
Theresa I. Yard*

Theresa I. Yard

Abstract

This Note will analyze Lome III’s private investment protection and promotion provisions to determine whether the provisions would actually promote the flow of capital needed by the ACP States to meet their development goals, or whether these provisions merely perpetuate the elements of the historical colonial relationship that persisted under the prior Lome Conventions. Part I of this Note will detail the historical relationship between the ACP States and the EEC countries, emphasizing the prior Lome Conventions. Part II will give the background of Lome III, and will review the Convention’s private investment provisions. Part III will analyze the effect of article 243, regarding investment protection agreements, and article 244, concerning investment insurance and guarantees, on the flow of private investment to ACP States. The Note will conclude that the private investment provisions are indeed a step toward promoting the economic development of the ACP States, if two conditions are met. First, the EEC and ACP must fulfill the promises that they have made to study the problems that discourage private investment and take substantive action based upon these studies. Second, the rules of origin and the safeguard clause of the Lome III Convention must be modified.
PROMISES, PROMISES: A CRITICAL ANALYSIS OF
LOMÉ III's PRIVATE INVESTMENT
PROVISIONS

1976: "In the history books [Lomé I] will go down as a symbol of a revolution which gave the Third World access to . . . [shared responsibility] and to increased prosperity."¹

1984: "The Lomé Convention does not provide answers to all questions and it cannot invent solutions to every problem. . . . [I]t is a genuine attempt to tackle some of the most serious problems confronting developing countries today."²

INTRODUCTION

On December 8, 1984, the European Economic Community³ (EEC or Community) and the African, Caribbean, and Pa-

---
² Address by Peter Barry, President of the European Council of Ministers, at the signing of Lomé III, A new dimension in ACP-EEC cooperation, COURIER, Jan.-Feb. 1985, at 7, 8.

The EEC has four institutions: the Commission, the Council, the European Parliament (formerly called the Assembly) and the Court of Justice of the European Communities. Treaty of Rome, supra art. 4; K. BORCHARDT, THE ABC OF COMMUNITY LAW 16 (1983). The Commission has broad executive powers. Treaty of Rome, supra art. 155. The Council is the supreme legislative body of the Community. Id. art. 145. The European Parliament has limited powers of supervision over the Commission. K. BORCHARDT, supra at 19. The Court of Justice administers the law of the ECSC, Euratom, and the EEC. Convention Relating to Certain Institutions Common to the European Communities, Mar. 25, 1957, S II, 1973 Gr. Brit. T.S. No. 1 (Cmd. 5179-
The African, Caribbean, and Pacific States (ACP or ACP States) signed the third Lomé Con-


4. The African, Caribbean, and Pacific States (ACP or ACP States) came together to achieve a stronger negotiating position during the talks that led to the conclusion of the first Lomé Convention in 1975. ACP-EEC Convention of Lomé, Feb. 28, 1975, 19 O.J. EUR. COMM. (No. L 25) 2 (1976), 14 I.L.M. 604 (1975) [hereinafter referred to as Lomé I]. After signing this Convention, the ACP States decided to institutionalize their group by signing the Georgetown Agreement. The Georgetown Agreement, June 6, 1975, art. 2, reprinted in COURIER, Sept.-Oct. 1985, at 54-55. Article Two of the Agreement lists the ACP group's objectives:

(a) to ensure the realisation of the objectives of the Convention of Lomé,

(b) to coordinate the activities of the ACP States in the application of the Lomé Convention,

(c) to determine joint positions of the ACP Group vis-a-vis the EEC on matters covered by the Convention of Lomé,

(d) to promote and strengthen the existing solidarity of the ACP Group,

(e) to contribute to the development of greater and closer trade, economic and cultural relations amongst the ACP States and amongst developing countries in general, and to this end to develop the exchange of information amongst the ACP States in the fields of trade, technology, industry and human resources,

(f) to contribute to the promotion of effective regional and inter-regional co-operation amongst the ACP States and amongst developing countries in general, and to strengthen the links between the respective regional organisations to which they belong,

(g) to promote the establishment of a new world economic order.

The ACP organs are the Council of Ministers and the Committee of Ambassadors, which are assisted by the ACP General Secretariat. Id. art. 3. The Council of Ministers, the supreme organ, consists of a member of the government or a representative designated by each ACP State. Id. art. 4. The Council draws the plans for the work necessary to the ACP Group's objectives. Id. art. 5. The Committee of Ambassadors is another ACP organ. It assists the Council of Ministers in performing its duties and ensures the implementation of the Lomé Convention. Id. art. 13. The ACP General Secretariat assists the ACP organs by carrying out the tasks they assign. Id. art. 19.

Since 1975, ACP membership has grown from 46 to 66 states. Dodoo, Structure and Functioning of the ACP Group, COURIER, Sept.-Oct. 1985, at 57-61. The following countries are currently members of the ACP group:

Angola, Antigua & Barbuda, Bahamas, Barbados, Belize, Benin, Botswana, Burkina Faso, Burundi, Cameroon, Cape Verde, Central African Republic, Chad, Comoros, Congo, Djibouti, Dominica, Equatorial Guinea, Ethiopia, Fiji, Gabon, Gambia, Ghana, Grenada, Guinea, Guinea Bissau, Guyana, Ivory Coast, Jamaica, Kenya, Kiribati, Lesotho, Liberia, Madagascar, Malawi, Mali, Mauritania, Mauritius, Mozambique, Niger, Nigeria, Papua New Guinea, Rwanda, St. Christopher & Nevis, St. Lucia, St. Vincent & Grenadines, Sao Tome & Principe, Senegal, Seychelles, Sierra Leone, Solomon Islands, Somalia, Sudan, Suriname, Swaziland, Tanzania, Togo, Tonga.
vention (Lomé III) in Lomé, the capital of Togo. This Convention is the latest in a series of conventions that have established a partnership between the EEC and the ACP through programs that establish price supports for particular ACP exports and financing for ACP development projects. The EEC and the ACP intend that their partnership under the Conventions serve as a model for relations between developing and developed countries.

A number of commentators have criticized the nature of the relationship that has developed between the ACP States

---

Trinidad & Tobago, Tuvalu, Uganda, Western Samoa, Vanuatu, Zaire, Zambia, and Zimbabwe.


The Lomé III Convention must be ratified by at least two-thirds of the ACP countries in conformity with their respective constitutional requirements. Lomé III, supra arts. 285-86. The Convention entered into force on May 1, 1986. Telephone interview with Elizabeth Grant, of the Delegation of the Commission of the European Communities to the United Nations (June 2, 1986).

6. Stabex is a commodity price stabilization plan established under the Lomé Conventions to maintain the revenues of commodity exporting ACP States. See infra notes 144-50 and accompanying text (discussion of the Stabex program). Sysmin operates by providing revenue to mineral exporters when their earnings fall due to market disruptions. See infra notes 187-88 and accompanying text (discussion of Sysmin program). Under Lomé III, the Community’s assistance shall total 8,500 million European Currency Units [hereinafter referred to as ECU]. One ECU equals approximately U.S.$.75; therefore, the Community pledged about U.S.$6.4 billion in financial aid. European Communities Press Release, December 6, 1984 (available in the Library of the Delegation of the Commission of the European Communities to the United Nations). Seven million four hundred thousand ECU will come from the European Development Fund [hereinafter referred to as EDF] and 100 million ECU will come from the European Investment Bank [hereinafter referred to as EIB] in the form of loans. Lomé III, supra note 5, arts. 194-96. This works out to U.S.$4 per year for each ACP citizen, when inflation and the addition of new ACP States are taken into account. EEC: Lomé Convention—A little more aid—with knobs on, ECONOMIST, Jan. 5-11, 1985, at 39.

7. The idea that the Conventions serve as models for relations between developing and developed countries is expressed in all three Lomé Conventions. See Lomé I, supra note 4, preamble; Lomé II, supra note 5, preamble; Lomé III, supra note 5, art. 3.
and the EEC under the Lomé Conventions. These critics have said that the parties' trade exchange is a continuation of the European countries' exploitation of their former colonies, because Lomé perpetuates interdependence in at least two ways. First, because the EEC needs the ACP's raw materials, it fosters good trade relations with the ACP by means of compensatory financing to minimize fluctuations in export earnings, trade preferences, and development aid. Second, because the ACP lacks an advanced manufacturing sector, it serves as a market for EEC goods made from ACP raw materials.
This Note will analyze Lomé III’s private investment protection and promotion provisions to determine whether the

15. See J. Ravenhill, supra note 11, at 37-38.
16. Lomé III, supra note 5, arts. 240-47. The text of the articles is as follows:

Article 240
The Contracting Parties recognize the importance of private investment for the promotion for their development co-operation and acknowledge in this respect the need to take such steps as would promote such investment. In this regard the Contracting Parties jointly and severally agree to:
(a) implement measures to encourage private economic operators who comply with the objectives and priorities of their development co-operation and with the appropriate laws and regulations of their respective States to participate in their development efforts;
(b) accord fair and equitable treatment to such investors, and encourage and create clear and stable conditions conducive to the participation of such investors;
(c) maintain a predictable and secure investment climate and be prepared to enter into negotiations on agreements which will improve such climate and, in so doing, further mutual interests;
(d) promote effective co-operation amongst their respective economic operators.

Article 241
1. In order to accelerate further their development cooperation and the expansion of directly productive investment, the Contracting Parties, using the technical and financial assistance provided within this Convention, agree to study measures which will facilitate an increased and more stable flow of private capital and which will further enhance:
(a) joint financing of productive investments with the private sector;
(b) access by interested ACP States to international financial markets;
(c) the activity and effectiveness of domestic financial markets.
2. To this end, the Contracting Parties agree to review the economic, technical, legal or institutional obstacles which currently hamper such developments as well as the action required to remove these obstacles, with due respect for international commitments, in order to promote further the development of productive investment.

