonou. For a summary of existing measures see the Annex to Reg. 2286/2002 [2002] OJ L348/5, as amended. Badiane, 'The Common Agricultural Policy and African Countries', in I.W. Zartman (ed.), *Europe and Africa: The New Phase* (1993), at 90–94, considers that the CAP is detrimental to ACP producers both because of its protective effect and because the resulting surplus production destabilizes world markets.

<sup>140</sup> Art. 8(1) Annex V Cotonou. The procedure for taking safeguards is set out in Reg. 2285/2002 [2002] OJ L348/2.

<sup>141</sup> The last time a safeguard measure was imposed was Commission Dec. 236/93 authorizing the French Republic to apply safeguard measures to the importation of bananas originating in the African, Caribbean and Pacific (ACP) States [1993] OJ L105/37.

<sup>142</sup> Prot. 6 Lomé I; Prot. 4 Lomé II; Prot. 4 Lomé III; Prot. 5 Lomé IV.

of non-ACP bananas otherwise in free circulation in the EEC.<sup>143</sup> A protocol on sugar, repeating the main terms of the 1951 Commonwealth Sugar Agreement,<sup>144</sup> provides for guaranteed purchases of specified quantities of sugar from specified ACP countries<sup>145</sup> at prices which have generally been almost double the world price.<sup>146</sup> Protocols on rum<sup>147</sup> and (from Lomé IV) on beef and veal<sup>148</sup> provided for reduced duties, and these products have also been able to earn high guaranteed EEC prices.

A major legal development occurred in 1994, when a GATT panel report (*EC – Bananas II*) held that the Lomé Convention, as an arrangement providing for discriminatory non-reciprocal trade preferences, cannot be justified as a regional trade agreement under Article XXIV GATT.<sup>149</sup> The reasoning of the panel, which is somewhat questionable, was that the principle of non-reciprocity in trade negotiations set out in Part IV of the GATT did not apply to Article XXIV.<sup>150</sup> The adoption of this report was blocked by the EC, and in the short term the EC (and those of the ACP countries that were GATT Contracting Parties) applied for and obtained a waiver of the most-favoured-nation obligation in Article I GATT for 'preferential treatment for products originating in ACP States as required by the relevant provisions of the Fourth Lomé Convention'.<sup>151</sup> Identical preferences in the Cotonou Agreement, negotiated in the

<sup>143</sup> The European Commission regularly authorized the UK to apply safeguard measures, and Italy to take surveillance measures, under Art. 115 of the EEC Treaty. See e.g., Commission Dec. (80/949/EEC) of 25 Sept. 1980 authorizing the UK to take interim protective measures with regard to fresh bananas originating in certain third countries [1980] OJ L267/35 and Commission Dec. (81/85/EEC) of 29 Jan. 1981 authorizing the Italian Republic to take intra-Community surveillance measures in respect of imports of bananas originating in certain third countries and put into free circulation in the other Member States [1981] OJ L58/32.

<sup>144</sup> The Commonwealth Sugar Agreement was concluded on 21 Dec. 1951 between the UK, the Queensland Sugar Board, and sugar industry associations in British West Indies, Fiji, Mauritius, and South Africa; the agreement was not published but noted in Keesing's Contemporary Archives 11944. It was initially for 8 years and renewed annually thereafter.

<sup>145</sup> Prot. 3 Lomé I; Prot. 7 Lomé II; Prot. 7 Lomé III; Prot. 8 Lomé IV. The corollary condition was that an ACP country that failed to meet its quota would have this quota reduced. India benefits similarly under the Agreement between the European Economic Community and the Republic of India on cane sugar [1975] OJ L190/36.

<sup>146</sup> From 1971 to 2001 the average EU sugar price was \$0.45/kg compared to the world price of \$0.24/kg: R. Grynberg and S. Silva, *Preference-Dependent Economies and Multilateral Liberalization* (2004), Table 5, citing C. Milner *et al.*, *The Impact of ACP Countries of the Reduction by the EU of Export Subsidies on Sugar*, Report prepared for the Commonwealth Secretariat, London (2003).

<sup>147</sup> Prot. 7 Lomé I; Prot. 5 Lomé II; Prot. 5 Lomé III; Prot. 6 Lomé IV.

<sup>148</sup> Prot. 7 Lomé IV.

<sup>149</sup> GATT Panel Report, *EC – Bananas II*, DS38/R, circulated 11 Feb. 1994, unadopted.

<sup>150</sup> The Note Ad Art. XXXVI:8 GATT (the provision in Part IV setting out the principle of non-reciprocity) provides that '[t]his paragraph would apply in the event of action under Section A of Article XVIII, Article XXVIII, Article XXVIII bis, Article XXXIII, or any other procedure under this Agreement' (emphasis added). The panel's reasoning as to why this last phrase does not apply to negotiations leading to an Art. XXIV-consistent regional trade agreement is not entirely convincing, even if it now has the status of conventional wisdom. It may also be relevant that the equivalent Art. V of the WTO General Agreement on Trade in Services (GATS) specifically allows for 'asymmetry' in regional integration agreements between developed and developing countries.

<sup>151</sup> The Fourth ACP–EEC Convention of Lomé, Decision of 9 Dec. 1994, GATT Doc L/7604, 19 Dec. 1994. The WTO Appellate Body held that certain non-tariff aspects of the EC's discriminatory treatment of bananas was not 'required' under the Lomé Convention and was therefore not covered by the waiver. See WTO Appellate Body Report, *EC – Bananas III*, WT/DS27/AB/R, adopted 25 Sept. 1997, and there is current litigation on the EC's implementation of this ruling: see *infra* note 162.

wake of *Bananas II*, are protected by an equivalent waiver, which will expire on 31 December 2007.<sup>152</sup>

The Cotonou Agreement itself provides for the expiry of non-reciprocal preferences, also on 31 December 2007, and promises negotiations on replacement arrangements. As far as the protocols are concerned, the Cotonou Agreement already modified the regime somewhat. It continued the beef protocol,<sup>153</sup> but abandoned the rum protocol, and its Second Bananas Protocol provides, weakly, that the EU shall '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'.<sup>154</sup> It also continued the sugar protocol,<sup>155</sup> but the value of this protocol has been significantly diminished by the reduction of the Community price for sugar, which has become unsustainably expensive.<sup>156</sup> As a result, the EU has undertaken to provide Sugar Protocol countries with compensatory financial and technical assistance.<sup>157</sup>

The value of the trade preferences under the Cotonou Agreement is substantial, even if the precise figures are uncertain. At present, of total imports into the Community from all countries, 25 per cent of tariff lines enter the Community market duty-free,<sup>158</sup> and the average most-favoured-nation tariff is only 7 per cent.<sup>159</sup> However, this average covers very high tariffs in certain sectors (agriculture 11 per cent, textiles 8 per cent, and food processing 20 per cent)<sup>160</sup> and in particular on certain products (processed meat 25 per cent, dairy 40 per cent, grain 38 per cent, sugar 39 per cent,<sup>161</sup> and bananas €176/tonne).<sup>162</sup> These products make up a very high proportion of the preferential exports of some countries, particularly the ACP countries, which they are able to do because of their preferential market access. One study calculates that preferences (mainly on sugar and bananas) account for 25 per cent of the value of the exports of six ACP

<sup>152</sup> ACP–EC Partnership Agreement, Decision of 14 Nov. 2001, WTO Doc WT/MIN(01)/15, 14 Nov. 2001. A separate waiver (WTO Doc WT/MIN(01)/16) protected the EC's quotas on bananas until 31 Dec. 2005. A request for an extension of this waiver (G/C/W/529, 11 Oct. 2005) was not approved. See also *infra* note 162.

<sup>153</sup> Prot. 4 and Declaration XXII Cotonou. However, countries benefiting from the beef protocol are not heavily dependent on it. Beef makes up only around 1% of total Botswanan and Namibian exports to the EU; the bulk is comprised of diamonds: R. Sandrey and T. Fundira, *Southern Africa and the Trading Relationship with the European Union*, Tralac Trade Brief No 1/2007, Jan. 2007.

<sup>154</sup> See also Declaration XXII Cotonou.

<sup>155</sup> Annex V Prot. 3 Cotonou.

<sup>156</sup> This was not helped by the WTO ruling that EU exports of surplus sugar onto world markets constitute an illegal export subsidy: see WTO Appellate Body Report, *EC – Export Subsidies on Sugar*, WT/DS265/AB/R, adopted on 19 May 2005. The amount of sugar at issue in the dispute approximated the sugar imported under the Sugar Protocol and the India Sugar Cane Agreement.

<sup>157</sup> Reg. 266/2006 establishing accompanying measures for Sugar Protocol countries affected by the reform of the EU sugar regime [2006] OJ L50/1 provides for the allocation of €40m to Sugar Protocol countries for 2006. The welfare losses are described in Grynberg and Silva, *supra* note 146.

<sup>158</sup> See *infra* note 189.

<sup>159</sup> WTO Trade Policy Review, WT/TPR/S/177, Table A.IV.2 (2006 figures).

<sup>160</sup> *Ibid.*

<sup>161</sup> *Ibid.*

<sup>162</sup> Reg. 1964/2005 on the tariff rates for bananas [2005] OJ 316/1. For challenges see *EC – Bananas (Article 21.5 – Ecuador)*, Request for the Establishment of a Panel, WT/DS27/80, 26 Feb. 2007; *EC – Bananas, Request for Consultations by Colombia*, WT/DS361/1, 26 Mar. 2007.

countries,<sup>163</sup> while another calculates that preferences are of substantial value for other ACP countries as well.<sup>164</sup> Associated with this is the fact that, with some isolated exceptions, such as canned tuna,<sup>165</sup> there has been virtually no diversification of ACP export industries away from agriculture and minerals.<sup>166</sup> As a result, in absolute terms ACP exports have remained relatively stable, but as a share of total EU imports, the ACP share declined in the period 1976 to 2005 from 7 per cent to 3 per cent; and even as a share of total EU imports from developing countries it declined from 15 per cent to 6 per cent.<sup>167</sup> Explanations and policy prescriptions for this state of affairs vary,<sup>168</sup> but clearly the existing system has not had the desired results.

