THE EUROPEAN COMMUNITIES AND AFRICAN, CARIBBEAN AND PACIFIC (ACP) COUNTRIES: POLITICAL, ECONOMIC AND LEGAL EFFECTS OF THE SINGLE EUROPEAN ACT 1986 ON POST-1992 ECONOMIC RELATIONS

by

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ABSTRACT.

THESIS TOPIC: THE EUROPEAN COMMUNITY AND AFRICAN, CARIBBEAN AND PACIFIC (ACP) COUNTRIES: POLITICAL, ECONOMIC AND LEGAL EFFECTS OF THE SINGLE EUROPEAN ACT (SEA) 1986 ON POST-1992 ECONOMIC RELATIONS.

This thesis is an attempt to examine in full the likely impact of the SEA 1986 on the economic relationship between the EC and the ACP.

It begins with a historical introduction to their economic relationship and an analysis of the various Yaounde and Lome Conventions that were signed between the two blocs. An attempt is then made to look at the likely impact of the SEA, with a fully-implemented Single European Market (SEM) after 1992, on their present economic relations from a legal as well as an economic perspective. In particular, the likely effects of the GATT negotiations at the Uruguay Round will be examined.

Other questions concerning the monetary arrangements between France and her 13 ex-colonies in Africa under the CFA Franc Zone arrangement, as well as the enduring problem of huge external indebtedness of the ACPs to the EC and other developed countries, will be examined and suggestions will be made towards achieving lasting solutions.

Chapter III deals mainly with the trade negotiations leading to the various Conventions that were signed between the two blocs. These will be examined critically with a view to suggesting improvements to the quality and style of negotiating future Conventions so that more satisfying results can be achieved from the point of view of both the ACPs and the EC.

Chapter IV examines the nature of transfer of technology between the two blocs. The

relevant provisions of the Lome Conventions will be looked at and attempts will be made to evaluate their preparedness or adequacy for tackling specific problems which the ACPs face when trying to transfer technology from the EC to their respective countries. Efforts of the UN Conference on Trade and Development (UNCTAD) and other international bodies will also be looked studied and critiqued. Finally, suggestions will be made towards the better improvement of technology transfer agreements so that the ACPs can begin to attain their long-desired technological advancement and self-sufficiency. The effect of the final unification of European Markets under the SEM after 1992 will also be examined in this context.

In Chapter V, basically, further suggestions are advanced and the social and political problems of most ACPs countries are examined. African countries are used as a case-study for this purpose but Caribbean countries are also looked at particularly in their attempts at achieving economic integration. These are evaluated and reasons adduced for their partial success or failure. Points made in preceding chapters are summarized in the hope that an overall picture of the EC-ACP economic relationship (especially on the eve of a completely unified SEM) will emerge and that the suggestions advanced towards tackling the challenges that arise will be fully appreciated.

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DEDICATION.

I dedicate this thesis to the enduring memory of my beloved mother, Mrs. Esther Aiyowieren Omonuwa (nee Ehioghae), who was called home on Saturday, 11th February, 1989.

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INTRODUCTION

There has been a lot of scholarly attention paid recently to the economic, as well as political and legal implications, of the proposed Single European Market (SEM) after 1992 on trade relations between the European Community (EC) and those countries that make up the trading bloc that has come to be known as the Africa, Caribbean and Pacific (ACP) countries[1], such as Nigeria. Regrettably, the focus has been on the likely negative results of the Single European Act (henceforth, the Single Act) 1986 on EC-ACP trade after 1992. It would appear that not much attention is being paid to the other side of the coin, that is, the likely positive effects. This paper seeks to examine, in some detail, the possible advantages and challenges, as well as disadvantages, which the largest single market in the world would present to the majority of the world's population who reside in the Third World. An attempt will be made in this essay to discuss the historical background to the European economic union and to examine its objectives for Europe and Europeans. Against this context, its implications for African and Third World countries in terms of trade, investment, monetary affairs and external debt, will be studied and the Lome Conventions between the EC and ACP states will be examined. An attempt will then be made to proffer suggestions to meet the challenges that would undoubtedly be presented by the Common Market.

The negotiations which resulted in these Conventions will also be critically examined with

[1] Most of the scholarly writing that has been done before now has been mainly on the economic implications and not so much on the legal implications.

a view to assessing the negotiating skills of the ACPs and suggestions will be made towards improving future negotiations so that the ACPs can reach agreements which would be economically beneficial to them.

The provisions of the Lome Conventions on transfer of technology between the EC and the ACPs will also be looked at and an attempt will be made to evaluate the appropriateness of these provisions with respect to controlling the restrictive business practices of EC Multinational corporations operating in the ACP countries. Suggestions will be made towards the solution of this problem especially in the light of efforts by the UN Conference on Trade (UNCTAD) and other international bodies in this regard. Political as well as legal issues arising out of the Single Act will be examined.

CHAPTER I

1. Historical Background:

The Common Market represents the fusion of two movements towards unity, the one economic and the other political, which Europe has witnessed since the end of World War II.

After World War II, indeed, Europeans became conscious of the need to deepen and strengthen the ties between them. Hence, an economic movement aimed at strengthening co-operation in Europe while at the same time reducing the commercial fragmentation from which the continent was then suffering. With time it became apparent that if they were to do more in the economic field they had to go further than mere co-operation and to commit themselves to integration: it became necessary, in other words, not merely to try to promote contacts between separate economies but on a broader front and in depth, to seek to merge the economies themselves. This conviction was by no means theoretical, but based directly on experience.[1]

After World War II, some leading European politicians, such as Sir Winston Churchill,[2] supported by the United States of America, had begun to suggest that it was time to rebuild Europe. They sought to rebuild Europe in a more co-operative and dynamic way that would pave the way for effective cultural, peaceful, economic and industrial co-operation.

This led to the establishment in 1949, of the Council of Europe, as an avenue through which

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[1] Ibid., p.2.

[2] On September 19th, 1946, in a speech at Zurich University, Sir Churchill proposed a "sovereign remedy", which was to "recreate the European family, or as much of it as we can, and provide it with a structure under which it can dwell in peace, in safety and in freedom. We must build a kind of United States of Europe". He went on to say something that will astonish you. "The first step in the recreation of the European family must be a partnership between France and Germany", at that time, it needs foresight as well as courage to make such a suggestion. Churchill went on to conclude his speech by proposing that his recreation of Europe should start by the setting up of a regional structure and to form a Council of Europe.

Europe could subscribe to a common forum. The enabling statute which was signed by ten European countries in London on May 5, 1949 represented a victory for those European states which favoured a "functional" approach to unity as opposed to outright federation. They favoured an approach based upon voluntary co-operation between states retaining their full sovereign powers, but which co-operation would, however, extend into various sectors of their economy and of their social and cultural policies.[3]

Under the Council of Europe were established:

(a) a Committee of Ministers; and

(b) a Consultative Assembly.

(a) The Committee of Ministers

This Committee was made up of one representative from each country and each member country had one vote. The representatives were the respective Ministers for Foreign Affairs or alternates who would be, wherever possible, members of their governments (Art. 14).

Decisions of the Committee were initially taken in the main by the unanimous vote of representatives casting a vote, and a majority of those entitled to sit. However, procedural questions were decided by a two-thirds majority; this last category included admission of new Members, adoption of the budget, recommendations for amendment of the statute (but not amendment of the voting article, Art. 20, for which unanimity was required), and decisions on questions arising from the findings of the Commission on Human Rights.

The operation of the unanimity rule caused considerable difficulty, for it virtually granted

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3 Bowett, The Law of International Institutions, 3rd ed., p.151.

a power of veto and retarded the work of the Committee.[4] The Committee therefore agreed in 1951 to a system whereby "Partial Agreements" could be reached, thus allowing Members in favour of a particular proposal to proceed with it without the participation of non-assenting Members. However, this system was not used until April 1956, on the adoption of the European Settlement Fund; it was not used by the "Six" who, in establishing the European Coal and Steel Community in 1951, preferred to act right outside the framework of the Council of Europe.[5]

The scope of the functions of the Committee were very wide and rather vague. Article 15 provided,

"(a) On the recommendation of the Consultative Assembly or on its own initiative, the Committee of Ministers shall consider the action required to further the aim of the Council of Europe, including the conclusion of conventions or agreements and the adoption by Governments of a common policy with regard to particular matters. Its conclusions shall be communicated to Members by the Secretary-General.

(b) In appropriate cases, the conclusions of the Committee may take the form of recommendations to the Governments of Members, and the Committee shall request the Governments of Members to inform it of the action taken by them with regard to such recommendations."

Thus, it is obvious that the Committee was not vested with the powers to take binding decisions on the Governments; its only power was to recommend matters to the Governments. It was in no sense an executive organ. Its wide functions were to be carried out under extremely limited powers, the only power to take binding decisions being related solely to questions of internal organization (Article 16).

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4 Ibid., see the views expressed at p.153.

5 These six countries were France, Germany, Italy, Belgium, the Netherlands and Luxembourg.

(b) The Consultative Assembly

The composition of the Assembly was quite unusual. It consisted of 140 representatives, each Member being represented by a number corresponding to its population size. France, Germany, Italy and the UK had 18 representatives each, Turkey 10, Belgium and Netherlands 7, and so on to a minimum of 3 for Iceland, Luxembourg, Cyprus and Malta. Article 25(a) of the statute permits a Member's Parliament to allow direct suffrage by the national electorate of the representatives to the Assembly at Strasbourg but the election has tended to be by the Members of the Parliament of their fellow parliamentarians.

The function of the Assembly was purely deliberative. Article 22 of the Statute described it as a deliberative organ, with power to make recommendations to the Committee of Ministers. The conclusions of the Assembly were presented to the Committee in the form of "recommendations", requiring a two-thirds majority vote, or of "resolutions" or "opinions" requiring a simple majority; resolutions could also be addressed directly to governments. The difference was largely one of terminology; although in general recommendations called for action by the Committee and resolutions did not, and opinions were given on matters or questions referred to it by the Committee. The essential point was that they were all of purely persuasive character; the Assembly could not bind the Committee or any State by its actions, thus preventing it from having any real legislative power. This was further compounded by the fact that whilst the Assembly tended to demonstrate considerable initiative, the Committee demonstrated conservatism and even apathy,[6] and the Statute contained little format for liaison between the two organs. This uneasy relationship predictably stunted the ability of the Council of Europe to perform aggressively the task of unifying Europe along the lines its founders had planned.

Military co-operation among European States happened relatively easily primarily because of the Soviet Union's strongman, Stalin. Stalin still controlled a sizeable portion of Europe. On March 17, 1948, the UK, France, Belgium, Netherlands and Luxembourg had established the Brussels Treaty Organization, purportedly for collective self-defence under Article 51 of the United Nations Charter.[7] However, this organization was almost immediately recognized as being inadequate because it had been set up in the first place to provide security against a threat (from Germany) which was now of secondary importance owing to recent developments.

The Berlin blockade and the Communist Coup in Czechoslovakia in February 1948 increased the alarm and by June 1948, the Vanderberg Resolution was adopted by the US Senate, authorizing the government to associate the ISA with alliances for defensive purposes. As it had become increasingly clear that the needed security could not be guaranteed by the collective security machinery of the UN Security Council, the Western powers came together on April 4, 1949 to sign the North Atlantic Treaty with the aim of

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6 Bowett, ibid., p.156.

7 Art. 51 of the United Nations Charter reads,
"Nothing in the present Charter shall impair the inherent right of individual or collective self-defense plans if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.

creating a regional security organization capable of defending Western Europe and North America.[8] This treaty was originally signed by 12 States, including the U.S.A., Canada and Iceland, but it lay open to other European States and in 1952, Greece and Turkey also joined. The number was brought up to fifteen by the accession of West Germany.

Article IV of the NATO Treaty provided that the Parties agreed to "consult together, whenever, in the opinion of any of them, the territorial integrity, political independence or security of any of the Parties is threatened". Under Article V, the Parties agreed that "an armed attack against one or more of them in Europe or North America shall be considered an attack against them all . . .". The Treaty established a Council, as well as a host of civil and military Committees.

Other unions which developed around this time were the transformation of the Brussels Treaty Organization into the Western European Union (WEU) in 1954, with an enlarged membership and a new leave of life,[9] and the Organization for Economic Co-operation and Development (OECD). The OECD was the result of the reconstitution on December 14, 1960 of the Organization for European Economic Co-operation (OEEC) which had been established by a Convention of April 16, 1948 to promote economic co-operation among European States. The OECD however, by its Article 16 provided that membership would be open to "any Government" by unanimous invitation of the Council, and Canada, Japan and USA, which had been mere associate members of the OEEC became full members of the OECD.

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[8] (1949) 43 A.J.I.L. Supplement, 159.

[9] For a more detailed discussion of the WEU, see Bowett, ibid., pp. 165-168.

By this time, the European economic recovery had been virtually completed and the goals of the OECD as listed in Article 1 summarized the maintenance of economic growth and the promotion of economic development, both within and without the territories of the Members themselves, as opposed to restoration of European Economy which the OEEC Convention had stated. In the main, Article 1 of the OEC Treaty defined its goals as being "to achieve the highest sustainable economic growth and employment and a rising standard of living, in Member countries . . . and thus to contribute to the development of the world economy", to "contribute to sound economic expansion in Member as well as non-Member countries . . .", and "to contribute to the expansion of world trade on a multilateral, non-discriminatory basis". The treaty established a Council, which was the principal organ, comprising all Members, and from which all acts of the Organization derive (Art. 7). It further established the Executive Committee (Art. 9) and various other Committees. It established its Secretariat in Paris.[10]

The foregoing is intended to give a background to the progress towards the establishment of the Common Market in Europe. Various economic integration efforts which subsequently emerged (other than the Treaty of Rome 1957)[11] and which are relevant to the Single Act include:

(i) the signing in 1944 of the treaty establishing the BENELUX Customs Union (between Belgium, the Netherlands and Luxembourg) by which customs duties were eventually abolished among the parties;

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[10] See generally, Bowett, ibid., pp. 168-176.

[11] See the European Economic Community Treaty, i.e. The Treaty of Rome signed in 1957 by Belgium, Germany, France, Italy, Luxembourg and the Netherlands.

(ii) the European Coal and Steel Community (ECSC) Treaty signed at Rome on April 18, 1951 by West Germany, Italy, France, Belgium, the Netherlands and Luxembourg, which was designed to eliminate national as well as monopolistic restriction on Coal and Steel among the Members. It aimed to create a single market for coal, steel and iron by eliminating all barriers to free, competitive trading such as tariff barriers, quota systems, all forms of price discrimination (including those in transport), restrictive agreements and cartels; and

(iii) the European Free Trade Association (EFTA) which was established in 1960 between Austria, the United Kingdom, Denmark, Norway, Portugal, Sweden and Switzerland as their own response to the Treaty of Rome. The EFTA Treaty provided for free movement of goods and services as well as a customs union among its members.[12]

On March 25, 1957, the treaty establishing the European Economic Community was signed in Rome by the six continuing members of the ECSC - i.e., France, Germany, Italy, Belgium, the Netherlands and Luxembourg. The European Community (EC) formerly

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[12] Adedeji, A., "Africa and the Single European Act 1986", paper presented at a seminar organized on Europe by the Federal Ministry of External Affairs, Lagos on June 14th, 1990. Professor Adedeji is the immediate past Executive-Secretary of the United Nations Economic Commission for Africa. See also Bowett, ibid., p.178. See also, Palmer M., and Lambert, J., et al, European Unity: Co-operation and Integration, Unwin University Books, 1967, pp.26-27. Here, the authors state, "After its successful administration of Marshall aid (provided by the U.S.A. government under President Truman), OEEC succeeded in removing quota restrictions from a high proportion of intra-European trade in industrial goods and in organising a multi-lateral payments system within Europe which paved the way for the convertibility of European currencies at the end of 1958. Since the OEEC was unable to go further in the freeing of trade or the creation of economic union in Europe, however, the main thrust of economic organization in Europe passed to the European Economic Community (EEC), which was established in 1958 and which soon led to the establishment of the European Free Trade Association (EFTA) by most of the other OEEC members. With OEEC split effectively into two groups, it was decided to transform the organization into the Organization for Economic Co-operation and Development, of which Canada and the United States were also full members".

European Economic Community (EEC)[13] developed a magnetism in the 1960s spurred by its ambitious goals of economic growth for Europe. At this time too, the EC began to identify its own interest, particularly within the framework of multilateral trade negotiations, and in its relations with developing countries. These trends attracted the interest of other European countries like Britain who had earlier been skeptical about its fruitfulness. In 1971, following the completion of intricate negotiations involving the Common Agricultural Policy (CAP), the independent funding of some EC activities, and planning for an economic and monetary union, Britain, Ireland and Denmark joined the Community.[14]

This enlarged membership added new weight and new problems which lay

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[13] On April 8, 1965, the institutional set up of the European Communities, i.e., the EEC Treaty, the European Atomic Energy Community (EURATOM) Treaty 1957, and the ECSC Treaty 1951 was simplified by the Treaty establishing "a Single Council and a Single Commission of European Communities", commonly referred to as the Merger Treaty. This treaty became effective on July 1, 1967 and from that date there was therefore one Council, one European Commission, one European Court, one Assembly, and, indeed, one European Community.

[14] See the European Communities Act passed 1972 in Britain. Although Britain joined the Community in 1971, the Treaty of Rome did not become binding on British citizens until the enabling Municipal Act was passed for EEC membership. President Charles De Gaulle of France almost unilaterally opposed Britain's membership and pressured on the other Member States to reject Britain's application. His reasons were founded upon: (i) the close economic ties between Britain and the U.S.A. which President De Gaulle felt would pave way for the Americans to dominate or manipulate the EEC as they had done with the NATO (and which had motivated President De Gaulle to order the withdrawal of French forces from the NATO and also of NATO forces from French territory), and (ii) the poor state of Britain's economy at the time. This, De Gaulle felt, would pollute the EEC. As a result of these reasons, the EEC in 1963 abandoned negotiations with Britain over her application for membership.

In 1967, there was a change of government in Britain and the new Labour government decided to apply again to join the EEC. Again, President De Gaulle of France opposed her application, ostensibly for the same reasons, and once again, Britain's application to join the EEC was rejected. However, De Gaulle had to leave office in France shortly after this second attempt, for a catalogue of domestic reasons not unconnected with the state of the French economy at the time.

In 1969, the Labour government in Britain made a third attempt at joining the EEC and this time the application was successful. Denmark, Ireland and Norway had also applied at the same time, but while Britain, Denmark and Ireland were admitted in 1971, Norway stayed out of it because the Norwegian people had voted in a referendum against joining the EEC on the basis that joining the Community would mean that any citizen of any Member State would be able to own land in Norway, a concept which they considered unacceptable.

fundamentally in the distrustful attitude of the nations of the new entrants to their respective governments' decisions, which generally promised to stunt the ability of their governments to operate effectively in the Community.[15] Further, the energy crisis of 1973 caught Europeans unaware and seemed to reveal through reactions in individual member States, a shallow resolve to meet common crises collectively. The uncertainty, recession and virtual stagnation which followed in respective member states dampened all hopes of achieving full economic and monetary union by 1980 as had earlier been postulated. Indeed, some member States flirted with the thought of seeking alternative strategies which would better improve their own inflationary or recessionary conditions even though at the expense of partner countries.

However, the EC gained an impetus in the later 1970s with three new and ambitious objectives for further developing the Community. These were: (1) the institution of direct election to a European Parliament; (2) efforts to revive progress towards economic and monetary union by creating in 1979 a new European unit of account and pooled reserves to

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[15] In the United Kingdom for instance, members of the public and indeed of the Prime Minister's Cabinet, expressed reservations about the extent to which Britain should get involved in the Community. Many resented the idea of a power which was external to Britain but which appear to prevail over the British Parliament in law-making. It curtailed the British sovereignty especially as all national laws were expected to be harmonized to conform with Community law and in case of conflict Community law prevailed. Further, all subsequent domestic legislation were expected to agree with prior Community law or they would be void to their extent of their inconsistency. In 1975, Britons voted in a referendum whether or not to stay in the EC; they voted 2 to 1 in favour of staying in the Community. See the 1975 decision of Lord Denning M.R. in BULMER v. BOLLINGER [1975].

In that case, Lord Denning M.R. led the Court of Appeal in deciding on the question whether domestic legislation could be passed in Britain subsequent to the European Communities Act of 1972, which legislation may not be consistent with the provisions of the EEC Treaty of Rome (1957) which was incorporated into British law by the EEC Act 1972. The Court held that Community rights and obligations were part of British law by virtue of the 1972 Act and thus had to be obeyed. The Court further held that in the spirit of that finding, any subsequent domestic legislation which was inconsistent with the intendment of the 1972 Act would be void to the extent of the inconsistency. This was the first network of instructions by the Superior Courts in England and Wales on what Community Law meant. It also meant that decisions of other Member's Courts on areas of Community competence were binding on British courts and had to be looked at and brought into the system of stare decisis.

back it; and (3) the further expansion of the Community to include Greece, Portugal and Spain.

The Treaty of Rome, by its provisions, sought the removal of customs duties and import and export quotas between member States (Art. 2(a)); the establishment of a common tariff and commercial policy for states outside the Community (Art. 2(b)); and abolition within the Community of obstacles to free movement of persons, services and capital (Art. 2(c)); the inauguration of common agricultural policies (Art. 2(d)); the establishment of a system ensuring competition (Art. 2(f)); the adoption of procedures for coordination of domestic policies (Art. 2(g)); and for remedying balance of payments disequilibria (Art. 2(e)); as well as the removal of differences in national laws necessary for the operation of the common market. It also created a European Social Fund (Art. 2(i) to educate and train displaced workers and to raise their standard of living. It established a European Investment Bank (Art. 2(j)) to facilitate economic expansion as well as an Assembly (Art. 4(1), primarily equipped to review (but not reject) decisions made by Council and the Commission. In addition, the Treaty of Rome assimilated the European Court of Justice which had been created in 1951 by the ECSC Treaty of Paris and which performed functions similar to those of the International Court of Justice (ICJ) at the Hague (Art. 4(1)). The Council and the Commission were established in their functions by an Advisory and Social Committee (Art. 4(2)).

The Treaty of Rome was clarified and modified by the Single Act. This Act was adopted in December 1985 at the Luxembourg Summit and entered into force on July 1, 1987.[16] In June 1985, the Commission sent a White Paper to the European Council entitled, "Completing the Internal Market". This was the beginning of Operation 1992. It lays down a programme and timetable for the abolition of barriers of all kinds in inter-state trade, the harmonization of rules, the approximation of legislation and tax structures, and the strengthening of monetary co-operation. To complete the internal market, the White Paper provides for removal of physical, technical and fiscal barriers. It was inter alia to make the implementation of this comprehensive programme possible that the Member States decided to amend the existing Treaties through the Single Act.

The main features of the Single Act are the strengthening of the decision-making power of the Community by extending qualified majority voting. This was the basic Constitutional change which the Act made.[17] The Act also enlarges the scope of the Community on a number of issues under the prerogative of the Member States and broadens Community competence and co-operation to include foreign policy.[18] Further, the Single Act specifically deals with Economic and Social Cohesion (Regional Development Fund), Research and Technological Development and Environment, and provides for closer involvement of Parliament in the legislative procedures.

On the whole, the essential features of the economic and monetary union as proposed

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16 See Mathijsen, A Guide to European Community Law, Chap. 2, p.13.

17 Ibid. See also Fairclough, A.J., "European Community after 1992 - Consequences for Africa", paper presented at a seminar organized on Europe by the Federal Ministry of External Affairs, Lagos, June 1990. Mr. Fairclough is a Special Adviser to Manuel Marin, Vice President of the European Commission.

18 Gakunu, P., "A.C.P. Trade After 1992: Co-operation or Confrontation", paper presented at a seminar organized on Europe by the Federal Minister of External Affairs, Lagos, June 12th, 1990. Mr. Peter Gakunu is the Chief, Trade and Customs Co-operation Division, General Secretariat of the African Caribbean and Pacific Group of States.

by the Commission are:[19]

(i) a common monetary policy directed by a new Community Institution, Eurofed. The system would be independent and subject to democratic scrutiny. It would be legally committed to price stability and would entrust to the twelve national central banks the task of implementing the monetary policy decided by the Council and its Board:

(ii) a regular dialogue between Eurofed and those responsible for economic policy in the Community with a view to promoting consistency between internal monetary policy and external exchange rate policy and co-ordinated economic policies;

(iii) a single currency, the ECI, to exploit to the full the potential benefits of the Single Market and to continue the competitiveness and dynamism of Community economy;

(iv) in the budgetary policy field, a system of co-ordination and voluntary constraints designed to guarantee both consistency with the stability oriented monetary policy mix accompanied by selective reinforcement of the Community budget's role in order to contribute to macro-economic convergence and cohesion.

2. The Community Institutions

(a) The Commission

Until the Merger Treaty was signed in Brussels, in April 1965, the Commission consisted of nine members. However, as at 1991, it has 17 members, with 6 Vice-Presidents. Every country has a Commissioner in the Commission with Britain, France, Germany and Italy having 2 each. A President is elected for a term of two years and is

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[19] See Fairclough, op. cit.

renewable. The Vice-Presidents are also elected for two years and their term is also renewable. The Commissioners however are elected for four years and can be re-appointed. Appointments are made unanimously by member governments. The Treaty provides that the members of the Commission should be chosen for their 'general competence' and they take an oath of independence from their national governments and of loyalty to the Community. Some of the members are former Ministers of member countries, or proven politicians while others have held senior international posts.[20] The Commissioners are not to be seen as Multi-headed Civil Servants or Secretary-Generals. The appointment of the President and Vice-Presidents is intended to be rotated among the different member countries. However, the dynamism of the particular President would influence the operational effectiveness and policies of the Commission at any given period, e.g., the dynamism of the incumbent President Jacques Delors has been of no mean significance in the achievement of the goals of the Commission particularly with the Single Act.

The Commission has an Executive Secretariat, and a Spokeman's Group for relationship with the Press. The Commission takes important decisions of policy including the draft regulations or decisions to be submitted to the Council, after full discussion, and if necessary by a majority vote, numerous minor questions are settled by written procedure.

The Commission is the initiator of almost all policy decisions, and plays the role of honest broker in the Council in promoting the necessary compromise between the different national interests involved. It is also the executive organ of the Community, and powers are vested in it to carry through the decisions taken by the Council. Finally, it is the watchdog

[20] The current British Prime Minister, John Major, had been President of the European Commission for two terms and then Chancellor of the Exchequer, Home Secretary before being appointed as Prime Minister.

or custodian of the Treaty, entrusted with ensuring that the basic text and all subsequent Community legislation are correctly observed.[21]

Article 235 of the Treaty of Rome deals with lacuna in the treaty. It is the job of the Commission to make proposals to the Council, on the basis of consultation with the assembly, in order to expand the scope of the Treaty to include those areas where there are gaps. Thus, the duties of the Commission can be said to summarize the co-ordination of national policies; where the treaties (after the Merger the Commission catered for the ECSC, the EEC, and the EURATOM) are silent on a matter, to make proposals to Council; the general administration of the Community as provided for by the Treaty, ensuring that the Treaty obligations were respected; expansion of the scope of the Community by bringing in and vetting new Members and Associate Members; and the expansion of the Treaty where necessary.

(b) The Council

The Council is the major political organ of the Community. The members are often Ministers of Foreign Affairs of their home countries and they represent the interests of their countries and not the interest of the Community. With respect to the other Community Institutions such as the Commission and the Court of Justice, the members are answerable to the Community and owe their allegiance to it rather than to their respective countries. It is an expert body and engages in decision-making but ratification is required for accountability.

Article 3 of the Merger Treaty 1965 states that the Council shall meet when convened

[21] Palmer, M. and Lambert, J., op. cit., p.173.

by its President on its own initiative or at the request of one of its members or of the Commission. Under Article 4 of the same treaty, a special Committee consisting of the Permanent Representatives of the Member States shall meet regularly and be responsible for preparing the work agenda of the Council and for carrying out the tasks assigned to it by the Council. Article 5 requires the Council to adopt its own rules of procedures.

(c) The Court of Justice

The Court of Justice is an essential element in the constitutional structure of the Communities. It was set up by the Treaty of Paris and its competence was extended by the Treaty of Rome to the two other Communities. Indeed, the three European Treaties contain an identical provision to describe the task of the Court: it "shall ensure that in the interpretation and application of this Treaty the law is observed.[22] This short and sibylline text covers a varied series of activities.[23]

The Court's task is complicated by the fact that Community law is basically economic law which, by definition, is essentially evolutive and in need of constant updating, while respecting the basic general principles. The interpretation and implementation of the Treaty provisions is thus in continual evolution, the more so, since only part of the Treaty provisions are drafted with detailed precision.[24]

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[22] EEC, Art. 164.

[23] Mathijsen, op. cit., p.68.

[24] Ibid. See also Case 27/80 Fietje [1980] E.C.R. 3839 at 3853(8) where, as in other cases, the Court refers to the evaluative character of Community law with the words "at the present stage in the development of Community law . . ."

Consequently, when called upon to state what Community law is in a given field, it is in the first place by reference to the objectives of the Community that the Court interprets the existing rules and formulates new ones, the so-called teleological interpretation. Furthermore, the task of the Court is not only to interpret, but also to state what the law is when the Community provisions do not explicitly provide the answer. This is not peculiar to the Court since "wherever there are courts, the law grows at the hand of the judges",[25] but for the reasons mentioned above, this applies particularly in the case of the European Community.

It is important for this reason for the judges to be politically independent, more so since the Council tends to act as an inter-governmental conference where every member fights for his country's interests. Furthermore, Parliament does not have all the powers required for exercising an effective democratic control and the Commission, which besides its overwhelming administrative tasks must also fulfill a political function, is bound to accept compromises in the implementation of Community legislation by the Member States.

The Court can only express itself in judgments[26] and when called upon to do so; nevertheless it has been able, over the years, to build up a set of rules which were of prime importance in the shaping of the Community. This happened mainly through rulings concerning the interpretation of the Treaties and the secondary Community legislation, at the request of national courts confronted with questions of interpretation of the Community rules applicable in cases pending before them.

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25 Schwarzenberger, International Law, p.24.

26 Exceptionally also in "opinions", see EEC, Art. 228(1).

The European Court of Justice (ECJ) can be distinguished from the International Court of Justice (ICJ) which was established under the United Nations Charter. The latter's jurisdiction with respect to treaties is only as good as the Member States. In other words, it has no jurisdiction on a particular treaty, over a Member-State which is not a signatory to or has not ratified that treaty. Member States can also refuse to consent to its jurisdiction no certain aspects of a particular treaty. Finally, its effectiveness is also weakened by the fact that cases have to be brought by the particular nations whose interests can be said to have been injured by the acts or omission of other nations. For the Asian countries, for instance, litigation is anathema to their political thinking.

The ECJ can also be distinguished from the European Court of Human Rights which was established pursuant to the European Convention of Human Rights which Convention was a product of the Council of Europe. A European Commission for human rights was set up which would receive complaints or 'applications' from both states and individuals. While the complaining nation needed to have signed the Convention, the complaining individual only needed to be within the territory of a State which ratified the Treaty.[27] The Commission can then refer those cases it cannot resolve to the Court of Human Rights. However, the Court depended firstly on consent, i.e., the State applying or in which the individual applicant is, has to have accepted the jurisdiction of the Court and in the latter case, the right of individual petition as well. Only the Commission or High Contracting Parties can take matters to the Court, but usually it is the Commission.

In other words, with the European Court of Human Rights (ECHR), jurisdiction

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27 States which had ratified the Convention were regarded as High Contracting Parties.

depends also on consent but once a State has consented it accepts its compulsory jurisdiction in all aspects of the Convention.

However, with respect to the ECJ, every Member of the European Community is automatically subject to the Court's jurisdiction in all aspects of the Treaty. Furthermore, cases can be brought by any member of the Community and a case can even be taken directly to the Court by a natural person, i.e., individual access. This was the first time any Court in the World would have such jurisdiction. It reflects precisely what the framers of the Treaty of Rome had in mind, i.e., to set up a Court of Justice which would mediate and arbitrate on the extent and nature of the rights and obligations of the Council vis-a-vis the Commission and the way the two institutions act with the Member States, and as between the Member States themselves and finally as between the Member States and individual citizens.

Members of the Court

The Court consists of thirteen Judges and is assisted by six Advocate-Generals; the latter, however, are not "members" of the Court. The Judges and the Advocate-Generals "shall be chosen from persons whose independence is beyond doubt and who possess the qualifications required for appointment to the highest judicial offices in their respective countries"[28] or "who are juris-consults of recognized competence".[29]

The Judges and the Advocate-Generals are appointed for a term of six years by

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28 EEC, Art. 167; this means that qualifications are determined in accordance with national law.

29 This provision makes it possible to include persons without a law degree, as was the case in the first ECSC Court.

common accord of the Governments of the Member States;[30] however, every three years a partial replacement of six, alternatively seven, Judges and three Advocate-Generals takes place in order to ensure continuity on the bench. Retiring Judges and Advocate-Generals are eligible for reappointment.

The President of the Court is elected by the Judges[31] from among their number for a term of three years and he may be re-elected.

The thirteen Judges are grouped in five Chambers of three and five Judges each;[32] cases brought before the Court are normally heard by one of these Chambers. However, when the Court hears cases brought by a Member State or an institution, or when the Court has to give a preliminary ruling,[33] the Court shall sit in plenary session.[34]

The position of the Advocate-General is a particularly interesting one: their independent position (they do not participate in the discussions that lead to the Court's decision) allows them to carry out their own personal examination of the case and express personal opinions, something the Judges cannot do. They can also examine any related question not brought forward by the parties. Although the reasoned oral submissions they present in open court do not necessarily reflect the Court's views, they often contain precious

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[30] Further provisions concerning the Judges and Advocate-Generals are to be found in the Protocol on the Statute of the Court of Justice annexed to the Treaty and in the Rules of Procedure.