Article 242
1. Taking account of the link between investment decisions, the capacity of the ACP States to generate adequate export earnings to service the investment and the ability effectively to support existing and new productive investment, the Community undertakes to explore ways and means to provide, within the framework of financial and technical co-operation:
(a) credit lines to finance imports of intermediate materials needed for the export industries of a requesting ACP State;
(b) appropriate and effective support for export promotion.
2. Taking into account of the role of domestic development financing institutions as channel and intermediary for attracting private capital flows into development co-operation, the Contracting Parties agree, within the framework of financial and technical co-operation, to encourage the setting-up or strengthening of:
provisions would actually promote the flow of capital needed by the ACP States to meet their development goals, or whether

(a) national or regional financing institutions to finance exports and guarantee export credits;
(b) regional payment mechanisms that would facilitate intra-ACP trade.

Article 243

1. The Contracting Parties affirm the need to promote and protect either party's investments on their respective territories, and in this context affirm the importance of concluding between States, and in their mutual interest, investment promotion and protection agreements which could also provide the basis for insurance and guarantee schemes.
2. In order to further encourage European investment in development projects of special importance to, and promoted by, the ACP States, the Community and the Member States on the one hand, and the ACP States on the other, may also conclude agreements relating to specific projects of mutual interest where the Community and European enterprises contribute towards their financing.

Article 244

1. The Contracting Parties agree to undertake a joint study of the scope and appropriate mechanisms of a joint ACP-EEC insurance and guarantee system, complementary to existing national systems, that could have a positive effect on the flow of private-sector resources from the Community to the ACP States.
2. The Contracting Parties further agree to explore the use of private sector market insurance to insure additional private capital flows to the ACP States.

Article 245

In order to promote the development of private investment flows, the Community and the ACP States hereby agree, within the framework of this Convention and in co-operation with other interested bodies, to:
(a) encourage the flow of information on investment opportunities between financial or development finance institutions, other specialized financial institutions and other potential investors and sponsors by organizing periodic investment promotion meetings, making available periodic information on existing financial or other specialized institutions, their facilities and conditions and encouraging the establishment of focal points on ACP States;
(b) make a detailed analysis, taking full account of work being done in other institutions, of possible net increases in the flow of funds for investment financing that might result from greater use of co-financing and joint ventures and, in this regard, enable suggestions to be made to multilateral, regional and other institutions regarding ways and means of improving and increasing the number of such arrangements in order to expand the funds available to ACP States in the form of equity and long-term capital;
(c) strengthen, with financial and technical assistance for the Community, existing activities to promote European private investment in the ACP States by organizing discussions between any ACP State interested and potential private investors on the legal and financial framework which that ACP State offers or might offer to a potential investor;
(d) encourage the dissemination, to all interested parties, of information on the nature and availability of investment guarantees and insurance mechanisms to facilitate investment in ACP States, and encourage or prepare,
these provisions merely perpetuate the elements of the historical colonial relationship\(^7\) that persisted under the prior Lomé

\[\ldots\]

Article 246

1. The Contracting Parties hereby recognize that the least-developed, landlocked and island ACP States suffer from certain unique disadvantages which render them less attractive to private investment.

2. The Contracting Parties therefore commit themselves to undertaking, as soon as possible after the entry into force of this Convention, a joint study to identify the specific measures it may be desirable to adopt in relation to those States in order to improve their attractiveness to investment.

Article 247

1. In order to improve understanding of the issues involved in private-sector flows and the effectiveness of attempts to encourage such flows, the Contracting Parties hereby agree that the Commission shall, with their assistance, produce regular reports for the information of the Council of Ministers on flows of investment, lending, payment arrears and capital movements between the Community and the ACP States.

2. The Contracting Parties hereby agree that the issues relating to the promotion and protection of investment in their respective territories may be the subject of discussions in the appropriate ACP-EEC co-operation forum or of consultations between the ACP State concerned and the Community, especially where particular investment promotion schemes are being implemented.

3. The Contracting Parties hereby agree to launch all the studies referred to in this Chapter in the shortest possible time and, in any event, not later than one year after the entry into force of this Convention. The result of these studies will be submitted upon completion to the interested parties for consideration and appropriate action, not later than two years after the entry into force of this Convention.

17. See infra notes 34-50 (discussion of the colonization of Africa). Some commentators argue that protection of private foreign investment under uncodified rules, such as the doctrine of state responsibility, served as the "legal garb . . . to cloak and protect the imperialistic interests of the international oligarchy during the nineteenth century and the first part of the twentieth." Cástaneda, The Underdeveloped Nations and the Development of International Law, 15 INT’L ORG. 38, 39 (1961); see also Guha Roy, Is the Law of Responsibility of States for Injuries to Aliens a Part of Universal International Law?, 55 AM. J. INT’L L. 863, 865 (1961). The doctrine of state responsi-
Conventions. Part I of this Note will detail the historical relationship between the ACP States and the EEC countries, emphasizing the prior Lomé Conventions. Part II will give the background of Lomé III, and will review the Convention's private investment provisions. Part III will analyze the effect of article 243, regarding investment protection agreements, and article 244 concerning investment insurance and guarantees, on the flow of private investment to ACP States. The Note will conclude that the private investment provisions are indeed a step toward promoting the economic development of the ACP States, if two conditions are met. First, the EEC and ACP must fulfill the promises that they have made to study the problems that discourage private investment and take substantive action based upon these studies. Second, the rules of origin and the safeguard clause of the Lomé III Convention must be modified.

I. THE RELATIONSHIP BETWEEN THE ACP AND THE EEC: AN HISTORICAL PERSPECTIVE

The present relationship between the EEC and the ACP...
evolved from the colonial empires developed by the European nations to secure access to needed raw materials.\textsuperscript{27} When decolonization began in the twentieth century, European nations established preferential trade relations with their former colonies, thus maintaining access to the raw materials previously supplied by those former colonies.\textsuperscript{28} Under the Treaty of Rome,\textsuperscript{29} many European nations granted their former colonies "associate status" with the EEC.\textsuperscript{30} The association continued through two formal agreements, the Yaounde Conventions,\textsuperscript{31} after most of the Associates had already gained independence.\textsuperscript{32} The Lomé Conventions changed the relationship between the EEC and the ACP from an association to a partnership.\textsuperscript{33} However, critics have argued that the Conventions did not create a true partnership and have done little more than perpetuate the colonial system by securing EEC access to the raw materials it needs for its manufacturing industries.\textsuperscript{34}

\textsuperscript{27} See E. Rice Jr., The Foundations of Early Modern Europe 1460-1559 28 (1970); S. Easton, The Rise and Fall of Western Colonialism 11 (1964).


\textsuperscript{29} Treaty of Rome, supra note 3, arts. 131-36.

\textsuperscript{30} Implementing Convention Relating to the Association with the Community of the Overseas Countries and Territories, May 25, 1957, 1973 Gr. Brit. T.S. No. 1 (Cmd. 5179-II) (official English translation), 298 U.N.T.S. 157 (1958) [hereinafter cited as Implementing Convention]. "Associate status" was a relationship designed to foster close economic relations between the European Community and the territories with which it previously had special relations, and to promote the latter's economic and social development. Treaty of Rome, supra note 3, art. 131. The objectives of the association were to establish reciprocal trade preferences between the Associates and the Community, increase the Member States' investment in the Associates, and to grant the nationals and firms of the Associates and the Member States the right of establishment. Id. art. 132.


\textsuperscript{32} See J. Moss, The Lomé Conventions and Their Implications for the United States 8 (1982).

\textsuperscript{33} Partnership, Not Association: Yaoundé Convention to be Replaced, European Community July 1973, at 20 [hereinafter cited as Partnership, Not Association]. European Community is a periodical which has, since 1979, been published under the new name Europe.

\textsuperscript{34} See, e.g., Dolan, supra note 10, at 371; Comment, Title V of the 2nd Lomé Con-
A. From Colonial Empires to the Treaty of Rome

The European countries colonized Africa in two separate waves during the fifteenth and nineteenth centuries. In the former period, Portugal encouraged exploration along Africa’s west coast in order to investigate whether Portuguese gold traders could bypass Moslem middlemen. Portugal and other European countries began to exploit Africa during the sixteenth and seventeenth centuries. Europeans established trading posts on the west coast to receive slaves, gold, and ivory brought by natives from the interior.

In the second half of the nineteenth century, political and economic pressures led the European countries to resume their colonial conquests. The Industrial Revolution caused manufacturers to seek new markets for their increased production capacities. Developing countries served the dual function of a market for manufactured goods and a source of raw materials for these manufacturers. To make this economic relationship possible, Europeans imposed their concepts of administration and finance on the African people through colonial government.

vention Between the EEC and ACP States: A Critical Assessment of the Industrial Cooperation Regime as it Relates to Africa, 5 Nw. J. Int’l L. & Bus. 352, 363 (1983-84). For centuries Africa has been a producer of commodities for Europe while the latter has engaged in capital intensive and technologically advanced types of production. Id. One author claimed that Lomé I continued this “[e]urocentric version of comparative advantage.” Id.

35. See Martin, supra note 8, at 223.
36. See E. Rice, Jr., supra note 27, at 28. Portugal embarked on a program of exploration of the African continent led by Prince Henry the Navigator. See id. There were other motives for the Portuguese expansion into Africa. Prince Henry was hostile to Islam and wanted to measure the power of Islamic military forces in Africa. See id. at 26.
37. See id. at 29.
38. See id.
39. See S. Easton, supra note 27, at 11-12.
40. The Industrial Revolution, which had its starting point in the seventeenth century, caused rapid social and economic change in nineteenth century Europe. See E. Pawson, The Early Industrial Revolution 14-15 (1979). The key features of the Industrial Revolution were the change from domestic production to the factory system, the expansion of overseas trade, and the agrarian revolution that allowed much of the rural food producing population to leave the farms in order to work in the factories. See A. Toynbee, The Industrial Revolution 58-66 (1884).
41. See S. Easton, supra note 27, at 11.
42. See Martin, supra note 8, at 224.
43. See S. Easton, supra note 27, at 11; Martin, supra note 8, at 224-25.
The acquisition of colonies was increasingly a matter of national prestige by the close of the nineteenth century. The colonies served as a base for wielding military power. Some European powers were concerned that emigration would deplete their military might and thus welcomed the colonies as places where their burgeoning populations could go without losing allegiance to their mother countries. The European zeal for colonies reached a zenith at the Conference of Berlin, in 1884, where the European powers established a system for dividing the control of the African continent.

The European zeal for colonial possessions waned in the twentieth century. World War I undermined the political and economic basis of European imperialism. At the end of World War I, the League of Nations worked to establish the mandate system to administer the former colonies of Turkey and Germany. The mandate system did not end European colonialism. However, the system did affect the tenure of

44. See S. Easton, supra note 27, at 12; D.K. Fieldhouse, Economics and Empire 1830-1914 65 (1973).
46. See id. at 66.
47. See W.D. Smith, European Imperialism in the Nineteenth and Twentieth Centuries 119-20 (1982). The Conference of Berlin set the ground rules for Europe’s imperial expansion in Africa. See W. Arnstein, Britain Yesterday and Today: 1830 to the Present 164 n.2 (3d ed. 1976). Each power agreed to give notice to the others to signify that it planned to occupy an area or declare a new protectorate. See id.
48. S. Easton, supra note 27, at 125-25.
49. See W.D. Smith, supra note 47, at 224. The World War of 1914-18 allowed native Africans who fought to see the Europeans fighting Europeans and also created political opportunities that encouraged resistance movements. See id. at 225.
50. The League of Nations was formed in 1920. After World War I world leaders realized the need to establish the League to achieve international peace and cooperation. See League Of Nations Covenant preamble.
51. Id. art. 22. The League of Nations mandate system was established by article 22 of the Covenant of the League of Nations. This system was needed to provide administration for German and Turkish territories after World War I. H.D. Hall, Mandates, Dependencies and Trusteeship, in 9 Studies in the Administration of International Law and Organization 30 n.3 (Carnegie Endowment For International Peace ed. 1948). Germany had ceded its territories to the Allied Associated Powers in the Treaty of Versailles. Id. The Turkish Empire renounced similar rights in the Treaty of Lausanne. Id. Under the system, the mandates, former colonies and territories of Germany and the Turkish Empire, would receive administrative advice from the mandatories. League Of Nations Covenant art. 22, para. 2. Each mandate was treated according to the level of its economic development. Id. art. 22, para. 3.
52. See W.D. Smith, supra note 47, at 225.
European control. The breakdown of colonialism occurred more rapidly after World War II. By the early 1960s, most of the former European colonies had gained their independence.

The founding of the EEC in 1957 brought another change in the African territories' relationship with Europe. France had fought for the association of its former colonies with the EEC during the negotiations for the Treaty. France had argued that its efforts to aid the development of its colonies and territories unfairly burdened its national budget and industries. France had already guaranteed prices to producers in its former colonies. Furthermore, French loans and grants totaling U.S.$3.1 billion were given to French dependencies between 1956 and 1959.

The future EEC Member States were reluctant to share France's burden, because they did not want to be accused of either pursuing collective colonialism, or of indirectly providing financial aid for France's colonial wars by relieving its treasury of the economic burden of the dependencies. The Federal Republic of Germany and the Netherlands opposed the inclusion of articles of association in the Treaty of Rome.

53. See id.
54. See id. at 225-26. The Western European powers became more amenable to decolonization after World War II. See id. at 240. The Second World War changed the structure of the world economy and world politics. See id. Europe's economic recovery from the war depended on alliance with the United States. See id. The colonies were seen as an economic liability. See id.
55. See id.
56. See supra note 3.
57. See Serfaty, The United States, Western Europe, and the Third World: Allies and Adversaries, in World Trade Competition, Western Countries and Third World Markets 19 (Center For Strategic and International Studies ed. 1981); The European Community And The Developing Countries 4 EUROPEAN DOCUMENTATION, 1977/1 (the African territories became associated with the European Economic Community).
58. See supra note 30 (discussion of the association).
60. See J. Ravenhill, supra note 11, at 48. The French Government had supplied a large part of the government revenues of its colonies and territories. See id.
61. See id. at 48.
62. See id. at 49.
63. See id. France said that it was unfair for it to bear the burden of developing its colonies through price supports and capital expenditure. See id. at 48.
concluding that preferential trade relations with the Associates would reduce imports from other developing countries. The future Member States of the EEC eventually conceded to France, however, when France conditioned its signature of the Treaty of Rome upon the association of its former colonies with the EEC.

As a result of France's persistence on the association issue, Part IV of the Treaty of Rome stated that the territories that had special relationships with Belgium, France, Italy and the Netherlands would be associated with the Community. The Treaty, and the Implementing Convention set forth the features of the association. Under the Convention, the EEC received duty-free access to the Associates' markets. Each Associate pledged to grant each Member State the same preferential trade treatment that it granted to the Member State with which it previously had special relations. The Member States established the European Development Fund (EDF) to complement the social and economic development efforts of the Associates' governments. The Community committed U.S. $581.25 million for the five-year term of the Implementing Convention.

Many of the Associates gained their independence during the late 1950s and early 1960s. Soon after the Treaty of

64. See supra note 30.
66. See id. at 13-14.
68. See Implementing Convention, supra note 30.
69. See Treaty of Rome, supra note 3, arts. 131-36; Implementing Convention, supra note 30, arts. 1-17. The Treaty designated the following group as Associates: Senegal, the Sudan, Guinea, the Ivory Coast, Dahomey, Mauretania, the Niger and the Upper Volta, the Middle Congo, Ubangi-Shari, Chad and Gaboon, St. Pierre and Miquelon, the Comoro Archipelago, Madagascar and dependencies, French Somali Coast, New Caledonia and dependencies, the French Settlements in Oceania, Togoland, the Southern Antarctic Territories, the French Trusteeship Territory in the Cameroons, the Belgian Congo and Ruanda-Urundi, the Italian Trusteeship Territory in Somaliland and the Netherlands New Guinea.
70. See id. art. 133.
71. See id. art. 132.
72. See Implementing Convention, supra note 30, art. 1.
73. See id. annex A.
74. See J. Moss, supra note 32, at 8. The French territories and Somalia gained
Rome went into force in 1957, France called for a new convention that would provide a permanent framework for the Community’s relationship with the newly independent African nations.75 The EEC and the Associates began negotiations for the first Yaoundé Convention,76 which was to replace the Implementing Convention of the Treaty of Rome. Some of the EEC Member States disagreed over the Convention’s trade preference provisions.77 The Federal Republic of Germany and the Netherlands did not want to give in to the Associates’ demands for the maintenance of existing Community trade and tariff barriers to goods imported from non-associated developing countries.78 France and Belgium wanted to comply with the Associates’ demands.79 Eventually, the parties reached a compromise by providing for a procedure whereby other countries could apply for associated status with the EEC.80


1. Yaoundé I and Yaoundé II

Between 1964 and 1974, the EEC and the African Associates concluded two Yaoundé Conventions:81 Yaoundé I, which was signed in 1963,82 and Yaoundé II, which was signed in 1969.83 The eighteen African Associates, which were collectively known as the Associated African States and Madagascar84 (AASM), appeared to have bargaining power equal to their independence by 1961. See id. at 4. The Belgian territories gained their independence in 1962. See id.

75. See E. Frey-Wouters, supra note 59, at 14.
76. Yaoundé I, supra note 31; See J. Ravenhill, supra note 11, at 53.
77. See J. Moss, supra note 32, at 5.
78. See id.
79. See id.
80. Yaoundé I, supra note 31, art. 58.
81. Yaoundé I, supra note 31; see J. Moss, supra note 32, at 4-8. The Yaoundé Conventions were named for the capital of Cameroon where the Conventions were signed in 1963 and 1969. The European Community and the Developing Countries, 4 EUROPEAN DOCUMENTATION 1977/1.
82. Yaoundé I, supra note 31.
84. The Associated African States and Madagascar (AASM) group included all the territories associated with the EEC under the Implementing Convention. See Pinder, The Community and the Developing Countries: Associates and Outsiders, 12 J. Common
that of the EEC because of their independence. 85 However, the AASM did not succeed in concluding an agreement offering a significantly different relationship from the one that existed under the Treaty of Rome’s Implementing Convention. 86 Yaoundé I, like the Implementing Convention, encompassed the areas of trade expansion, 87 social and economic development, 88 and the EEC’s right of establishment in Associates. 89

Reciprocal trade preferences 90 continued under both Yaoundé Conventions. 91 The Community increased its aid to the African Associates to 730 million European Currency Units (ECU) under Yaoundé I 92 and later increased this aid to 918 million European Currency Units (ECU) under Yaoundé II. 93

Mkt. Stud. 53, 54 n.1 (1974); The European Economic Community and the Developing Countries, 4 European Documentation 1/1977; Commission of the European Communities Information Directorate-General, Lomé III Analysis of the EEC-ACP Convention I (1985) [hereinafter cited as Lomé III Analysis]; see supra note 69 and accompanying text.

85. See Dolan, supra note 10, at 371.


87. See Yaoundé I, supra note 31, arts. 2-15; Implementing Convention, supra note 30, arts. 9-12.

88. Yaoundé I, supra note 31, arts. 17-30; Implementing Convention, supra note 30, arts. 1-5.

89. Yaoundé I, supra note 31, arts. 31-40; Implementing Convention, supra note 30, art. 8.

90. The reciprocal trade preferences consisted of the following: each Associate received duty-free access to Community markets and in return pledged to reduce duties on the Member States’ exports to their countries. Yaoundé I, supra note 31, arts. 2(1), 3(1); Yaoundé II, supra note 31, arts. 2(1), 3(1); see also, Note, supra note 11, at 468-69. Some of the Associates favored retaining reciprocal trade preferences as a means of preserving African dignity in their relationship with the EEC. See J. Ravenhill, supra note 11, at 64. Reciprocal preferences may have hindered the development of the Associates’ own industries by allowing EEC manufacturers duty-free access to the Associates’ markets. See id. at 62.

91. Yaoundé I, supra note 31, arts. 2(1), 3(1); Yaoundé II, supra note 31, arts. 2(1), 3(1). Under article 133 of the Treaty of Rome, each Associate received duty-free access to the EEC and in return pledged to reduce duties on the Member States’ exports to their countries. Treaty of Rome, supra note 3, art. 133(1)(2). The EEC was willing to compromise on this issue. See E. Frey-Wouters, supra note 59, at 14. In Yaoundé I, EEC trade preferences on some tropical goods shipped into the Associates’ markets were abolished or reduced. Id.

92. Yaoundé I, supra note 31, art. 16. During Yaoundé I the EDF distributed 666 million ECU in the form of grants. Id. art. 16(a). The EIB issued loans totaling 64 million ECU. Id. art. 16(b).

93. Yaoundé II, supra note 31, art. 18. The EIB increased the amount it loaned under Yaoundé II to 90 million ECU. Id. art. 18(b). The Development Fund made grants of 748 million ECU and loans of 80 million ECU. Id. art. 18(a).
The Associates said that their relationship with the EEC under the Yaoundé Conventions did not promote their industrial development interests. They complained that their tariff preferences over non-Associates in EEC trade were eroded by cuts in the Community's common external tariff and by generalized preferences. The Associates' portion of the EEC's total imports had declined from 13.4% in 1958, to 7.4% in 1974. Furthermore, the Associates had made their greatest gains in exports to markets that did not grant them trade preferences. The failure of the Yaoundé Conventions to increase the Associates' exports to the Community caused the Commission of the European Community to recommend that there be no Yaoundé III, and that the Community form a partnership with the Associates.

2. The Lagos Agreement and the Arusha Accord

Between 1962 and 1974, the EEC had tried to establish preferential trade relations with British Commonwealth African countries that were not signatories to the Yaoundé Conventions. Great Britain’s application for membership in the
EEC raised the issue of the treatment to be accorded to the Commonwealth countries by the Community. In 1966, Nigeria and the EEC concluded the Lagos Agreement, which granted Nigeria associate status. This agreement was never ratified because French-Nigerian relations deteriorated during the Nigerian Civil War. In 1969, the Community and Kenya, Tanzania, and Uganda concluded the Arusha Accord, a trade and cooperation agreement. However, the EEC failed to reach trade agreements with other Commonwealth countries in Africa.

3. Negotiations for Lomé I

Three factors led to the negotiations for the first Lomé Convention. First, the EEC wanted to establish trade relations with the British Commonwealth countries. Second, the EEC wanted to establish a new form of relationship with the Associates because of their dissatisfaction with the results of the Yaoundé Conventions. Third, the EEC’s comprehensive


103. See J. Ravenhill, supra note 11, at 73. Great Britain wanted associated status for Commonwealth Africa, and the Caribbean and Pacific Islands. See id. Great Britain knew that the EEC would not grant associated status to the countries of Commonwealth Asia because of their relatively advanced level of economic development. See id.

104. See C. Cosgrove Twitchett, supra note 86, at 8.

105. See id.; R. Collins, Nigeria in Conflict 171 (1970). The Nigerian Civil War erupted when the eastern portion of the country (including Biafra) seceded in May of 1967. See id. at 157. France was sympathetic to Biafra and sent arms and mercenaries. See id. Because of this Nigeria would not seek association with the Community until 1973. See E. Frey-Wouters, supra note 59, at 27.

106. See Arusha Accord, supra note 101, art. 1. The Arusha Accord provided that three countries’ exports to the Community would benefit from tariff preferences existing within the Community. See id. art. 2. See generally Ghai, The Association Agreement between the European Community and the Partner States of the East African Community, 12 J. Common Mkt. Stud. 78 (1973-74).


109. See generally supra text accompanying notes 68-69.

110. See Partnership, Not Association, supra note 33, at 20.
development policy\textsuperscript{111} led the Community to expand its relations with developing countries.\textsuperscript{112}

The British Commonwealth countries had an opportunity to establish relations with the EEC pursuant to Protocol No. 22 of the Treaty of Accession of the United Kingdom to the EEC.\textsuperscript{113} The Community offered the Commonwealth countries three options.\textsuperscript{114} None of these forms of relationship with the Community proved satisfactory to the Commonwealth countries.\textsuperscript{115} The Commonwealth countries ignored the EEC’s deadline for response, and instead, began talks with the AASM and the Arusha groups\textsuperscript{116} intending to create a unified bargaining position for talks between the African countries and the EEC.\textsuperscript{117} These groups met through the Organization of African Unity\textsuperscript{118} (OAU) and were able to formulate principles for a common relationship with the EEC.\textsuperscript{119}

The Community moved to open negotiations for a new


112. See id. at 1-2. In 1972, the EEC decided to pursue a comprehensive worldwide development policy while preserving its policy of regional association. See id. at 1-2.


114. Id. Protocol 22.

The Community made the following proposals:

1. Association under the successor convention to Yaoundé II.
2. New association agreements to be concluded under Article 238 of the Treaty of Rome. These agreements would provide reciprocal rights in the area of trade.
3. Trade agreements to expedite developing trade between the Commonwealth countries and the EEC.

\textit{Id.}

115. See Pinder, supra note 84, at 58. Each alternative was construed as challenging the Commonwealth countries’ sovereignty, in light of their political independence. See id. The Commonwealth countries also argued that reciprocal trade preferences, which were a feature of the relationships offered by the EEC, were not appropriate in light of the disparate levels of economic development between them and the EEC. See id.; J. Moss, supra note 32, at 16.

116. See supra notes 84, 106, and accompanying text.

117. See J. Moss, supra note 32, at 17.


119. See Pinder, supra note 84, at 61. The principles agreed upon by the OAU were:

a. non-reciprocity in trade and tariff concessions;
convention that would include not only the African countries, but also several British Commonwealth countries of the Caribbean and Pacific. These parties accepted the invitation to negotiate jointly. Throughout the talks, the African, Caribbean, and Pacific States maintained a unified bargaining posture. The ACP insisted that reciprocal trade preferences be omitted from the convention and that the rules of origin, which determined the eligibility of ACP products for tariff preferences, be revised to facilitate ACP industrial development.

In addition, the ACP demanded that its products have duty-free access to EEC countries and that the Community establish a system guaranteeing stable prices for its princi-

b. the extension on a non-discriminatory basis, toward third countries, of the provisions on the right of establishment;

c. revision of the rules of origin so as to facilitate the industrial integration of African countries;

d. revision of the provisions on the movement of payments and capital to take account of the objective monetary independence in African countries and their need for monetary cooperation;

e. the dissociation of EEC financial and technical aid from any particular form of relationship with the EEC;

f. free and assured access to EEC markets for all African products, whether or not they are subject to the common agricultural policy of the EEC;

g. the guaranteeing to African countries of stable, equitable and remunerative prices in EEC markets for their main products in order to allow them to increase their export earnings;

h. no adverse effect on intra-African cooperation.

See id. at 61-62.

120. See Oumar Sy, supra note 107, at 52.

121. See id. The African Commonwealth countries, the AASM, the Arusha groups and the Commonwealth countries of the Caribbean and the Pacific agreed, in mid-1972, to jointly negotiate as a means of achieving a stronger negotiating position with the EEC. See Ramphal, The ACP-the early years, COURIER, Sept.-Oct. 1985, at 81-82.

122. See Oumar Sy, supra note 107, at 53. The African group supported the principle that the three groups were really one negotiating group, and not merely three groups speaking with one voice. This attitude continued through the negotiations in 1974. See id.

123. The rules of origin had been a part of the two Yaoundé Conventions. Yaoundé I, supra note 31, art. 2, annex to Convention; Yaoundé II, supra note 31, art. 2, Protocol 1. The Community's purpose in creating the rules of origin was to ensure that the exports of Associates who received tariff preferences from the EEC contained a minimum percentage of local content. McQueen, Lomé and the Protective Effect of the Rules of Origin, 16 J. WORLD TRADE L. 119, 122 (1982). The requirement of local content prevented third countries from shipping their goods to the Associates to take advantage of their tariff preferences to the EEC. See id. at 119.

pal exports to the EEC. The EEC was more open to the ACP’s demands during these negotiations than during the Yaoundé negotiations, because Europe was experiencing a recession and was facing the oil crisis of 1973, which created uncertainty over its access to oil reserves. Several ACP States had oil reserves or were under exploration by oil companies. The recession, the oil crisis, and the ACP States’ unified negotiating position allowed the ACP States to exercise power that had not previously existed in the EEC’s earlier dealings with these underdeveloped countries.

C. Lomé I: The Birth of a Partnership Between the EEC and the ACP

The signing of Lomé I by the EEC and the ACP States marked an important change in their relationship. The partnership between the EEC and the ACP began with a number of significant gains for the ACP States. The parties agreed to

125. See id.
126. See Farnsworth, Europe’s Technicians in a Job Scramble, N.Y. Times, Mar. 13, 1973, at 1, col. 1 (discussion of Europe’s recession).
127. The oil crisis of 1973 was the result of three distinct historical developments that interacted to cause the supply of oil to be insufficient to meet world demand. See Penrose, The Development of Crisis, in THE OIL CRISIS 39 (R. Vernon ed. 1976). The first of these developments was the increased bargaining power of the Organization of Petroleum Exporting Countries (hereinafter referred to as “OPEC”) with the international oil companies. See id. The second development was the Western world’s growing dependence on OPEC oil. See P. Odell, OIL AND WORLD POWER: BACKGROUND TO THE OIL CRISIS 200 (1974). The last factor was the United States’ support of the establishment and expansion of Israel in Palestine against the Arab States’ opposition. See P. Odell supra. In 1973, OPEC’s members agreed to set unilateral prices for their oil, and some members cut back their oil production. Mikdashi, The OPEC Process, in THE OIL CRISIS 204-05 (R. Vernon ed. 1976).
128. See Europe Expects to Add Oil Curbs, New 5% Cut in Arab Output May Cause 25% Shortfall, N.Y. Times, Dec. 11, 1973, at 69, col. 1. Petroleum industry experts anticipated that Europe would experience a 25% shortfall in its petroleum supplies by the end of 1974. See id. The Arab States’ decision to reduce their production compounded Europe’s economic problems, causing the recession in Europe to worsen. Farnsworth, . . . They’ve Already Hit Some Places, N.Y. Times, Nov. 25, 1973, at D1, col. 5.
129. See J. Moss, supra note 32, at 19.
130. See J. RAVENHILL, supra note 11, at 94-97.
131. See Lomé I, supra note 4. This Convention was signed on February 28, 1975 and was in force for five years. Id. art. 91.
132. See E. FREY-WOUTERS, supra note 59, at 253.
133. See Note, supra note 11, at 473-74. The ACP States also gained more preferential access to EEC markets than they had under the Yaoundé Conventions. See id.
discontinue reciprocal trade preferences,\textsuperscript{134} create the Centre for Industrial Development\textsuperscript{135} (CID or Centre), and establish a commodity price stabilization plan.\textsuperscript{136}

During the negotiations, the ACP States insisted that reciprocal trade preferences be eliminated from the relationship between the EEC and the ACP, because these preferences were "out of the question . . ., bearing in mind the inequality" in the trade relationship between the two organizations.\textsuperscript{137} The ACP also reminded the Community that the General Agreement on Tariffs and Trade\textsuperscript{138} (GATT) had recognized that developing countries should not be required to grant reciprocal trade preferences to developed countries.\textsuperscript{139} These arguments and the ACP States’ strong bargaining position

\textsuperscript{134} See E. Frey-Wouters, supra note 59, at 19.

\textsuperscript{135} Lomé I, supra note 4, art. 36. Article 36 states:

A Centre for Industrial Development shall be set up. It shall have the following functions:

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

\textit{Id.}

\textsuperscript{136} Id. arts. 16-24. The commodity price stabilization plan, which is popularly known as Stabex, stabilizes ACP export earnings. See infra text accompanying notes 144-50.

\textsuperscript{137} See Oumar Sy, supra note 107, at 53. The African Countries were initially divided over retaining reciprocal trade preferences. See id. The group opposing reciprocal trade preferences based their argument on the inequality in the trade relationship between the EEC and the ACP. See id. Eventually, all the African States supported this view. See supra note 119.


caused the EEC to agree to eliminate reciprocal trade preferences.\footnote{140}

The second major gain to the ACP from Lomé I was the establishment of the CID to promote industrial development in the ACP States.\footnote{141} The Centre gathers and disseminates, in the Community and the ACP States, information on opportunities for industrial cooperation.\footnote{142} The Centre carries out studies on the potential for industrial development in ACP States and organizes meetings and contacts between the Community and the ACP States' industrial policy-makers, promoters, firms, and financial institutions.\footnote{143}

The third achievement of Lomé I was a price stabilization plan, popularly known as Stabex,\footnote{144} for the ACP States' commodity exports\footnote{145} to the Community. One of the ACP States' major exports to the EEC is commodities\footnote{146} and the ACP had been adversely affected by the full force of world market price fluctuations.\footnote{147} The purpose of Stabex is to remedy the harmful effects of instability of export earnings on the ACP States' economies.\footnote{148} An ACP State was eligible to apply for a transfer of funds, in the form of aid or loans, when the state's actual earnings for an export product represented 7.5% or more of its total export earnings\footnote{149} and the price for the product falls

\begin{enumerate}
\item[140.] See supra notes 126-30 and accompanying text.
\item[141.] See Lomé I, supra note 4, art. 36.
\item[142.] Id. art. 36(a).
\item[143.] Id. art. 36(b)-(c).
\item[144.] Id. arts. 16-19.
\item[145.] Id. art. 17. The Stabex plan is applicable to the products listed in article 17 of Lomé I, which includes varieties of groundnuts, cocoa, coffee, cotton, coconuts, palm and kernel products, and wood. Id. The list also includes raw hides, skins and leather, fresh bananas, tea, raw sisal, and iron ore. Id.
\item[146.] See K. Focke, From Lomé I Towards Lomé II 13 (1980). During the period between 1975 and 1978, 90.6% to 41.6% of the ACP's exports to the Community were foodstuffs. See id.
\item[147.] See J. Ravenhill, supra note 11, at 72.
\item[148.] Lomé I, supra note 4, art. 16. The ACP States suffered from external trade deficits as a result of the deterioration in commodity prices, because their gross national products (GNP) were highly dependent on commodity exports. See OECD, World Economic Interdependence and the Evolving North-South Relationship 47 (1983).
\item[149.] Lomé I, supra note 4, art. 17(2). The Stabex requirement is different for the least developed ACP States listed in article 48 of Lomé. Id. The product had to represent 2.5% of a least developed ACP States' total earnings from exports in order for it to qualify to apply for a fund transfer. Id.
\end{enumerate}
7.5% below the reference level established by Stabex.\footnote{Id. art. 19(2). The reference level was the average of an ACP State’s export earnings for a product for the prior four years. Id. art. 19(1). Least developed ACP States had to experience a 2.5% fall in actual earnings for the product below the reference level in order to qualify for a fund transfer. Id. art. 19(2).} Lomé I also contained two features that the ACP States perceived as obstacles to their development goals.\footnote{See Note, supra note 11, at 461; see infra text accompanying notes 157-59.} These features, the rules of origin\footnote{Id., supra note 4, Protocol I, art. 1.} and the safeguard clause,\footnote{Id., Protocol 1, art. 1(a)-(b). Originating products also included those that did not originate in an ACP State, but which had undergone sufficient working or processing, as defined in article 3 of Protocol 1 in an ACP State. Id. art. 3.} were objectionable to the ACP States because they discouraged investment by third countries in ACP States.\footnote{For the purposes of this Note, a third country investor is an investor who is not from an ACP or a Member State of the EEC. Id. art. 10; see infra notes 160-63 and accompanying text.} 

The rules of origin defined which products would be designated as originating in an ACP State for the purpose of granting preferential tariff access to the EEC.\footnote{Id. art. 10; see infra notes 160-63 and accompanying text.} Originating products were those whose value was added entirely in one or more ACP States or in the Community.\footnote{See McQueen, supra note 123.} According to the rules, a third country investor\footnote{Id., supra note 4, Protocol 1, art. 1.} in an ACP State that imported non-EEC or non-ACP intermediary materials for finishing in an ACP State did not receive tariff preferences when it shipped its goods to the EEC.\footnote{EEC exporters from ACP countries are exempt from the rules of origin. See id.} Thus, under the rules of origin, the investor from a third country was at a competitive disadvantage with EEC investors in an ACP State.\footnote{See Yelpaala, supra note 28, at 850-51.} 

The safeguard clause discouraged third country investment in ACP States.\footnote{See Lomé I, supra note 4, at 850-51.} In essence, the EEC reserved the right to take measures to safeguard the economy of the Community or of a Member State, or to safeguard a sector of the economy of the Community or of a Member State, from serious disturbances\footnote{Lomé I, supra note 4, Protocol 1; see infra notes 155-59 and accompanying text.} caused by Lomé I’s trade provisions.\footnote{Id., arts. 1-15.
did not elaborate on what would constitute a serious disturbance. This ambiguity made it difficult to determine when the Community would invoke the clause to limit ACP exports to the Community. The safeguard clause discouraged investment in ACP enterprises, because investors had to raise funds for capital expansion from sales to developed countries.\textsuperscript{163}

While Stabex helped to protect the ACP States’ economies from fluctuations in export earnings from commodities, the ACP States exports to the EEC dropped below their pre-Lomé I level.\textsuperscript{164} This development was attributed in part by the ACP States to the institution of the EEC’s Generalized System of Preferences\textsuperscript{165} (GSP) in 1971, which lessened the tariff advantage of ACP States\textsuperscript{166} over other less developed countries.\textsuperscript{167}

D. Lomé II

The second Lomé Convention (Lomé II) took effect on March 1, 1980.\textsuperscript{168} The ACP and the EEC were both disappointed with the terms of the Convention.\textsuperscript{169} Each of these

163. See Yelpaala, supra note 28, at 851. ACP States’ economies center around their exports. See Note, supra note 11, at 465.

164. See J. Moss, supra note 32, at 35. Before Lomé I, 45.6% of the ACP’s exports went to the Community. See id. During Lomé I, only 38.4% of the ACP’s exports went to the EEC. See id. ACP exports of manufacturers increased by only 30%, not the 106% claimed by the EEC. See id. at 55. The reason for the discrepancy is the Community’s classification of natural uranium and its composites as manufactured products. See id. Sixty percent of these ACP exports to the EEC came from only five or six ACP States. See K. Focke, supra note 146, at 12. Thirty-two of the ACP States contributed under one percent of the ACP’s exports to the Community. See id. at 13.

165. The Generalized System of Preferences (GSP) extends preferential customs treatment to a limited number of agricultural products from less developed countries (LDCs). Their manufactures and semi-manufactures are not subject to the EEC’s Common External Tariff. See E. Frey-Wouters, supra note 59, at 178.

166. See Rewriting Lomé, Economist, Sept. 23-29, 1978, at 93. Ninety-nine and two-tenths percent of the ACP’s exports to the Community enter free of duty. See id.

167. See J. Moss, supra note 32, at 53; Shaw, supra note 8, at 146. A comparison of the tariff advantages granted to the ACP States with those granted under the GSP reveals that out of the twenty-five most important ACP exports only seven enjoyed a lower tariff than EEC imports from other LDCs. One must also note that the GSP tariff for four of the seven exports in question was below the Common External Tariff. See J. Moss, supra note 32, at 53.

168. See C. Cosgrove Twitchett, supra note 86, at 100-02.

169. The results of the ACP-EEC trade cooperation were disappointing under Lomé I and Lomé II. See K. Focke, supra note 146, at 11-14 (results of Lomé I trade cooperation). The aid package fell per capita 20% in real terms between Lomé I and Lomé II. See Lomé Convention: The community plays Scrooge, Economist, Oct. 15-21, 1983, at 66. Desmond Cartey, President of the ACP Council of Ministers called
parties had had to make major concessions in order to reach an agreement.\textsuperscript{170}

1. The ACP's Negotiating Demands

The ACP States entered the Lomé II negotiations demanding modification of the rules of origin,\textsuperscript{171} clarification of the safeguard clause,\textsuperscript{172} and an insurance program for mineral export earnings.\textsuperscript{173} The ACP wanted changes in the rules of origin and the safeguard clause, because of the negative impact that they had had on investment in ACP States.\textsuperscript{174} Creating an insurance program for mineral earnings was also a priority for the ACP, because these earnings were subject to fluctuations that disturbed its members' economies.\textsuperscript{175}

2. The EEC's Demands

The EEC entered the negotiations for Lomé II intending to preserve Lomé I, including the rules of origin and the safeguard clause, and proposing the addition of provisions protecting human rights and procuring investment protection.\textsuperscript{176} The EEC Member States disagreed on the form of the invest-

\textsuperscript{170} See C. Cosgrove Twitchett, supra note 86, at 95-96.
\textsuperscript{171} See J. Ravenhill, supra note 11, at 170.
\textsuperscript{172} See id. at 181.
\textsuperscript{173} C. Cosgrove Twitchett, supra note 86, at 112.
\textsuperscript{174} See text accompanying notes 151-63.
\textsuperscript{175} See Lomé II, supra note 5, art. 49.
\textsuperscript{176} See C. Cosgrove Twitchett, supra note 86, at 100. The Member States had expressed their concern for the international protection of human rights. See id. at 98-99. They hoped that Lomé II would include a provision enabling the EEC to suspend aid when an ACP State was guilty of gross and persistent human rights violations. See Simmonds, The Lomé Convention: Implementation and Renegotiation, 16 Common Mkt. L. Rev. 425, 446-47 (1979). The ACP States took the position that such a provision would infringe upon their internal political autonomy. See id. at 447. For a discussion of the EEC's human rights policy, see Young-Anawaty, Human Rights and the ACP-EEC Lomé II Convention: Business as Usual at the EEC, 13 N.Y.U. J. Int'l L. & Pol. 63 (1980).
ment protection provisions. The smaller Member States wanted Lomé II’s investment provisions to call for the establishment of a multilateral protection agreement on the Community level. Great Britain, France, and the Federal Republic of Germany, which had earlier concluded satisfactory bilateral investment protection agreements with ACP States, were against a multilateral accord, because it would require them to sacrifice their trade interests for those of the entire

177. See J. Ravenhill, supra note 11, at 269.
178. See id. In the early 1970s, the EEC had focused on a Community insurance system that would complement national investment insurance plans. 1973-1974 EUR. PARL. Doc. (No. 208) 34 (1973). However, the emphasis shifted to measures primarily on the Community level by the end of the decade. See Commission Communication to the Council, Need To Encourage Investment In Developing Countries and Guidelines For Such Action, DOCUMENTS OF THE COMMISSION OF THE EUROPEAN COMMUNITIES COM (78) 23 final, at 4-5 (30 Jan. 1978).
179. Germany and France had investment protection agreements with the following ACP States:

<table>
<thead>
<tr>
<th>Parties to Treaty</th>
<th>Date of Signature</th>
</tr>
</thead>
<tbody>
<tr>
<td>France</td>
<td></td>
</tr>
<tr>
<td>Liberia</td>
<td>March 23, 1979</td>
</tr>
<tr>
<td>Mauritius</td>
<td>Mar. 22, 1973</td>
</tr>
<tr>
<td>Sudan</td>
<td>July 31, 1978</td>
</tr>
<tr>
<td>Zaire</td>
<td>Oct. 5, 1972</td>
</tr>
<tr>
<td>Germany</td>
<td></td>
</tr>
<tr>
<td>Cameroon</td>
<td>June 29, 1962</td>
</tr>
<tr>
<td>Central African Republic</td>
<td>Aug. 23, 1965</td>
</tr>
<tr>
<td>Chad</td>
<td>Apr. 11, 1967</td>
</tr>
<tr>
<td>Congo</td>
<td>Sept. 13, 1965</td>
</tr>
<tr>
<td>Ethiopia</td>
<td>Apr. 21, 1964</td>
</tr>
<tr>
<td>Gabon</td>
<td>May 16, 1965</td>
</tr>
<tr>
<td>Ghana</td>
<td>May 19, 1967</td>
</tr>
<tr>
<td>Guinea</td>
<td>Apr. 19, 1962</td>
</tr>
<tr>
<td>Ivory Coast</td>
<td>Oct. 27, 1966</td>
</tr>
<tr>
<td>Kenya</td>
<td>Dec. 4, 1964</td>
</tr>
<tr>
<td>Liberia</td>
<td>Dec. 12, 1961</td>
</tr>
<tr>
<td>Malagasy</td>
<td>Sept. 21, 1962</td>
</tr>
<tr>
<td>Mauritius</td>
<td>May 25, 1971</td>
</tr>
<tr>
<td>Rwanda</td>
<td>May 18, 1967</td>
</tr>
<tr>
<td>Senegal</td>
<td>Jan. 24, 1964</td>
</tr>
<tr>
<td>Sierra Leone</td>
<td>Apr. 8, 1965</td>
</tr>
<tr>
<td>Somalia</td>
<td>Nov. 27, 1981</td>
</tr>
<tr>
<td>Sudan</td>
<td>Feb. 7, 1963</td>
</tr>
<tr>
<td>Tanzania</td>
<td>Jan. 30, 1965</td>
</tr>
<tr>
<td>Uganda</td>
<td>Nov. 29, 1966</td>
</tr>
<tr>
<td>Zaire</td>
<td>Mar. 18, 1969</td>
</tr>
<tr>
<td>Zambia</td>
<td>Dec. 10, 1966</td>
</tr>
</tbody>
</table>

See ICSID, INVESTMENT PROMOTION AND PROTECTION TREATIES, Binder 2, indices, at 3-4 (compilation 1983).
Community. After a difficult period of talks, the EEC achieved a unified position. To pacify the smaller Member States, the Community proposal required that each ACP State guarantee each Member State, in its investment protection agreements, the same terms granted to the most favored Member State. The proposal would have applied to both old and new agreements.

3. The Lomé II Negotiations

During the negotiations for Lomé II, the ACP lacked the bargaining strength it had during the negotiations for Lomé I. In the late 1970s, several important dialogues between developed and developing countries took place without success. The ACP was unable to win EEC concessions to most of its major demands. Over the course of the Lomé II negotiations, the EEC reminded the ACP States of the benefits that they had already received from their relationship with the Community. The Community's willingness to give in to the

180. See J. Ravenhill, supra note 11, at 270.
181. See id.
182. See id. The phrase "most favored Member State" refers to the Member State that had won the most favorable concession from an ACP State in its prior investment protection agreements. See id. The proposal would operate like a "most favored nation" clause which allows either of the two contracting parties to enjoy greater privileges accorded by the other to another nation. See P. Jessup, supra note 17, at 35.
184. See J. Moss, supra note 32, at 135. The oil crisis during the Lomé I negotiations, see supra note 127, had reminded the EEC of its acute dependence on the ACP countries for minerals. See J. Moss, supra note 32, at 135. By the time of the Lomé II negotiations, the EEC had become less concerned about the security of its supply of minerals, thus it was less inclined to accommodate ACP demands. See id.
185. Kirkpatrick, Lomé II, 14 J. World Trade L. 352 (1980); Joekes & Kirkpatrick, The Results of UNCTAD V, 13 J. World Trade L. 535 (1979). For example, the United Nations Conference on Trade and Development (UNCTAD V) ended in June, 1979, without the conference reaching an accord in areas of concern to third world countries. See Joekes & Kirkpatrick, supra at 547. The topics at UNCTAD V included interdependence, monetary issues, debt problems, commodities and protectionism. See id. at 535-46. The Tokyo Round of multilateral trade negotiations became deadlocked over the issue of measures against protectionism. See Kirkpatrick, supra, at 352.
186. See Kirkpatrick, supra note 185, at 352. ACP negotiators... were constantly reminded of the unique position in which they were as beneficiaries of the EEC." Ambassador Rainford, Chairman of the ACP Committee of Ambassadors dur-
ACP's demand for an insurance plan for mineral earnings, by creating the program popularly known as Sysmin, was primarily the result of the EEC's mineral dependence, rather than the ACP's bargaining power. The EEC succeeded in achieving its major negotiating objectives. Lomé II contained both the main features of Lomé I and investment protection provisions. Each of Lomé II's partners had an interest in drafting effective investment protection provisions. The EEC wanted to encourage its investors to develop ACP mineral exports. The ACP States, like many other developing countries, had begun to realize in the 1960s that private investment was essential for the development of their mineral wealth.

The Lomé II negotiations, Lomé II: "An improvement", but it is hoped that the spirit of partnership will be "rekindled." COURIER, (spec. ed.) Nov. 1979, at 24, 25.

187. Lomé II, supra note 5, art. 49 (defines the Sysmin program). This was a very limited gain because the Community's negotiators handed its proposals to their ACP counterparts on a take-it-or-leave-it basis, shortly before the deadline for the end of the negotiations. See Martin, ACP-EEC Cooperation in Mining, Energy and Investment, COURIER, May-June 1982, at 25. ACP States that derive 15% or more of their export earnings from minerals covered in article 150 of the Lomé II Convention, Lomé II, supra note 5, art. 53, may receive aid when they have had or can anticipate a drop of 10% or more in their exports or production capacity. Id. art. 52. This aid, in the form of special financing, must be reimbursed on the same terms and conditions as a special loan. Id. art. 56. Special loans have a maturity period of 40 years and bear interest at the rate of 1% per annum. Id. art. 102.

188. See J. Moss, supra note 32, at 107-10. EEC investment in the ACP mining sector had not been keeping up with the projected future mineral needs of Europe. See id. at 107. Sysmin helped remedy the effects of declining investment in the ACP mining sector by providing aid to maintain ACP mineral export capacity. Lomé II, supra note 5, art. 49.

189. See supra text accompanying note 176. However, the Community did not persuade the ACP to include a human rights clause in Lomé II. See C. COSGROVE TWITCHETT, supra note 86, at 96.

190. Lomé II, supra note 5, arts. 60-64.


192. See J. Moss, supra note 32, at 110; see supra note 188 (discussion of the declining level of EEC investment in the ACP mining sector).

193. See E.I. NWOGUGU, supra note 191, at 93.
ereignty. However, the ACP viewed the EEC's proposed investment provisions as doing just that, insofar as they would have allowed the EEC Member States to obtain new rights under their bilateral investment agreements. The ACP would have preferred that the EEC Member States enter new negotiations to acquire these rights.


As a result of the ACP States' failure to accept the EEC's proposal, and the compromises the parties made in agreeing on a provision, Lomé II contains ambiguous articles on investment protection and promotion. Article 64 states that the joint declaration governed the treatment of investors. In this joint declaration, the ACP recognized that, as of the date of Lomé II's ratification, investments of EEC Member States would not be subject to discriminatory treatment. Therefore, investment protection agreements entered into before the Convention would not be covered by the "right" of non-discriminatory treatment. During the negotiations, the ACP States insisted that the

194. See J. Moss, supra note 32, at 115.
195. See supra text accompanying notes 181-82.
196. See J. Ravenhill, supra note 11, at 270-71.
197. See id. at 271.
198. See id.
199. See id.
200. The joint declaration is annexed to Lomé II. See Lomé II, supra note 5, annex 9.
201. See id. art. 64.
202. See id. annex 9(3)-(4). The joint declaration did not contain a clear definition of discriminatory treatment. Member States' agreements entered into after Lomé II's ratification would serve as reference agreements. Id. (2)(a)-(b). Such reference agreements would provide a contingent standard of investment protection. See Z. Kronjol, Protection of Foreign Investment 45 (1972). The level of protection given by article 64 is dependent upon the rights accorded to individual Member States in their agreements with the ACP States. Lomé II, supra note 5, annex 9(2)(a)-(b).
203. Id. annex 9(1). As a result of the joint declaration's prospective effect, the Member States that entered into agreements with ACP States before Lomé II's ratification were able to operate under more favorable terms than were Member States that never had agreements with ACP States before Lomé II's ratification. See J. Ravenhill, supra note 11, at 272. Articles 60-64 and the joint declaration did not improve investment protection agreements. They merely made such agreements available to more Member States. See id.
word "right" be changed to "principle." 204 The ACP states were concerned that potential investors would think that there were substantial risks in investing in an ACP State, if the ACP had to grant the EEC investment protection provisions. 205 After Lomé II was signed, the co-presidents of the ACP-EEC Council of Ministers exchanged letters on the interpretation of the joint declaration that reduced the protection it offered to EEC investors. 206 The co-presidents said that the "right" to non-discriminatory treatment depended on the conclusion of bilateral agreements and that the word "right," as used in the statement in the joint declaration, was the equivalent of the word "principle." 207

Commentators considered the results of Lomé II to be more disappointing than those of Lomé I. 208 Lomé II failed to meet requests for fund transfers under the Stabex program, 209 which had been regarded as one successful feature of Lomé I. 210 Lomé II's joint declaration on investment protection did little to create a stable investment environment. 211 The Community's recognition of this continuing instability in the area of investments was revealed by the EEC's efforts to incorporate more effective private investment protection provisions into Lomé III. 212

204. See Voss, supra note 191, at 365.
205. See J. Ravenhill, supra note 11, at 271.
206. See id. at 272.
207. See Voss, supra note 191, at 365. The author claims that the change in the language downgraded the amount of protection offered by the joint declaration. See id. at 364-65.
208. See supra note 169.
209. See supra note 169.
210. See Kibola, supra note 169, at 38.
211. See Comment, supra note 34, at 386.
212. The European Parliament prepared a report on the proposed content of the third Lomé Convention that contained particular recommendations for promoting private investment in ACP States. The Parliament suggested:

1. setting up and putting into force proper arrangements for protection of investments, repatriation of profits and payments of trading debts (but avoiding the Community itself becoming a guarantor).
2. better linking onto national development plans of the effects on imports and exports of investment from abroad.
3. the creation, by appropriate political and economic measures by national governments, of a climate in which indigenous and foreign investment will take place and flourish.
4. particular assistance might be given to the better provision of risk capital by local banking systems.
II. THE INVESTMENT PROVISIONS OF LOMÉ III

While Lomé III retains the Stabex\textsuperscript{213} and the Sysmin\textsuperscript{214} programs, financial and technical cooperation,\textsuperscript{215} and the ACP States’ preferential access to the EEC,\textsuperscript{216} it differs from Lomé I and Lomé II,\textsuperscript{217} insofar as the parties were able to agree on more detailed private investment protection and promotion provisions.\textsuperscript{218} The final provisions, set forth in articles 240 to 247, are the product of a great compromise between the ACP and the Community.\textsuperscript{219} As a result, these articles are not self-executing.\textsuperscript{220} Most of the investment provisions call for action based upon studies that the ACP and the EEC will conduct some time after Lomé III’s ratification.\textsuperscript{221} At the present time, articles 240 to 247 are an integrated set of promises to review the problems that discourage private investment in ACP countries and to study investment protection and promotion plans with a view to future action.\textsuperscript{222}

A. The Negotiations for Lomé III

The negotiations for Lomé III began in October of 1983, when the EEC’s existence was threatened by the world recession and internal disputes over the Community’s finances.\textsuperscript{223}

\begin{footnotesize}
\begin{itemize}
\item 1983-1984 EUR. PARL. DOC. (No. 605) 97 (1983).
\item 213. Lomé III, supra note 5, arts. 147-74.
\item 214. Id. arts. 176-84.
\item 215. Id. arts. 185-239.
\item 216. Id. arts. 129-30.
\item 217. The new Convention contains innovative titles on social and cultural cooperation. Id. arts. 114-28. These provisions cover the enhancement of human resources and the promotion of the cultural identities of the ACP peoples. Id.
\item 218. Id. arts. 240-47.
\item 219. See infra notes 256-37 and accompanying text. The division of responsibilities between the Member States and the Community precluded Lomé III from containing detailed investment insurance provisions. Lomé III ANALYSIS, supra note 84, at 50.
\item 220. See Lomé III, supra note 5, art. 240 (article implementing the investment title).
\item 221. See id. art. 247(3).
\item 222. See id. arts. 240-47.
\item 223. See Lewis, Common Market Chiefs in Crucial Parley Today, N.Y. Times, Dec. 4, 1983, at 3, col. 1. In December, 1983, political analysts agreed that the EEC had to formulate a solution to the Community’s financial problems. See id. Great Britain, France and the Federal Republic of Germany wanted the Community to reduce its subsidies to farmers under its agricultural policy. See id. Great Britain said that it should not have to contribute more to the EEC than it received in return. See N.Y. Times, Dec. 6, 1983, at D22, col. 4. See generally Europe’s Economy in Crisis (R.
Both the EEC's instability and the partners' dissatisfaction with the results of Lomé II affected the negotiations. The reasons for the parties' dissatisfaction with Lomé II varied, as did their proposed remedies.

The ACP leaders criticized Lomé II, because the Convention failed to halt the decline in the level of ACP exports to the EEC. The ACP States also complained that the financial aid that they had received under the Stabex program during Lomé II was unsatisfactory. The fund was unable to satisfy a large percentage of requests for fund transfers, and the ACP leadership hinted that there would be no Lomé III.

The EEC Commission recognized that renegotiating the Lomé Conventions every five years unnecessarily called into question the stability of the ACP-EEC relationship. The Commission said that a permanent convention would provide a lasting framework for relations and development cooperation between the EEC and the ACP. However, the ACP and

Dahrendorf ed. 1982) (discussion of Europe's economic crisis from the perspective of each Member State).

224. See Lomé Convention: The community plays Scrooge, Economist, Oct. 15-19, 1983, at 66. The ACP States were particularly disappointed that most of the cooperative efforts of the ACP and the EEC were plagued by a lack of funds. See ACP/EEC Negotiations: Shearer and Cheysson Open Ministerial Conference, Asking For “Quantitative Leap”, Europe Agency Internationale D’Information Pour La Presse (No. 3786) (n.s.) 5 (Feb. 10, 1984).


227. See Kibola, supra note 169, at 47.

228. See id. at 38-41. In 1981 the Stabex program was able to meet only 24% of the requests for transfers. Stabex, Financing Decisions for 1981, Courier, Nov.-Dec. 1982, at I. The program's resources were at ECU 112 million but, requests for transfers totaled ECU 453 million. See id.

229. See ACP President hints at possibility of no Lomé III, European Report (No. 904) § V, at 3 (Nov. 10, 1982). Desmond Cartey of Trinidad and Tobago, President of the ACP Council of Ministers, stated, in a November 3, 1982, speech to the ACP-EEC Consultative Assembly, that many ACP States had been hesitant to sign a second Lomé Convention. See id. He used language suggesting that the ACP States were considering not negotiating a third Lomé Convention. See id.


231. Id. at 20-21.
the EEC decided Lomé III would have a five-year term.232

The negotiations for Lomé III began at the first Ministerial Conference at Luxembourg on October 6, 1983.233 Despite their different views on the problems plaguing the Lomé Conventions, both the EEC and the ACP agreed that increasing capital to the ACP States would further their mutual aim of promoting ACP development.234 Both parties wanted to negotiate concrete investment provisions.235 Intra-Community conflict236 and the ACP's demand that the EEC guarantee ACP access to European capital markets, as a condition for accepting an investment provision,237 hampered the negotiations.

The EEC's lack of foreign affairs powers under the Treaty of Rome limited the Community in negotiating an investment protection code for Lomé III.238 Article 113 of the Treaty of

232. Lomé III, supra note 5, art. 291. Lomé III has a five-year term. Id.
236. See supra note 212. The European Parliament was opposed to any plan that would require the Community to act as a guarantor. 1983-1984 EUR. PARL. DOC. (No. 605) 97 (1983).
237. ACP-EEC: Implementation of Negotiation Structure For Renewal of Lomé Convention, EUROPE AGENCE INTERNATIONAL D'INFORMATION POUR LA PRESSE (No. 3705) 9 (Oct. 8, 1983). The President of the Committee of ACP Ambassadors said that the two should go hand-in-hand, while speaking at a joint meeting of the ACP and the EEC Council. Id.
238. See Treaty of Rome, supra note 3, art. 113(2). The Treaty of Rome only grants the Community the power to conclude trade agreements based upon a common commercial policy. See Voss, supra note 191, at 376. The Member States cannot exercise concurrent power with regard to the EEC's common commercial policy. Opinion of the Court Given Pursuant to Article 228 of the EEC Treaty of 11 November 1975, 1975 E. COMM. CT. J. REP. 1355, 1364. [1976 Transfer Binder] COMMON Mkt. REP.
Rome permits the Community to establish a common commercial policy. However, under article 113, the Community must defer to the Member States' bilateral investment protection policies, because such policies are foreign affairs matters and beyond the scope of the Community's common commercial policy. Despite these limitations and differences, the Lomé partners were able to reach a compromise on private investment provisions.


The purpose of the investment title, as set forth in article 240, is the promotion of investment for the development goals of the EEC and the ACP. The EEC and the ACP will implement measures to encourage "private economic operators" who complement their development priorities and objectives to participate in their development efforts. To accomplish this end, the ACP and the EEC pledged to create a stable investment environment, promote effective cooperation among their respective investors and treat these investors eq-

(CCH) ¶ 8365, at 7643. There has been some dispute over what is encompassed in the common commercial policy, because it is the outcome of a progressive development based upon specific measures which may refer without distinction to 'autonomous' and external aspects of that policy and which do not necessarily presuppose, the existence of a large body of rules, but combine gradually to form that body. Id. at 1363.


240. Id. art. 113(1). Foreign investment policy does not come within the scope of the common commercial policy. See Voss, supra note 191, at 376. The EEC Council has issued a decision based on article 113 calling for the gradual standardization of Member States' trade accords with third countries. Council Decision No. 69/494 of Dec. 16, 1969, 12 O.J. EUR. COMM. (No. L326), reprinted in O.J. EUR. COMM. Special Edition (Dec. 1972), 2 COMMON MKT. REP. (CCH) ¶ 3837. This decision does not affect the Member States' capacity to conclude bilateral investment protection agreements, because the EEC's trade policy is not coextensive with Member States' foreign investment policies. See Voss, supra note 191, at 377.

241. See LOMÉ ANALYSIS, supra note 84, at 49; see A Race To the Finish—"Final" EEC/ACP Negotiating Conference?, EUROPEAN REPORT, (No. 1073) 6 (Oct. 6, 1984) (bi-weekly newsletter published by the European Information Service).

242. Lomé III, supra note 5, art. 240.

243. The ACP and the EEC will conduct studies to identify the measures necessary to promote private investment in ACP States. Id. arts. 240-47. For the text of articles 240-47, see supra note 16.

244. "Economic operators" are ACP or EEC investors. Id. art. 240(a)-(b).

245. Id. art. 240(a).
suitably once the Convention has been ratified. \footnote{Id. art. 240(b)-(d).}

Articles 241 and 242 call for the ACP and the EEC to study methods of increasing the stable flow of private capital and methods for providing financing as means of encouraging private investment. \footnote{Id. arts. 241-42.} Specifically, the EEC and the ACP plan to study ways to enhance joint financing of investments with the EEC's private sector, ways to establish credit lines to finance the importation of intermediate materials needed for ACP export industries, and ways to create national or regional institutions to finance exports. \footnote{Id. art. 242(1)(a). Intermediate materials are semi-finished products. See McQueen, \textit{supra} note 123, at 127. ACP States do not have the manufacturing capacities needed to provide each other with intermediate products for finishing. See \textit{id}. They must therefore look to the Community and third countries for these products. See \textit{id}.}

The EEC conceded to the ACP on the issue of ACP access to EEC capital markets, \footnote{Lomé III, \textit{supra} note 5, art. 242(2)(a).} and studies are planned to determine how interested ACP States may gain access to international financial markets. \footnote{Id. art. 237 and accompanying text (discussion of ACP's States' demand for access to EEC capital markets).}

In article 243(1), the ACP and the EEC reiterate the need to promote investment in their respective territories. \footnote{Id. art. 243(1).} That article calls for both bilateral and multilateral investment protection agreements. \footnote{Bilateral investment protection agreements are agreements between a capital exporting country and a capital importing country. Z. KRONFOL, \textit{supra} note 202, at 30.} \footnote{Multilateral investment protection agreements are agreements between more than two capital exporting and capital importing countries. See \textit{id}.} Agreements may take a multilateral form only when there are specific projects to which the Community and a European enterprise have contributed financing. \footnote{Id. art. 243(2).}

Article 244 of Lomé III authorizes the ACP and the EEC
to undertake a study of the scope of and appropriate mechanisms for a joint investment insurance program. However, the joint study of such a system was limited by the stipulation that such a system complement existing national systems.

In article 245, the ACP and the EEC announce their commitment to increase the flow of information on investment opportunities in ACP States and to conduct studies on ways to achieve a net increase in the flow of capital to the ACP. The ACP and the EEC will organize investment promotion meetings to establish contacts between financial and development finance institutions, and investors and agencies handling investment guarantee systems. The Community and the ACP pledged to study the possibility that co-financing and joint ventures would result in a net increase in funds, and to take suggestions on increasing the number of such arrangements. They also promised to conduct a study to identify measures for making the least developed ACP countries more attractive for investment.

Article 247, the implementing provision of the investment title, requires both the ACP and the EEC to produce regular reports for the ACP Council of Ministers on the flow of investment, lending, payment arrears and capital movement between the EEC and the ACP States. Discussions on protection and promotion are to be held, when necessary, in either the appropriate ACP-EEC forum or between the ACP State concerned and the Community. All of the studies listed in articles 240 to 247 are required to commence within one year.

258. Id. art. 244(1). This protection system would provide insurance coverage for host country expropriation of a substantial portion of a foreign enterprise's property, for loss due to war, revolution, or insurrection or for inconvertibility of local currency. See International and Comparative Law Center, Negotiating and Drafting International Commercial Contracts 149-50 (1966).
259. Lomé III, supra note 5, art. 244(1).
260. Id. art. 245(a)-(b).
261. Id. art. 245(a).
262. Id. art. 245(d).
263. Id. art. 245(b).
264. The least-developed ACP States are listed in article 257 of Lomé III. Id. art. 257. The Convention does not state what constitutes a least-developed state. Id.
265. Id. art. 246(2).
266. See supra note 4 (discussion of the ACP Council of Ministers).
267. