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## NOTE

### Toward Lomé III: Perfecting the European Community's African Partnership

by Daniel Girard\*

#### I. INTRODUCTION

**T**he European Economic Community (EEC) is linked by treaty<sup>1</sup> with 64 developing African, Caribbean and Pacific countries (ACP states).<sup>2</sup> Under the terms of the Second Lomé Convention (Lomé II),<sup>3</sup> the

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<sup>1</sup> European Economic Community-African, Caribbean, and Pacific Countries: Documents from Lomé II Meeting, Oct. 31, 1979, *reprinted in* 19 I.L.M. 327 (1980) [hereinafter cited as Lomé II]. Lomé II was preceded by a previous agreement also signed at Lomé, Togo. European Economic Community-African, Caribbean, and Pacific Countries: Documents from Lomé Meeting, Feb. 28, 1975, *reprinted in* 14 I.L.M. 595 (1975) [hereinafter cited as Lomé I].

<sup>2</sup> The ACP countries are classified by Lomé II as follows:

(a) defined as "least developed"

Antigua and Barbuda	Mauritania
Belize	Niger
Benin	Rwanda
Botswana	St. Lucia
Burundi	St. Vincent and the Grenadines
Cape Verde	Sao Tome Principe
Central African Republic	Seychelles
Chad	Sierra Leone
Comoros	Solomon Islands
Djibouti	Somalia
Dominica	Sudan
Equatorial Guinea	Swaziland

ACP states enjoy the privilege of exporting products to the EEC "free of customs duties and charges having equivalent effect."<sup>4</sup> The ACP states benefit from a system of compensatory financing designed to minimize the effect of fluctuations in commodity and mineral export earnings.<sup>5</sup> Lomé II also provides programs for industrial, agricultural, commercial and technical cooperation between the states.<sup>6</sup> Moreover, the ACP states are beneficiaries of a financial aid package worth approximately \$6.9 billion.<sup>7</sup> However, some scholars assert that the Lomé agreements merely ensure EEC access to raw materials and a vast market for processed goods, which perpetuates a historical pattern of colonial exploitation.<sup>8</sup>

This Comment examines the Lomé treaty's so called "safeguard

Ethiopia	Tanzania
Gambia	Togo
Grenada	Tonga
Guinea	Tuvalu
Guinea-Bissau	Uganda
Kiribati	Upper Volta
Lesotho	Vanuatu
Malawi	Western Samoa
Mali	

(b) Landlocked or island countries not defined as "least developed"

Bahamas	Mauritius
Barbados	Papua-New Guinea
Fiji	Trinidad & Tobago
Jamaica	Zambia
Madagascar	

(c) others

Cameroon	Liberia
Congo	Nigeria
Gabon	Senegal
Ghana	Surinam
Guyana	Zaire
Ivory Coast	Zimbabwe
Kenya	

St. Christopher and Nevis has not yet been classified. Telephone conversation with F. Pillivuyt, Information Officer, Public Information Office of the European Economic Community (Apr. 2, 1984).

<sup>3</sup> See *supra* note 1.

<sup>4</sup> Lomé II, *supra* note 1, 19 I.L.M. at 343 (art. 2(1)).

<sup>5</sup> Simmonds, *The Second Lomé Convention: The Innovative Features*, 17 COMMON MKT. L. REV. 415, 419 (1980).

<sup>6</sup> *Id.* at 423-32.

<sup>7</sup> *Id.* at 426. The amount of EEC aid to the ACP states was a critical element in both Lomé negotiations. Under Lomé II, ACP states were to receive 62 percent more financial assistance than under Lomé I. ACP firms and nationals were also granted broader discretion in the evaluation and implementation of projects. *Id.* at 426-28.

<sup>8</sup> See *infra* note 160 and accompanying text.

clause,"<sup>9</sup> which enables the EEC to take protective action should Lomé II's liberal market access provisions threaten the EEC's internal economy. The EEC's power to act unilaterally to suspend the Lomé II trade provisions may interfere with the industrial development of the ACP states.

The safeguard clause is drafted in general terms which provide that necessary safeguard measures may be taken if "difficulties arise which may result in a deterioration in a sector of the economy . . . or a region" of the community.<sup>10</sup> The scope of the clauses's definitional phrases has not been litigated<sup>11</sup> because the EEC's power to act is discretionary. The EEC retains broad power to suspend or restrict the importation of goods originating in ACP states.<sup>12</sup>

The negotiators of the Lomé agreements have sought to establish their trade relationship on the basis of "complete equality between partners."<sup>13</sup> In the field of trade cooperation, the object of both Lomé I and Lomé II has been to improve the balance of ACP-EEC trade by accelerating the growth rate of ACP trade.<sup>14</sup> The unequal nature of a relationship

<sup>9</sup> Lomé II, *supra* note 1, 19 I.L.M. at 344 (art. 12). Lomé II's safeguard clause is as follows:

1. If, as a result of applying the provisions of this Chapter, serious disturbances occur in a sector of the economy of the Community or of one or more of its Member States, or jeopardize their external financial stability, or if difficulties arise which may result in a deterioration in a sector of the economy of the Community or of a region thereof, the Community may take, or may authorize, the Member State concerned to take, safeguard measures. These measures, their duration and their methods of application shall be notified immediately to the Council of Ministers.
2. The Community and its Member States undertake not to use safeguard measures or other means for protectionist purposes or to hamper structural development.
3. These safeguard measures shall be restricted to those which would least disturb trade between the Contracting Parties in implementing the objectives of the Convention and must not exceed the scope of what is strictly necessary to remedy the difficulties that have arisen.
4. Safeguard measures shall, at the time of their application, take account of the existing level of the ACP exports concerned to the Community and their potential for development.

<sup>10</sup> *Id.*

<sup>11</sup> This safeguard clause has never been formally invoked, and barring extreme circumstances, its use is unlikely. See McQueen, *Lomé and the Protective Effect of the Rules of Origin*, 16 J. WORLD TRADE L. 119, 120 (1982). However, the EEC has used the clause to pressure ACP states to "voluntarily" agree to export restraints. See *infra* note 147 and accompanying text.

<sup>12</sup> Lomé II, *supra* note 1, 19 I.L.M. at 344-45 (arts. 12-15).

<sup>13</sup> Lomé I, *supra* note 1, 14 I.L.M. at 604 (preamble).

<sup>14</sup> *Id.* at 607 (art. 1). Lomé I provides that:

In the field of trade co-operation, the object . . . is to promote trade between the Contracting Parties, taking account of their respective levels of development, and in particular, of the need to secure additional benefits for the trade of the

is explicitly recognized.<sup>15</sup>

The safeguard powers of the EEC are at odds with the stated objectives of the Lomé agreements. Given the scope of the Lomé safeguard clause, any significant export achievement by an ACP undertaking may give rise to circumstances in which the safeguard clause would arguably apply. However, to require the EEC or its Member States to divest themselves of the right to take protective measures in the face of a damaging import trend is unreasonable. Nevertheless, under the present arrangement, the ability of ACP states to plan their economies and attract foreign direct investment may be unnecessarily impaired.<sup>16</sup>

By injecting an element of uncertainty in the ACP-EEC trade relationship, the clause makes ACP states less attractive targets for direct investors of non-EEC developed countries. Planners within the ACP states must also contend with the safeguard clause's limiting effect on the market access provisions of Lomé II. Moreover, the EEC's right to take protective measures without consultation undermines the partnership which the parties have sought to establish.

This Comment traces the development of safeguard clauses in the ACP-EEC partnership in light of the historical pattern of Eurafrikan trade. Part I briefly recounts the initial character of Europe's trade with Africa. Part II discusses the incorporation of Europe's African colonies in the EEC and the association regime<sup>17</sup> which followed African independence. Part III introduces Lomé I and II and the shift from association to partnership. The effect of the Lomé agreements on the industrialization of the ACP states is assessed in Part IV. An alternative safeguard system which provides the ACP states with guaranteed access to EEC markets is set forth in Part V. Finally, in Part VI, the role of the proposed safeguard system in perfecting the ACP-EEC partnership is discussed.

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ACP States, in order to accelerate the growth of their trade and improve the conditions of access of their products to the market of the European Economic Community . . . .

Article 1 of Lomé II is cast in similar language. Lomé II, *supra* note 1, 19 I.L.M. at 342-43 (art. 1).

<sup>15</sup> See *supra* note 14.

<sup>16</sup> Yelapaala, *The Lomé Conventions and the Political Economy of the African-Caribbean-Pacific Countries: A Critical Analysis of the Trade Provisions*, 13 N.Y.U. J. INT'L L. & POL. 807, 878-79 (1980). Yelapaala considers the safeguard clause to be one of seven basic issues which future conventions must confront. Formal criteria governing the use of safeguard clauses would "facilitate ACP export and investment planning for the EEC markets." *Id.* at 879.

<sup>17</sup> See *infra* notes 47-88 and accompanying text.