[31] It goes without saying that the choice is the object of informal discussions with the Governments of the Member States, since some kind of geographical equilibrium is desirable among the Presidents of the various institutions and organs of the Community.

[32] EEC, Art. 165(2).

[33] See EEC, Art. 177.

[34] EEC, Art. 165(3).

indications in regard to the reasoning which led to the decision. Those submissions are published, together with the judgments, in the Court's Reports.[35]

The Court's Jurisdiction

In the order of the Treaty provisions, the court's jurisdiction consists mainly of the following:

(i) to find whether or not a Member State has failed to fulfill an obligation under the Treaty; actions can be brought either by the Commission or another Member State;[36]

(ii) to exercise unlimited jurisdiction with regard to penalties; actions can be brought by natural and legal persons;[37]

(iii) to review the legality of an act, or of a failure to act, of the Council and the Commission at the request of Member States, the Council or the Commission and, under certain conditions, Parliament[38] and natural and legal persons;[39]

(iv) to give a preliminary ruling at the request of a national court or tribunal;[40]

(v) to grant compensation for damage caused by the institutions; actions can be brought against the Community by Member States and natural or legal persons;[41]

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35 Mathijsen, op. cit., pp. 71-72.

36 EEC, Arts. 169, 170 and 171.

37 EEC, Art. 172.

38 EEC, Art. 173.

39 EEC, Arts. 173-176.

40 EEC, Art. 177.

41 EEC, Arts. 178 and 215.

(vi) to decide in disputes between the Community institutions and their servants;[42] and

(vii) to act as Court of Appeal for the judgments of the Court of First Instance.[43]

When the Commission or a Member State considers that a Member State has failed to fulfill an obligation it may bring the matter before the Court of Justice. The Court's jurisdiction in cases brought against a Member State consists merely in "finding" that the State in question has failed to fulfill an obligation under the Treaty. Where such a finding is made, the Member State "shall take measures to comply with the judgment of the Court".[44]

In order to ensure compliance with obligations laid down by its regulations, the Council may make provisions for penalties to be imposed in case of infringement, on natural or legal persons. The latter have the right to ask the Court to review the basis of the decision taken and also, under its unlimited jurisdiction to review the amount of the fine fixed under such provisions.[45] When the Council wants to grant unlimited jurisdiction to the Court, it must do so explicitly. Under this jurisdiction, the Court may not only suppress the fine, but it may also decide to increase or decrease it.

In reviewing the legality of Community acts, the Court protects all those who are subject to Community Law against arbitrary action of the institutions, but it also ensures that Community activities remain within the boundaries laid down by the Treaty and that the institutions respect the balance of powers within the Community.

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42 EEC, Art. 179 although only on appeal from the Court of First Instance.

43 SEA 1986, Art. 168a.

44 EEC, Art. 171.

45 EEC, Art. 172.

Within the Community, the Member States, the Council and the Commission are considered to have an overall interest in the correct implementation of Community law, and have therefore, subject to a two-month time limit, an unlimited right to initiate proceedings aimed at controlling the legality of Community acts. Natural and legal persons, on the other hand, must prove their specific and particular interest in such a control. In this respect, it is assumed that acts having a general application concern everybody and nobody in particular. Therefore, they cannot, normally, be challenged in Court by individuals, unless it can be shown that these acts contain provisions which in reality have an "individual" rather than a "general" application. This can be the case with an act taken in the form of a general act, e.g., a regulation, or with an indiviual act, e.g., a decision, but addressed to another person.[46]

The Court of First Instance.

Since 1989, the Court of Justice also functions as a court appeal from the decisions of the newly created Court of First Instance.[47]

An appeal may be brought before the Court within two months of the notification of the decision appealed against. This decision may concern a final decision, a decision disposing of the substantial part of the substantive issues only or a decision disposing of

[46] See Joined Cases 41-44\70 <u>International Fruit Company</u> v. <u>Commission</u> [1971] E.C.R. 411 at 422(21) (Where the Couft held that Art. 7 of Reg. 983\70 "is not a provision with a general application but must be analyzed as a bundle of individual decisions"); Case <u>Roquette Freres</u> v. <u>Council</u> [1980] E.C.R. 3333. See also Mathijsen, op cit, pp. 68-98.

[47] Council Dec. of October 24, 1988, establishing a Court of First Instance of the European Communities, O.J. 1988, L319/1.

procedural issues concerning a plea of lack of competence or inadmissibility.[48]

The appeal may be brought by the unsuccessful party (the interveners when the decision directly affects them), the Member States and the Community institutions.[49]

An appeal to the Court shall be limited to points of law. It shall lie on the grounds of lack of competence of the Court of First Instance, a breach of procedure as well as the infringement of Community law.[50]

If the appeal is well-founded, the Court shall quash the decision and may itself give a final judgment or refer the case back to the Court of First Instance.[51]

As provided for in the Single Act[52] the Council attached to the Court of Justice[53] "a court with jurisdiction to hear and determine at first instance, subject to a right of appeal to the Court of Justice on points of law only and in accordance with the conditions laid down by Statute, certain classes of action or proceedings brought by natural or legal persons".[54] This Court of First Instance started functioning in November 1989.

There are twelve members in this Court which are chosen from persons whose independence is beyond doubt and who possess the ability required for appointment to judicial office. They are appointed by common accord of the Governments of the Member

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48 Protocol on the Statute of the Court of Justice (as modified by the above-mentioned Dec.) Art. 49(1).

49 Ibid., Art. 49(2).

50 Ibid., Art. 51.

51 Ibid., Art. 54.

52 SEA, Art. 11.

53 Council Decision of October 24, 1988, O.J. 1988, L319/1.

54 EEC, Art. 168A(1).

States for a term of six years. The membership is partially renewed every three years, and retiring members are eligible for re-appointment.[55] They elect their President for three years.

The members of the Court of First Instance may be called upon to perform the task of Advocate-General; contrary to the Court of Justice there are no appointed Advocate-Generals, but their task is the same[56] and they may make their submissions in writing.[57]

The Court of First Instance only sits in chambers of three of five judges.[58] It establishes its rules of procedure in agreement with the Court of Justice; those rules require unanimous approval of the Council.[59]

The Court of First Instance exercises at first instance the jurisdiction conferred by the Treaty on the Court in:

(a) disputes between the institutions and their servants;[60]

(b) actions brought against the Commission by undertakings concerning ECSC levies, production, prices and agreements and concentrations;[61]

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55 EEC, Art. 168A(3).

56 Decision of October 24, 1988, Art. 2(3).

57 Ibid., Art. 9(46(3)).

58 Ibid., Art. 2(4).

59 EEC, Art. 168A(4). Since the Rules of Procedure have not been adopted yet, the Court of First Instance presently applies the Rules of the Court of Justice.

60 See EEC, Art. 179. See Case T159/89 Vitranyani v. Commission. Another 153 cases were transferred from the Court of Justice; Dec. of October 24, 1988, Art. 14.

Cases from the Court are from now on preceded by the letter C (for Court) and the cases before the Court of First Instance by the letter T (for Tribunal).

61 Dec., Art. 3(b) and ECSC, Arts. 50 and 57 to 66.

(c) actions brought against an institution by natural or legal persons relating to the implementation of EEC competition rules applicable to undertakings;[62]

(d) actions for compensation for damage caused by an institution through an act or failure to act which is the object of an action for which the Court of First Instance has jurisdiction;[63] and

(e) actions brought against an institution concerning dumping and subsidies, if the Council so decides after two years of operation of the Court of First Instance.[64]

Most of the rules provided for in the Protocol on the Statute of the Court of Justice apply to the Court of First Instance,[65] however, the Court of First Instance may dispense with the written procedure.[66]

Where a case is referred back by the Court of Justice, the Court of First Instance shall be bound by the decision of the Court of Justice on points of law.[67]

(d) The European Parliament

Before the Merger Treaty, this institution was referred to by all the Treaties as the Assembly, the Council and several Members States to calling it the "Parliament".

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62 Ibid., at (c) and EEC, Arts. 85 et seq.

63 Dec. Art 3(2).

64 Ibid., at (3). See EEC, Art. 113.

65 Ibid., Art. 9 (46 et seq.).

66 Decision, Art. 9(52). The first judgment was given on January 30, 1990, only two weeks after the formal hearing; York von Wartenburg v. Parliament.

67 Ibid., Art. 9(55(2)).

However, back in 1962, the Assembly decided to call itself the "European Parliament".[68] The Single Act refers to the institutions "designated as referred to hereafter" and the reference is always to the "European Parliament".[69]

However, it should be noted that this institution does not have the powers which are characteristic of democratic parliaments, i.e., the powers to legislate and raise taxes, and also, the term "European Parliament tends to create the illusion that democratic control already exists in the European Community. There is, strictly, no question yet of a legislative power.[70]

What purpose then, did the framers of the Treaty of Rome have in mind when they drafted the provisions of the Treaty relating to the Assembly (i.e., the Parliament)? They intended to create a body which would propagate the advancement of a collective political power, i.e., to emphasize Community power. The Commission members are appointed by the Council and so there is a compromise between the two bodies. The Commission is influenced to an extent by the Council and therefore cannot be too effective in propagating Community ideals as opposed to national interests.

Election of Members

According to the Treaty, Parliamentconsists of "representatives of the people brought together in the Community", (EEC, Art. 137) and exercises advisory and supervisory

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[68] Resolution of March 30, 1962 (J.O. 1962, 1045). On March 20, 1958, the Assembly had decided to call itself, "European Parliamentary Assembly".

[69] SEA, Art. 3(1).

[70] Mathijsen, op. cit., p.17.

powers.

Until June 1979, i.e., the date of the first direct elections for Parliament, the members were simply designated by the respective national Parliaments from among their members, and in accordance with the procedure laid down by each Member State.[71] It was not until September 20, 1976 that the Act concerning the Election of the Representatives of the Assembly by Direct Universal Suffrage was finally adopted by the Representatives of the Member States in Council.

Elections by direct universal suffrage must be held "in accordance with a uniform procedure in all Members States",[72] but agreement in such procedure has not yet been obtained and all the elections until now were held in accordance with the method of voting decided nationally.[73]

Presently, Parliament is comprised of 518 representatives distributed nationally as follows: 81 each for the larger Member States (Germany, France, Italy and the United Kingdom), 60 for Spain, 25 for the Netherlands, 24 for Belgium, Greece and Portugal, 16 and 15 respectively for Denmark and Ireland and 6 for Luxembourg.[74]

It took twenty-seven years before direct elections to the Parliament could be instituted

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71 EEC, former Art. 138; this Art. lapsed on July 17, 1979 in accordance with Art. 14 of the Act concerning the election. The method of "designating" the members was intended as a temporary procedure - although it lasted 27 years. Art. 21(3) of the ECSC Treaty already provided for election by direct universal suffrage. Agreement concerning the implementation of this provision was finally reached at the Summit Conference (forerunner of the European Council) held in Paris in 1974.

72 EEC, Art. 138(3) and Act concerning the election, Art. 7(1) and (2).

73 All Member States, except the United Kingdom, apply with some variations a proportional representation system via party lists.

74 EEC, Art. 138(2), as last modified by Art. 10 of the Act of Accession ESP/PORT.

because the Member States were in no hurry to see direct elections to the Parliament. Already, many saw the Community as an assault to their individual sovereignty. But when the United Kingdom, Ireland and Denmark, and then Greece, Portugal and Spain joined the Community, they tipped the balance in favour of direct elections.

Members Mandate

Members of the European Parliament (MEPs) are elected for a term of five years and can be re-elected. Anybody can stand for Parliament,[75] it being understood that upon election the rules concerning incompatibility[76] apply. Under the old rules, MEPs had to be members of a national Parliament, now the Act concerning direct election simply states that there is no incompatibility between the two offices.[77] Although it must be admitted that fulfilling two mandates is a nearly impossible task, it would appear that the disjunction between the two -
only very few MEPs still have a double mandate - has estranged the European Parliament from the national ones, thereby eliminating a good chance for political integration.[78]

During the sessions of Parliament, the representatives enjoy the privileges and immunities accorded to members of national parliaments when in their own country, and

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[75] Including, e.g., in the UK, peers and Ministers of religion who are excluded from election to Westminster.

[76] Act concerning direct election, Art. 6(1) and (2). Where an elected candidate does not wish to relinquish an office which is incompatible with that of an MEP, he will be replaced, pending the entry into force of the uniform electoral procedure, in accordance with procedures laid down by each Member State.

[77] Ibid., Art. 5.

[78] Mathijsen, op. cit., p.19.

immunity from detention and legal proceedings when on the territory of another Member States.[79]

Tasks and Powers

According to the Treaty, Parliament exercises only "advisory and supervisory" powers and although the SEA has introduced a "co-operation procedure" between the Council, Commission and Parliament for the adoption of certain Community acts, the tasks and powers have remained, on the whole, unchanged.[80] The Treaty of April 22, 1970, which amended certain budgetary provisions of the original three Treaties and of the Merger Treaty, did confer upon Parliament certain budgetary powers.[81] Nonetheless, Parliament still does not exercise the main attributes of an elected representative body such as legislation and the raising of taxes.

The tasks of Parliament, as defined in the Treaty, are as follows:

- to participate in the legislative procedure;
- to put questions to the Council and the Commission;
- to adopt a motion of censure where it disapproves of the activities of the Commission;
- to discuss the annual General Report submitted to it by the Commission;
- to participate in the budgetary procedure;
- to initiate procedures in the Court of Justice against the Council or the Commission in case they failed to act, or to protect its own rights and to intervene in other cases;

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[79] Protocol on the privileges and immunities of the European Communities of April 8, 1965, Att. 10. See, e.g., Case 149/85 Wybot v. Faure [1986] E.C.R. 2403; it follows that Parliament is always "in session".

[80] Mathijsen, op. cit., p.19.

[81] EEC, Art. 203 as amended.

- to participate in other activities of the Communities.[82]

Internal Organizations

Parliament is made up of political parties (called "groups") and parliamentary committees.

The Representatives sit in eleven multi-national political groups, but the Act concerning the elections stipulates that they shall vote on individual basis and shall not be bound by any instruction nor receive a binding mandate.[83]

The Rules of Procedure of Parliament require for the formation of a political group 21 representatives when they belong to one single Member State, 15 when they come from two Member States and 10 when the number of Member States is three or more.[84]

This rule was ostensibly formulated to encourage the formation of trans-national groups which is one of the main characteristics of the European Parliament.

The Rules of Procedure also provide that Parliament can set up standing or temporary, general or special committees and determine their task. These committees prepare the resolutions to be adopted by Parliament in plenary sessions.

Parliament elects a President and 12 Vice-Presidents which together form the "Bureau", i.e., the executive body. This Bureau drafts the agenda of the sessions, decides on matters of competence and makes up the preliminary draft of Parliament's budget.[85]

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e Mathijsen, op cit, pp. 15-3

[83] Act concerning direct election, Art. 4(1). There are no Party whips in the European Parliament.

[84] Rules, Art. 36.

[85] Rules, Arts. 5-7, 12 and 50.

3. Relationship With African, Carribean and Pacific Countries - How It Began

(a) Political and Economic Basis of the Relationship

As a result of skilled and forceful negotiation by France, the Six agreed in founding the EEC, to take over a share of the responsibilities of certain Member States towards their dependent countries and territories in the rest of the world. Part IV of the Treaty established an association, the purposes of which were to promote the economic and social development of the overseas countries and territories and to establish close economic relations between them and the Community as a whole. There was also added, the "Implementing Convention relating to the Association with the Community of the Overseas Countries and Territories". The association involved three elements: the freeing of trade with the associates at the same tempo as within the Community; the granting of direct aid in the form of investments by the Community as a whole; the establishment of other institutions.[86]

In Part IV of the Treaty of Rome and the Implementing Convention, the conditions of Association of the Overseas Countries and Territories of France, Italy, the Netherlands and Belgium were laid down for a five-year period.[87]

The association policy of the EEC can only be understood within the framework of the French colonial policy after the Second World War. For the association of the overseas countries and territories with the EEC was particularly the consequence of the special constitutional, economic and monetary relations of France with its colonies.[88]

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[86] Palmer, M. et al, op. cit., pp. 230-231.

[87] Dodoo, C. and Kuster, R., "The Road to Lome", in Alting von Geusau, F.A.M., (Ed.), The Lome Convention and A New International Economic Order, Sijthoff-Leyden, 1977, p.16.

[88] Ibid.

At the time of the negotiations on the establishment of the EEC, France still had many colonies in Africa which were directly governed from Paris and were subject to a kind of direct economic colonialism. In addition, the four Communes, St. Louis, Alsace, Rufisque and Goree which were cities of these French colonies were regarded as France Overseas cities and their citizens with the implication that they enjoyed the same rights and benefits as any citizen of Paris. This meant that the colonies' economies were developed corresponding to the French national economy and that they were, in fact, a part of it. France formed together with its colonies a centralised and closed area, which was determined by special relations between France and its colonies, such as the trade system, the monetary system of the "zone franc" and also budgetary aid. [This will be discussed in detail later.] The commercial relations were also very important. In 1955, for example, 23% of imports to France came from and 32% of its exports went to its overseas territories.[89] Furthermore, the economic and trade policy which France applied within the monetary system of the "zone franc" implied that its colonies were strongly dependent on the French market for the sale of their products.[90] For the products from its overseas territories had been exempted from tariffs and/or quantitiative import restrictions on the French market and certain tropical products could even be sold against guaranteed prices (the "suprix" system). These special relations implied that France claimed a special treatment of its African colonies as a condition to become a member of the EEC. For France it was not possible to accept the establishment of a customs union, implying a free trade area with a common external tariff

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[89] Ibid.

[90] Ibid., p.17.

vis-a-vis non-EEC members, including its African colonies. France wanted to create to some extent a link between its overseas territories and the EEC because of the economic and monetary unity it formed with its colonies.

France therefore claimed that the overseas countries and territories should be associated with the EEC, implying the establishment of a free trade area between the overseas countries and territories in the EEC.

Furthermore, France claimed from the other EEC members that they should participate in the financial aid which it was giving to its colonies. France contributed yearly a considerable amount to the development of its overseas territories. This financial burden might have hampered its competitive position on the Common Market.[91] By asking their future partners to participate in this financial assistance simultaneously, some sort of compensation would be given for the opening of the French overseas markets to their products. However, the French motives cannot be explained by economic motives alone. There was also a political motive. France also tried to promote a broader cooperation between two continents with complementing economies, which perhaps might be able to play a very important role in the world power relations in the future.

Initially, Germany and the Netherlands had opposed the French proposals primarily because they felt that the preferential treatment of the associated territories would harm the exports from other developing countries to the Common Market. This could have indirect effect on the German and Dutch exports to these countries because their trade relations were

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[91] Ibid.

traditionally more directed at Commonwealth Africa and Latin America than on French colonies.[92]

In the end, however, Germany and the Netherlands had to accept the association of overseas countries and territories because France claimed acceptance from the other EEC members as a condition for signing the Rome Treaty. Eventually, the six EEC members agreed that the non-European countries and territories "maintaining special relationships with Belgium, France, Italy and the Netherlands", should become associated with the EEC (Part IV of the Rome Treaty, Arts. 131-136) and the Implementing Convention). It was to last five years.

(b The Independence of Overseas Countries and Territories and the Association Conventions: Legal Issues.

This association found its basis in an agreement between the six Member States of the Community without participation by the overseas countries and territories concerned. It was established by the EEC on their behalf. Shortly after the coming into force of the Rome Treaty most former territories achieved independence. It followed that their legal status changed with independence as they ceased to be mere affiliates or appendages of France and the other former colonial masters but were in fact of equal sovereign status. However, their economic status did not correspondingly change, as, for instance, the former French colonies, continued to depend on France for the sustenance of their economies. Not surprisingly, the newly independent states requested that the association regime be continued until the end of the stipulated period of five years. They went further to request for a possible new association treaty to take place on the basis of equality of states concerned, on the expiration

92 Ibid., p.18.

of the five-year term. The extent to which the Yaounde I, Yaounde II and Lome Conventions which subsequently resulted can be said to have been truly 'equal' for all parties concerned will be discussed later.

However, in reply to the associated countries' request that the regime be replaced by a new treaty, Germany and the Netherlands held the view that, since they were now politically and economically as well as legally independent, Articles 131-136 ought not to be the legal basis of the proposed new Convention. Article 131 stated as follows: "The purpose of association shall be to promote the economic and social development of the countries and territories and to establish close economic relations between them and the Community as a whole".

This, they argued, ceased to be of effect if the countries attained independence and thus creased to be "overseas countries and territories" of the six EEC members. They argued that the proper legal basis for any new Convention would be Article 138 which provides for association between the EEC and non-Member States.[93]

France, on the other hand, held the view that the association should be a permanent framework for Euro-African co-operation and it should be based on Article 131 of Part IV of the Rome Treaty, the original basis of the association. This implied that the associated countries were entitled to ask for continuation of the association and, which was more important, to receive development aid. The problem of the legal basis of a new association agreement was not explicitly solved and it was concluded without indicating its legal basis.[94]

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93 Ibid., p.19.

94 Ibid., p.20.

(c) The Yaounde Conventions.

After Germany and the Netherlands had given up their objections to the continuation of the association, and in return France agreed in principle to a reduction of the common external tariff on a number of tropical products it was possible to agree on a new Convention.

The negotiations between the European Community and 17 African States and Madagascar (AASM) resulted in a Convention which was signed on July 20, 1963 in Yaounde, the capital of Cameroun. This Convention did not enter into force until June 1, 1964, because of a delay in the ratification procedure, as a result of the cooling of relations between the Dutch and the French after the latter had opposed the attempt of Britain to join the EEC. This new Convention was called, "The Convention between the European Community and the African and Malagasy States associated with the Community" and was concluded for a period of five years, i.e., to expire on May 31st, 1969.

This Convention will be discussed in detail later but it is pertinent to point out here that there were a few differences between the Yaounde Convention and the Implementing Convention which were the result of changes in the political situation and necessary economic adjustments. These economic adjustments were the consequence of internal developments within the EEC, especially brought about by the establishment of the common agricultural policy.[95] The free trade principle of the first association agreement was maintained, namely, the reciprocal granting of tariff preferences for industrial products and for some tropical products. However, on a certain number of tropical products, such as

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[95] Cohen, R., "Europe and the Developing Countries", in Everts, P., The European Community in the World, Rotterdam University Press, 1972, p.112.

coffee, tea, cocoa and tropical fur, the EEC preferences were unilaterally reduced or even abolished by reducing the common external tariff in order to meet the wishes of the non-associated developing countries which was strongly supported by Germany and the Netherlands. Furthermore, the agricultural products exported by the associated countries to the EEC, which were comparable to or competitive with agricultural products produced within the EEC, were controlled by special trade arrangements. However, to give some compensation to the associated countries for the abolition of a number of preferences and the establishment of new trade arrangements for certain agricultural products, the financial aid by the European Development Fund (EDF) was increased from 581.25 million units of account (u.a.) to 730 million u.a. The changed political situation was expressed by the fact that for the first time joint association institutions were set up to administer the Yaounde Convention, namely, the Association Council, the Parliamentary Conference of Association and the Court of Arbitration.[96]

In December, 1968, the negotiations on the renewal of the Yaounde I Convention started between the EEC and AASM in line with the provisions of the Yaounde I Convention.

Significant about these negotiation and the ensuing Convention was the fact that the AASM wanted far more than the EEC was willing to give. Thus, the Convention which was signed in July 1969, in Yaounde and entered into force on January 1, 1971 did not fundamentally change the pattern established earlier despite the sharp complaints of the

[96] Dodoo, C. and Kuster, R., op. cit., p.21.

associated countries. There were only a few small differences.[97]

In general, it improved certain technical rules and the resources of the EDF were increased from 730 million u.a. to 918 million u.a. This was done to compensate the reduction of preferential arrangements which was a continuation of Yaounde I. Yaounde II will be discussed in detail in Chapter 2 of this thesis.

In the meantime, those overseas countries and territories which did not become independent and for whose foreign policy the EEC countries continued to be responsible continued to be associated with the EEC on the basis of Part IV, on a five-yearly basis. The structure of the arrangements remained similar to the Yaounde Conventions except that they did not have joint institutions. In addition, the negotiations for these overseas countries and territories (OCT) did not include those countries and territories but were simply between the responsible EEC countries and the other EEC members.

(d) The Commonwealth Countries of Comparable Economic Structure and Production: The Association Agreement with Nigeria and the East African Community.

The negotiations that resulted in the first Yaounde Convention coincided in part with the negotiations on the accession of the United Kingdom to the Community following the declaration by Prime Minister Harold MacMillan in July 1961 that Britain would apply for EEC membership. One of the most important problems treated during these negotiations concerned the relations with Commonwealth countries. Negotiating for the United Kingdom, Mr. Heath proposed the association of the Commonwealth developing countries without making a distinction between South East Asiatic States on the one hand and dependent and

[97] Schiffman, C., "A Negotiation and a Convention", The Courier, No. 31, Special Issue, March 1975, p.4.

independent states in Africa, the Caribbean and the Pacific on the other hand. However, the EEC classified the latter group, for the first time in the so-called classification "Deniau", classification according to the essential characteristics of the export trade of the Commonwealth countries and of the kind of problem posed with regard to the provisions of the Rome Treaty. On the basis of this classification it was decided that for the dependent Commonwealth States, association would be the best solution whereas the independent states in Africa and the Caribbean could accede to the new Yaounde Convention; if so desired other arrangements could be looked for.

In January 1963, the negotiations with the United Kingdom were broken off after the initialling of the Yaounde Convention but before the signing of the Convention. However, this did not have any effect on the possibility of admitting developing Commonwealth countries to the group of associated countries for under these circumstances, some of the Member States of the EEC, especially Germany and the Netherlands, only wished to proceed to the signing of the Convention after safeguarding that the developing Commonwealth countries could also benefit by this Convention.

This guarantee was given by a Declaration of Intent issued by the Six on April 1st and 2nd, 1963, which came simultaneously into force with the signing of the Yaounde I Convention and which was repeated at the signing of the Yaounde II Convention. This declaration, which was meant to stress the open character of the association, stated that the EEC was willing to extend the Yaounde Convention or other similar instruments to other countries having an "economic structure and production comparable with those of the AASM".

These non-associated developing countries (notably the Commonwealth countries) could choose out of the following possibilities:

- Participation in the Yaounde Convention, which governed the relations between the Community and the AASM.
- Conclusion of one or more special association agreements on the basis of Article 238 of the Rome Treaty, which would cover reciprocal rights and obligations, especially in the field of trade.
- Conclusion of simple trade agreements with a view to facilitate and to develop their trade with the EEC.

According to the EEC point of view the developing countries from the Commonwealth were not to be allowed to suffer from the failure of the negotiations between the EEC and the United Kingdom. It would not, the EEC felt, be reasonable to refuse them the privileged links with the Community which they had been allowed to expect. Furthermore, some EEC countries, such as Germany and the Netherlands, saw in this declaration of intent a possibility to reduce the post-colonial aspects of the Yaounde Convention.[98]

Nigeria and the three East African States, Uganda, Tanzania and Kenya appealed to this declaration and all four countries opted for the second solution - a special association based on Article 238 of the Rome Treaty.

The first association agreement was signed with Nigeria in Lagos on July 1, 1966 and would have expired on the same day as the Yaounde I Convention. However, this association was never brought into force because it could not be ratified before its expiry

[98] Dodoo, C., and Kuster, R., op. cit. p.26.

date owing to internal political problems in Nigeria, viz., the civil war involving Biafra. After that, a new request for negotiations was never submitted by the Nigerian government until the start of the negotiations of the Lome Convention. The association agreement with Tanzania, Uganda and Kenya, which had established on June 6, 1967, the East African Community, was concluded which existed during the same period as the Yaounde II Convention.

Unlike the Yaounde Conventions, the Lagos and Arusha agreements did not include any technical and financial clauses, they had not been requested either. With respect to trade and the institutions, the provisions were similar to those of the Yaounde Conventions with a few exceptions. These will be discussed later. In order to take into account the interests of the associated states of the Yaounde Convention, the preferential treatment for some important export products of Nigeria and the East African States were subjected to some quantitative limitations. Moreover, the three East African States were obliged to see to it that the overall volume of tariff concessions and the balance of concessions among the Member States are maintained during the lifetime of the treaty.[99]

The institutional provisions of the Lagos and Arusha agreements were less far-reaching than those of the Yaounde Conventions, because the former were more limited in scope. There was just an Association Council and a Court of Arbitration. One Commonwealth state, Mauritius, appealed to the first option of the declaration of intent and acceded to the Yaounde II Convention. The agreement making Mauritius the 19th member of the Yaounde Convention was signed at Port Louis, the capital of the island, on May 12,

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[99] Mutharika, B.W.T., "The Trade and Economic Implictions of Africa's Association with the Enlarged European Economic Community", Economic Bulletin for Africa, Vol. X, No. 2, May 1974, p.42.

1972.

(e) The Enlargement of the EEC, and the Process That Led to the Lome I Convention:

On January 7, 1973, Britain, Denmark and Ireland became full members of the European Community with the same right sand obligations as the original six members. This implied that the question of association of developing countries with the EEC got new importance because Britain's accession entailed several problems concerning the Commonwealth developing countries:

- For the Commonwealth African countries, the British market was a major outlet for their export products.
- Britain was very anxious to keep the markets in its former colonies and that is why it was necessary, in its own interest, to work out a reciprocal satisfying arrangement for them.
- It would be inconsistent with the provisions of the Rome Treaty to maintain separate preferences (Commonwealth preferences) of EEC members towards third countries and outside EEC areas.[100]

On the ground of these problems, the EEC development policy, which was almost limited to French Africa, was not acceptable to Britain. According to the British point of view it was necessary to establish machinery to ensure that to those Commonwealth countries for which it was needed, possibilities should be given to safeguard their trade and economic interests within the enlarged Community.

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[100] Krohn, H., "Das Abkommen von Lome Zwischen der Europaischen Gemeinschaft und den AKP-Staten", Europa-Archiv, Folge 6/1975, pp. 177-178.

Britain's strong trade relations with the developing countries implied that it was considered necessary to guarantee the privileges enjoyed by each party concerned. Therefore, two possibilities for the future policy of the EEC vis-a-vis developing countries were put forward during the negotiations on the accession of Britain to the EEC:

- The first possibility would be to replace the association policy vis-a-vis French Africa by a global development policy.
- The second possibility, which was chosen at the end, was to extend the association's policy to the Commonwealth countries in Africa, the Caribbean and the Pacific, and to improve its contents.

However, at the summit meeting of the EEC in Paris, in October 1972, it was decided that besides the regional association policy ought to be developed step by step.[101] This was expressed by the Communique of the Summit Conference which stated: "The Community must, without detracting from the advantages enjoyed by countries with which it has special relations, respond even more than in the past to the expectations of all the developing countries". This implied a dilemma between "conserving the privileges of the associates" (strongly supported by the French government) and "measures such as most-favoured-nation tariff reductions or the generalized scheme of preferences, which are important for non-associated developing countries (mainly supported by the Dutch and the German governments).

This dilemma was the consequence of the fact that these measures, in so far as they benefited the poor non-associated developing countries, could have a diminishing effect on

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101 Dodoo, C., and Kuster, R., op. cit., p. 28.

the advantages of the associated developing countries.[102]

In accordance with the second possibility, the EEC made a detailed and precise offer of association to twenty independent Commonwealth developing countries in Africa, the Indian and Pacific Oceans and the Caribbean under Protocol 22 of the accession treaty with Britain, Denmark or Ireland. In this protocol, the declaration of interest of 1/2 April 1963 was inserted and the proposal was made to those independent Commonwealth countries that the negotiations envisaged for the conclusion of an agreement based on one of the formulae contained in the declaration should begin as from August 1st, 1973.

Accordingly, those independent Commonwealth countries which chose to negotiate within the framework of the first formula were invited to participate side by side with the AASM in negotiating the new convention to follow the second Yaounde Convention.

Certain difficulties had to be overcomed before the negotiations could start. Generally, the AASM were not too happy with the idea of having to share their benefits, especially in the field of trade, with the Commonwealth countries.[103] They also thought that the increase in the number of associated countries would reduce the financial and technical assistance which they received from the EEC under the Yaounde Conventions. Further, they were afraid to lose their identity by the arrival of the new partners especially Nigeria which had a much stronger economy and a population that almost equalled their joint populations.

But, during a meeting in Nouakchott in 1972, the AASM decided to join hands with

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[102] Pinder, J., "The Community and the Developing Countries: Associates and Outsiders", Journal of Common Market Studies, 1973, No. 1, p.53.

[103] Mutharika, op. cit., Pinder, op. cit.

the Commonwealth countries to negotiate a new Convention.

However, the Commonwealth countries had yet to decide whether to join. Many countries had mixed feelings about the true purpose behind the EEC's offer of association. Many felt it was a ploy to introduce a form of neo-colonialism. Others felt that association with the EEC would introduce inflexibilities in their economic policies and would therefore be harmful to economic development. Yet others were apprehensive about submitting to a regime established without their participation. There were, however, those who considered that association with the EEC would imply greater possibilities to develop their exports and to stimulate economic development.

Nigeria played a catalyzing role in getting the Commonwealth African countries and the AASM to agree to negotiate a new Convention. In 1973, the moment of choice, the presidency of the Organization of African Unity rested with Nigeria and once she declared herself for the negotiations, the other African countries began to follow. She put her full economic and political weight into the negotiations with the EEC in the high hope that the ensuing Convention would mean economic advancement for the poorest developing countries of Africa.[104] The Lome Conventions (I to IV) and their impact on the economies of the ACP countries will be examined in greater detail in Chapter 2, especially in light of the SEM after 1992.

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[104] Treaty of Rome, Part IV, Article 131.

CHAPTER II

A. ECONOMIC RELATIONSHIP BETWEEN THE EUROPEAN COMMUNITY AND THE ACP COUNTRIES

1. (i) The Association of African Countries

Article 131 of the Treaty of Rome provides for the association with the Community of the non-European countries and territories which have special relations with Belgium, France, Italy and the Netherlands.[1] The objectives of the Association were to

> "promote the economic and social development of the countries and territories and to establish close economic relations between them and the Community as a whole".

