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# ANY PLACE FOR LOME TRADE PROVISIONS UNDER THE WTO? : TOWARDS LOME V

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## INTRODUCTION

The WTO and its forerunner GATT are products of immediate post World War II diplomacy brought about by the demand for the economic reconstruction of war torn Western Europe.[1] Protectionist attitudes of nations during the pre-war era and other economic misjudgements were partly blamed for the outbreak of the war.[2] The emergent system was therefore one dominated by liberal economic thought. The system essentially prohibits the use of restrictions on imports other than tariffs, and then provides for negotiation of reduced tariff levels. Central to this system is the principle of "non-discrimination" embodied in the twin tenets of the "most-favoured-nation"(MFN) and "national treatment" principles.[3]

The MFN principle calls for each Contracting Party to grant to every other Contracting Party the most favourable treatment that it grants to any other country in respect of imports of products. It therefore essentially requires that a country treat all other Contracting Party's products equally. National treatment obliges a country to treat foreign goods equally to local goods once they have gone through customs and entered into the local commerce.[4]

It is patent that because of their emphasis on equality the basic precepts of GATT did not take into account the structural differences and fundamental disparity and disequlibrium that exists between the developed and the developing countries. Efforts by developing

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[1] Bangwati, J. *The World Trading System at Risk*. Princeton University Press, Princeton, 1991. p. 34. It is notable that although vanquished Germany was quickly admitted to GATT, Japan was kept out for about 10 years.

[2] Jackson, J. H. *The World Trading System: Law and Policy of International Economic Relations*. MIT press, Cambridge, 1989. p.31

[3] ibid. p.31

[4] ibid. see also Chapter 2 of this paper

countries for post war world trade policy rules to take account of such disparities initially were not successful.[5]

Developing countries, supported by the United Kingdom and France, demanded and managed to have included in the Havana Charter specific provisions on economic development allowing for the granting of trade preferences.[6] Article 15 of the Havana Charter on the Preferential Agreements for Economic Development and Reconstruction recognised that special circumstances, including the need for economic development, could justify granting of preferential agreements. All that was required was for the agreement to be shown to the International Trade Organisation and, if two-thirds of the members approved, it would be allowed as an exception to the general most favoured nation provisions.[7]

Due to the still birth of the Havana Charter these provisions did not see the light of day. The stop-gap GATT contained much tamer concessions for the developing countries. GATT allowed for the continuation of some existing colonial preference schemes particularly relating to English and French colonial possessions.[8] A few exceptions to the non-discrimination and reciprocity principles that could benefit developing countries were also permitted.[9] It is notable that despite the lack of consideration for developing countries in general, right from the outset, GATT looked upon English and French colonies with some favour. This is of great significance considering the future development of the Lomé Convention.

Developing countries, particularly those that did not benefit from the preferences as defined in GATT, frustrated by the injustice created by treating unequal nations equally,

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[5] McMahon, J. A. *Agricultural Trade, Protectionism and The Problems of Development: a Legal Perspective*. Leicester University Press, London. 1992. p.108 see also further discussion in Chapter 1 of this paper.
[6] McMahon op.cit. p.107
[7] *Havana Charter for an International Trade Organisation*, Cmd 3775, HMSO, London (1947)
[8] Article 1:2 of GATT; as independence had not yet been achieved by most of the colonies this allowance was negotiated with English and French interests in mind.
[9] McMahon op.cit. p.128

continued to press for the international trade system to recognise and reflect differences in levels of economic development more fully. This led in the early 1960's to the principle of non-reciprocity being incorporated into GATT (in Part IV). Further pressure from developing countries eventually culminated in a waiver being negotiated into GATT to allow for a Generalised System of Preferences (GSP).[10] This essentially allowed developed countries to grant preferential treatment to goods originating in the developing countries. The GSP was designed to reduce regional preference systems, the growth of which had previously threatened to divide the world market into a small number of restricted markets, each comprised of a single developed country and several less developed satellites.[11] Having been introduced as a mere waiver the GSP initially appeared to rank lower in the GATT system. Developing countries therefore pressed for the GSP to be made more permanent in the GATT system.[12] This desire was eventually realised during the Tokyo Round of multilateral trade negotiations. The Tokyo Declaration of 1973 recognised the principles of differential and more favourable treatment, in favour of developing countries, and provisions to this effect were incorporated in several of the instruments emanating from the Tokyo Round, including the "Enabling Clause" which legitimised such deviations from MFN treatment in the GATT. During the Uruguay Round, the Punta del Este Declaration reaffirmed this principle of more favourable treatment for developing countries.[13]

Parallel to these developments in the GATT system, former English and French colonies in Africa, Caribbean and Pacific regions were negotiating special preferences with their former colonial masters. The structure of the imperialist economic systems had deliberately left the colonies inseparably tied to their metropolises by a system of preferential trade, budgetary and commercial subsidies.[14] This forced the colonies, upon attaining independence, to seek continued concessions from their former colonial masters.

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[10] Gibbs, M.. The Future Representation of the South in The International System. in World Trade After the Uruguay Round p.174.
[11] De Bouter (1977)11 J Int'l L&Econ 353
[12] McMahon op.cit. p. 128
[13] Gibbs op. cit.
[14] Rodeny, W. *How Europe Underdeveloped Africa*. Nairobi: Heinemann, 1989. Chapter 4

The governments of the metropolises where not averse to the gains they had made from the colonial set-up and pressed for the preference structure to be continued. The first steps in this direction came when France, as a condition for its joining the European Union in 1957, sought to integrate her colonies into the arrangement in order to secure alternative markets for her products. Members of the proposed community who did not have their own colonies opposed this. The eventual compromise to full inclusion in the Community was so-called "Associated Status" pursuant to part IV of the Treaty of Rome.[15]

As various African, Caribbean and Pacific nations gained independence and as the membership of the European community increased, this initial arrangement was altered variously during the 1960's.[16] In 1975, the European Economic Community and 46 African, Caribbean and Pacific (ACP) countries, signed a five-year comprehensive agreement on trade, industrial and financial co-operation known as The First Lomé Convention. Preferences were at the core of the trade provisions of the Convention. The trade Co-operation title of the First Lomé Convention declared its object to be:

> 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 ACP States, in order to accelerate the rate of growth of their trade and to improve the conditions of access of their products to the market of the European Economic Community, (hereinafter called the 'Community') so as to ensure a better balance in the trade of the Contracting Parties.[17]

The Convention was received with great enthusiasm by both the European nations and the ACP states. Objections to co-operation between Europe and the former colonies as a hindrance to industrialisation in the colonies by individuals like Kwame Nkrumah,[18] were

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[15] Matthews, Douglas E. Lomé IV and ACP/EEC Relations: Surviving the Lost Decade (1991) 22 Cal. W. Int'l L.J.1 at p.24

[16] See Chapter 3 of this Essay

[17] First Lomé Convention

[18] Nkrumah, K. *Neo-colonialism: The Last Stage of Imperialism*. London: Panaf Books Ltd,1965. p.19 Nkrumah appeared to view the Treaty of Rome as being to neo-colonialism what the Berlin Treaty of 1885 was to colonialism. Some authors go even further and have labelled the Lomé Convention, rather harshly as " a Grandchild of The Berlin Conference" see Tibazarwa, C.M. *From Berlin to Brussels: 100 Years of Afro-European Co-operation*. Durham: Pentlad Press Ltd, 1994. Chapter III.

forgotten. Reflecting the mood of the moment the then Chairman of the ACP and Senegalese Minister of Trade, Mr Babacar BA, stated:

> We have just set up a new type of relationship between underdeveloped and developed countries. I regard this as very important. In my view the co-operation we are about to establish with Europe has a certain revolutionary character,...the Lomé Convention is a great achievement and an absolutely new and unique fact in the relations of the Third World with industrial countries.[19]

Yet the agreement appeared to go almost unnoticed by the rest of the world in general and the GATT in particular. This was perhaps because of the sympathy, alluded to earlier, that the GATT viewed the English and French colonies with or perhaps the fact that the trade involving the ACP states formed an insignificant part of the total world trade. In a report on the Lomé Convention prepared by the Overseas Development Institute it is observed that:

> There has[d] been a tacit acceptance that the trading position of the ACP states has been broadly non-threatening and that certain EU member states should continue to be allowed to discharge their post-colonial obligations ...[20]

It is only towards the end of the Uruguay Round that the issue of the Lomé Convention was raised substantively.[21] The Uruguay Round and the resultant WTO was a watershed moment for world economic relations. It heralded a new era in the push for a liberal world trade order. A leading scholar in the field of international economic law, Prof. John H. Jackson, described it as "the most important event in recent world economic history."[22] For developing countries in general and the ACP in particular, the WTO is of particular significance. Prof. Jackson notes an important feature of the WTO is the:

> integration of developing countries and economies in transition: Developing countries are more fully integrated into the GATT/WTO system than before, with a requirement that all countries have tariff and service schedules, and with

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[19] The Courier No 3

[20] Davenport, M.; Hewitt, A.; Koning A. *Europe's Preferred Partners? The Lomé Countries in World Trade*. London: Overseas Development Institute,1995. p.65

[21] ibid.

[22] Jackson, J. H. *The World Trade Organisation:Constitution and Jurisprudence*. London: The Royal Institute of International Affairs, 1998. p.1

> constraints on certain less developed country (LDC) exceptions. This measure could be one of the most important features of the Uruguay Round result...[23]

Trade preferences, the core of the Lomé Convention trade provisions, therefore received special attention in the WTO that has inevitably led to discord between the two international trade documents. No longer could sentimental sympathy for the former English and French colonies be the source of protection. The place of the Lomé Convention within the World Trading system would have to be defended legally and not rhetorically.

It is proposed in this essay to examine the Lomé Convention trade preference provisions in light of the changes that have been brought about by the new World Trade Organisation with a view to establishing the compatibility of the Lomé regime within the changed context of world trade. It is hoped that we shall be able to determine exactly where there is disharmony between the documents and what the consequences of these have been. As Lomé IV is due to come to and end on the 29th February 2000,[24] we shall seek to examine the proposals that have been advanced for future ACP-EU relations to determine their compatibility with the GATT system.

Chapter 1 of this essay will examine the history of WTO as it relates to developing countries. The Chapter will look in particular at the way that trade preferences for the developing countries have developed and have been viewed at different times in world trade and GATT history.

Chapter 2 will examine the basic principles of WTO with a view to providing a background upon which to examine the Lomé provisions. In particular the MFN provision, non-discrimination, GSP and the treatment of free trade areas will be looked at.

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[23] ibid. p.4
[24] The Fourth Lomé Convention

In Chapter 3 it is proposed to examine the trade provisions of Lomé against the background of WTO. It is proposed to begin with a brief look at the historical origins of Lomé, then to examine the various Lomé Conventions, their structure and provisions with particular emphasis being placed on the trade provisions. In Chapter 3 the issue of the compatibility of the Lomé trade preferences with WTO provisions will also be examined to see if there is any place within WTO for them.

Chapter 4 will examine the options open for future ACP-EU relations in the new world trade order. In particular it will look briefly at the Green Paper published by the EC on the proposals for Lomé V[25] and examine the options that it envisages in light of WTO compatibility.

The two documents that are to be examined are very complex in their provisions. The results of the Uruguay Round are embodied in a document of some 26,000 pages. Most of these are detailed schedules but even so the basic agreement approaches 1000 pages. It is hardly surprising therefore that "the WTO Agreement, including its elaborate Annexes, is probably understood fully by no nation that has accepted it, including some of the richest and most powerful trading nations that are members."[26] The Lomé Convention has also, in its over twenty years of existence, not been fully understood by the member countries.[27] It is perhaps hubris to attempt to analyse two such complex legal instruments in a short paper like this one. The utility of the paper it is hoped will lie in its providing a

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[25] Green Paper on relations between the European Union and the ACP countries on the eve of the 21st century

[26] Jackson op.cit. p. 1.

[27] Hewitt, A. and Koning, A. " The Survival Of Special Preferences Under The Lomé Convention: The ACP countries and the European Union After the Uruguay Round" World *Trade After The Uruguay Round: Prospects and Policy Options for the Twenty-first Century*. Sander, H. and A. Inotai (ed.). London : Routledge, 1996. P.93.

sketch outline of the legal issues involved as we seek to determine whether there is any place for Lomé trade preferences under the WTO. It should be borne in mind that the current Lomé Convention expires in the year 2000.

## I. DEVELOPING COUNTRIES AND THE WORLD TRADE ORGANISATION: A HISTORICAL PERSPECTIVE

In order to undertake a meaningful examination of the current and future place of the Lomé Convention within the World Trade Organisation, the analysis must be informed by the nature of past relations between developed and developing countries. In this part of the paper it is sought to examine the history of the World Trade Organisation as it relates to developing countries in general and ACP states in particular in order to provide a background for the rest of the study.

Trade between nations has existed for as long as nations have existed as separate entities. Records of international trade in antiquity abound.[28] Contemporary international trade structures are of much more humble ancestry beginning only after the end of the Second World War. In order to understand the post-World War II events it is necessary to look a little further back.

Portuguese exploration of the African coast in the 15th Century and later Spanish exploration of the new world opened up new trading markets for Europe. For several centuries after this, trade between Europe, Africa and the Americas comprised mostly of traffic in African slaves from Africa to Europe and her American colonies. The American colonies became large producers of agricultural produce. The profits from the slave trade and the slave labour helped to fuel the great economic and industrial growth in Europe. Africa stagnated and became a consumer of the excess industrial products from Europe.[29]

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[28] See e.g. Cary, M. and T.M. Haarhoff. *Life and Thought in the Greek and Roman World.* London: Methem & Co., 1940.

[29] Rodney, W. *How Europe Underdeveloped Africa.* Nairobi: Heinemann, 1972.

At the Berlin Conference of 1884-1885, the Afro-European relationship assumed legalistic features, the European Countries, having come to the realisation that there was something inherently wrong with the trans-Atlantic trade in humans, formally abolished slavery. Europe also set out ground rules for establishing European protectorates in Africa.[30] There was then a scramble and partition of Africa. France, which ended up with the largest part of Africa, Germany, Belgium, Italy, Portugal, Spain and the United Kingdom then set up colonies to produce raw materials and to act as consumers of European industrial goods. Henceforth Africa served as a source of raw materials and agricultural produce for Europe and as a market for home country manufacturers. Little effort was made to introduce industry to the colonies.[31]

Prior to the Scramble and partition of the African continent, world trade was relatively free of national trade barriers. Apart from the United States which in the second half of the 19th century had been very protectionist, little protectionism existed in Europe. England for example was completely liberal until the end of the 19th century operating a tariff system that contained only 15 items. Duties were imposed purely for revenue purposes while statistical and inspection formalities were kept to a minimum.[32] European rivalry in Africa and other parts of the world was soon bound to increase inter-European antagonism and to make each country look upon her colonial territory as deserving preferential treatment in trade matters. The early years of the twentieth century therefore saw the beginnings of imperial preference systems.[33] Typically colonies furnished food, minerals and other materials for the metropolitan area, which, when secured under preferential arrangements gave the home industry an opportunity to furnish manufactured goods in easy competition with other nations. Part of these manufactured goods would be

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[30] The U.S. and 13 European Countries took part in the Conference held from 15/11/1884-26/2/1885. Chapter 1 of the Final Act ot the Conference covered freedom of trade in Africa while chapter 2 was on the abolition of slavery see Tibazarwa op. cit p. 30

[31] Smith, K. A.. *Creating the World Economy: Merchant Capital, Colonialism, and World Trade.* Boulder: Westriew Press, 1991. Chapter 8.

[32] Curzon, G. *Multilateral Commercial Diplomacy: The General Agreement on Tariffs and Trade and Its Impact on National Commercial Policies and Techniques.* London: Michel Joseph Books,1965. p.19

[33] ibid.

sold in the colonies under preferential duties, thus avoiding unpleasant competition. Whenever a serious competitor entered the scene new duties would be levied to secure the colonial powers controlling position.[34]

Therefore on the eve of the First World War all the European nations had moved or were moving towards protectionist policies. The United States, though it had recently introduced some liberal trade measures, still remained largely protectionist.[35]

The First World War played havoc on the existing world trade system. The war economy led to greater state activity in international commerce. Allied countries also formed joint purchase programmes during the war. After the war, the Treaty of Versailles completely altered the political and trade geography of Europe. Newly formed states sought to protect their independence by using trade barriers. The former belligerent states also set up trade barriers to protect industries that they had found essential during the war. The United States, which had emerged from the war as the strongest economy, in particular set up tariffs to protect agricultural production. The net result was that the world emerged from the First World War with considerably higher trade barriers than it had had entering it.[36]

During the period after the First World War, non-tariff barriers were gradually reduced through a series of conferences including the League of Nations Prohibitions Conference of 1927-1929. There was however a considerable increase in tariff levels. Imperial Preference systems established before the First World War were in particular added to and consolidated. The British for example concluded an important agreement with Commonwealth countries at a meeting held in Ottawa, Canada in 1932. Several attempts were made to reverse this. The World Economic Conference held in 1927 sought to *inter*

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[34] Wiesholoff, H.A. *Colonial Policies in Africa*. Philadelphia: University of Pennsylvania Press, 1944. p.16
[35] ibid. p.20
[36] ibid. p.21

*alia* "put a stop to the growth of customs tariffs..."[37] while the 1923 International Conference on Customs Formalities, sponsored by the League of Nations, completed an International Convention Relating to the Simplification of Customs Formalities.[38] These efforts were not very successful as despite them protectionism increased, foreign products were deliberately restricted in one country after another and retaliatory measures were imposed by one country after another to such an extent that on the eve of the depression world trade had considerably been choked off. During the early years of the depression the United States passed the infamous Hawley-Smoot Act of 1930 increasing the protection afforded to the domestic market on a large number of goods. The British soon followed by introducing an Import Duties Act in 1932 causing the depression to deepen.[39]

Developing countries played an insignificant role in the international trade developments in the inter-war period. What later became known as the ACP states were still firmly under colonial rule. The murmurs of Developing countries that were independent could hardly be expected to be heard amidst the rumble of great power politics that characterised the inter-war period.

After the depression, despite improved economic performance in many countries there was no corresponding increase in world trade mainly due to the international political situation which meant that many countries were putting their economies on a war footing. The lessons of the depression were not lost to all. The United States took the first steps to try and liberalise trade with it Reciprocal Trade Arrangements Programme that began in 1934.[40] Political relations at the time however meant that, despite the power of the American economy, the general tendency towards the extension and consolidation of restrictions was to continue up to and beyond the outbreak of the Second World War.

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[37] ibid
[38] Jackson op.cit. p.31
[39] Tussie, D. *The Less Developed Countries and The World Trading System: A Challenge to the GATT.* New York, St Martin's Press,1987. p.10
[40] Jackson op.cit. p.69

Towards the end of the Second Word War, initiatives were made by the United States in co-operation with its allies, particularly the united Kingdom, for the establishment of a World Trading Body after the war. Two strands of thought led to these major initiatives. Firstly, political and business elites in the United States supported moves to free trade as a means of guaranteeing export markets for American goods. Secondly, it was widely believed in the United States and Britain that the protectionism that had characterised the period leading up to the war had been a great contributory factor to the war. The prevailing consensus was that free trade based on David Ricaldo's neo-classical economic theory of comparative advantage would lead to economic prosperity for all and form the basis for a more stable world order. [41]

In late 1945, the United States published proposals for the creation of an international trade organisation. The United Nations, which had been formed earlier in the same year, took up the proposals within its subordinate body the Economic and Social Council (ECOSOC). At its first meeting ECOSOC adopted a resolution calling for a conference to draft a charter for an International Trade Organisation. This led to the convening of the United Nations Conference on Trade and Employment in Havana, Cuba from 21st November 1947 to 24th March 1948 attended by fifty-three states. The Conference produced the Havana Charter for an International Trade Organisation (ITO).[42]

Although the United States was the principal sponsor of the ITO Charter, the Charter failed to receive U.S. domestic Congressional approval. Without the support of the largest world economy the ITO could not proceed. The result was that the ITO was "still-born" and was never to see the light of day. In anticipation of the success of the Havana Conference and, to hasten the moves towards the liberalisation of world trade, twenty-three nations met in Geneva in March 1947 to negotiate tariff concessions. In January 1948 these multi-lateral tariff cuts based on the most favoured nation (MFN) principle

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[41] ibid p.31

[42] ibid. p.32-33

Williams, M. *International Economic Organisations and The Third World.* Hertfordshine:Harvester,1994. p.143

were implemented. The failure of the ITO pushed this earlier agreement, "The General Agreement on Tariffs and Trade" that had been signed on 30th October 1947, to the centre of world commerce.[43] The thrust of The General Agreement was to channel all protection against imports into the tariff, to bind the tariffs to agreed maximums and then to provide for agreements for tariff reductions with the eventual aim of full elimination.[44] By the fortuity of history, this relatively feeble institution that had always been intended to be provisional managed to play a central role in world trade for almost five decades.

What is immediately noticeable from the point of view of the developing countries is that the ITO was concluded by fifty-three nations while only 23 mostly developed countries were involved in the initial General Agreement on Tariffs and Trade. This difference in make up of the negotiating parties reflected on the agreement's contents so that:

> Whereas the Havana Charter had included eight articles on development and provisions dealing with commodity trade, GATT omitted special provisions for trade in raw materials and only one article (Article XVIII) was devoted specifically to the problem of economic development[45]

Developing countries, supported by the United Kingdom and France, had demanded and managed to have included in the Havana Charter specific provisions on economic development allowing for granting of trade preferences.[46] Article 15 of the Havana Charter on Preferential Agreements for Economic Development and Reconstruction recognised that special circumstances, including the need for economic development, could justify granting of new preferential agreements. The stop-gap GATT had far tamer provisions though it allowed for the continuation of existing colonial preference schemes particularly relating to English and French colonial possessions.

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[43] Williams ibid. p.144
Jackson op.cit. Chapter 2
[44] Jackson ibid. p.23
[45] Williams op.cit. p.157
[46] McMahon op. cit. p. 107

It would be necessary for developing countries to force amendments into the GATT system in order that their peculiar trade needs could be accommodated. This process took some time due to apathy to GATT amongst developing nations. Some Latin American nations, like Mexico, were sufficiently dismayed by the GATT set up that they opted to stay out off GATT for years and even decades and very only admitted very recently.[47] Of the twenty-three GATT founding members, nine were developing countries but in the early years they remained indifferent to the work of GATT. Developing county participation in the Geneva (1947), Annecy (1949), Torquay (1950-51), Geneva (1956) and Dillon Round (1960-61) of GATT multilateral trade negotiations was minimal. For example, only Chile, Haiti, India, Israel, Nigeria, Pakistan and Peru of the twenty developing GATT Contracting Parties at the time participated in the Dillon Round.

The situation began to improve in the late 1950's when a panel was appointed by GATT to investigate *inter alia* the failure of developing countries to develop as rapidly as the industrialised countries. The report, known as the Harberler Report, acknowledged for the first time the difficulties that faced the developing countries within the GATT regime and helped to spur interest in GATT by the developing nations.[48] Matters were made better by the growing list of newly independent nations that were eager to exercise their new found sovereignty by participating in international organisations.

In 1964, the first United Nations Conference on Trade and Development (UNCTAD I) was convened. The conference adopted a report focusing attention on the need for special rules for the trade of developing countries.[49] UNCTAD had an immediate effect on GATT. In 1965, GATT was amended to add Part IV-Trade and Development which brought the issue of development more fully into focus. Part IV was however not completely unprecedented. GATT had previously allowed waivers to provide for the continuation of and addition to colonial preference systems such waivers being granted to the United States in respect of some Pacific Islands, Italy-Libya, Australia-Papua New

[47] Tussie op. cit p.4
[48] McMahon op.cit p.19
[49] Jackson op.cit p.278

Guinea, and the United Kingdom and members of its Commonwealth.[50] When adopted, Part IV was heralded as a breakthrough in North -South relations but the importance of Part IV to the world trading system "lay more in its symbolic value than any substantive changes it brought to the trade relations between the developed and developing countries. It gave legal sanction to the special and differential treatment and provided developing countries with a concrete reference point."[51] In retrospect it has become clear that the industrial countries accepted Part IV partly for strategic reasons, in particular, to limit Soviet influence, and partly because of the marginal significance of developing country markets the demands of the developing countries could "in consequence, be accommodated, fraying the liberal trading regime only at the margin while securing a large and growing membership for institutions that embodied the principles of the liberal order".[52] As the developing countries' trade has grown in importance, the hostility of the industrial countries to the idea of special and deferential treatment has also grown.[53]

The addition of Part IV to the GATT has nevertheless occasioned a number of developments within the world trading system. The most tangible result of the special and deferential treatment introduced by part IV was the Generalised System of Preferences (GSP).[54] This essentially allowed the provision of unilateral trade concessions to exports from developing countries. Initially GSP was introduced as a mere waiver to the GATT provisions rather than as part of the GATT rules themselves. It was therefore perceived to rank lower within the GATT framework. Developing countries used the Tokyo Round of multi-lateral trade negotiations as a vehicle through which to press for the GSP to be given a more permanent place in the GATT system. This was eventually realised when the Tokyo Round extended the GSP. The Tokyo Round framework agreement entitled "Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries", also known as the "Enabling Clause" provided a legal basis for the

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[50] Patterson, G. *Discrimination in International Trade: The Policy Issues 1945-1965.* Princeton: Princeton University Press,1966. p.324-332.
[51] Williams op.cit. p.158
[52] Bhagwati, J. *Protectionism.* Cambridge: MIT Press, 1988. p.12
[53] Watkins, K. *Fixing the Rules North South Issues in International Trade and the GATT Uruguay Round.* London: Catholic institute for International Relations,1992. p.33

GSP, preferential arrangements amongst developing countries and more favourable treatment for developing countries.

The development of the GSP system however exposed serious divisions between the developing countries already in receipt of selective preferences like the Lomé Convention nations and those outside the scheme.[55] These divisions would during the Uruguay Round of trade negotiations result in ominous conclusions for the preferential trade schemes like the Lomé Convention.

On 20th September 1986, at the Uruguayan sea-side resort of Punte del Este what was to become the most complex, ambitious and most far-reaching multilateral trade negotiating round in the history of GATT was launched. These negotiations lasted for over seven years and were finally concluded on the 15th December, 1993. Final backing to the results was given with the signing of the "Final Act" at a meeting in Marrakesh, Morocco, in April 1994. The Marrakesh Declaration of 15th April, 1994, was the final chapter in the eventful history of GATT and paved the way for the launch of a new international trade organisation. The Uruguay Round negotiations eventually culminated on 1st January 1995 with the launch of a new international economic organisation- The World Trade Organisation (WTO). This was a watershed moment for world trade relationships and it had particular significance for developing countries.

There was much greater participation by developing countries in the Uruguay Round than in any of the previous rounds of mutilateral trade negotiations. Of the 117 states involved in the Uruguay Round negotiations, about three-quarters were developing countries. A key feature of the Uruguay round was that it covered a much wider area than the previous multilateral trade negotiation rounds. Three factors have been cited as being the cause of the replacement of scepticism with a more positive attitude by developing countries. Firstly, the heterogeneous Third World became greatly differentiated in the 1980's with

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[54] ibid. p.34

[55] Williams, M. *Third World Co-operation: The Group of 77 in UNCTAD*. London: Printer, 1991. Chapter 6

the emergence of the Asian tiger economies. This resulted in different developing nations pursuing different agenda and the resultant relaxation in group discipline. Secondly, greater world trade particularly growth in non-agricultural exports of Latin American and Asian countries led to greater interest in the WTO by these nations. Finally, the fact that there was an attack on agricultural protectionism encouraged many developing countries to participate.[56] Although not all the areas covered were of equal importance to developing countries as a group, the extension of GATT to cover agricultural production, trade in services, and the creation of the WTO to oversee world trade were important to all developing countries. Developing countries were therefore willing to invest more in GATT negotiations than they had previously done.[57] The greater participation of developing countries in the Uruguay Round did not guarantee that the results would be favourable to all of the countries.

In the early 1980's exports from the more advanced of the developing countries began to make themselves felt in the industrial countries' economies. It soon became clear to these developing countries that rather than receiving more favourable treatment; they encountered increasing discrimination in their trade. These took the form of voluntary export restraints, extension of free-trade agreements and customs unions amongst the developed countries; higher MFN tariffs on products of interest to the developing countries than those of interest to the developed nations; and greater restraints on textiles and clothing exports. In addition, developed nations were beginning to use the GSP, which the developing countries had campaigned so hard for, as a weapon against the developing countries. GSP began to be applied in a conditional and discriminatory manner by the developed nations in order to apply pressure on the developing countries in an effort to change their domestic policies frequently on matters other than trade.[58]

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[56] Williams, M. *International Economic Organisations and the Third World.* Hertfordshire: Harvester, 1994. P. 170-171.