<sup>163</sup> Mauritius, St Lucia, Belize, St Kitts and Nevis, Guyana, and Fiji: Alexandraki and Lankes, 'The Impact of Preference Erosion on Middle-Income Developing Countries', IMF Working Paper WP/04/169, Sept. 2004. The data include preferences from the Quad countries (US, EU, Canada, and Japan) but for these countries the relevant preferences are exclusively from the EU (though the figures predate reforms to the EU's sugar and bananas regimes).

<sup>164</sup> Bouët *et al.*, 'Is Erosion of Tariff Preferences a Serious Concern?', in K. Anderson and W. Martin, *Agricultural Trade Reform and the Doha Development Agenda* (2005), at 188, affirms the results in Alexandraki and Lankes, *supra* note 163, but also emphasizes the value of preferences on other products to a number of African and Caribbean countries. Relatively low figures (under 10%) are given in Candau and Jean, 'What Are EU Trade Preferences Worth for Sub-Saharan Africa and Other Developing Countries?', Centre d'Etudes Prospectives et d'Informations Internationales, Working Paper 2005-19, May 2006, at 25, Table 7. For dollar figures see UNCTAD, *Erosion of Preferences for the Least Developed Countries: Assessment of Effects and Mitigating Options*, TD/B/52/4, 4 Aug. 2005 and Hoekman *et al.*, 'Preference Erosion: The Terms of the Debate', in R. Newfarmer (ed.), *Trade, Doha, and Development: A Window into the Issues* (2005).

<sup>165</sup> The ACP share of world canned tuna production increased from 5% to 12% from 1976 to 2003: see Oceanic Development, Poseidon, and Megapesca, *The European Tuna Sector: Economic Situation, Prospects and Analysis of the Impact of the Liberalisation of Trade*, Final Report, FPA12/TUN/05 (2005), available at: [http://ec.europa.eu/fisheries/publications/studies/tuna\\_2005\\_en.pdf](http://ec.europa.eu/fisheries/publications/studies/tuna_2005_en.pdf), at 114, cited in L. Campling, *Economic Partnership Agreements (EPAs) and Pacific Fisheries*, Revised Paper prepared for the Joint Pacific ACP Trade and Fisheries Officials and Ministers Meetings, Vanuatu, 13–14 Nov. 2006 (on file with author), at 1 n. 3; see also at 5, on the importance of preferences to the canning industry.

<sup>166</sup> The main exports from the ACP are as follows: Southern Africa: diamonds (42%), mineral oil (17%), aluminium (13%), fish (8%), gold (6%); West Africa: mineral oil (45%), cocoa (21%), fish (5%), timber (4%), iron/ aluminium (4%); Central Africa: mineral oil (47%), timber (23%), bananas (5%), cocoa (4%); East South Africa: textiles (15%), fish (11%), diamonds (9%), sugar (8%), cut flowers (7%); Caribbean region: corundum (10%), ethanol (10%), sugar (8%); Pacific region: palm oil (36%), sugar (16%), copper ore (13%), coffee (7%), fish (5%). See A. Valqui and B. Hofmann, *Trade for Development: ACP/EU Economic Partnership Agreements*, German Federal Ministry for Economic Cooperation and Development, Feb. 2007, available at: [www.bmz.de/en/service/infotehk/fach/materialien/Materialie175.pdf](http://www.bmz.de/en/service/infotehk/fach/materialien/Materialie175.pdf), at 4. Ships and aircraft are customarily included in trade statistics, but as these figures refer to transfers of ownership and not origin they are excluded here. A more detailed breakdown of EU–ACP trade is contained in European Commission, *ACP– Trade Statistics*, available at: <http://trade.ec.europa.eu/doclib/html/113468.htm>.

<sup>167</sup> The 1976 figures are from M. Minchin, *Preference Utilization and Tariff Reduction in European Union Imports from Africa, Caribbean, and Pacific Countries*, World Bank Policy Research Working Paper 3688, Aug. 2005, at 3, who cites EU figures. The 2005 figures are calculated from total import statistics in European Commission, *Preferential Trade in the EU – Making Trade Policy Work For Development: Report on EU Market Access for Developing Countries and the Potential for Preference Erosion 2003–2005*, Report from DG Trade of the European Commission to the European Parliament, May 2006, Table 2, available at: [trade.ec.europa.eu/doclib/docs/2006/may/tradoc\\_128863.pdf](http://trade.ec.europa.eu/doclib/docs/2006/may/tradoc_128863.pdf).

<sup>168</sup> There are also other reasons for the failure to diversify: see Osakwe, 'Foreign Aid, Resources and Export Diversification in Africa: A New Test of Existing Theories', MPRA Paper 2228, Mar. 2007, available at: <http://mpa.ub.uni-muenchen.de/2228>. See also UN Economic Commission for Africa, *Economic Report on Africa 2007: Accelerating Africa's Development through Diversification* (2007).

## 2 *Stabex*

In addition to market access schemes, the Community has provided financial and technical assistance to ACP countries under a variety of programmes, some with trade-related components. These will not be discussed here. It is appropriate, however, to note briefly the 'Stabex' scheme, introduced in the first Lomé Convention and expanded thereafter,<sup>169</sup> which was designed to ensure against fluctuations in export earnings for certain commodities on which the ACP countries were heavily dependent.<sup>170</sup> In principle, this system was supposed to provide repayable loans to make up temporary shortfalls in export earnings of basic commodities, judged according to a variable reference price; and was supposed to be funded by surpluses in good years. However, it suffered from a long-term decline in commodity prices, leading to unpaid loans and insufficient funds in the system, and soon turned into simply yet another subsidy. In addition, it led to dependency and had the effect of discouraging diversification and industrialization. As a result, despite frequent modifications, the schemes were abandoned in the Cotonou Agreement, and replaced by additional development aid.

## 3 *Human Rights Conditionality*

Beginning with the 'Uganda Guidelines' in 1977,<sup>171</sup> the Community has sought to condition the benefits granted under Lomé Conventions on compliance with human rights and democratic principles.<sup>172</sup> Lomé III contained a preambular reference to human rights, and Lomé IV contained a provision referring to the parties' human rights obligations and providing for financial aid for the promotion of human rights.<sup>173</sup> In 1995 it became official EU policy to include such clauses in *all* new trade and cooperation agreements negotiated with third countries,<sup>174</sup> and in the same year the Community revised the human rights clause in Lomé IV to make human rights, democratic principles and the rule of law an essential element of the agreement and to permit the suspension of the convention (including any trade rights) in the event of human rights violations.<sup>175</sup> These provisions were amended slightly in the Cotonou Agreement,<sup>176</sup> and again in the 2005 revisions to this Agreement, where an increased emphasis was placed on political dialogue prior to adoption of sanctions.<sup>177</sup> In terms of

<sup>169</sup> In Lomé II, a similar system for minerals (Sysmin) was established and for a short time in the late 1980s it was accompanied by an equivalent scheme for non-ACP least developed countries (Complex).

<sup>170</sup> For a summary with references see UNCTAD, *Economic Development in Africa: Trade Performance and Commodity Dependence* (2003), at 35–37.

<sup>171</sup> Council Declaration on the situation in Uganda, adopted 21 June 1977, Bull EC 6-1977, para. 2.2.59.

<sup>172</sup> A fuller account is given in L. Bartels, *Human Rights Conditionality in the EU's International Agreements* (2005).

<sup>173</sup> Art. 5 Lomé IV.

<sup>174</sup> Commission Communication on the Inclusion of Respect for Democratic Principles and Human Rights in Agreements between the Community and Third Countries, COM(95)216 and Commission Communication on the European Union and the External Dimension of Human Rights Policy: From Rome to Maastricht and Beyond, COM(95)567.

<sup>175</sup> Revised Art. 5(1)(3) and new Art. 366a Lomé IV, introduced in the Agreement Amending the Fourth ACP–EC Convention of Lomé signed in Mauritius on 4 Nov. 1995 [1998] OJ L156/3.

<sup>176</sup> Arts 9 and 96 Cotonou; see also Art. 8 on political dialogue.

<sup>177</sup> Agreement amending the Cotonou Agreement [2005] OJ L209/27, amending Arts 8, 9, and 96 and introducing a new Annex VII.



practice, these clauses have been invoked on numerous occasions, usually in response to military coups. However, with one exception, the measures taken have involved the suspension of financial aid and other cooperation but not trade benefits. The exception concerns the suspension since 2002 of the EU's obligation not to impose any restrictions on any capital payments between residents of the Community and Zimbabwe,<sup>178</sup> which is necessary to allow for a freezing of funds of certain listed members of the Zimbabwe government.<sup>179</sup>

## B Generalized System of Preferences (GSP)

After the abandonment of reciprocity in its relations with the ACP countries and the establishment of the Stabex system, the next major change in the EC's trade and development policy in the early 1970s was its adoption of a GSP programme in 1971.<sup>180</sup> This programme has been renewed regularly since then and in its current form applies from 1 January 2006 to 31 December 2008.<sup>181</sup> It is not available to all developing countries, but only to those that are not both 'high-income' and diversified in their exports,<sup>182</sup> thus excluding Hong Kong, Israel, Singapore, Korea and Taiwan. For administrative reasons, it also excludes countries that obtain at least equivalent treatment under free trade agreements.<sup>183</sup> The possibility of such exclusions was recognized in the UNCTAD Agreed Conclusions, though whether or not this implies WTO legality is still an open question.<sup>184</sup>

<sup>178</sup> Dec. 148/2002 concluding consultations with Zimbabwe under Art. 96 of the ACP-EC Partnership Agreement [2002] OJ L50/64, *inter alia* suspending Art. 12 of Annex II to the Cotonou Agreement, renewed [2007] OJ L53/23.