The territories referred to were: French West Africa (Senegal, the Sudan, Guinea, Ivory Coast, Dahomey, now known as Republic of Benin, Mauritania, Niger, Upper Volta), French Equatorial Africa (Middle Congo, later known as Congo Brazzaville, Ubangi-Shari, Tchad, Cameroon), St. Pierre and Miquelon, the Comoro Archipelago, Madagascar and dependencies, French settlements in Somaliland, New Caledonia and dependencies, French settlements in Oceania, Southern and Antarctic territories, Togo, Belgian Congo, Rwanda-Urundi, Somaliland under Italian trusteeship and Netherlands New Guinea.[2] In 1957, these territories were still administered by the European metropolitan powers; their association with the proposed

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[1] Treaty of Rome, Part IV, Article 131.

[2] Okigbo, P.N.C., Africa and the Common Market, Northwestern University Press, Evanston, 1972, p.26.

Community was not open to their choice. As a result of France's insistence, the association was a necessary consequence of the establishment of the Community: but the form had to be decided upon by the Six on behalf of the territories.

The Community was designed to evolve, through a customs union into an economic union; after a transitional period of twelve years, the six Community States would become an integrated market with a common external tariff, without restrictions on the movement of persons, goods and services and capital. With their population and natural resources, the Six would represent the largest single economic constellation in the world. Under the terms of the Treaty of Rome, the member states were to reduce their duties on goods originating from within the Community; the associated states were to benefit from these reductions but were also required to reduce the duties they charged on imports from the metropolitan member states. There would thus be relatively free movement of goods (and services) between the Community and the associated states. The division of labour would thus be pushed further: associated states would specialize in the production of those agricultural commodities for which they have special advantages (by reason of climate and geography) while the member states specialized in industrial goods and those agricultural commodities for which they had particular advantages.[3]

Yet, because of the disparity in economic power and the inequality in size, this arrangement would offer more real advantages to the Community than to the associated states. While the Community was proceeding to integrate the economies of the Six, the associated states, even after they became independent, would represent eighteen separate markets, each in isolation too small to have any influence on the course of the trade or policy of the others.

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3 Ibid., p.27.

Further, the eighteen associated territories put together had a smaller population than West Germany, a smaller national income than Belgium. Consequently, we had on one side the common market of the Six and on the other, eighteen separate and small markets. Close association as foreseen in Part IV of the Treaty of Rome would thus mean the absorption by Europe of these eighteen separate markets; in the circumstances, the Community would have eighteen captive markets in Africa.[4]

In return for this, the associated territories could claim two advantages: first, their exports could enter the markets of the Six at preferential rates of duty as a result of the reduction of the level of intra-Community duties and the progressive establishment of a common external tariff.

In the circumstances of 1957 to 1958, these might have been thought of as significant advantages. But armed with hindsight in 1963, the newly-emergent states began to see that the relative value of these concessions had become eroded by the agreements reached between the Community and the United Kingdom, and in the GATT (i.e., the General Agreement on Tariffs and Trade), to reduce the common external tariff on certain tropical products. However, there were still important tariff advantages for products like cloves, spices and nutmegs.

The second advantage stemmed from the establishment of an overseas development fund capitalized at 581.25 million u.a., i.e. units of account (each unit of account amounted to US$1). The fund was set up to finance development of an infrastructure and of social overhead capital. This multilateral aid for African countries was meant to supplement the aid they obtained from their metropolitan powers. If the Treaty of Rome was to incorporate independent territories

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[4] Ibid., p.28.

whose economies were so fragile, some scheme would have to be found to strengthen them. The overseas development fund was a programme designed to give concreteness to this idea.

The first principle, namely of accommodating the dependent territories within the scheme for a European economic community, had to be made consistent with the basic philosophy of the Treaty of Rome that there should be no discrimination between member states. Some member states had pockets of privileges in their overseas dependencies; the alternative would have been to make them abolish immediately these pockets of privileges or to reduce their incidence by gradually narrowing down the differential treatment between the metropolitan powers and the other member states. The second course was chosen as being easier, more manageable and more realistic.

The tariff concessions granted to the associated states would have been very significant if the markets of the Six were incapable of absorbing the output of the commodities traditionally traded by the African countries. But in virtually every case, the Community market had to supplement its supplies by imports from 'third' countries. However, although the associated states did not stand to gain very much in the short run, the assurance of a preferred access to the markets of the Six was bound to stimulate investment in agriculture.

The slow development of local industry was mainly due to indigenous rather than exogenous factors, e.g., the small size of the market showed some prospect of developing any industry of note - Senegal, Ivory Coast and Congo (Leopoldville). But of these three, the most promising from the point of view of resources, Congo, was plunged into a civil war from the time of its birth as a new nation, a war which has left its scars.

The growth of processing industries in the associated states would give them advantages over third countries. Their semi-finished agricultural products and semi-manufactures would consequently find a sheltered market in Europe although facing competition with similar products and manufactures from plants in Europe.

Overseas Development Fund - (The First Development Fund, 1958-1962)

One of the most important features of the Convention of Association of 1958 was the establishment of an overseas development fund for the social and economic development of the associated countries. The receipts from this fund represent the most concrete benefits that the associated states obtained from their association with the Community. The territories were required to submit to the Commission projects in social and economic development for which financing by the Community was required. On the basis of these submissions, the Commission would then prepare and submit programmes for:

(a) social development: hospitals, teaching and research establishments, vocational training institutions and institutions for professional training;

(b) general economic development including productive and specific development projects.

Under the Treaty of Rome, for the first five years, 1958-1962, 581.25 million units of account would be contributed and made available to the associated territories. Funds were to be allocated on a geographic basis. Belgium was to provide 70 million u.a., Germany 200 million, France 200 million, Italy 40 million, Luxembourg 1.25 million, and the Netherlands 70 million. Thirty million u.a. were to go to Belgian dependencies, 511.25 million u.a. were to go to French dependencies, 5 million u.a. to Italian dependencies and 35 million u.a. to Dutch dependencies.

France was thus being relieved of much of her burden of providing investment funds for her dependencies; these accounted for 87.8 per cent of the total planned disbursements between 1958 and 1962. The arrangement worked particularly against Germany which had no possession but was called upon to contribute as much as France.

One significant feature of this financing scheme was the possibility of carrying forward from one year to the next funds not spent on a particular project in a given year. This ensured continuity in implementing development projects - that once a project had been approved, funds would be released at the appropriate time and no uncertainty of funds would hamper the continuation of such projects.

By January 1963, five years after the original provision came into force, the Fund Management Committee had examined a total of 316 projects valued at $438.9 million. Of these, 162 projects worth $154.6 million were for social development, and 142 projects worth $264.9 million for economic development. As at January 1963, there were pending twelve projects worth $19.4 million awaiting approval. Provisional commitments had thus been made for nearly $438.9 million but there were additional provisions for contingencies ($15 million) for ancillary costs ($5.5 million) and for other projects ($2.9 million) bringing the overall total of commitments to $512.3 million out of the Fund's total resources of $581.25 million. The balance was fully committed by August 1965.

Every country received something: the significance of the receipt by each country depended partly on its size and the magnitude of its needs (and internal resources). For some territories, assistance from the Fund represented the only source of external aid after the assistance from the former metropolitan country. The most vocal critics of the 1958 association had not clearly understood the degree of dependence of these territories on external finance for their development. These critics were mainly from countries that had, at the time, large reserves of export surpluses, on which they could and did draw heavily for their own development.[5]

By 1961, all the newly-independent states had appointed representatives to the European Economic Community. The Commission immediately set about working out the basis for a new convention; this was submitted in 1961 to the Council of Ministers of the Six, the European Parliament and to the African and Malagasy states. Discussion had to be conducted at three levels: among the six to obtain a unanimous point of view as required by Article 136 of the Treaty; among the African and Malagasy states to have their common point of view in order to respect their new sovereignty; finally, among the eighteen African and Malagasy states and the six member states. In all these separate and joint dialogues, the EEC Commission played a definitive role.

(ii) The Yaounde I Convention

By 1960, some countries had formally asked that the association regime should continue. There were Togo, Ivory Coast (Cote D'Ivoire), the Central African Republic, Congo (Brazzaville), Gabon, Malagasy, Tchad and Upper Volta. By December, 162, the agreement was initialled and in July 1963 was signed at the 1st Yaounde Convention. It came into force in January 1964.

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[5] Okigbo, Africa and the Common Market, op. cit., p.36.

The Legal Basis of the Yaounde Convention, 1963

As it was stated in Chapter I, the original association of African territories had been established under Part IV of the Treaty of Rome; consequently, that association took its roots in the Treaty itself while the details of implementation were contained in an Implementation Convention annexed to, but forming an integral part of, the Treaty. However, the legal basis of the Yaounde Convention does not rest solely on Part IV of the Treaty of Rome but also under the relevant Articles of the Treaty authorizing the Community to make further treaties.[6]

The Treaty of Rome defines a procedure for concluding agreements which then bind member stats. During the transitional period, agreements arising from tariff negotiations were to be concluded under Article 111 and after that period under Article 113. Association agreements were to be concluded under Article 238. Consequently, agreements concluded under these articles in strict accordance with the rules in Article 228 would be binding on the institutions of the Community and on member states.[7]

The independence of the African territories altered the legal basis of the 'special relations' of these territories to their metropolitan powers, relations that justified Part IV of the Treaty of Rome. Any new treaty with the European Economic Community could no longer be made for the associated states on the old basis but would rank as treaties entered into by the Community with self-governing and sovereign states.

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6 Ibid., pp.43-44.

7 See the exposition of A. Sciolla-Lagrange, "The Preferential Areas Associated with the European Economic Community", in Expansion of World Trade, British Institute of International and Comparative Law, No. 7, 1965, pp.43-55.

Yet, in the Yaounde I Convention, nowhere was the source of the legal competence of the Community stated probably because of the irreconcilable positions adopted by Germany and the Netherlands as against France (discussed in Chapter I). The question therefore remains whether the Yaounde I Convention was a continuation, though in a modified form, of the original association under Part IV or whether it was an entirely new treaty.

This question remained open during the British negotiations in 1962. The Community had rejected the concept of association under Part IV for India, Pakistan and Ceylon, not on the grounds that they were already independent states, and that therefore Part IV would be inconsistent with their independent status, but because the structure of their economies and the importance of their manufacturing industries raised a set of problems not envisaged under Part IV of the Treaty of Rome.[8] This concept had, however, been accepted by the Community for Commonwealth African States although they had already attained independence by that date.[9]

Thus, while the Greek and Turkish Agreements rested specifically on Article 238, the Yaounde Convention did not explicitly state its legal basis. The Council of Ministers of the Six took their decisions under Article 136 in Part IV, which states:

> "For a first period of five years as from the date of entry into force of this Treaty, an Implementing Convention annexed to this Treaty shall determine the particulars and procedure concerning the association of the countries and territories with the Community.
>
> Before the expiry of the Convention provided for in the preceding paragraph, the Council, acting by means of a unanimous vote, shall, proceeding from the results achieved, and on the basis of the principles set out in this Treaty, determine the provisions to be made for a further period."

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[8] See Ernst Wohlfarth, "The European Economic Community and World Trade" in Expansion of World Trade, No. 7, 1965, pp.4-9.

[9] See EEC Sixth General Report for 1962-63.

Article 238 reads as follows:

> "The Community may conclude with a third country, a union of states, or an international organization, agreements creating an association embodying reciprocal rights and obligations, joint actions and special procedures.
>
> Such agreements shall be concluded by the Council acting by means of a unanimous vote and after consulting the Assembly".

When the newly independent African states came to negotiate in 1961, the Six were anxious to avoid the charge of neo-colonialism flung at them in 1958 for having 'imposed' on unwilling Africans an association with the Community. The Council did not therefore merely determine the provisions to be made for a further period under Article 136 but conducted negotiations with the Associated states. But the legal antecedents go back to Article 136 of Part IV. Indeed, the regime of preferences in the Yaounde Convention was, in outline, very closely bound to that established under Part IV, but a concession was made to the newly-won sovereignty of the African States in establishing joint institutions of association. The formal requirement for negotiating as equals was scrupulously observed: joint steering committees, working parties, ministerial meetings, rotating chairmanship of the meetings of the committees, and of ministers. But the basic documents and proposals that served as thematic materials were provided by the Commission and the final form of the Convention differed only slightly from the basic proposal of the Commission.[10]

Article 238 authorizes the Council of Ministers to conclude treaties of association on behalf of the Community and presumably on behalf of the member states. A straight forward treaty of association could be signed by the Council itself; but one like the Yaounde Convention, requiring member states to make financial contributions for the development of the

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[10] Ibid.

associated states went beyond the limit extended to the Council under Article 238. Only the member states themselves could, at law, assume such financial obligations. This explains why the member states as well as the Council were signatories to the Yaounde Conventions (as also to the Greek and Turkish Conventions). The Yaounde I Convention was therefore, juridically, a 'mixed agreement' in the sense that the Community and the member states are on the side jointly the contracting party.[11] Although the legal basis for the Yaounde Convention goes back to Article 136 in Part IV, it cannot be concluded that the Convention rested only on that Article; it must be regarded as deriving in part from Articles 136 and 238.[12]

Article 238 does not define the meaning, content or scope of 'reciprocal rights and obligations' that the Council can accept on behalf of the member states. Should these be limited only to those fields in which the Council has specific powers to assume international obligations? Or can the Council assume obligations under Article 238 in all fields in which it is internally competent? The second alternative which is wider and more generous is consistent with the elaboration of procedures introduced into Article 238.

The Nigerian Agreement (to be discussed later) on the other hand is perhaps the first association agreement entered into by the Community completely within the scope of Article 238. Juridically this marked an important step in the exercise of the treaty-making power of the Community: for the Council could, at law, conclude the Agreement with Nigeria as the only signatory on behalf not only of the institutions of the Community but also of the member

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11 Okigbo, Africa and the Common Market, op. cit., p.48.

12 Ibid. See also A. Sciolla-Lagrange, op. cit., pp.46-47.

states.[13]

The Provisions of the Yaounde I Convention

The Yaounde Convention had five titles: trade, financial and technical cooperation, rights of establishment, services, payment and capital, institutions and general provisions. For the purpose of this thesis, discussion will be limited principally to financial and technical cooperation.

Financial and Technical Cooperation

The first development fund was capitalized at 581.25 million u.a. Under the Yaounde I Convention, a second fund was set up with 730 million u.a. of which 666 million u.a. was distributed by member states' contributions, 620 million u.a. were to be given as grants and 46 million u.a. as loans, while the contribution by the European Investment Bank would be loans. These resources were to be applied to social and economic investment and technical cooperation (500 million u.a.) and to diversification and production (230 million u.a.). From the liquid assets of the Fund, 50 million u.a. would be applied to price stabilization.

The Community ensured its control of the Fund by keeping a firm grip on the selection of projects for assistance, the amount of assistance and the disbursement on projects. Up to March 1986, seventy-four schemes totalling 240 million u.a. had been approved for all associated states and territories. In the Yaounde I Convention, a large amount was devoted towards providing for services of experts, technicians, instructors, the undertaking of

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[13] Ibid.

development surveys and studies, and development of vocational training.[14]

The amount was allocated as follows:

183 million u.a. for eleven states: Cameroon (15.8), Central African Republic (6.8), Tchad (5.7), Congo (Brazzaville) (6.4), Dahomey (5.5), Ivory Coast (46.7), Madagascar (31.6), Mali (5.6), Niger (6.5), Senegal (46.7), Togo (5.7), all these being for production and diversification.

32 million u.a. for four states for diversification only: Burundi (5.25), Congo (Leopoldville) (15.0), Rwanda (5.25), Somalia (6.50).

15 million u.a. for three states for diversification only: Gabon (4.0), Mauritania (5.0), Upper Volta (now Burkina Faso) (6.0).

There was a further stipulation that for the eleven states in the first category, aids for production should not be more than three fourths of the total allocation and a suitable proportion must be devoted to 'the structural improvements of cropping plans'.[15]

(iii) The Yaounde II Convention

Both the EEC and the associated African countries agreed that the Yaounde I accord would be continued. The Yaounde II Convention was signed in Yaounde, Cameroon, on July 29, 1969 and went into effect in January 1970 for five years.

Although the results of the first Yaounde agreement were disappointing, the Africans had no other option but to renegotiate. While the trade flows had increased between the two regions,

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[14] Ibid.

[15] Yaounde Convention, 1963, Article 17(b), and Protocol No. 5, Articles 4-10; see also EEC Commission, Sixth General Report, 1962-1963, pp.193-5.

the exports of some non-associated developing countries increased in percentage terms more rapidly than those of the Yaounde group. Nevertheless, the trade preferences offered under the EEC arrangement were, it was felt better than no preferences at all. This attitude was compounded by the fact that in the interim between the signing of the first agreement in 1964 and its renegotiation, several other competing African nations, including Nigeria, Kenya, Tanzania and Uganda, had begun negotiations with the EEC for special trade relations. If the Yaounde countries had chosen not to renew the Yaounde treaty or had taken an exceedingly hard line regarding preferences or aid stipulations, they might have found themselves with no trade preferences at all.

During the negotiations leading to the Yaounde II accord the African countries pushed for concessions in two main areas - price supports for tropical products and increased aid. The Yaounde II Convention had done away with the French suprix (the price guarantees) and the African countries repeatedly asked for some form of support of guaranteed returns on tropical products. The associated countries also demanded that the European Development Fund be increased to 1,500 million u.a. from 7.30 million u.a., that more emphasis be put on industrialization projects, and that the funds be given to local contractors rather than being funnelled through Europe.[16] In addition, the Yaounde group wanted to maintain the preferential trade network that protected their exports under the EEC's Common External Tariff (CET).

In these negotiations, the Dutch and the Germans were again the main group among the EEC opposing existing Yaounde tenets. They pressed for reductions in the preferences granted

[16] Yaounde Convention, Protocol No. 5, Article 27.

to the Yaounde group and no increase in aid. By contrast, the French position strongly favoured continued trade advantages for the African states and increased aid. The Belgians tended to go along with the French position, and the Italians remained fairly neutral and mediated between the two sides.[17]

The Yaounde II Convention, born of these differences was very similar to the first agreement but the results did favour the European position over the African. The general principles of the first Yaounde accord were continued with some minor modifications. In fact, twenty-seven of the sixty-four articles in Yaounde I were left unchanged.[18] The rights of ownership clause remained intact and almost all of the provisions concerning institutions and procedures were retained.[19] It was in the area of trade and aid provisions that the adjustments were made.

While the free trade zone remained essentially intact, the common external tariff protecting three key associated African exports - coffee, cocoa and palm oil - was lowered slightly. Further, free trade area stipulations, through a special protocol, were modified to allow the African countries to participate in a possible system of generalized preferences.[20]

Under the Yaounde II accord, the European Development Fund aid program was increased from 730 million u.a. to 918 million u.a. This amount was comprised of 748 million u.a. in grants to the Yaounde group, 80 million u.a. in special loans, and 90 million u.a. in

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[17] Financial Times, (June 4, 1969) p.7.

[18]12 Zartman, W.I., "The EEC's New Deal with Africa", Africa Report (February 1970), p.28.

[19] See Moss, J., The Lome Conventions and Their Implications for the United States, Westview Press, Boulder, 1982, p.7.

[20] European Economic Community, "The Association Between the Community and the Associated African States and Madagascar, Balance Sheet and Outlook", (July 11, 1969), p.5.

European Investment Bank Loans.

There were several other slight modifications which distinguish Yaounde I and II. An increased emphasis was placed on regional economic unions among the African states and/or with third party African countries. The European Development Fund was to give priority to production and industrialization projects and local enterprises were to be given preferences in bidding for the European Development Fund (EDF) projects. Further, the African states were asked to put more effort into coordinating their requests for aid within their own development programmes taking over projects launched by European aid.

(iv) The Lagos Agreement

In 1963, the Nigerian government applied to open negotiations with the EEC under an association sui generis with reciprocal rights and obligations. Exploration talks were held between the Commission and a Nigerian delegation in the autumn of 1963 and in June 1964 the Council gave the Commission a mandate to open formal negotiations. Five rounds of negotiations took place leading to agreement on an association between Nigeria and the Community. The Treaty was signed in Lagos in July 1966 to expire on May 30, 1969, the same date as the Yaounde I Convention. The main element of the agreement was entry into the Community market for Nigerian exports on the same terms as those applying to exports from the associated countries, except for the four major Nigerian export products which were in competition with exports from the associated countries: cocoa, palm oil, groundnut oil and plywood. For these products, import quotas, increasing annually, were agreed, imports above that amount being subject to the common external tariff.

Nigeria had repeatedly stated in international forums that she stood against the extension of preferential systems and did not propose to negotiate for preferences in the Community. Her purpose was to seek an equally competitive position with her major competitors for whom a preferential zone had been created only in 1958, thus endangering her position in her traditional markets in Europe.[21] As stated earlier, the Lagos Agreement was never ratified by the Nigerian government owing to a civil war which broke out in 1967, and subsequently never went into effect, before its expiry date.

(v) The Agreement with East African Countries

In 1963, the three East African countries, Kenya, Tangayika and Uganda, applied to negotiate an association with the EEC. Exploratory talks took place in late 1963 and early 1964. By this time, Tangayika had been replaced by Tanzania, following its merger with Zanzibar. In June 1965, the Council of Ministers granted the Commission a mandate to open formal negotiations, and a first round took place; after a suspension talks were resumed in November 1966. The Agreement was signed in Arusha on July 29, 1968 and was to expire also on May 30, 1969 (same date as Yaounde I Convention). It was also never ratified before its expiry date and so never went into force.

2. (i) The Lome I and II Conventions

In 1972, the Treaty of Accession was signed joining Great Britain to the European

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[21] At the New Delhi UNCTAD conference held in the Spring of 1968, there was broad acceptance of the "generalized preference system" for all countries in the developing world when exporting to industrial countries. This system was adopted by the EEC in 1971 in modified form, when they granted limited tariff preferences to industrial exports from all developing nations.

Community. The 20 independent Commonwealth countries were offered three possible forms of relationship with the EEC, delineated in Protocol 22 of the Treaty of Accession (this was discussed in Chapter I). These countries were: 12 African Commonwealth African countries, including Nigeria, the Commonwealth Caribbean countries of Barbados, Guyana, Jamaica, Trinidad and Tobago, and the Commonwealth Pacific countries of Fiji, Tonga and Western Samoa. These possibilities were extended to the Yaounde countries as well and later extended to the previously non-associated countries of Ethiopia, Liberia, Equatorial Guinea and Sudan, as well as Tunisia and Morocco, Libya, Algeria and Egypt. Several months of deliberations ensued as these countries weighed the pros and cons of association with the EEC. As discussed in Chapter I, the Yaounde and Commonwealth groups had to sort out their different interests, and with the help of the OAU, and the UN Economic Commission for Africa, a group was formed known as the "African, Caribbean and Pacific" group (ACP) composed of Anglophone and Francophone Africa (Botswana, Burundi, Cameroon, Central African Republic, Congo, Guinea, Guinea Bissau, Equatorial Guinea, Upper Volta, Kenya, Lesotho, Malawi, Malagasy, Mali, Mauritius, Mauritania, Niger, Nigeria, Rwanda, Senegal, Sierra Leone, Somalia, Sudan, Swaziland, Tanzania, Chad, Togo, Uganda, Zaire, Zambia, as well as the states of Sudan, Liberia and Ethiopia), as well as the Caribbean and Pacific countries of the Bahamas, Barbados, Fiji, Grenada, Guyana, Jamaica, Tonga, Trinidad and Tobago, and Western Samoa.

The outcome of eighteen months of negotiation between the ACP group and the EEC was the Lome I Convention signed in Lome capital of Togo, on February 28, 1975. By this time, the EEC membership had increased to nine following the accession of Britain, Ireland and Denmark.

The main provisions of the Lome I Convention were:

1. Duty - and quota-free access without reciprocity to the European market for goods exported from the ACP. However, there was a safeguard clause for highly sensitive goods and a special regime for products covered by the EEC's Common Agreement Policy (CAP).

2. A stabilization fund of $450 million to compensate the ACP in the event of reductions in the receipts from the exports of their principal base products. This fund is known as "STABEX".

3. Financial aid for the ACP; 3,000 million EUA (European Units of Account) from the European Development Fund and 390 million EUA from the European Investment Bank.

4. Industrial and technological cooperation to reduce ACP states' disadvantages in these areas to be provided by a new institution, the Centre for Industrial Development (CID).

5. Joint institutions to supervise and help implement the agreement: The Council of Ministers, the Committee of Ambassadors and the Consultative Assembly.[22]

6. An agreement in the form of a separate Protocol (Protocol 3) which provides that the EEC shall undertake to buy 1.4 million tons of sugar from ACP countries each year with a guaranteed minimum price worked out with reference to Community prices and

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22 It was however, criticized as going against the general policy established during the United Nations Conference on World Trade and Development of 1964, that industrial countries should not require preferential treatment from developing countries. See Bowett, et al, op. cit., p.234. See also Okigbo, Africa and the Common Market, p.131, which elaborates on the argument that the Lagos Agreement went beyond creating a preferential area and did in fact create a free trade area. He says that this was so because the Agreement created an obligation on both sides not to impose new quantitative restrictions except by a defined procedure, not to raise or impose customs duties except under defined conditions and circumstances, and to reduce reciprocally the customs duties in force. But there was no obligation to harmonize the customs tariff: each party was free to determine and to implement its own commercial policy and to maintain its own external tariff against third countries.

other economic factors. The ACP countries are guaranteed a price at least equal to the price guaranteed to European producers.[23]

The Lome I accord was in many respects a better deal for the Africans than were the Yaounde Conventions. While the ACP did not see all of their demands satisfied, Lome I was markedly different from Yaounde in several fundamental aspects. In the areas of trade cooperation, the reverse preferences requirement was dropped, and nearly all of the ACP exports (99.2% of all ACP exports) entered the EEC duty free. Provision was made for export price stability through the STABEX scheme. Although the STABEX fund was modest sum for such an encompassing problem, it was a novel and important beginning for the poorer ACP countries. Lome dealt with industrial cooperation and technology transfer through a new institution, the CID, which on the face of it appeared to represent a somewhat stronger commitment on the part of the Europeans to assist change in the ACP states.

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[23] Several new institutions were created under Lome I although they were largely adapted from Yaounde. The "Council of Ministers" (see Lome Convention, Articles 70-75;this Council has similar functions to those of the Council of Association under the Yaounde Convention) is composed of members of the Council of Ministers of the European Communities, members of the Commission of the European Communities and members of the government of each ACP state. It has responsibility for broad policy decisions, for reviewing the operation and achievements of the Convention arrangements and for taking such specific decisions as it is empowered to do by the Conventions (see, for example, the provisions of Articles 41, 48, 60 on financial and technical co-operation). Decisions of the Council are binding on all contracting parties who must take the necessary measures in order to implement them (Article 81 of the Convention contains an elementary arbitration procedure for settling disputes on its implementation or interpretation).

The "Committee of Ambassadors" has the responsibility of ensuring the day-to-day operations of the Convention, of generally keeping under review the functioning of the Convention and the development of its objectives, and of supervising the work of committees, working groups and other bodies, whether continuous or ad hoc (Convention, Articles 75 to 79, The Committee of Association under the Yaounde Agreements served similar functions). This Committee, like the Council of Ministers, has representatives from each EEC state, from the Commission and from each ACP state.

A "Consultative Assembly" was also created which is composed on a parity basis of members of the European Parliament and representatives designated by the ACP states (Convention, Article 80; under the Yaounde Agreements, the Parliamentary Conference of Association served similar functions).

Finally, the EDF was expanded to approximately 4.3 million u.a., approximately 3.7 times the amount of aid available under Yaounde II. However, given the increase in memberships, benefits on a per country basis only doubled. Attempts were also made to improve the EDF by including provisions for greater ACP participation in its administration.[24]

Lome I was operational between April 1976 and February 1980. During the last two years of the first agreement, the Lome II accord was negotiated and became operational in March 1980. It expired in February 1985. It continued the major provisions of Lome I with some additions and expansions. The most important changes were the expansion of the STABEX product coverage and the introduction of SYSMIN, a scheme to assist mineral producing countries experiencing production difficulties.

One particular innovation introduced by Lome I was the abolition of the earlier Yaounde reverse preference model by offering the ACP duty-free quota access to the markets of the Nine with no requirement of reciprocal treatment in the ACP markets. This had been one of the key demands of the ACP countries during the negotiations. Many African countries felt that these reverse preferences prevented them from buying imports from the least cost supplier, entailed losses in customs revenues, hindered their industrialization, and led to discrimination against imports from other developing countries.[25] Others found reverse preferences unacceptable for political reasons charging that these preferences were neo-colonial in character.

Under Lome I, goods from ACP countries also had easier access to the Community market free of all customs duties or taxes or equivalent effect, and without quantitative

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[24] Lome I Dossier.

[25] Ibid., passion.

restriction, quotas or equivalent measures. Agricultural products experienced a small levy but got preferential access in comparison with non-associated suppliers. The rules of origin also affected ACP access to the Community. These rules were intended to enable the customs administration in the Community to identify exactly which products it can regard as having in the ACP and hence which products can be considered eligible for free access. After extensive negotiations, the ACP agreed to the following:

1. The ACP countries would constitute a single customs area which would facilitate arrangements for successive processing.

2. The EEC should be willing to consider requests for temporary derogations required for purposes of industrial development in the countries concerned.

3. For a good to be considered as originating from the ACP, the value of imported components must not exceed an average 50% of the value of the finished goods.[26]

However, the potential processing of components and raw materials which these African countries hoped to initiate was severely reduced because of a limiting annex. The protocol (Annex II) contained a list of specific processes which did not confer originating status to the product produced in the ACP countries. The list was voluminous, running 23 pages and, ironically, in some cases, the value added in processing must necessarily surpass the value of the components. In other cases, the desired status of originating product was not given, regardless of the value added.

Consequently, during the Lome II negotiations, the ACP countries pressed for the lifting of the Rules of Origin to allow the ACP more freedom in choosing foreign investments to meet

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[26] Moss, J., op. cit., p.27.

its industrialization needs. But the EEC responded by pointing out that the Council of Ministers would waive Rules of Origin if an ACP state showed that they inhibited industrial development.[27]

The Community however liberalized duties on certain ACP products (tomatoes, carrots, onions, asparagus, mushrooms). There were two other protocols, for rum and bananas, aimed to preserve traditional trade patterns between ACP and EEC nations through managed markets. In particular, the banana protocol (Protocol 4 of Lome II) allowed terms which were designed to protect traditional Caribbean and West African suppliers to the Community. The preference system was especially needed by the small Caribbean islands, whose production costs are high and whose prices usually cannot compete with Central American "dollar fruit" prices.[28]

With respect to the STABEX under both Lome I and Lome II, the ACP countries regarded it as a positive addition to their relations with the Community and a welcome balance of payments support. They were however disappointed in that it fell short of providing comprehensive security against the uncertainties of the marketplace to which they had aspired. This was mainly due to the fact that STABEX was applied to a limited number of products (only agricultural products and not processed products). Failure to cover processed products afforded

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[27] The model for these rules were EEC rules which have previously applied in free trade agreements between the EEC and the European Free Trade Association (EFTA).

[28] See, Ravenhill, J., "Europe and Africa: An Essential Continuity", Europe, Africa and Lome III, Boardsman, R., et al (ed.), University Press of America, Lanham, 1985, p.40, "Although all preferential trade agreements must have such rules in order to prevent their beneficiaries from becoming victims of trade diversion from third parties, the arrangements imposed by the EEC in the Lome context are unduly restrictive for countries at the level of development of the ACP Group (in that they require either particular processes of production to be performed and/or excessive value to be added locally). As Matthew McQueen has documented, this is particularly the case for those labour-intensive products that are regarded as "sensitive" by the EEC - goods for which the ACP might bassumed to have a comparable advantage. Restrictive rules of origin prevent ACP countries from taking advantage of competition among transnational corporations from various countries in order to secure the lowest priced imports". For McQueen's views, see, "Lome and the Protective Effect of the Rules of Origin", Journal of World Trade Law, 16, 2 (March-April 1982), p.125.

a disguised form of protection to European processing industries. Products which competed with European production were similarly excluded. The ACP countries also claimed that STABEX was under-financed, the system's resources being available only for 60% of the legitimate claims. Finally, determination of the question whether or not to offer compensation under STABEX rested solely in the hands of the EEC Commission. Although the Commission elaborated a lengthy list of criteria for determining whether or not to offer compensation under STABEX it became quite obvious, as the years progressed that consideration was based as much on these criteria as on other elements outside the framework of the Convention. There was no rigorous procedure and once the Commission had made its determination the ACP countries were left with no recourse for appeal. This was hardly in accordance with the idea of a jointly-managed relationship between equals.

[29](ii) The Lome III and Lome IV Conventions

The third Lome Convention was signed in Lome in December 1985 and went into effect in February 1986. The EC members had been increased by two with the accession of Greece and Spain. The ACP group also had additions. There were seven new signatories to the Convention, namely Angola, Antigua and Barbuda, Belize, Mozambique, St. Christopher and Nevis, St. Vincent and the Grenandines, and Vanuatu.

Lome III essentially maintained the provisions of the Lome II accord but the Community's financial contribution increased to ECU 8.5 billion (the ECU was the new monetary unit of the European Community). It was agreed by the two groups that priority

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[29] Ravenhill, J., op. cit., pp.46-49.

would be accorded to the financing of agriculture. The general feeling of the ACP countries was one of cautious optimism as they came to realize that in the ten years of economic and trade partnership with the EEC under the Lome Conventions the promises made at the signing of the Conventions had been far from realized. The actual implementation of the programmes stipulated on paper had proved disappointing.