[57] Steven, C. "The Consequences of the Uruguay Round for Developing Countries," *World Trade after the Uruguay Round: Prospects and Policy Options for the Twenty-first Century*, ed. Harald Sander and Andras Inotai. London: Routlege, 1996. p.72-73

[58] Gibbs, M. "The Future of Representation of the South in the International System," in ibid. p. 175

Part of the response of the developing countries that were affected by this type of treatment from the developed nations was that, while seeking the preservation of the preferential commitments that they had acquired earlier, they began to concentrate on defending the integrity of the unconditional MFN clause and obtaining MFN tariff reductions.[59] In consequence agreements like The Lomé Convention that were in essence a departure from the MFN principle and which relied on differential tariffs for products entering the European Union would necessity fall into legal conflict with the WTO rules.

In the next part of this paper the outcome of the Uruguay Round will be examined briefly to determine the manner in which it has had an effect on the developing countries. In particular the issue of how trade preferences is viewed by the WTO rules will be examined.

[59] ibid.

## II. WORLD TRADE ORGANISATION: SOME ASPECTS THAT AFFECT LOME

One of the unfortunate consequences of the eventful antecedents of the World Trade Organisation, detailed in a previous part of this paper, is that invariably the World Trade Organisation Agreement is, as Jackson points out, "not particularly polished or coherent, to say nothing of the problem of numerous ambiguities which are probably inevitable for a negotiation with so many participating countries."[60] This problem is compounded by the sheer volume of the text of the document which approaches 1000 pages excluding over 26,000 pages of detailed schedules. It is of course quite difficult to spell out in the space that this paper allows the essence of seven years of extremely tough negotiations which eventually led to such a complex document. However, amidst the complexity some core principles, many of which vary the framework for the old GATT, can be gleaned. As the WTO itself has put it:

> The WTO Agreement contains some 29 individual legal texts – covering everything from agriculture to textiles and clothing, and from services to government procurement, rules of origin and intellectual property. Added to these are the more than 25 additional ministerial declarations, decisions and understandings which spell out obligations and commitments for the WTO members. However, a number of simple and fundamental principles run throughout all these instruments which, together, make up the multi-lateral trading system.[61]

In this part of the paper it is proposed to undertake a nomadic survey of these main elements of the World Trade Organisation Agreement with emphasis on the areas that affect Lomé trade provisions. The survey will be nomadic in the sense that it will not be particularly structured and will move over each of the core principles of WTO that affect Lomé trade preferences in order to get a brief insight into them to form the glasses through which the provisions of Lomé itself will later be examined.

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[60] Jackson, J. 1998 op.cit. p.36

[61] World Trade Organisation. *Trading into the Future*. Geneva: WTO,1995. P.5

## 2.1 Legal and Institutional Structure of WTO.

### 2.1.1 Legal Structure of the WTO

The WTO Agreement was in a way grafted onto the defunct GATT and to a great extent retains at its core the basic legal framework that had served GATT for over 40 years. The basic legal structure of the WTO involves a series of interrelated agreements.[62] The main treaty of the WTO is the "Final Act" which is the short form for "Final act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations".[63] The first element of the Final Act is the "WTO Charter" more accurately described as the "Agreement Establishing the World Trade Organisation". The WTO Charter consists of 14 articles, which deal with institutional and procedural matters. Article I establishes the WTO while the other articles deal with the structure and day to day running of the organisation. These will be considered when dealing with the WTO's institutional structure below.

The "substance" of the Charter, as Jackson refers to states, is contained in the 4 annexes.[64] A reading of article 4 of the Final Act and article XIV of the WTO Charter indicates that in order to become a member of the WTO, a party must accept to be bound by the provisions of all of the annexes and cannot pick and choose as was the situation after the Tokyo Round of multilateral trade negotiations. The agreement is therefore to be taken as a whole.

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[62] Jackson, J. op.cit. p.38. Professor Jackson gives a very cogent explanation of the legal and institutional structure of the WTO in Chapter 3 of his book. The framework for analysis the WTO agreement used here borrows greatly from his summary of the WTO agreement.

[63] World Trade Organisation (WTO). *Final Act Embodying the Results of the Uruguay Round Multilateral Trade Negotiations* .Marrakesh, 1994; 33 ILM 1140

[64] Jackson, J. op.cit.

The first annex, Annex 1, contains a large series of texts termed "The Multilateral Agreement" which comprise the bulk of the Uruguay Round results. This annex is in turn divided into three parts: Annexes 1A, 1B and 1C.

Annex 1A is the largest of the annexes; it contains about 21 agreements that are collectively known as the "Multilateral Agreements on Trade in Goods". The agreements include GATT 1994 which is essentially the old GATT 1947 as modified by amendments, the Tokyo Round 'Codes' renegotiated in the Uruguay Round and some new Uruguay Round agreements. In addition to GATT 1994, the Multilateral Agreements on Trade in Goods that make up Annex 1 include *inter alia* the following agreements:

-Understanding on Balance-of-Payments Provisions
-Understanding in Respect of Waivers
-Marrakesh Protocol
-Agreement on Agriculture
-Agreement on the Application of Sanitary and Phytosanitary Measures
-Agreement on Technical Barriers to Trade
-Agreement on Trade-Related Investment Measures
-Agreement on Preshipment Inspection
-Agreement on Rules of Origin
-Agreement on Import Licensing Procedures
-Agreement on Subsidies and Countervailing Measures
-Agreement on Safeguards

These agreements of all the bulky WTO texts have the greatest effect on Lomé trade provisions since Lomé is concerned mainly with trade in goods. It is therefore necessary to take a closer look at the underlying principles that run through these agreements after the rest of the WTO Agreement has been looked at.

Annex 1B, the General Agreement on Trade in Services (GATS) was an addition made to the world trade system during the Uruguay Round. This agreement spread the control of world trade under the GATT regime to trade in services. The extension of the control of trade to services was greatly resisted by some developing countries particularly Brazil, Turkey and India but the pressure from the western countries ensured that it sailed through.[65] The GATS does not however create much conflict with Lomé as the initial Lomé framework was not concerned with trade in services. By the time that Lomé IV, which included trade in services, was being negotiated, the Uruguay Round was well underway and the Lomé negotiators took care to fall within what was being agreed in the Uruguay Round as regards trade in services.

Annex 1C, the Agreement on Trade-Related Intellectual Property measures (TRIPS) also does not cause much concern for Lomé. Intellectual properly matters are not of great concern in the trade of ACP states and therefore Lomé is not greatly affected by the TRIPS agreement.

Annex 2 of the WTO Charter contains the Understanding on the Rules and Procedures Governing the Settlement of Disputes better known as the Dispute Settlement Understanding (DSU). This understanding provides an integrated and unified dispute settlement mechanism that did not exist under the old GATT regime. Under the DSU members commit themselves not to take unilateral action against perceived violations of the trade rules but to seek recourse in the multilateral dispute settlement system and to abide by its rules and findings. The greatest effect on Lomé of this enhanced dispute settlement system is that disputes that arise out of world trade relationships including complaints that may be raised about Lomé are subject to much faster resolution. The key features of WTO dispute settlement will be considered below along with the institutional structure of the WTO.

[65] Stevens, C. "The Consequences of the Uruguay Round for Developing Countries" in Sander, H. and Inotai, A.(eds.) op.cit. p.77

Annex 3 of the WTO Charter contains the Trade Policy Review Mechanism (TRIM) through which the WTO reviews the overall trade policies of each of the member countries on a periodic and regular basis and reports on these policies.

The final annex, Annex 4, contains four agreements that are the 'plurilateral agreements'. These agreements, unlike the rest to the WTO agreements, are optional.[66] The agreements are the Agreement on trade in Civil Aircraft, Agreement on Government Procurement, International Dairy Agreement and the Agreement Regarding Bovine Meat. The last two of these agreements are being terminated.[67]

Apart from the text and the annexes, the Uruguay Round Final Act also contained 11 Ministerial Decisions and Declarations that form an integral part of the WTO. Of these, the ones that are most likely to impact on Lomé are the Decision on Measures in Favour of Least Developed Countries and the Decision on Measures Concerning the Least Developed Countries and Net Food Importing Countries.

### 2.1.2 Institutional Structure of the WTO

Although it has been seen above that there is a way in which the WTO was grafted onto GATT it is not a simple extension of GATT. WTO has a very different character and to a great extent completely replaces its predecessor. Perhaps the principle difference is in the respective institutional set-ups of GATT and the WTO. Whereas the WTO has a well defined institutional set-up its predecessor did not have the benefit of such a structure.

As discussed in the earlier part of this paper, the reason that the ITO never came into being in the 1940's was because of the United States Congress' failure to approve the ITO Agreement.[68] The scope of the GATT, that emerged as a replacement after the failure of ITO, was therefore limited by what the United States Congress had already or would be

[66] Jackson op.cit.
[67] ibid.
[68] Chapter 1 p.11 of this paper

willing to approve. The United States' constitutional and legislative provisions at the time of inception of GATT had been framed to allow the president to enter into an agreement to reduce tariffs and other restrictions on trade without referring the agreements to the Congress for approval. Any agreement that involved the establishment of an organisation would however require Congressional approval. To avoid the necessity of seeking Congressional approval, the GATT provisions were therefore carefully drafted to eliminate any suggestion of an organisation.[69] "The GATT was therefore a set of rules, a multilateral agreement, with no institutional foundation,[and with] only a small associated secretariat."[70] To emphasise this theory, all the multilateral decisions under GATT were taken by the "CONTRACTING PARTIES" acting jointly and not by an organisation. GATT was never an "organisation" and did not have any "members".[71]

In contrast, the WTO was specifically set up as an organisation and has a well-defined institutional structure. The WTO is established under Article I of the WTO Charter. Article II of the WTO Charter provides that "the WTO shall provide the common institutional framework for the conduct of trade relations among its Members..." Article VIII determines the status of the WTO and provides that the WTO has a legal personality and shall be accorded by each of its members such legal capacity as may be necessary to exercise its functions.

The highest authority of the WTO is the Ministerial Conference, which is composed of representatives of all WTO members. The Ministerial Conference meets at least once every two years and is empowered to take decisions on all matters under any of the multilateral trade agreements.[72] Decision-making, continuing a long GATT tradition, is mainly by consensus and not by voting. Where consensus is not possible, the WTO charter allows for voting on a majority one country one-vote basis. Voting is also specifically provided for when the matter before the Ministerial Conference is

[69] Jackson (1992) op.cit p.33
[70] World Trade Organisation (WTO). (1995) op.cit p.11
[71] Jackson (1995) p.47 Clearly this ended up becoming just legal semantics because for all for all intents and purposes GATT operated very much like an organisation.

interpretation or amendment of the provisions of the multilateral agreements, admission of new members and the waiver of obligations of any member.[73]

The general work of the WTO falls to a number of subsidiary bodies; principally the General Council, also composed of all WTO members, which convenes as often as necessary and which is required to report to the Ministerial Conference.[74] Apart from conducting its regular business on behalf of the Ministerial Conference, the General Council also convenes in two particular forums as the Dispute Settlement Body, to oversee the dispute settlement procedures and as the Trade Policy Review Body.[75] The responsibilities of the General Council are delegated to three other major bodies – namely the Councils for Trade in Goods, Trade in Services and Trade-Related Aspects of Intellectual Property Rights.[76] The Council for Trade in Goods oversees the functioning of the Multilateral Trade Agreements in Annex 1A of the WTO Charter, though many of the agreements have their own specific overseeing body.[77] The latter two councils have responsibility for their respective WTO agreements (Annexes 1B and 1C) and can in turn establish their own subsidiary bodies.[78]

The Ministerial Conference also establishes a number of Committees to assist it to fulfil its duties. Committees on Trade and Development, Balance-of-Payments Restrictions and on Budget, Finance and Administration are established to handle matters falling under their respective spheres.[79] Each of the four plurilateral agreements of the WTO- those on civil aircraft, government procurement, dairy products and bovine meat establish their own management bodies, which operate within the WTO framework and report to the General Council.[80]

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[72]Article IV(1) WTO Charter
[73] Article IX
[74] Article IV(2)
[75] Article IV(3), IV(4)
[76] Article IV(5)
[77] World Trade Organisation (WTO) 1995 op.cit.p.13
[78] Article IV(6)
[79] Article IV(7)

The day-to-day management of the WTO is by the Secretariat headed by the Director-General.[81] The WTO Secretariat, located in Geneva, has around 450 members of staff whose responsibilities include the servicing of WTO delegate bodies with respect to the negotiation and implementation of agreements. The Secretariat has a particular responsibility to provide technical support to developing countries, and especially the least developed countries.[82]

### 2.1.3 Dispute Settlement Under the WTO

One of the great differences between the GATT and the WTO lies in the area of dispute settlement procedures. Under the GATT, the dispute settlement procedure was not clearly defined and spread amongst the various agreements- each of the agreements having a different dispute settlement system.[83] One of the changes brought to the GATT system by the WTO that stands out above the rest is the strengthening of the dispute settlement mechanism that it has introduced.[84] The dispute settlement system is now more clearly defined, faster, more automatic and much less susceptible to blockages than the old GATT system.[85] Modern commercial diplomacy requires disputes be resolved quickly in order to provide security and predictability to the multilateral trading system. The WTO dispute settlement procedure is an important contribution to the stability of the global economy. Without enforcement, the rules-based system would not be workable. The dispute settlement system underscores the rule of law and makes the trading system more secure

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[80] Article IV(8)
[81] Article VI The current Director-General is Renato Ruggiero of Uruguay
[82] World Trade Organisation (WTO) 1995 op.cit. p.14
[83] Jackson (1989) op.cit. p.94-103
[84] Article 3(2) *Understanding on Rules and Procedures Governing the Settlement of Disputes.* (Dispute Settlement Understanding) Annex 2 to the Final Act.
[85] World Trade Organisation (WTO) 1995 op.cit p.11

and predictable.[86] The current WTO Director-General has therefore described the WTO dispute settlement procedure as the "heart of the WTO system".[87]

The Dispute Settlement Understanding sets out in much detail the timetable and procedures to be followed in resolving disputes. The focus is on finding mutually acceptable solutions to problems between members consistent with WTO provisions. The first stage in the dispute settlement process is therefore the bilateral consultations between the governments concerned. Complaints to the WTO can only be made by the governmental authorities of the participating nation. Private sector complaints have to be channelled though their respective governments. Once the complaint is made to the WTO, the country against which it is made is required to enter into bilateral consultations within 30 days.[88]

If the bilateral consultations fail to resolve the dispute, with the agreement of both parties, the case can be brought to the WTO Director-General, who, acting in an *ex officio* capacity will offer good offices, conciliation or mediation to settle the dispute.[89] If after 60 days there is no settlement, the complainant nation can ask the Dispute Settlement Body (DSB) to establish a Panel.[90] The Panel will be established unless the DSB decides by consensus against establishment of a Panel.[91] The Panel normally comprises three persons from countries that are not subject to the dispute.[92] The Panel will present a report within three months in cases of urgency but normally within six months.

The Panel reports are adopted by the DSB within 60 days of issuance, unless one party notifies its decision to appeal or a consensus emerges against the adoption of the report.[93]

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[86] World Trade Organisation (WTO) Dispute Settlement Bulletin
http://www.wto.org/wto/about/dispute0.htm
[87] Ruggiero,R. Special Report Concerning Preparation for the First Ministerial Conference-Singapore. 30th September 1996. WTO Focus Newsletter. August/ September 1996 p.7
[88] Article 4 Dispute Settlement Understanding
[89] Article 5 Dispute Settlement Understanding
[90] Article 5(4)
[91] Article 6(1)
[92] Article 8
[93] Article 16

Appeals go to the Appellate Body composed of seven permanent members, three of whom serve on any one case.[94] Appeals are limited to issues of law covered in the Panel report and legal interpretations developed by the Panel. The resultant report must be adopted by the DSB and unconditionally accepted by the parties within 30 days following its issue unless the DSB decides by consensus against its adoption.[95]

Prompt compliance with the recommendations or ruling of the DSB is emphasised in the Dispute Settlement Understanding. If after a reasonable period the party against whom the decision was made fails to comply, the disputants may agree on a mutually acceptable compensation- for instance, tariff reductions in areas of particular interest to the complainant. If no satisfactory compensation is agreed, the complainant may request authorisation from the DSB to suspend concessions or obligations against the other party. In principle, concessions should be suspended in the same sector as that at issue in the panel case. If this is not possible or is ineffective, the suspension may be permitted in a different sector.

Special procedures are laid out for cases involving developing nations.[96] The emphasis is on ensuring that they are not unduly prejudiced in the dispute settlement procedure.

Although the WTO is relatively young, the dispute settlement procedure is already being utilised to resolve many disputes. The 100th dispute was notified to the WTO in August 1998, just over two-and –a –half years since the establishment of the WTO.[97] Perhaps the most controversial of these disputes to date is one stemming from the Lomé Convention. The dispute involves a complaint brought by Ecuador, Guatemala, Honduras, Mexico and the United States against the European Community's Preferential regime for the importation, sale and distribution of bananas in favour of the African, Caribbean and

[94] Article 17
[95] Article 17(7)
[96] Article 24
[97] WTO Focus Newsletter August/ September 1998 p.1-5

Pacific members of the Lomé.[98] Although it has led to controversy the dispute provides an insight into workings of the WTO dispute settlement system. This dispute and its implications on the future of Lomé shall be examined towards the end of this paper.

## 2.2 A Survey of the Main WTO Principles that Affect Lomé

Lomé trade provisions are concerned mainly with trade in goods and are therefore most greatly affected by Annex 1A of the WTO charter the Multilateral Agreements on Trade in Goods. The key agreement out of these and the cornerstone of trade relations in the area of goods is the GATT, 1994.[99] GATT 1994 has its roots in GATT 1947 and essentially continues its underlining philosophy and reproduces its provisions as modified by the amendments during the various trade negotiation rounds that took place under the GATT. The economic thinking that gave rise to the GATT system after the war was one greatly influenced by neo-classical liberal economics and the notion of "liberal trade". Neo-classical economists postulated that if trade between nations was allowed, free of distortions caused by governmental interference, then, on the basis of David Ricardo's comparative advantage theory, the total world trade would increase and this would translate into improved welfare for all nations.[100] Although the theory has its critics it has provided a powerful intellectual underpinning for GATT.[101]

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[98] European Communities- Regime for the Importation, Sale and distribution of Bananas, complaints by Ecuador, Guatemala, Honduras, Mexico and the United States (WT/DS 27) see http://www.wto.org/wto/dispute/bulletin.htm

[99] World Trade Organisation (WTO). *Developing Countries and the Uruguay Round: An Overview.* Committee on Trade and Development 77th Session 21 and 25 November,1994. Note by Secretariat 19th November 1994. See http//www.wto.org/legal/ldc_512.htm#Trade in Goods

[100] Jackson (1989) op. cit. P.8
for Ricardo's theory see Ricardo, D. *On the Principles of Political Economy and Taxation*(1817). In Sraffa, P. (ed.), *The Works and Correspondence of David Ricardo.* Cambridge: Cambridge University Press, 1951. P. 133-5.

[101] Criticism is often levelled against the theory in that it confines developing countries to agricultural production where it is said that they have a comparative advantage and prevents the protection of infant industries. See List, F. *The National System of Political Economy.* 1841

The GATT system essentially prohibits the use of restrictions on imports other than tariffs,[102] it then provides for binding of tariff levels and negotiations for the reduction of the tariffs.[103] Increase in tariffs is permitted only under strict circumstances and provided that compensation is given in the form of bindings on other tariffs.[104] Reciprocity is required to ensure that when one country lowers its tariffs against another's exports, it will in return be granted concessions of equal importance.[105] Central to making this system fully universal are the principles of multilateralisim and non-discrimination embodied in the twin tenets of the most-favoured-nation (MFN) and national treatment. MFN requires that any concession granted to one member should be extended to all other members while national treatment forbids discrimination against foreign goods once the goods are in a country.

Exceptions to these obligations may only be invoked under certain conditions for balance-of-payment purposes,[106] for development,[107] as a safeguard against serious injury to the local economy,[108] for health or safety,[109] national security,[110] and for regional integration agreements.[111] Differential and more favourable treatment to developing countries and to least developed countries is permitted under the 1979 Enabling Clause with respect to tariffs in the context of the Generalised System of Preferences (GSP) and non-tariff measures, notwithstanding the MFN clause, and with respect to regional or global arrangements concluded by developing countries.

A slightly more detailed look at a number of the GATT principles, which are of particular interest as far as Lomé is concerned, may now be undertaken.

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[102] Article XI GATT 1994; restrictions other than tariffs could take the form of quotas, exchange controls, import licensing, embargoes, subsidies, administrative barriers and voluntary export restraints.
[103] Article II and Schedules
[104] Article XXVIII
[105] Reciprocity although not defined is a concept running through GATT documents; for example Art. XXVIII *bis* calls for tariff negotiations to be conducted "on a reciprocal and mutually advantageous basis"
[106] Article XII
[107] Article XVIII
[108] Article XIX
[109] Article XX
[110] Article XXI
[111] Article XXIV

### 2.2.1 Tariffication and Bindings under WTO

As indicated above, the main trust of GATT, 1994, carried over from GATT 1947, is to channel all the border restrictions on the importation of goods into tariffs and then through multi-lateral trade negotiations to progressively reduce the tariff levels. One of the true success stories of the world trading system based on the GATT model is the effect that it has had on tariff rates particularly on the rates of tariffs imposed by the developed nations. During the time that the GATT model has been in operation the rate of tariffs has greatly been reduced.[112]

How was this progress achieved? The drafters of the GATT essentially addressed five types of border barriers to imports: tariffs, quotas, subsidies, state trading and customs procedures. Tariffs were allowed to continue but it was provided for negotiations for their reduction. Quotas were completely prohibited. Customs procedures were to be guided by a norm of reasonableness with limits on delaying and costly measures. Subsidies and state trading were also restricted although not as firmly.[113] The procedure adopted with regard to tariffs was commitments to limit the level of tariffs. These commitments are called "bindings" or concessions. A binding is a maximum tariff: the party is obligated not to allow their tariff levels to exceed the GATT bindings. The country may however set a tariff at a level lower than the binding.[114] If no binding exists, a country may charge any tariff that it deems fit even a prohibitive tariff.

The bindings for each country are contained in that country's "schedule of tariff concessions," which is incorporated into the GATT by Article II. These schedules are voluminous: they consist of lists of product descriptions, followed by a tariff level- either specific or *ad valorem*. Negotiation of the tariff bindings can be a complicated and time-consuming matter. During the first five multilateral trade negotiation rounds tariff

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[112] Jackson (1989) op. cit. P. 117
[113] Jackson (1989) ibid. P. 115
[114] South Africa has done this with a number of products see Blumberg, L. "Get Gatt-wise" *Seifsa News* January/February, 1994.

bindings were negotiated on an item-by-item basis. A complicated process involving each country negotiating with each other country tariff rates on individual items.[115] During the Kennedy and Tokyo Rounds a linear approach was adopted whereby an across the board tariff reduction was agreed and then each country would list the items that it wished to have excluded from the blanket reduction and the negotiations would be in respect to these items only.[116] This is the procedure that has been carried over into GATT, 1994.

The success of WTO in the reduction tariff levels to an almost negligible level, particularly in the most important trading nations in the world, has, as will be seen, had great impact on Lomé which is based on preferential treatment.

### 2.2.2 National Treatment[117]

National treatment is a non-discrimination principle that requires that once imported goods have cleared customs and border procedures, they should be treated equally to domestically produced like goods. The aim of this rule is to prevent domestic taxes and regulations from being used as protectionist measures that would defeat the purpose of tariff bindings. The national treatment obligation applies to all products and not just to bound products.

[115] Jackson (1989) op. cit. P. 120
[116] ibid. p. 121
[117] ibid. Chapter 8

### 2.2.3 The MFN Principle [118]

Article I of GATT 1994[119] provides in part that

> With respect to customs duties...any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like products originating in or destined for territories of all other contracting parties.

This is the famous MFN clause that essentially outlaws discrimination among members. The name sounds like a contradiction. It suggests some kind of special treatment for one particular country, but in the WTO it actually means non-discrimination-treating everyone equally. WTO members are bound by Article I to grant to products of other members treatment no less favourable than that accorded to the products of any other country. No country is permitted by the MFN clause to give special trading advantages to another member country or to discriminate against any other member: all are on equal basis and all share the benefits of any moves towards lower trade barriers. Therefore if country A has granted MFN status to country B, and then grants low tariffs to imports from country C, A is required to grant the same low tariff treatment to products that come from B. B will thus remain most favoured.

The MFN principle can be traced back to the twelfth century.[120] However, MFN did not always equal treatment. When a number of early bilateral MFN treaties were signed, being included among a country's "most-favoured" trading partners was like being in an exclusive club because only a few countries enjoyed this privilege and were thus truly most favoured.[121] This is the origin of the contradictory name. Today, because the number of

[118] for a comprehensive discussion of this principle see Jackson (1989) op. cit. Chapter 6
[119] the principle also appears in GATS (Article II) in relation to services and in the TRIPs Agreement (Article 4) in regard to protection of intellectual property
[120] Jackson (1989) op. cit. p.133
[121] World Trade Organisation (WTO) see http://www.wto.org/about/facts2.htm#mfn

countries that are members of the WTO is very large, MFN treatment does truly translate into equal treatment.

### 2.2.4 Allowable Exceptions to WTO Obligations

#### 2.2.4.1 Regional Trade Arrangements

By far the most important exception to the MFN principle is the authorisation of regional trade arrangements permitted pursuant to Article XXIV of GATT 1994. This article provides for exceptions to the MFN principle for customs unions, free trade areas, and interim agreements leading to either.

Free trade areas are areas in which member countries remove tariffs between themselves but retain whatever tariffs each member chooses with non-member countries.[122] Provisions on rules of origin in such an arrangement have obviously to be strengthened in order to prevent imports from outside coming into the region via the area with the lowest tariffs. A customs union is like a free trade area, but, in addition, members must adopt a common external tariff with non-members. Another type of regional trading block not specifically mentioned in Article XXXIV is the common market. Here the countries operate as a single market. Like the customs union there are no tariffs between member and there are common external tariffs. In addition, there is a common system of taxation, free movement of labour, capital, materials, goods and services.[123]

GATT permits the exception to the MFN rule for customs unions and free trade areas subject to two important limitations.[124]Firstly, the MFN departures are allowed only if the free trade area or the customs union is defined so as to require liberalisation of substantially all the trade involved. This means that the customs union or free trade area cannot be restricted to say agricultural produce only. Secondly, GATT requires that the

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[122] Sloman, J. *Economics*. New York: Prentia Hall 1992. P.878
[123] ibid. p.879
[124] Jackson(1989) op.cit. p.141

common tariff in the customs union towards third-countries should not be higher than the aggregate before the customs union was formed.

The customs union and free trade area exception to the GATT/WTO most favoured nation obligation is widely used. Todate, 184 regional trade arrangements have been notified to the GATT/WTO, of these 109 are still in force. Almost all of the 134 WTO member states are involved in some kind of a trade group, albeit with a varying intensity.[125]

The most well known and powerful of all regional trade arrangements is the European Union. The European Union originated as the European Economic Community following the signing of the Treaty of Rome in 1957 by six European countries- Belgium, France, Italy, Luxembourg, Netherlands and West Germany. Since then there have been four sets of accessions increasing the membership of the union to fifteen. The United Kingdom, Denmark and Ireland joined in 1973; Greece in 1981; Spain and Portugal in 1985; while Austria, Finland and Sweden joined in 1995.[126]

The European Economic Community began with the desire by the European nations to restore peace, prosperity, self-sufficiency in food and influence that had been lost after the outbreak of the Second World War. The European Community actually began with three major treaties. The Treaty of Paris of 1951 set up the European Coal and Steel Community which created a single market in coal and steel and served as a model for the growth of the community. The European Atomic Energy Commission was established in Rome on the 25th of March 1957 on the same day that the Treaty of Rome establishing the European Community was signed. Since then there have been three major amending

[125] see http://www.wto.org/wto/develop/regional.htm the agreements are as diverse well known NAFTA to less well known MERCOSUR(the customs union between Argentina, Brazil, Paraguay and Uruguay)
[126] for legal history of the European Union see Steiner, J. and Woods, l. *Textbook on EC Law*. 5th ed. London: Blackstone Press Limited, 1997. P.3-10
Wyatt, D. and Dashwood, A. *Wyatt and Dashwood's European Community Law*. 3rd ed. London: Sweet and Maxwell, 1993. P.3-15

treaties: the Merger Treaty of 1965, the Single European Act of 1986 and the Treaty of the European Union (Maastricht Treaty) that established the union signed in 1992.

It is beyond the scope of this paper to examine the European Union in detail but it will suffice to note that the European nations were so successful in these goals that, today, apart from being peaceful, prosperous, self sufficient in food and very influential, the European Union trades externally more than any other part of the world.[127] This means that the European Union transactions will be within the realm of WTO rules and therefore scrutiny under WTO rules more than any other part of the world. Agreements that the European Union has with other nations such as Lomé will also come under greater scrutiny. It is notable, as will be seen in the next chapter of this paper, that the signing of the Treaty of Rome was complicated by France's insistence that a place for its colonies within the treaty set-up be provided. As a result of this the history of the European Union and ACP Lomé states has been inseparably intertwined.

### 2.2.4.2 Exceptions from WTO Obligations for Developing Countries.

Part IV of GATT

As previously noted, GATT as originally framed contained very few provisions that were in the aid of developing nations.[128] Only Article XVIII at the time recognised the need for the developing countries to be treated differently in the world trading system. The Article in greatly political rather than in proper legal terms recognised that the countries of the world were at different stages of development and it was necessary for this to be taken into account in negotiations. The Article allows developing countries to maintain more flexibility in their tariff structure and to apply quantitative restrictions for balance of payments purposes.[129]

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[127] http://www.europa.eu.int
[128] see p. 3 of this paper
[129] Article XVIII(2) (a) and (b)

When in the 1960's a new chapter Part IV on trade and development was added to GATT, the provisions in respect of developing nations were enhanced. Part IV stresses the need for increased access to the world markets for primary as well as manufactured products from the developing countries. Article XXXVI (8) of GATT in particular emphasises that developed nations are not to expect reciprocity, from developing nations, for commitments made by them in trade negotiations to reduce or remove tariffs and other barriers to trade of less-developed countries. Developing nations are not therefore expected in the course of trade negotiations, to make contributions which are inconsistent with their individual development, financial and trade needs. Part IV has been criticised though for lacking a clearly binding or obligatory character contained in other parts of GATT and instead merely stating general political objectives to improve the economic position of developing nations.[130]

The Enabling Clause

GATT 1994 permits differential and more favourable treatment to developing countries and to least developed countries under the 1979 "Enabling Clause" with respect to tariffs in the context of the Generalised System of Preferences (GSP) and non-tariff measures notwithstanding the MFN clause, and also with respect to regional and global arrangements concluded by developing countries.

The GSP scheme, allowed by the enabling clause, enables the developing countries to be given preferential treatment. The typical GSP scheme grants duty free entry for industrial products from the developing nation. The grant is then limited by various restrictions like quotas and voluntary export restraints, on particularly sensitive items, such as shoes, textiles and clothing. The developed nations are not legally obliged by GATT/WTO to grant the preferences but are merely enabled or allowed to grant the preferences. It is also

[130]Bhagwati,J. op.cit p.12

left to the developed nation granting the preferences to decide what a developing country is.

It should also be noted that the enabling clause permits countries to depart from the MFN obligation in Article 1(1) on the condition that all the developing countries are treated equally. Once a nation is considered to be developing it must benefit from the scheme. MFN therefore remains the core principle. This aspect of the Enabling Clause is of importance when considering Lomé which seeks to distinguish between and discriminate against certain developing nations in their exports to the European Union.

Waiver

Under Article XXV(5) of GATT it is provided that in exceptional circumstances, not elsewhere provided for, the GATT members may waive an obligation imposed by the agreement. In order for such a waiver to be granted the decision must be taken approved by a two-thirds majority of at least half of the WTO members. Under GATT 1994, the waiver mechanism the waivers are granted on a year-to-year basis. Renewal of the waiver is dependent upon progress being made by the country receiving the waiver towards elimination of the conditions which had made the waiver necessary in the first place. Any member who feels that its own benefits under GATT are being impaired by the waiver is allowed to invoke the Dispute Settlement Procedure.[131]

The waiver mechanism and other exceptions to GATT obligations provide a means through which developing nations in general and Lomé nations in particular can continue in arrangements which at face value appear to be inconsistent with the MFN principle. The current Lomé Convention was granted a special five-year derogation from GATT on 9th December 1994. This derogation is therefore due to expire on the 9th of December

[131] Understanding in Respect of Waivers of Obligations under the General Agreement on Tariffs and Trade 1994 clause 3

1999 while the convention itself is due to expire in February 2000. This means that any new arrangement would be under scrutiny and would probably have to seek a waiver also.

In the next part of this paper we shall examine the Lomé Convention as it relates to the WTO with a view to determining why it was necessary for Lomé to seek the waiver in the first place and what the chances of a new Lomé Convention are under the WTO.

## III THE LOME CONVENTION

In this part of the paper the trade provisions of the Lomé Convention will be examined in order to determine their compatibility with the WTO. To begin with there will be a short historical introduction to the Lomé Conventions. The paper shall then proceed to examine in detail the trade provisions of Lomé. Finally, the latter will be analysed in light of the requirements of the WTO.

### 3.1 From Association to Lomé

At the time when the Treaty of Rome was being negotiated, four of the future members of the European Economic Community- France, Belgium, the Netherlands, and Italy- still had dependent territories. Only the Federal Republic of Germany and Luxembourg did not have any colonies. Each of the countries with colonies had preferential trading regimes with those colonies.[132] In addition, France was giving preferential treatment to imports from a number of her dependent territories, as was Italy to imports from Libya. These preferential trading regimes were greatly beneficial to the European nations. For France, and to a lesser extent Belgium, the economies of the colonies were inseparably tied to the metropole by the system of trade preferences, budgetary and commercial subsidies, and expatriate personnel.[133] The needs of settler communities in the colonies also had a great influence on domestic policy.

Towards the end of the negotiations for the creation of the European Economic Community, France, no doubt seeking to protect the gains arising from her relationship with her colonies, made it a condition of her participation in the community that provision be made for the European colonies overseas. France initially proposed integration of the colonies into the community. West Germany and the Netherlands, fearful that the

[132] see Chapter 1 p.3-4 of this paper

[133] Zartman, W. *The Politics of Trade Negotiations between Africa and the European Economic Communtiy*. Princeton: Princeton University Press, 1971. P.6

Community was promoting collective colonialism with its moral and economic baggage, resisted. A compromise was reached when it became clear that absent concessions in this area, France would not sign into the Community.

The compromise to full inclusion in the community was the so-called "Associated Status" under Part IV of the Treaty of Rome set to last for an initial five years. Two distinct forms of association with the EEC were conceivable under the Treaty of Rome. The first was contained in Articles 131-136, Part IV, of the treaty which allowed for association with the EEC of overseas territories and dependencies of member states. In particular Article 131 accorded the "status of association" with the community to non-European entities which maintain special relationships with Belgium, France, Netherlands and Italy. The other form of association was in accordance with article 238 of the Treaty of Rome. This allowed the EEC to conclude arrangements with third countries, unions of states, and international organisations that would create an association embodying reciprocal rights and obligations.[134]

The dependencies were associated under the first type of agreement. They were associated with the EEC under article 131 of the Treaty which sought promotion of economic and social development of the countries concerned and established closer contacts between the dependencies and the EEC. Article 132 provided that customs duties between members of the EEC and the associated territories- as well as between associated members themselves – would be abolished following the same time-table as set up for the EEC states themselves. The hallmarks of the association were preferential access and reciprocity. There was a safeguard for the associated states which could levy customs duties necessary for their development and industrialisation. The Treaty also provided for development assistance funded from the customs duties.[135]

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[134] Cosgrove-Twitchett, C. *Europe and Africa: from association to partnership.* Surrey: Saxon House, 1978. P. 1-2

[135] ibid. p.12

GATT had occasion to examine Part IV of the Treaty of Rome when the treaty was submitted to it for scrutiny pursuant to the provisions of Article XXIV 7(a) that requires free trade area agreements to be submitted for examination. Some members of the working party appointed to examine the issue of association concluded that the association agreement did not constitute a free trade area as defined by Article XXIV of GATT but was rather an extension of existing preferential arrangements. The EEC defended the treaty vigorously. Eventually the working party had to report a deadlock over the issue.[136] There was in any event no will to challenge the agreement from within GATT.

An outstanding feature of the Association agreement in view of events that were to follow was that:

> Part IV of the Treaty of Rome and the Implementing Convention were the result of negotiations between the six member States of the Community, not between the six and the associated countries and territories. They were accepted on behalf of those countries and territories, which were then dependent, by the Governments of the respective metropolitan Powers with whom sovereignty lay. The acceptability of their provisions was, however, soon to be put to the test, since by 1962 all the associated countries and territories in Africa, with the exception of French Somali Coast, had become independent.[137]

The wind of change, which brought independence to the colonies, coincided with the end of the first five years of the Treaty. When the Treaty came up for review in 1962 the climate under which it had initially been negotiated had changed. There were many new African states eager to assert their new found independence. The United Kingdom was also seeking entry into the EEC which, if successful, would affect the members of its Commonwealth. The result was a great debate on the merits of association. Many African leaders particularly from the former English colonies criticised the association as a mere means of perpetuating European economic domination of Africa. Kwame Nkrumah was particularly vocal in this respect.[138] Countries that were part of the Association were far less critical. The first two states amongst the associated states to achieve independence-

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[136] Barnes, W.G. *Europe and the Developing World: Association under Part IV of the Treaty of Rome.* London: Chatham House, 1967. P.10-12

[137] ibid. p.8

[138] Nkrumah op. cit

Cameroon and Togo- immediately opened discussions on the means of continuing the association.[139] Eventually all –except one[140]- of the former associated states decided to continue with the association with the EEC.

A new convention was negotiated. This time it was not by the metropolitan states on behalf of the territories but by eighteen African states (called the Associated African and Malagasy States (AAMS)) on the one hand and the EEC on the other.[141] The convention, the First Yaoundé Convention was signed in Yaoundé on 20th July 1963 and came into effect on 1st June 1964.[142] The trade provisions of the Yaoundé Convention fell into three parts: the abolition of duties on imports and exports, removal of quantitative restrictions on imports and provisions concerning agricultural products.[143] The Convention provided for preferential access to the EEC of certain tropical products from the eighteen states. The products would enjoy duty free access to the EEC while other products would have a similar duty to that charged between EEC members.[144] Reciprocity was also a key element of the agreement. The other trade provisions accorded to those of the Treaty of Rome except that it did not cover trade between the eighteen, the period of reduction of tariffs of the associated states no longer followed the time table of the EEC states, and the EEC also undertook that when drawing up the common agricultural policy the interests of the associated states would be considered. The Yaoundé Convention also reserved to the EEC the right to conclude with any state of comparable economic structure as the associated states an agreement of association or allow such state accession to the Yaoundé convention.[145] This was amplified by the EEC's Declaration of Intent in 1963 which declared that the Community would respond favourably to approaches from developing

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[139] Zartman op. cit. P.25 The Capitals of these two countries Yaoundé and Lomé later gave their names to the important conventions signed between the EEC and the former colonies.
[140] Guinea opted out. Sékou Touré was also very vocal against the association and its perceived imperialism see ibid. p.20
[141] The African nations were Benin(Dahomey), Burundi, Cameroon, Central Africa Republic, Chad, Congo, Gabon, Cote d' Ivoire, Madagascar, Mali, Mauritania, Niger, Rwanda, Senegal, Somalia, Togo, Burkina Faso (Upper Volta), and The Democratic Republic of Congo (Zaire).
[142] Zartman op. cit. P.54
[143] Okigbo, P.N. C. *Africa and the Common Market*. London: Longmans, 1967. P.49
[144] The EEC member were under pressure in GATT to reduce tariffs and this was the protection that they could grant the eighteen from such reduction. See Barnes op. cit. P.16
[145] Barnes op. cit. Chapter 4

countries having comparable production structures as those of the AAMS.[146] The second Yaoundé Convention succeeded the first Yaoundé Convention after its expiry in 1969.

Commonwealth African nations initially turned down association with the EEC at the September 1962 Commonwealth Conference in London. They based their arguments *inter alia* on the disruptive effect that British entry into the EEC would have on their own markets but the main motive was political.[147] When, in 1963 following a French veto, the United Kingdom's entry into the EEC failed the Commonwealth countries began to re-examine the issue of association.[148] The result of this re-evaluation was that two agreements were signed between the EEC and African members of the British Commonwealth.

Nigeria and the EC signed the Lagos Convention in July 1966.[149] This was a special association for Nigeria based on Article 238 of the Treaty of Rome (the second type of association with the EEC), as Nigeria preferred not to be involved in the Yaoundé Association. The Lagos convention did not have aid provisions or common institutions but guaranteed duty free entry into the Community for Nigerian's four main exports which at the time were cocoa, palm and peanut oils, and tropical woods. This convention was however never ratified nor applied due to the outbreak of the Nigerian civil war.[150]

Subsequently, in 1968, the East African countries of Kenya, Uganda and Tanzania entered into an agreement - the Arusha Agreement - with the EEC along similar lines to the

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[146] Cosgrove-Twitchett, C. op. cit. P. 90-91

[147] Nigeria, Ghana and Tanganyika were convinced that association was mere neo-colonialism. The decisive consideration being that association meant political and military alignment with continental Europe in some inexplicable way that Commonwealth membership did not. See Zartman op.cit. p.77-78

[148] Okigbo. op. cit. p. 78 The pressure of a common external tariff to the EC seems to have convinced them. A number of agreements had been signed between the EC and other nations that showed the concept association to be sufficently elastic to accommodate Commonwealth nations of different ideological leanings.

[149] *Agreement establishing an Association between the EEC and the Republic of Nigeria and Annexed Documents*, Brussels, 1966.

[150] Ratification of the convention by the EEC was difficult because of the perceived human rights violations committed by the government of Nigeria in Biafra. See Zartman op.cit. p. 93

Nigerian one.[151] The Arusha agreement provided for duty free entry of the three countries' exports to the EEC, though a selected range of products were to be subjected to quantitative restrictions; these being unroasted coffee, cloves and tinned pineapples.[152] The Arusha convention was replaced by the second Arusha Convention in 1969 that ran parallel to the second Yaoundé convention and expiredon 31st January 1975.

A notable aspect of the Lagos Convention is that, unlike the Yaoundé Conventions, it was non-reciprocal in nature.[153] The Arusha Conventions contained reciprocity provisions but they turned out to be symbolic as they were derogated from so far that it heralded the subsequent abandonment of reciprocity by the EEC in such agreements.[154] Since the UNCTAD conference the idea of reciprocity in agreements involving developing nations was changing. The landscape of EEC-Africa relations was soon to be altered dramatically making non-reciprocity as well as a number of other matters important features.

In 1973, the United Kingdom, together with Ireland and Denmark, was granted accession to the European Communities after two unsuccessful attempts at joining.[155] The enlarged EEC agreed that it's various association agreements and the United Kingdom's special Commonwealth trading agreements should remain unchanged for two years. Protocol 22 attached to the accession treaty divided the developing Commonwealth countries into two categories: "associables" and "non-associables". The "non-associables" comprised the Asian Commonwealth and Hong Kong, and were eligible to negotiate trade agreements with the enlarged EEC on the same basis as other Asian or Latin American less developed countries. The "associables" from the Commonwealth in Africa, the Caribbean and the Pacific were encouraged to join the AAMS in an enlarged Yaoundé-type association.[156]

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[151] *Agreement establishing an association between the EEC and the United Republic of Tanzania, the Republic of Uganda, and the Republic of Kenya and Annexed Documents*, Brussels, 1969.
[152] These products were of special interest to the Yaoundé Associates.
[153] Zartman op.cit. p.86 and 99
[154] Cosgrove-Twitchett op.cit. p.146
[155] *Treaty concerning the Accession of the Kingdom of Denmark, Ireland, the Kingdom of Norway and the United Kingdom of Great Britain and Northern Ireland to the EEC and the EAEC..(and) the ECSC*, Brussels, January 1972. [Norway did not in fact join]

Protocol 22 gave the twenty independent Commonwealth countries in sub-Saharan Africa, the Caribbean and the Pacific three options. One was a Yaoundé-type association while a second possibility entailed the negotiation of special conventions similar in structure and substance to the Arusha association. Finally, there was the possibility that the EEC would negotiate and conclude a trade agreement with the invited commonwealth state.[157]

African Commonwealth nations for various reasons felt that these options were not to their liking. At the same time the AASM countries issued communiqués indicating their fear of erosion of their benefits under Yaoundé.[158] Following this there was a series of political manoeuvres between the two groups of nations with the intervention of the Organisation of African Unity (OAU) and the UN's Economic Commission for Africa with a view to finding common ground. Eventually, following a meeting in Mauritania the AASM announced its intention to join forces with the Commonwealth countries in negotiating a new package with the EEC to replace Yaoundé II. Thus was born the Africa, Caribbean, and Pacific (ACP) group of countries.[159] The ACP group initially comprised 46 countries: the original 18 AAMS and Mauritius; 21 Commonwealth less developed countries (in Africa: Botswana, Gambia, Ghana, Kenya, Lesotho, Malawi, Nigeria, Sierra Leone, Swaziland, Tanzania, Uganda, and Zambia; in the Caribbean: Bahamas, Barbados, Grenada, Guyana, Jamaica, and Trinidad and Tobago; in the Pacific: Fiji, Tonga, and Western Samoa): other African states not originally part of AASM or the commonwealth (Equatorial Guinea, Ethiopia, Guinea, Burkina Faso, Liberia and Sudan.

In 1973, following a meeting of the economics affairs ministers of the ACP states it was announced that they intended to start a bloc-to- bloc negotiation on the new agreement with the EEC. The ACP wanted an entirely new type of agreement. Negotiations

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[156] Cosgrove-Twitchett op. cit. p. 147

[157] ibid.

[158] Babarinde,O.A. *The Lomé Convention and Development: An Empirical Assessment*. Brookfield: Avebury Press, 1994. P. 18-19

[159] ibid p. 19 see also Oumar Sy, S. "The Birth of the ACP Group." *The Courier* No. 93 September – October 1985 p51-56 and Dodoo, N.M.C. "Structure and Functioning of the ACP Group" *The Courier* No 93 September – October 1985 p. 57-61 for greater detail into the exact functioning of the ACP which is outside the scope of this paper.

therefore began in Brussels in July 1973 between the EEC and a united ACP towards a convention to replace Yaoundé and accommodate the new ACP aspirations. These negotiations lasted roughly eighteen months during which 183 negotiating sessions took place, and at least 493 co-ordinated meetings were held. The mammoth task was finally completed on 28th February 1975 when the Lomé Convention was signed.[160] The Convention came into force on 1st April 1976.[161]

The Convention was greeted with great enthusiasm. In many respects it was truly a remarkable achievement. As Babarinde notes:

> ...it was truly the first of its kind in North-South relations in the sense that two unequal groups of countries negotiated as "parties". Moreover, in terms of its aim (a *bona fide* contract designed to stimulate economic development in the ACP societies), scope (encompassing four regions of the world), and substance (covering an array of issue-areas), the Lomé pact was an unprecedented one.[162]

In legal terms the Lomé Convention was also unique because " as a treaty under international law, the Lomé Convention was a *sui generis* contract between the EEC and ACP states, making no mention of the preceding association agreements or Article 238 of the Treaty of Rome."[163] It is this *sui generis* character of Lomé that has been given credit for the continuing existence of Lomé for over twenty-five years.[164]

The 1975 Lomé agreement (Lomé I)[165] was to run for five years and expired on 28th February 1980. It has since been renegotiated and renewed three times. The second Lomé Convention (Lomé II) was signed in 1980 while the third (Lomé III) was signed in 1985.[166] Lomé IV[167] was signed in 1990 but this time it was to run for ten years. It came

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[160] Babarinde op.cit p.20
[161] The delay in its coming into force was due to a delay in British ratification.
[162] Babarinde op. cit. p.11
[163] Cosgrove-Twitchett op.cit. p.149
[164] Babarinde op.cit. p. 12
[165] For a full text see *The Courier* No 31 Special Issue March 1975
[166] For a full text see *The Courier* No 89 January- February 1985
[167] For a full text see *The Courier* No. 120 March-April 1990

up for revision in 1995 and a revised agreement Lomé IV *bis*[168] was signed in Mauritius in 1995.

Having outlined briefly the history of Lomé, the remainder of this part of the paper will point out it's key provisions. Emphasis will be placed on the trade provisions in a bid to highlight the issue of compatibility with WTO rules. The analysis will concentrate on the provisions of Lomé IV but will be informed by changes that took place in the other conventions.

### 3.2 The Lomé Convention: Basic Structure and Provisions

Tibazarwa is of the view that " the whole [Lomé] Convention reflects the paramount interests of trade."[169] This would not be surprising given that Lomé is a product of colonial trade preference regimes. However, although the central place of trade may have been a fact in Lomé I it may be argued that it does not appear to be necessarily so in the current Lomé Convention. The importance of trade appears to have been declining if the chronological order of the articles in the convention is anything to go by. In Lomé I the trade provisions were covered under Title I beginning at Article 1. In Lomé IV these provisions have been relegated to Article 168. This has been caused by the addition of many clauses containing a cornucopia of aspirational political statements which, in the writer's view, are of questionable real value and help to add bulk to the convention and obscure the true agreement.

Notwithstanding the addition of new clauses to the convention the nucleus of Lomé has remained intact over the four versions of Lomé. The agreement is mainly based on free access without reciprocity to the European market for goods exported from the ACP countries. It also has stabilisation funds (STABEX and SYSMIN) to compensate the

[168] For a full text see *The Courier* No. 155 January-February 1996
[169] Tibazarwa op.cit. p.68

ACP in the event of reduction in the receipts that they derive from the export of primary products their principal exports. There is also financial aid for ACP; industrial and technical co-operation; and joint institutions to supervise observance of the agreement.

The basic layout of the provisions of Lomé IV is as follows:

Part One- General Provisions of ACP-EC Co-operation

Part Two-The Areas of ACP-EC Co-operation

- Title I-Environment
- Title II-Agricultural Co-operation, food security and rural development
- Title III-Development and Fisheries
- Title IV-Co-operation on Commodities
- Title V-Industrial Development, Manufacturing and Processing
- Title VI- Mining Development
- Title VII-Energy Development
- Title VIII- Enterprise Development
- Title IX- Development of Services
- Title X-Trade Development
- Title XI-Cultural and Social Co-operation
- Title XII-Regional Co-operation

Part Three-The Instruments of ACP-EC Co-operation

- I –Trade Co-operation (Articles 167-185)
- II-Commodities (Articles 186-213 –STABEX)
  (Articles 214-219 -SYSMIN)
- III-Development Finance Co-operation (Article 220-327)
- IV-General Provisions for the Least-Developed, Land-locked and Island ACP States

Part Four-Operation of Institutions

Protocols

Part One and Two of the convention contain the general aspirational statements of what the convention is aimed at achieving. The rest of the clauses form the core of Lomé and have remained basically unchanged since Lomé I.

### 3.2.1 Lomé Trade Provisions

The trade provisions of Lomé include non-reciprocal preferences for industrial ACP exports to the European market, preferential treatment for agricultural exports subject to the common agricultural policy of the EU and special protocols for exports of bananas, rum, sugar, beef and veal. Rather than analyse every single one of the Lomé provisions, it is proposed to concentrate on the particularly problematic ones in view of the WTO rules.

#### 3.2.1.1 Non- Reciprocity

Lomé departed from the principles of reciprocity that were a hallmark of the earlier Yaoundé and Arusha agreements. There are no requirements for reverse preferences in Lomé and Arusha agreements. There are no requirements for reverse preferences in Lomé. This results in an imbalance between the obligations of the EU and those undertaken by the ACP. This difference is clearly justified given the different developmental levels of the partners. Non-reciprocity of Lomé could potentially form a WTO violation since the concept of reciprocity in which non-discrimination amongst trading partners is an integral part is central to the WTO. Part IV of GATT, which was introduced for the benefit of the developing nations, however eliminates this difficulty as it allows for non-reciprocal agreements between countries at different levels of development.

### 3.2.1.2 Trade Preferences

The trade co-operation provisions of Lomé are aimed at the promotion and diversification of ACP exports to the EU in order to decrease ACP dependence on the export of primary products. Preferential access to the EU market is offered as the main instrument of achieving this aim.

Lomé provides that manufactured goods originating from the ACP countries shall have access to the EU market free of customs duty and taxes of equivalent effect and without being subject to quotas or other quantitative restriction.[170] This arrangement means that ACP countries are treated in a similar manner as EU member countries treat each other in relation to the manufactured goods exported to the EU.

Lomé specifically provides that ACP goods should not be granted less favourable treatment than non-Lomé country goods. This has meant that they have enjoyed the most preferential treatment, occupying the top position in the EU's complex hierarchy of preferential trading arrangements. Other developing countries, mainly in Asia and Latin America, have benefited from the EU's Generalised System of Preferences (GSP) or from special trading agreements with the EU (Mediterranean Countries).[171] In order to benefit from the preferences offered by Lomé the goods from the ACP states must satisfy the Rules of Origin requirements in Protocol I which essentially provides that 50% of the manufactured product must be made in the ACP state.

Not surprisingly, one area of exception to the rule of free and unlimited access for ACP products to the EU concerns certain agricultural products coming directly or indirectly under the EU's Common Agricultural Policy (CAP). Altogether though approximately 97

[170] Lomé IV Article 168-169; Lomé I Article 2-3
[171] Davenport et al (1995) op. cit. p. 2 and Rydelski op. cit.

per cent of ACP exports get preferential access to the EU market, most without being restricted by any duty or non-tariff barrier.[172]

Of great importance as far as preferential access to the EU is concerned are the four Protocols on the import of sugar, rum, bananas, and beef and veal. These protocols provide for access of specific quantities of these commodities into the EU. Mechanisms are also available for the admission of certain other important agricultural products, such as strawberries, tomatoes, molasses, and sorghum, particularly during the off season in Europe.

In return for these concessions Lomé provides that ACP countries, having regard to their current development needs, will not be required during the period of the convention to give undertakings in regard to imported goods of EU origin corresponding to those given by the EU in respect of ACP goods.[173] This formally gives effect to the principle of non-reciprocity mentioned above. ACP countries instead provide that in their trade with the EU they will not discriminate against any EU country to the advantage of other EU countries, and will grant to the EU treatment no less favourable than that granted the most favoured nation.[174] Finally, Lomé provides that ACP countries shall not be required to apply the MFN clause by reference to their trade with one another, or with other developing countries.[175] ACP nations can therefore determine their own trade policy with the EU and other countries, provided only that these policies are not discriminatory in favour of any developed nation.

During the negotiation for Lomé IV an additional clause dealing with services was inserted.[176] The clause merely makes a broad statement about how in future the parties

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[172] Hewitt and Koning. " The Survival of Special preferences Under the Lomé Convention: The ACP Countries and the European Union after the Uruguay Round" in Sander and Inotai op.cit. p. 89
[173] Lomé IV Article 174(1); Lomé I Article 7
[174] Lomé IV Article 174(2)(a)
[175] Lomé IV Article 174(2)(a); Lomé I Article 72(b)
[176] Lomé IV Article 185

will negotiate to elaborate the clause to take advantage of GATT negotiations relating to trade in services.

The Lomé trade provisions granting preferential access to the EU are extremely difficult if not impossible to reconcile with the WTO requirements. Two of the provisions in particular potentially constitute Article I MFN violations in their application. The first is the trade preference arrangements in the form of tariff rates that differ not only from the MFN rates available to WTO contracting parties but also differ from the GSP rates available for other non-ACP developing countries. The second are the commodity protocols and their provision for guaranteed access at guaranteed prices.

Prior to the inclusion of the "Enabling Clause" into the WTO in 1979, developed countries seeking to apply GSP schemes to developing nations needed to seek a waiver from GATT Article I provisions. During the Tokyo Round the Article I Enabling Clause was negotiated which made it unnecessary to seek such a waiver. However, as seen earlier, whereas the Enabling Clause allowed the creation of systems of trade preferences for developing countries, it did so on an MFN basis. The provisions are such that countries are permitted to depart from GATT Article I obligations on condition that all developing countries are treated equally.

The problem with Lomé in this respect is that it clearly seeks to give the ACP nations an advantage over other developing nations and cannot therefore be said to fall within the strict parameters of the Enabling Clause. The Convention has, however, not been challenged so far on this ground, because there is a WTO waiver that was granted to Lomé for a five-year period beginning on 9th December 1994. The derogation allowance expires in February 2000 hence the need to analyse the direction that Lomé will take after that. It is notable that the waiver granted to Lomé did not cover Article XI or Article XIII provisions. Moreover, the Article I waiver was given with the usual GATT proviso that preferences should only be granted "to the extent necessary". There is a long GATT legal tradition regarding the generally narrow interpretation of this clause. Further, in order to

receive the prerequisite unanimous approval for passage of the waiver, a further proviso was appended which allows the contracting parties to have recourse to the nullification and impairment provisions of Article XXIII of GATT. As a result the United States and certain Central American banana producing states have been able to continue proceeding against Lomé within the WTO dispute settlement mechanism which has been a source of great concern in recent world trade relations.

In 1996, Ecuador, Guatemala, Honduras, Mexico and the United States brought proceedings before the WTO against the EU's Lomé banana trading regime.[177] The complaint essentially was that the EU regime discriminated against third countries other than the ACP, in favour of ACP countries, EU producers and the European shippers and importers. The alleged discrimination included: different and more demanding licensing requirements for third country origin bananas, and specific country quotas for ACP states in excess of past performance.

The WTO Dispute Settlement Panel reported in 1997 and found that a number of elements of Lomé were contrary to GATT and called for the dismantling of these aspects. The panel essentially ruled that the waiver granted to Lomé did not permit discriminatory treatment in the nature of quotas and licensing requirements.[178] An appeal against the Panel decision was initiated by the EU but in September 1997 the Appellate Body essentially confirmed the Panel findings.[179] The WTO Dispute Settlement Body adopted the Appellate and Panel Reports in late 1997. An arbitrator later ruled that an appropriate period for the EU to implement the recommendations of the report would expire in January 1999.

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[177] European Communities Regime for the Importation, Sale and Distribution of Bananas, Complaint by Ecuador, Guatemala, Honduras, Mexico and the United States (WT/DS 27)
Earlier complaints under the old GATT in 1993 and 1994 had found against Lomé but the EU had blocked the adoption of the Panel Report a channel unavailable under GATT 1994.

[178] For Panel Report see http://www.wto.org/dispute/bananas.htm

[179] For Appellate Body Report see http://www.wto.org/wto/dispute/banad.wp5
for the effect that the Report will have on ACP banana producing states see http://www.cbea.org/cbea2/wto/index-fr.htm

The EU failed to make all the changes required and in April 1999 the Dispute Settlement Body authorised the United States to suspend the application to the EU and its member states of tariff concessions covering trade in a maximum amount of U.S. $ 191.4 million per year. This figure was determined as the level of nullification or impairment suffered by the United States as a result of the Lomé banana protocol. Lomé had become the centre of the biggest trade dispute under the new WTO.

### 3.2.2 Other Lomé Provisions

Lomé contains a number of other provisions which, though not directly of effect on the WTO are trade related and require mention.

#### 3.2.2.1 Stabilisation of Export Earnings for Agricultural Commodities (STABEX)

One of the problems of the production of primary agricultural products is that they tend to experience great price fluctuations. The ACP countries with rigid economic structures are unable to take advantage of unexpected increased export receipts while drops in export prices throw everything into disarray. This creates great difficulty in economic planning. Lomé acknowledges this problem and has put in place the STABEX scheme in order "to provide a remedy for the adverse effects of unstable export receipts and thus help the ACP countries to secure economic stability, profitability and steady growth."[180]

STABEX covers a selected range of ACP products exported to the EU ranging from groundnuts to Karakul skins. It operates on the basis of reference levels calculated in relation to each ACP state's average sales to the EU over the preceding four years. If during a calendar year an ACP country's exports of an eligible commodity falls below the

[180] Lomé IV Article 186; Lomé I Article 16

reference level by a predetermined margin, the country can request a transfer from the EU's stabilisation fund to cover all or part of the gap in export earnings.

### 3.2.2.2 Mining Products: Special Financing Facility (SYSMIN)

During the negotiations for Lomé II, a scheme similar to STABEX was added to Lomé to provide similar assistance to mineral producing countries among the ACP states.[181] The scheme covers six commodities- copper and cobalt, phosphates, manganese, bauxite and aluminium, tin, and iron ore. It provides for financial and technical assistance to maintain capacity for the production of certain mining products in ACP countries through a 'special financing facility". Aid is also given for the development of new mining and energy resources.

### 3.2.2.3 Development Finance Co-operation

Lomé also provides for development finance assistance to the ACP states through the European Development Fund (EDF). This is one of the schemes that have continued over from the Yaoundé Conventions. The aim of the development finance assistance is "to support and promote the efforts of ACP states to achieve long term, self-determined, self-reliant and self-sustained integrated social, cultural and economic development on the basis of mutual interest and in the spirit of interdependence. [182] The EU has a wide choice of ways in which it can finance the aid. They run from a straight subsidy or non-payable grant to normal loans at market rates. They include the loan on special terms, subscription of risk capital and loans with interest rate subsidies.

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[181] Lomé IV Article 214

[182] Lomé IV Article 220; Lomé I Article 40 the aims of the development finance assistance have changed slightly since Lomé I.

### 3.2.2.4 Institutions

Lomé has a simple institutional structure. At the top is the Council of Ministers. It comprises, on the one side, the members of the Council of the European Union and members of the European Commission; and on the other, one member of the government from each of the ACP countries. The EU and ACP countries occupy the chair alternatively. The task of the Council of Minister is to administer the convention and it has the necessary powers for decision and consultation for this purpose.[183] It is assisted by the Committee of Ambassadors which carriers out the assignments given by the Council and supervises the other organs and working groups.[184]

There is a Consultative Assembly which consists on the one hand of members of the European Parliament, and on the other of representatives appointed by the ACP states, both parties appointing the same number of representatives. The Assembly deliberates on matters in the convention and reports to the Ministers or Ambassadors.[185] Lomé has a Secretariat that operates on conditions determined by internal regulations of the Council of Ministers.

In this part of the paper we have seen that the Lomé trade provisions are incompatible with the provisions of the WTO. Negotiations for a successor to the current arrangement between the ACP and the EU began in September 1998. To promote debate on the future relationship, in November 1996, the European Commission published a Green Paper on the future of the ACP relationship with the EU.[186] It is proposed in the final part of this paper to examine what the Green Paper has envisaged for future EU-ACP relationships in light of the WTO requirements.

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[183] Lomé IV Part 4 Articles 338-345
[184] Article 346-347
[185] Article 350-351
[186] Green Paper on relations between the European Union and the ACP countries on the eve of the 21st century –Challenges and options for a new partnership. 14th November 1996.

## IV. TOWARDS LOME V

Despite the preferences granted to the ACP states via Lomé for the past twenty-five years, ACP countries have not demonstrated the capacity to utilise existing preferences effectively. As Hewitt and Koning point out the share of ACP exports in the EU market has declined while their dependence on the EU market for their export revenue is still significant. Diversification away from primary commodities into non-traditional and processed products has also been less that expected. In the last five years until 1992, for example, ten traditional commodities still accounted for almost 61 per cent of ACP exports to Europe on average. Apart from petroleum, these included coffee, cocoa, sugar, bananas, copper, aluminium, and gold.[187] Paradoxically, in contrast with ACP performance, developing countries which have enjoyed less favourable treatment in the EU market, in particular Asian countries, have been far more successful. The frustration with Lomé's failure to achieve its aims coupled with its incompatibility with the WTO, the impending expiry of Lomé and its WTO waiver has led the EU to rethink its future relationship with the ACP states. As Ikiara correctly points out:

[187] Hewitt and Koning in Sander and Inotai(eds) op. cit. p. 91
An exception to this dismal ACP performance is Mauritius whose success its Prime Minister has attributed to the Lomé preferences careful exploitation. See Dr. The Hon. Navinchandra Ramgoolana. "Achieving Economic Growth in Africa: The Mauritian Experience" Lecture delivered at Harverd University 25th September 1998. http://www.ksg.harvard.edu/cid/speech

> From a European perspective, there are radical changes in the global economy and global geopolitical interests that necessitate equally radical changes in future relationships between European Union and the African, Caribbean, Pacific (ACP) group of countries. The changes include: expansion of the European Union membership making the interests of European Union members quite divers, the liberalisation of global trade systems following the Uruguay Round multilateral trade4 agreement, the collapse of the former communist regimes in USSR and Eastern Europe, and growing differentiation among the ACP economies[188]

It is with this in the back of one's mind that one must look at the Green Paper and the future of EU-ACP relations.

## 4.1 The EU's Green Paper-The Future of Trade Arrangements

The impending expiry of Lomé IV in February 2000 prompted the EU to publish a Green paper to open a wide-ranging public debate on the EU's future relations with ACP countries. The aim of the paper is to raise awareness of the need for an effective EU co-operation policy towards ACP states. The Green Paper contains a summary of the main issues in two parts. The first part of the analysis reviews the past and the broad political, economic and social trends; while the second part sets out options for the revitalisation of the EU-ACP partnership.

In the trade section of the Green Paper, the European Commission argues that for three reasons the nature of the current EU-ACP relationship as defined by Lomé has to change. Firstly, it is pointed out that the Uruguay Round Agreement and tougher WTO dispute settlement procedures put the future of differentiated, non-reciprocal schemes such as Lomé in doubt. Secondly, it is argued that liberalisation will affect the relative value of preferences and competitiveness. Studies indicate that the main losers here will be ACP countries.[189] Thirdly, new issues in international trade must be included in the future

[188] Ikiara, G.K. "The Green Paper on Relations between the European Union and the ACP Countries: Some Comments" (ECDPM Working Paper NO. 26) Maastricht: ECDPM, 1997. http://carryon.oneworld.org/edpm/pubs/wp26_gb.html.
[189] Davenport, Hewitt and Koning op.cit.

convention. Such matters include environment, competition policies, investment, standards and social rights.

The Green Paper has made four main proposals for future ACP-EU relations. The options are:

(1) Maintaining the current Lomé *status quo,* this would mean the retention of a contractual system of non-reciprocal, differentiated preferences, specific to the ACP, which would possibly be supplemented by schemes in areas related to trade such as standards and certification, the environment, competition, intellectual property rights and agreements on services.

(2) The application of the EU's GSP either bilaterally or multilaterally. This second option would remove trade from the co-operation agreement, making the co-operation agreement an aid package. Trade would thereafter not be part of the negotiations as GSP is a matter for unilateral policy. Least-developed ACP countries would, under this option, be grouped together with non-ACP least-developed countries under unilateral (EU) GSP upgraded to parity with Lomé preferences with non-reciprocity. Alternatively, least-developed countries as a whole could be part of multilateral WTO bound –preferential arrangements. Advanced developing country ACP states would only be eligible for normal GSP.

(3) The third option is uniform reciprocity, which would require that after a transitional period, all ACP countries would extend reciprocity to the EU.

(4) The last option is the consideration of differentiated reciprocity either between the EU and homogenous regional groups of ACP countries or with single ACP countries, supplemented with co-operation in new fields such as environment.

The Green Paper argues that each of the options is not mutually exclusive and could be combined in various ways. The WTO compatibility of each of the proposals will now be briefly examined.[190]

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[190] for in depth consideration of these see Rydelski, R.M.S. "The Future of the Lomé Convention and its WTO Compatibility" 13 European Journal of Economic Law 398 pp401; McMahon, J.A. "Lome V: towards a new trade horizon" [1997} Wed Journal of Current Legal Issues

### *4.1.1* The Maintenance of the *Status Quo*

Option one- the maintenance of the *status quo*- would confirm the ACP at the top of the pyramid of trade preferences granted by the European Union. The *status quo* as already seen clearly is a violation of the WTO provisions. Therefore unless efforts were made within the WTO to amend either or both Article XXIV and Part IV to permit for the selective developed-developing country non-reciprocal trade arrangements, this option would continue to be WTO incompatible and would continue to require a waiver under Article XXV 5 of GATT 1994.

There are a number of difficulties with either of these approaches at continuing the *status quo*. Seeking amendments to the WTO would rely on the European Union's influence over the WTO and these would be fundamental changes and the question asked would be why they were not brought up during the lengthy Uruguay Round negotiations. On the other hand the difficulty with getting a waiver for Lomé IV before the WTO came into existence implies that under the present WTO rules it would be much more difficult.

It is also noted that the reduction of and the extension of trade preferences to new areas following the Uruguay Round has greatly reduced the commercial value of the Lomé preferences. Grynberg points out that in respect of coffee, for example, the extension of preference arrangements for tropical tree products such as coffee to the South-east Asian countries as well as to Central America means that only coffee from a few countries such

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http://webjcli.ncl.ac.uk/1997/issue4/mcmahon4.html; Thomas, R.H. op.cit.; Grynberg, R ." Negotiating a Fait Accompli: The WTO Incompatibility of the Lomé Convention Trade Provisions and ACP-EU Negotiations" (ECDPM Working Paper no. 38) Maastricht: ECDPM, 1997. http://carryon.onerworld.org/ecdpm/pubs/wp39_gb.html.; Graumanis, A. "SADC-EU Co-operation Beyond Lomé: between continuity and change" (FGD Occassional paper no 11) Braamfontein, The Foundation for Global Dialogue, 1997. P.11-20

as Brazil now enters the EU subject to any duty whatsoever.[191] Thus, the Lomé trade preference arrangements in this key sector are in effect of little or no commercial value.

Under the circumstances expending a great deal of goodwill on attempting to have the WTO rules amended or seeking a waiver to perpetuate a system of diminished commercial utility is questionable.

### 4.1.2 Integration of the ACP into the EU's GSP

This option is more WTO compatible. It is proposed to move the 'advanced' developing ACP states into the normal GSP and the least-developed ACP countries join the non-ACP least –developed countries to obtain upgraded GSP on par with Lomé preferences. Effectively this would terminate the special treatment that ACP countries have had since the inception of Lomé in 1975. It is line with Part IV and the Enabling Clause since it treats developing countries in accordance with the GSP. Its non-reciprocity is in accordance with Article XXXVI: 8 of GATT Part IV.

The difficulty of this approach is that it raises the problematic issue of "differentiation". How is the distinction between different grades of developing countries to be arrived at? This has been a source of problems in cases where countries as diverse as Swaziland and Singapore are grouped together as developing countries. There is also the issue of how to deal with those ACP countries that shall be considered 'advanced" and will therefore face new tariffs after they lose their Lomé status. The greater difficulty with this option is that it is most likely not to be accepted by the ACP states.[192] The Negotiating Mandate of the ACP Group indicates that this particular approach would not be acceptable to ACP countries.[193]

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[191] Grynberg op.cit
[192] Rydelski op. cit. p.401
[193] ACP Group Negotiating Mandate ACP/28/028/98rev2 Neg. Brussels, 30th September ,1998 http://www.oneworld org/euforic/framed/euforics.htm

### 4.1.3 Uniform Reciprocity

This option anticipates that, after a common transitional period, all ACP countries will extend reciprocity to the EU. This appears to anticipate the establishment of a free trade area between the EU and all ACP states

The main difficulty with this approach, as Thomas points out, is that the idea of a free trade area between the EU on the one part and a geographically diverse grouping like the ACP is stretching the bounds of imagination too far.[194]

Potentially, reciprocity and a free trade area would allow the new trading arrangement to be covered by Article XXIV of GATT 1994 through the creation of a free trade area and the integration of the ACP into the international trading system. Thomas however points out that Article XXIV of GATT is not suited for relationships amongst groups of developed and developing countries. The enabling clause would also not be applicable, as it does not provide for North-South reciprocal trade arrangements.[195]

### 4.1.4 Differentiated Reciprocity

This fourth proposal put forward by the EU envisages the EU concluding free trade area agreements with the ACP broken up into several groupings-Africa according to regional blocs such as COMESA, ECOWAS or SADC; then the Caribbean and finally, the Pacific.

While this may be a more manageable and realistic arrangement in contrast to the third option, its GATT compatibility is still questionable. It would not escape the problem raised in respect of the third option *vis* that neither Article XXIV of GATT nor the Enabling Clause are suited for arrangements between developed and developing countries.

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[194] Thomas op.cit
[195] Thomas ibid.

It would therefore require an amendment to Article XXIV or the Enabling Clause allowing such North –South flexibility to be compatible with WTO. Alternatively individual waivers for each of the arrangements entered into could be negotiated. This option also has the effect of breaking up the ACP thus weakening their bargaining power that was so effective during the Lomé negotiations.

### 4.2 Which Way for Lomé V

It is the writer's view that the best option for the future EU-ACP relations in view of the desire for WTO compatibility is a hybrid between maintaining the status quo and integration of the ACP into the EU's GSP system. The parts of Lomé that are not directly affected by the WTO rules, the non-trade aspects of Lomé such as STABEX should be retained as close as possible to their present form. These aspects of Lomé should not be abandoned without thinking through a better policy.

The trade provisions should slowly move towards integration of the ACP into the GSP. Necessary steps must be taken however to ensure that developing countries that are to benefit from the GSP are clearly defined by transparent criteria to prevent the Singapore – Swaziland scenario. The STABEX system can then be used to compensate all the present ACP countries for any losses that they may incur as a result of the elimination of the Lomé preferences. The basis for compensation will be similar to the current STABEX system except that the reference period shall be the level of trade under Lomé. STABEX would then continue for such a period as would enable the countries to recover from the effect of removal of preferences, say ten years.

This approach would be WTO compatible, as the developing countries would be treated equally under EU's general GSP scheme. The only benefit for Lomé countries would be STABEX support to help weather the storm of loss of preferences.

To those ACP countries that would wish to oppose such an approach it is necessary that they be reminded that the colonial benefits that Europe obtained from the preference system appear to have worn out and:

> It is evident that Europe accepts that the context of Yaoundé and Lomé has changed completely, that the colonial era and its legacy of "responsibility" has irrevocably terminated, and with it the "golden handshakes" that were once expected; proffered and accepted all around. The terms of Europe's future interests in the ACP area and in the South are much less likely to be determined by "general solidarity", and certainly far less by "responsibility" than by "hard core" political, economic, cultural and security interests.[196]

The major part of African trade is carried on with the EU. This may have declined over the years but it still made up 46 per cent in 1993. Africa on the other hand plays merely a subordinate function in the EU's trade making up for less than 4 per cent. It is therefore for the ACP states to take the initiative.[197] A WTO compatible Lomé is possible with a little effort.

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[196] Huggins, G. "Commentry on the Green Paper on Relations between the European Union and the ACP Countries"(ECDPM Working Paper No 28) Maastricht:ECDPM, 1997. Hppt://carryon.oneworld.org/ecdpm/pubs/wp_gb.html.

[197] Kappel,R. "European Development Cooperation with Africa: The future of Lomé" Leipzig: University of Leipzig. Papers on Africa Politics and Economics Series No 3, 1996.

## CONCLUSION

This paper set out to examine the Lomé Convention trade provisions in light of the WTO rules. In the first chapter of the paper the history of the WTO as it relates to the developing countries of the world was examined. It was observed that the WTO developed with the issue of developing countries only being considered after the key provisions of the trading system had been put into place. In the second chapter of this essay, the basic principles of the WTO were examined. A nomadic survey of the provisions that are of particular impact on Lomé was also undertaken. The third chapter of the essay briefly looked at the history of Lomé and then examined its trade provisions for their WTO compatibility. It was concluded that but for the waiver granted to Lomé it is not WTO compatible. The current Lomé convention Lomé IV and its WTO waiver expire early in the next millennium and it was observed that it would be necessary to look at the possibilities available for Lomé in future. The final chapter of the paper examined the proposals made by the EU on the future of Lomé and looked at the WTO compatibility of each of the options. A proposal was made on the way in which a future WTO compatible Lomé could be concluded. It will be interesting to watch the negotiations for the new Lomé convention, if indeed there will be a further Lomé convention, to see if there is any place for the Lomé trade provisions under the WTO.

**BIBLIOGRAPHY**


1. *Agreement establishing an Association between the EEC and the Republic of Nigeria and Annexed Documents*, Brussels, 1966.
2. *Agreement establishing an association between the EEC and the United Republic of Tanzania, the Republic of Uganda, and the Republic of Kenya and Annexed Documents*, Brussels, 1969.
3. Akintan, S.A. *The law of International Economic Institutions in Africa*. Leyden: Sythoff, 1977.
4. Babarinde,O.A. *The Lomé Convention and Development: An Empirical Assessment*. Brookfield: Avebury Press, 1994.
5. Barnes, W.G. *Europe and the Developing World: Association under Part IV of the Treaty of Rome*. London: Chatham House, 1967.
6. Berger, G. R. "Preferential Trade Treatment for Less Developed Countries: Implications of the Tokyo Round" Harvard International Law Journal 20 (1979) 540
7. Bhagwati, J. *The World Trading System at Risk*. Princeton University Press, Princeton, 1991.
8. Bhagwati, J. *Protectionism*. Cambridge: MIT Press, 1988.
9. Cary, M. and T.M. Haarhoff. *Life and Thought in the Greek and Roman World*. London: Methem & Co., 1940.
10. Cosgrove-Twitchett, C. *Europe and Africa: from association to partnership*. Surrey: Saxon House, 1978.
11. Curzon, G. *Multilateral Commercial Diplomacy: The General Agreement on Tariffs and Trade and Its Impact on National Commercial Policies and Techniques*. London: Michel Joseph Books,1965.
12. Davenport, M.; Hewitt, A.; Koning A. *Europe's Preferred Partners? The Lomé Countries in World Trade*. London: Overseas Development Institute,1995.
13. De Bouter (1977)11 J Int'l L&Econ 353

14. Dodoo, N.M.C. "Structure and Functioning of the ACP Group" *The Courier* No 93 September – October 1985.
15. European Communities- Regime for the Importation, Sale and distribution of Bananas, complaints by Ecuador, Guatemala, Honduras, Mexico and the United States (WT/DS 27) see http://www.wto.org/wto/dispute/bulletin.htm
16. Gibbs, M.. The Future Representation of the South in The International System. in World Trade After the Uruguay Round
17. Graumanis, A. "SADC-EU Co-operation Beyond Lomé: between continuity and change" (FGD Occassional paper no 11) Braamfontein, The Foundation for Global Dialogue, 1997.
18. Green Paper on relations between the European Union and the ACP countries on the eve of the 21st century
19. Green Paper on relations between the European Union and the ACP countries on the eve of the 21st century –Challenges and options for a new partnership. 14th November 1996.
20. Grynberg, R ." Negotiating a Fait Accompli: The WTO Incompatibility of the Lomé Convention Trade Provisions and ACP-EU Negotiations" (ECDPM Working Paper no. 38) Maastricht: ECDPM, 1997. http://carryon.onerworld.org/ecdpm/pubs/wp39_gb.html.
21. *Havana Charter for an International Trade Organisation*, Cmd 3775, HMSO, London (1947)
22. Hewitt, A. and Koning, A. " The Survival Of Special Preferences Under The Lomé Convention: The ACP countries and the European Union After the Uruguay Round" in *World Trade After The Uruguay Round: Prospects and Policy Options for the Twenty-first Century*. Sander, H. and A. Inotai (ed.). London : Routledge, 1996.
23. Huggins, G. "Commentry on the Green Paper on Relations between the European Union and the ACP Countries"(ECDPM Working Paper No 28) Maastricht:ECDPM, 1997. http://carryon.oneworld.org/ecdpm/pubs/wp_gb.html

24. Ikiara, G.K. "The Green Paper on Relations between the European Union and the ACP Countries: Some Comments" (ECDPM Working Paper NO. 26) Maastricht: ECDPM, 1997. http://carryon.oneworld.org/edpm/pubs/wp26_gb.html.

25. Jackson, J. H. *The World Trading System: Law and Policy of International Economic Relations*. MIT press, Cambridge, 1989.

26. Jackson, J. H. *The World Trade Organisation:Constitution and Jurisprudence*. London: The Royal Institute of International Affairs, 1998.

27. Kappel,R. "European Development Cooperation with Africa: The future of Lomé" Leipzig: University of Leipzig. Papers on Africa Politics and Economics Series No 3, 1996

28. Kiplagat, K. "Fortress Europe and Africa under the Lomé Convention: from policies of paralsis to dynamic response" (1993) North Carolina Journal of International and Commercial Law Regulation 589

29. Matthews, D. E. Lomé IV and ACP/EEC Relations: Surviving the Lost Decade (1991) 22 Cal. W. Int'l L.J.1 at p.24

30. McMahon, J. A. *Agricultural Trade, Protectionism and The Problems of Development: a Legal Perspective*. Leicester University Press, London. 1992.

31. McMahon, J.A. "Lome V: towards a new trade horizon" [1997} Wed Journal of Current Legal Issues http://webjcli.ncl.ac.uk/1997/issue4/mcmahon4.html

32. Nkrumah, K. *Neo-colonialism: The Last Stage of Imperialism*. London: Panaf Books Ltd,1965.

33. Okigbo, P.N. C. *Africa and the Common Market*. London: Longmans, 1967.

34. Otieno-Odek, J. "Lomé IV: Dynamic or Static Improvement on Previous Conventions?-the sub-Saharan Africa Perspective" Comp & Int. Law Journal of Southern Africa vol. 27 (1994) 164

35. Oumar Sy, S. "The Birth of the ACP Group." *The Courier* No. 93 September – October 1985.

36. Patterson, G. *Discrimination in International Trade: The Policy Issues 1945-1965*. Princeton: Princeton University Press,1966

37. Ramgoolana, Dr. The Hon. N. "Achieving Economic Growth in Africa: The Mauritian Experience" Lecture delivered at Harverd University 25th September 1998.
38. Rodeny, W. *How Europe Underdeveloped Africa*. Nairobi: Heinemann, 1989.
39. Ruggiero,R. Special Report Concerning Preparation for the First Ministerial Conference-Singapore. 30th September 1996. *WTO Focus Newsletter*. August/ September 1996
40. Rydelski, R.M.S. "The Future of the Lomé Convention and its WTO Compatibility" 13 European Journal of Economic Law 398
41. Sloman, J. *Economics*. New York: Prentia Hall 1992
42. Smith, K. A.. *Creating the World Economy: Merchant Capital, Colonialism, and World Trade*. Boulder: Westriew Press, 1991.
43. Sraffa, P. (ed.), *The Works and Correspondence of David Ricardo*. Cambridge: Cambridge University Press, 1951.
44. Steiner, J. and Woods, l. *Textbook on EC Law*. 5th ed. London: Blackstone Press Limited, 1997.
45. Steven, C. "The Consequences of the Uruguay Round for Developing Countries," *World Trade after the Uruguay Round: Prospects and Policy Options for the Twenty-first Century*, ed. Harald Sander and Andras Inotai. London: Routlege, 1996. p.72-73
46. *The Courier* No 31 Special Issue March 1975
47. *The Courier* No 89 January- February 1985
48. *The Courier* No. 120 March-April 1990
49. *The Courier* No. 155 January-February 1996
50. The First Lomé Convention
51. The Fourth Lomé Convention
52. The Second Lomé Convention
53. The Third Lomé Convention
54. Tibazarwa, C.M. *From Berlin to Brussels: 100 Years of Afro-European Co-operation*. Durham: Pentlad Press Ltd, 1994.

55. *Treaty concerning the Accession of the Kingdom of Denmark, Ireland, the Kingdom of Norway and the United Kingdom of Great Britain and Northern Ireland to the EEC and the EAEC..(and) the ECSC*, Brussels, January 1972.

56. Tussie, D. *The Less Developed Countries and The World Trading System: A Challenge to the GATT*. New York, St Martin's Press,1987.

57. *Understanding on Rules and Procedures Governing the Settlement of Disputes.* (Dispute Settlement Understanding) Annex 2 to the Final Act.

58. Vale, C.J.P. "The Lomé Conventions: From Sunday Chari ty to a New International Economic Order" South African Institute of International Affairs, 1980.

59. Watkins, K. *Fixing the Rules North South Issues in International Trade and the GATT Uruguay Round.* London: Catholic institute for International Relations,1992.

60. Wiesholoff, H.A. *Colonial Policies in Africa*. Philadelphia: University of Pennsylvania Press, 1944.

61. Williams, M. *Third World Co-operation: The Group of 77 in UNCTAD*. London: Printer, 1991.

62. Williams, M. *International Economic Organisations and The Third World.* Hertfordshine:Harvester,1994.

63. World Trade Organisation (WTO) Dispute Settlement Bulletin http://www.wto.org/wto/about/dispute0.htm

64. World Trade Organisation (WTO). *Developing Countries and the Uruguay Round: An Overview*. Committee on Trade and Development 77th Session 21 and 25 November,1994. Note by Secretariat 19th November 1994. See http//www.wto.org/legal/ldc_512.htm#Trade in Goods

65. World Trade Organisation (WTO). *Final Act Embodying the Results of the Uruguay Round Multilateral Trade Negotiations* .Marrakesh, 1994; 33 ILM 1140

66. World Trade Organisation. *Trading into the Future*. Geneva: WTO,1995

67. Wyatt, D. and Dashwood, A. *Wyatt and Dashwood's European Community Law*. 3rd ed. London: Sweet and Maxwell, 1993.

68. Zartman, W. *The Politics of Trade Negotiations between Africa and the European Economic Communtiy*. Princeton: Princeton University Press, 1971.

## WEB SITES

As at 26th April 1999


1. http://www.wto.org/wto/about/dispute0.htm
2. http://www.ksg.harvard.edu/cid/speech
3. http://webjcli.ncl.ac.uk/1997/issue4/mcmahon4.html
4. http://carryon.oneworld.org/edpm/pubs/wp26_gb.html
5. http://www.cbea.org/cbea2/wto/index-fr.htm
6. http://www.europa.eu.int
7. http://www.wto.org/about/facts2.htm#mfn
8. http://www.wto.org/wto/develop/regional.htm
9. http://www.wto.org/wto/dispute/bulletin.htm
10. http://carryon.onerworld.org/ecdpm/pubs/wp39_gb.html.