<sup>179</sup> Reg. 310/2002 concerning certain restrictive measures in respect of Zimbabwe [2002] OJ L50/4, implementing Common Position 145/2002 [2002] OJ L50/1.

<sup>180</sup> Regs 1308/71 to 1314/71 [1971] OJ L142. Technically the first country to offer a GSP was the Soviet Union in 1965, and the first GATT Contracting Party was Australia, authorized by specific waiver in a Decision of 28 Mar. 1966, GATT Doc. L/2627, 4 Apr. 1966. The US followed in 1976, after a hiccup in its trade policy by the sudden imposition in 1971 of a 10% surcharge on all imports for 4 months.

<sup>181</sup> Reg. 980/2005 applying a scheme of generalised tariff preferences [2005] OJ L169/1 (the 'GSP Reg.'). Like its predecessors this regulation is based solely on Art. 133 EC (common commercial policy). In Case 45/86, *Commission v. Council (Tariff Preferences)* [1987] ECR 1493, the ECJ held that the common commercial policy authorized measures with a development dimension. However, this preceded the enactment of Art. 179 EC, which specifically authorizes measures with the objective of fostering, *inter alia*, 'the smooth and gradual integration of the developing countries into the world economy'. It would now seem appropriate for a GSP Reg. to have at least a dual legal basis: on which see Case C-94/03, *Commission v. Council (Rotterdam Convention)* [2006] ECR I-0001.

<sup>182</sup> Art. 3(1) GSP Reg., *supra* note 181. High income is defined in terms of World Bank classification for the past 3 years; and diversification is defined as when imports of its five largest GSP covered sections represent less than 75% in value of all its GSP imports to the Community.

<sup>183</sup> Art. 3(2) of *ibid.* No countries have to date been removed from the programme, but this may be expected to follow the consolidation of GSP benefits into the EU-Chile association agreement: see Dec. 2/2006 of the EU-Chile Association Council [2006] OJ L322/5.

<sup>184</sup> In WTO Appellate Body Report, *EC - Tariff Preferences*, WT/DS246/AB/R, adopted on 20 Apr. 2004, para. 174 n. 355, the Appellate Body expressly refused to rule on the WTO legality of *a priori* exclusions. The panel in *EC - Tariff Preferences*, WT/DS246/R, adopted as modified by the Appellate Body Report on 20 Apr. 2004, para. 7.113, noted that certain *a priori* exclusions, targeted at competitiveness in the market place, were permitted in the Agreed Conclusions and considered that they were therefore WTO legal.

In line with the original purpose of fostering industrialization, the initial focus of the Community's programme was to be on manufactured and semi-manufactured products. However, as these only comprised a very small proportion of Community imports from developing countries,<sup>185</sup> the programme also included a limited number of processed agricultural products, which was gradually increased over the following decades.<sup>186</sup> Administratively, the structure of the GSP regime has also undergone substantial rationalization. Initially, it was administered through annually changing quotas, divided according to both beneficiaries and EU Member States. The complexity and uncertainty that resulted led to a substantial under-utilization of the available preferences.<sup>187</sup> In 1995, quotas were replaced by a set of tariffs,<sup>188</sup> and in subsequent revisions these have been amended and simplified.

The current GSP Regulation provides for three 'arrangements': a general arrangement providing for duty reductions, a special incentives arrangement for sustainable development and good governance providing for duty-free entry, and a special arrangement for least developed countries also providing for duty-free entry. There are also a number of mechanisms for withdrawing preferences on certain economic and non-economic grounds.

### 1 *General Arrangement*

The general arrangement applies to around 87 per cent of dutiable tariff lines,<sup>189</sup> which translates to a theoretical 9 per cent of all imports into the EU. In fact, a 48 per cent utilization rate meant that only 4.4 per cent of imports actually benefited from this arrangement.<sup>190</sup> The arrangement also distinguishes between products according to their 'sensitivity', which relates to their competitiveness with domestic production. Around 40 per cent of product lines are classed as 'non-sensitive' products and receive duty-free tariff treatment; and around 60 per cent are classed as 'sensitive' (mainly agricultural) and receive an absolute reduction of 3.5 per cent on *ad valorem* duties and a relative reduction of 30 per cent on any specific duties.<sup>191</sup> This is reflected in the import figures. Despite the fact that developing countries export far more agricultural products than industrial products, only 19 per cent of products eligible for preferences under the

<sup>185</sup> Industrial products comprised 6.6% of EU imports from developing countries in 1968: European Commission, 'The EEC and Generalized Preferences In Favour of Semi-Finished and Manufactured Products Imported from the Developing Countries', Information Memo, June 1971, at 6.

<sup>186</sup> A. Borrmann *et al.*, *The EC's Generalized System of Preferences* (1981), at 31–32.

<sup>187</sup> Borrmann, *supra* note 186, at 82–117.

<sup>188</sup> The GSP Regs since 1994 are Reg. 3281/94 (industrial products) [1994] OJ L348/1; Reg. 1256/96 (agricultural products) [1996] OJ L160/1; Reg. 2820/98 [1998] OJ L357/1; Reg. 2501/2001 [2001] OJ L346/1 and the present Reg., *supra* note 181, valid until 31 Dec. 2008.

<sup>189</sup> In 2007 the EU has a total of 9,720 tariff lines of which 2,379 are duty free (2,374 bound within the WTO at 0% and 5 suspended): email from European Commission, 16 Apr. 2007. The GSP applies to around 6,400 tariff lines of which around 2,500 are non-sensitive and 3,900 sensitive: email from European Commission, 20 Apr. 2007.

<sup>190</sup> GSP statistics for 2006 provided by European Commission, on file with author.

<sup>191</sup> Art. 7 GSP Reg., *supra* note 181. There are some variations on textiles and alcohol. Very low 'nuisance' tariffs (of less than 1% *ad valorem* or €2 per individual € amount) are also suspended: *ibid.*, Art. 15.

general arrangement were agricultural, as opposed to 55 per cent industrial products and another 25 per cent textiles.<sup>192</sup>

In an effort to promote 'fairness' among beneficiaries, products from a particular country that take up too large a proportion of total GSP-covered imports are subject to 'graduation'.<sup>193</sup> In 2006, India (19 per cent), Brazil (9 per cent) and Bangladesh (7 per cent) were the three major GSP beneficiaries in terms of their share of total GSP-covered imports.<sup>194</sup> China, which had been in second place (11 per cent) under the previous GSP Regulation,<sup>195</sup> fell to 11th place (3 per cent) in 2006. This was the express and intended result of graduation for most of its product sectors. It is still an open question whether this form of graduation discriminating between developing countries complies with WTO rules.<sup>196</sup>

## 2 Special Incentives (GSP+)

Since 1998, the Community has offered additional preferences for certain non-trade reasons.<sup>197</sup> One aspect of this programme was a 'drugs regime' under which the Community provided duty-free market access to a closed list of 12 countries deemed to be in need of special assistance because of their need to combat drug production and trafficking.

In *EC – Tariff Preferences* the WTO Appellate Body held that this arrangement violated the WTO Enabling Clause.<sup>198</sup> It said that the drugs regime was necessarily discriminatory because it was operated through a 'closed list' that precluded an assessment of the different situations of the potential beneficiaries.<sup>199</sup> It is, however, the further statements of the Appellate Body that are relevant in assessing the legality of other GSP schemes, including the special incentives in the EU's scheme. The Appellate Body agreed with the defendant that the term 'non-discriminatory' required merely the same treatment of beneficiary countries in the same situations, and not, as the panel had held, the same treatment of all beneficiary countries.<sup>200</sup> The Appellate Body elaborated on this, stating that additional preferences would only be permissible if they represented a 'positive response' to an objective 'development, financial or trade need'.<sup>201</sup> In any given case, it is necessary that there is a sufficient likelihood that the identified needs *are* addressed by the trade preferences.<sup>202</sup>

<sup>192</sup> These proportions are the same for eligible and actual GSP imports. For GSP statistics see *supra* note 190.

<sup>193</sup> Art. 14 GSP Reg., *supra* note 181. This is defined as when the average value of the section is more than 15% of the total of GSP imports into the EU (12.5% for textiles and clothing); but this does not apply when the country is so vulnerable that the section comprises more than 50% of the country's exports to the EU.

<sup>194</sup> For GSP statistics see *supra* note 190.

<sup>195</sup> Information available at: [http://ec.europa.eu/trade/issues/global/gsp/pr211205\\_en.htm](http://ec.europa.eu/trade/issues/global/gsp/pr211205_en.htm).

<sup>196</sup> See *supra* note 184.

<sup>197</sup> The first instances were Arts 7 and 8 of Reg. 3281/94 [1994] OJ L348/1 and Arts 7 and 8 of Reg. 1256/96 [1996] OJ L160/1, in each case to come into effect as of 1 Jan. 1998.

<sup>198</sup> WTO Appellate Body Report, *EC – Tariff Preferences*, *supra* note 184. For discussion see Bartels, 'The WTO Ruling on *EC – Tariff Preferences to Developing Countries* and its Implications for Conditionality in GSP Programs', in T. Cottier *et al.* (eds), *Human Rights and International Trade* (2005), at 463–487 and Charnovitz *et al.*, 'The Appellate Body's GSP Decision: Internet Roundtable', 3 *World Trade Rev* (2004) 239.

<sup>199</sup> *EC – Tariff Preferences*, *supra* note 184, paras 181–187.

<sup>200</sup> *Ibid.*, at para. 153.

<sup>201</sup> *Ibid.*, at para. 165.

