Trade Negotiations or Trade Capitulations: An African Experience

Patricia Michelle Lenagham

Follow this and additional works at: https://scholarship.law.berkeley.edu/blrlj

Part of the Law Commons

Recommended Citation

Link to publisher version (DOI)
https://doi.org/10.15779/Z386W9P

This Article is brought to you for free and open access by the Law Journals and Related Materials at Berkeley Law Scholarship Repository. It has been accepted for inclusion in Berkeley La Raza Law Journal by an authorized administrator of Berkeley Law Scholarship Repository. For more information, please contact jcera@law.berkeley.edu.
Trade Negotiations or Trade Capitulations: An African Experience

Patricia Michelle Lenaghan

The rhetoric of global trade is filled with promise. We are told that free trade brings opportunity for all people, not just a fortunate few. We are told that it can provide a ladder to a better life, and deliverance from poverty . . . Sadly, the reality of the international trading system today does not match the rhetoric.

(Kofi Annan, 10 September 2003).1

I. INTRODUCTION

The debate on economic development within the global economy centers on the facilitation of trade within the framework of the World Trade Organization (WTO), which emphasizes the equal treatment of trading partners as a means of ensuring the economic advantages associated with trade. In particular, the General Agreement on Tariffs and Trade (GATT) Most Favored Nation (MFN) Clause as contained in Article 1 of the GATT obliges parties to grant each other equal treatment with regard to inter-party trade.

However, the so-called MFN treatment does not take into account existing inequality in economic structures as well as levels of development between developed and developing (less developed) countries. 2 Preferences were seen as helping to overcome these disadvantages. For this reason, it was necessary to implement legislative changes in order to introduce preferential treatment of developing countries (DCs).

---

1. Cancun, Mexico, 10 September 2003 - Secretary-General’s message to the Fifth Ministerial Conference of the World Trade Organization (delivered by Rubens Ricupero, Secretary-General, UNCTAD).

2. For operational and analytical purposes, the World Bank’s main criterion for classifying economies is gross national income (GNI) per capita. A developing country is defined as a country with a low income average, a relatively undeveloped infrastructure and a poor human development index when compared to the global norm. Thus, classifying a country as developing already implies an existing disequilibrium between developed and developing countries. See, http://web.worldbank.org/WEBSITE/EXTERNAL/DATASTATISTICS/0,,contentMDK:20420458–menuPK:64133156–pagePK:64133150–piPK:64133175–theSitePK:239419,00.html (last accessed June 6, 2006).
The 1947 GATT had no provisions for special arrangements, such as non-reciprocal duty free access, to help developing countries through trade. However, a number of provisions were added in 1965, for example, Article XVIII, Article XXVIII and Part IV on Trade and Development. In order to allow the Generalized System of Preferences (GSP) to become legally operational, on June 25, 1971, the GATT Contracting Parties decided to waive the provisions of Article I of the GATT for a period of 10 years. Following the conclusion of the Tokyo Round, on November 28, 1979, the Contracting Parties adopted the Decision on Differential and More Favorable Treatment, Reciprocity and Fuller Participation of Developing Countries (the “Enabling Clause”) which provided a legal basis for the granting of trade preferences. The Enabling Clause therefore constitutes the legal basis by which individual WTO Members may unilaterally grant GSP preferences to developing countries.

The generalized basis of preferences under the Enabling Clause means that there is no need for donor countries to seek permission to grant preferences to developing countries or even better preferences to least-developed countries (LDC’s). However, unilateral preferences that are only available to selected developing countries are not covered by the Enabling Clause reciprocal preferences, under GATT Article XXIV on regional trade agreements. For example, preferences under the Cotonou Agreement for African, Caribbean and Pacific (ACP) countries are not covered.

The GSP is the most extensive and explicit expression of an attempt to use trade preferences as a tool of development. Today there are a number of other schemes limited to sub-groups of developing countries with varying product coverage and preferential arrangements.

Recently, there have been increased aspirations to help developing countries through aid, debt relief and trade initiatives. At the first Ministerial Meeting of the WTO in Singapore in 1996, then Director-General of the WTO, Renato Ruggiero declared his intention to press WTO members to afford tariff and quota free entry to imports from the least-developed countries (LDC’s) to the markets of the developed countries.

This initiative bore fruit in 2000, when the European Union (EU) Trade Commissioner Pascal Lamy announced the ‘Everything But Arms’ (EBA) Initiative, under which it proposed to eliminate all tariffs on imports from LDC’s except arms and to free such imports from any quantitative restriction. Other developed countries have made similar proposals, including the United States’ African Growth and Opportunities Act.

In May 2000, at the Signing of the Trade and Development Act of 2000, containing as Title 1 the African Growth and Opportunity Act, President Clinton stated:


...[I] t is clear that by breaking down barriers to trade, building new opportunities and raising prosperity, we can lift lives in every country and on every continent. ...Trade is one of the most powerful engines driving development in the region. ...5

In June 2000, at the Signing Ceremony for the new partnership agreement between the African Caribbean Pacific Group of States and the Member States of the European Union, the Cotonou Agreement, Poul Nielsen, the European Commissioner for Development Co-operation and Humanitarian Aid, described the objectives of the new agreement as follows:

We have agreed to develop a common and comprehensive strategy centered on the objective of reducing and eventually eradicating poverty consistent with the objectives of sustainable development and the gradual integration of the ACP countries into the world economy.

Both the African Growth and Opportunity Act (AGOA) and the Cotonou Agreement are based on the assumption that they can assist in poverty reduction, increase growth and achieve sustainable development in Africa. Both establish non-reciprocal trade preferences for African countries with regard to their trade with the EU and the U.S., respectively. The implementation of non-reciprocal preferential trade arrangements is part of the concept of special treatment for developing countries.

While the Cotonou Agreement and the AGOA aspire to promote Africa countries' advancement, this paper argues that the unbalanced power relationship between the EU and the U.S. on the one hand, and Africa on the other, raises suspicions that the negotiation and implementation of these agreements have failed to fully address African concerns.

I raise this point by critically evaluating the use of trade preferences within the African context. Part II of this paper focuses on the recent relationship between Africa and the United States (US) in terms of the AGOA. The supposedly altruistic aspects of the AGOA are recognized as furthering primarily the interests of the dominant U.S. Part III explores the historical relationship between the EU and Africa. Following an analysis of the current EU and ACP relationship is an examination of the Cotonou Agreement and the Everything But Arms Agreement. The Cotonou Agreement represents a considerable break with the unilateral preferences of the past and aims to replace preferential trading with reciprocal Economic Partnership Agreements (EPAs). Until now, only the EU and South Africa have completed EPA negotiations. For this reason, the analysis of the negotiations process between the EU and South Africa seeks to identify the possibility of coercion by the dominant EU in further EPA negotiations. These findings assist recommendations on how best to employ the EPA negotiations process in the other ACP regions.

II.
AFRICAN GROWTH AND OPPORTUNITIES ACT (AGOA)

A. Historical Background

In an attempt to understand these dissimilar agreements between Africa and the EU, on the one hand, and the U.S. and Africa on the other, it is important to take note of the historical experiences, different economic perceptions as well as the different global roles that might have been an influence.