## II. INITIAL ASPECTS OF EURAFRICAN TRADE: AFRICA AS A SOURCE OF RAW MATERIALS AND A MARKET FOR MANUFACTURED GOODS

The current pattern of Africa's trade with Europe developed in the late 19th century.<sup>18</sup> European colonial enterprises sought to counteract falling profit margins at home<sup>19</sup> through the use of inexpensive labor and Africa's abundant natural resources.<sup>20</sup> African populations subsequently served as markets for products manufactured in Europe's industrial centers.<sup>21</sup> A perceived need to protect trade relations<sup>22</sup> led the major European powers to claim vast sections of the African continent.<sup>23</sup> At the Berlin Conference in 1884,<sup>24</sup> European statesmen partitioned Africa into protectorates which could be exploited with a minimum of outside interference.<sup>25</sup>

<sup>18</sup> Yansane, *Decolonization, Dependency, and Development in Africa: The Theory Revisited*, in *DECOLONIZATION AND DEPENDENCY 4* (A. Yansane ed. 1980). Aside from the massive slave trade during the seventeenth and eighteenth centuries, Europe's trade with Africa consisted largely of barter with African middlemen in search of precious metals. Africa also produced modest quantities of gum, ivory, timber, animal skins and cereals. R. HALLET, *AFRICA SINCE 1875*, at 15 (1974).

<sup>19</sup> Amoa, *Relations Between Africa and Europe in Historical Perspective*, 13 *U. GHANA L.J.* 7, 26-27 (1976).

<sup>20</sup> *Id.* at 28. After the mid-nineteenth century, the range of African exports increased dramatically with such products as wool, cotton, palm oil, groundnuts (peanuts) and cloves being produced for European consumption. By the early twentieth century, Africa was also producing sugar, rubber, coffee, tea, cocoa, sisal, tobacco and a variety of fruits. African mines were also supplying foreign markets with diamonds, gold, tin, copper, bauxite, manganese ore, iron ore, phosphates, oil and natural gas. R. HALLET, *supra* note 18, at 15.

<sup>21</sup> In the early nineteenth century, African raw materials were exchanged for textiles and metalware. Gradually, more sophisticated goods were imported. Foodstuffs acquired in trade included tea, beer, rice, sugar, dried fish and flour. Africans also received building materials such as cement, glass and corrugated iron, along with tools and firearms. Internal trade insured the distribution of these items from the major towns to the countryside. R. HALLET, *supra* note 18, at 14.

<sup>22</sup> Sanderson, *Partition: Coincidence or Conjecture?* in *EUROPEAN IMPERIALISM AND THE PARTITION OF AFRICA 10* (E. Penrose ed. 1975). See generally H. WILSON, *THE IMPERIAL EXPERIENCE IN SUB-SAHARAN AFRICA SINCE 1870*, at 48-49 (1977).

<sup>23</sup> H. WILSON, *supra* note 22, at 82.

<sup>24</sup> The Berlin conference was called by Chancellor Bismarck of Germany and lasted from Nov. 1884 to Feb. 1885. The participants passed resolutions against slave trade, in favor of free trade, and on the need to prove effective occupation before annexing new territories. The Berlin conference established the ground rules for the territorial acquisitions which took place in the next twenty years. R. OLIVER & J. FAGE, *A SHORT HISTORY OF AFRICA 186-95* (1963).

<sup>25</sup> Amoa, *supra* note 19, at 27-28; see Sanderson, *supra* note 22, at 10-12. In the thirty years following the Berlin Conference, Africa was almost entirely occupied by seven European powers. France acquired the largest portion of the African continent, claiming the North-African states of Algeria, Tunisia and Morocco as well as French West Africa, French Equatorial Africa and the island of Madagascar. The British dominated territories included Gambia, Sierra Leone, the Gold Coast, Nigeria, British East Africa, Egypt, the Anglo-Egypt-

African colonization contributed to the expansion of Europe's economy in the post-industrial era.<sup>26</sup> The terms of Europe's trade with Africa in the late 19th century were unilaterally defined by economic<sup>27</sup> and military coercion.<sup>28</sup> Africa was primarily developed to supply crops and raw materials to meet European needs,<sup>29</sup> but the colonies also provided a market for Europe's manufactured goods.<sup>30</sup>

This system of trade favored Europe at the expense of local economic development. Most of the industrial development which took place in non-mining areas<sup>31</sup> centered around the processing of cash crops for European markets.<sup>32</sup> African workers received monetary incomes in return for their labor,<sup>33</sup> which generated a demand for manufactured consumer

tian Sudan, Rhodesia and South Africa. Belgium claimed a vast portion of central Africa known as the Belgian Congo. Portugal claimed Angola and Mozambique, while Germany occupied the Cameroon, German East Africa and South West Africa. Spain claimed Rio de Oro on the Atlantic Coast and Spanish Guinea. Italy acquired Eritrea and Somaliland in the Horn of Africa. Duignan & Gann, *The Pre-Colonial Economies of Sub-Saharan Africa*, in 4 COLONIALISM IN AFRICA 1870-1960, at 33, 65 (P. Duignan & L. Gann eds. 1975).

<sup>26</sup> Amoa, *supra* note 19, at 27-28. Colonization benefitted merchants and investors who enjoyed the captive markets. Investments were safe from confiscation with Europeans controlling the banking and currency systems. Metropolitan powers benefitted from secure sources of raw materials and a large share of the available African market. From 1950 to 1957, 67 percent of exports to French colonies originated in France. During the same period, 47 percent of the imports of British Africa came from Britain. Nevertheless, Europeans doing business in Africa faced high costs for transportation, duties, handling and risk factors, and therefore, derived no exorbitant profits from their trade. Duignan & Gann, *Economic Achievements of the Colonizers: An Assessment*, in 4 COLONIALISM IN AFRICA 1870-1960, at 673, 679 (P. Duignan & L. Gann eds. 1975).

<sup>27</sup> R. CORNEVIN, L'AFRIQUE NOIRE DE 1919 A NOS JOURS 23-30 (1973). Economic coercion was applied in a number of ways. Coercive practices included the compulsory cultivation of crops and the use of forced labor. Duignan & Gann, *supra* note 26, at 690.

<sup>28</sup> H. WILSON, *supra* note 22, at 88-94. A number of African kingdoms resisted European occupation. The Ashanti, who defeated European forces in the early 19th century, were finally overcome in 1901. The Zulu were defeated in 1879 and 1906. Guerilla leaders in West Africa and the Sudan maintained independent forces until the turn of the century. In all cases, the Europeans eventually prevailed, destroying the old powers. B. FETTER, COLONIAL RULE IN AFRICA 7-8 (1979).

<sup>29</sup> Duignan & Gann, *supra* note 26, at 690.

<sup>30</sup> The African market of European goods was initially negligible. R. OLIVER & J. FAGE, *supra* note 24, at 196-97. In the years following World War II, Africa gained importance as an export market for Europe. *See supra* note 26.

<sup>31</sup> Unlike the cultivation of cash crops, the development of mining in Southern Africa required the introduction of advanced industrial technology. Deep mines were excavated, while railway and automobiles replaced earlier methods of transportation. This technology remained largely unassimilated by Africans, however. Davidson, *Africa in Historical Perspective*, in AFRICA SOUTH OF THE SAHARA 44 (1979).

<sup>32</sup> Elkan & Van Zaanenbergh, *How People Came to Live in Towns*, in 4 COLONIALISM IN AFRICA 1870-1960, at 655, 656 (P. Duignan & L. Gann eds. 1975).

<sup>33</sup> Skinner, *The Persistence of Psychological and Structural Dependence After Colonialism*, in DECOLONIALIZATION AND DEPENDENCY 72 (A. Yansane ed. 1980).

goods<sup>34</sup> that were not locally produced.<sup>35</sup> Both colonial administration<sup>36</sup> and pressure from overseas suppliers anxious to retain their African markets tended to preclude industrial development in Africa.<sup>37</sup> The local economies' dependence on trade with Europe resulted in profound economic<sup>38</sup> and social<sup>39</sup> change.

The exchange of raw materials and primary agricultural products for goods manufactured in Europe continues to characterize a large part of African trade.<sup>40</sup> Most African states have economic structures based on the export of a single or a small group of commodities,<sup>41</sup> and are dependent upon purchasers in developed nations. European politicians still see Africa as a source of raw materials and an outlet for finished products.<sup>42</sup>

<sup>34</sup> Elkan & Van Zaanenbergh, *supra* note 32, at 656.

<sup>35</sup> European governments were unwilling to impose tariffs, provide industrial training, or deploy the capital considered necessary for industrial growth. Economic policies focused on retrenchment, rather than foreign aid to combat slowed growth rates. *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> Overseas trade opportunities provided the initial stimulus for development in most African colonies, yet the sale of cash crops or wage labor led to highly uneven economic growth. In economic terms, the absence of market information, high risks, insufficient market opportunities, a lack of marketing facilities and coercive governmental practices hampered development. Large sectors of Africa had a rural subsistence-based economy at the end of the colonial period. Meier, *External Trade and Internal Development*, in 4 COLONIALISM IN AFRICA 1870-1960, at 427, 465-66 (P. Duignan & L. Dunn eds. 1975). At the present time, 85 percent of Africa's wealth is produced by 5 percent of its land area. Duignan & Gann, *supra* note 26, at 693.

<sup>38</sup> See A. MABOGUNJE, *THE DEVELOPMENT PROCESS* 78-83 (1980); S. NEUMARK, *FOREIGN TRADE AND ECONOMIC DEVELOPMENT IN AFRICA: A HISTORICAL PERSPECTIVE* 165-87 (1964).

<sup>39</sup> See generally INTERNATIONAL AFRICAN INSTITUTE & UNESCO, *SOCIAL IMPLICATIONS OF INDUSTRIALIZATION AND URBANIZATION IN AFRICA SOUTH OF THE SAHARA* (1958); J. GIBBS, *PEOPLES OF AFRICA* (1965).