The situation was much worse with the signing of the Lome IV Convention mainly because the ACP countries were apprehensive of the impact which the SEA would have on the Lome IV Convention. They were also apprehensive of the fact that they were likely to lose most of their markets in the EC to Eastern European countries following the collapse of communism in Europe and the full implementation of the Single Market by 1992.

Under the Lome IV accord which was signed on December 15, 1989, the Community's financial aid amounted to ECU 12 billion. This amount was considered to be too small by the ACP countries (who were now 69 following the accession of the Dominican Republic, Haiti and Namibia).

They argued that when this EDF amount was shared among the 450 million people of the 69 countries to be assisted by these resources, they might be in danger of breaching the spirit of the Lome III accord. The Community also committed itself under Lome IV to helping the ACP countries carry out structural adjustments of their economies, adding the sum of ECU 1,150 million to the EDF specifically for this purpose.

While maintaining generally the provisions of the Lome III Convention, Lome IV created a clearer SYSMIN which had been innovated under Lome II and maintained under Lome III. This special facility for mining products had been the subject of long negotiations aimed at simplifying its functioning and making it better suited to the ACP countries' economic restructuring requirements. Under Lome IV, the structure of SYSMIN has been clarified and a clear focus has been put on the concept of viability. SYSMIN operations will also be possible where an ACP country's export earnings suffer substantially as a result of disruption, without the viability of the mining sector necessarily being affected.

Further, preventive operations and those aimed at diversification will be facilitated. The present dependence thresholds have not changed but two new products have been included: uranium and gold.[30] Other provisions of the Lome IV Convention will be analysed later in this chapter.

B. IMPLICATIONS OF THE SINGLE EUROPEAN MARKET FOR ACP COUNTRIES

1. Trade and Investment

(a) General issues relating to trade between the European Community and ACP countries after 1992

An important aspect of the Single European Market (SEM) is the differential impact it is likely to have on developing countries. As the Soviet Union and Eastern Europe seek to raise the consumption levels of their peoples, there will necessarily develop a large market for manufactured goods, perhaps of a quality that can be met satisfactorily from Third World sources.

However, it is only those countries of the Third World equipped to exploit it such as

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30 The Courier, No. 120, March-April 1990, p.16.

India, Malaysia, Korea and Brazil, etc., which have a large manufacturing base anchored either on local primary materials and labour or on local high technology and knowledge, which can hope to derive full benefits from the SEM. With manufacturing output as low as 11% of Africa's total output in 1986/87, there is no assurance that the opportunities bound to be opened up for cheap and mass consumer goals in Eastern Europe will be exploited by African countries.[31] The same may be said for the Caribbean and Pacific countries which make up the ACP group. In fact, it is the Newly Industrialized Countries (NICs) of Asia who are likely to benefit most from trade creation for manufactured goods,[32] while sub-Saharian African, Caribbean and Latin American countries will have to content themselves with producing primary raw materials.

However, as Okigbo puts it, Third World countries, especially African and other ACP countries will not find it easy even to rely on the export of primary raw materials. Said he: "the question is not whether Africa can export more but what it will export".[33] First, the production processes of the past ten to fifteen years in the Western countries are decreasingly energy/labour and primary raw materials intensive; instead they are getting more high technology, information and knowledge-based. Consequently, the overall demand for African primary commodities will only grow at a decreasing rate.

Further, high technology is daily spurning new products as substitutes for primary

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[31] See the views expressed by Pius Okigbo in his Chairman's Statement at the Seminar organized on Europe by the Federal Ministry of External Affairs, Lagos, June 1990. Dr. Okigbo is a member of the South Commission.

[32] Abolaji, T., "EC-ACP Trade After 1992: Co-operation or Confrontation", paper presented at a seminar organized on Europe by the Federal Ministry of External Affairs, Lagos, June 1990. Mr. Abolaji is the Executive Director, Nigerian Export Promotion Council.

[33] Okigbo, Chairman's Statement, op. cit.

products of interest to Africa and other ACP countries. When fully applied, they can replace 33% of the market for soyabeans, 100% for gum arabic, 66% for sugar, 55% for cocoa and 60% for flavours and medicinal plants in Africa. Altogether, these are equivalent to a potential 10 billion per annum loss in export trade.[34] Similarly, new materials have also been developed in place of metal and natural gas which could reduce the consumption of steel by 37%, tin by 42%, zinc by 32%, nickel by 23% and aluminium by 9.1%.[35]

The obvious deducible fact from all this is that highly industrialized countries do not now need as much African produce or the commodities produced by African labour as they did twenty years ago. Some commentators feel that if care is not taken, Africa may be becoming gradually irrelevant in world economy. Thus, for African and Third World countries to take advantage of new export possibilities opened up by the SEM and the incorporation in it of the peripheral market for Eastern Europe, there must be concerned efforts to incorporate more value added by processing, more semi-manufactured goods and more manufactures generally. However, this can lead to quota retaliation, so the ACPs have to think in advance of ways to circumvent this problem.

A related problem is that of capital flight from African and other Third World countries as a result of disinvestment owing to the ailing nature of their economies. As highly industrialized countries pull out their investments from the ACP countries, the chances for these countries to make enough foreign exchange to meet their external trade and import commitments and even to maintain credit-worthy balance of payment accounts will decrease correspondingly.

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[34] Ibid.

[35] Ibid.

Capital flight will thus lead to a deficit in the current account of the balance of payments of these less developed countries. This problem has been heightened by the fact that European investment flows to ACP countries have declined sharply as European creditors restructure their operations in readiness for 1992. This is directly linked to the external debt burden to be discussed later.

(b) ACP-EEC Trade Relations

This section seeks to examine in some detail the effect which the SEM, after 1992, will have on the relationship between ACP countries and the Community. As has been stated earlier, right from the early days of the Treaty of Rome, France insisted that European integration would be meaningless without special provision for the relationship between Europe and Africa. This was based on the recognition that the various colonial economies were inseparably linked with the metropolitan economies through a system of trade preferences, monetary arrangements, commercial budgetary subventions and quasi-political treaties. There were also huge investments in the mining and other extractive industries as well as a host of expatriate personnel managing the colonial administrations. When these colonial empires eventually collapsed, the Community negotiated new arrangements with the newly independent African states in a bid to provide them with greater trade, investment, aid and access in the EEC. These negotiations led to the two Yaounde Conventions which were replaced in 1975 by the Lome Conventions.[36]

These conventions, however, have been widely criticized within the Third World as being unequal, a scheme merely to perpetrate a new form of imperialism. Not surprisingly, the ACP

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[36] See Adedeji, A., op. cit. By this time, Britain, now a member of the Community, sought to preserve the preferences enjoyed by her former colonies under the Commonwealth arrangement.

countries made little or no progress in their economies in spite of the successive Conventions that were signed. Lucien Pagni asks, "The basic question now is why a technologically advanced Europe has not managed to get the ACPs to create and develop a viable, lasting industrial economy? Or conversely, how come, with the financial and technical aid of the developed nations, the ACPs have failed to make a success of the economic and social progress which underlay their aspirations and their struggle for independence?"[37]

Other observers feel that the answer lies in the very nature of the Yaounde and Lome agreements. ACP countries have always been the weaker parties. An example is the "Rules of Origin" principle which underlines the ACP exports to the EC.[38] The exports must have been produced from 90% of local sources and this includes machinery. This standard is extremely difficult for the ACP countries to meet, given their level of development. However, even if this percentage is reduced, there are other problems which they will encounter such as consumer-labelling requirements, environmental requirements, etc., which may still work to affect their production quotas especially as they will be new on the international markets. Their bargaining power with respect to dealing with these import and export barriers will not be as strong as that of more developed countries who have been trading in those markets for a long time. Again, the ACPs have to work out ways of circumventing or watering down these adverse effects.

The fourth and latest Lome Convention was signed in December 1989 against a background of intensive debate about the implications of these treaties for ACP countries after

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[37] Pagni, L., "From Lome I to Lome IV . . .", The Courier, No. 120, March-April 1990, p.17.

[38] This was discussed earlier. For a more detailed explanation of the "Rules of Origin" principle, see Afolabi, P., Lome III: Prospects and Problems, Nigerian Institute of International Affairs, Lagos, Lecture Series No. 40.

1992. The European Commission's Vice-President, Manuel Marin, tried to convince the ACP countries that the goals and provisions of the Single Act were compatible with the Lome IV Convention.[39]

According to the Commission's report, the Lome IV Convention would ensure a new framework of European aid, including financing on grant basis, structural adjustment and external debt. Significant improvements were also introduced in primary commodity trade (through STABEX and SYSMIN); more liberal conditions of access of manufactured goods on the European market have been assured; and there were guarantees of a fair treatment of tropical products (especially bananas and sugar cane) in the EC market. It is the expectation of the ACP group that these potential gains would not be eroded when the Single Act is implemented.[40]

How realistic these expectations are is yet to be seen. What is clear is that the SEM poses two major challenges to ACP countries: (i) maintaining the Community market for their exports since unification opens it up to foreign aid and foreign direct investment opportunities not only by Western Europe itself, but also by other investors from the OECD. As Marin puts it, "it has to be realized that the Convention [Lome IV] may make trade easier, but it cannot create it artificially."[41]

A critical aspect of ACP trade with the EC is the abolition in 1992 of Article 115 of the Treaty of Rome under which the Commission authorizes a member state to restrict the free movement of some goods from other member states where these originate in a third country and

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[39] See generally, the European Commission's Report on the Lome IV Convention in The Courier, No. 120, op. cit.

[40] Adedeji, A., op. cit., see also The Courier, No. 120, ibid., p.13.

[41] Ibid., p.12.

where transhipment would result in circumspection of quotas.[42]

There is no doubt that the removal of this article would expose the ACP countries to severe competition from non-EC developed countries as well as the Newly Industrialized Countries (NICs).[43] For instance, the Multi-Fibre Agreement (MFA) is likely to be affected by this removal. Similarly, the banana exports to the EC from Cote D'Ivoire, Cameroun, Somalia and the Caribbean which are sustained because of the preferential treatment enjoyed under the Treaty of Rome would certainly collapse with serious catastrophic consequences for the producers. Yet, Protocol 4 on Bananas in the Lome IV Convention guarantees that no "ACP state shall be placed, as regards access to the traditional markets and its advantages on those markets, in a less favourable situation than in the past or at the present". Indeed, there is the fear that the Value Added Tax (VAT) and excise taxes will be lowered causing European imports to increase, especially for beverages and tobacco. Some observers feel that liberalization of the EC agriculture under the CAP would mean the dismantling of preferential trade regulations under the Lome IV Convention and that this would in turn mean that the ACP countries will be even worse off than other developing countries, particularly as they have lost a sizeable share of their market in the EC to other developing countries since 1975 due to the fact that the EC has completed similar trade arrangements with other developing countries.

With regard to the world's textile and clothing trade, this is largely regulated by the Multi-Fibre Agreement (MFA). However, the ACP countries have been exempted from the MFA controls which have restricted other developing countries' textiles and clothing exports to

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42 See Article 13 of the SEA 1986 which amends Article 8(A) of the Treaty of Rome.

43 Adedeji, op. cit.

the Community.[44] The MFA comes to an end in 1991, and the question remains whether it ought to be extended or gradually abolished and brought under the rules of the General Agreement on Tariffs and Trade (GATT) under whose auspices the current multilateral trade negotiations are being conducted through the Uruguay Round.[45]

The GATT negotiations are pointing to a general reduction or erosion of special preferences such as those under Lome IV. Furthermore, the EC has concluded special arrangements with other regions, including Asia and Latin America, with the result that the Community's trade preferences have become generalized for all developing countries.[46] Adedeji is of the view that if textiles and clothing are gradually brought under GATT rules, this may become an important instrument for European protection of domestic industries to the detriment of African cotton and textiles.[47] He further argues that, although ACP countries have been treated more liberally than have been other developing countries, it is a fact that the EC has gradually imposed more control on ACP clothing exports in the past. He concludes that the more successful they become the more likely it is that barriers will be applied in the future in relations with ACP countries.[48]

(c) Legal Questions on the EC-ACP Relationship After 1992

As has been stated already, the main anxiety of ACP countries is the question whether

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44 Ibid.

45 Ibid. See also the recent lecture of Salim, S.A., "Africa: The Challenges of European Economic Integration", p.12, Guardian Lecture Series, (No. 3), Lagos, 1990. Dr. Salim is the Secretary-General of the Organization of African Unity.

46 Salim, ibid.

47 Adedeji, op. cit.

48 Ibid.

the EC will continue to honour its obligations to the ACP group under the Lome Conventions after 1992 when the Single Act is implemented.[49]

Although the EC has claimed that these obligations will be respected there are certain obvious contradictions between the stated intentions of the Single Act and those expressed in the provisions of the Lome IV Convention as they affect both groups.

An example is the abolition of Article 115 of the Treaty of Rome by Article 13 which substitutes a new Article 8(A) in the Single Act discussed earlier. To remove the restrictions enjoyed by the ACP countries under the old Article 115 would mean that other multilateral agreements such as the MFA which exist between ACP countries and the EC countries would also be affected. Article 8(A) as provided under the Single Act states inter alia, "The internal market shall comprise an area without frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of this Treaty".

It would also affect the banana export trade between ACP countries such as Cameroun and Somalia which were sustained because of the preferential treatment they enjoyed, which preferences were respected and upheld under Article 115 of the Treaty of Rome. What then happens to Protocol 4 of the Lome IV Convention which guarantees the status quo on banana trade export from ACP countries to the EC as they exist at December 31, 1992 (when the SEM would be fully implemented)?

It is a question of conflict of laws. First, the Single Act is a treaty as between the twelve member countries of the EC. However, as far as the ACP countries are concerned, it is a

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[49] Salim, op. cit. See also Adedeji, op. cit.

regional legislation "although conceived and elaborated at an international forum".[50] Lome IV, however, is a convention, i.e., a treaty within the meaning of Article 38(i)(a) of the Statute of the ICJ, and as such imposes binding obligations on the signatories, viz., the EC and the ACP countries.[51] Such obligations are protected by international law.

It follows that the EC will have to discharge its commitments under the Lome IV Convention, even though this may mean not strictly conforming to the obligations contained in the Single Act. "The established principle is indeed that a state may not plead a provision in its domestic law (or absence of such a provision for that matter) to avoid discharging an international obligation".[52]

Another legal issue is the effect of the GATT on post-1992 EC-ACP relationship. As Salim observes, the current Uruguay Round of GATT negotiations point to a general reduction or erosion of special preferences such as those under Lome IV. Thus, when the MFA, for instance, ends in 1991 there is the fear that it may be abolished and brought under GATT rules.

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[50] Ogan, C.A., "The Single European Act (1986) and the Problems of Africa's Survival by the Close of the Twentieth Century and Beyond", paper presented at the annual conference of the Nigerian Society of International Law, Lagos, May 2nd to 4th, 1991, p.6.

[51] Article 38 of the Statute of the ICJ refers to "international custom", as "evidence of a general practice accepted as law". Brierly, in The Law of Nations (6th edn., 1963, by Sir Humphrey Waldock, p. 61,) remarks that "what is sought for is a general recognition among States of a certain practice as obligatory". Such sources of international custom or usage would include treaties which have been accepted by a large number of nations. Thus, while the Vienna Convention on the Law of Treaties would be binding on most of the EC and ACP countries, being signatories to it, it would still be binding on those countries who are not signatories to it on the basis of international custom. See also Brownlie, I., Principles of Public International Law, Oxford University Press, 4th edition, 1990, pp.4-5. Such a custom as the Vienna Convention on the Law of Treaties would thus be part of the general principles of international law through custom. The only exception to this rule is with respect to any EC or ACP country which has persistently objected to this Treaty. The principle of the "persistent objector" states that although a treaty may be accepted by many countries it would not be binding on a country which has persistently objected to it.

[52] Ogan, ibid. See also The Free Zones Case 1932, PCIJ, Series A/B Case of 46, p.167. Article 27 of the Vienna Convention on the Law of Treaties now regulates this.

Even if it is extended there would still be a question whether the EC countries, who are all signatories to the GATT, can discharge their obligations to those ACP countries who are signatories to the GATT under the Lome IV Convention.[53]

With respect to those ACP countries who are not signatories to the GATT, the EC is bound to fully discharge its obligations under Lome IV on the basis of the ordinary principle that pacta sunt servanda.[54]

Where, however, the ACP states concerned are also signatories to the GATT, it would mean that while under the Lome IV Convention they are entitled to preferential treatment, the granting of such treatment by the EC would mean the violation of yet another international obligation to which both parties are signatories. Article 30(3) of the Vienna Convention on the Law of Treaties, 1969, provides that "where all parties to an earlier treaty are parties to the later treaty but the earlier treaty is not terminated or suspended in operation . . . the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty".

Thus, if the decisions reached at the current Uruguay Round of negotiations abolish the standard of preferential treatment, it would mean that the EC would be under no international duty (vis-a-vis ACP states who are also signatories to the GATT) to discharge any obligations assumed under the Lome IV Convention.[55] As Ogan puts it, "The danger of seeing the Lome

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[53] Article 1 of the General Agreement on Tariffs and Trade (GATT) provides that any advantage granted to any state must be automatically extended to the other states who are signatories - the so-called Most-Favoured Nation clause (MFN).

[54] Ogan, op. cit., p.7. See also Article 30(4)(b) of the 1969 Vienna Convention on the Law of Treaties. This provision states that where the parties to a later treaty do not include all the parties to the earlier one, as between a state party to both and a state party to only one of the treaties, the treaty to which both states are parties governs their mutual rights and obligations.

[55] Ogan, ibid.

IV grounded substantially as a result of the Uruguay Round is therefore real, since it all depends on the combined efforts of the EEC, Japan and the United States of America to renounce the principle of preferential treatment at the negotiations".[56]

Perhaps the following words of Jeffrey J. Schott are indicative of the USA's attitude towards trade preferences for Africa:

> "Discussion which focuses unduly on Africa's trade problems and African trade preferences is a bit misguided, because none of those preferences has much of an effect on African development, although it can be claimed, of course, that they do at least make a marginal difference. Trade preferences, indeed, distract attention from the real problem of African development, which (at least today) has little to do with trade barriers. If there were open access and preferences for African goods in foreign markets, those countries still would not sell much more than they do right now because they cannot produce the goods in the first place.
>
> The problem for Africa is to attract investment funds to expand production capabilities, and it is therefore necessary to improve its investment climate, either through the provision of multinational guarantees to backstop those investment funds or through some other actions to attract investment there. Talking about trade preferences, then, is irrelevant to most aspects of African development at this stage."[57]

It is submitted that the solution is not quite as simplistic as that; how, for instance does a small country like Madagascar attract the requisite foreign investment with which to develop its economy. While Schott's views are not necessarily wrong, they do give the impression that all an ACP country needs to do is to attract foreign investment and then its economy will begin to improve. Other factors like consumer-labelling requirements, environmental requirements, etc., mentioned earlier do play an influential role in determining the ACPs' acess to foreign

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[56] Ibid.

[57] Schott, J.J., "The GATT and the Uruguay Round of Multilateral Trade Negotiations: A Broader Perspective - Monetary Policy, Exchange Rates and Trade", in Rubin, S.J. (ed.), Conflict and Resolution in US-EC Trade Relations, Oceana Publications Inc., New York, Part 1, Chap. 7, p.67. This Paper is an edited transcript of Mr. Schott's spoken remarks at the April 1987 Colloquium held at the Institute for International Economics, Washington, D.C., U.S.A. where he is a Research Fellow.

markets and cannot be ignored.

2. **Europe 1992 and Monetary Arrangements in Africa: The CFA Franc Zone**

The Franc Zone (FZ) is a monetary co-operation arrangement that was set up between France and her former colonies in West and Central Africa following the latter's independence in the early 1960s.[58] The CFA is the currency of the West African Monetary Union (UMOA) created by a treaty which came into force on 12th May, 1962 and complemented by two other agreements also adopted on 12th May, 1962, viz., the Co-Operation Agreement between France and the Republics members of the West African Monetary Union, and the Articles of Agreement of the Central Bank of West African States. A similar arrangement had been concluded in 1960 between France and five former Central African French colonies - Cameroun, Central African Republic, Chad, Congo and Gabon which grouped within the Bank of Central African States (BEAC).[59]

The Franc Zone operates according to four basic principles, namely:

1. fixed parity between currencies (principle of equivalency of currencies);
2. freedom of internal transfers: transfers from one country to another are free and transfers from one currency to another are unlimited (principles of freedom of transfers and unlimited transfers);
3. harmonization of exchange regulations of the member states according to the French regulations for all external financial transactions (principle of exchange harmonization);

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[58] Martin, G., "The Franc Zone, Underdevelopment and Dependency in Francophone Africa", Third World Quarterly, Vol. 8, 1986, p.205.

[59] Ogan, op. cit., p.8. See also Shuster, M.R., The Public International Law of Money, Oxford UniversitPress, 1973, p.293.

4. pooling of foreign exchange reserves of the FZ member states in the operations account (principle of common management of foreign exchange reserves).

The UMOA Treaty, as well as the monetary co-operation convention concluded between France and the Central African countries both recognize the 'CFA Franc' (CFA F) as a single monetary unit issued by a common financial institution. This common monetary unit is issued solely by the Central Bank of West African states within the UMOA, and by BEAC in Central Africa. Since the African states' independence, the value of the CFA F has remained fixed at 0.02 French Franc (FF). In relation to the FF, the CFA F enjoys the benefits of equivalency of currencies, freedom of transfers and unlimited transfers. The CFA F also enjoys the benefit of free convertibility with the FF through the operations accounts' mechanism.[60]

However, these apparent benefits which the CFA F enjoys have been purchased at a high cost, i.e., at the expense of any measure of sovereignty over domestic money. It has meant that the value of the CFA F changes with respect not to changes in the national economy of the francophone country but to changes in the economy of France. Apart from this, a high degree of inequality exists between France and her 13 African partner-countries. For instance, it is striking to note that France is practically as populous as these 13 counties (54.3 million against 59.9 million inhabitants), but her GNP is almost 20 times higher than the cumulated GNP of these countries ($627.2 billion as against $32.7 billion) and that her GNP per capita is 14 times higher than the average GNP per capita of these countries ($11.540 against $813.8).[61] Thus, while France and her African partners are legally equal, it is quite clear that they are greatly

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[60] Martin, op. cit., pp.208-210.

[61] Ibid., p.211.

unequal in economic terms, which economic inequality would of necessity have great impact on the distribution of power and influence within the FZ system.[62] Indeed, it is obvious from the statistics given above that African states more than compensate France for her benevolence, in that the aggregate deposits made by them have always covered the monetary value of France's commitments to the Zone. Yet, decision-making respecting major issues is largely a French affair.[63]

It does not appear that the issue of monetary co-operation with non-EC states has featured among the recent studies conducted by the EC regarding the implications of the Single Act, the full monetary union with a single currency under a single monetary authority. What then happens to the CFA F zone as France goes deeper and deeper into the European monetary system? Will the EC, within the framework of the monetary union, assume all the responsibilities that France has so far shouldered under her co-operation agreements which have been an indirect channel of aid to her? What should be the reaction of members of the CFA F Zone if France were to end its support and management of the CFA F Zone? A third but unlikely option may be for France to manage the CFA F Zone on a kind of trust for the EC.[64]

Were France to end her monetary co-operation with these African colonies, Salim asks, "would the result be a disaster, an end to this arrangement of limited convertibility of an African currency, or should it be seen as a challenge to Africa's maturity and ability to handle its own

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[62] Ibid., p.210.

[63] Ogan, op. cit., p.8. See also Martin, op. cit., p.215. "The acute imbalance between the rights and powers of France on the one hand and African states on the other hand, results in a situation of extreme legal and political inequality. What is more, by cushioning the African member states against any monetary risks through the free convertibility guarantee, the FZ system puts these countries in a position of dependency which is not conducive to the normal assumptions of their full monetary and financial responsibilities, to say the least."

[64] Ogan, ibid., p.9. This is not likely as it would be too obvious a case of neo-colonialism.

affairs without outside supervision?"[65] While Okigbo feels that the EC should help ECOWAS (the Economic Community of West African States) to evolve its own monetary union into a West African currency assured of convertibility and stability by the European Monetary Fund,[66] Salim feels that the CFA F arrangement really demonstrates the possibilities and advantages that can be exploited through intra-African co-operation. One clear fact is that financial and monetary autonomy is a crucial component of the sovereignty of the Third World countries.[67]

3. The European Community and the External Debt Crisis of ACP Countries After 1992

Perhaps the most immediate problem which needs to be examined in considering post-1992 EC-Third World relations is the longstanding burden of external indebtedness. Growth is impossible on a sustainable basis for Africa's millions with debt service running at prohibitive proportions of the gross domestic product.[68] It would appear that none of the existing debt relief plans or proposals which have so far been postulated can bring real solution to the Third World debt problem. Even the Lome IV Convention did not go beyond committing the EC to support ACP countries in the effort to strengthen their external debt management mechanisms

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[65] Salim, op. cit., pp.11-12.

[66] Okigbo, Chairman's Speech, op. cit.

[67] Martin, op. cit., pp.205-257. See also Rweyemamu, J., Underdevelopment and Industrialisation in Tanzania, Nairobi, Oxford University Press, 1973, p.38. The author is of the view that African countries should strive to achieve a minimal degree of economic independence which implies "control over economic decision-making and the national economy, the establishment of a firm industrial structure leading to a self-generating and self-sustaining growth and a diversification of external economic contacts consistent with the nation's economic interests".

[68] Okigbo, op. cit.

at the national level and to reverse the outflow of capital.[69]

Indeed, most of the various financial proposals that have been put forward for relieving the debt problem, such as the Baker Plan and the Brady Proposal, hinged credit flow upon structural reforms in the Third World.[70] When viewed on the whole the various plans (including the Mitterand Proposal and the Paris Club Plan) have a basic problem in their failure to get to the roots of the debt problem: concentrating on the symptoms instead of the causes.[71]

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[69] Adedeji, op. cit.

[70] Okigbo, op. cit. The Nigerian government, for instance, embraced a 'home-grown'' Structural Adjustment Programme (SAP) in June 1986 with the IMF and World Bank acting as advisers. It had earlier 'rejected' a US$2.5 million IMF loan to bail out the battered economy. However, under the SAP, Nigeria had, by January 1990, rescheduled US$11.6 billion of its foreign debt - US$9 billion of which was owed to the Paris Club. Debt servicing effectively wiped out any gains which SAP may have brought. The foreign debt is expected to reach US$40 billion by 1992. The problem with the SAP is that it is hardly "indigenous". It contains the standard IMF and World Bank prescriptions. See Moghalu, K.C., "Nigeria" South, January 1990, pp.69-73.

[71] Olukoshi, A.O., The Nigerian External Debt Crisis (Lagos and Oxford: Malthouse, 1990) pp.202-205. See also Okigbo, op. cit. The Brady Plan's debt relief applies only to commercial debt, not International Monetary Fund (IMF), World Bank and regional bank loans. Every dollar or cent must be met and principal must be paid in full on due date otherwise the debtor countries face the prospect of suspension of all disbursements under existing programmes.

The Bradley Proposal, named after U.S. Democratic Senator Bill Bradley in June 1986, came to be regarded as an alternative to the Baker Plan which had been designed for the 16 most indebted nations (which included Nigeria and Egypt). It called for a cut of 3 percentage points in the interest rates charged on all outstanding private and public debts of 15 debtors for 3 years; and US$9 billion in additional loans over the same period from multinational development banks in exchange for internal moves to generate growth, liberalize trade, and reverse capital flight. Like the Baker Plan, it made credit conditional upon structural reforms in the Third World but, in contrast, did not require new loans by commercial banks.

The Mitterand Proposal was put forward by French President, Francois Mitterand in his letter of June 6, 1988, to his fellow Group of 7 (G-7) leaders. They were due tmeet in summit in Toronto, Canada, from 19th-21st June, 1988. He spelt out three debt relief options for the consideration of the G-7. (i) He called for the immediate cancellation of all bilateral and officially-guaranteed commercial debts of some Third World countries. This option was especially favoured by France. (ii) The second option entailed the rescheduling over 15 years of Third World debts at half the market rate of interest. (iii) The third option called for the extension of repayment periods for rescheduled debts to over 25 years at a market rate of interest.

The Paris Club Plan, sponsored by western export credit guarantee agencies, called on creditor governments to waive payment of past loans by converting them into grants for low income debtor countries pursuing the IMF;s adjustment measures. It also called for a reduction of interest rate on officially guaranteed debt below market rates and to reschedule such debts over a longer period up to twenty years.

In April 1987, Nigel Lawson, then British Chancellor of the Exchequer, addressed the Interim Committee of the IMF. He suggested, as a solution to the Third World, and especially African, debt crisis, an initiative under which aid loans to Africa would be converted to outright grants. He also urged creditors to allow longer repayment periods, such as twenty years, when Africa's debts were being rescheduled, and for the reduction of interest rates on African external debts to below market levels, provided that the countries were pursuing an approved set of economic reform policies.[72] Olukoshi sees these various proposals, including the efforts at selective debt forgiveness/write-offs, such as under the Mitterand Proposal, as being "preoccupied more with cosmetic reforms that would offer the debtors some respite to take on more loans and deepen the debt crisis".[73]

The best course for ACP and other Third World countries would be to press for an outright cancellation of all official bilateral debts whose repayment is, in any case, in arrears.

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[72] The African Development Bank (ADB) proposed a solution whereby Africa's medium and long-term loans not granted on concessionary terms would be converted to long term securities of at least twenty years maturity at fixed interest rates below market rates. It also called for the establishment of a redemption fund into which the debtor countries would make annual payments over the twenty-yeaperiod to cumulate at maturity to the loan principal outstanding. In this way, it was envisaged that sufficient funds would have accumulated in the redemption fund to ensure the liquidation of outstanding securities at maturity.

The Organization of African Unity (OAU) in its Proposal called for a common African position to the debt problem, urging that the debt crisis be tackled within the framework of an integrated, co-operative, development-based strategy that takes account of particular characteristics of the African debt. It emphasized the need for debt relief and shared responsibility between debtors and creditors in the management of the debt crisis.

For a detailed discussion of other proposals such as the Sachs Proposal, the Group of 24 and the Lafalce Proposal, see Olukoshi, ibid., pp.202-203.

[73] Ibid., p.205.

This view is shared by Okigbo and Olukoshi.[74] Outright cancellation or, at the minimum, a revaluation of the commercial debt at prices in the secondary markets would not hurt the external creditors much because, in principle, most of the debts have been written off through the loss provisions by creditors banks.

The multilateral Bretton Woods institutions whose loans now hang on the necks of ACP debtor countries like an albatross because they cannot be rescheduled may be persuaded to join hands with ACP and other Third World countries in mitigating the burden of their debt to them. Adedeji holds the view that the four members of the seven most industrialized market economies (Germany, France, Italy and Britain) who are members of the EC, should take the necessary initiative in addressing the problem of multilateral debts which allow for no rescheduling whatsoever.[75]

Jamaican Prime Minister, Michael Manley, in an article in the Wall Street Journal of May 3rd, 1990, stated that, "Common sense and conscience demand that the major powers that determine the policies of multilateral lending agencies take an urgent look at those agencies' inflexible rules that have long outgrown justification and now add to the strangling problems of debtor countries."[76]

It is clear that with the challenges of a unified and monolithic Europe after 1992, ACP and other Third World countries can no longer afford to speak in a multiplicity of tones. Many scholars have called on Third World countries to form a cartel and openly admit and proclaim that since they cannot pay they will not pay; and the creditors on their part should openly

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[74] Okigbo, Chairman's Statement, op. cit., Olukoshi, ibid.

[75] Adedeji, op. cit.

[76] Ibid.

concede that since they cannot pay they should not pay. Okigbo goes further to call for an international conference on debt immediately, wherein the debtors will put forward their co-ordinated position and speak with one voice.[77]

An attempt will be made in Chapter V to examine and analyze some of the socio-political problems which have hindered African and other ACP countries from coming together to take firm and monolithic policy decisions regarding their economic and political future. It is only when they can do this successfully that they can rise to the challenges of a unified European Market.

77 Okigbo, Chairman's Statement, op. cit.

CHAPTER III.

TRADE NEGOTIATIONS BETWEEN THE EUROPEAN COMMUNITY (EC) AND AFRICAN, CARIBBEAN AND PACIFIC (ACP) COUNTRIES---A CRITIQUE OF THE NEGOTIATIONS LEADING TO THE AASM, YAOUNDE AND LOME CONVENTIONS.

1 INTRODUCTION:

The negotiations leading to the series of Conventions which were signed between the EC on the one hand, and the ACP countries on the other, between 1958 and 1989, and which came to be known as the AASM (or Association), Yaounde and Lome Conventions respectively, form the subject of scrutiny in this Chapter.

The purpose of this Chapter is not to pass a moral judgment on the right or wrong (or indeed fairness or unfairness) of the agreements arrived at, but rather to analyze the negotiations[1] which resulted in those Conventions. An attempt will be made to examine the interests which each party represented, which interests consequently informed their choice of issues. The agenda of the negotiations, the strategies or tactics employed by both parties in trying to achieve their pre-determined goals will be examined. In particular, an attempt will be made to analyze the difficulties inherent in any dialogue of this nature between economically,

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[1] See generally, Karass, "Talking It Out",(NEGOTIATING, The Game of Life), Newsweek, December 2, 1968, pp. 90-95; Williams, G.R., "Stages of the Negotiation Process" in Legal Negotiation and Settlement, St. Paul, Minn: West Publ. Co., (1983), pp.70-89; Fisher,R., and Ury,W., Getting To Yes, Boston: Houghton Mifflin, (1981), pp. 10-14, 113-117; and Gifford, "A Context-Based Theory of Strategy Selection in Legal Negotiation", (1985), Ohio State L.J., 41.

and therefore politically, unbalanced parties and any possible effects that this imbalance may have had on the negotiations, i.e., how closely related the results were to the original goals of either party. Some suggestions will be proferred for the improvement of future negotiations between the two blocs.

In order to do this effectively, it is important to place the events in their proper historical perspective. For instance, a thorough understanding and critique of the negotiations leading to the Conventions is only possible after a similar exercise has been carried out on the preceding Association of African States and Malagasy Convention (1958--1962) and the Yaounde Conventions (1963--1973) both of which gave birth to the Lome Conventions. Similar accords which were signed with Nigeria, and with the East African countries of Uganda, Kenya and Tanzania will also be analyzed. This discussion, though tenuously narrative is necessary in order to properly analyze the negotiations and their results.

Definition of Negotiation:

Negotiation is the process whereby parties plan a transaction or resolve a dispute through discussions usually supported by reasoned arguments. It nearly always involves an exchange of concessions and compromises in order to reach agreement. These discussions are usually voluntary and agreement where reached is binding and enforceable as a contract between the parties to it. This Paper seeks to examine the discussions and the exchange of concessions which took place between the ACP countries and the EC as they strove to reach a mutually beneficial trade agreement---the Weak confronting the Strong.

11 THE NEGOTIATIONS LEADING TO THE CONVENTIONS:

(A) The Association of African and Malagasy States Convention-1958--1962

(i) Raison d'Etre:

Late in the negotiations for the creation of an European Economic Community (EEC) among the Six (France, West Germany, Italy, Belgium , the Netherlands and Luxembourg), France brought up the colonial question, insisting that European economic integration would only be possible if it made provisions for the European colonies overseas. For France, and to a lesser extent Belgium, the economies of their colonies were inseparably tied to the metropole by a system of preferential trade, budgetary and commercial subsidies, and/or expatriate personnel and investment. Further, the economic needs of their colonies had grown beyond the metropole's ability to handle them alone.[2]

It appeared to the Six that the African territories, who were neither politically independent nor economically strong, could no more be handed back to the devil of the colonial pact (which was fast collapsing) than they could be let loose in the deep blue sea of an economic independence.[3] They reasoned that only a compromise between the evils of either extreme would do. Preferential colonial relations could be gradually multilateralized until a single free-trade area was created, with both the burdens of aid and the benefits of protected trade and investment being shared by all the Six. In the process, the overseas Associates would enjoy greater trade and investment, and the increased quantity would presumably be reinforced by higher quality born of competition. In sum, the benefits of European unity-- an enlarged duty-free market-- would be offered to the Member's colonies and territories, without changing the

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[2] Refer to Chapter I for a detailed discussion of the origins of the Conventions.

[3]Zartman, I.W.,The Politics of Trade Negotiations between Africa and the European Economic Community, Princeton University Press, Princeton, New Jersey,1971, P.7.

colonial nature of the political and economic relationship.

The principle of "associating" the overseas territories in the Common Market was practically imposed by France at the Venice conference of Foreign Ministers, in late May 1956, as an additional price for French adhesion to the Community. Implementation of the principle was, however, the last point of the Treaty to be settled and was not arranged until the eighth and last ministerial conference, nine months later and a month before signature. In the interim, France assiduously pursued "snowball tactics", building up commitments and winning over allies until the Netherlands stood alone in its opposition.

(ii) The Stages of the Negotiations:

(a) Belgian Support.

The French effort to win support for their position began with Belgium, whose central African territories--despite their looser economic relationship with the metropole--gave it common interests with France. It was on the basis of a Franco-Belgian memorandum that accord was nearly reached at the sixth ministerial conference at Val-Duchesse in late January 1957, as the Six moved slowly toward agreement on the last remaining areas of dispute.[4] France's dual basic demand for a free-trade area was accepted: the overseas Associates opened themselves to imports from all of the Six on the same basis as imports from their metropole, and the Six reciprocated with preferential duty-free entry for imports from any member's overseas territories. The stumbling block concerned the third major French point: participation of all Members in an Overseas Development Fund. The principle of support for social (infrastructure)

[4] Le Monde, 29 January 1957. On the French Position see ibid., 10 October 1956, 20 October 1957. France was operating under the influence of the 1956 Suez crisis, which made it apparent that the Entente Cordiale was too small and the Atlantic Alliance too fragile; ibid.,19 December 1956.

projects was however, generally admitted. An additional obstacle, on which the memorandum did not take a stand, was agreement on the identification of overseas Associates, particularly in regard to Tunisia and Morocco (new and independent competitors of some Members), and Algeria (an integral part of France then in bloody rebellion). At the same time Italy spoke of including among the Associates, Somalia (its trust territory) and Libya (its former colony), and the Netherlands of including its West Indies.

(b) German Support.

Winning over German support was begun at the seventh ministerial conference, also at Val-Duchesse, in early February. There appeared to have been an underlying fear of making a commitment for the life of the Treaty (EEC,Article 240 stated it to be of "unlimited duration") to provide funds for political entities that were such poor insurance risks as were the colonies. France therefore agreed to include only the principles of Association in the Treaty, leaving the details in an annex (The Implementation Convention) that would cover the first five years. These provisions were important points that would be the basis for much later negotiations. The Germans agreed to participate in an investment fund but refused but refused to be assigned a specific percentage (the Franco-Belgian memorandum had proposed a fixed quota for Member's contributions for social projects, and a quota-- presumably fluctuating-- based on the value of each Member's exports to the Associates for economic projects, with the Associates' regional development plans to be submitted to an EEC body).[5]

Germany wanted economic projects discussed item by item, a process that France, in turn, felt would result in providing European funding for only the better projects and leaving the

[5] Zartman, I.W.,op cit.,p.11.

poorer projects to the metropole. It can be seen that France was under a lot of pressure to reach a suitable agreement on the Associates with the other Members of the Community. This pressure most likely came from the home government of Charles de Gaulle which could no longer bear the financial responsibility of catering for its African colonies alone. Furthermore, the French proposal for providing preferential treatment for Associates' exports--a high European tariff on tropical products imported from non-Associates--troubled Germany and the Netherlands, whose sources for these products were not among the Associates and whose would therefore rise (although they would also rise if they shifted to the higher--priced Associates as sources, as France and Belgium wanted). There was however agreement that a free-trade area between Members and Associates would be installed progressively; that while Algeria would have to be included it would be so only under circumscribing conditions (Article 227 of the EEC Treaty of Rome), and that Tunisia and Morocco-- and eventually quite a list of overseas non-Associates-- would be assured the possibility of eventual Association through Declarations of Intentions appended to the Treaty (all matters for renewed discussion in the 1960s).

(c) Hard Bargaining in the Negotiations.

During the first half of February 1957, it appeared certain that the treaty negotiations would have to be carried to the level of heads of state. While only a few details were left unsettled, they were so important to some of the Six that the creation of a "Common Market" was threatened, the Netherlands even threatened to join the British-sponsored "counter-Community", the European Free Trade Association (EFTA), and France refused to sign the EEC Treaty unless it protected not only the Six but their colonies as well. The use of threat by the Netherlands at this point was a negotiating tactic aimed at getting France to relax some of her demands especially as the relationship between France and Britain at this time was not particularly cordial. The effect of this threat appeared however to be lost on France who counter-threatened not to join the Community if its colonies were not protected. Needless to say, if France chose to stay out of the Community it would be fatal because the French economy was the strongest in post-World War 11 Europe at the time, Germany still smarting from the devastation of the war.

The chances of France's winning its hand appeared small since it was the petitioner on two non-negotiable points: Association and a matter of ownership of fissionable materials under the Euratom Treaty (which was being negotiated at the same time).[6] It was therefore both surprising and relieving that agreement was reached at the eighth ministerial meeting in Paris in February 1957. The Overseas Fund, lasting five years, would dispense a sum including matched German and French contributions of 200 million u.a. (1 unit of account--u.a.-- equalled US$ 1.00). Belgian, Italian and Dutch territories would also be covered; and, in a Belgian compromise at the last minute, Germany would be allowed quotas for non-Associated exports of tropical products and the common European tariff on tropical products would be applied progressively so as not to harm non-Associated exports suddenly.[7]

(d) The Final Agreement.

The substance of the agreement had been proposed as a package, with concessions only on the details: France offered to share the exclusiveness of her colonial market and an investment area (thus gradually inviting competition) if the other Members would agree to help

[6] Le Monde, 3 February 1957.

[7] Zartman, op cit., p.11.

meet the Associates' market and capital needs that France could no longer handle. The result was Part IV of the Rome Treaty (comprising only 6 articles, Rome 131--136) and an appended Implementation Convention (of 17 articles), plus a number of lesser annexes, protocols, and Declarations of Intentions, covering the three basic aspects of overseas Association: trade, aid and establishment. The same provisions for the progressive elimination of commercial restrictions-- tariffs and quotas-- and the establishment of a free-trade area that were to apply to trade among European Members were also to apply to trade between Europe and Africa (and other colonial countries), and by the same token, to trade among colonial African Associates, whether French, Belgian or Italian.

The Overseas Development Fund (FEDOM) totalling 581.25 million u.a. was to be allocated among the individual Associates by the EEC Commission on the basis of project requests. Among the contributors, France and Germany each provided 34.4 per cent (200 million u.a.), Belgium and the Netherlands each provided 6.9 per cent (40 million u.a.), and Luxembourg, .22 per cent (1.25 million u.a.). Among the recipients, 87.8 per cent (511.25 million u.a.) was to be allocated to French Associates who were the most in number, 6.02 per cent (35 million u.a.) to Dutch Associates, 5.16 per cent (30 million u.a.) to Belgian Associates, for the first five years.

Analysis--One of the most significant features of the negotiations leading to the Association Convention of 1958 was the fact that the African and Malagasy States which were the subject of negotiation were not themselves parties to the negotiations. Not being politically independent they did not have the legal basis upon which to negotiate as equals with the EEC Members. The metropolitan powers, especially France, negotiated on behalf of their colonies and decided for them what their interests were. The negotiations were completely a European affair.

It can be argued that France's, and to a large extent the other Members, motives were not purely altruistic as propagated, but were essentially economic in nature. France wanted to retain its contact with its colonies as a cheap source of raw materials, and at the same time, to share its financial responsibility to the Associates with the other Members in exchange for extending her monopoly of the colonial market to them. If the Associates did not realise this during the AASM negotiations, they seemed to be aware of it in the subsequent negotiations. In those latter negotiations they sought to have a joint decision-making body with respect to the Conventions, and also compensation in terms of precise provision for industrial and technical cooperation with the Europeans which would accelerate their own development.

Not unexpectedly, this led to criticisms from non-Associated African countries, chief among which was Ghana, Africa's first country to politically regain its independence.[8] Their charges were of neo-colonialism, and economic exploitation. These charges were to have an effect on the renewed negotiations in 1962 by which time many more colonies had regained their political independence as will be seen in the negotiations which resulted in the two Yaounde Conventions.

(B) The Yaounde Conventions.

(i) Raison d'Etre:

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[8] The Ghanaian peoples regained their independence in March 1957. Liberia had actually been granted its independence in the 19th century by the U.S.A. shortly after she was established by the U.S.A. as a territory for freed slave returnees. Ethiopia was never colonised at any period of her history.

A The EC's Standpoint.

Four pressures operated on the EEC to revise its original Association agreement with 25 overseas countries and territories. (a) One was the expiration and promised renewal of the "Application Convention relative to the Association", which by the Rome Treaty (Article 136) was to occur five years after the Convention's entry into force, i.e., the end of 1962. (b) Another was the accession of 16 Associates to independence during 1960 and two more before the expiration of the Convention. Two politically applicable options were contained in the Treaty: Declarations of Intention annexed to the Treaty proposed the negotiation of Association Conventions with independent countries belonging to the Franc zone and with Somalia (whose independence in 1960 was prescribed by the Trusteeship Agreement, Article 24); and the Treaty itself (Article 238) permitted new Associations "characterized by reciprocated rights and obligations, common actions, and special procedures", to be negotiated by the Commission, i,e., the European Commission, (Article 238) and concluded by unanimous action of the Council(the European Council) with the advice of the Assembly.

To these two pressures were added the Association's problems of functioning under the Rome Treaty, especially in two matters: (c) the FEDOM, (d) and the Common External Tariff (CET). By 1960, little FEDOM money had been allocated and less and less spent. The cumbersomeness of its procedure had become most evident. There was a need to review aid procedures. In May 1960, the Six decided to accelerate their moves toward the CET, so that the first (30 per cent) alignment of Member's tariffs took place at the beginning of 1961, a year ahead of schedule. In the process, the margin of protection given by France, a high-tariff country, to its African territories, was also reduced at an accelerated rate. There was therefore also a need to review customs arrangements.[9]

B The African's Standpoint.

As the African Associates achieved independence (beginning with Cameroon and Togo on January 1, and April 27 1960 respectively), they immediately opened the debate on the means of continuing the Association. While Cameroon wished to maintain its Association with the Community, Togo proposed that the existing arrangements be terminated and a new Association be negotiated on the basis of Article 238 of the Treaty. Although the Togolese solution attracted the sympathy of the Six, notably the Netherlands, it would have meant the cessation of European aid, almost before it began, and the preparation of overlapping bilateral negotiations for each newly independent state, at a time when neither side was fully prepared for talks on a new Association.

It was not without difficulty that the Council, meeting in mid-July, late September, and mid-October 1960, was able to issue a decision (in the vaguest of terms) covering the new independence of its Associates.

Recognizing a common desire to maintain Association "until new arrangements" could be made, the Council agreed to handle aid proposals "by a new procedure to be determined",to accept representatives from the Associated states "according to the conditions to be determined", and eventually to organize ad hoc meetings between them and the Members' permanent representatives, as well as among ministers of the Associated and Member states, in the presence of the Commission. Such equivocal terms, which registered agreement only in postponing it, were the only ones able to win acceptance from the Six.

[9] See summary discussions in L'Association des Etats Africains et Malagache a la Communaute Economique Europeenne (Paris: La Documentation francaise), 15 October 1966, Note et Etude documentaire no. 3327, pp.12,14.

The Africans, however, were thinking in terms not only of direct presentation of aids projects and accreditation of ambassadors to the EEC, as the Six had already granted, but of direct participation in meetings of the Council of Ministers when their affairs were discussed (a position they had discussed in a meeting with France in early February 1961). Therefore, the Ivory Coast, Congo (Brazzaville) and Dahomey requested the opening of talks in mid-January 1961 and a week later, France, which had a natural role as spokesman for its former colonies, proposed to the Council that negotiations be opened.

(ii) The Stages of the Negotiations:

Once this step had been reached, the parties began to block out their positions.

A The Europeans.

(a) France\Belgium versus Germany\Netherlands

In the view of Belgium and France, the Associates should not be considered third states (as under EEC Article 238) but should continue to benefit from preferential system (already lessened by the CET) without which their economies would undergo sudden and serious dislocations. On the other side, Germany and the Netherlands considered the goal to be economic independence rather than protection for the African States; the new agreement should enable Africa to reach a competitive position on the world market within the shortest possible time-- about five years. Italy's position throughout the negotiations remained that of seeking to harmonize the interests of all parties-- Members (of both persuasions), Associates, and non-Associates who were trading partners of both groups.

(b) The EEC Commission Report- an attempt to bridge the gap.

The EEC Commission report, presented to the Council in July 1961, was a far-reaching document. On many points it tried to bridge the gap between the two sides within the Six. It used both Articles 136 and 238 as the legal basis for its legal argument; it sought both to stabilize the Community market for Tropical products and to leave the door open for free functioning of supply and demand; it looked to both the maintenance of a Eurafrican Association and the establishment and the establishment of African economic groups; and it insisted on the necessity of indemnifying the African States for the loss of special French prices (Surprix) that would result from existing Common Market agreements.

To these ends it made a number of proposals. For tropical products the Commission suggested the elimination of tariffs, quotas, and consumption taxes inside the Association and the accelerated establishment of the CET (to come into effect in 1965). Most important, the new FED(European Development Fund) was to distribute $220 million for each of the 5 to 7 years of the new Association, a sum roughly equal to the largest annual figure (1962) for grants scheduled by the FEDOM. In their ensemble, the Commission's proposals provided a framework for a new Treaty.

B The Africans- Formation of the UAM

Other parties also began to formulate their positions. In Africa, the heads of 12 Associated States met in mid-December 1960 at Brazzaville in the second of a series of conferences setting up the African and Malagasy Union (UAM). They arrived with relatively little difficulty at an early identity of views, demanding more price-stabilization measures, generous and effective aid procedures, continued support prices and protection for tropical products, increased European consumption of their exports, joint management of aid, and participation in judging new applications from competitors for Association. When they met in

Yaounde late March 1961 to create an Economic Cooperation Organization (OAMCE) for the UAM, they strongly reiterated their demands and asked that these matters be put on the agenda of the proposed meeting of the permanent representatives which was to take place in June. Experts from all Associated States met in Paris late April to prepare common positions, not only for the 12 States of the OAMCE but also, in most cases, for the other Associates. Their demands concerned a voice in Community decisions concerning competing African economies; a stabilization fund with guarantees covering loans; price, marketing, and anti-dumping provisions for fats and oils; and the establishment of a technical assistance programme for the Association.

The whole series of positions developed over 5 months was rather comprehensive and helped the Associates present a united front in negotiation. The specific organization of 12 Associates into an Afro-Malagasy Union gave them a concerted means of pressure. When the 12 met in Tananarive, Malagasy Republic, in early September 1961 to sign the UAM charter, for example, they also passed a few more resolutions on the Association, notably on price stabilization, technical assistance, and participation in all decisions affecting them, including quotas for exports from competing non-Associates.[10]

Subsequently, the June interparliamentary conference in Strasbourg showed a remarkable identity of views, except for the issue of rights of established. It appeared that all the Africans' demands had been met but in fact the formal negotiations had not even begun. They were however, in the preparatory stages.

C (a) <u>The First Meeting of Permanent Representatives</u>

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[10] Zartman, op cit, p.30.

The first meeting of permanent representatives was held in early June in Brussels. The Africans were nearly always the "askers", presenting their demand with common agreement. They requested the continuation of preferences despite accelerated progress toward a CET, the creation of stabilization measures and better marketing conditions for tropical products, the right to establish protective measures, the opportunity to defend their economic interests in European decisions regarding competing non-Associates, and the abolition of European consumption taxes on tropical products. Senegal presented the resolutions adopted by the Associates in April, and other countries provided supporting arguments.

The Europeans, on the other hand, received the requests-- usually merely by taking note of them-- and were severely divided. Germany and particularly the Netherlands looked to an expansion of the Community and, a fortiori, to an open and supple Association; when it came to preferences for the Associates, the two Members (who brought their tropical products outside the Association) wanted the decision placed within a larger framework that would include the interests of competing non-Associates as well as of Members and Associates. France defended a clear priority obligation to the Associates, most of whom were her former colonies. At one point, an OAMCE resolution appealed directly to France, "within the framework of the cooperation agreements contracted with her", to "subordinate" compliance with Community decisions on the CET to prior agreements with the Associates.[11]

In other matters, the division among the Members was apparent but silent, dampening discussion and delaying decisions. The most important of these was the Africans' insistence on joint management, a demand which to the Europeans, was simply too close to full membership

[11] Ibid., p.33.

to be accepted. Yet many of the concrete proposals from the Africans came down to this single egalitarian item. With insufficient technical knowledge to propose substantive reforms, and with the recent acquisition of sovereign equality still fresh in their minds, the Associates demanded joint procedure.

(b) The Second Meeting of Permanent Representatives

The second preparatory meeting of permanent representatives in early November 1961 had been postponed several times because of the difficulties the Six encountered in achieving a common position. A more comprehensive list of positions was drawn up. The Europeans were able to announce a number of points of agreement among themselves, some of them conciliatory toward the Africans' positions. Thus, the object of Association was defined as "the promotion of economic and social development of the Associates... in order to reinforce their economic independence"; aid provisions and the Treaty itself, "freely agreed to on the basis of complete equality", were to contain "advantages at least equivalent" to those of the Treaty of Rome for a period of five to seven years, although Association could be considered to be for an unlimited duration (EEC Article 240). The Six also agreed to include safeguard clauses and the principle of reciprocal consultation. In addition, they agreed to study and include measures to stabilize export income, and to establish new forms of aid and technical cooperation,as well as ministerial, preparatory, and parliamentary institutions. However, on the key matter of trade and tariff details, continued divergences among the Members permitted only a statement that the interests of Members, Associates, and non-Associates, "who are both our friends and yours", would be kept in mind.

The Africans were not completely satisfied. On many of the Europeans' points they insisted on greater precision. The objectives should mention industrialization as the means to social and economic development; the principles should include solid guarantees against the loss of protected markets; measures to facilitate marketing were absolutely necessary and should include market organization, export guarantees, agricultural price stabilization, long-term agreements, tariff protection, price-support funds, and a common commercial policy towards competing non-Associates. Decision-making should be institutionalized on the basis of parity, and aid should be jointly managed from beginning to end; technical assistance and institutions of the Association should be spelled out in detail, and a development institute created. On two additional points, the demands were heavy: aid must be increased, not merely maintained, and should include private investment guarantees, a development bank, and a commercial production fund; existing trade and tariff protection must be maintained against competitive imports from non-Associates in Africa that were either more developed than the Associates or were members of other customs zones.

For all its wordiness, however, the November meeting provided a realistic jumping off place for negotiations since divergences in African and European positions were clearly apparent.

D The First Interministerial Conference

The first interministerial conference opened in Paris in early December 1961, and in many ways sounded as if no preliminary meetings had taken place.[12] The president of the Council announced essentially the same concessions and divergences that had opened the second meeting of permanent representatives. The necessity for delegation heads to re-state the arguments, each mustering greater eloquence in support of common positions, meant that the

[12] Ibid., p.36.

Europeans were barraged with a series of strong statements of demands and grievances. Paul Darboux of Dahomey pointed out that consumption taxes and quotas on bananas and coffee negated the principle of free trade. Marcel Douzima of Central African Republic and Raphael Saller of the Ivory Coast suggested that concern for competing non-Associates was biting into the favoured position of the Associates and calling into question the unlimited duration of the Association. Since these criticisms were directed primarily against Germany, and Ludwig Erhardt was equally outspoken in stating his position, a recess was necessary at one point for Georges Gorse of France and Paul Fayat of Belgium to conciliate the Germans, Ivoriens and Malagasys.

Other moments were spent debating essentially moot points. For instance, a discussion broke out among the Africans on whether or not the Association was political, and whether the legal basis of the negotiations was EEC Article 238 (Togo, Mali, Congo, the Netherlands, Germany) or Article 136 (France, Belgium and the OAMCE). The Congo broke ranks by asking for bilateral treaties of short durations, with the Association actively open to other African States. Yet some points of agreement were established. The Association was to remain unlimited, but the treaty giving it substance would be negotiated for five to seven years; the economic advantages of Association and its aid fund would be at least equivalent to those of the Rome Treaty and the FEDOM, the safeguard clauses for the Associates would be maintained, and the new institutions would include a Council, a Committee, and a parliamentary assembly. On the conduct of the negotiations themselves,the proposals that the Associates had drawn up for an executive co-ordinating committee and three working groups-- on institutions and administration, financial and technical cooperation, and commerce and markets--were also accepted, and the first meeting gave way to the work of the smaller groups meeting during the first three months of 1962. The first stage of the negotiations had been concerned with institutions to the working groups; the second was to fill in the flesh on the bones.

The Different Positions

The OAMCE 12 met in Bangui in February 1962 and resolved, amongst others, to insist on preferences, as well as an amount of aid under the FED to be equal to or greater than the highest grant under FEDOM (1962). The Europeans also tried to reconcile their differences. At a meeting of the Permanent Representatives held in late January 1962, positions were clearly outlined. Germany favoured the Commission's proposals of an accelerated and reduced CET, along with a "special commercial regime" for the Associates' tropical products, in order to maintain the Association while encouraging trade with competing African non-Associates. The Netherlands concurred; it favoured replacing preferences with annually decreasing aid to the Associates and also a special unilateral dispensation for France to enable her to maintain special preferential ties with them. It would not be opposed to a "special commercial regime" as a transitional measure, but it could not accept a free trade area, which it felt would be at the expense of other African countries trading with Europe. France agreed with the proposal for an accelerated CET but was opposed to reducing the CET unless full compensation was made to the satisfaction of the Associates. Continuing non-degressive price supports were considered necessary by the French; only a free- trade area could give satisfaction to the Associates' needs. Belgium (and Luxembourg) also opposed a "special commercial regime" and favoured a free trade area, but favoured an accelerated and reduced CET as well as the replacement of preferences with compensation. Italy, although not yet ready to take a position, declared it favoured acceleration and reduction of the CET and also a free trade area. In the Council of Ministers meeting in March, these overlapping positions were drawn slightly closer together by the Netherlands' acceptance of a free-trade area for a limited time only, in exchange for France's agreement to reduce CET on tropical products (thus reducing the Associates' advantages on the European market).

Thus, it can be seen that the Six were talking in terms substantially different from those of the Africans, and that the overlap in European positions facilitated an exchange of concessions among the Six. Since French position was in many ways the minimum acceptable to the Africans, any mutual concessions among the Europeans meant moving away from the African demands.

E The Second Interministerial Meeting

The second interministerial meeting took place in early April 1962. The meeting opened with a series of speeches by the Associates similar to those delivered at the first interministerial conference; they dealt largely with broad concepts or the specific problems of one country and were almost irrelevant since it was not yet known what the Members had been able to agree upon. Once France's Gorse, spokesman for the Six, took the floor, the tone changed and both substantive bargaining and negotiating tactics came into play. Gorse announced that the Six had agreed on a five-year treaty "and foresee a commercial regime based on Part IV of the Treaty with several modifications." A free-trade area and a reduced, accelerated CET would be established; measures would be taken to increase coffee and banana imports to the Community; and safeguard clauses were to be elaborated. Cameroon's Victor Kanga, speaking for the Africans, answered with a wordy reiteration of the Associates' demands, notably calling for a reinforcement of the Rome Treaty basis, and the safe-guard clauses, joint-determination of the CET, aid to production, and other points. Gorse retorted that no further mention was to be made of the Rome Treaty basis, warning that a "remarkable effort of compromise" had already been made and one state (the Netherlands) would admit no additional discussion of the problem; safeguards and production aid had already been admitted. The session was then suspended to get across the point that the Six had already reached a painful compromise on certain points.

When the meeting reconvened, Gorse again requested the Associates not to push reference to the free-trade Association beyond the delicate agreement and to drop their insistence on joint-determination of the CET.

Kanga bowed to the pleas on the Rome Treaty, but repeated demands on the CET. Gorse replied that the CET was a European matter, but that the matter could be "examined in the course of the negotiations". He then turned the discussion to the FED. The European position was to set a single sum and divide it thereafter as necessary. Because there was still no agreement on that sum among the Six, the best the Members could offer was a FED that would be slightly greater than the FEDOM. The sums put forward earlier for the five-year period by the European Members varied from 1.2 billion u.a. (France) to 680 million u.a. (Germany, the Netherlands), with the Commission's figure somewhat above France's. After Gorse spoke, the Associates requested suspension of the session, and then Mauritania's Mamadou Toure presented their demands. The Africans request was for an annual sum of 220 million u.a. in grants, 20 million u.a. in loans, and 113.3 million u.a. in commercial aid in form of various support and stabilization funds, totalling nearly 1.8 billion u.a. over the five-year period. This sum, determined by adding up component aid figures, was to be specifically assigned to production and diversification categories and allocated by country. The Members then requested suspension, and returned with a draft resolution. Debate continued between the Members (Gorse) and Associates (Saller) over the draft's promise to take "African interests into consideration" in the Community's Common Agricultural Policy (CAP) and over the equal absence of explicitness on production and diversification aid. When the Netherlands and Italy protested that time was being wasted in hair-splitting, the session was again suspended.

F A Working Draft

The final resolution was essentially the European draft with some African rewording. By presenting a draft, which represented an already negotiated compromise among the Six, and by warning that major changes would endanger the whole delicately constructed edifice, the Six were able to maintain control of the terms. The resolution further agreed to take African needs into consideration regarding the CET and the CAP, and to include ways to increase both private investments and European consumption of tropical products, as well as to improve conditions for marketing the products. Technical assistance and the use of grants and loans were spelt out in greater detail. On the basis of these points, the working groups and executive committee were to draw up a draft treaty for the next meeting in June. African demands for co-management and full consultation, full compensation for reductions in the CET, price stabilization, special funds, marketing and private investment guarantees, and tripled aid all fell by the wayside.

The EEC Council of Ministers met early in June to consider the Commission's draft treaty, which had been submitted ten days before, but was unable to resolve the points of divergence and adjourned in deadlock. It met again in two weeks on the day the third interministerial meeting was to have been held, and arrived at a painful and partial agreement. The FED was finally fixed for five years at 780 million u.a. (the figure mentioned at times by Belgium, Germany and Italy), about halfway between the unchanged Dutch proposal (680 million u.a.) and the lowest French figure (890 million u.a.), and almost 200 million u.a. above the FEDOM total of 581.25 million u.a. Thus, the demands for a new form of aid were met, but large as it was, the sum was disappointingly low in the eyes of the Africans, who looked for more than twice the amount. To compensate the Dutch for their agreement to an increased FED, the bulk of the sum was borne by France, Germany and Italy.

G The Third Interministerial Meeting

The third interministerial session opened on 4 July 1962. The draft was presented by the Europeans. The commercial provisions would maintain a free-trade area between Europe and Africa, but the CET on some tropical products would be reduced, with undefined special provisions for bananas and tropical woods; the Associates agreed to accept these provisions. African States' quotas were to be progressively reduced and elimination by the end of 1965, a proposal which the Associates accepted on condition of adequate compensation. On future commercial agreements (including Association) with competing African non-Associates, the Eighteen would be consulted and their interests protected. Divergences thus narrowed to the matter of aid.

The remainder of the two-day session was a dialogue between Saller, speaking for the Eighteen, and Colombo, chairman of the Six. Since the two positions were irreconcilable in substance, the two sides had nothing to do but play their "most extreme card" procedurally. For the Members, this amounted to repeating that the proposals made up a single package, and that its provisions were both coherently interrelated and painstakingly negotiated. For the Associates, the only thing to do was to reject the aid proposals as insufficient, and if the ensemble was inseparable, to reject the compensatory provisions as inadequate too.

Their arithmetic was sound, even if not convincing to the Six: the Associates had received 580 million u.a. from the Community under the Association Convention plus 325 million u.a. in price supports from France or 905 million u.a., whereas under the new proposals they would only get 780 million (and no price supports) or 125 million u.a. less--not the promised aid "equal to or greater than the FEDOM". Instead Saller proposed 230 million u.a. in diversification aid over and above the 580 million sum, or 810 million u.a. for the FED; in addition, price supports should be eliminated only gradually, and with compensation up to the 325 million u.a. figure. Colombo pointed out that there was no sense in removing the price supports if the compensation was to remain, but Saller objected that at this crucial moment African economies could not stand a sudden fall in prices and still progress toward development. After the session was suspended three times to allow consultations on both sides Gorse "in a personal capacity" announced that, although it was difficult to mix bilateral and multi-lateral provisions, France itself would "doubtless" grant aid complementary to the supported prices for a certain period. The move was a skilful attempt to break the deadlock without contravening the ban on preferences, but after another suspension the Associates declared that the package was inadequate and they would need to refer to their governments. The negotiations thus broke down, without even a final communique, and talks were suspended throughout the Summer. Since it was still unclear whether ratification of a final agreement by the Member's parliaments was a step that could be dispensed with, it was becoming less and less likely that a convention could be negotiated and put into effect before the old one ran out.

H The Fourth Interministerial Meeting

The fourth interministerial meeting, scheduled for September, opened late in the following month. By juggling some figures and raising others, the Six were able to propose a FED total that had the appearance of meeting one African demand. The total was raised to 800 million u.a., but 70 million was set aside for territories not yet independent, soothing African sentiments. The balance was to be in form of aid and loans which would be used for economic investments and diversification aid. In these matters, African wishes were met. Thus as the negotiations moved toward a conclusion, the divergences between the two sides were narrowed by balanced compromises, but the convergence point was significantly closer to the initial European offer than to the African demands. Furthermore, as the debates narrowed down to points that affected Africans only, the early African unity broke down.[13] The allocation of the FED sum on production and diversification (230 million u.a.) among the Eighteen proved to be the new problem, bringing out some of the bitter rivalries that up to this point had been confined to the Associates private negotiations. There was also a division in regard to the balance 183 million u.a. between the "minority", i.e., non-French ex-colonies, and the former French colonies. Instead of holding the meeting up any longer, it was decided to adjourn, leaving the Eighteen to work out their own shares. A draft, drawn up by the Six, was to be circulated to the Associates by the beginning of November, with final meetings to be held in mid-November and December to "dot i's" and then initial the treaty.

I The Fifth Interministerial Meeting

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[13] Ibid., p.51.

In fact the November meeting never was held. The fifth interministerial meeting on December 19, 1962 was able to settle matters but it took a midnight intervention by Colombo to bring about a satisfactory agreement on allocation of aid among the Africans. On the following day, the treaty was initialled, 10 days before the expiration of the old Association. Other official and bureaucratic negotiations continued between the parties but the actual Convention was signed in Yaounde, Cameroon on 20 July, 1963 and came into effect on 1 June 1964, following the necessary ratifications.

Analysis

From an analytical point of view, the Yaounde set of negotiations were a very disorderly process. Discussions were continually being re-made, non-decisions were solemnly announced, principles were frequently being re-interpreted, major excluded issues were constantly being re-introduced, important details were not decided until the last minute, and the actual duration and potential shape of the Association were changed after the text had been initialled. Yet the "success" of the negotiations--in the sense of a final agreement continuing the Association was not in doubt.