In comparison to the strong historical ties that the EU holds in Africa, the U.S. represents a comparatively limited relationship. Other than establishing an independent Liberia as a resettlement area for freed slaves\(^6\) and other African descendants in the 1840's, the U.S. policy towards Africa has been based on the so-called 'hands-off' principle.\(^7\)

During the period of the Cold War, the U.S. recognized the potential of Africa as a large supplier for raw materials critical in particular to military and industrial purposes. Perhaps most illustrative of this is the U.S. commitment in the Congo (presently the Democratic Republic of Congo) during the rule of draconian dictator Mobutu Sese Seko, in the 1960’s as a result of their dependence on strategic minerals for use in U.S. nuclear weapons program. Later U.S. relations focused on Nigeria, who became the second leading exporter of oil to the U.S. in the early 1970s.

Perhaps even more important was the U.S. foreign affairs policy to fight Communism wherever it appeared in the world. The intensity of this waged war is particularly visible in the 1960s and the 1970s, in the U.S. support of anti-communist rebel movements like the South-African sponsored guerrilla group UNITA in Angola and military incursions by South Africa itself as part of the later destabilization policies.\(^8\)

During the 1980s and the 1990s, U.S. foreign policy towards Africa was primarily based on the principle of quiet diplomacy.\(^9\) This was followed by

\(^6\) The United States slave history extends back to the early 15th century with 20 Africans having been sold in Virginia in 1619. Slaves shipped from Africa were primarily used in the Southern colonies. The further importation of slaves was banned following the adoption of the United States Constitution in 1787; all new slaves would have to be descendants from resident slaves. Throughout the first half of the 19th century the Abolitionist movement to end slavery grew and the conflict culminated in the United States Civil War. Lincoln’s Emancipation Proclamation of January 1863 heralded the end of slavery. Following the final ratification of the Thirteenth Amendment to the Constitution in December 1865, the last slaves were freed in Kentucky. See, The Antislavery literature project, available at, http/antislavery.eserver.org/ (last accessed June 6, 2006).


intermittent interventions such as the United States’ participation in the UN humanitarian mission in Somalia from 1992 until 1994. In response to the genocide in Rwanda that erupted in April 1994, the Clinton Administration established new governmental institutions like The African Crisis Response Initiative, which was aimed at developing African capacity for peacekeeping with US assistance.

From these initiatives evolved a commitment to build a new partnership with Africa giving rise to a White House Conference on Africa in 1994 which was followed by an African Summit in 1995, forming the foundation for economic relationships between the U.S. and Africa.

B. AGOA

In May 2000, the U.S. Congress enacted AGOA I, a unilateral piece of legislation said to benefit sub-Saharan African countries solely with regard to trade and trade-related issues. U.S. President Clinton signed the Act into law on 18 May 2000. Starting from October 2000, AGOA I covered a period of eight years. In contrast to extended Cotonou discussions between the EU and ACP countries, this trade act is unilateral, not bilateral. The U.S. government failed to engage African governments in negotiations, indicating a fundamental disrespect for the sovereignty of African governments in the implementation of their economic policies.

In order to enhance the application and functioning of AGOA, the AGOA has twice been amended and modified. On August 6, 2002, amendments to AGOA I were signed into law by U.S. President George W. Bush, which substantially expands preferential access for imports from beneficiary sub-Saharan African countries, and on July 13, 2004, the so-called AGOA Acceleration Act of 2004 (AGOA III) was enacted by the U.S. Congress further extending AGOA to 2015.

AGOA builds on existing U.S. trade programs by expanding the (duty-free) benefits previously available only under the Generalized System of Preferences (GSP) program. Duty-free access to the U.S. market under the combined AGOA/GSP program now stands at approximately 7,000 product tariff lines, including the roughly 1,800 product tariff lines that were added to the GSP by the AGOA legislation. Notably, these include items such as apparel and footwear, wine, certain motor vehicle components, a variety of agricultural products, chemicals, steel and others.

Product-eligibility for AGOA includes duty-free and quota-free access to the U.S. market without limits being made for apparel produced in eligible sub-Saharan African countries from U.S. fabric, yarn and thread. It also provides for substantial growth of duty-free and quota-free apparel imports made from fabric produced in beneficiary countries in sub-Saharan Africa. Under a Special Rule for Lesser Developed Beneficiary Countries, those with a per capita GNP under $1500

---

10. According to section 107 of AGOA I, the term SSA countries refers to the following or any successor political entities: Angola, Benin, Botswana, Burkina Faso, Burundi, Cameroon, Cape Verde, Central African Republic, Chad, Comoros, Democratic Republic of Congo, Republic of Congo, Côte d’Ivoire, Djibouti, Equatorial Guinea, Eritrea, Ethiopia, Gabon, Gambia, Ghana, Guinea, Guinea-Bissau, Kenya, Lesotho, Liberia, Madagascar, Malawi, Mali, Mauritania, Mauritius, Mozambique, Namibia, Niger, Nigeria, Rwanda, Sao Tomé and Principe, Senegal, Seychelles, Sierra Leone, Somalia, South Africa, Sudan, Swaziland, Tanzania, Togo, Uganda, Zambia, Zimbabwe.

in 1998 will enjoy duty-free access for apparel made from fabric originating anywhere in the world until September 30, 2004.

C. Eligibility Conditions

Regarding application, AGOA distinguishes between eligibility regarding countries and the eligibility of products. Section 104 of AGOA I refers to certain “country eligibility” requirements. In order to receive the benefits of AGOA I, a Sub-Saharan African country must:

...[be] determined to have established, or to have been making continual progress towards establishing a market-based economy, the rule of law and political pluralism, elimination of barriers to U.S. trade and investment, protection of intellectual property, efforts to combat corruption, policies to reduce poverty, increasing availability of health care and educational opportunities, protection of human rights and worker rights, and elimination of certain child labor practices and refrain from activities that undermine U.S. national security.

In addition to these eligibility requirements the U.S. President has the right to certify a country's eligibility status. This one sided determination of eligibility as well as the provision for reviewing a country's status every year, with the right of the U.S. to withdraw the eligibility status any time causes uncertainty and instability and keeps African trade vulnerable to U.S. politics. For example, during the 2004 presidential election, Africa was not a priority. This caused a delay in the renewal of a ‘special treatment’ clause by the U.S. Congress, forcing Swaziland to retrain textile workers as the Taiwanese factory owners diverted orders to other factories. Kenya foresaw a textile industry disaster if the extension were not passed by the September 2004 deadline. What enterprising manufacturer would seriously invest in factories that might lose their major market in a few months?

The uncertainty of AGOA eligibility is further aggravated through the political and economic conditions imposed on eligible countries. For the purposes of this analysis the following criteria will be critiqued: the elimination of barriers to U.S. trade and investment, protection of intellectual property, and the duty to refrain from activities that undermine U.S. national security.