<sup>202</sup> *Ibid.*

Following this ruling, the Community modified its special incentives arrangement. Duty-free market access<sup>203</sup> was available on all GSP products<sup>204</sup> to all countries applying by 31 October 2005,<sup>205</sup> so long as they were ‘vulnerable’ (defined in terms of export non-diversification and less than 1 per cent share of EU GSP imports)<sup>206</sup> and committed to ratifying and implementing a list of conventions on human rights, sustainable development and good governance by a certain date.<sup>207</sup> Except for Pakistan, all of the countries benefiting from the former drugs arrangement are on this list, in addition to Georgia, Moldova, Mongolia and Sri Lanka.<sup>208</sup> These preferences may also be withdrawn in the event that these conventions are not incorporated into domestic legislation or effectively implemented.<sup>209</sup>

In fact, it is questionable whether these criteria meet the conditions set out in *EC – Tariff Preferences*.<sup>210</sup> First, the temporal condition on applications has the effect of creating a ‘closed list’ of beneficiaries until at least 2009, thus replicating the fatal characteristic of the drugs regime. Second, by defining the ‘vulnerability’ criterion in terms of their share of EU imports, and not in terms of the needs of the beneficiary at issue, it is hard to see how this relates to their ‘development, financial or trade needs’.<sup>211</sup> Third, by requiring ratification of certain treaties as a condition of receiving benefits, the EU *a priori* excludes countries with the same objective needs but without the desire to ratify the listed treaties, again in violation of the Appellate Body’s criteria. Finally, it is likely that at least some of the current beneficiaries of GSP+ preferences do not have at least some of the identified ‘needs’ – for instance, those relating to the prevention of apartheid or genocide. For this variety of reasons, one may with some confidence consider the GSP+ arrangement to violate the terms of the Enabling Clause.

<sup>203</sup> *Ad valorem* and specific duties (unless also subject to *ad valorem* duties) are suspended, except for some sugar confectionery: Art. 8 GSP Reg., *supra* note 181.

<sup>204</sup> This does not therefore cover the 13% of non-GSP covered dutiable products.

<sup>205</sup> Art. 10 GSP Reg., *supra* note 181.

<sup>206</sup> *Ibid.*, Art. 9. The vulnerability also repeats the high-income and export diversification criteria applicable to the general arrangement. In practice, this criterion excludes numerous developing countries: in Latin America (Argentina and Brazil), South Asia (Bangladesh, India, Pakistan, and Sri Lanka), South East Asia (China, Indonesia, Malaysia, Philippines, Thailand, and Vietnam), the Mediterranean and the Middle East (Saudi Arabia and the United Arab Emirates), Eastern Europe and Central Asia (Russia, Ukraine, and Kazakhstan), and South Africa. This is not counting the countries with EU free trade agreements. For GSP statistics see *supra* note 190. See also C. Stevens and J. Kennan, *GSP Reform: a Longer-Term Strategy (with special reference to the ACP)* (2005), p. vi; C. Stevens, J. Kennan, and M. Meyn, *The Costs to the ACP of Exporting to the EU under the GSP: Final Report* (2007), at 14.

<sup>207</sup> Annex III to the GSP Reg., *supra* note 181, lists these as ‘[c]ore human and labour rights UN/ILO conventions’ and ‘Conventions related to the environment and governance principles’.

<sup>208</sup> Commission Dec. 924/2005 of 21 Dec. 2005 [2005] OJ L337/50. The list comprises Bolivia, Colombia, Ecuador, Peru, and Venezuela (the Andean Community), as well as Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua, and Panama. The missing ‘drugs arrangement’ country is Pakistan, whose late addition to the former ‘closed list’ sparked India’s complaint in *EC – Tariff Preferences*. According to its Art. 11(3), this Dec. was supposed to have been published by 15 Dec. 2005.

<sup>209</sup> Art 16(2) GSP Reg., *supra* note 181.

<sup>210</sup> See Bartels, ‘The WTO-Legality of the EU’s GSP+ Arrangement’, 10 *J Int’l Economic L* (2007, forthcoming).

<sup>211</sup> In practice, this criterion excludes three countries (India, Pakistan, and Vietnam) classified by the World Bank as ‘low income’ countries: Stevens and Kennan, *supra* note 206.

### 3 Least Developed Countries (LDCs)

The WTO Enabling Clause permits donor countries to grant additional preferences to least developed countries without granting the same preferences to other developing countries.<sup>212</sup> The EU has granted least developed countries some form of additional preferential treatment since 1977,<sup>213</sup> and over the years this offer has been steadily improved.<sup>214</sup> In 1998, least developed countries were granted ACP equivalent market access,<sup>215</sup> and under the 2001 'Everything But Arms' (EBA) programme they were granted duty-free access on all products except arms, with full liberalization for bananas, rice and sugar staggered over a number of years.<sup>216</sup> The current GSP programme repeats this offer for an indefinite duration<sup>217</sup> for 50 least developed countries.<sup>218</sup> Bananas have been fully liberalized since 2006 and rice and sugar are due to be liberalized fully in 2009.<sup>219</sup> In 2006, over half of all EBA imports were accounted for by Cambodia (53 per cent), followed by Laos (12 per cent), Yemen (10 per cent) and Nepal (8 per cent).

The EU's offer matches the 2001 WTO Doha Declaration,<sup>220</sup> in which WTO Members committed themselves to duty-free quota-free (DFQF) treatment for all least developed countries, and exceeds the more recent interpretation of this commitment to mean only 97 per cent for countries 'facing difficulties' with a commitment to liberalize further.<sup>221</sup> It also exceeds the offer available under the Cotonou Agreement. On the other hand, partly for reasons of administrative complexity, least developed country ACP Members (of which there are 39) continued to use the Cotonou system for some time.<sup>222</sup>

### 4 Suspension of Preferences

#### (a) Safeguards

The safeguards provision in the Community's original GSP programme had two purposes: to protect Community producers and to protect ACP producers. The degree to

<sup>212</sup> Decision on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries (Enabling Clause), Decision of 28 Nov. 1979, GATT Doc L/490, available at: [www.wto.org/english/docs\\_e/legal\\_e/enabling\\_e.doc](http://www.wto.org/english/docs_e/legal_e/enabling_e.doc), at para. 2(d).

<sup>213</sup> Para. 2(d) of the 1979 WTO Enabling Clause permits a degree of preferential treatment for LDCs that is not extended to other developing countries.

<sup>214</sup> A brief early history is given in Peers, 'Reform of the European Community's Generalized System of Preferences: A Missed Opportunity', 29 *J World Trade* (1995) 79, at 83.

<sup>215</sup> Reg. 602/98 [1998] OJ L80/1.

<sup>216</sup> Reg. 416/2001[2001] OJ L60/43.

<sup>217</sup> Art 30(2) GSP Reg., *supra* note 181.

<sup>218</sup> *Ibid.*, Annex I, which lists the countries eligible for least developed country preferences, repeats the existing list of least developed countries determined by the UN Committee on Development Policy (CDP), available at: [www.un.org/special-rep/ohrrls/ldc/list.htm](http://www.un.org/special-rep/ohrrls/ldc/list.htm). *Ibid.*, Art. 12(7), provides for graduation of former LDCs, but there is no mechanism for adding new LDCs.

<sup>219</sup> *Ibid.*, Art. 12.

<sup>220</sup> Doha Ministerial Declaration, WT/MIN(01)/DEC/1, 20 Nov. 2001, para. 42.

<sup>221</sup> Hong Kong Ministerial Declaration, WT/MIN(05)/DEC, 22 Dec. 2005, Annex F, para. 36.

<sup>222</sup> UNCTAD, *supra* note 164, at para. 27.

which this was reflected in the legislation differed depending on the nature of the products at issue. In the Community's regulation on agricultural products, the safeguards clause provided expressly that duties may be reintroduced on imports 'which place or are likely to place Community producers of similar or directly competitive products at a serious disadvantage or create an unfavourable situation in the ACP States'.<sup>223</sup> The regulation on industrial products was a little softer, stating merely in a preambular recital that 'the temporary and non-binding nature of the system means that the offer may be withdrawn wholly or in part at a later stage, thus maintaining the possibility of remedying any unfavourable situations which might arise, including in the African, Caribbean and Pacific States'.<sup>224</sup> From 1990, regulation on agricultural products abandoned the express reference to ACP countries, and copied instead the softer recital.<sup>225</sup> The recitals were abandoned in the 1995 revisions of the EU's GSP programme. This is fortunate, as it is doubtful whether a form of graduation expressly discriminating between beneficiary countries purely on the basis of their historical links to the donor country would be WTO legal.<sup>226</sup>

Presently, imports (under all three GSP arrangements) are subject to two specific safeguards clauses and, in addition, all other relevant safeguard clauses under the EC Treaty or elsewhere continue to be applicable.<sup>227</sup> The first of the specific clauses is a modification of the original safeguards clause, and provides for the suspension of preferences when imports 'cause, or threaten to cause, serious difficulties to a Community producer of like or directly competing products'.<sup>228</sup> For textiles and apparel, safeguards may be imposed when imports reach certain volume triggers.<sup>229</sup> The second is stricter, providing for safeguards on products that 'cause, or threaten to cause, serious disturbance to Community markets, in particular to one or more of the outermost regions, or these markets' regulatory mechanisms'.<sup>230</sup> This clause originates in the Everything But Arms (EBA) initiative, where it was limited to rice, sugar and bananas, but in 2002 it was adopted in the GSP Regulation, where it applies to all agricultural products and for all beneficiary countries.<sup>231</sup>

<sup>223</sup> E.g., Art. 31 of Reg. 3321/80 [1980] OJ L354/82.

<sup>224</sup> Recital 4 to Reg. 3322/80 [1980] OJ L354/114.

<sup>225</sup> Recital 4 to Reg. 3833/90 [1990] OJ L370/86.

<sup>226</sup> See *supra* note 184. But note UNCTAD Resolution 96(IV), which called for an improvement of GSP preferences 'taking into account the relevant interests of those developing countries enjoying special advantages, as well as the need to find ways and means of protecting their interests': UNCTAD, TD/B/C.5/49, at 3.

<sup>227</sup> Art. 25 GSP Reg., *supra* note 181.

<sup>228</sup> *Ibid.*, Art. 21(1).

<sup>229</sup> *Ibid.*, Art. 21(8). All that is required is a simple increase in volume of 20% per year or (for clothing) the amount exceeds 12.5% of the total EU imports in 12 months (with some exceptions).

<sup>230</sup> Art. 22 GSP Reg., *supra* note 181.

<sup>231</sup> This provoked a strong objection by Sweden on the ground that it reduces the potential benefits of the EBA initiative to least developed countries. See Statement by Sweden, Statements on a Council Reg. applying a scheme of generalised tariff preferences for the period from 1 Jan. 2002 to 31 Dec. 2004 [2001] L346/60.

## (b) Withdrawal on Non-economic Grounds

In 1994, preferences were withdrawn on an *ad hoc* basis from Korea for its discriminatory application of intellectual property rules.<sup>232</sup> In the revisions to the GSP Regulation in 1995, a clause was introduced formalizing such withdrawal of preferences,<sup>233</sup> and this has barely changed since then. At present, preferences may be withdrawn in the event of fraud, failure to comply with rules of origin or failure to cooperate in the administration of the different GSP arrangements,<sup>234</sup> but also if a beneficiary country fails to comply with various non-trade norms. These norms are serious and systematic violations of principles: set out in the human rights conventions used as a basis for the special incentives, exports of products made by prison labour, serious shortcomings in customs controls on export or transit of drugs, failure to comply with international conventions on money-laundering, serious and systematic 'unfair trading practices' (subject to a relevant WTO determination), and serious and systematic infringements of the objectives of regional fishery organizations or arrangements to which the Community is a member concerning the conservation and management of fishery resources.<sup>235</sup> Preferences are presently withdrawn from Myanmar and Belarus for violation of labour standards.<sup>236</sup>

In principle, a withdrawal of preferences on these non-economic grounds amounts to discrimination between different developing countries, and, in the case of Myanmar, between least developed countries. This means that it is only permissible if it meets the criteria set out by the Appellate Body in *EC – Tariff Preferences*.<sup>237</sup> For this to be the case, it would be necessary that the continuing grant of preferences to other beneficiaries, while they are temporarily withdrawn from the delinquent beneficiary, be a 'positive response' to an objectively defined development, financial or trade need *of those other countries*. This is even more difficult to justify than the special incentives. In addition to the problem of identifying the 'needs' of the countries in terms of implementation of the listed conventions, one also needs to identify these 'needs' in terms of improving the situations addressed by the other conditions set out in this provision, including administrative cooperation with the EU and refraining from 'unfair trade practices'. Furthermore, it is the threat of withdrawal of these preferences that now constitutes the 'positive response' to these needs. Whether a sufficient causal nexus can be identified between this threat and the improvement of the identified needs is questionable at best.

<sup>232</sup> Reg. 1291/94 [1994] OJ L141/9; extended by Reg. 3281/94 [1994] OJ L348/1.

<sup>233</sup> *Ibid.*, Art. 9.

<sup>234</sup> Art. 17 GSP Reg., *supra* note 181.

<sup>235</sup> *Ibid.*, Art. 16(1).

<sup>236</sup> Reg. 1933/2006 [2006] OJ L405/35; corrected by [2007] OJ L29/14; Reg. 552/97 [1997] OJ L85/8; continued by Art. 29 GSP Reg., *supra* note 181.

<sup>237</sup> See above at 742.

### C Regional Trade Agreements

From the late 1960s the EEC entered into a number of regional trade agreements<sup>238</sup> with countries in the Mediterranean basin. The EEC concluded a first generation of agreements in 1969 and 1970 with Morocco, Tunisia, Spain and Israel,<sup>239</sup> and a second generation of agreements with Israel in 1975, the Maghreb (Algeria, Morocco and Tunisia) and the Mashreq (Egypt, Lebanon, Jordan and Syria) in 1976 and 1977.<sup>240</sup> With the exception of the Israel agreement, these agreements were non-reciprocal,<sup>241</sup> and therefore, in light of *EEC – Bananas II*, not justified under Article XXIV GATT.<sup>242</sup>

Following the end of the Cold War, the EU concluded new association agreements with formerly communist countries (now all EU members), renewed its relations with the Mediterranean countries with a series of nine ‘Euro-Mediterranean’ association agreements,<sup>243</sup> concluded free trade agreements with Mexico,<sup>244</sup> South Africa<sup>245</sup> and Chile<sup>246</sup> and is presently seeking to negotiate agreements with a range of other countries.<sup>247</sup> These agreements all provide for almost complete liberalization on industrial goods, and with some variations for agriculture.<sup>248</sup> For example, in the EU–Mexico agreement, 97 per cent of existing trade will be fully liberalized, comprising 100 per cent of industrial trade, 99 per cent of fisheries trade and 59 per cent of agricultural trade. Going somewhat deeper, agricultural trade accounts for only around 5 per cent of existing trade between the parties,<sup>249</sup> but this says nothing about trade

<sup>238</sup> These are frequently also called free trade agreements or (particularly by economists) preferential trade agreements. This article follows the WTO practice of calling these ‘regional trade agreements’, even though they are not necessarily regional.

<sup>239</sup> EC agreements with Morocco [1969] JO L197/3, Tunisia [1969] JO L198/3, Spain [1970] JO L182/2, and Israel [1970] JO L183/2. See also *supra* note 88.

<sup>240</sup> EC agreements with Israel [1975] OJ L136/3, Algeria [1978] OJ L263/2, Morocco [1978] OJ L264/2, Tunisia [1978] OJ L265/2, Egypt [1978] OJ L266/2, Lebanon [1978] OJ L267/2, Jordan [1978] OJ L268/2, and Syria [1978] OJ L269/2.

<sup>241</sup> GATT Working Party Reports on agreements with Israel, GATT Doc L/4365, 23 June 1976; Tunisia, GATT Doc L/4558, Algeria, GATT Doc L/4559, Morocco, GATT Doc L/4560, all 31 Oct. 1977; and Egypt, GATT Doc L/4660, Syria, GATT Doc L/4661, Jordan, GATT Doc L/4662, and Lebanon, GATT Doc L/4663, all 5 May 1978.

<sup>242</sup> See *supra* note 149.

<sup>243</sup> There are Euro-Mediterranean association agreements with Algeria [2005] OJ L265/2; Egypt [2004] OJ L304/39; Israel [2000] OJ L147/3; Jordan [2002] OJ L129/3; Lebanon [2006] OJ L143/2; Morocco [2000] OJ L70/2; an Interim Agreement with the Palestinian Authority [1997] OJ L187/3; Syria (not yet signed), and Tunisia [1998] OJ L97/2.

<sup>244</sup> EC–Mexico association agreement [2000] OJ L276/45.

<sup>245</sup> EC–South Africa trade, development and cooperation agreement (TDCA) [1999] OJ L311/3.

<sup>246</sup> EC–Chile association agreement [2002] OJ L352/3.

<sup>247</sup> Negotiation directives are in place for agreements with Mercosur (1999), the Gulf Cooperation Council (GCC) (2001), and ASEAN, Korea, and India (all 2007). The EU and both Central America and the Andean Community have declared their intention to negotiate further trade agreements. For current information see the DG Trade website at <http://ec.europa.eu/trade/>.

<sup>248</sup> In addition, the EU has concluded numerous co-operation agreements with developing countries since the 1990s. These have little impact on the trade obligations of the various parties. The EEC–India Co-operation Agreement was discussed in Case C–268/94, *Portugal v. Council* [1996] ECR I–6177.

<sup>249</sup> WT/REG109/6, 24 Mar. 2006, Tables in Annex.



in the absence of trade barriers (indeed, the small figure may well indicate the intensity of those barriers). Very broadly speaking, the other agreements provide for similar levels of liberalization. There is, however, doubt as to whether this meets the 'substantially all the trade' requirement in Article XXIV:8 GATT, and that the notification and approval process is not complete for any of these agreements.

The EU's regional trade agreements are also significant in a number of other ways. They tackle other trade-related issues not fully covered in the WTO, including services, intellectual property, government procurement, investment and competition,<sup>250</sup> they provide for safeguards, and they contain human rights clauses.<sup>251</sup> The human rights clause has the potential to be used to suspend trade benefits under the agreement, but this has not yet occurred, despite various calls to this effect by the European Parliament and others.<sup>252</sup>

### D *Under-utilization of Preferences: Rules of Origin*

The discussion so far has concentrated on coverage of the EU's various preferential arrangements for developing countries in terms of potential beneficiaries, product coverage, tariff reductions, and suspensions of benefits. In order to provide a complete picture, however, it is necessary also to consider the rules specifying which products are entitled to benefit for preferential treatment, which can substantially limit the degree of preference 'utilization'. In 2006, the average utilization of GSP preferences was only 49 per cent, and for EBA preferences for least developed countries it was as low as 22 per cent.<sup>253</sup> Admittedly, these figures hide extremes. Utilization rates were over 80 per cent for five countries under the general and GSP+ arrangements (India, Pakistan, Argentina, Ecuador and Peru) and three EBA beneficiaries (Maldives, Nepal and Yemen). But utilization was less than 10 per cent for six of the top 20 EBA beneficiaries.<sup>254</sup>

The EU's rules of origin are restrictive in two main ways. One is procedural: if the procedure for applying for preferences is sufficiently burdensome, which includes tracing of the origin of inputs, exporters may prefer to export at the most-favoured-nation rate. One economist calculates that, on average, exporters only apply for preferences under the Cotonou Agreement when these are at least 4 per cent less than the normal most-favoured-nation rate.<sup>255</sup> The other restriction is substantive: rules of origin that are intolerant of inputs can limit the scope of the preferential treatment that is

<sup>250</sup> See the contributions, especially in Part 2, in L. Bartels and F. Ortino (eds), *Regional Trade Agreements and the WTO Legal System* (2006).

<sup>251</sup> See Bartels, generally, *supra* note 172.

<sup>252</sup> *Ibid.*, at 37.

<sup>253</sup> See *supra* note 190.

<sup>254</sup> *Ibid.* Utilization was practically zero for garments made in Cambodia in 2001 and 2002. See UNCTAD, *Trade Preferences for LDCs: An Early Assessment of Benefits and Possible Improvements*, UNCTAD/ITCD/TSB/2003/8 (2003), Pt. II.

<sup>255</sup> Manchin, 'Preference Utilisation and Tariff Reduction in EU Imports from ACP Countries', 29 *World Economy* (2006) 1243, at 1255.

nominally granted under the preferential arrangement.<sup>256</sup> For example, a rule of origin requiring that inputs originate in the same country as the final product effectively precludes preferences for products depending on imported inputs. The EU's rule stating that preferences are only available to clothes made from yarn is useful only to clothes manufacturers in countries that also have fabric industries, and even where this is the case, this might not be the cheapest or highest quality fabric.<sup>257</sup>

### 1 *Originating Products*

In determining the origin of products, the EU adopts the same basic tests in all of its preferential arrangements.<sup>258</sup> Goods have originating status when they are either 'wholly obtained' (mainly primary products), or are 'sufficiently worked or processed' in the relevant country. This second test usually requires a product to be manufactured from materials of a different heading, or to undergo specified processes, or the product may use a certain maximum proportion of non-originating materials. In addition, there are two other rules of general application: there is 'tolerance' of a low maximum amount of value added to the product, and an exclusion of products using specified 'insufficient working or processing operations'.

In general, the most liberal rules of origin are found in the Cotonou Agreement, and the most restrictive under the GSP Regulation, including the GSP+ arrangement and the arrangement for least developed countries.<sup>259</sup> Just to take one example, the definition of 'wholly obtained' fish caught outside territorial waters is based on cumulative nationality requirements involving a vessel's registration, flag, ownership and crew. Under Cotonou, these requirements may be satisfied by any EU or ACP nationals,<sup>260</sup> while under the GSP Regulation they are only satisfied by nationals from any EU Member State or the *same* GSP country, which rules out combinations of nationalities, for example, of crew and ownership.<sup>261</sup> Furthermore, the Cotonou Agreement requires merely that the crew be 50 per cent qualifying nationals,<sup>262</sup> while the GSP Regulation requires 75 per cent.<sup>263</sup> Similar differences may be observed in the levels of 'tolerance' between the different regimes: the Cotonou Agreement allows 15 per cent of non-originating value,<sup>264</sup> while the GSP scheme allows only 10 per cent.<sup>265</sup>

<sup>256</sup> The WTO regulates non-preferential rules of origin, but imposes only minimal transparency and due process requirements on preferential rules of origin: see WTO Agreement on Rules of Origin, available at: [www.wto.org/english/docs\\_e/legal\\_e/22-roo.doc](http://www.wto.org/english/docs_e/legal_e/22-roo.doc), Annex II.

<sup>257</sup> The EU's rules of origin are available for any given product at: <http://exporthelp.europa.eu>.

<sup>258</sup> For a helpful summary of the rules of origin in the Community's different preferential arrangements (including the GSP) see Naumann, 'Comparing EU Free Trade Agreements – Rules of Origin', ECDPM InBrief 61 (2006), available at: [www.ecdpm.org/inbrief61](http://www.ecdpm.org/inbrief61).

<sup>259</sup> Art. 5 GSP Reg., *supra* note 181, refers to the rules set out in Commission Reg. 2454/93 [1993] OJ L253/1.

<sup>260</sup> Art. 3(2) of Prot. 1 Cotonou; and see also the derogations available under Art. 3(3). Nationals of the Overseas Countries and Territories are also included.

<sup>261</sup> Art. 68(2) Reg. 2454, *supra* note 259.

<sup>262</sup> Art. 3(2)(d) of Prot. 1 Cotonou.

<sup>263</sup> Art. 68(2) Reg. 2454, *supra* note 259.

<sup>264</sup> Art. 4(2) of Prot. 1 Cotonou.

<sup>265</sup> Art. 71(1) GSP Reg., *supra* note 181.

## 2 Cumulation of Origin

Another difference between the different rules of origin concerns the possibility of 'cumulating' inputs from different originating sources without losing the preferential status of the final product.<sup>266</sup> This is a critical derogation from rules of origin principles, as it enables developing countries to develop industries which assemble products using inputs of different origin. All of the Community's preferential arrangements permit 'bilateral' cumulation, which allows a product to use inputs originating in the territory of the other party, so long as these satisfy minimum processing or value added rules. This is preferable to an absence of cumulation, but it is effectively a protectionist device used to encourage the beneficiary country to source its inputs from the Community instead of other (perhaps less expensive) sources. More generous is 'regional' cumulation, which allows for inputs to be sourced from third countries, as this allows for a wider range of intermediate goods. 'Diagonal' (or 'partial') cumulation permits the aggregation of *products* that have originating status under rules specified in the arrangement at issue, while 'full' cumulation is more generous, and permits the aggregation of *processing* operations in the relevant country. This has the advantage that the products which are the subject of processing do not themselves need to acquire originating status under the relevant rules.

All of the Community's preferential arrangements provide for bilateral cumulation. Beyond this, the rules vary.<sup>267</sup> The Cotonou Agreement has the most generous rules of origin, allowing for full cumulation between the EU and ACP countries. Diagonal cumulation is also foreseen between the ACP and South Africa. Next is the Euro-Mediterranean region, where there is full cumulation between the Community and Algeria, Morocco and Tunisia, and it is planned for diagonal cumulation to exist between the Community, the Euro-Mediterranean countries, the EFTA countries, the Faroe Islands and Turkey.<sup>268</sup> In principle, the GSP scheme is among the most restrictive of these arrangements, in that all three of its separate arrangements allow only for bilateral cumulation between a beneficiary country and the Community.<sup>269</sup> There are three main exceptions. First, diagonal cumulation is allowed between the beneficiary country and the Community, Norway and Switzerland. Second, diagonal cumulation is allowed within four regions in Asia and Latin America.<sup>270</sup> Third,

<sup>266</sup> As a rule, the country of origin is the last country of processing, provided that this processing has the highest value added.

<sup>267</sup> A convenient list, with references, is available at: [http://ec.europa.eu/taxation\\_customs/customs/customs\\_duties/rules\\_origin/preferential/article\\_779\\_en](http://ec.europa.eu/taxation_customs/customs/customs_duties/rules_origin/preferential/article_779_en).

<sup>268</sup> On the Pan-European Cumulation System see European Commission, *A User's Handbook to the Rules of Preferential Origin used in Trade between the European Community, other European Countries and the Countries Participating to the Euro-Mediterranean Partnership*, available at: [http://ec.europa.eu/taxation\\_customs/resources/documents/handbook\\_en.pdf](http://ec.europa.eu/taxation_customs/resources/documents/handbook_en.pdf). The system is effected by the adoption of new protocols to the relevant agreements. For their dates of entry into force see Commission Notice [2006] OJ C220/3.

<sup>269</sup> Art. 67(4) Reg. 2454/93, *supra* note 259, as amended by Reg. 3254/94 [1994] OJ L346/1.

<sup>270</sup> These are the Association of Southeast Asian Nations (ASEAN), the Central American Common Market (Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua, and Panama), the Andean Group (Bolivia, Colombia, Ecuador, Peru, and Venezuela), and the South Asian Association for Regional Cooperation (Bangladesh, Bhutan, India, Maldives, Nepal, Pakistan, and Sri Lanka): Art. 72 GSP Reg., *supra* note 181.

cumulation rules may be relaxed for least developed countries. Along these lines, Nepal, Cambodia and Laos have been permitted to use a limited diagonal cumulation rule, such that a quota of listed textiles may still obtain GSP preferences even if they use fabric or yarn originating in the ACP, the Association of Southeast Asian Nations (ASEAN) (except Myanmar) or the South Asian Association for Regional Cooperation (SAARC).<sup>271</sup>

### 3 Reforms

It is a common criticism that stringent rules of origin in preferential trade arrangements have trade effects far beyond their stated purpose of ensuring that only products from the appropriate country obtain preferential treatment. The Commission has recognized this,<sup>272</sup> and proposes to simplify and relax the existing rules in a number of respects. It aims to replace the complicated existing rules with a simple ‘value-added’ test, with suggested different levels for least developed countries and GSP+ beneficiaries,<sup>273</sup> to introduce full cumulation within coherent regional groupings, and to simplify various administrative requirements.<sup>274</sup> At the present time, however, with the exception of the Pan-European cumulation system, there are no concrete proposals to this effect.

## 5 Post-Cotonou Trading Arrangements

One of the most significant issues in the EU’s current trade and development policy concerns the shape of the arrangements with the ACP countries following the expiry of the non-reciprocal trade preferences in the Cotonou Agreement at the end of 2007. Article 36(1) of the Cotonou Agreement states that:

In view of the objectives and principles set out above, the Parties agree to conclude new World Trade Organisation (WTO) compatible trading arrangements, removing progressively barriers to trade between them and enhancing cooperation in all areas relevant to trade.

The two main ways in which this is to be achieved are set out in Article 37. Article 37(1) states that Economic Partnership Agreements (EPAs) shall be negotiated and shall enter into force at least by 1 January 2008. Alternatively, Article 37(6) foresees that WTO-compatible market access opportunities equally favourable to those in Cotonou will be offered to any non-least developed ACP country that decides that it is not in a position to enter into an EPA. No ACP country has requested consideration of

<sup>271</sup> See Commission Regs 1806–1808/2006 [2006] OJ L343/69–74. Bangladesh benefited from a similar derogation in 1997 under Commission Reg. 2260/97 [1997] OJ L311/8.

<sup>272</sup> Commission Green Paper on the Future of Rules of Origin in Preferential Trade Arrangements, COM(2003)787, 18 Dec. 2003; Commission Communication on the Rules of Origin in Preferential Trade Arrangements: Orientations for the Future, COM(2005)100, 16 Mar. 2005; and Commission 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, 7 July 2004, pt. 6.6. Art. 37(7) of the Cotonou Agreement also foresees a revision of rules of origin to improve market access in the Economic Partnership Agreements.

<sup>273</sup> Green Paper, *supra* note 272, 9.

<sup>274</sup> *Ibid.*

alternative arrangements, nor is this favoured by the EU.<sup>275</sup> In a very real sense, this brings the EU's trade and development policy back full circle to its free trade ambitions in Part IV of the EEC Treaty. And this is no accident: for the first time in a number of decades the 'African renaissance' and the changing structure of world trade is encouraging the EU to pursue a more aggressive trade agenda in this part of the world.<sup>276</sup>

### A *Economic Partnership Agreements*

Negotiations on Economic Partnership Agreements commenced in September 2002 and were due to be completed in time for the agreements to come into force on 1 January 2008.<sup>277</sup> The broad framework for these negotiations was set out originally in the Cotonou Agreement as follows:

Negotiations of the economic partnership agreements will be undertaken with ACP countries which consider themselves in a position to do so, at the level they consider appropriate and in accordance with the procedures agreed by the ACP Group, taking into account regional integration process [sic] within the ACP.<sup>278</sup>

Early in the negotiation process it was decided, with the EU's strong encouragement,<sup>279</sup> that EPAs would be negotiated with ACP countries in groups of their choosing. In principle, this could support existing regional integration processes. The problem, however, is that the current configurations of the EPA negotiating groups only partially match these existing arrangements. For most of the negotiation process, the ACP countries<sup>280</sup> have been divided into six regional groups: a Pacific Group,<sup>281</sup>

<sup>275</sup> In a leaked memorandum to European Commission Delegations, the Director-General of DG Trade stated that, while no ACP country had yet requested an alternative, 'we should also say that EPAs are our best alternative ... and any other options will be less valuable for trade and development'. The memorandum also referred to alternatives as 'in reality, impractical'. See Carl, 'Note for the Attention of Delegations in ACP Countries: Recent UK statements on EPAs', Brussels, Trade/MPC D(2005) 3910, 11 Apr. 2005, available at: [www.epawatch.net/documents/doc287\\_1.doc](http://www.epawatch.net/documents/doc287_1.doc).

<sup>276</sup> H.-B. Solignac Lecomte, *Effectiveness of Developing Country Participation in ACP-EU Negotiations*, Working Paper (2001), at 14.

<sup>277</sup> In the absence of publicly available draft agreements, it is not possible to comment on the agreements in detail; rather, what follows is a brief summary of the 'known unknowns'. These relate to the inclusion of obligations on services, investment, trade facilitation, and government procurement, the inclusion of a human rights clause, the precise scope of 'trade for aid' and – significantly – rules of origin. For a summary of the different negotiating positions see *ACP-EC EPA Negotiations: Joint Report on the All-ACP-EC Phase of EPA Negotiations*, ACP/00/118/03, ACP-EC/NG/NP/43, Rev. 1, Brussels, 2 Oct. 2003 and subsequent 'roadmaps' available at: [http://ec.europa.eu/trade/issues/bilateral/regions/acp/regneg\\_en.htm](http://ec.europa.eu/trade/issues/bilateral/regions/acp/regneg_en.htm). An evaluation is set out in Commission Staff Working Document, *The Trade and Development Aspects of EPA Negotiations*, SEC(2005)1459, 9 Nov. 2005.

<sup>278</sup> Art. 36(5) Cotonou.

<sup>279</sup> The EU supports this on the ground that regional integration brings both trade and investment benefits. See European Commission, 'Economic Partnership Agreements: Questions and Answers', 1 Mar. 2007, available at: [http://ec.europa.eu/trade/issues/bilateral/regions/acp/memo010307\\_en.htm](http://ec.europa.eu/trade/issues/bilateral/regions/acp/memo010307_en.htm).

<sup>280</sup> Cuba, an ACP country, is not a party to the Cotonou Agreement and therefore not involved in EPA negotiations. In addition, Somalia and East Timor are not at present involved in EPA negotiations: See EU Economic Partnership Agreements, Answer to Question 105203, HC Debs, C748W, 11 Dec. 2006.

<sup>281</sup> Cook Islands, Micronesia, Fiji, Kiribati, Marshall Islands, Nauru, Niue, Palau, Papua New Guinea, Samoa, Solomon Islands, Tonga, Tuvalu, Vanuatu.

a Caribbean Group,<sup>282</sup> a West Africa Group,<sup>283</sup> a Central Africa Group,<sup>284</sup> a Southern African Development Community (SADC) Group,<sup>285</sup> and an Eastern and Southern African (ESA) Group.<sup>286</sup>

In some cases, these groups build on an existing grouping: for example, the Caribbean Group is comprised of Caricom (an embryonic customs union) and the Dominican Republic, and the SADC Group is based on the Southern African Customs Union (SACU), comprising South Africa, Botswana, Namibia, Swaziland and Lesotho, with the addition of a number of other neighbouring countries. In itself, the widening of these arrangements could undermine their integrationalist objectives.<sup>287</sup> Of far more concern, however, is the splitting of existing regional arrangements into different EPA negotiating groups. This is particularly a problem for the ESA Group, which includes most of the members of the Common Market for Eastern and Southern Africa (COMESA), some of the members of the Southern African Development Community (SADC), and until recently, two existing and two future members of the East African Community (EAC). Each of these existing organizations has ambitions to be a customs union, and it is difficult to see how an individual member of a customs union can negotiate a free trade agreement without the consent of its customs union partners.<sup>288</sup> There is therefore a legal question as to whether the EPA process is in fact ‘taking account’ of the regional integration process, as required under the Cotonou Agreement, or whether it is undermining this process.

As to the content of EPA, the overall framework is that of ‘WTO compatibility’.<sup>289</sup> This is essentially a reference to Article XXIV of GATT, which permits regional trade

<sup>282</sup> Antigua and Barbuda, Bahamas, Barbados, Belize, Dominica, Dominican Republic, Grenada, Guyana, Haiti, Jamaica, St Kitts and Nevis, St Lucia, St Vincent and the Grenadines, Surinam, Trinidad and Tobago. All except the Dominican Republic are members of the Caribbean Community (Caricom) and all are members of Cariforum.

<sup>283</sup> Benin, Burkina Faso, Cape Verde, Côte d’Ivoire, Gambia, Ghana, Guinea, Guinea-Bissau, Liberia, Mali, Mauritania, Niger, Nigeria, Senegal, Sierra Leone, Togo. All except Mauritania are members of the Economic Community of West African States (ECOWAS).

<sup>284</sup> Cameroon, Central African Republic, Chad, Congo, Equatorial Guinea, Gabon, and São Tomé and Príncipe. All except São Tomé and Príncipe are members of the Communauté Economique et Monétaire de l’Afrique Centrale (CEMAC).

<sup>285</sup> South Africa, Botswana, Lesotho, Namibia, Swaziland (all SACU; Swaziland also COMESA), Mozambique, Angola, and Tanzania (EAC). All are members of SADC, but other SADC members are part of the ESA Group.

<sup>286</sup> Burundi, Rwanda, Kenya, and Uganda (all EAC), Malawi, Mauritius, Madagascar, Zambia, and Zimbabwe (all SADC), Comoros, Democratic Republic of Congo, Djibouti, Eritrea, Ethiopia, Seychelles, and Sudan. All of these are members of COMESA except for Kenya and Uganda. In addition, Swaziland is a COMESA member but also part of the SADC Group, and Egypt and Libya are COMESA members but not involved in EPA negotiations.

<sup>287</sup> Bilal and Grynberg, ‘EPAs Make Sense Only if They Foster Development: A Broad Overview’, in S. Bilal and R. Grynberg (eds), *Navigating New Waters: A Reader on ACP–EU Trade Relations* (2007), i, 15.

<sup>288</sup> The legal problems are greater for customs unions with exclusive competence in trade, such as the European Community.

<sup>289</sup> See Desta, ‘EC–ACP Economic Partnership Agreements and WTO Compatibility: An Experiment in North–South Interregional Agreements?’, 43 *CML Rev* (2006) 1343.

agreements between WTO Members only if they eliminate all barriers to trade on ‘substantially all the trade’ between the parties to the agreement.<sup>290</sup> There has never been an agreed definition of ‘substantially all the trade’, but it is customarily understood to mean around 80 to 90 per cent of all trade between the parties, though some WTO Members have sought to introduce stricter requirements.<sup>291</sup> The theory underlying this rule is that it is only in such cases that a regional trade agreement will create more trade (by reducing protection among the members) than it will artificially divert (by rendering imports from third countries comparatively more expensive).<sup>292</sup> As mentioned, in *EC – Bananas II*, a GATT panel held that this condition could not be met by an agreement providing for non-reciprocal trade preferences.<sup>293</sup> The starting point for negotiating EPAs is therefore that these will be reciprocal free trade agreements.

On the EU side, this is relatively simple. On 4 April 2007, the EU offered to grant all ACP-EPA negotiating countries (except South Africa)<sup>294</sup> full duty-free quota-free market access, with phased liberalization for rice and (over a longer term) sugar.<sup>295</sup> In terms of coverage, this is almost identical to the degree of market access offered to least developed countries under the Everything But Arms arrangement in the EU’s GSP programme. In the sense that it even improves on market access under the Cotonou Agreement, this offer also appears to comply with the promise in the Cotonou Agreement that ‘[o]n the Community side trade liberalisation shall build on the acquis and shall aim at improving current market access for the ACP-EPA countries through inter alia, a review of the rules of origin’.<sup>296</sup> On the other hand, the Cotonou Agreement is notable for its discrimination between certain countries covered by the commodity protocols, and others not so protected. Inasmuch as the new offer removes this discrimination, commodity protocol countries will now have to compete with non-protocol countries (as well as non-ACP LDCs) in sugar and beef. While this does

<sup>290</sup> This understanding is stated in the Explanatory Memorandum to the European Commission’s Draft Mandate to negotiate EPAs, 9 Apr. 2002, available at: <http://trade.ec.europa.eu/doclib/html/112023.htm>. In fact, a number of the ACP EPA negotiating countries are not WTO Members. For agreements with such countries, strictly speaking, a waiver should be obtained under Art. XXIV:10 GATT.

<sup>291</sup> Australia suggests coverage of 95% together with consideration of ‘highly traded’ and potentially traded products: See Submission on Regional Trade Agreements – Paper by Australia, WTO Doc TN/RL/W/173/Rev. 1, 3 Mar. 2005 and further at WTO Doc TN/RL/W/180, 13 May 2005. The somewhat vaguer EU position is set out in its Submission on Regional Trade Agreements, WTO Doc TN/RL/W/179, 12 May 2005.

<sup>292</sup> A convenient summary of the economics theories underlying Art. XXIV is found in WTO, *World Trade Report 2003* (2003), at 46–66.

<sup>293</sup> See *supra* notes 149 to 151.

<sup>294</sup> In 1997 South Africa acceded to the Lomé Convention except for its trade provisions. Its trade with the EU is governed by a separate EU–South Africa agreement (TDCA), *supra* note 245. A review of this agreement is taking place simultaneously with the SADC group EPA negotiations, which South Africa was invited to join in 2006: see COM(2006)673, 28 Nov. 2006.

<sup>295</sup> European Commission, ‘EC Market Access Offer in Economic Partnership Agreements (EPAs)’, 4 Apr. 2007, available at: [http://ec.europa.eu/trade/issues/bilateral/regions/acp/mao040407\\_en.htm](http://ec.europa.eu/trade/issues/bilateral/regions/acp/mao040407_en.htm). As detailed in this document, sugar will be liberalized only in 2015, 6 years later than under the EBA, and then still subject to special safeguards. For French objections see Note from the French Delegation to the Council, Brussels, 8410/07, 13 Apr. 2007.

<sup>296</sup> Art. 37(6) Cotonou.

not affect their market access, as such, it does potentially diminish their competitive advantages. As a result, this runs the risk of contradicting the statement (significantly, not a promise) in the Cotonou Agreement that:

the Parties reaffirm the importance of the commodity protocols. They agree on the need to review them in the context of the new trading arrangements, in particular as regards their compatibility with WTO rules, with a view to safeguarding the benefits derived therefrom, bearing in mind the special legal status of the Sugar Protocol.<sup>297</sup>

The situation on the side of the EPA countries is more complicated. Even assuming reciprocity, there is still a question whether, under WTO law, partners to a regional trade agreement may liberalize at different rates, particularly when this agreement is concluded between countries of different levels of economic development.<sup>298</sup> It may be that Article XXIV GATT already allows for some degree of ‘asymmetry’.<sup>299</sup> Alternatively, it may be that Article XXIV should be amended to state this expressly.<sup>300</sup> In any case, it is notable that the EPA guidelines set down by the Cotonou Agreement presumes a measure of asymmetry. Article 37(7) states, in part, that:

... Negotiations shall take account of the level of development and the socio-economic impact of trade measures on ACP countries, and their capacity to adapt and adjust their economies to the liberalisation process. Negotiations will therefore be as flexible as possible in establishing the duration of a sufficient transitional period, the final product coverage, taking into account sensitive sectors, and the degree of asymmetry in terms of timetable for tariff dismantlement, while remaining in conformity with WTO rules then prevailing.

Though couched in different terms, this provision resembles the framework established under Part IV of the EEC Treaty and the Yaoundé Conventions, which, as noted above, imposed a reciprocity regime that in many respects was more virtual than real.<sup>301</sup> This was contentious within the GATT,<sup>302</sup> and it is likely that history will be repeated also in this respect. It is no doubt for this reason that Article 37(8) contains the oddly defeatist statement that ‘[t]he Parties shall closely cooperate and collaborate

<sup>297</sup> Art. 36(4) Cotonou. The ‘special legal status’ of the sugar protocol refers to the ‘indefinite’ duration of this protocol, as set out in Art. 13 of Annex V and Art. 1 of Prot. 3 to Annex V. Art. 10 of Prot. 3 allows for denunciation with 2 years’ notice, but a Declaration by the Community on this provision states that this ‘is for the purposes of juridical security and does not represent for the Community any qualification or limitation of the principles enunciated in Article 1 of that Protocol’. It is hard to know what to make of this language.

<sup>298</sup> Unlike Art. XXIV GATT, the equivalent WTO provision for services provides that ‘[w]here developing countries are parties to a [regional integration agreement] ... flexibility shall be provided for regarding the conditions [equivalent to Art. XXIV:8 GATT] in accordance with the level of development of the countries concerned’: Art. V(3)(a) of the WTO General Agreement on Trade in Services (GATS).

<sup>299</sup> See *supra* note 150.

<sup>300</sup> See Submission on Regional Trade Agreements – Paper by the ACP Group of States, WTO Doc TN/RL/W/155, 28 Apr. 2004; Onguglo and Ito, ‘In Defence of the ACP Submission on Special and Differential Treatment in GATT Article XXIV’, in Bilal and Grynberg, *supra* note 287 and Lang, ‘Renegotiating GATT Article XXIV – a Priority for African Countries engaged in North-South Trade Agreements’, ATPC Work in Progress No 33, Feb. 2006. Negotiations to clarify the development dimension of Art. XXIV were mandated in the Doha Ministerial Declaration, *supra* note 220, para. 29.

<sup>301</sup> See *supra* at 724–725.

<sup>302</sup> See *supra*, text to note 99.



in the WTO with a view to defending the arrangements reached, in particular with regard to the degree of flexibility available’.

## B Alternatives to EPAs

Despite the lack of official interest in any alternatives to EPA negotiations, it is worth speculating briefly as to how such an alternative might appear. For this purpose, a distinction must be drawn between least developed and non-least developed ACP countries. Interestingly, nothing is said specifically in the Cotonou Agreement about non-EPA alternatives for least developed countries. Article 37(9) provides that:

The Community will start by the year 2000, a process which by the end of multilateral trade negotiations and at the latest 2005 will allow duty free access for essentially all products from all LDC building on the level of the existing trade provisions of the Fourth ACP-EC Convention and which will simplify and review the rules of origin, including cumulation provisions, that apply to their exports.

This promise was mainly fulfilled by means of the Everything But Arms (EBA) initiative, though the commitment in this provision to simplify and review the rules of origin has not yet occurred. In other words, except for more restrictive rules of origin, which depending on the products at issue may be a consideration, a least-developed ACP country now has the option of exiting the EPA process and relying solely on EBA preferences.

For non-least developed countries, the Cotonou Agreement is more explicit as to alternatives. Article 37(6) refers to consideration of ‘a new framework for trade which is equivalent to their existing situation and in conformity with WTO rules’. Given that a regional trade agreement consistent with Article XXIV GATT is not comprehended by this provision, the only possible alternative is a non-discriminatory GSP arrangement consistent with the Enabling Clause, including any WTO-consistent arrangements allowing for additional preferences for certain developing countries with objectively determined trade, development or financial needs.<sup>303</sup> However, GSP options for non-LDC ACP countries are problematic from both a practical and theoretical point of view. Practically, the EU would need to liberalize the applicable GSP arrangement to Cotonou levels in terms of market access and rules of origin, and (for GSP+) would have to open its ‘closed list’ of beneficiaries before 2009 (as argued above, this is in any case required under WTO rules).<sup>304</sup> The theoretical difficulty is that even if Cotonou-equivalent market access (including equivalent rules of origin) were granted to non-LDC ACP countries, this could not place them in a situation ‘equivalent to their existing situation’, for the simple reason that they would now be competitors with other countries under the same arrangement.<sup>305</sup> In other words, the promise expressed in Article 37(6) appears always to have been impossible to fulfil.

<sup>303</sup> Theoretically, of course, full market access could also be offered on a most-favoured-nation basis.

<sup>304</sup> See *supra* at 742.

<sup>305</sup> Somewhat ironically, the same factors affect the EU’s obligation to ‘maintain total market access’ for MFN banana suppliers when rebinding its banana tariff. See *EC – The ACP-EC Partnership Agreement – Recourse to Arbitration*, WT/L/616, circulated 1 Aug. 2005, paras 68 and 73; and also *EC – The ACP-EC Partnership Agreement – Second Recourse to Arbitration*, WT/L/625, circulated 27 Oct. 2005, paras 30–39; though in the end in this arbitration the arbitrator did not need to take these into account: para. 116. The obligation is contained in WTO Doc WT/MIN(01)/15, *supra* note 152, Annex 1.

## 6 Conclusion

The present is a period of significant shifts in the EU's trade and development policy, which at a fundamental level is the result of a change in its rationale. From 1957 to the 1990s, in one form or another, the main objective was to maintain the historical economic relationship between erstwhile colonizers and subjects. A more general trade policy for other developing countries, which slowly took shape during the 1970s, was reactive, and always contingent on not harming either the primary relationship or, of course, domestic producers. The economic means deployed to achieve this primary objective differed over the years. Part IV of the EEC Treaty and the Yaoundé Conventions applied liberal economic policies, while the Lomé Conventions abandoned reciprocity and added commodity export price stabilization schemes. Nonetheless, these arrangements shared the same political objective.

This has now changed. The gradual acceptance of the principle that trade with developing countries should be non-discriminatory, the growing ability to enforce this principle within the WTO, and a decline in internal EU support for a special relationship with its ex-colonies has changed the overall objective of the EU's trade and development policy to one of equity among developing countries. This new objective is still not well reflected in the EU's existing legal instruments, which discriminate between developing countries by means of insupportably strict rules of origin, arbitrarily different levels of GSP preferences, and a fragmentary system of regional trade agreements. It will also take time to bring order to the EU's elaborate system of subsidies, which are expensive to maintain, unsustainable in the long term, and still damaging to third countries. Nonetheless, a combination of internal political will and external legal scrutiny should finally see a proper transformation of an EU trade and development policy from one based on history to one based on principle.