Another way of looking at the Yaounde negotiation process is that the Africans, having failed to realize that the Europeans needed them economically as much as they needed the Europeans, they negotiated as if they had everything to gain and nothing to lose, and the Europeans were simply to give and were not going to gain anything. Thus, they underestimated their own importance to the EC and could not therefore get them to respect their demands. oN

Alternative Arrangement For The Africans

Further, they had, apparently, prepared no viable alternative position--what William Ury in his book, Getting Past No[14] calls the BATNA, i.e., the Best Alternative To A Negotiated Agreement. Had they a viable alternative such as going it all alone with their newly independent status, forming economic unions with each other, or even economic cooperation with other countries outside the EC, this might have served as an incentive to make the EC reconsider favourably the Africans' demands. In other words, they did nothing to show the Europeans what they (the Europeans) stood to lose if the Africans opted for an alternative arrangement.

Quite apart from this is the fact that it is possible (although not probable in the author's opinion) that the Europeans may have been employing a good guy\bad guy tactic by pretending to disagree over certain issues initially-- with Germany pretending to be the bad guy who was impossible and France, the good, conceding member of the same side. Such a ploy would be aimed at getting the Africans to agree to substantially lower terms than they wanted without much ado. If the Africans recognized this tactic they would not give in so easily.

Non-negotiation

The entire Yaounde negotiations may indeed be said to be a non-negotiation in the sense that it was always the EC position that was adopted with cosmetic amendments by the Africans. The Europeans would hear out the Africans, then argue among themselves as to what they should or should not agree to, and then agree on a position which they would then practically impose on the Africans. To do this, they would present a draft to the Africans which were never jointly prepared by both parties. By preparing the drafts the Europeans were able to ensure that they effectively dominated the outcome. It had the form of a negotiation but was in essence more like a one-way traffic of concessions and compromises from the Africans to the

[14] Bantam Books,New York, 1991, pp.20-22.

Europeans. This was less obvious in the Lome I negotiations because the oil wealth and power of the ACP lead negotiators increased their confidence to bargain more aggressively, but by the Lome IV Conventions the pattern had returned to the Yaounde position because most of the richer ACP countries were themselves now heavily in debt and were pursuing austerity measures imposed by the World Bank and the International Monetary Fund (IMF). This substantially affected their negotiating power as will be seen later.

Pressure on France

It is worthy of note that France's pressure to reach agreement with the Africans, was not just from the French population who wanted to see France continue to maintain some hegemony over her ex-colonies but it was also economic. The French economy was largely supported by its monetary arrangements with its ex-colonies in Africa under the Franc Zone (FZ) system. Under this arrangement, all the 13 ex-colonies had a single currency (CFA Franc) which was fixed permanently at 0.02 per cent of the French Franc. Given the fact that France was practically as populated as these countries put together, yet had a GNP 14 times higher than the average GNP of these countries, and a per capita income 20 times higher than the average per capita income of these countries, it is obvious that these colonies were in fact an indirect channel of aid to the French economy.[15] It is surprising that the Africans did not realize this and exploit it to their advantage.

If for instance, the Africans had allowed the deadline to expire they would have been able to find out just how much they meant to the Europeans. Obviously, the Europeans needed to get the agreement signed before the expiration of the old one. Realizing this would have

[15] Martin, G., "The Franc Zone, Underdevelopment and Dependency in Francophone Africa", Third World Quaterly, Vol. 8, 1986, pp. 205-210.

constituted a useful tool in the hands of the Africans.

Intimidation Tactics

It appears also that the Africans fell too readily for the intimidation tactics used by the Europeans. When the EC negotiators would retort (to an African demand) that they wanted to hear no more about it, and that they had just barely been able to concede so much, the Africans failed to recognize this for what it was-- a tactic meant to intimidate them into giving up their position. More skilled negotiators perhaps, would have ignored this and pressed on with their demands. This would also have shown the Europeans that they meant what they said.

The Complexity of the Negotiations

One point that must be borne in mind was the complexity of the negotiations themselves. Owing to the fact that it was a multi-party affair, a lot of issues and sub-issues arose both with the EC and the African group, as is the case with international multilateral negotiations. This is usually exploited by the parties involved by delaying decision-making on one point until another has been decided. This was evident in the Younde negotiations. It was also evident that the Europeans often delayed agreement on a point in the hope of trading it against another as a concession, thus manipulating the complexity of the negotiations to obtain a bargaining advantage.[16]

Pressure on both Parties.

That the Yaounde set of negotiations were concluded at midnight, barely 10 days before the expiration of the AASM Convention goes to confirm the pressure to reach agreement which was brought to bear on both parties. For the Africans, although they had not been satisfied with

[16]Druckman,D.,Negotiations, Sage, Beverly Hills, London,1977, pp.350-351. See also Zartman, op cit, p. 56.

the Association Convention, they preferred some sort of economic tie with and aid flow from the Europeans to going it alone. To do this, they feared, would lead to a sudden collapse in their economies and possibly lead to social and political unrest. Thus the possibility of a walk-out or non-agreement for them was remote. They resorted rather to making moral pleas to the Europeans, exploiting the altruistic motives the Europeans claimed. The Europeans had started this whole system of aid in the first place, the Africans claimed, and should not now back out of it because the African economies could not bear it and it would lead to political instability.

With the Europeans, the European Commission was carefully monitoring the stages of the negotiations and pressure from home governments, particularly the French was mounting, to maintain their traditional monopolistic markets in Africa. Failure to reach agreement might have resulted in the French government losing its face before the French Parliament.

The Africans' concern for their sovereignty

It appeared also that the Africans were overly concerned about asserting their newly-attained sovereignty. The Europeans realised this need and humoured or met it by painstakingly observing the Convention protocols that apply to negotiations between sovereign nations while substantially denying the Africans a definite say in the decision-making. This they felt would be too close to full membership of the EC to be acceptable. Undoubtedly, the Europeans were exploiting the Africans' need for recognition as sovereign nations to their advantage by employing the Motivation Theory which Nieremberg, and other negotiation scholars, believe help in understanding an opponent's behaviour in a negotiation process.[17]

[17] Nieremberg,G.I., Fundamentals of Negotiation, New York: Hawthorn Books [1973].
The Motivation Theory basically says that a party to a negotiation should seek to understand the other party's needs, interests and motivation and to try to satisfy those needs, in other to get him cooperate during the negotiation. Nieremberg proposed a hierachy of needs which included food, love, recognition and sex.

Unskilled Negotiation

The Africans were apparently unable to exploit the disunity among the Europeans to their advantage. The Europeans were more or less divided along two lines, France\Belgium against Germany\Netherlands. Had they been skilled negotiators, the Africans might have been able to exploit the apparent disunity over the amount of funds to put in the FEDOM to get much more than was eventually allocated to them. This was particularly so because France was torn between its obligation and promises to the Africans and its loyalty under the EEC Treaty to the Europeans. If the Africans had insisted on France honouring earlier promises made to them as a condition for signing the Convention, France may in turn have insisted upon giving the Africans something close to what they demanded as a condition for France remaining in the EC.

The Africans were the askers and the Europeans were the givers; the Europeans had all the alternatives while the only card in the Africans' hand was blank. Thus, once the Europeans were able to agree on a position, they could warn the Africans not to tamper with the edifice lest its delicate balance be disturbed and fall into irreconcilable chaos. This stilled almost any African objections.

Disunity among the Africans

On the Africans' side, there was more unity on principles at the beginning than on details at the end, the fissures were always present but the plaster of African unity cracked before it could harden. Further they were not blessed, like the Europeans, with a commitment to unity under a treaty and this was one of the reasons for founding the UAM and its economic organization, the OAMCE. In a sense the emergence of the OAMCE as a group within the Eighteen(comprising of 12 States) could be seen as a coalition of those States which had similar iterests to protect. This however appeared to be a loose grouping without a clearly defined, united strategy, hence it quickly fell into a disunited chaos as the negotiations moved from general issues to specific details. Internal rivalries and dissents within the group came to the surface.

In sum, the Africans' greatest strength was their weakness. Their under-development gave them substance for appeals to the Six. It was the source of their warnings. This was how they got from the negotiations what they got.

Yaounde II

The negotiations for the Yaounde II Convention formally commenced in December 1968 and were concluded in mid-1969 with the signature of the Convention. These negotiations were neither so difficult nor as lengthy as those for Yaounde I.[18] They did not seek to set the Association on a new course, but rather sought to extend the already existing arrangements.

Basically, the Africans were not very pleased with the achievements of Yaounde I although they wanted the Association extended. The Dutch and West German desire to widen association was to some extent being gratified by the agreements between the EEC and three East African countries. As a result of this, the diplomatic environment in which the negotiations took place was more relaxed than was the case with Yaounde I.

The resulting Convention had essentially the same principles as under Yaounde I but with the overall aid under FED being

increased to 1 billion u.a.

(C) The Agreements with Nigeria, and East Africa

[18] Cosgrove-Twitchett, C., "Europe and Africa; from Association to Partnership", Saxon House, Farnborough, 1978, p.115.

(i) Raison d'Etre

For the purposes of the mandate, the Council and the Commission saw no reason for treating differently the various English-speaking countries who had asked for Association after Britain's attempt to join the EEC in 1962 had failed. They all chose the same option for separate Association offered by the 1963 Declaration of Intentions. They were seeking ways around what they regarded as "discrimination" against them in the Yaounde agreements. France posed the same three questions to all the Commonwealth (English-speaking) applicants: the problem of membership in two preference systems, protection of the Yaounde Associates' interests, and reciprocal advantages. They had non-discriminatory tariff systems, and enjoyed non-reciprocal Commonwealth preferences. They were "outs" seeking an association that they had formerly rejected for its presumed political implications; as such, they declined to apply for European aid, and the Six had no need to offer any, either as compensation for reduced preferences and revised surprix or as continuation of previous obligations. Their negotiations therefore centred on the principle of commercial reciprocity, and on certain side guarantees, safeguards, and procedures.

(ii) Differences Between The Nigerian Situation and The Yaounde Situation

Within this general framework of similarities, however, the interests of Commonwealth East and West Africa (Nigeria) were very different and at best parallel. Nigeria sought to get its products over the CET wall on terms as near those of its Yaounde competitors as possible with as little change in its own non-discriminatory tariff policy as possible-- all of which it did. "The maximum advantage it could obtain was limited by the terms of the Yaounde agreement, which it could not exceed. It was assured of success by a number of factors, provided only that it showed a bit of skill and suppleness in negotiating (which it also did)."[19]

For one, Nigeria's importance as Africa's largest State in terms of population made it a valuable trading partner (in both directions) and site for investment, and current figures gave every indication that prospects for trade increases were good. Also, Nigeria's association was valuable for symbolic or political reasons, as it undercut African criticism of Association and created the impression that other African countries would follow in Nigeria's footsteps. Thus, European Members, caught by their political commitment, could offer little resistance to Nigeria's rather stiff demands. Nigeria was only prepared to agree to trade preferences nominally, but would impose fiscal taxes so as not to offend the UNCTAD regulations.

In this situation, there was relatively less need for persuasive arguments from one side to the other, as had been the case negotiations. Instead, both parties spoke during the negotiations to their own domestic audiences and foreign critics to show why they were agreeing.

(iii) The Actual Negotiations

The real manoevering came about when discussions reached the point of detailed implementation within the limits of the agreed principles. Within the framework of the modified free-trade area the problem was to find a way for Nigeria to grant as few preferences as possible and for Europe to grant the Eighteen as much as possible.

The negotiations began with the establishment of guiding principles within the various commitments of the two parties. These principles then posed questions of implementation (protection of the Eighteen, preferences for the Six) to which answers were immediately

[19] Zartman, op cit p.108.

proposed. There would be special quotas for four of Nigeria's products and, nominal preferences on 26 selected products. Once the nature of these answers was determined, no further shifting took place, and none of the attempts at modification changed anything but a few details.

Thus the Nigerian negotiations were to a large extent, not a case of simple convergence, in the sense of two sides moving together from distant positions. It was rather a case of joint "moves", in which all parties jumped from matters of one level of complexity to another.

Contrasts Between The Nigerian Negotiations and The Yaounde Negotiations

A significant and unique characteristic of the Nigerian negotiations was the fact that Nigeria often proposed the working hypothesis. Under the Yaounde and East African negotiations, the Africans posed problems. The Nigerians in their set, proposed answers.[20] This had the double advantage for the Nigerians of controlling the focal point for agreement about a first proposal, and of making the Community accept or reject. In this particular set of negotiations, rejection simply meant counter-proposing minor modifications, certainly a position showing less control over the final outcome.

Zartman asks the question, how did Nigeria arrive at this position of advantage?[21] He suggests four answers:

First, the Europeans were unanimous in recognizing that the Nigerians (led by Dr. Pius Okigbo) were able negotiators, more skilful than the Eighteen or East Africans. Their position of initiative, then, may have come about because of their tactical skill. He however adds, that it

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[20] Ibid., p.111.

[21] Ibid.

is unlikely that they were more skilled negotiators than the Europeans of the Commission and the Council, who had been through all this many times before with different kinds of negotiators.

Secondly, he suggests that the fact that Nigeria was acting alone, whereas the other sets of negotiations were carried on in parallel or jointly by three or eighteen States, in which latter case the Europeans could seize the initiative.

His third answer suggests that in the other sets of negotiations, the initiative was in a sense already seized--a prior agreement or situation existed which could be used as a reference point. For instance, with the Yaounde negotiations, they referred to the Association Convention, while the East African agreements referred to the Nigerian agreement.

His final answer is that Nigeria could seize initiative because it was stronger, in the context of the negotiations. As stiff as Nigeria's demands were, they were not so disruptive economically that they justified opposition. The most crucial difference between the Yaounde and Lagos negotiations was that the Eighteen were "in" and were fighting for their life to stay in, whereas Nigeria was "out" and would only want to come in if it gained more than it stood to lose. Thus it was natural for the Six to hear what Nigeria "needed" to come in, and then try to whittle them down a bit. Skilfully, Nigeria took advantage of this situation. It also appears that the Nigerians were aware of their value as a test case for non-Associated negotiations with the EC. They seemed also to be aware of the fact that the Europeans faced charges of neo-colonialism and economic exploitation of the Africans from the rest of Africa. They were thus anxious to prove their critics wrong. Nigeria, being a country of considerable importance and political clout in Africa, which had in fact earlier been quite vocal in its criticism of the

Conventions (along with Ghana), was a valuable asset to bring into the EC economic arrangements with Africa. To do this, the Europeans felt, would vindicate their motives, and hopefully convince other African countries to come in. So convinced were they that they overlooked opposition from France which at this time had a less-than-cordial relationship with Nigeria (Nigeria had broken off diplomatic relations with France early in 1961 because the latter made atomic tests in the Sahara desert). Nigeria exploited the EC's perceived willingness to bring it in at considerable cost to further its motives for joining the Community which were to reduce the discrimination it suffered in the EC market as a result of preferences granted to the African countries which signed the Younde Convention.[22] The agreement was signed in Lagos, Nigeria on 16 July 1966.

The Agreement With East Africa

With East Africa, the negotiations began on a mandate identical to Nigeria's. But none of the circumstances surrounding the Nigerian negotiations were present for East Africa. East Africa was neither economically nor politically important nor had any strong spokesman. It also had no value as a test case once the Lagos negotiations had been concluded.

It would appear that the East Africans did not understand the rules of the negotiations.[23] Values and quantitative differences (such as the ostensibly small gap separating their non-discriminatory proposal from Nigeria's purely symbolic discrimination) derived their importance from the context of the negotiations--its principles, stages,levels,crests,etc.,--rather than from intrinsic or empirical content. More important was the fact that East Africa (i.e., Kenya,

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[22] See generally Okigbo, P.N.C., Africa and the Common Market, Evanston, NorthWestern University Press, 1967, chapters 5 and 6.

[23] Zartman,ibid., p.113.

Uganda and Tanzania) reverted to its original position between the preliminaries and the first round of negotiations, thus going back on the first level agreement on principles. Instead of seeking answers to questions deriving from principles, East Africa sought to change the principles on the second level.

The Six tried to establish a favourable negotiating context (or work up to a crest) by talking non-discrimination. If the Three were following any negotiating rules, it was their own cultural pattern of "talking until they agree", on the assumption that the whole act and purpose of talking was to arrive consensus.[24]

Reality was the reverse: the basis of consensus--return to the initial principle--was reached when talking stopped. Once this "return" took place, the negotiations on the questions and answers of implementation were in the Europeans' hands, and they determined the "crest" of the talks. Having lost the initiative the East Africans could no longer use the threat even of a veto as a bargaining point lest the Europeans take them at their word. Unlike the Nigerians, they had little hand in determining what they could take or leave. Even the moral appeals of the Eighteen were denied them. The Agreement was signed in Arusha, Tanzania on 24th September 1969, to run parallel to the second Yaounde Agreement until 31st January, 1975.

(D) The Lome Conventions

This part of this Paper seeks to examine the series of negotiations that led to the creation of the economic pact which has come to be known as the Lome Conventions, the first of which was signed in 1975. The three succeeding Conventions did not differ much as most of the groundwork had been done during the Lome 1 talks.

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[24] Ibid., p. 114. See also Gluckman, H., in Castagno, A.A., and Bennett, eds., Boston University Papers on Africa (New York: Praeger, 1967), p.209.

(i) Raison d'Etre

In 1972, the Treaty of Accession was signed, joining Great Britain to the European Community. The 20 independent Commonwealth States were offered three possible forms of relationship with the EEC, delineated in Protocol 22 of the Treaty of Accession. These possibilities were applied to the Yaounde countries as well and were later extended to the previously non-Associated States of Ethiopia, Liberia, Equatorial Guinea and Sudan, as well as Tunisia and Morocco, Libya, Algeria and Egypt. The first option was access to an Yaounde-type agreement. The second option called for "one or more special Conventions of Associations" which would, as with the Arusha (East Africa) Agreement, comprise "reciprocal rights and obligations, particularly in the field of trade". The third option was a simple trade agreement" with a view to facilitating and developing trade between the Community and those countries". Each country was asked to respond by January 1973 to the Community offer with a statement of the option it had chosen so that negotiations could begin in August of that year.[25]

However, the Commonwealth African countries refused all three possibilities and instead began organizing themselves to push for a new type of economic pact.

For the following few months manoevering took place between the Yaounde and Commonwealth groups, the Organization of African Unity (OAU) and the United Nations Economic Commission for Africa. The result was the formation of the "African, Caribbean and Pacific" group (ACP) composed of Francophone and Anglophone Africa, Ethiopia, Liberia and Sudan and the Pacific and Caribbean countries, formerly French and British territories. The

[25] Moss, J., The Lome Conventions and their implications for the United States, Westview Press, Boulder, Colorado, 1982, p.15.

ACP negotiated as a bloc during the Lome I talks, a first venture in "Trade Unions of the Poor".[26]

(ii) The ACP's Negotiating Principles

At the opening conference on future relations between the EEC and the ACP in Brussels in July of 1973, eight negotiating principles were put forward by the ACP:

1. Non-reciprocity in trade and tariff concessions.
2. The extension toward third countries, on a non-discriminatory basis, of the provisions on the rights of establishment.
3. Revision of the rules of origin so as to facilitate the industrial integration of ACP countries.
4. Revision of the provisions on the movement of payments and capital to take account of the objective of monetary independence in ACP countries and their need for monetary cooperation.
5. The disassociation of EEC financial and technical aid from any particular form of relationship with the EEC.
6. Free and assured access to EEC markets for all ACP products whether or not they were subject to the Common Agricultural Policy of the EEC.
7. The guaranteeing to the ACP countries of stable, equitable and remunerative prices in EEC markets for their main products in order to allow them to increase their export earnings.
8. No adverse effect on intra-ACP cooperation regarding institutional link-ups with the EEC, the ACPs stated briefly that "it is the type of agreement negotiated that

[26] Ibid., p. 19.

would determine the institutional set-up" and that they would like to participate actively in the management and administration of the FED which was now called the European Development Fund (EDF).

(ii) The Actual Negotiations

The emergence of the ACP group as a permanent and autonomous force made the Lome negotiations novel in comparison to earlier talks. It was possible owing to the catalyzing role which Nigeria played. In the year of decision (1973) Nigeria was Chairman of the OAU and used its influence to spearhead the other African countries to form the ACP group with some Pacific and Caribbean countries. It proved to be a great unifying force during the negotiations with Nigeria serving as Chairman of the ACP group. The effect of the formation of the ACP group and the choice of a lead negotiator on the negotiations will be examined later in the analysis of the negotiations.

European unity and strength vis-a-vis the ACPs in negotiations were eroded for several reasons. The Europeans were weakened by the recurrent internal divisions of opinion as to how to deal with the ACPs. Particularly, these were the first negotiations with nine of the EEC Members present instead of the original Six.[27] Britain, one of the new Members had its own specific interests to protect in the Commonwealth States. Further, the Lome I negotiations took place against the background of the oil crisis in Europe. The resulting rise in "producer power" in petroleum and other commodities exemplified to the third world countries the power to be exercised by collective bargaining.[28] This made the EEC somewhat vulnerable to the ACP

[27] Ireland and Denmark joined the Community on the same date as Britain.

[28] Moss,J., op cit, p.18.

demands, especially as Nigeria the ACP's chief negotiator, is the world's eighth largest producer of crude oil, and Gabon, Congo (Brazzaville), Zaire and Trinidad control 1300 million tons of proven oil resources.[29] The oil crisis also precipitated discussions regarding increased reliance on nuclear energy. In this regard the ACP States looked attractive as there are significant uranium deposits throughout Central Africa.

The Europeans on their own part wanted to maintain their historic hegemony in African import markets as suppliers of manufactured and consumer goods. This was identified by the Africans who insisted on compensation by the inclusion of precise provisions for industrialization and economic cooperation as well as increased aid, as solid steps towards the development of their economies.

(iv) The Final Agreement

The outcome of eighteen months of negotiations was the Lome I Convention signed in Lome, Togo on February 28, 1975. Its main provisions were as follows:

1. Duty-free and quota-free access without reciprocity to the European market for goods exported from the ACP. However, there was a safeguard clause for highly sensitive goods and a special regime for products covered by the EEC's Common Agreement Policy (ACP).
2. A stabilization fund of 450 million u.a. to compensate the ACP in the event of reductions in the receipts from the exports of their principal basic products--STABEX.
3. Financial aid--3000 million u.a. from the EDF and 390 million u.a. from the

[29] Ibid. See also Petroleum and Gas Journal (September, 1974).

European Investment Bank.

4. Industrial and technological cooperation to reduce ACP States' disadvantages in these areas to be provided by a new institution, the Centre for Industrial Development (CID).

5. Joint institutions to supervise and help implement the agreement: the Council of Ministers, the Committee of Ambassadors and the Consultative Assembly.

6. An agreement in the form of a separate Protocol (Protocol 3), which provides that the EEC shall undertake to buy 1.4 million tons of sugar from ACP countries each year with a guaranteed minimum price worked out with reference to Community prices and other economic factors. The ACP countries are guaranteed a price at least equal to the price guaranteed to European producers.

Altogether this seemed to be a better deal for the Africans than were the Yaounde negotiations although the Africans remained the "beggars" and the Europeans the "givers". However, the actual implementation of the Convention was a disappointment to the ACP States. The Second and Third Lome Conventions were signed in 1979 and 1984 respectively and contained precious little changes to the body of the Conventions, save increases in the EC's financial commitment to the EDF.

(v) <u>The Lome IV Convention</u>

The Fourth and latest Lome Convention was signed in December 1989 against a background of intensive debate and speculation on the effects which the Single European Act 1986 (Single Act) would have on the relationship between the EC and the ACP group after 1992 when the European Common Market would have been fully implemented. The Single Act provides that the steps towards the final union of the European Common Market should have been completed by December 31st, 1992.

One of the effects of the Single Act is the abolition of any restrictions on the free movement of goods within the Community. The ACPs during the Lome IV talks, pointed out that this provision would injure the preferred status which banana exports from the ACP countries enjoyed and which was protected by the fact that imports from other countries do not enter the EC without restrictions. They also brought up the issue of the rules of origin principle which made harsh stipulations on ACP goods entering the EC. Scant attention was paid by the EC negotiators to the issues. They argued instead that the Single Act was quite compatible with the underlying rationale of the Lome Conventions.

A new Protocol (Protocol 4) was included in the Convention which dealt with the banana trade. It provided that under Convention (IV) no ACP State shall be placed as regards access to its traditional markets and its advantages in those markets, in a less favourable situation than in the past or at present. It however avoided any clear stipulation as to how this provision would be compatible with the Single Act's provision (Article 8A) that there would be free and unrestricted access of goods and persons within the EC as opposed to what obtained under Article 115 of the Treaty of Rome upon which the banana trade deals were based.

III CONCLUSION

Improvements in Negotiating Skills

There are long term lessons for the ACPs in the negotiations especially from the point of view of their economic and political problems. However, these will be discussed more fully in the context of the Conclusion-- in Chapter V. Suffice it to say here that in analysis, it can said that the Lome Conventions were a better package for the Africans. Their ability to organize themselves into a single bloc of ACP countries with a well thought out and united strategy had a positive impact on the negotiating process. They were able to narrow down their negotiating issues to 8 specific principles. They had also previously resolved the differences which existed between the Yaounde countries and the new members of the ACP group.

Further, their choice of a chairmen also facilitated the negotiation process. The decision to choose Nigeria as chairman or lead negotiator was a positive strategy in the sense that Nigeria had successfully negotiated a laudable agreement with the EC and earned their respect as able negotiators. Added to this was the fact that Nigeria enjoyed some political importance as the World's largest producer of crude oil. At a time when Europe suffered from an oil recession this was a powerful weapon to hold.

Altogether, the superficial unity but substantial disunity which characterized the Yaounde negotiations were remarkably absent from the Lome negotiations. The same may be said of the fact that in the Yaounde negotiations the Africans were seemingly unable to recognize the various negotiating tactis employed by the Europeans. As a result they gave in easily to the European pressure. They apparently also did not have a BATNA, i.e., a viable alternative, which they could hold out to the Europeans to make them want to make concessions to the demands. By this time of the Lome Conventions the ACPs were fully aware that the Europeans' interest in the Conventions were not wholly altruistic as propagated. They clearly benefitted from their economic relationship with the Africans. This knowledge gave the ACPs greater confidence to request for specific compensation for these gains, such as precise commitments to industrial and technical cooperation between the two blocs as a step towards the development of the ACP economies.

Otherwise, the entire Lome Conventions did not differ very much from the earlier Yaounde and other related accords that were signed between the Africans and the Europeans in that essentially they were between the weak and the strong, the poor against the rich. Thus with one party asking or begging and the other giving the bargaining lines were more or less determined in favour of the "giving" party. What the "asking" party would be able to get would depend on the skill and tact of its negotiators as seen in the Nigerian talks. In particular, the poorer parties (the Africans--later the ACPs) relied on trade with the EC. They also relied heavily on financial aid from the Community. Hence, increase of aid funds by the EC without acceding to other important requests from the Africans, or ACPs, always proved to be a master card in the hands of the Europeans. In the Lome IV Convention, the EC increased aid to 12 billion u.a., now ECU (European Currency Unit) from 8.5 billion ECU under Lome III. This swept under the carpet all ACP objections to the rules of origin principle and the abolition of Article 115 of the Rome Treaty by the Single Act (Article 8A).

A Possible Tactic For Future Negotiations

Perhaps the ACPs should have adopted the strategy of asking their opponents, the Europeans, for advice. This is a common strategy used in international negotiations with very difficult opponents. Ury in Getting Past No[30] advocates that when a negotiator asks his

[30]op cit pp. 66-67.

opponent to advise him on how to go about satisfying the interests of his colleagues and constituents this usually provokes a gentler and more responsive attitude in the opponent and leads to a problem-solving negotiation based on trust rather than one of purely hard-bargaining. If for instance, the Africans had tabled the concerns of their governments and the peoples about the economic difficulties they were having owing to the many tariffs which were placed on goods being exported to the EC, well as the rules of origin principle which placed a high requirement on goods coming into the EC from the ACPs, the Europeans might have been able to place themselves in the shoes of the African negotiators and both parties might have been able to work together towards a more mutually satisfying negotiation. Necessarily, this would involve a lot of creative and innovative ideas from both parties as they strove to satisfy the underlying interests of both sides to the negotiations.

Future Negotiations

During the Yaounde negotiations the Africans had appeared to be too preoccupied with the appearance of sovereignty a need which the Europeans saw and exploited by the painstaking observance of protocols on sovereign equality while retaining control over the more substantive issues. While they were only peripherally united, European unity, once achieved on any particular issue, remained unshaken thereby leaving the Africans with no alternative but to accept the terms. This was not the case with the Lome negotiations, independence having been achieved by most ACPs over 20 years earlier. They also proved to be more united substantially than the Europeans. However, the fact still remains that they were no match for the Europeans in terms of skill and experience in negotiation. It is suggested that the various ACP governments should make serious efforts to send their negotiating teams to developed countries to the more sophisticated tactics which tend to be used in complex negotiations such as international trade negotiations. It is submitted that only then will the ACPs be able to meet the Europeans on an equal footing and negotiate agreements which can bring economic advancement to them.

CHAPTER IV.

TRANSFER OF TECHNOLOGY BETWEEN THE EUROPEAN COMMUNITY (EC) AND THE AFRICAN, CARIBBEAN AND PACIFIC (ACP) COUNTRIES--ISSUES AND PROBLEMS.

1 INTRODUCTION.

This Chapter seeks to examine critically some of the issues and problems involved in the transfer of technology between the European Community (EC) in general and its Member-states in particular, on the one hand and the African, Caribbean and Pacific (ACP) countries on the other. In this process, similar issues arising out of technology transfer between developed and developing countries on the whole will be looked at in an attempt to find solutions to some of the problems. Basically, an attempt will be made to examine the trade agreements typically signed between developing and developed countries (particularly the Lome Conventions signed by the EC and ACP group) with a view to analyzing the provisions on technology transfer and comparing them with United Nations (UN) and other international standards on fair provisions for technology transfer. Particular attention will be paid to the role of Multinational Corporations (MNCs) in this regard and the attempts which have been made so far to control the restrictions which they tend to place on the effective use of technology which they transfer to developing countries.

Finally, effort will be made to look at the problems which the ACPs and other developing countries encounter as they try to develop their own indigenous technologies.

2 TRANSFER OF TECHNOLOGY BETWEEN THE EC AND THE ACP COUNTRIES---GENERAL ISSUES.

Transfer of technology involves the transmission of knowledge. Such knowledge may or may not be subject to legal protection[1]

Essentially most developed countries develop and export technology to developing countries.[2]

There has been an increasing consciousness among developing countries (or countries of the South), no less among the ACPs, of the role which technology plays in the process of development, [3] as policy makers have realized that only technological advancement can provide their people with a better standard of living.

The Meaning of Development

The ACP countries could be classified as developing countries. Generally, developing countries are in dire need of technological advancement. However, this is not the only factor that makes them undeveloped. It is necessary to determine what is meant by the terms "developed" and "less developed" (or "underdeveloped") within the context of international economic relations in order to identify the reasons why those countries which fall into the latter category find themselves in a disadvantageous position in respect to technology transfer especially where such transfer is carried out by multinational corporations (MNCs) with their base in developed countries.

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[1]See generally, Castel, J.G., et al, International Business Transactions and Economic Relations, Emond Montgomery, Canada, 1986, pp. 720-722.

[2] Ibid. Such transfer would include show-how, know-how, trade secrets, patents, trademarks and service marks, copyright and trade designs.

[3] THE CHALLENGE TO THE SOUTH (The Report of the South Commission), Oxford University Press, 1990, pp.73-77, 109-113, 253-263. See also Vagt, D.F. Transnational Business Problems (University Casebook Series), The Foundation Press, U.S.A., 1986, P.334.

Many economists tend to base their assessment of a country's level of development on per capita income. In other words, if per capita income has doubled, the result would be referred to as "development". The truth is that it is not quite as simplistic as that. The level of poverty and unemployment must be looked at, as well as the level of social inequality.[4] If all these three variables have declined from high levels, in addition to the increasing of per capita income, then undoubtedly, there can be said to have been a period of development for the country concerned. If one or two of these central problems have been growing worse and especially if all three have, then even if per capita income has doubled, it should not be referred to as development.[5]

Most Third World countries fall into the category of countries which are often referred to as "less developed" or LDCs. Apart from having the features described above they are characterized by many other features (which place them in disadvantageous bargaining positions with respect to MNCs) some of which are as follows:[6]

(1) There is a shortage of adequately trained civil servants to examine and investigate whether or not commercial and business laws are being complied with by MNCs or locally-owned companies.

(2) Secondly, the implications of this dearth of expertise indicate that the laws themselves are usually quite old, designed for times when the holding of a patent, the legal institution which

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[4] Seers, D., "The Meaning Of Development", in Wilber, C.K. (Ed.), The Political Economy of Development and Underdevelopment, Random House, New York, 1973, p.7.

[5] Ibid.

[6] Muller, R., "The Multinational Corporation and the Underdevelopment of the Third World", in Wilber, C.K. (Ed.), The Political Economy of Development and Underdevelopment, Random House, New York, 1973, p.125.

sets the limits on the market power of technology, had far different implications than it does today.

(3) The laws, as well as taxation practices and other governmental functions, have remained unrevised too long to take cognisance of the major changes in the origins of economic power.

(4) Whereas, the institutions of organized labor in advanced countries are generally regarded in those societies as a countervailing force or a check upon the power of the corporation, in most LDCs, organized labor is either weak stifled or absent. Thus the bargaining power of the MNCs to maximize profit is far greater in Third World countries than in advanced or developed countries.[7]

It is the less developed countries (LDCs) which exhibit a dire need for progress in science and technology. This is particularly true of most ACP countries. In the first place, despite varying levels of development, the ACP group represents a significant number of countries in the lowest stratum in the league of developing nations. In 1974, a review showed that of the world's 46 poorest countries (i.e. those with per capita incomes of less than US$ 200), 22 were members of the ACP group.[8] Surely changes in per capita income have taken place over the years but the point that a sizeable number of the world's poorest LDCs are members of the ACP group still holds true even today. In 1976, per capita incomes of a large number of ACPs were below the US$360 level, and seldom exceeded US$ 600. The few exceptions which existed were to be found largely in the ACP countries in the Caribbean and Pacific. On the other hand, per capita incomes in most of Latin America and the Middle East

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[7] Ibid.

[8] Development Aid, Bulletin of the European Communities, Supplement 8\74, p.14. See also generally, Long, F., op cit, p. 111.

far exceeded this.

In the case of the few exceptions mentioned above, the small size of domestic markets, a narrow and enclave-type industrialization pattern and limited export prospects have left much to be desired in terms of balanced development. At least 34 of the 67 countries which make up the ACP (i.e. at least half) are classified as Least Developed, Landlocked, or Island economies. In addition to the fact that many of its members are Least Developed, Landlocked, or Island economies, the ACP group represents the largest single institutional grouping of such disadvantaged States.

In the light of this it is not surprising that many ACP States are characterized by the following:[9]

(1) Very low levels of industrialization. In 1975, the average share of manufactures of total exports of developing countries was between 14% and 24% but in a large number of ACP States it was as low as 5%.

(2) Largely monocultural-type agriculture. Many ACP States rely on one or two agricultural types for the bulk of their foreign exchange earnings, and these are exported mainly to the EC.

(3) The lack of agricultural self-sufficiency. A joint report by the Food and Drug Organization (FAO) and the United Nations Economic Commission for Africa published in 1978 revealed that all of the ACP States in Africa (with a comparative advantage in agriculture) were deficient in food supplies.[10] This food deficiency has been increasing

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[9] Long, F., ibid.

[10] See "Food Crisis is Seen throughout Africa", in the International Herald Tribune, September 16-17, 1978, p.1.

over the years and has been worsened by famine in countries like Ethiopia. A similar situation, in terms of agricultural self-sufficiency, appears to exist in many ACP States in the Caribbean and the Pacific. In appreciation of this problem various countries of the South launched "feed our people" campaigns in the late 1970s and early 1980s to try to achieve agricultural self-sufficiency.

(4) A high incidence of poverty.

(5) A high incidence of unemployment and underemployment.

(6) Low levels of per capita income (a point discussed earlier).[11]

It is not surprising that the levels of technological capability in many ACP States are grossly inadequate compared to other developing countries. There seems to be an inability to rationally apply imported technology or even to fully grasp the process of selection, adaptation, absorption and assimilation of foreign technology. The ACPs also seem to face crippling problems in their attempt to develop indigenous to full potential. The UNCTAD (United Nations Conference on Trade and Industry) and other international organizations have recognized this problem and attempted to deal with it.

A survey done by the United Nations Mission on Science and Technology shows that many of the ACP countries were in fact unable to identify their technological needs, had inappropriate mechanisms for the search for alternative technology, and were not equipped with proper institutional machinery for evaluating and selecting appropriate technology. Instruments

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[11] The "Operation Feed The Nation" campaign was launched in Nigeria in 1977 and the "Green Revolution" in 1981.
See also Long, F., op cit, p.112.

for unpacking technology were non-existent or obsolete and there was poor infrastructure for the adaptation and diffusion of imported technology, and for the development and improvement of local ones.[12]

3 THE ROLE OF EC MULTINATIONAL CORPORATIONS IN THE TRANSFER OF TECHNOLOGY TO ACP COUNTRIES.

MNCs or MNEs (Multinational Enterprises) are arguably not really multinational both in the sense that most MNCs are controlled by capital from a single center-country and in the sense that they operate across borders rather than within. To the extent that the legal orders and ideologies of the countries in which they operate are of secondary importance to them they can be said to be actually transnational and not multinational.

Generally, it is the MNCs which constitute the largest single vehicle for technology transfer from the EC countries to the ACP countries. However, there are several aspects to technology transfer. First, there is the direct cost in terms of patent and license fees and royalties. The experience of the ACPs has been that many of the MNCs located in ACP countries (like their counterparts elsewhere in the world) seek primarily to maximize profit.22 Sometimes they go further to maximize the profits of the parent company at the expense of the local subsidiary. The result is that many subsidiaries within the ACP States are run at an "official" loss while much money is paid out yearly in form of dividends, royalties, patent fees, etc. to the parent company.23 Thus, the MNCs' activities benefit first the parent company,

[12] See UNCTAD-- Terminal Report of the exploratory Mission Geneva 1976. The ACP countries covered in the Report were: Botswana, Burundi, Ethiopia, Guyana, Lesotho, Niger, Senegal, Uganda, Tanzania, Upper Volta, Zambia and Sudan.

their parent economy second (this is usually the EC or the USA), and only then the host economy in the ACP country. The same is true for most other Third World countries.[13]

Apart from the huge cost of financing a transfer of technology through an MNC subsidiary a fundamental issue of great concern to the ACPs is the question of the appropriateness of the technology which is transferred by these MNCs. The Lome Conventions obligate the EC to ensure that technology which is transferred is adapted and suitable to ACP needs.[14] However, the truth is that a great deal of technology that is transferred is second-rated, early-model

technology which the MNCs themselves have abandoned. This is often in form of outdated machinery.[15] Similarly, machinery and other equipment are often supplied without adequate provision for training local manpower in the operation of these machinery and without adequate provision for repair and servicing of these machinery. What is more, there have been cases of MNCs selling early-model or used machinery to ACP firms at prices far higher than they sell late-models of the same machinery in developed countries.[16]

Serious efforts must be made by the ACP countries themselves to ensure that technology

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[13] Turner, L., op cit.

[14] Article 85 Lome IV Convention. The provisions of the Lome Conventions regarding technology transfer will be discussed later.

[15]This is the author's personal observation of the situation in Nigeria, an African country, where for instance, telephone equipment which are purchased from developed countries are old models which the suppliers themselves have become dissatisfied with and abandoned. Needless to say, they do not function effectively.
See also Barnet, R., and Muller, R., Global Reach, Simon and Shuster, New York, 1974, p. 165 for a similar discussion of the situation in Brazil and other Latin American countries. See also Long, F., op cit, p.132. Long further makes the observation that many MNCs still regard the higher level manpower positions in the local subsidiaries as the exclusive rights of foreign personnel, (see p. 129).

[16] Ibid. Barnet and Muller make the same point with respect to Latin American countries, see pp. 160, 164.

transferred by EC transnationals is appropriate to the tastes, income characteristics, and climate of the host ACP country. For transfer of technology to be fully effective, it must where necessary, allow for product adaptation or innovation, and this in turn may require changes in the production process.[17] While technology transfers between countries at similar levels of development, e.g., the USA and the EC, with similar culture, income and factor-price characteristics would probably not require major adaptation, the same may not be true of ACP and other Third World countries.

The Origin of the power of the EC transnationals in the ACPs

How did the MNCs get to be so powerful in the ACP countries? It would appear that the answer lies in the colonial history of the ACP countries. In the first place, in the colonial set up, the ACP countries were assigned the role of primary producers-- an economic legacy which has remained in most of these countries. This continues to be so even though many of the ACPs have, within the recent past, rigorously pursued policies of economic diversification. The result is that, in spite of an agricultural potential, the ACPs lack the capacity to satisfy even certain basic consumption demands such as food supply. While primary production, like all forms of production, includes technological efforts, in many ACP countries this technology was owned and controlled by transnational corporations. Thus the technological linkages that were developed were specific to the transnational corporation, and took place within the vertically integrated world production structure of these corporations, rather than within the ACP

[17] Hughes, H., "Technology Transfer: The Australian Experience", in Multinationals From Small Companies, Agmon,
T., and Kindleberger, C.P., The M.I.T. Press, Cambridge, Massachusetts and London, England, 1977, pp. 103-104.

countries. In other words, technology was not being transferred to their economies as such, but to subsidiaries of the transnationals.[18]

Further, the above was compounded by the fact that primary production, to a large extent in its unprocessed form, was export geared. The processing of these minerals such as copper, bauxite, etc., took place in metropolitan centers. This served to deprive many ACP countries of the opportunity to acquire technological know-how in agro-industrial activities linked to primary production, and the prospects of developing requisite industrial skills.[19] Added to this was the fact that while most ACP States specialized in primary production, their consumption needs (durable and non-durable goods) the satisfaction of which represents forms of embodied technology, were met by manufactured imports from the metropolitan countries. Thus, they were unable to develop requisite technological know-how to satisfy the consumption needs of the population. The transnationals, such as Unilever, and Tate and Lyle, served as agents and direct suppliers of most of the consumption goods.

An important point to note is the fact that in many cases where rudimentary forms of farming and mining existed in Africa, they were later found to be technically superior to modern large scale ones (which were generally preferred by the MNCs) and also socially and environmentally more appropriate. For instance, the introduction of the use of tractors and other forms of machinery which needed gas to function. This gas was found to be quite injurious to the soil itself and affected the crops produced. Also these sophisticated machinery were often labor-saving thereby dispensing with the services of the vast majority of farmers who would

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[18] Long, F., op cit, p. 115.

[19] See generally, Streeten, P., "Technology Gaps Between Rich and Poor Countries", in Scottish Journal of Political Economy, November 1972.

otherwise be employed if the rudimentary methods of farming and mining, such as digging with hoes and machets were used.[20]

Effects of their activities.

As stated above, the MNCs often introduced technology which directly created unemployment in the ACPs. Whereas in the ACP countries, technology needs to be labor-intensive to meet the teeming population, the sort of technology that MNCs exported and continue to export to ACPs is capital-intensive and labor-saving, because that is what they have developed in the developed countries as a response to the high cost of labor. Such transferred technology tends to convert the ACPs' human resources, which are arguably their biggest assets, into social liabilities.[21]

China, a Third World non-ACP country has attempted to solve this problem by engaging in what may be referred to as "reverse engineering". This entails taking an equipment apart to study its component parts in order to see how they function with the aim of making alternative technology or improving on the same technology without offending the patent. This process can have the effect of converting capital-intensive technology into more labor-intensive technology, and has been assimilated by companies in Korea and Japan. It would undoubtedly be useful in the ACP countries. However, proper planning, funding and training are requisites for this process to be effectively assimilated into ACP countries. It is suggested that this should be one of the goals of the Lome Convention through its Technical Cooperation provisions.

On the issue of unemployment in the ACPs (and other developing countries), it is easy

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[20] Turner, L., op cit, pp. 152-153.

[21] Turner, L., op cit, p. 166.

to see why the MNCs would bring in technology which is labor-saving. For one, there is an obvious conflict between the financial goals of corporations and the development goals of the ACPs. Employing the bottom 40% of the population or even absorbing the millions who swell the ranks of the unemployed each year is not the obvious way to make quick returns on investment. The MNCs' managers tend not to be able to afford long-term visions. While the ACPs are increasingly eager to gain control over technology to increase their bargaining power and self-reliance, MNCs, on the other hand, appear to be interested in maintaining tight control of proprietary rights, frustrating competition from local entrepreneurs, and maintaining managerial control and flexibility in allocating corporate resources on a global basis.[22]

Further, the MNCs generally do not bring foreign exchange into the developing country.[23] They prefer to borrow from the local banks. There they compete against the local or indigenous firms who are no match for them, because the MNCs in the developing countries are backed by the creditworthiness of their parent companies.[24] At the end of the fiscal year, they repatriate profits to the parent company, using up that foreign exchange which they may not have contributed in the first place. This does not help the local economies. Moreover, the local banks from which they borrow are often subsidiaries of or branches of parent banks in developed countries. Thus, a US-based MNC will find it very easy to obtain loans from a local bank which has the Bank of America as its major partner. There are often interlocking interests of common ownership, management, and technical personnel in the groups that control banks

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[22] Barnet, R. et al, op cit, p. 129.

[23] Muller, R., op cit, p. 129.

[24] ibid.

and corporations.[25]

The logical result of the process described above is the creation within the ACP State of a society in which income is very poorly distributed. This is a major cause of poverty. After royalties, dividends, etc., have been paid out by the subsidiary, the little that is left is shared by the tiny elite population within the ACP country, who are shareholders of the subsidiary. These elite minority are closely tied to foreign capitalists and consume the wealth in lavish living, investing the rest in foreign banks while the rest of the teeming population starves.[26] The economy also suffers. Indeed, as at today, in most of the poorer ACP countries, over 90% of the patents existing there are earned by foreigners especially EC transnationals.[27] Yet, the patent system remains the principal method through which the transnationals transfer technology to the ACPs and other LDCs.

Similar data exist with respect to trademarks. The ownership pattern of these by the EC transnationals in ACP countries may be as high as 80%.[28] They are often used in the ACPs through licensing agreements or joint ventures with local firms. However, the practical effect which they have on the ACP economies is that indigenous or local firms which produce similar products are not readily patronized by the local population because they feel that they are not as reliable or durable as those made by MNCs with longstanding and reputable trademarks.[29]

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[25] Ibid.

[26] This is the author's observation of the situation in Nigeria. See also Turner, L., op cit, p. 67, where a similar observation is made with regard to Latin American countries.

[27] Long, F., op cit, p. 125. See generally, Turner, L., op cit, p.67, and Barnet, R., et al, op cit, p. 135.

[28] Long, ibid.

[29] This is true of many LDCs, not just ACPs. See Turner, L., op cit, p. 48.

It is incumbent on the governments of those ACP countries to place restrictions on the MNCs for such period as is necessary to encourage acceptance of the locally-made goods. The apprehension of the local firms is understandable and comparable to that which US firms have about Japanese firms operating in the US.

4 REGULATION OF RESTRICTIVE BUSINESS PRACTICES IN TRANSFER OF TECHNOLOGY

A study of the Lome I to IV Conventions will reveal the fact that there is a marked absence of any explicit policy of regulating activities of MNCs in the area of technology transfer. There is no attempt to clearly state what steps will be taken to control the restrictive business practices of the MNCs involved in technology transfers. As will be seen later, the Conventions create a Center to be responsible for transfer of technology but they vest it with no power to see that these transfers are effected according to international standards. This is a major shortcoming of the attempts at technological cooperation between the EC and the ACP.

The successive Lome Conventions which were signed between the EC and the ACP States (between 1975 and 1989) formally recognize the importance of science and technology to the economic development of the ACP States. In particular, the sections relating to industrial cooperation between the two blocs under the Lome Conventions draw attention to the following:

(a) The need to facilitate technology transfer. Often the process of negotiating technology transfer agreements is slow and bureaucratic, and often the European country is not sure if the ACP country can pay for the technology, so it requires various forms of bank guarantees as conditions for signing the agreement. These in themselves make the process more difficult for the ACPs.

(b) The need to adapt technology to the specific needs of the ACP States. In many cases, technology which is transferred from the EC to an ACP country, especially sophisticated machinery, is labor-saving and thereby contributes to the unemployment problem in the ACP States (a point which has been discussed earlier).

(c) The need to increase the research capacity of the ACP. This is needed particularly in the area of development of indigenous technologies. Many ACPs lack the necessary funds and facilities to equip their research institutes adequately for this purpose.

(d) The need to maximize costs and terms associated with the acquisition of imported technology-- a concern which was noticeably absent from in Lome I but which was highlighted in the subsequent Conventions. In many ACPs, prohibitive proportions of the yearly earnings of ACP subsidiaries of MNCs are paid out as patent or royalty fees for the technology transferred.

It is possible to argue that abuses arising from forms of dominant market behavior as they affect technology in areas such as patents are controlled by Article 85 of the Treaty of Rome[30] establishing the EEC.[31]

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[30] This is a possible argument because the Lome Conventions were signed pursuant to the Treaty of Rome, and thus the latter's provisions would apply to the Conventions. It however overlooks the fact that the EEC Treaty refers specifically to the Members' dealings with each other and not to their dealings with third countries, except where clearly so stated.

[31] Article 85(i) of the EEC Treaty, 1957 provides,

"The following shall be prohibited as incompatible with the common market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market, and in particular those which:
(a) directly or indirectly fix purchase or selling prices or any other trading conditions;
(b) limit or control production, markets, technical development, or investment;
(c) share markets or sources of supply;
(d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
(e) make the conclusions of contracts subject to acceptance by the other parties of supplementary obligations which,

Further, Article 86 of the Treaty explicitly deals with the control of restrictive business practices.[32] However, these

provisions were inserted to benefit the EC Member-States inter se, in their relations with each other. For the Lome Convention to have a meaningful impact on EC-ACP relations respecting transfer of technology, it must incorporate adequate mechanisms for regulating the activities of MNCs who are suppliers of most of the technology that is imported into ACP States. It must seek to regulate them in such a way that their restrictive business practices will not effect stifle economic growth and opportunity for promoting indigenous technology in the ACP States. Many of the provisions of the technology transfer agreements unduly restrict competition between local firms and the MNC. Others restrict export of manufactures to countries where other subsidiaries of the MNC do not operate which generally are countries where there is no market for those goods. Further, the foreign companies often demand very high royalty fees for the use of their licenses.

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by their nature or according to commercial usage, have no connection with the subject of such contracts." Subsection (ii) provides inter alia, that any agreements or decisions prohibited pursuant to this Article shall be automatically void.

[32] It provides,

"Any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible with the common market in so far as it may affect trade between Member States.

Such abuse may, in particular, consist in:

(a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;

(b) limiting production, markets or technical development to the prejudice of consumers;

(c) applying dissimilar conditions to equivalent transactions with trading parties, thereby placing them at a competitive disadvantage;

(d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts."

A typical clause may oblige the ACP country or the recipient enterprise to acquire capital assets, intermediate assets, and raw materials from a particular source or to make permanent use of the personnel appointed by the enterprise supplying the technology.[33] Other clauses may provide that the technology-selling enterprise keeps its right to the prices for sale and resale of the products manufactured on the basis of the respective technology.[34] Some clauses place restrictions on the volume and structure for production, establish an option for total or partial purchase in favor of the supplier of the technology, or commit the purchaser of technology to disclose to the supplier the inventions or improvements accomplished through utilization of the technology. All these clauses have the effect of impeding the independent manufacturing and research capability of the local enterprise and consequently the local economy.[35]

In spite of the concern shown to technology transfer in the Lome Convention, it is a matter of surprise that provisions do not currently exist within the Convention for controlling the negative effects of technology transfer to the ACP group, brought about by transnational corporations from the EC.

Various attempts at controlling Restrictive Business Practices of Transnationals.

The question of controlling the activities of transnational corporations in the area of

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[33] See Vagt, D.F., op cit, pp. 335-336. The author refers to the directives of the Andean Subregional Market (ANCOM) comprising of Latin American countries and the steps they have taken to control the restrictive business practices of the MNCs, which are essentially similar to those which are in operation in the ACPs.

[34] Ibid.

[35] Ibid.

technology transfer has been recognized by the UNCTAD. In 1972 at the third UNCTAD Conference in Santiago, Chile, following reports on the activities of ITT in Chile, a resolution was adopted by that body calling for a study of the possible bases for international action on the topic of technology transfer. That developed into an attempt to draft a Code of Conduct on the transfer of technology. A similar exercise had been started, to create a Code of Conduct for transnational corporations which resulted in a draft code in 1982 by an International Working Group established in 1977. It also resembles the Restrictive Business Practices Code which was adopted in 1980 by the UN General Assembly.[36]

The interesting point about the whole idea of controlling the restrictive business practices of MNCs which are essentially based in developed countries is the fact that the international community is itself not fully agreed on the form or legal effect which the control mechanisms should have. There is an obvious tension between the concern of developing countries to maximize access to current technology with minimum restrictions on its use by their domestic enterprises, and the tendency of developed countries to emphasize the role of industrial property rights as an encouragement to invention and technological innovation. They argue that if owners of patents, trademarks, and know-how do not receive an equitable return for transferring their technologies to developing countries, the flow of knowledge may be substantially reduced and developing countries' dependence accentuated.[37] On the other hand, developing nations typically feel that science, technology and knowledge are part of the common heritage of mankind and must be made available to all with as few restrictions as possible. Others go

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[36] UN Doc. TD/RPB/Conf/10,Sect.(D)(3)(1980).

[37] See generally Castel, et al, op cit.

further to assert that since the economies of developed countries were nurtured and sustained through the economic oppression, milking and exploitation of the African and other Third World peoples first through the slave trade and then through colonialism, the developed countries, (particularly the EC), owed it to those Third World countries to make available to them their advanced technology as cheaply as possibly.[38] Suffice it to say that, in less developed countries, where between 75% to 95% of the patents for technology are owned by foreign investors[39] the result often is that much of the profit which is made by subsidiaries of MNCs in LDCs are siphoned out of the country in form of royalty fees and dividends with just a tiny share remaining. This does not help their economic situation nor provide them with much needed foreign exchange.

In an attempt to solve this, some economists and scholars have advocated the abolition of the patent system.[40] Others have called for modifications to it, e.g., by creating "working requirements" which essentially are rules that cause the inventor to lose the rights under a patent unless it is practiced within the jurisdiction within a certain period of time.[41]

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[38] See generally Rodney, W., How Europe Underdeveloped Africa, Howard University Press, Washington, D.C., 1982.

[39] See Long, F., op cit, p. 125.

[40] Turner, L., op cit, pp. 64-65. He presents the view of the governments of the Third World countries as follows,

"Governments see a commonly used product or process in the developed world that could be of use in the Third World, but when they approach the firms responsible they find the latter will allow the use of products only on payment of royalties which may well be beyond the reach of the Third World economies. The governments feel that such technology should be transferred free of charge to the Third World, while the companies point out that they are not in business for charity. It is disturbing to see how in India, about nine tenths of patent registrations are by foreign companies, and _ some of these registrations are made for purely defensive reasons, so that local enterprises will not try to move into these areas (about one quarter of such patents are never exploited)." See also Kidron. M., Foreign Investments in India, Oxford University Press, 1965.

[41] Vagt,D.F., op cit, p. 337.

One of the major reasons why the progress on the UNCTAD's Code of Conduct on transfer of technology has been quite slow (it is still in draft form) is the inability of the international community to agree on the Code's legality. The developing countries want the Code to be a legally binding document, but the developed countries would prefer it to be a non-binding set of guidelines of principles. The effect of the latter proposition is that the regulations or guidelines could be ignored without penalty. Needless to say, this is likely to happen often because developing countries are so badly in need of technology that they will tend to agree to terms which are clearly in violation of international standards.

A further point of significant disagreement is the coverage of the Code-- whether it should apply to transfers of technology within a country between a branch of a foreign enterprise and a local firm, as argued by the developing countries, or whether transfers within national boundaries should be regulated by national legislation, rather than an international Code, as argued by the developed countries.[42] While the Restrictive Business Practices Code adopted by the UN General Assembly in 1980 tends to favor the developed countries' position in that it deals with purely antitrust aspects of transfer of technology, the draft Code of Conduct on Transnational Corporations, as at the close of the 6th UNCTAD Conference in June 1985 can be said to meet the needs of the developing countries.

It lists a number of provisions considered to be objectionable in technology transfer agreements.[43] These include grant-backs of improvements, resale price-fixing, export restrictions, tied procurement clauses, local research restrictions, restrictions on the use of local

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[42] Castel, et al, ibid.

[43] Draft International Code of Conduct on Transfer of Technology (TD/Code/TOT/47,20 June 1985)

personnel, clauses prohibiting the acquiring party from challenging the validity of a patent, clauses prohibiting the use of competing technologies, and obligations or restrictions which continue after the expiration of the particular industrial property right. During the negotiation of a technology transfer agreement, both parties are to observe certain "fair and honest practices", which include disclosure by the acquiring party of relevant legislation and official local economic and social objectives, and disclosure by the supplying party of any known attacks on the validity of its industrial property right, as well as any serious health, safety, and environmental risks associated with the technology. The agreement, when negotiated, is to contain certain guarantees from each side, including appropriate guarantees of confidentiality and quality control on the part of the acquiring party, as well as warranties of validity of industrial property right, of accurate description of technology, and of suitability for production of the agreed goods and services on the part of the supplying party.

Other international organizations which have recognized the need for regulating the activities of MNCs in this area are the International Labor Organization (ILO) and the Organization for Economic Cooperation and Development (OECD). It should however be noted that the OECD Declaration on International Investment and Multinational Enterprises (1976) seeks to set out guidelines for ensuring that the MNCs observe the spirit and the letter of the local laws in which they operate.[44] This in essence serves the interests of the developed countries whose legal system is the parameter for evaluating these laws. In other words, the

[44] 75 Dept. State Bull. 83 (1976).

developed countries will be imposing their own standards on the LDCs.[45] Even where there are local experts to interpret these laws, they are usually trained in Ivy League institutions in developed countries and are, to varying degrees, influenced by the Western Legal System. The same argument raised in respect of the OECD Declaration could be made in respect of the UN Charter on Economic Rights and Duties. The Center for Transnational Corporations which was created as a result of a report by a group of "Eminent Persons" appointed by the Secretary-General of UNCTAD after the 1972 Chile Conference to study the impact of MNCs, has also recognized this problem.

Interpretation

It should be pointed out here that it is one thing to make these regulations and quite another to interpret and enforce them. The interpretation of a breach, if not clearly specified, may prove as difficult and nebulous as has Article 51 of the UN Charter on Self-Defence among nations and just as subject to abuse. It would depend at any given time on who is doing the interpretation and on the interplay of political and economic power. Further, if it is not given legal backing it would simply be ignored by powerful nations.

The Approach of the Lome Conventions.

The Lome I Convention provides extensively for technology transfer (Arts. 26-39) and for financial and technical cooperation (Arts.40-61). Article 26 provides inter alia,

"The Community and the ACP States, acknowledging the pressing need for the industrial

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[45]Barnet, R., and Muller, R., Global Reach, Simon and Shuster, New York, 1974, p. 138. "It is a measure of the desperation of the governments of the underdeveloped world that they seek the professional advice of those US business consulting firms which advise the very corporations they are seeking to control." The authors cite the example of Liberia whose Finance and tax laws were drafted by the US Trade Department.

development of the latter, agree to take all measures necessary to bring about effective industrial cooperation. Industrial cooperation between the Community and the ACP States shall have the following objectives:

(d) to facilitate the transfer of technology to the ACP States and to promote the adaptation of such technology to their specific conditions and needs, for example by expanding the capacity of the ACP States for research, for adaptation of technology and for training in industrial skills at all levels in these States;..."

Article 31 provides,

"With a view to helping the ACP States to overcome the obstacles encountered by them in matters of access to and adaptation of technology, the Community is prepared in particular to:

(a) keep the ACP States better informed on technological matters and assist them in selecting the technology best adapted to their needs;

(b) facilitate their contacts and relations with firms and institutions in possession of the appropriate technological know-how;

(c) facilitate the acquisition, on favorable terms and conditions, of patents and other industrial property, in particular through financial and/or through other suitable arrangements with firms and institutions within the Community;

(d) contribute to the establishment and expansion of industrial research facilities in the ACP States with particular reference to the adaptation of available technology to the conditions and needs of those States."

However, nothing is said about the control of restrictive business practices which may hamper the flow of technology and also hinder the development of the ACP economies. Under Article 36 a Center for Industrial Development is established. Its functions are as follows:

(a) to gather and disseminate in the Community and the ACP States, all relevant information on the conditions of and opportunities for industrial cooperation;

(b) to have, at the request of the Community and the ACP States, studies carried out on the possibilities and potential for industrial development of the ACP States, bearing in mind the necessity for adaptation of technology to their needs and requirements, and to ensure their follow-up;

(c) to organize and facilitate contacts and meetings of all kinds between Community and ACP States' industrial policy-makers, promoters, and firms and financial institutions;

(d) to provide specific industrial information and support services;

(e) to help them identify, on the basis of needs indicated by ACP States, the opportunities for industrial training and applied research in the Community in the ACP States, and to provide relevant information and recommendations.

Nothing is said about the role of EC MNCs in the transfer of technology to the ACP States. The provisions are also silent on the mechanics for actually ensuring that the technology transferred is adaptable adequate to the needs of the ACPs. In order to do this effectively, some form of control must be exerted over the activities of these transnationals. Yet, the CID does not appear to be vested with the power to exert the necessary control.

It can be seen that the Center (CID) is not empowered or equipped to effectively deal with the range of issues which arise from technological relationships between EC transnationals and the firms' ACP subsidiaries and local enterprises.

While the CID is a step taken in the right direction, it suffers from two limitations. One is its severe budgetary limitations, which affects its ability to be fully effective. Article 36 of the Lome I Convention concludes by providing that "The Center's Statutes and rules of operation shall be adopted by the Council of Ministers on a proposal from the Committee of Ambassadors (to the EEC) upon the entry into force of this Convention". This shows that the CID is subject to the European Council for approval of its rules, regulations and powers, and of course, subject to the European Commission for its funding. It is no surprise therefore that it lacks the authority and funds to perform effectively as a control over the restrictive activities of the EC MNCs.

Its second major limitation is with respect to its scope. Its scope is too narrow in that it excludes all regulatory responsibilities, thus making it impossible to make a major impact on improving the terms and conditions of technology transfer, and in strengthening of technological capabilities of the ACP group. It does not, for instance, attempt to deal with the problems which transnational corporations pose to the development of the ACP States.

Frank Long [46] advocates that the scope of the CID should be widened to include assistance to the ACP in four major areas. A summary of these is as follows:

(i) the development of new technologies for the processing of raw materials, indigenous industrial processes, machinery and local equipment suited to the local needs in agriculture, mining, food processing etc.;

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[46] op cit, pp. 138-139.

(ii) technical assistance on consulting and engineering services as well as access to small scale or medium-sized firms in the EEC willing to enter into collaboration agreements for adapting and improving existing imported technology and for the development of indigenous technology;
(iii) development of local consultancy organizations to provide engineering and technical services in project studies and feasibility reports, product design, etc.;
(iv) local industrial laboratories in chemical and metallurgical analyses, material testing in processing activities, mineral analyses and identification, etc.

However, even if the CID's scope is widened to include assistance to the ACPs in these crucial areas, the local enterprises and subsidiaries will still be at the mercy of the EC MNCs who unduly restrict their economic activities through restrictive business practices, unless such practices can be effectively curtailed by the use of sanctions. It is thus necessary to go even further to empower the CID to take necessary action against EC transnationals who breach the regulations of UNCTAD's Code on Control of transnational corporations if and when these are finalized. It will be recalled that EEC Articles 85 and 86 also deal with such control. Until concerted effort is made to support these regulations with penalties for breach, they will not be taken seriously and the CID will remain a mere consulting body, subject to the whims and dictates of the European Council, while the ACP countries continue to labor under unfair technology transfer agreements.

Article 35 of the Lome I Convention sets up a Committee on Industrial Cooperation which would be supervised by the Committee of Ambassadors and which would among others,

"guide, supervise and control the activities of the Center for Industrial Development referred to in Article 36 and report to the Committee of Ambassadors and, through it, to the

Council of Ministers".

Here again we can see the level of control exercised over the CID by the EC. Under the latest Lome Convention (IV), signed in 1989, the Committee for Industrial Cooperation is retained (Article 87) but the CID is replaced by a new Center for Development Industry (CDI). It has more detailed functions than the CID and incorporates some of the changes proposed earlier. For example, Article 89(d) provides that the CDI "shall identify potential partners of the ACP States and Community for joint investment operations and assist in the implementation and follow-up". It however still lacks any regulatory responsibilities or powers for controlling the excesses of EEC MNCs in the ACP countries.

The Likely Effect of the SEM.

Given the fact that by the end of 1992 the Single European Market (SEM) will have been fully implemented, the implications are that European or EC MNCs will become even more fortified because many of the domestic laws and competition policies which currently separate them will be harmonized. With no control whatsoever exerted on them the ACP economies will be left at their mercy because they will be able to restrict practically every effort of the ACP firms to operate competitive businesses in the EC. In other words, while today ACP firms have to contend with restrictive practices from various EEC transnationals which operate within varying economic legal systems or market economies, they will from 1993 have to cope with restrictive business practices from transnationals which are backed by the most powerful and comprehensive market force (with competition laws duly harmonized) in the world. Needless to say, they will not stand a chance.

It is suggested that the ACP countries in their national or regional economic laws should emulate the Directives of the Andean Commission or Andean Subregional Market (ANCOM) which was founded by Bolivia, Chile, Columbia, Ecuador and Peru. It designed rules to prevent Member- States from bidding against each other for the favor of a foreign holder of technology. Its rules also prohibited restrictive licensing and prohibited clauses (in licensing agreements) which obligated the holders of patents to pay royalties on unused patents.[47] Many of these rules are directly relevant to the ACPs' situation. For instance, the directives prohibit clauses which provide that the "technique selling enterprise keeps its right to the prices for sale or re-sale of the products manufactured on the basis of the respective technique", and clauses "prohibiting the use of competitive techniques".[48] The ACPs face the same problems in the sense that many of the transfer agreements entered into by their local enterprises or MNC subsidiaries contain similar restrictions. The ANCOM directives further prohibit clauses which "commit the purchaser of technology to disclose to the supplier the inventions or improvements accomplished through utilization of said technology", or which obligate "the licensees of patents to pay royalties on un-used patents".[49] These restrictive practices can be found in many agreements signed between ACP countries and EC transnationals.

5 RECENT TRENDS ON THE TRANSFER OF TECHNOLOGY IN ACP AND OTHER DEVELOPING COUNTRIES.

Foreign Direct Investment (FDI) has been the mode of technology transfer traditionally favoured by the MNCs. However, in recent times, other mechanisms of transfer are acquiring

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[47] Decision 24 of December 31, 1970, as translated in 10 Int. Leg. Materials 152,159 (1971) by Messrs. Carrizosa & Vila, Bogota, Colombia.

[48] Ibid., Art. 20 (b),(d), respectively.

[49] Ibid. Art. 20 (f) and (g).

some importance.[50] This has resulted in some decline of the share of technology receipts from affiliates in total technology receipts from developing countries, although the monetary receipts from technology transfers generally, have been on the increase.[51]

In 1975, for instance, (the year of the Lome I Convention), the United Kingdom, an EC Member received a total of 32.43 million pounds sterling as technology transfer receipts from developing countries including the ACPs.[52] By 1980 (the year the Lome II Convention came into force) the UK's technology receipts from developing countries (including ACPs) had increased to 71.26 million pounds sterling. While the 1975 figure represented 16.8% of the UK's total receipts from technology transfer generally and 45.6% of receipts from affiliates through technology transfer, the 1980 figure represented 18.8% of total receipts from technology transfers generally but 40.9% of receipts from affiliates through technology transfers.[53]

In 1980, the Federal Republic of Germany, another EC Member, received a total of 73.3 million Deutsche Mark as its total technology transfer receipts from developing countries (including ACP countries). This represented 7.3% of its total receipts through technology transfers and 95% of its receipts from affiliates through technology transfer. However, by 1985, (by which time the Lome III Convention had come into force) it received a total of 156.4 million Deutsche Mark from transfers to developing countries which figure represented 9.7% of its total

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[50] See generally, "Technology Transfer: issues and policies", Transnational Corporations In World Development, *Trends and Prospectus*, United Nations, New York, 1988, p. 177.

[51] Ibid.

[52] Ibid. See Table XI.1 on "Selected developed market economies: technology receipts from developing countries"--- source, United Nations Centre on Transnational Corporations.

[53] Ibid.

receipts from technology transfers and 90.4% of its receipts from affiliates.[54]

In the Third Survey,[55] the rise of joint ventures was mentioned as probably the most significant and universal of changes in the relationship in the relationship between MNCs and enterprises in host developing countries. A recent OECD survey of the enterprises licensing out their technologies internationally noted that technology licensing is increasing for most enterprises.[56] Though the bulk of licensing remains concentrated in industrialized market economies, licensing to developing countries in Asia, followed by Latin America and the ACPs has been quite significant. The sample enterprises also reported that other technology transfer activities such as joint ventures and sales of technology service contracts and supply of turnkey plants were growing even faster than licensing.[57]

Michelle Gittelman, states in his Paper titled "Transnational Corporations in Europe 1992: Implications for Developing Countries",[58] that in 1986, the European Community imported US $ 135.6 billion from developing countries which included the ACPs and exported US $ 133.9 billion to them which figure represented about 40% of the Community's total trade flows.

He further opines that, the Single European Market (SEM) can be seen as exerting both

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[54] Ibid.

[55] UNCTC, Transnational Corporations in World Development: Third Survey, (United Nations Publication, Sales No. E83. II.A.14), 1983, p.46.

[56] OECD, "International technology licensing Survey results", May 1987 (mimeographed).

[57] "Technology Transfer: Issues and Policies", Transnational Corporations in World Development, *Trends and Prospects*, op cit, p. 177.

[58] The CTC Reporter, No. 29, Spring 1990, p.38. The CTC Reporter is a periodical prepared by the UNCTC (United Nations Centre on Transnational Corporations).

negative and positive effects on developing countries generally with the net result depending largely on the Commission's policies and the behaviour of MNCs in response to those policies.

With respect to the negative implications, Gittelman opines that if the EC implements policies designed to promote European sourcing, then export-oriented FDI in developing countries could decline, as MNCs respond by exporting less to the Community and investing more within it. He however, makes an exception for the ACPs because of the trade preferences they enjoy with the EC under the Lome Convention. This he feels could see their position being strengthened as host countries for FDI "if they are seen as low-cost gateways to the European market". However as has been shown earlier this is not as straightforward as it sounds because the Lome convention did not create an efficient machinery for effecting transfer of technology between the two blocs (see the earlier discussion on the approach of the Lome Convention to technology transfer between the EC and the ACPs, and the attempts to control the restrictive business practices of the MNCs). Further, he acknowledges that some of the comparative advantages enjoyed by the ACPs have been chipped away by the inclusion of Greece, Portugal and Spain in the EC.

On the positive implications, Gittelman is of the view that FDI flows into developing countries could rise sharply if the borders of the SEM are kept open to imports of components and final goods from non-EC countries. The 1992 programme, having injected a strong dose of competition into many sectors of the European economy, with the result that a low-cost position is achieved which is likely to become a strategic imperative for many MNCs competing in growing Community markets. This fact, coupled with liberal commercial policies, could lead to rising FDI in developing countries generally, and ACPs in particular, as part of a manufacturing strategy by MNCs to rationalize production among low-cost export bases in industries such as automobiles, consumer goods etc.[59] This view however undervalues the implications of the recent political events in Eastern Europe, some of which are formidable competitors with the ACPs for FDI. Although these countries accounted for only 7% of the Community's total imports and 5.5% of its exports[60] current trends indicate that the trade and investment relationship between Eastern and Western Europe is poised for rapid growth.

The Issue of Protection of Patents.

As discussed earlier, MNCs (especially high-technology enterprises) have increasingly been concerned about inadequate legal protection of their technology, e.g., computer software etc. However, many ACP and other developing countries have been able to show by statistics that the abolition of product patents does not necessarily have a disincentive effect on FDI and technology transfer generally. A recent case-study on Nigeria, an ACP country, confirmed familiar assertions on the role of patents in developing countries.[61] These include the overwhelming dominance of MNCs in patent ownership, the low incidence of local working of patents through investment or transfer of technology arrangements, their predominant use to cover imports and to eliminate or control competition, and the prevalence of restrictive business practices in licensing agreements.

In a recent case-study on the Turkish pharmaceutical industry, results showed that the abolition of product patent did not adversely affect inflows of technology of FDI in that industry.

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[59] Ibid.

[60] Ibid.

[61] Adikibi, O., "The multinational corporation and monopoly of patents in Nigeria", World Development, 16 (1988), p. 517.

Indeed, such inflows increased at a faster rate in that industry compared to other sectors where patent protection was provided.[62]

The Nigerian case-study found the lowest patent exploitation rates in the most technologically intensive and dynamic industries-- such as in pharmaceuticals (4%), chemicals (5%), and machinery and tools (1%)-- while higher exploitation rates (5% to 10%) were found with respect to older technologies, such as in food products, cosmetics and textiles.[63] This suggests that even where patent protection is provided, foreign investors may tend to exploit older or more mature rather than newer technologies in the ACPs. The factor influencing such investment patterns would probably have little to do with levels of intellectual property protection.

6 DEVELOPMENT AND IMPROVEMENT OF INDIGENOUS TECHNOLOGY

One final area where the EC could help the ACPs tremendously is in the area of Research and Development (R&D) indigenous technology. So far, emphasis has been on the transfer and adaptation of technology from the developed world to the LDCs. But the ACPs need to be able to improve their own local technologies which is often better-suited to their peculiar needs than the imported ones which were fashioned for the Western society. It is suggested that this should be a primary focus of the CDI (Center for Development Industry) under the Lome IV Convention, and in particular, the goal of the technical cooperation between the two blocs. One economist said that Africans do not need highly sophisticated tractors but better hoes and cutlasses with to plough their farms. The thrust of this argument is that hoes

[62] Kirim, A., "Reconsidering patents and economic development: a case-study of the Turkish pharmaceutical industry", World Development, 13 (1985), p. 227.

[63] Adikibi, O., op cit.

and cutlasses are labor-intensive and therefore better-suited to the people's needs.

The EC, through the Lome Convention has done a lot already through the provision of development aid or funds (ECU 12 billion under Lome IV). However, these funds are allocated in quotas and restricted to specific projects in particular countries. It is submitted that a separate fund and indeed a separate body, should be set up specifically to assist in research and development of local technology. Only then can the EC be taken seriously in its pledge to help the ACPs to lift themselves out of the role of primary producers whose role is to feed EC transnationals and industries and indirectly EC economies while their own economies continue to go downhill. This is the legacy of the colonial set-up and continues to be so in spite of the successive conventions and trade agreements that have been signed between the two blocs. A good example of an organization funded by a developed country for the purpose of assisting R&D in developing countries is the International Research and Development Council (IDRC) which was set up by the Canadian government for this purpose. It has successfully assisted in the funding of various projects in Africa, the Caribbean and other developing countries, with a view to helping these countries gain confidence in their ability to develop and improve upon their indigenous technology.

It has also assisted in the training of skilled manpower, and experts in various research fields. In particular, breakthroughs have been achieved in tropical agriculture and development of pesticides in East and West Africa and Malaysia. The provision of funds and training assistance by a developed country to an LDC can be regarded as a form of technology transfer, with which the developing country can achieve scientific breakthroughs.

7 CONCLUSION

It is no exaggeration to say that ACP countries currently depend on foreign technology to be able to survive in a world that is increasingly technological. Most of this technology is imported from the EC countries who are their principal trading partners through accident of their colonial history.

However the ACPs cannot continue to rely on the importation of technology through the existing licensing agreements which they enter into with the MNCs. This is because a lot of the technology that is thus transferred is early-model and second-rated and usually over-priced. It follows that concerted efforts must be made to effectively regulate the activities of the MNCs in the area of technology transfer.

It is recommended that the CDI be invested with the power to regulate effectively the activities of the EC MNCs in the ACPs according to the rules laid out in the draft Code of Conduct for Transnational Corporations drafted under the auspices of the UNCTAD. Further, for this Code to be effective it should be made into a final document and ratified by Member-nations as well as given the force of law. Until this is done ACP economies will continue to be exploited by the MNCs whose primary allegiance is to their parent companies and economies.

To do this would mean reversing the trend of trade that has existed between the ACP peoples and the Europeans, right from the era of the slave trade through the colonial era. Developing the ACP economies, towns and cities , was always of secondary importance to feeding the European industries and economies. Thus technology was actually transferred to the MNCs' subsidiaries and not the host economies. This has built into the ACP economic structure and it is difficult for them to change from being primary- producer, mono-agricultural economies to diversified, science and technology-based economies which are capable of providing their populations with basic necessities such as food supply, employment and healthcare, which are requisites for development.

The Lome Conventions and their predecessors, the Yaounde Conventions, failed to bring about technological advancement in the ACPs. It is submitted that this is mainly because the commitment to adequate transfer of technology was only a lip-service. No concrete effort was made to control the restrictive business practices of the EC transnationals. No solid attempt was made to help the ACPs in developing and improving their own indigenous technologies which in many cases proved to be better-suited to their needs than those imported by the MNCs. The ACPs on their own part do not appear to have clear-cut policies with respect to regulating the transfer of technology. Their laws are often out-dated and in dire need of reform. Further, the mechanism for making sure that MNCs obey the host country's laws is just not efficient either due to poor funding or corruption of the government officials. Finally, the parameters for judging these breaches is usually deeply rooted in the Western legal system which in itself was designed with developed countries in mind. The ACPs have to incorporate into their national and regional economic laws, an effective regime of checks on the restrictive business practices of the EC transnationals, like the South American Member-countries of ANCOM have done.

This they can only do through their own determination to make the changes. The history of the Lome Conventions, and indeed EC-African relationship has tended to show that the Europeans would prefer to keep the ACPs and other LDCs in the position of cheap raw material producers, and dumping grounds for out-dated, over-priced technology. The ACPs cannot therefore expect these changes to be made for them, they must be authors of their own destiny.

In post-1992 Europe, the EC transnationals will have the benefit of a monolithic European Market (with harmonized Competition laws) and therefore a fortified economic and political base from which to further exploit the ACP economies. Technical cooperation as prescribed in the Lome IV accord will be meaningless as long as its priorities continue to be determined solely by the European Council. The CDI will simply be an instrument for propagating the interests of the MNCs who, in a typical capitalist set up control indirectly, the European Market, and more so after its complete unification in 1992.

CHAPTER V.

CONCLUSION.

SUGGESTED SOLUTIONS.

(1) GENERAL.

The relationship between the EC and the ACPs dates back to 1958 when the first Convention was signed associating the African colonies with the EC. However, the EC's economic relationship with the African, Caribbean and Pacific countries as a group began in 1975 with the signing of the first Lome Convention. This Convention attempted to address some of the shortcomings of the earlier Yaounde Conventions (1963 and 1968) such as inadequate funding, poor distribution of resources to countries as well as to projects, and allegations of harsh, inflexible rules of trade such as the rules of origin principle. It also had a firm legal basis in Article 238 of the Treaty of Rome whereas the Yaounde Conventions had avoided this issue having been unable to resolve it to the satisfaction of all Members of the EC.

However, the Lome Conventions have also failed so far to lead the ACPs on the path to development and technological and economic self-sufficiency. The Lome IV Convention was signed in December, 1989 amidst intensive debate and speculation among the ACPs as to the likely impact of the Single Act 1986 on the Conventions. It was feared that the gains made through preferences established under the Conventions and protected by Article 115 of the Treaty of Rome would be effectively eroded owing to the fact that Article 13 of the Single Act in effect substitutes for the old Article 115 a new Article 8(A). This new Article 8(a) provides that the internal market shall comprise an area without frontiers in which the free movement of goods, persons, services and capital is ensured. To the ACPs, this meant that they would be exposed to fierce competition, first from Eastern Europe following the collapse of communism, and also from the Newly Industrialized Countries (NICs) of Asia.

Various legal questions also arise regarding the compatibility of the Single Act with the Lome Conventions. It is submitted that the EC will have to discharge its obligations to the ACPs under the Lome Conventions even where this may mean not strictly complying with the provisions of the Single Act. This is because the Lome Convention is a Treaty within the definition of the Vienna Convention on the Law of Treaties 1969, while the Single Act is, as far the ACPs are concerned, a regional legislation.

Similarly, the ACPs fear that as the GATT negotiations at the Uruguay Round tend to move towards the erosion of preferences under the so-called Most Favoured Nation (MFN) clause, the preferences guaranteed under the Lome IV Convention may well be compromised. Again, this is a question of international law. It is submitted that the EC (whose Members are all signatories to the GATT) is bound to discharge its obligations under Lome IV to those ACP countries which are not signatories to the GATT because of the principle of international law of *pacta sunt servanda*. However, with respect to those ACPs which are signatories to the GATT, the GATT rules would prevail.

With respect to the crucial problem of external indebtedness, the answer would appear to lie in group action. The ACPs would have to come together and form a cartel and speak with one voice. They would have to admit publicly that since they cannot pay off those debts they will not pay them, and the EC and other creditors should openly admit that the ACPs should not pay because these debts have already been written off through loss adjustment provisions anyway.

For the ACPs to be able to speak effectively with one voice on international issues affecting them, such as the likely effects of the Single Act, they need to organize themselves properly into subregional groupings, e.g., groupings of African countries or of Caribbean countries, etc.

African countries have in the past tried to come together to solve their economic problems, without much success. The same is true of the Caribbean and Pacific countries. For the purpose of this thesis, some of the attempts of African countries and Caribbean countries at economic integration will be examined.

(2) ATTEMPTS AT ECONOMIC INTEGRATION.

(i) THE LAGOS PLAN OF ACTION 1980.

For the African countries, the major obstacle in the path to economic integration, has been their lack of political will and commitment to the course of intra-African integration. A good example is the Lagos Plan of Action 1980 (the Plan).[1] Had it been pursued vigorously and seriously, African countries would have been much better prepared to absorb the consequences of the Single Act. The Plan emphasized the need for the establishment of an African Monetary Union which if it had been implemented, would have provided African countries with a shock absorber for the CFA Franc Zone- EC monetary union riddle. Under the EC monetary union the future of the CFA Franc, which is attached to the French Franc at a fixed rate of 1 French Franc to 50 CFA Francs, is uncertain because the Single Act makes no express statement on or provision for monetary unions which EC Members have with third

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[1] See the Lagos Plan of Action for the Economic Development of Africa (1980-2000) which was signed in Lagos in November, 1980 by the Heads of State of the OAU.

countries.

The Lagos Plan of Action was indeed an ambitious one; it aimed by the year 2000 at making Africa self-sufficient in food, its industrial production should have risen to 2% of the world total, and its intra-regional trade should have been liberalized to the extent of a *de facto* African Common Market.[2] However, many observers felt that the mechanics were unclear and the formulation of concrete policies was avoided throughout the Plan.[3] Indeed, the "South" magazine issue of November, 1980 opined that, "the absence of mechanical details (such as financing which was described hazily), so politically remitted to individual governments, makes the explicit enumeration of targets and dates a dangerous source of possible frustration in years to come".[4] The various governments failed to follow up on the steps which they outlined in the Plan and which were necessary to achieve their goals. The result was that nothing came out of the Lagos Plan of Action.

(ii) <u>THE ECONOMIC COMMUNITY OF WEST AFRICAN STATES TREATY 1975.</u>

It has been a similar experience with the Economic Community of West African States (ECOWAS). It came into being in 1975 with the Treaty of Lagos.[5] Member States were barred from imposing new duties or increasing existing duties on intra-Community trade during the first two years of the Treaty. In the succeeding eight years they were expected to eliminate all barriers on such trade, but today, some seventeen years after the ratification of the ECOWAS

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[2] Ibid, see Chapter VII on Trade and Finance, pp.83-90.

[3] <u>South</u>, no.2, November, 1980, pp.52-53.

[4] Ibid.

[5] The Economic Community of West African States Treaty, a.k.a. The Treaty of Lagos, was signed in Lagos on 28th May, 1975 by the Heads of State of 15 West African countries. It contains 14 Chapters and has 65 Articles.

Treaty, these initial steps have not been effected because of lack of political will and commitment, and because of incessant changes in government in the various Member States.

Comments on the future of ACP-EC trade if economic integration is not seriously pursued.

It is obvious that African and other ACP countries cannot hope to utilize fully the important opportunities that will emerge from the full implementation of the provisions of the Single Act, nor effectively cope with the economic consequences of the full implementation of the SEM or the Monetary Union, unless the subject of integration among themselves is taken seriously. One basic inference that can be made is that the full implementation of the Single Act will result in continental standardization; i.e., Europe will have uniform standards which it will apply to dealings between the EC and Africa.[6]

Today, individual, or a group of ACP countries maintain special relations with individual EC countries (e.g. Francophone Africa with France, or the Commonwealth ACP States with the UK). These special or concessionary relationships whether in matters of finance, money, trade or immigration, will have to be reviewed to conform to the standardized Europe. Speaking of the effect on African countries, Salim says, "Within the Community itself it means that these special relationships will be subjected to scrutiny. The end product of this scrutiny shall be a policy of consensus based on the principle of common denominators. It will therefore be what is minimally objectionable within the Community and correspondingly least favourable to African countries which maintain these relationships. Whichever way one looks at it the law

[6] Salim, op cit, p.8.

of averages will not work to increase or multiply the advantages for Africa."[7]

Also speaking of African countries, Lucien Pagni states the issue thus: "Africa will not be granted its role and place in the new international balance. It and it alone will determine what they shall be with the success of its economic achievements and the quality of its social organization. The alternatives are fundamental reform or decline."[8]

(iii) THE AFRICAN ECONOMIC COMMUNITY (AEC).

It is perhaps in the wake of the realization that economic integration is the only way out for them, that 47 Heads of State of the OAU came together in Abuja, Nigeria on June 3rd, 1991 to sign the Treaty establishing the African Economic Union (AEC).[9]

The draft of the Treaty sought to establish an African Parliament as well as a Court of Justice after the fashion of the European Court of Justice (ECJ). It also sought to unite the various monetary arrangements and to establish a common African currency. Finally, the provisions of the Draft Treaty proposed the liberalization of trade to the extent of a Common Market.

Going by the experiences of the Lagos Plan of Action and the ECOWAS, it is, needless to say, necessary to pursue with seriousness and precision the provisions of this Treaty, especially the provisions regarding the financing of projects explicitly enumerated. The various governments must also take seriously their financial commitments to the OAU, e.g., annual dues, if this experiment is to succeed. A lesson should be learned from the European

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[7] Ibid.

[8] Pagni, L., op cit.

[9] See the Draft of the AEC Treaty which was later amended and signed at the summit of June 3rd, 1991.

experience.

(iv) CARIFTA AND CARICOM.

With respect to the Caribbean countries, attempts have also been made at establishing economic cooperation and integration. On December 15, 1965 Antigua, Guyana and Barbados reached an agreement over the setting up of a Caribbean Free Trade Association (CARIFTA). It was finally launched on April 30, 1968. It emerged as the first attempt of the Commonwealth Caribbean to form an economic unit independent of outside guidance.

Its goals included the expansion and diversification of trade in the area of association; ensuring that trade would take place in conditions of fair competition; the encouragement of the economies of the area; the harmonious development of Caribbean trade by the removal of barriers to it; and ensuring that the benefits of free trade are equitably distributed among Member territories.[10]

Nevertheless, rivalries appeared at the start. Jamaica, for example, was reluctant to accept the sitting of the Regional Development Bank in Barbados. The founding Members,[11] which had a population of more than half a million, needed very heavy capital investment to develop their economies and maintain their standard of living. Poor communication also caused a problem. Three years after the Association was founded, the UN Economic Commission for the Caribbean found that the CARIFTA Members still had neither the vessels nor the port

[10] Article 2, CARIFTA.

[11] Antigua, Barbados, Dominica, Grenada, Guyana, Jamaica, Monteserrat, St.Kitts- Nevis- Anguilla, St.Lucia, St.Vincent, Trinidad and Tobago. British Honduras joined in 1971.

facilities to handle increasing inter-island trade.[12]

The CARIFTA was succeeded in 1973 by the CARICOM-- the Caribbean Community and Common Market. It has a more specialized role. It was designed *inter alia*, to oversee foreign affairs, rationalize agricultural production, create linkages between industrial and agricultural enterprises and to harmonize fiscal incentives for industry, agriculture and tourism.[13]

It however needs a more unified approach on the part of all Member countries in identifying specific markets and specific products for their exports. This is one of the major problems of the CARICOM.[14] It also needs to develop a unified strategy for the development of procedures for sharing market information, the establishment of supervision standards for the market, and arrangements for joint supply of orders by several producers in different territories.[15]

(3) POLITICAL AND SOCIAL PROBLEMS.

However, before the dream of an economically integrated ACP can be realized there is the need for political re-orientation among the citizens of Member States. The integration of Europe has been largely due to the political consensus that exists among Members, which

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[12] Mitchell, H., Caribbean Patterns, John Wiley & sons, New York & Toronto, 1972, pp.352-355.

[13] Ibid.

[14] Chernick, S.E., The Commonwealth Caribbean (The Integration Experience), John Hopkins University Press, Baltimore & London, 1978, p.197. This is a report of a mission sent to the Commonwealth Caribbean by the World Bank.

[15] Ibid.

consensus is founded upon the principles of democracy. These principles of democracy have taken root in the politics of the individual West European countries and at the level of the Community itself.[16] With the AEC for instance, democracy cannot be achieved at Community level ahead of the solid entrenchment of democratic institutions in Member African countries. It is pedestrian to speak of an African Parliament (and presumably of conducting elections into it) when the individual Member States do not have democratically elected legislatures, or even of an independent African Court of Justice when the judiciary is virtually an annexe of the executive in most Member countries.

Further, the leaders of most ACP countries are dictators, either civilian-- who assumed office, say on independence, and then refused to vacate the office even after decades in office-- or military-- who did not assume power through a democratic process but rather through military coups d'etat. Their regimes are usually characterized by the stifling of the press, the absence of independent judiciaries and accountable executives, as well as a general paranoia, which in turn generate disaffection and lead, in many countries, to incessant changes in government. These constant changes in leadership in turn create an unstable economic climate for external investors. They also result in a marked lack of continuity of, and a general attitude of nonchalance towards specific government projects on which huge sums of public funds, may already have been spent.

This is a common problem across the ACP countries in Africa. Added to this is the prevalence of corruption among public and civil servants which result in the embezzlement of public funds, the perversion of justice and a general lack of patriotic commitment towards

[16] Salim, op cit, p. 15.

national interests and projects. Their citizens need to learn not only to be tolerant of their civilian elected leaders in order to allow democracy to take root, but also to be committed towards redressing corruption and bringing offenders to book. It is only when this is done, and ACP countries have become fully democratized, that their governments can successfully commit themselves to full economic regional and subregional integration. They can then identify issues of common interest to them and speak with one voice on those issues. They will then also be able to adopt a common policy, as a bloc, to global issues such as the challenges posed by post-1992 Europe.

(4) NEGOTIATING FUTURE CONVENTIONS.

It is no exaggeration to say that the African countries (during the negotiations which resulted in the Yaounde Conventions) and the ACPs (during the negotiations leading to the Lome Conventions) were generally not as skilled in negotiating as the EC were. This was however much more obvious in the Yaounde negotiations (as well as in the agreement with East Africa) than in the Lome Conventions, although it appeared not to have been the case with the Nigerian negotiations.

The result was that the EC had, in the Yaounde, East African and Lome accords, essentially the upper hand. This they exploited to good use in determining what priority to attach to the items for negotiation, and generally in manipulating the outcome of the negotiations.

The Africans, in the Yaounde Conventions, were unable to realize that the EC needed them as much as they needed the EC. In other words, the motives of the Europeans in negotiating the Conventions were not purely altruistic as propagated. The European factories and industries needed the African countries as a cheap source of raw materials in order to survive. Were the Africans in full grasp of this fact they would have been able to use it as a tool in negotiation. They would have been able to maintain their positions in the face of intimidation tactics or threats which the Europeans frequently used. Similarly, the Africans failed to exploit the initial sharp disagreement between France and Belgium one the one hand, who favoured signing the Conventions, and Germany--backed by Italy-- who were not particularly enamoured of the idea. The Africans ought to have been able to play off one side, e.g., France, against the other in order to get as much as they could in terms of financial aid, trade preferences and other concessions.

In the Lome negotiations, the EC was negotiating with an enlarged group--the African, Caribbean and Pacific (ACP) countries. They made substantial gains as a result of their improved negotiating strategies. Having organized themselves into the ACP group they chose Nigeria as chief negotiator and catalyzing force. Nigeria was respected by the EC as an able negotiator having negotiated a well-applauded agreement with them much earlier. Thus, Nigeria's image enhanced the ACP's bargaining position.

Further, Nigeria, as the eighth largest oil-producer in the world, exploited the global oil recession at the time to obtain concessions from the EC which they otherwise would not have given. Consequently, the Lome Conventions turned out generally to be a better package than the Yaounde Conventions had been.

However, it was still quite obvious that the Europeans had the upper hand because they were giving while the Africans were asking. In other words, the skill of the ACP negotiating team could best be measured by what they were able to get the EC to give. It is necessary therefore, for future conventions, to ensure that the lead negotiators are well-trained and exposed to sophisticated negotiating tactics, so as to meet the Europeans on a more equal level. It is suggested that the ACP countries should contribute money towards this end because it would be a good investment on the outcome of future negotiations. The task of negotiating agreements with terms which are beneficial to ACP economies is one which must be pursued vigorously and with financial commitment where necessary.

(5) IMPROVING TRANSFER OF TECHNOLOGY.

The ACP group contains some of the world's poorest LDCs. Correspondingly, these countries have the most dire need for technological advancement. ACPs generally, depend almost exclusively on developed countries, mainly the EC, the USA, and Japan, for the advanced technology they use. In other words, they are principally importers of technology. Such foreign technologies are usually imported through MNCs.

This has resulted in two main disadvantages, namely,

i, the imposition of restrictive business practices into agreements for transfer of technology between the two blocs, and

ii, the neglect of development of indigenous or local technology.

Restrictive Business Practices.

The ACPs import technology on terms which are decided by the suppliers of technology, e.g., the EC transnationals. These terms do not necessarily favour the ACP interests but rather are designed to benefit the transnationals. This has resulted in restrictive business practices being inserted into the transfer agreements.

These restrictive business practices in turn have adverse effects on the economy of the ACP country. This is because such clauses tend to place restrictions on the volume and structure for production by the recipient enterprise, or to prohibit the use of competitive techniques, or to establish an option, in favour of the supplier of technology, to purchase the enterprise. They could also commit the purchaser of technology to disclose to the supplier the inventions or improvements accomplished through utilization of the technology.

By far the most far reaching of clauses contained in a typical transfer agreement is the provision for payment of royalties for use of patents and trademarks. These are often too high for the ACP country to pay comfortably. Further, the profits of the MNCs' subsidiaries in the ACPs are largely shipped out as dividends to the parent company as dividends. Many MNCs even go as far as including clauses obligating the licensees to pay royalties on un-used patents. This has been found to be aimed purely at preventing the domestic or local companies from making the same products. It has led to intensive debate among economists on the purpose of the patent system. While developed countries feel it is necessary to reward inventors of technology as an incentive to inspire them further, developing countries (including ACPs) typically feel that technological know-how, like all forms of human knowledge is part of the human heritage and should be made available to developing countries as cheaply as possible. It is suggested that lower patent rates should be adopted for ACP countries under the Lome Convention's provision for technical cooperation.

The United Nations and other international bodies have recognized the need to control the restrictive business practices of transnationals operating in developing countries. To this end, the UNCTAD set up a Committee to make recommendations on the control of the conduct of transnationals. It recommendations are however still in draft stage after about 20 years of existence owing to the fact that there is a disagreement between developed and developing countries on the legal nature of the Directives of the UNCTAD Committee. The developed countries feel that they should only be guidelines while the developing countries feel that they should be law backed by penalties for breach. It is suggested that it is only when they are backed by sanctions that would be truly effective because, if there are no sanctions developing countries would always give in to unfair conditions of transfer because they need the technology so badly anyway.

The Lome Conventions also recognize the importance of technological advancement and transfer of technology to the economic development of the ACP States. Lome I provided in its Articles 26-39 for transfer of technology between the EC and the ACP countries. In Articles 40-61 it provided for financial and technical cooperation between the two blocs. It established, under Article 36 a Centre for Industrial Development (CID) with the responsibility for facilitating the transfer of technology. This Centre is replaced under Lome IV by a Centre for Development Industry (CDI) created under Article 87. It retains essentially the same powers. Neither the CID nor the CDI was vested with any powers to take action against EC transnationals who include restrictive business clauses in their agreements for transfer of technology. This in effect means that the ACP local enterprises and subsidiaries are left at the mercy of the EC transnationals with the attendant adverse effects on their economies.

It is submitted that the CDI should be re-organized and imbued with the power to take necessary action to regulate the restrictive business practices of these transnationals and also to carry out punitive actions where there is a breach. Further, because the transnationals are subjected to virtually no control they often supply second-rated, early-model technology for more than the normal price of new model ones. In addition to this is the fact that a lot of the technology transferred is not suitable for ACP countries either because of weather conditions or because they are not suitable to meet the needs of ACP countries. A good example is the fact that many of the sophisticated machinery supplied by MNCs are labour-saving, ostensibly developed in response to the high cost of labour in the EC and other developed countries. Such machinery only worsen the unemployment problem in the ACP countries some of which have teeming populations which need to be gainfully employed.

The CDI should have the authority and expert personnel with which to monitor the adequacy and adaptability of technology which is imported into the ACPs from the EC. The individual ACP countries should also endeavour to incorporate in their national laws provisions which prohibit the inclusion of restrictive business practices in technology transfer agreements. Similarly, the regional and subregional economic groupings should make directives to this effect as have the Andean Commission of South American Countries (ANCOM).

Developing Indigenous Technology.

The importation of technology has tended to overshadow the development of indigenous technologies. Many of these indigenous technologies, although rudimentary, have been proven to be more suitable to the needs of the ACPs. It is suggested that a good proportion of the financial aid given to the ACPs under the EDF should be devoted to the promotion of research and development of indigenous technologies. Training facilities and equipment such as books, video films, etc., could also be made available to the ACPs as these would go a long way towards helping them develop the much-needed confidence in their own indigenous technologies and in their ability to attain technological advancement.

(6) COPING WITH THE EFFECTS OF THE SEM AFTER 1992.

With the completion of the SEM after 1992, the ACPs stand the risk of being further exploited by EC transnationals who would then have the benefit of a monolithic Europe, with harmonized competition laws, and a single currency. Faced with the largest single market in the world they will not stand a chance unless serious steps are taken now to address the problem of regulating restrictive business practices, improving negotiating skills and also the integration of their economies to enable them speak with one voice on crucial international issues affecting them. To do this successfully, it is necessary that the institutions of democracy be put in place in order to ensure that the ACPs are governed by leaders who are sensitive to the voice and needs of the people.

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APPENDIX

SIGNATORIES TO THE LOME IV CONVENTION

THE EC

1. BELGIUM
2. DENMARK
3. GERMANY
4. GREECE
5. SPAIN
6. FRANCE
7. IRELAND
8. ITALY
9. LUXEMBOURG
10. NETHERLANDS
11. PORTUGAL
12. BRITAIN AND NORTHERN IRELAND

THE ACP COUNTRIES

1. ANGOLA
2. ANTIGUA AND BARBUDA
3. BAHAMAS
4. BARBADOS
5. BELIZE

6. BENIN

7. BOTSWANA

8. BURKINA FASO

9. BURUNDI

10. CAMEROUN

11. CAPE VERDE

12. CENTRAL AFRICAN REPUBLIC

13. COMOROS

14. CONGO

15. COTE d'IVOIRE

16. DJIBOUTI

17. DOMINICA

18. ETHIOPIA

19. FIJI

20. GABON

21. GAMBIA

22. GHANA

23. GRENADA

24. GUINEA

25. GUINEA-BISSAU

26. EQUATORIAL GUINEA

27. GUYANA

28. HAITI

29. JAMAICA

30. KENYA

31. KIRIBATI

32. LESOTHO

33. LIBERIA

34. MADAGASCAR

35. MALAWI

36. MALI

37. MAURITANIA

38. MAURITIUS

39. MOZAMBIQUE

40. NIGER

41. NIGERIA

42. UGANDA

43. PAPUA NEW GUINEA

44. RWANDA

45. SAINT KITTS AND NEVIS

46. SAINT LUCIA

47. SAINT VINCENT AND THE GRENADINES

48. WESTERN SAMOA

49. SAO TOME AND PRINCIPE

50. SENEGAL

51. SEYCHELLES

52. SIERRA LEONE

53. SOLOMON ISLANDS

54. SOMALIA

55. SUDAN

56. SURINAME

57. SWAZILAND

58. TANZANIA

59. CHAD (TCHAD)

60. TOGO

61. TONGA

62. TRINIDAD AND TOBAGO

63. TUVALU

64. VANUATU

65. ZAIRE

66. ZAMBIA

67. ZIMBABWE.