---

12. If a product is considered eligible, a zero tariff is provided except those regarded as “import sensitive.”
13. 37 sub-Saharan African countries, including South Africa are qualified for AGOA. President Clinton issued a proclamation on October 2, 2000 designating 34 countries in Sub-Saharan Africa as eligible for the trade benefits of AGOA: Benin, Botswana, Cameroon, Cape Verde, Central African Republic, Chad, Republic of Congo, Côte d’Ivoire, Democratic Republic of Congo, Djibouti, Eritrea, Ethiopia, Gabon, The Gambia, Ghana, Guinea, Guinea-Bissau, Kenya, Lesotho, Madagascar, Malawi, Mali, Mauritania, Mauritius, Mozambique, Namibia, Niger, Nigeria, Rwanda, Sao Tome and Principe, Senegal, Seychelles, Sierra Leone, South Africa, Swaziland, Tanzania, Uganda and Zambia.
1. Economic Patriarchy

An eligible African country’s elected government can no longer decide the form of economy it wants to pursue if it also wishes to trade with the US. Taken together, the requirements demand full liberalization of an economy. A potential African trading partner has to pursue structural adjustment reforms such as cutting government spending and removing price controls and subsidies. By virtue of these requirements, the U.S. government is compelling African industries to open to the production for American corporations, many of which have assets several times the size of the gross domestic product of an African economy. The U.S. retains discretion in the sense that should a particular product from beneficiary-countries be seen as competing with the local industry, the product stands the risk of being excluded.

This important conditionality of ‘national treatment,’ results in a country being forced to treat foreign corporations equally with its own national corporations. For example, no incentives can be given to an African corporation without giving similar incentives to a U.S. company. In this manner, the government of South Africa cannot give any special considerations to its local seed company, even if it has had several decades of success in developing local drought-resistant varieties of food crops. Local small businesses, such as those interested in providing appropriate irrigation technology, cannot be given special interest rates on loans so they can serve small-scale farmers. At the same time, global corporations such as Monsanto or Pioneer Seed, can borrow money anywhere in the world, finding the lowest interest rates, and can offshore their profits to avoid paying taxes in South Africa. National treatment, coupled with the privatization of state industries advocated by structural adjustment programs also opens up ownership of local firms to foreign corporations.15

2. Intellectual Property Rights

Acceptance of AGOA benefits furthermore results in eligible African countries being forced to comply with intellectual property rights (IPR) protection that is in excess of the protection offered by the WTO.

African countries have historically refused to implement the Trade Related Intellectual Property Rights (TRIPs) provisions of the WTO because they endeavor to seek alternative protection instruments for their rich biodiversity. They object to plant breeders’ rights above farmers’ rights as protected in the Convention on Biological Diversity.

This position is particularly problematic in lieu of the United States’ refusal to grant the Organization of African Unity’s (OAU) request that its unanimous resolution against patenting life forms be put on the agenda for the WTO Ministerial

meeting in Seattle. Now through conditions imposed by Section 104(A) of the AGOA, the U.S. is obtaining a compliance with this narrow approach to intellectual property protection that privatizes living microorganisms, outside the realm of the WTO.

The stringent intellectual property requirements seem to have little or no relation to AGOA trade. It appears this conditionality, therefore, is a means for the U.S. to enforce its domestic IP laws on African countries resisting the WTO’s TRIP.

3. Activities that Undermine National Security

The U.S. requires that an African country wanting to trade should not undermine U.S. national security or foreign policy interests. This provision directly infringes on African states sovereignty. It is especially problematic, given the intense pressure the Bush Administration put on Angola, Guinea and Cameroon in the United Nations Security Council (February 2003) to support the U.S. invasion of Iraq. U.S. lobbying involved ranking officials from both the White House as well as the State Departments. President Bush telephoned several leaders, including Angolan President José Eduardo dos Santos, South African President Thabo Mbeki, a leading opponent of war with Iraq, as well as President Abdoulaye Wade of Senegal, President Olusegun Obasanjo of Nigeria and President Paul Biya of Cameroon. Assistant Secretary of State for African Affairs, Walter Kansteiner, visited the capitals of all three African council members, and the National Security advisor, Condoleezza Rice, talked by telephone with Wade of Senegal and Ethiopian Prime Minister Meles Zenawi. Rwanda’s President Paul Kagame, who has criticized the French position, discussed the issue with President Bush and senior American officials during a visit to Washington earlier. Secretary of State Colin Powell hosted a luncheon in Washington for Francois Fall, the foreign minister of Guinea, the nation holding the Council presidency for the month of March.

D. Non-tariff Barriers

As tariff barriers are eliminated, other forms of protection, such as rules of origin, quotas and the negative impact of agricultural subsidies, emerge or become more important. This is certainly true of AGOA and the U.S. relationship to AGOA eligible countries. It is important to note the increased impact of the negative criteria that eligible countries have to comply with in an attempt to be certified as eligible and share in AGOA benefits is further enlarged in the event of a reduction of the resulting trade benefits as a direct result of these non-tariff barriers.

TRADE NEGOTIATIONS OR TRADE CAPITULATIONS

1. Multifiber requirements

In the clothing sector, AGOA quota and rules of origin restrictions severely curtail the benefits of 'free trade' that AGOA experts estimate would be five times larger if the U.S. imposed the less stringent multifiber agreement (MFA) rules of origin on African clothing. Moreover, preferential access for African clothing exports will be short-lived and overtaken by the eradication of MFA quotas on other developing countries in 2005.

Most of the enterprises invested in textile and apparel manufacturing are from Southeast Asia, especially from Taiwan, Hong Kong, and Singapore. Among the African countries, South African companies have investments in Lesotho, and Mauritius invests in the Malagasy Republic. Companies from the US, France, China, India, Bahrain and Israel also have invested in textile and garment factories since AGOA, taking advantage of the national treatment requirement discussed above.

Because they are producing mainly in export processing zones (EPZs), the foreign corporations pay little or no taxes and offshore their profits. Often the state is required to provide infrastructure (i.e. sufficient water is an issue for textiles), even when it cannot deliver adequate health care or education for the workers. Foreign ownership, with corporations paying no taxes and providing sweatshop oppression for workers, might increase GDP, but it does not promote human development. Economic growth with less than a living wage increases corporate profit only – ignoring human survival, let alone national development.

Former chief economist of the World Bank Joseph Stiglitz has heavily criticized the ideology of neoliberal ‘market fundamentalism’ that fails to pay attention to human needs. For instance, concerns regarding environmental issues and sustainable development as well as the social well being of people are frequently not factored in. Employment is often precarious as corporations can move freely in search of cheaper labor costs, weak regulations or lower taxes. In free market economies people are expected to move to where employment can be found, adjusting their social conditions. In addition so-called ‘brain drain’ of educated professionals in developing countries has further negative implications for their country of origin.