<sup>40</sup> In 1977, for example, 86 percent of the EEC's exports to the ACP states were manufactured products, primarily machinery and transport equipment. Food products accounted for ten percent of the EEC exports to the ACP, while raw materials comprised only one percent of EEC exports.

During this same period, three main products—oil, coffee and cocoa—accounted for over half of the EEC's imports from the ACP states. These along with seven other products—copper, timber, sugar, iron ore, groundnuts, aluminum and cotton—comprised 80 percent of the EEC's imports from the ACP states. Manufactured products accounted for only 3.6 percent of EEC imports from the ACP. EUROSTAT, *ANALYSE DES ÉCHANGES ENTRE LA COMMUNAUTÉ EUROPÉENNE ET LES ÉTATS ACP* §§ 2.12, 3.16 (1979).

<sup>41</sup> The economies of ACP states often fluctuate with the price of a single raw material or commodity in world markets. These fluctuations occur when a country exports a few raw materials or commodities, the price of which may vary for reasons entirely beyond the exporting state's control. Examples of ACP states with economies tied exclusively to a single raw material are: Guinea, iron ore comprising 90 percent of exports; Chad, cotton comprising 69 percent of exports; Mauritius, sugar comprising 93 percent of exports; and Zambia, copper comprising 95 percent of exports. *Lomé Dossier*, reprinted from *THE COURIER*, No. 31, at 41-43 (Mar. 1975) (special issue) [hereinafter cited as *Lomé Dossier*].

<sup>42</sup> The following internal communication was directed by the EEC Council to the EEC



Since World War II, however, Europeans have increasingly sought equitable grounds on which to justify their relationship with Africa.<sup>43</sup> Africans themselves have rejected European domination of local institutions and called for greater autonomy and independence in their dealings with advanced nations.<sup>44</sup> EEC trade agreements with Africa reflect an awareness of Africa's economic weakness both in their aid provisions and their stated objectives.<sup>45</sup> However, the extent to which the EEC will permit significant alterations in the traditional pattern of Eurafican trade continues to be the subject of considerable controversy.<sup>46</sup>

### III. THE ASSOCIATION REGIME

#### A. *Creation of the EEC and Association of European Colonies*

In the early 1950's, Western European statesmen proposed the creation of an economic unit capable of competing with the United States.<sup>47</sup> France, West Germany, Italy, Belgium, Luxembourg and the Netherlands subsequently agreed on a proposal for the merger of their economies into

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#### Commission:

The Community has a vital interest in seeing its network of investments in the developing countries expand at the same rate as those of its competitors in trade, particularly the United States and Japan. It is therefore essential that a large number of major investments be made in the various sectors of the developing countries' economies in order to: maintain and strengthen the presence of European industry and trade on the markets of the developing countries . . . [and] provide the Community with more secure and diverse supplies of raw materials, etc.

EUROPE, AGENCE INTERNATIONALE D'INFORMATION POUR LA PRESSE, EUROPE DOCUMENTS, No. 985, at 2 (Feb. 2, 1978).

<sup>43</sup> Sir Keith Hancock, a British advocate of enlightened colonial policy, emphasized the need for "vigorous state action to promote colonial development and welfare." R. OLIVER & J. FAGE, *supra* note 24, at 222. By 1945, Great Britain had decided that its African Commonwealth colonies should become independent. France, in contrast, formulated a policy of reform rather than independence during this period. Legal reform, African participation in the administrative and political process and massive assistance programs were implemented. H. WILSON, *supra* note 22, at 299-302. For a succinct account of the decolonization of French and Equatorial Africa, see Crowder & O'Brien, *French West Africa, 1945-1960*, in *HISTORY OF WEST AFRICA* (J. Ajanyi & M. Crowder eds. 1974).

<sup>44</sup> Kwame Nkrumah, Ghana's first president, led the movement for national independence among the former British Commonwealth colonies. See K. NKUMAH, *GHANA: THE AUTOBIOGRAPHY OF KWAME NKUMAH* (1959). Felix Houphouet-Boigny of the Ivory Coast founded an interterritorial political party, the Rassemblement Democratique Africain, which played a leading role in the politicization of the French territories. R. OLIVER & J. FAGE, *supra* note 24, at 244.

<sup>45</sup> See *infra* notes 98-118 and accompanying text.

<sup>46</sup> See *infra* note 160 and accompanying text.

<sup>47</sup> R. BROAD & R. JARRETT, *COMMUNITY EUROPE: A SHORT GUIDE TO THE COMMON MARKET 14-17* (1968).

a single community.<sup>48</sup> As a result, the Treaty of Rome was signed on March 25, 1957, establishing the European Economic Community.<sup>49</sup>

The six original members of the EEC were unable to agree, however, on the relationship colonial territories should have to the EEC. France<sup>50</sup> sought to integrate her colonies into the EEC.<sup>51</sup> African colonies belonging to the Franc area were integrated in a protected trading system inextricably linked to French monetary and economic policy.<sup>52</sup> Moreover, production of certain agricultural products in French colonies outstripped France's domestic demand.<sup>53</sup> Accession of French colonies to the EEC provided alternative markets in Europe for their products.<sup>54</sup> Additionally, France hoped for high tariff barriers to the importation of tropical products from states not associated with the EEC.<sup>55</sup>

Other EEC countries did not wish to see France's territorial possessions included in the community. West Germany in particular opposed the addition of French colonies to the EEC,<sup>56</sup> anticipating that such an arrangement would require the community's subsidization of French colonial ventures in Africa and Indochina.<sup>57</sup> The financial demands of the overseas territories on the French treasury were considerable. France was willing to open colonial markets to the other EEC countries, but anxious to avoid sole responsibility for continued financing of the necessary

<sup>48</sup> *Id.* at 23.

<sup>49</sup> Treaty Establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 11 [hereafter cited as Treaty of Rome].

<sup>50</sup> For an historical perspective on French interaction with black Africa from the 16th century to the period of the "Scramble for Africa" (1879-1902), see W. COHEN, *THE FRENCH ENCOUNTER WITH AFRICANS* (1980). A detailed account of post-World War II French-African political relations is contained in D. WHITE, *BLACK AFRICA AND DEGAULLE* (1979).

<sup>51</sup> The EEC is a customs union. Products entering the EEC are subject to a uniform tariff, while barriers to the movement of goods between Member States, signatories to the Treaty of Rome, are progressively eliminated. The Treaty of Rome also provides for the free movement of persons, services and capital between Member States. Treaty of Rome, *supra* note 49, 298 U.N.T.S. at 15-16 (art. 36(a-b)); at 21-24 (arts. 15-22); at 26-30 (arts. 30-37); at 36-44 (arts. 48-73). See D. LASOK & J. BRIDGE, *AN INTRODUCTION TO THE LAW AND INSTITUTIONS OF THE EUROPEAN COMMUNITIES* (1972).

<sup>52</sup> I. ZARTMAN, *THE POLITICS OF TRADE NEGOTIATIONS BETWEEN AFRICA AND THE EUROPEAN ECONOMIC COMMUNITY* 6 (1971). For a discussion of the Franc Area and its tendency to concentrate African production on a limited number of products, see van Benthem van den Bergh, *The New Convention of Association with African States*, 1 *COMMON MKT. L. REV.* 156, 156-158 (1963).

<sup>53</sup> van Benthem van den Bergh, *supra* note 52, at 158. Coffee, cocoa, cotton and groundnuts (peanuts) were being produced in large quantities by Senegal, Mali, Mauritania, Niger, the Ivory Coast, Chad, the Cameroons and Madagascar. *Id.* at 157 n.1.

<sup>54</sup> I. ZARTMAN, *supra* note 52, at 8.

<sup>55</sup> *Id.* at 10; van Benthem van den Bergh, *supra* note 52, at 158.

<sup>56</sup> P. OKIGBO, *AFRICA AND THE COMMON MARKET* 26 (1967).

<sup>57</sup> Amoia, *supra* note 19, at 29.

infrastructure.<sup>58</sup>

Outright inclusion of France's overseas territories in the EEC would have raised major technical problems.<sup>59</sup> Moreover, Germany and the Netherlands, and possibly others within the six original members of the EEC, would have rejected such a proposal.<sup>60</sup> However, France was unwilling to see her dependencies excluded from the community. By advocating a compromise plan of "association" between the EEC and France's overseas territories, French negotiators achieved their primary objectives.<sup>61</sup>

### B. *The Reverse Preference: Association at a Price*

In exchange for financial assistance and other advantages, France, and to a lesser extent Italy and Belgium, agreed to share formerly captive markets with their European partners.<sup>62</sup> The compromise plan of association extended the EEC customs union to include colonial territories (Associated States) on an individual basis.<sup>63</sup> Goods originating in Associated States were to be admitted into the EEC's Member States duty free.<sup>64</sup> Associated States reciprocated by undertaking the progressive elimination of "duties and charges" on imports originating in Member States.<sup>65</sup> The plan prohibited Associated States from discriminating in favor of the

<sup>58</sup> van Benthem van den Bergh, *supra* note 52, at 159. France argued that it was unable to renovate its aging industrial base to meet German competition while bearing alone the cost of African development. Without basic facilities, equipment, services and installations, France's colonies would have been of little value. *Id.*

<sup>59</sup> C. COSGROVE-TWITCHETT, *EUROPE AND AFRICA: FROM ASSOCIATION TO PARTNERSHIP* 9 (1978). The Treaty of Rome was drafted to incorporate a small number of geographically contiguous, economically advanced countries. To incorporate France's colonies outright, countless derogations, exceptions and safeguard clauses would have been required. *Id.* at 9-10.

<sup>60</sup> I. ZARTMAN, *supra* note 52, at 7; van Benthem van den Bergh, *supra* note 52, at 159.

<sup>61</sup> van Benthem van den Bergh, *supra* note 52, at 159. France provided its territories with access to the EEC market of 170 million people, while acquiring partners in the costly undertaking of developing African infra-structures. C. COSGROVE-TWITCHETT, *supra* note 59, at 10. The association of overseas territories is only one of a series of provisions which were included in the Treaty of Rome at the insistence of France. Along with the association, France also demanded that the treaty contain safeguard provisions for its balance of payments. These provisions were for use in response to problems arising from trade between the Member States. *Id.* at 7-11. France's negotiating strategy is discussed in I. ZARTMAN, *supra* note 52.

<sup>62</sup> J. MATTHEWS, *ASSOCIATION SYSTEM OF THE EUROPEAN COMMUNITY* 13 (1977).

<sup>63</sup> P. OKIGBO, *supra* note 56, at 26.

<sup>64</sup> While the economies of the Member States were to be integrated, the 18 Associated States remained as separate, isolated markets. Combined, the Associated States had a smaller population than West Germany, and a smaller national income than Belgium. Arguably, the isolation and weakness of their individual economies made them captive markets for the European nations under association. *Id.* at 27-28.

<sup>65</sup> G. VERBIT, *TRADE AGREEMENTS FOR DEVELOPING COUNTRIES* 9 (1969).

European state with which they had "special relations."<sup>66</sup>

The requirement that Associated States reduce the duties charged on imports from the EEC has been termed a "reverse preference."<sup>67</sup> This system furthers a division of labor in which African states specialize in the production of tropical agricultural products and raw materials. The EEC in turn provides industrial products and processed goods.<sup>68</sup> Reciprocity in this context has been criticized because it hinders the growth of industry in developing countries.<sup>69</sup> Without the flexibility to impose tariffs on imported goods, developing countries are unable to shield growing domestic industries from competition against stronger, established concerns based in developed countries.<sup>70</sup> Under this arrangement, exports to the EEC from non-associated developing countries actually increased more than those of Associated States.<sup>71</sup> There is no evidence that the preferences granted to the Associated States had a beneficial effect on their trade with the EEC.

### C. African Independence and the Yaoundé Agreements

The advantages the Associated States derived, as well as the obligations they incurred, were arranged by the colonial powers.<sup>72</sup> The relative status of the parties suggests a trusteeship.<sup>73</sup> With the movement towards

<sup>66</sup> Treaty of Rome, *supra* note 49, 298 U.N.T.S. at 65-66 (art. 132(1-3)).

<sup>67</sup> See, e.g., R. BAILEY, *THE EUROPEAN COMMUNITY AND THE WORLD* 35 (1973); Gruhn, *The Lomé Convention: Inching Towards Interdependence*, 30 INT'L ORGANIZATION 241, 246 (1976). The Treaty of Rome permits Associated States to "levy customs duties which correspond to the needs of their development and . . . industrialization or which . . . have the object of contributing to their budgets." Treaty of Rome, *supra* note 49, 298 U.N.T.S. at 66 (art. 133(3)). Discrimination between Member States is prohibited. The Associated State is required to apply the same rate of duty to the country with which it had special relations as it applies to all Member States. *Id.* See *supra* notes 63-65 and accompanying text.

<sup>68</sup> BAILEY, *supra* note 67, at 35; P. OKIGBO, *supra* note 56, at 27.

<sup>69</sup> P. OKIGBO, *supra* note 56, at 56. A 1964 U.N. Conference addressed this problem. UNITED NATIONS, REPORT BY THE SECRETARY-GENERAL OF THE UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT, TOWARDS A NEW TRADE POLICY FOR DEVELOPMENT, U.N. Doc. E/CONF. 46/3, at 32-34 (1964). See also Pinder, *The Community and Developing Countries: Associates and Outsiders*, 12 J. COMMON MKT. STUD. 53, 59 (1973).

<sup>70</sup> Association prevented the Associated States from using export duties to encourage local processing of exportable raw materials. Selective application of export duties makes domestically produced products more attractive than similar European products. P. OKIGBO, *supra* note 56, at 55-56.

<sup>71</sup> van Benthem van den Bergh, *supra* note 52, at 161 n.10. EEC imports from the Associated States increased from \$915 million in 1958 to \$989 million in 1963; imports from non-associated developing African countries went from \$979 million in 1958 to \$1,699 million in 1963. C. COSGROVE-TWITCHETT, *supra* note 59, at 61.

<sup>72</sup> C. COSGROVE-TWITCHETT, *supra* note 59, at 21; P. OKIGBO, *supra* note 56, at 26.

<sup>73</sup> Rivkin, *Africa and the EEC: New Inter-Regional Association*, 2 J. L. & ECON. DEV. 56 (1967).

independence in the late 1950's, the legal relations of the EEC and its former colonies took on a different character.

Between 1958 and 1962, eighteen sovereign nations were created from formerly dependent territories.<sup>74</sup> A number of the new African states formally requested that the association regime be continued.<sup>75</sup> Negotiations between representatives of the EEC and the Associated States began as early as 1961.<sup>76</sup> As a result, Yaoundé I was signed in July 1963 at Yaoundé, Cameroon and came into force in January 1964.<sup>77</sup>

Yaoundé I expired in 1969, and a subsequent agreement, Yaoundé II, was negotiated and ratified in the same year, remaining in effect until 1975.<sup>78</sup> The enthusiasm displayed by African states for continued association with the EEC is primarily attributable to the financial aid granted under both Yaoundé I and II.<sup>79</sup>

Trade provisions under both agreements largely resembled those established by the Treaty of Rome.<sup>80</sup> Discrimination against or between the EEC's Member States was prohibited.<sup>81</sup> Associated States were given duty-free access to the EEC for a limited number of primary products only.<sup>82</sup> The reverse preference system described above remained substan-

<sup>74</sup> The new nations created were Guinea, Senegal, Mali, Ivory Coast, Dahomey, Mauritania, Niger, Upper Volta, the Central African Republic, Chad, Gabon, Cameroon, Madagascar, Congo (Brazzaville), Congo (Leopoldville), Rwanda, Burundi and Somalia. P. OKIGBO, *supra* note 56, at 45.

<sup>75</sup> The states requesting that association continue were Togo, Ivory Coast, the Central African Republic, Congo (Brazzaville), Gabon, Malagasy Republic, Chad and Upper Volta. P. OKIGBO, *supra* note 56, at 45.

<sup>76</sup> C. COSGROVE-TWITCHETT, *supra* note 59, at 73.

<sup>77</sup> Convention of Association Between the European Economic Community and the African and Malagasy States Associated with that Community, July 20, 1963, *reprinted in* 2 I.L.M. 971 (1963) [hereinafter cited as Yaoundé I]. All the newly-formed states, *supra* note 74, excepting Guinea, as well as Togo joined the Association of African and Malagasy States. J. MATTHEWS, *supra* note 62, at 14, 15.

<sup>78</sup> Convention of Association Between the European Economic Community and the African and Malagasy States Associated with that Community, July 29, 1969, *reprinted in* 9 I.L.M. 484 (1970) [hereinafter cited as Yaoundé II]. In 1972, Mauritius joined the Associated States. J. MATTHEWS, *supra* note 62, at 18.

<sup>79</sup> The European Development Fund (EDF) was created to administer EEC aid to the Associated States. From 1964 to 1969, the EDF's resources totaled \$750 million. EDF resources for the next five years increased to \$918 million. J. MATTHEWS, *supra* note 62, at 17. For some of the poorest Associated States, the EDF accounted for 30 percent of total external aid received. Gruhn, *supra* note 67, at 247.

<sup>80</sup> C. COSGROVE-TWITCHETT, *supra* note 59, at 99, 118.

<sup>81</sup> Gruhn, *supra* note 67, at 246.

<sup>82</sup> Products granted duty-free access under Yaoundé I were: fresh pineapples, desiccated coconut, unroasted coffee, tea, uncrushed pepper, vanilla, cloves (not crushed or ground), nutmegs (not crushed or ground) and cocoa beans. All other imports from the Associated States were subject to the same rate of duty applied among Member States. P. OKIGBO, *supra* note 56, at 49-50.

tially unchanged.<sup>83</sup>

Both Associated States and the EEC's Member States were granted separate safeguard powers by the Yaoundé Conventions.<sup>84</sup> No evidence indicates the EEC ever invoked the clause.<sup>85</sup> The export performance of the Associated States posed no threat to the EEC economies. EEC imports from the Associated States, as a percentage of total EEC imports from developing countries, declined from 13.4% in 1958 to 7.4% in 1974.<sup>86</sup> Moreover, EEC exports to Associated States, as a percentage of total EEC exports to developing countries, declined from 11.6% in 1958 to 9.9% in 1973.<sup>87</sup> Thus, EEC trade with the Associated States retained its initial character throughout the period of association. The Treaty of Rome and the Yaoundé conventions apparently had little effect on the traditional pattern of Europe's trade with Africa.<sup>88</sup>

#### IV. THE LOMÉ CONVENTIONS

##### A. *Lomé I*

##### 1. The ACP-EEC Partnership

Yaoundé II's successor, the First Lomé Convention (Lomé I),<sup>89</sup> was negotiated under circumstances more advantageous to the developing countries. The accession of the United Kingdom to the European Economic Community in 1973<sup>90</sup> ensured the participation of African and Car-

<sup>83</sup> Yelapaala, *supra* note 16, at 820-22.

<sup>84</sup> The safeguard clause available to the EEC under Yaoundé I permits action: "If serious disturbances occur in one sector of the economy of the Community or of one or more Member States, or jeopardize their external financial stability, and if difficulties arise which may result in a region suffering grave economic hardship . . ." Yaoundé I, *supra* note 77, 2 I.L.M. at 977 (art. 13(2)) (emphasis added).

Under Yaoundé II, the EEC is permitted to act: "If serious disturbances occur in a sector of the economy of the Community or of one or more of its Member States, or jeopardize their external financial stability, or if difficulties arise which result in a deterioration in the economic situation of a region in the Community . . ." Yaoundé II, *supra* note 78, 9 I.L.M. at 487-88 (art. 16(2)) (emphasis added). For a discussion of the broader safeguard powers available to the Associated States, see P. OKICBO, *supra* note 56, at 52-54 (concluding that the inherent limitations of the clause unduly interfered with the ability of Associated States to make use of it).

<sup>85</sup> Yelapaala, *supra* note 16, at 844.

<sup>86</sup> J. MATTHEWS, *supra* note 62, at 46 (table 5).

<sup>87</sup> *Id.*

<sup>88</sup> Gruhn, *supra* note 67, at 246.

<sup>89</sup> Lomé I, *supra* note 1.

<sup>90</sup> The EEC enactment through which Great Britain acceded to the EEC is formally known as: An Act to make provision in connection with the enlargement of the European Communities to include the United Kingdom, together with (for certain purposes) the Channel Islands, the Isle of Man and Gibraltar. 2 COMMON MKT. REP. (CCH) ¶ 7012 (1973). See D. WALL, EUROPEAN COMMUNITIES ACT 15 (1973).

ibbean Commonwealth countries in the negotiations.<sup>91</sup> The ACP states negotiated as a bloc to increase their bargaining power.<sup>92</sup> Developing nations were pressuring the U.N. General Assembly to address problems of uneven development and allocation of world resources.<sup>93</sup>

While Lomé I negotiations were underway, the EEC was negotiating multilateral trade agreements within the General Agreement on Tariffs and Trade (GATT).<sup>94</sup> The EEC was also participating in the reform of the international monetary system under the auspices of the International Monetary Fund.<sup>95</sup> The common theme in these negotiations was the establishment of a more equitable allocation of resources in the world economy.<sup>96</sup> Moreover, the dependency of the industrial states on the less developed countries became readily apparent during the first oil crisis.<sup>97</sup>

<sup>91</sup> Dodoo & Kusten, *The Road to Lomé*, in *THE LOMÉ CONVENTION AND A NEW INTERNATIONAL ECONOMIC ORDER* 30-31 (F. Alting von Gesau ed. 1977).

<sup>92</sup> Gruhn, *supra* note 67, at 247-48. Several factors explain the unity of ACP states in the negotiations: (1) ACP states considered a unified approach the only successful negotiating technique towards the EEC; (2) ACP states had common interests in the negotiations; (3) Nigeria's participation represented a powerful catalyzing force; and, (4) ACP states generally felt greater potential economic and political power. Dodoo & Kusten, *supra* note 91, at 34. On growing African unity in trade negotiations, see generally I. ZARTMAN, *supra* note 52, at 23.

<sup>93</sup> The U.N. General Assembly adopted the Charter of Economic Rights and Duties of States, generally known as the New Economic Order, on Dec. 12, 1974. G.A. Res. 3281, 29 U.N. GAOR Supp. (No. 31) at 50, U.N. Doc. A/9631 (1974). See generally Haight, *The New International Economic Order and the Charter of Rights and Duties of States*, 9 INT'L LAW. 591 (1975).

<sup>94</sup> The General Agreement on Tariffs and Trade (GATT), *opened for signature*, Oct. 30, 1974, 61 Stat. A3, T.I.A.S. No. 1700, 55 U.N.T.S. 187, is a multilateral trade agreement providing a schedule of tariff commitments, common rules of trade and an organization to promote negotiations, settle disputes and administer the agreement's provisions. The basic principles of GATT require members to generalize preferences on a non-discriminatory basis, protect domestic industries through customs tariffs rather than non-tariff barriers, and consult with each other prior to modifying their external commercial policies. P. LOERTIE, *ECONOMIC INTEGRATION AND THE LAW OF GATT* 1 (1975).

<sup>95</sup> The International Monetary Fund (IMF) was created in 1944 at the Bretton Woods Conference. The IMF possesses broad powers to guide the international financial conduct of its members. The Fund's purpose is to monitor currency exchange rates, administer a code of "fair practice" in the field of foreign exchange rates and international financial transactions and provide financial resources to countries needing assistance in dealing with payment imbalances. Southard, *The Evolution of the International Monetary Fund*, 5 N.C. J. INT'L L. & COM. REG. 425, 426 (1980). The abandonment of the gold standard by the United States and the adoption of floating rates by the world's major industrial countries in the early 1970's required a major reappraisal of international fiscal relations. *Id.* at 460-68.

<sup>96</sup> Simmonds, *The Lomé Convention and the New International Economic Order*, 13 COMMON MKT. L. REV. 315, 319 (1976).

<sup>97</sup> From 1970 to 1974, members of the Organization of Petroleum Exporting Countries (OPEC) obtained a 478.7% increase in the posted price of crude petroleum. In 1974, oil exporting countries had a \$70 billion trade surplus, while non oil-producing developing

The enhanced bargaining power of the ACP states is reflected in terms of the new agreement. Article I of Lomé I emphasized the increased concern for trade growth in the ACP states.<sup>98</sup> Accordingly, under Lomé I, the EEC no longer required the granting of reverse preferences as it had under association.<sup>99</sup> Elimination of the reverse preference requirement is considered to be in recognition of the preexisting inequalities in the EEC-ACP trade relationship.<sup>100</sup>

## 2. Improved Market Access Subject to Rules of Origin and Safeguard Provisions

Lomé I provided the ACP states with better access to EEC markets than African exporters had enjoyed under association. An estimated 99.2% of the value of ACP exports to the EEC was given duty-free access under Lomé I, free from quotas or other quantitative restrictions.<sup>101</sup> A further advantage was that the EEC agreed to treat the ACP states as a single customs area in applying the "rules of origin."<sup>102</sup>

countries saw their deficit increase from \$6 billion in 1973 to \$28 billion in 1974. To counteract this deficit and secure allies in their confrontation with developed nations, OPEC countries responded with aid programs to developing nations. In turn, developed nations increased their own assistance to developing nations. Hudes, *Towards a New International Economic Order*, 1 YALE STUD. IN WORLD PUB. ORD. 87, 99-101 (1975). The successful formation of OPEC, and the "energy crisis" are viewed by some writers as the crucial elements creating a turning point in relations between industrially developed nations and poor developing nations. See Coppens, Faber & Lof, *European Community's Security of Supply with Raw Materials and the Interests of Developing Countries: The Need for a Cooperative Strategy*, in THE LOMÉ CONVENTION AND A NEW INTERNATIONAL ECONOMIC ORDER 161 (F. Altling von Gesau ed. 1977).

<sup>98</sup> See *supra* note 14.

<sup>99</sup> Lomé I, *supra* note 1, 14 I.L.M. at 608 (art. 7(1)). A primary factor in the acquiescence of the EEC to the elimination of the reverse preference demand was the United States opposition. Under the Generalized System of Preferences, the U.S. President has the authority to extend duty-free treatment to developing countries on a broad range of articles. 19 U.S.C. § 2461 (1982). The President may revoke such treatment if "such country affords preferential treatment to the products of a developed country, other than the United States . . . unless the President has received assurances satisfactory to him that such preferential treatment will be eliminated before January 1, 1976." *Id.* § 2462(b).

<sup>100</sup> C. COSGROVE-TWITCHETT, *supra* note 59, at 150; GRUHN, *supra* note 67, at 255; Laing, *New Departures in Multilateral Trade, Development and Cooperation: The Lomé Convention and Its Impact on the United States*, 26 MERCER L. REV. 781, 798 (1976); SIMMONDS, *supra* note 96, at 324; see R. Baily, *supra* note 67, at 35. For a view that the elimination of reverse preferences will be of little benefit to the ACP states, see Dolan, *The Lomé Convention and Europe's Relationship with the Third World: A Critical Analysis*, 1 Revue d'Intégration Européenne 369, 392 (1978).

<sup>101</sup> *Lomé Dossier*, *supra* note 41, at 23. This estimate excludes sugar, which is separately considered. Under the Association, only raw materials and primary products were given duty-free access. See *supra* note 82 and accompanying text.

<sup>102</sup> Lomé I, *supra* note 1, 14 I.L.M. AT 623 (PROTOCOL No. 1, ART. 1(2)).



The rules of origin are a complex set of requirements incorporated in Lomé I to ensure that products granted duty-free treatment actually originate in one of the ACP states. All products jointly produced in a number of ACP states receive originating status. The EEC refuses to extend this principle to third party developing nations.<sup>103</sup> All non-originating products processed in ACP states receive duty free treatment only if 50% of the product's export value is added in the ACP state.<sup>104</sup> The rules of origin are designed to prevent Japanese or U.S. exporters from using the ACP states as a front for duty-free penetration of the EEC market.<sup>105</sup>

The EEC's fear of regional economic harm within the community is reflected in the Lomé safeguard provision. EEC negotiators may have anticipated such harm from Lomé I's liberalized market access provisions. Under article 10, protective measures are authorized under the following circumstances:

[I]f, as a result of applying the provisions of this Chapter, serious disturbances occur in a sector of the economy of the Community or of one or more of its Member States, or jeopardize their external financial stability, or if difficulties arise which may result in a deterioration in a sector of the economy of a region of the Community . . . .<sup>106</sup>

Yaoundé I permitted protective measures when the threat of a region suffering "grave economic hardship" existed.<sup>107</sup> Yaoundé II required a "deterioration in the economic situation" of a region.<sup>108</sup>

Under Lomé I, however, protective measures may be taken *in anticipation* of a "deterioration in a sector" of a region's economy.<sup>109</sup> In exchange for concessions in other areas, ACP negotiators have granted the EEC broad discretion in determining when the application of safeguard measures is justified. Without the requirement that threatened harm be of grave proportions, or that deterioration in the region's economy actually occur, there is greater opportunity for unilateral action by the EEC.

## B. Lomé II

Lomé I expired on March 1, 1980. A renegotiated agreement (Lomé

<sup>103</sup> Doodoo & Kusten, *supra* note 91, at 43.

<sup>104</sup> The ACP suggested that 25 percent of added value should confer originating status. The EEC insisted on 50 percent fearing that a lower percentage would permit third party exporters merely to package goods in ACP states, adding 25 percent to value and obtaining duty-free treatment. *Id.* See generally Nusbaumer, *Origin Systems and the Trade of Developing Countries*, 13 J. World Trade L. 34 (1979).

<sup>105</sup> Yelapaala, *supra* note 16, at 842.

<sup>106</sup> Lomé I, *supra* note 1, 14 I.L.M. AT 608 (ART. 10).

<sup>107</sup> See *supra* note 84.

<sup>108</sup> *Id.*

<sup>109</sup> Lomé I, *supra* note 1, 14 I.L.M. AT 608 (ART. 10).

II)<sup>110</sup> took effect immediately. Lomé II was negotiated in a different international climate from its predecessor. The results of the U.N Conference on Trade and Development (UNCTAD) V<sup>111</sup> in Manila were not satisfactory to the developing nations.<sup>112</sup> GATT negotiations in Tokyo over the use of protectionist measures were deadlocked.<sup>113</sup> Confronted with their own internal economic problems, EEC officials were unlikely to concede to ACP demands for a significant revision of Lomé I.<sup>114</sup> Instead, ACP negotiators were reminded of their unique position as beneficiaries of the EEC.<sup>115</sup>

The EEC approach to Lomé II negotiations was formally stated at the opening session in July 1978. "The convention has proved itself in practice. The renegotiations will therefore not deal with sweeping changes or renovation but with adjustments and improvements."<sup>116</sup> Accordingly, the trade provisions of Lomé II reproduce the provisions of Lomé I with only minor alterations.<sup>117</sup> The safeguard provisions and the rules of origin remain largely unchanged.<sup>118</sup>

<sup>110</sup> See *supra* note 1.

<sup>111</sup> The United Nations Conference on Trade and Development (UNCTAD), first convened in 1964, is now a permanent organ of the U.N. General Assembly. The Conference formulates principles and policies for the promotion of trade, including the initiation of multilateral pacts designed to harmonize government policies in the area of international commerce. G.A. Res. 1994, 19 U.N. GAOR Supp. (No. 15) at 1, U.N. Doc. A/5815 (1965).

<sup>112</sup> See Joeques & Kirkpatrick, *The Results of UNCTAD V*, 13 J. World Trade L. 535 (1979).

<sup>113</sup> Noge, *A Legal Guide to the Tokyo Round*, 13 J. World Trade L. 436, 437 (1979).

<sup>114</sup> Kirkpatrick, *Lomé II*, 14 J. World Trade L. 352 (1980). EEC OFFICIALS APPROACHED THE CONVENTION WITH THE OBJECTIVES OF IMPROVING ACCESS TO RAW MATERIALS AND OBTAINING GUARANTEES ON ITS INVESTMENTS IN THE ACP STATES. *Id.*

<sup>115</sup> Rainford, *Ranimer L'Esprit de Partnership*, *Le Courier*, No. 58, at 25 (Nov. 1979).

<sup>116</sup> *The Courier*, No. 51, at III (SEPT./OCT. 1978).

<sup>117</sup> Kirkpatrick, *supra* note 114, at 353, 359; Simmonds, *The Second Lomé Convention: The Innovative Features*, 17 Common Mkt. L. Rev. 415, 418 (1980). CERTAIN AGRICULTURAL PRODUCTS, NOT COVERED BY LOMÉ I, WERE INCLUDED IN THE EEC'S COMMON AGRICULTURAL POLICY THUS BENEFITTING FROM REDUCED IMPORT DUTIES. BEEF EXPORT QUOTAS, PREVIOUSLY NEGOTIATED ON A YEARLY BASIS ARE NOW FIXED FOR A FIVE-YEAR PERIOD. YELPAALA, *supra* note 16, at 827.

<sup>118</sup> For the full text of the Lomé II safeguard clause, see *supra* note 9. Provisions 12(2) and 12(4) were added in response to widespread concern over increased protectionism, and the possible effect such protectionism could have on the developing economies of the ACP states. See Helleiner, *Lomé: Market Access and Industrial Cooperation*, 13 J. World Trade L. 181, 182-86 (1979). ANTICIPATING THE LOMÉ II NEGOTIATIONS, HELLEINER SUGGESTS A NARROW DEFINITION OF THE LOMÉ II SAFEGUARD CLAUSES SO THAT THE CIRCUMSTANCES FOR ITS USE ARE PREDICTABLE. ALSO, "VOLUNTARY EXPORT RESTRAINTS" OBTAINED FROM DEVELOPING COUNTRIES ARE OFTEN USED IN LIEU OF SAFEGUARDS. FOR EXAMPLE, THE EEC MAY IMPLIEDLY THREATEN MORE RESTRICTIVE ACTION IF VOLUNTARY MEASURES ARE NOT ADOPTED. *Id.* at 182-83.

## V. THE LOMÉ CONVENTIONS AND THE INDUSTRIALIZATION OF THE ACP STATES

### A. *Static Trade Performance of the ACP States Under Lomé I*

The ACP states generally desire to improve their ability to produce semi-processed and manufactured goods for export.<sup>119</sup> Improved capacity to process raw materials into manufactured goods has long been identified as fundamental to increasing the prosperity of the world's poorest countries.<sup>120</sup> Both Lomé I and Lomé II explicitly recognize "the need to secure additional benefits for the trade of the ACP States."<sup>121</sup> Thus, one measure of the success of the conventions is the effect of the market access provisions on the industrial development of the ACP states.

The trade performance of the ACP states in the Lomé years, however, is disappointing. The pattern of trade between the ACP states and the EEC remained essentially unchanged in the period in which Lomé I was in effect.<sup>122</sup> In the same period, the share of the total EEC imports from non-oil exporting ACP states declined sharply<sup>123</sup> while the composition of the ACP states' exports to the EEC remained largely unchanged.<sup>124</sup> Although the preferential access granted under Lomé I was presented by the EEC as a major development instrument,<sup>125</sup> the impact of the agreement on the ACP-EEC trade relationship has been described as "negligible."<sup>126</sup>

### B. *External Factors Reduce the Value of Lomé Preferences*

Two factors extrinsic to the conventions reduce the benefits to the

<sup>119</sup> Moss & Ravenhill, *Trade Developments During the First Lomé Convention*, 10 *World Dev.* 841, 850 (1982). See Yelapaala, *supra* note 16, at 833 n.155.

<sup>120</sup> See P. Okigbo, *supra* note 56, at 56. See, e.g., United Nations Conference on Trade and Development, *Incentives for Industrial Exports*, U.N. Doc. TD/B/C.2/184, at 1 (1982).

<sup>121</sup> See *supra* note 14.

<sup>122</sup> Moss & Ravenhill, *supra* note 119, at 845.

<sup>123</sup> *Id.* at 847-48 (table 8).

<sup>124</sup> *Id.* at 849. See *supra* notes 20 and 40.

<sup>125</sup> On Feb. 28, 1975, at Lomé, Togo, Francois-Xavier Ortoli, President of the Commission of the European Communities spoke in the following terms:

The importance and the originality of the Lomé Convention derive not only from the particular conditions in which it has been negotiated but also, perhaps especially, from its contents. . . .

Although financial aid remains necessary, and even fundamental, for a certain number of particularly poor countries, it cannot remain the only method of development cooperation. That is why we wanted to open the European market to products from the ACP States and give them access to our know-how and technology in a framework of intensive industrial cooperation.

*Lomé Dossier*, *supra* note 41, at 20.

<sup>126</sup> Moss & Ravenhill, *supra* note 119, at 849.

ACP states of duty free access to the EEC.<sup>127</sup> The first factor is the reduction in the EEC's Common External Tariff,<sup>128</sup> which was obtained through a series of GATT<sup>129</sup> multilateral negotiations. By lowering the Common External Tariff, the advantage conferred upon the ACP states by the convention is diminished.<sup>130</sup> The second factor is the deployment of the EEC's Generalized System of Preferences (GSP),<sup>131</sup> which extends preferential treatment to all developing countries on a nonreciprocal basis.<sup>132</sup> The GSP imposes greater restrictions<sup>133</sup> than the Lomé agreements on producers in developing countries, but nevertheless erodes the value of the preferences granted to the ACP states.<sup>134</sup>

### C. *Intrinsic Barriers to Development*

#### 1. Miscellaneous Shortcomings: Rules of Origin and Shipping Rates

In addition to the extrinsic factors which reduce the value of the Lomé trade preferences, a variety of factors intrinsic to Lomé II interfere with industrial development. The rules of origin, in particular, may protect manufactures in the EEC by requiring a higher percentage of added value than is necessary to avoid trade deflection.<sup>135</sup> Moreover, Lomé II shipping rules appear to favor the export of raw materials over processed

<sup>127</sup> *Id.* at 841.

<sup>128</sup> The Common External Tariff is the duty imposed by the EEC on all imports originating outside the EEC. Treaty of Rome, *supra* note 49, 298 U.N.T.S. at 22-26 (arts. 18-29). See also P. Mathijsen, *A Guide to European Community Law* 52 (2d ed. 1975).

<sup>129</sup> See *supra* note 94.

<sup>130</sup> Moss & Ravenhill, *supra* note 119, at 841.

<sup>131</sup> The Generalized System of Preferences (GSP) was developed through UNCTAD, *supra* note 111, to meet the trade needs of developing countries. Under the GSP, developing countries agree to offer non-reciprocal, general tariff reductions on the manufactured and semi-manufactured imports of developing countries. Behnam, *Development and Structure of the Generalized System of Preferences*, 9 *J. World Trade L.* 442, 443 (1975); see also *supra* note 99.

<sup>132</sup> Weston, *How Sensitive is the EEC's Generalised System of Preferences?*, [1980] 1 *ODI Review: A Journal of Development Policy* 11, 12.

<sup>133</sup> Under the GSP, quotas are imposed on imports of "sensitive" products. As a result, individual developing countries are subject to "ceilings" limiting the value of exports granted preferential treatment. DeBouter, *Tariff Preferences Revisited*, 11 *J. Int'l L. & Econ.* 353, 371 n.80 (1977). See generally Weston, *supra* note 132 (arguing that tariff quotas require exporters in developing countries to incur additional storage costs and customs delay).

<sup>134</sup> Moss & Ravenhill, *supra* note 119, at 841.

<sup>135</sup> Helleiner, *supra* note 118, at 183-84. Helleiner finds the rules of origin "at present hopelessly complex and unnecessarily restrictive." *Id.* See also McQueen, *supra* note 11; Moss & Ravenhill, *supra* note 119, at 842 (given low levels of per capita income in ACP states, rules of origin impose "particularly onerous requirement"); Yelapaala, *supra* note 16, at 842 (future success of ACP states in exporting manufactured goods depends in part on liberalization of rules of origin).

goods.<sup>136</sup> In some sectors, freight rates themselves discourage ACP processing of raw materials.<sup>137</sup> The EEC could presumably exercise its influence to obtain more efficient rate setting systems.<sup>138</sup>

## 2. Economic Structure of ACP States as a Barrier to Increased Manufactured Exports

Overall, the greatest obstacle to effective use of the Lomé market access provisions is the economic structure of the ACP states. Unless substantial structural transformations are achieved through increased investments in plants and equipment, ACP producers will remain unable to penetrate EEC markets.<sup>139</sup> The experience of the Associated States under the Yaoundé conventions demonstrates that trade preferences standing alone will not foster industrial development.<sup>140</sup> Although Lomé I and II offer some advantages, the conditions of access offered to major ACP exporters remain basically the same as under association.<sup>141</sup> The inability of ACP states to increase their share of manufactured exports should therefore come as no surprise.

## 3. The Lomé Safeguard Clause

To exploit the trade preferences granted under the Lomé convention, the ACP states must attract foreign investment or induce efficient domestic investment in manufacturing sectors.<sup>142</sup> The safeguard powers retained by the EEC throughout the Yaoundé and Lomé regimes permit unilateral suspension of preferential access in the event of anticipated harm to EEC

<sup>136</sup> McQueen, *supra* note 11, at 130; Yelapaala, *supra* note 16, at 833-42. See generally Belassa, *The "New Protectionism" and the International Economy*, 12 J. World Trade L. 409, 420 (1978) (EEC COMMISSION HAS MOVED TO PROTECT DOMESTIC SHIPBUILDING INDUSTRIES).

<sup>137</sup> Helleiner, *supra* note 118, at 184.

The structure of freight rates is escalated in many sectors, just as EEC tariffs against the ACP countries used to be, so as to generate higher levels of effective protection for EEC processing the higher the stage of fabrication. These differentiated rates are not obviously the product of rational efficiency-motivated rate-setting systems and they constitute a serious impediment to the development of raw material processing for export.

*Id.* See also United Nations Conference on Trade and Development, *The Processing Before Export of Primary Commodities: Areas for Further International Cooperation*, U.N. Doc. TD/229/SUPP. 2, at 58-59 (MAR. 28, 1979).

<sup>138</sup> Helleiner, *supra* note 118, at 184-85.

<sup>139</sup> Yelapaala, *supra* note 16, at 839.

<sup>140</sup> See *supra* notes 86-88 and accompanying text.

<sup>141</sup> Moss & Ravenhill, *supra* note 119, at 842.

<sup>142</sup> Yelapaala, *Costs and Benefits from Foreign Direct Investment: A Study of Ghana*, 2 N.Y.U. J. Int'l & Comp. L. 72, 91-92 (1980).

economies.<sup>143</sup> The safeguard clause deprives planners in ACP states of the assurance that EEC markets will provide a duty-free outlet for increased production capacity.<sup>144</sup> Moreover, with preferential access subject to unilateral suspension, ACP states are less attractive to non-EEC, foreign direct investors.<sup>145</sup> The safeguard clause interferes with industrial development planning and undermines the bargaining position of ACP state governments which must negotiate the terms under which third party direct investors will operate. The safeguard clause therefore injects an element of uncertainty in the ACP-EEC relationship which is most harmful to industrial growth of the ACP states.

The safeguard clause need not be formally invoked to be effective. The EEC's unilateral power to invoke the clause is sufficient to interfere with the ability of ACP states to plan for their industrial development. By threatening use of the clause, the EEC can obtain the ACP states commitment to "voluntarily" limit exports of sensitive products.<sup>146</sup> That such a commitment may be obtained without formally invoking the safeguard clause was demonstrated in 1979 when the EEC acted to limit exports of textiles from the Ivory Coast, Madagascar and Mauritius.<sup>147</sup> If the Lomé goal of "secur[ing] additional benefits for the trade of ACP States"<sup>148</sup> is to be realized, the conditions under which the safeguard clause may directly or indirectly come into play must be sharply defined.<sup>149</sup>

## VI. ENSURING ACCESS: RESTRUCTURING THE SAFEGUARD CLAUSE

### A. *Proposed Modification*

Under the Multi-Fiber Arrangement,<sup>150</sup> the EEC sets overall import

<sup>143</sup> Yelapaala, *supra* note 16, at 816-27.

<sup>144</sup> See Moss & Ravenhill, *supra* note 119, at 842; Yelapaala, *supra* note 16, at 844.

<sup>145</sup> On access to EEC markets as an important element in inducing foreign investment in ACP states, see McQueen, *supra* note 11, at 128.

<sup>146</sup> Helleiner, *supra* note 118, at 183.

<sup>147</sup> McQueen, *supra* note 11, at 120; Moss & Ravenhill, *supra* note 119, at 842; United Nations Conference on Trade and Development, Review of Trends, Developments and Restrictions in Trade in Manufactures and Semi-Manufactures, Including Areas of Special Interest to Developing Countries, and of Developments Arising From the Implementation of the Results of the Multilateral Trade Negotiations, U.N. Doc. TD/B/C.2/215, at 41 (Feb. 18, 1983) [HEREINAFTER CITED AS UNCTAD, Review of Trends].

<sup>148</sup> See *supra* notes 14 and 121 and accompanying text.

<sup>149</sup> See Helleiner, *supra* note 118, at 182-83 (firm rules governing use of safeguard clauses and "voluntary" export restraints should be established); Yelapaala, *supra* note 16, at 844 (lack of firm criteria governing use of safeguard clause permits EEC to invoke at will, since justification for use not required).

<sup>150</sup> Arrangement Regarding International Trade in Textiles, Dec. 20, 1973, 25 U.S.T. 1001, T.I.A.S. No. 7840. General Agreement on Tariffs and Trade, Basic Instruments and

levels for textiles and clothes from the ACP states, known as the "ACP line."<sup>151</sup> The ACP line establishes the import levels which the EEC would consider necessary for applying the Lomé II safeguard clause.<sup>152</sup> The terms of Lomé II give no indication that the export privileges of the ACP states are subject to quantitative restriction. In practice, however, the EEC does impose such restrictions where imports of "sensitive products"<sup>153</sup> are concerned.

ACP states should encourage the EEC to extend the principle of the ACP line to all imports from ACP states. ACP representatives should participate in establishing a ceiling above which safeguard measures could be applied. In the event that the EEC takes protective measures before the ACP line has been surpassed, the ACP producer should be compensated for resulting losses.<sup>154</sup> The proposed arrangement should only be applied to ACP states with producers who currently possess significant export capacities. When the EEC admits imports from the "least developed"<sup>155</sup> ACP states, safeguard measures should be unavailable.

## B. Guaranteed Access for ACP States

### 1. Least Developed Countries

Under the proposed safeguard system, the least developed ACP states would enjoy an unqualified privilege of duty-free access to EEC markets. Producers in the least developed ACP states would nevertheless remain subject to the rules of origin<sup>156</sup> which ensure significant processing in the ACP state.<sup>157</sup>

Application of safeguard measures by the EEC would entitle the least developed ACP state to compensation. Such an arrangement would provide the least developed ACP states with an effective guarantee of access to markets in the EEC. As a result, the state's bargaining position relative to third party direct investors would be significantly improved and the process of planning for industrial development facilitated.

Selected Documents (21st SUPP. 1975).

<sup>151</sup> UNCTAD, Review of Trends, *supra* note 147, at 41.

<sup>152</sup> *Id.*

<sup>153</sup> See *supra* note 133.

<sup>154</sup> See Helleiner, *supra* note 118, at 182-83 (when one party ceases to afford to another privileges enshrined in agreement, compensation should be offered for losses resulting therefrom).

<sup>155</sup> See *supra* note 2.

<sup>156</sup> See *supra* notes 102-04 and accompanying text.

<sup>157</sup> *Id.*

## 2. Other ACP States

ACP states not defined as least developed would also enjoy guaranteed access to EEC markets under the proposed extension of the ACP line. Once established, an industry specific ACP line would encourage exploitation of the trade preferences without apprehension of sudden application of safeguard measures. As in the case of the least developed countries, the remaining ACP states would be subject to the rules of origin to prevent abuse.

### C. Retained Safeguard Powers of the EEC

The proposed safeguard system does not divest the EEC of the power to safeguard local industries from sudden disturbances caused by competition. Least developed countries are unlikely to develop export capacity capable of harming EEC industries within the five year term.<sup>158</sup> Should a country develop such a capacity, appropriate measures could be taken when the agreement is renegotiated.

ACP states not defined as least developed would be subject to the ACP lines governing various industries. The EEC's power to set an acceptable level of imports would obviate the need for protectionist action until that level had been surpassed. Imports in excess of the acceptable level would then, at the EEC's discretion, be subject to safeguard action.

## VII. TOWARD A MORE EFFECTIVE PARTNERSHIP

### A. The Lomé Record: Conflicting Assessments

Scholars disagree on the value of the Lomé conventions to the ACP states. Several writers view the conventions as significant steps toward a true ACP-EEC partnership.<sup>159</sup> Critics of the Lomé relationship see Lomé I and II as neo-colonial instruments designed to perpetuate a trade sys-

<sup>158</sup> Yelapaala, *supra* note 142, at 842.

<sup>159</sup> C. Cosgrove-Twitchett, *supra* note 59, at 164, 168. Tracing EEC-ACP trade relations from the period immediately preceding the signing of the Treaty of Rome to the period following the signing of Lomé I, this author concludes that "[Lomé I] represents a significant advance over the Yaoundé régime, particularly in terms of access to the EEC market." *Id.* at 167. The author believes that "all the ACP governments would refute . . . allegations of neo-colonialism." *Id.* at 168.

Another writer states:

Economic rewards . . . may fall short of optimistic estimates . . . . Yet it would appear that organized, skilled, and firm political and technical pressure did allow weak states to apply pressure on strong states with considerable gains. . . . A combination of the urgency of the issues under negotiation and of leadership skill minimized systemic constraints.

Gruhn, *supra* note 67, at 261.



tem which has benefitted European interests at the expense of African economic progress.<sup>160</sup> Both views undoubtedly contain substantial elements of truth.

Even those who are sharply critical of the Lomé system recognize that many individuals acting on behalf of the EEC are genuinely concerned with the development of the ACP states.<sup>161</sup> Moreover, commentators who favor the Lomé system recognize that inequitable features still characterize the ACP-EEC relationship.<sup>162</sup> In practice, the Convention has proved durable and popular. Original ACP membership has grown from 46 to 64 countries.<sup>163</sup>

The enduring nature of trade patterns<sup>164</sup> linking Europe and her former colonies reflects the strength of the economic and cultural bonds between the states. Despite past inequities,<sup>165</sup> severing trade ties developed over centuries would be disastrous for the economic growth of the states concerned. The ACP states should seek instead to create a working partnership with the EEC. As with any business relationship, the partnership must be economically attractive to all parties concerned.

#### B. ACP-EEC Partnership Under the Proposed Safeguard System

The proposed safeguard system preserves the EEC's legitimate interest in protecting its internal economies from sudden disturbances in competitive conditions. Unlike the present arrangement, the alternative suggested allows ACP states to plan their external trade with greater certainty. Moreover, ACP states are afforded significant additional leverage in negotiating terms under which foreign direct investment projects

<sup>160</sup> Concluding that significant change in the pattern of ACP-EEC trade is unlikely, Kojo Yelapaala emphasizes the effect of non-tariff barriers, safeguard clauses and bilateral agreements between ACP states and the EEC countries. See Yelapaala, *supra* note 16.

Other writers have voiced similar concerns about the Lomé agreements. See Dolan, *supra* note 100; Shaw, *EEC-ACP Interactions and Images as Redefinitions of Eurafrica: Exemplary Exclusive and/or Exploitative?*, 18 J. Common Mkt. Stud. 135 (1979).

SCHOLARS IN THE ACP STATES HAVE ALSO CRITICIZED THE LOMÉ AGREEMENTS. See Nabudere, *Stabilization of Export Earnings ("Stabex") in the Lomé Convention*, 13 U. Ghana L.J. 59 (1976); see also Botchwey, *The ACP-EEC Convention—New Order, or Old Order with a New Face*, 13 U. Ghana L.J. 133 (1976); SAWYERR, *Industrial Co-operation under the ACP-EEC Convention of Lomé*, 13 U. Ghana L.J. 93 (1976).

<sup>161</sup> In an article voicing sharp criticism of Lomé I, Dolan concedes that "the [EEC] Commission's Directorate for development policy, in particular, and many others associated with the Community, and in the Member States, are deeply concerned with development problems." Dolan, *supra* note 100, at 393.

<sup>162</sup> Gruhn, *supra* note 67, at 259.

<sup>163</sup> See *supra* notes 2 and 89. Moreover, Angola and Mozambique are expected to sign Lomé III. The Courier, No. 82, at I (Nov./Dec. 1983).

<sup>164</sup> See *supra* notes 18-40 and accompanying text.

<sup>165</sup> See, e.g., *supra* notes 66-71 and accompanying text.

within their boundaries will operate. The ACP states' ability to offer guaranteed access to the EEC, for direct investors whose exports satisfy the rules of origin, would materially improve the attraction of ACP states as direct investment targets.

Finally, the establishment of guaranteed export ceilings would recognize three factors obscured by the Lomé relationship. First, the economic structure of the ACP states is such that trade preferences limited by traditional safeguard provisions provide little opportunity for increasing trade growth.<sup>166</sup> Notwithstanding the Lomé objective of upgrading ACP trade, the market access provisions have proved ineffective.<sup>167</sup> Second, the Lomé relationship should not hamper the ACP states' ability to attract investment from third party states. The rules of origin are structured to favor EEC firms operating in ACP states.<sup>168</sup> The safeguard clauses themselves are unlikely to be invoked against EEC firms.<sup>169</sup> By agreeing to accept a fixed quota of manufactured exports, the EEC will recognize that investment from third party states may be necessary to permit ACP states to make use of the market access provisions. Third, by recognizing that despite the unequal nature of the existing trade pattern, the EEC is willing to accept only a limited number of manufactured products exported from ACP states, the ACP-EEC partnership will be placed on a more realistic footing. While Europe has renounced the coercive practices of the past,<sup>170</sup> negotiations fixing an export ceiling will underscore the pragmatic limitations on the EEC's benevolence.

### VIII. CONCLUSION

Europe's trade with Africa was originally defined through the use of superior military and economic force. Since World War II, however, Europeans have increasingly sought to justify their commercial and political relations with Africa on ethical grounds. Former colonies were integrated into the EEC on a unilateral basis under the association system. In exchange for the right to export raw materials to the EEC free of import duties, Associated States extended corresponding preferences to EEC Member States on a non-discriminating basis.

Lomé I and II provided for increased aid to the developing countries trading with the EEC, along with preferential market access provisions and an attempt to create a North-South partnership. Throughout the association and partnership periods, African trade with Europe retained its

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<sup>166</sup> See *supra* notes 36-88 and 139-41 and accompanying text.

<sup>167</sup> *Id.*

<sup>168</sup> McQueen, *supra* note 11, at 177.

<sup>169</sup> *Id.* at 128.

<sup>170</sup> See *supra* notes 27-28 and accompanying text.

initial character—African states supplied raw materials and imported manufactured goods.

Through the safeguard clauses of Lomé I and II, the EEC has retained the power to act unilaterally to suspend the market access provisions extended to developing nations. The EEC's broad power to act in the face of a threatened disruption to its economy may unjustly interfere with the ability of ACP states to plan their economies and attract investment from non-EEC developed nations.

A preferable alternative would provide for multilateral negotiations fixing industry-specific export ceilings, below which ACP producers would be guaranteed access to EEC markets. Application of safeguard measures to ACP exports below the export ceiling would entitle the ACP producer to compensation. Under such an arrangement, the ACP states would be empowered to make more effective use of the market access provisions.