19. Matthew Stern and Nuzeni Netshitomboni, SAIIA Trade Report No. 3, AGOA, Africa and Agriculture South Africa’s Experience: AGOA: What it is?
23. www.ied.info/ (last accessed on June 6, 2006).
All these factors are clear indications that these agreements still do not benefit all. As Nelson Mandela said during a lecture at the British Museum:

...if globalization is to create real peace and stability across the world, it must be a process benefiting all. It must not allow the most economically and politically powerful countries to dominate and submerge the countries of the weaker and peripheral regions. It should not be allowed to drain the wealth of smaller countries towards the larger ones, or to increase inequality between richer and poorer regions. 26

2. Agricultural Financial Assistance

In agriculture, the U.S. continues to provide considerable financial assistance to its farmers. Historically, the U.S. grain, sugar and dairy industries have received exceptionally high subsidies (around half of total production value). The 2002 Farm Bill provides for up to $180 billion in agricultural support over the next 10 years. According to the EU, this represents a 70 percent to 80 percent increase in expected expenditure.27

During the more than 40 years of discussions about GATT, finally culminating in the WTO, the U.S. was largely responsible for the agricultural exemptions from liberalization measures. A major portion of the Uruguay Round was devoted to devising the Agreement on Agriculture, an accord to lower tariffs, subsidies and non-tariff barriers on agricultural commodities. In June 2004, the WTO panel on U.S. cotton found that $3.2 billion of U.S. cotton subsidies and $1.6 billion of export credits (for cotton and other commodities) contravened WTO rules.28 A similar decision was reached regarding EU sugar subsidies later the same year. Oxfam has estimated that EU sugar export dumping translated into foreign exchange losses in the region of $494 million for Brazil, $151 million for Thailand, and $60 million each for South Africa and India in 2002.29

Similarly, agricultural regulations and standards in the U.S. raise the cost of exports and can inhibit trade. For example, South African fruit infected with citrus black spot (CBS) is banned in the US. Jooste argues that CBS is a harmless fungus that merely detracts from the appearance of the fruit. Moreover, there is no reason to believe that CBS can be transferred to orchards in the US.30 Nonetheless, South...
African citrus exporters spend around 4 percent of total revenues to comply with US-imposed CBS standards.

E. Utilization

To appreciate AGOA’s impact on Africa’s economic growth and prosperity, it is essential to inspect the extent of AGOA. AGOA utilization is dominated by a small number of eligible countries with Nigeria, South Africa, Angola, Gabon, Equatorial Guinea, Lesotho and Kenya accounting for more than 93 percent of AGOA duty-free benefits. This domination is linked to the availability of the principal products that are exported to the US. Imports from just five countries (Nigeria, South Africa, Angola, Gabon and Equatorial Guinea) comprise 86 percent of total U.S. imports from Africa. All of these countries excluding South Africa are overwhelmingly exporters of oil. AGOA exports valued at $6.8 billion remain petroleum products, principally from Nigeria and Gabon. Textile and apparel accounted for $803.3 million and other good performers include agricultural products.

The most hopeful product under AGOA was the entry of African textiles into the U.S. market. However, the final act was a disappointment. Only textiles made with American thread and yarn can enter the U.S. duty/quota free if the African country is not ‘less developed’. In addition if it were found that the new imports reduced employment in the US, then the act would be revoked.

AGOA, accordingly as a result of its limited application and strict eligibility requirements only offers Africa unequal trading relationships with the US. In addition, these benefits will remain illusory for most countries in sub-Saharan Africa. This is particularly so for countries that have to rely on products other than petroleum, such as agricultural products that in addition have to face competition with subsidized agricultural products. Furthermore, the limitations place on textiles and apparel together with cumbersome Rules of origin make it difficult for exporters to meet program requirements. In addition, the programs also every so often cap the quantity of developing-country exports that can receive benefits, in effect penalizing successful countries. Finally, there is some evidence that such unilateral preference programs stunt trade liberalization in developing countries themselves.


III.

THE RELATIONSHIP BETWEEN AFRICA AND THE EUROPEAN UNION

Trade preferences for African, Caribbean and Pacific (ACP) countries originated with the Treaty Establishing the European Economic Community (EEC), the Treaty of Rome. The Treaty of Rome made express reference to the first European Development Fund for Overseas Countries and Territories (EDF) as the main instrument for financial aid to Africa. More than 50 years later, the 9th EDF (2002-2007) worth €13.5 billion perpetuates this relationship. In December 2005, the European Council adopted the 10th EDF (2008-2013) in the amount of €22.7 billion.

In addition to the EDF, the EU has provided for preferential trade treatment to its former colonies in Africa by granting preferential duty free access on a non-reciprocal basis to the European market for most products except those covered by the Common Agricultural Policy. This is in accordance with the provisions of the two Yaoundé Conventions, the Arusha Convention, four Lomé Conventions and now the Cotonou Agreement.

Analyzing the relationship between Africa and the EU necessitates a broader discussion of the EU’s historical ties with African, Caribbean and Pacific countries (ACP). It would be without effect to merely discuss the most recent developments in terms of the Cotonou Agreement here. The unique position in which Africa finds herself is the result of her dependent ties with Europe, first, as a colonized land, and later, in terms of product dependency brought by the list of preferential access granted products. Hence the historical development of the relationship between the EU and ACP must be analyzed.

A. The Treaty of Rome

The cornerstone of this relationship, the Treaty of Rome, was entered into at a time when a considerable part of the African continent was subject to colonial rule by European empires. One of the main aims of the Treaty of Rome was to establish a customs union and common external tariff for the Members. A direct consequence of a common external tariff was that Belgium, the Netherlands and France were unable to maintain preferential trade relations with their colonial

---

34. Signatories to the Treaty Establishing the European Economic Community (EEC) signed in Rome on 25 March 1957 (hereinafter referred to as the Treaty of Rome) were Belgium, France, Italy, Luxembourg, the Netherlands and West Germany.

35. Articles 131 and 136 of the Rome Treaty.


38. Until the nineteenth century the vast interior of Africa was not colonized. Between the 1870 (Franco-Prussian War) and World War I (1914–1918), Europe added almost one-fifth of the land area of the globe to its overseas colonial possessions. Principal European occupiers included France, Britain, Belgium, and Portugal and to a lesser extent Italy and Germany. The following countries have previously been under Belgian, French or Italian colonial rule Mauritania, Senegal, Mali, Niger, Upper Volta (currently Burkina Faso), Côte d’Ivoire, Dahomey (currently Benin), Togo, Cameroon, Chad, Gabon, the Central African Republic, the Congo Brazzaville, the Congo-Léopoldville (named Zaire and transformed into the Democratic Republic of the Congo), Rwanda, Burundi, Somalia and Madagascar.
overseas countries and territories. Upon a request from France, the European Economic Community decided to adopt a common agenda towards the so-called "Third World." As a result, Part IV – Association of the Overseas Countries and Territories – was included into the Treaty of Rome and the establishment of the first European Development Fund.

B. Yaoundé Convention

With the independence of most colonies in the beginning of the 1960's, reciprocal preferences were brought into existence on a bilateral basis. First, Yaoundé I\textsuperscript{39} and Yaoundé II\textsuperscript{40} gave the former colonies commercial advantages on industrial items and financial assistance from the European Economic Community (EEC).

The Arusha Convention of 1969 established separate benefits for three East African states\textsuperscript{41} previously under British rule or administration.\textsuperscript{42} Interestingly, Yaoundé I created an aid and trade regime and was characterized by free access to the European market, based on the principles of reciprocity and non-discrimination. However, the GATT Working Party criticized the requirement of reciprocal advantages from less developed partners.

C. Trends of the Lomé Agreements

Since Yaoundé was an EEC agreement and the United Kingdom was not yet party to the EEC, the EEC invited Commonwealth less-developed countries (LDC's) to associate with the EEC, resulting in the Arusha Convention in September 1969.\textsuperscript{43} The Arusha Convention was more limited compared to the Yaoundé Conventions. Arusha members did not have access to aid benefits from the Economic Development Fund. Nonetheless, it was based on the principles of free-trade and reciprocity.

In the mid-seventies international attention was focus on the need to develop an economic relationship between first- and third-world countries. The accession of the UK to the EEC in January 1973 made it necessary to consider how to establish relations with Commonwealth countries. As a result the EEC expanded membership to former, African and Caribbean, British colonies and entered into a co-operation agreement with these states in 1975, the first so-called Lomé Convention.\textsuperscript{44}

\textsuperscript{39.} Signed in the capital of Cameroon in 1963 between the 6 EEC Member States and the eighteen African States, known as the "Associated African States and Madagascar" (AASM).
\textsuperscript{40.} 1969 between 6 EU States and 18 African States.
\textsuperscript{41.} Kenya, Uganda and Tanzania.
\textsuperscript{42.} Valid for the period 1 January 1971 to January 1975.
\textsuperscript{43.} A more general common policy towards potential associates than the Lagos Convention in 8 July 1966.
\textsuperscript{44.} The first Lomé Convention (Lomé I) was signed by representatives from some fifty three countries in Lomé, the capital of Togo, on 28 February 1975. It entered into effect on 1 April 1976 and expired on 1 March 1980 (46 states on behalf of the ACP group consisting of the 18 AASM, Mauritius (which has already joined Yaoundé II in 1972), 21 Commonwealth LCD’s (Bahamas, Barbados, Botswana, Fiji, Gambia, Ghana, Grenada, Guyana, Jamaica, Kenya, Lesotho, Malawi, Nigeria, Sierra...}
Lomé I provided for a much wider partnership between the EEC and African, Caribbean and Pacific countries (ACP), incorporating a more extensive and explicit use of trade preferences as a tool of development than the Yaoundé Conventions. Preferential trade access included duty free access without any quota restrictions was afforded to ACP products entering the European market on a non-reciprocal basis. Furthermore, preferential access to certain ACP export products such as sugar, rum, bananas and bovine meat, allowed the sale of a fixed amount of products at guaranteed prices in the European market. The rationale behind the selection of these export products was based on appreciation that these products already enjoyed a strong presence in the export market and the guaranteed market would ensure stability in earnings. The Lomé Convention included a commodity export earnings stabilization scheme known as STABEX to further ensure stability.

However, in practice the benefits were marginal as a result of benefits already held under the Generalized System of Preferences (GSP). In 1968, the United Nations Conference on Trade and Development (UNCTAD) recommended the creation of a “Generalized System of Tariff Preferences” under which industrialized countries would grant trade preferences to all developing countries based on the understanding that tariff preferences are instruments for achieving increased trade with developing countries. The European Community was the first to implement a GSP scheme in 1971 in terms of which the EU grants products imported from GSP beneficiary countries either duty-free access or a tariff reduction. All beneficiary countries enjoy the benefit of the general arrangements. However, special arrangements for least developed countries (LDCs), could also be structured in terms of the Lomé Convention or the later Everything But Arms Agreement.

Lomé II succeeded Lomé I, without providing much change. Perhaps the most significant improvement was the inclusion of another compensation system similar to that of the STABEX, the so-called SYSMIN scheme. The SYSMIN scheme was designed to assist mineral producing ACP states that were experiencing chronic production problems. In addition, the STABEX scheme was extended to cover ACP commodities, bringing it to a total of forty-four agricultural products. Lomé III was structured in a similar fashion to Lomé II. However, Lomé III enhanced the STABEX scheme, and similar positive changes affected the SYSMIN scheme for the mining industry.

---

45. STABEX applied to agricultural raw materials and was aimed at compensating ACP countries for the shortfall in export earning due to fluctuations in the prices or supply of commodities.

46. Lister The European Community and the Developing World: The role of the Lomé Convention 110.

47. In 1978, negotiations between the ACP group and the EEC restarted and concluded in a second accord (hereinafter called Lomé II) on 31 October 1979. Lomé II was scheduled to enter into force on 1 March 1980 and last for five years.

48. Articles 49 – 59 of Lomé II.

49. Lomé III was signed on 8 December 1985, between the ten Member States of the EEC and sixty-seven states of the ACP group - besides the 58 states which already enjoy membership, Angola, Antigua and Barbuda, Belize, Dominican Republic, Mozambique, Saint Kitts and Nevis, Saint Vincent and the Grenadines, Vanuatu and Zimbabwe joined the ACP group.
Amidst developments in East Germany and Eastern Europe the fourth Lomé Convention's main rationale was to broaden country inclusion. In contrast to its predecessors, which covered five-year-periods, Lomé IV was the first accord to cover a ten-year period. The rationale for the longer period was to provide a more stable foundation as well as to allow for the weaknesses of the previous Lomé accords to be addressed. The preferential access of selected commodities had resulted in discouragement of diversification of ACP economies. To address this weakness, Lomé IV focused more on developing trade in general rather than simply focusing on preferential access. Lomé IV noticeably supported the structural adjustment process initiated by the Bretton Woods institutions. In addition, Lomé IV expanded the preferential treatment and removed some of the qualitative or quota restrictions.

D. The Cotonou Agreement

Between 1994 and 1995, the Mid-Term Review of the Convention took place between the fifteen EC members and 72 ACP member states. Major economic and political changes such as increased interest towards Eastern Europe, and the future enlargement of the EC, as well as the globalization of international relations and the liberalization of world trade necessitated this review. In addition, the unimpressive performance of the ACP while enjoying these trade preferences, coupled with an insistent concentration of production in raw materials and agricultural products followed by a limited diversification in other areas of production, led to replacement of the Lomé Convention by the Cotonou Agreement.

For the EU the Lomé Convention, embodying provisions of non-reciprocal trade preferences, was no longer seen as an appropriate framework for assisting the

---

50. East and West Germany were been reunited (‘German Unification’) with the dismantling of the “wall.”

51. The pending fall of the ‘Iron Curtain’ heralding the end of the ‘Cold War’.

52. Signed December 1989 signed between 12 EU States and 68 ACP States. The Fourth Lomé Convention was in two periods, 1990-1994 and 1995-2000. Lomé IV was signed between 15 EU States and 70 ACP States (which became 71 with the addition of South Africa).


55. Austria, Finland and Sweden had joined the EC in 1995 bringing its total membership to 15.

56. Eritrea, Namibia and South Africa had joined the ACP group in the meantime.

57. Following an unsuccessful coup d’état on the August 22, 1991 in the Soviet Union, President Michail Gorbatschow resigned and new state: the Commonwealth of Independent States (CIS) was formed.

58. In 1990, Malta and Cyprus applied for accession to the EC; in 1991 “Europe Agreements” were signed with Poland, Hungary and Czechoslovakia.

59. The Uruguay Round Agreement substantially changed GATT procedures and waivers.

ACP group in the new global economy. It was hoped that Lomé would encourage the ACP countries to diversify their exports and increase their market share. The favorable provisions of Lomé\(^1\) had limited impact on the ACP group.

Trade liberalization has become imperative in the face of challenges presented by globalization. The entire concept of special and differentiated treatment (SDT) for DCs and LDCs has come under review. Greater emphasis is put on reciprocity in trade liberalization in order to achieve fuller participation of these countries in the world economy.\(^2\) Developing countries may not expect special treatment under the WTO system, although some provision is made to accommodate such countries.\(^3\)

The underlying principle behind the EU’s decision to conclude these regional agreements is the need to ensure the WTO compatibility of future ACP-EU trade relations. Overall objectives and principles of EPAs are the eradication of poverty, sustainable development, and gradual integration of ACP countries into the global economy.\(^4\)

Since 2000, the ACP relations are governed by the Cotonou Agreement, signed at Cotonou, on June 23, 2000, between the ACP States\(^5\) and the European Community (EC).\(^6\) The Cotonou Agreement represents a considerable break with the unilateral preferences of the past. Confronted with concerns regarding the WTO

---

61. Granting trade preferences, with no duty of reciprocity, derogating from the rules governing world trade.


63. These measures include extension of timeframes, total or partial exemption of commitments, promise of technical assistance and so-called “less than binding” commitments.

64. Founded upon the uneven development and democratization among ACP countries, different ACP countries will be receiving different treatment from the EU. The ACP group was successful in maintaining the three protocols on sugar, veal and beef, and bananas until December 2007. Starting 2008, a set of EPAs will replace the current all-ACP non-reciprocal tariff preferences by introducing reciprocal Free Trade Agreements. These free trade agreements would be WTO-compatible. The 39 ACP least developed countries (LDCs) can ‘keep Lomé’ (or even a slightly better version of it) without having to reciprocate by opening their markets to EU products before 2008. The non-LCDs are transferred to a non-reciprocal system of preferences less generous than Lomé.

65. The Group of ACP States has been established by virtue of the Georgetown Agreement (Guyana) in 1975, see http://www.caricom.org/archives/georgetownagreementonacp.htm amended thereafter in 1992, see http://www.caricom.org/archives/georgetownagreement1992.htm. With regard to the “Final Act” to the Cotonou Agreement the following 76 states are signatories to the Cotonou Agreement on behalf of the ACP group: Angola, Antigua and Barbuda, Bahamas, Barbados, Belize, Benin, Botswana, Burkina Faso, Burundi, Cameroon, Cape Verde, Central African Republic, Chad, Comoros, Democratic Republic of Congo, Republic of the Congo, Cook Islands, Côte d’Ivoire, Djibouti, Dominica, Dominican Republic, Equatorial Guinea, Ethiopia, Fiji, Gabon, the Gambia, Ghana, Grenada, Guinea, Guinea-Bissau, Guyana, Haiti, Jamaica, Kenya, Kiribati, Lesotho, Liberia, Madagascar, Malawi, Mali, Marshall Islands, Mauritania, Mauritius, Micronesia, Mozambique, Namibia, Nauru, Niger, Nigeria, Niue, Palau, Papua New Guinea, Rwanda, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, Samoa, São Tomé and Príncipe, Senegal, Seychelles, Sierra Leone, Solomon Islands, South Africa, Sudan, Suriname, Swaziland, Tanzania, Togo, Tonga, Trinidad and Tobago, Tuvalu, Uganda, Vanuatu, Zambia and Zimbabwe. Note that South Africa has a qualified status with regard to the Agreement following from “Protocol 3” to the Cotonou Agreement.

66. EC Member States at the time of signature (2000): Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Spain, Sweden and the United Kingdom of Great Britain (UK) and Northern Ireland. On 1 May 2004 the European Union’s biggest enlargement - Cyprus, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, the Slovak Republic, and Slovenia join the EU.
compatibility of the Lomé trade preferences, the Cotonou Agreement agrees to phase out these preferences. In terms of the Cotonou Agreement, ACP countries will continue to receive non-reciprocal trade preferences under a WTO waiver for a transitional period. By 2008, these preferences should have been renegotiated and replaced with EPAs, reciprocal in nature, between different regional groupings of the ACP countries and the EU\textsuperscript{67} liberalizing all bilateral trade between on a reciprocal basis, thereby making the agreements fully WTO-compatible.\textsuperscript{58} The 39 LDCs will not be affected by the requirement for EPAs and can retain their Lomé benefits.

The Cotonou Agreement entered into force on April 1, 2003.\textsuperscript{69} The Cotonou Agreement is intended to last twenty years but contains a clause allowing for revision every five years. The Cotonou Agreement contains five pillars with poverty reduction as their underlying goal. The pillars consist of a political dimension, participatory approaches, a strengthened focus on poverty reduction, framework for economic and trade co-operation, and financial cooperation. The Cotonou Agreement also includes development strategies, calling for the integration of the private sector and civil society partners. The ninth European Development Fund (EDF) (2002 - 2007) amounts to €13.5 billion and an additional €9.9 billion of uncommitted monies from previous EDF. Neither the STABEX nor the SYSMIN scheme form part of the Cotonou Agreement. Different aid programs will address deficits in export earnings.

For the first time, emphasis is put on political factors. Political dialogue, peace-building policies, conflict prevention and conflict resolution, the respect for fundamental elements such as human rights,\textsuperscript{70} democratic principles, the rule of law and good governance\textsuperscript{71} are included as core issue of the Cotonou Agreement. Violation of these principles could lead to the suspension of the benefits granted by the Cotonou Agreement as parties to the Agreement have to treat these obligations in earnest. In past conventions, references to human rights were regarded more as declaratory statements than compulsory obligations.

\textsuperscript{67} European Union (undated). New ACP-EU Agreement. Available at \url{http://europa.eu.int/comm/development/cotonou/index_en.htm} (last accessed on June 6, 2006).
\textsuperscript{68} Maria Persson and Fredrik Wilhelmsson Revisiting the Effects of EU Trade Preferences September 2005 \textit{Work in progress}, available at \url{http://www.nek.lu.se/NEKFWI/Revisiting%20the%20Effects%20of%20EU%20Trade%20Preferences.pdf}
\textsuperscript{69} Following ratification by the Member States of the EC and at least two-thirds of the ACP States. This number of ratifications was reached on February 27, 2003.
\textsuperscript{70} The protection of human rights is expressively referred to in that the specific international instruments protecting human rights are individually mentioned in the preamble. Referring to the principles of the Charter of the United Nations, and recalling the Universal Declaration of Human Rights, the conclusions of the 1993 Vienna Conference on Human Rights, the Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights, the Convention on the Rights of the Child, the Convention on the Elimination of all forms of Discrimination against Women, the International Convention on the Elimination of all forms of Racial Discrimination, the 1949 Geneva Conventions and the other instruments of international humanitarian law, the 1954 Convention relating to the status of stateless persons, the 1951 Geneva Convention relating to the Status of Refugees and the 1967 New York Protocol relating to the Status of Refugees, considering the Convention for the Protection of Human Rights and Fundamental Freedoms of the Council of Europe, the African Charter on Human and Peoples' Rights and the American Convention on Human Rights as positive regional contributions to the respect of human rights in the European Union and in the ACP States.
\textsuperscript{71} Article 8 The Cotonou Agreement covers a wider range of political issues that was not included in the ambit of Lomé. The Cotonou Agreement recognizes that a political environment guaranteeing peace, security and stability, democratic principles and the rule of law, and good governance is essential. (Article 9(3)).
However, the effectiveness of the Cotonou provisions has been illustrated in the case of the Islamic Republic of Mauritania. In terms of Article 96 of the Cotonou Agreement, a consultations procedure was initiated on November 29, 2005, in response to the August 3, 2005 coup d’etat that overthrew an elected Government. Mauritania was considered to be in breach of an “essential element” of the Agreement. In response, the Mauritanian interim government gave 23 undertakings in the areas of respect for democratic principles, fundamental freedoms and rights, the rule of law, and good governance and promised to provide the EU with a report on implementation by mid-January 2006, to be followed by quarterly reports on subsequent developments. The reports have been submitted on time and demonstrated that “steady progress” had been made and the timetables in different areas had been respected.

In addition to the explicit referral regarding the respect for fundamental human rights, a further commitment to social development and therefore socio-economic rights is found in Article 25 under Social Sector Development.

The Cotonou Agreement replaces non-reciprocal trade benefits72 established by the Lomé Convention73 with several new WTO compatible trade regimes between the EU and ACP countries on either a regional or individual basis.74 As a result, Cotonou opens ACP markets to European products. The non-reciprocal tariff preferences will be maintained until December 31, 2007, although incompatible with WTO law.75 However, an exceptional waiver was given by the WTO. Starting in 2008, a set of reciprocal Economic Partnership Agreements (EPAs) will replace these non-reciprocal tariff preferences. The EPAs will have to support regional integration initiatives already existing within the ACP. The premise of these EPAs is based on the establishment of a free trade area with the EU.

In the meantime, the present trading regime will remain in place during the preparatory period of 2002 till 2008. After that, the EPAs will enter into force gradually, with a transition period of 12 years. Until now, only the EU and South Africa have finished the negotiations on an EPA. For this reason, it is crucial that the completed South African EPA be analyzed for positive recommendations on how best to employ the EPA negotiations process for the other ACP regions.

72. Under the Lomé Convention system of trade preferences there was no reciprocal clause, ACP countries were given duty-free access into the EU for industrial goods, with the ACP being able to put duties on EU imports so as to protect their infant industries. The ACP states were merely obliged to apply the most-favoured-nation clause to the Union and to refrain from discriminating between countries of the Union. Specific provisions applied to products of vital importance for the economy of several states, such as bananas, rice and sugar.

73. This agreement includes a transitional period of eight years. ACP countries will continue to benefit from current trade preferences without disruptions during the eight-year “preparatory” period.

74. Based on the understanding of the ACP’s rather heterogeneous nature, the Cotonou Agreement is aimed at tailoring the structure of the cooperation agreement to a specific country’s level of development for purposes of improved economic and trade cooperation. Differentiation could divide the ACP group into geographical areas and/or levels of development. Founded upon the uneven development and democratization among ACP countries, different ACP countries will be receiving different treatment from the EU. The 39 ACP least developed countries (LDCs) can ‘keep Lomé’ (or even a slightly better version of it) without having to reciprocate by opening their markets to EU products before 2008. The non-LDCs are transferred to a non-reciprocal system of preferences less generous than Lomé.

75. Non-reciprocal duty free entry of ACP products into the EU market is in violation of the Most Favoured Nation (MFN) principle of Article 1 of the GATT.
E. The Transition to Economic Partnership Agreements: South Africa and the EU

South Africa joined the Lomé Convention in June 1998 as a qualified member, though essentially excluded from the agreement’s trade regime and its provisions on development assistance. South Africa, however, could tender for projects in all ACP countries, financed from the 8th European Development Fund (EDF), as well as participate fully in the political institutions of the Lomé Convention.

Consequently, South Africa’s accession to the Cotonou Convention is in accordance with a protocol defining its qualified status. The admission of South Africa as a member of the Lomé Convention created a special relationship between the European Union and South Africa. At this time the so-called two pillars approach was adopted. South Africa remains excluded from most of the trade and aid provisions of the new Convention but benefits in its own way in these same areas, by means of the South African-specific EPA, the SA-EU Trade, Development and Cooperation Agreement (TDCA).

F. The Trade and Development Cooperation Agreement (TDCA)

The EU was the first major trading partner with which South Africa established a preferential trade agreement after 1994. The Trade, Development, and Cooperation Agreement (TDCA) was signed between South Africa and the EU on 11 October 1999 after four years of difficult negotiations. The agreement was only ratified in May 2004; however, aspects of the TDCA were provisionally implemented and entered into force in January 2000.

The TDCA seeks to establish a WTO compatible Free Trade Area (FTA) between the parties, covering 90 percent of the products traded between the two partners. However, it also contains important provisions on development cooperation. The agreement’s trade coverage is asymmetric and differentiated. Being the more developed partner, the EU will liberalize 95 percent of its imports from South Africa over a ten year period while South Africa will liberalize only 86 percent of imports from the EU over a 12 year period.

Of particular significance in the negotiations of this free trade agreement was the “commercial haggling by wealthy Europeans” in an agreement “which professed concerns to promote development and greater equity in trade relations with developing countries”.

At the onset of the negotiations process in March 1996, the EU demanded

76. The two pillars approach is represented by the qualified membership of South Africa the Lomé/Cotonou Conventions and by the Trade, Development and Co-operation agreement between South Africa and the European Union.

77. South Africa’s qualified status with regard to the Agreement is outlined in Protocol 3 on South Africa.


compliance of this agreement with its Common Agricultural Policy (CAP) and effectively 40 percent of South Africa’s unsubsidized agricultural exports were excluded. Despite numerous rounds of talks by February 1998, 40 percent of South Africa’s agricultural exports remained excluded, including certain key products such as apples, pears, oranges, wines and cut flowers.

By March 1999, unrelenting negotiations enabled the South African team to secure that 27 percent of South African agricultural exports would remain excluded from liberalization. The main agricultural products excluded on the EU side are, among others: beef, sugar, some dairy, corn, rice, certain cut flowers, certain fresh fruits and juices. On the non-agriculture side, the exclusion of unwrought aluminum is particularly noticeable. South Africa traditionally has a strong market presence with all of the above products.

The capacity of ACP regions to participate in negotiations of such magnitude is questionable. The EU insisted that South Africa be granted qualified membership to Lomé based on the premise that South Africa was “too developed.” Notwithstanding this developed status of South Africa the TDCA was only signed after four years of difficult negotiations and numerous concessions granted by the South African Government. Despite these concessions all the EU Member States only ratified the agreement in May 2004.

At the heart of the delay in the ratification process was Spain, Portugal and Greece’s insistence that the South African government and South African producers respect the use of so-called geographic indications, i.e. sherry, port, grappa and ouzo. The South African position was that these names where generic and not afforded protection in terms of any of the acknowledged international mechanisms, unlike the geographic indication of champagne, which South Africa respected. Nonetheless, to avoid the further delay, the South African government once again conceded to discontinue the use of these generic names on the international market and to phase out the use of these terms on the domestic market.

It is suggested that negotiations between ACP regions and the EU with the aim to establish Economic Partnership Agreements be structured in a manner similar to the TDCA. The EPAs are set to become regional free trade areas with a strong development component. In light of difficulties experienced by the “too developed” South African negotiations team, subsequent EPA are criticized for the possibility that DC and LDCs will participate in similar coercion driven negotiations.

First, there is a fear that these free trade agreements will have a severe negative effect on the weaker least developed countries. Regional organizations within Africa, in particular, are ineffective and duplicative in both membership and goals. This poses the predicament for countries to decide with which regional partners they will negotiate the EPAs.

In Southern Africa, there are a number of regional integration agreements and bilateral agreements unfolding within the context of the worldwide multilateral trading system. These include: SACU (Southern African Customs Union), SADC

TRADE NEGOTIATIONS OR TRADE CAPITULATIONS

(Southern African Development Community) and COMESA (Common Market for Eastern and Southern Africa), the East African Community (EAC), the Indian Ocean Commission (IOC) and the Economic Community of Central African States (ECCAS). While the existence of these groupings is not a problem, overlapping membership between the groupings has the potential to cause conflict.

For example, the overlap between SADC (Southern African Development Community) and COMESA (Common Market for Eastern and Southern Africa) membership; most countries that are members of both have decided to negotiate within the COMESA fold. COMESA (minus Egypt) has established the ESA (Eastern and Southern Africa) trade-negotiating unit. The remaining SADC states include the BLNS (Botswana, Namibia, Lesotho and Swaziland members of the customs union between South Africa and BNLS), Tanzania, Angola and Mozambique.

The EPAs are structured in a manner intended to enhance regional integration. Yet, the opposite effect is noticeable in the regional division that has already occurred as a result of the EPAs negotiations process.

Second, the capacity of these Southern African states to partake in negotiations of such magnitude is questionable. Perhaps the TDCA negotiations process could hold lessons for Southern Africa in their ongoing EPA talks with the EU. It is without doubt that for both South Africa and the ACP regions, these negotiations with the EU, resulting in a reciprocal free trade agreement with their largest preferential trading partner, is of vital importance to all parties concerned.

G. The True Cost of Economic Partnership Agreements

EPAs will constitute unprecedented reciprocal free trade arrangements between the world's largest single market and some of the poorest economic regions. Clearly, the ACP group is far too large and diverse to generalize the impact that such an arrangement would have on its members. Nonetheless, for all concerned, a critical question is how to optimize the benefits of free trade, while mitigating the costs.

In September 2002, the EU and ACP countries launched their negotiations on Economic Partnership Agreements. The Cotonou agreement defines EPAs as comprehensive free trade agreements. These EPAs will replace the non-reciprocal trade preferences with reciprocal and WTO-compatible arrangements, at the latest by 2008.

ACP countries that are not LDCs cannot benefit from the tariff- and quota-free 'Everything but Arms' initiative, and will suffer the loss of some market access if they are afforded the Generalised System of Preferences. For the LDCs, the EBA alternative seems only a theoretical option if their non-LDC neighbors opt for

EPAs. Not joining EPA negotiations would isolate an LDC and almost certainly fragment trade relations with non-LDC regional counterparts.

Any welfare gain in ACP regions will depend on whether trade creation outweighs trade diversion. However, economies of scale are most likely to be reaped by countries with larger, more competitive and advanced economies

H. Subsequent conditions

Every five years, the opportunity exists to revise the Cotonou Agreement. Negotiations for this first review were officially launched during the ACP-EU Council of Ministers’ meeting in Gaborone in May 2004. Economic and trade cooperation is not included in this review process,

Some of the EU proposals for the review process aim at adapting the strong political dimension of the Cotonou Agreement, arguing that the Agreement’s political provisions should be enriched with references to the International Criminal Court, the fight against terrorism and the proliferation of weapons of mass destruction. Violation of this principle could lead to a suspension of EU aid under Article 96 of the Cotonou Agreement. ACP countries strongly object to the proposal, arguing that it is not an essential element for development and poverty reduction. This is similar to criticism leveled at the AGOA eligibility requirements imposed on sub-Saharan countries. Countries’ beneficiary status is based on the existing criteria under the Generalized System of Preferences program, as well as new AGOA requirements, which prohibit eligible countries from providing support for international terrorism.85

I. Everything But Arms Initiative (EBA)

Another more recent preferential trade agreement between the European Union and least developed countries is the Everything But Arms Initiative (EBA). The EBA was enacted by the EC Council Regulation No. 416/2001 on February 28, 2001, amending EC Regulation No. 2820/98. The EBA applied a multi-annual scheme of generalized tariff preferences to extend duty-free access without any quantitative restrictions to 919 agricultural products originating in the least developed countries. More than 50 percent of the liberalized tariff lines covered meat and dairy products, beverages and milled products. The European Commission will review the EBA in 2005, when amendments can be introduced, if necessary.

The EBA went into effect on March 5, 2001. One common criticism of GSP schemes and other non-binding unilateral preferential schemes for developing countries was the uncertainty of such trade regimes stemming from their annual renewal. Not being subject to periodic renewal, the EBA initiative reduces the uncertainty of renewal on the one hand. On the other hand, since the EC Council enacted the EBA, unlike the EU-ACP arrangements, the EU can unilaterally modify the EBA.

The basis for the EBA under the WTO is paragraph 2(d) of the Enabling

---

Clause of 1979. The clause allows for special treatment to be granted for least developed countries in the context of any general or specific measures in favor of developing countries. The EBA had to be not only WTO compatible but also in line with the ACP regime.

The Lomé Convention required the EU to grant non-discriminatory market access to all ACP countries. However, the EBA initiative would have granted more preferential market access to ACP LDCs than that enjoyed by ACP non-LDCs. Therefore, in the Cotonou Agreement that superseded the last Lomé Convention, article 174(2)(b) of the Lomé Convention imposing non-discrimination among ACP states was eliminated.

Thus, the European Union can offer better market access to LDC ACP states without extending it to non-LDC ACP countries. On the other hand, the EBA introduces new provisions allowing the EU to introduce safeguard measures when massive increases in imports originating from the LDCs arise in relation to their usual levels of production and export capacity. Specific safeguards apply with regard to sensitive products (bananas, sugar and rice). Yu and Jensen argue that the EBA initiative is not likely to generate substantial financial gains for the LDCs, primarily because of limited product diversification that currently exists, coupled with tariff concessions already enjoyed under GSP or Cotonou. Furthermore, a great deal of the gains will likely come from the three sensitive products that are subject to lengthy implementation, especially sugar, bananas and rice.

IV. CONCLUSION

Clearly, the EU and the U.S. approaches differ: the U.S. implemented AGOA unilaterally, giving preference to African countries; whereas the EU and ACP countries concluded an agreement based on mutual consent and freedom of choice (the Cotonou Agreement), that will be replaced by EPAs. These EPAs in all probability will be structured in a similar fashion to the TDCA between the EU and South Africa. The design of the AGOA requires neither the consent of the African countries nor does it take their interests into consideration. Moreover, the AGOA may be revised, modified, and even withdrawn at the sole discretion of U.S. Congress. At least at first glance, the operational structure of the U.S. gives way to the impression of superiority.

However, despite the mutual agreement nature of the Cotonou Agreement, criticism has been leveled against the Cotonou Agreement. In all likelihood the EPAs that follow will fail to take into account existing trade inequalities and uneven negotiating power. Furthermore, EPAs have failed to address the issue of regional integration as well as the distinction between developing and least developed countries. It is, however, hoped that these EPAs will not merely remain a constant renewal of a promise of development and beneficial trade, but indeed incorporate the needs of these regions. The expectation is that these negotiations will produce an agreement that concerns the promotion of development and greater equity in trade

relations with developing countries rather than “commercial haggling by wealthy Europeans” or the imposition of unilateral restrictive conditions.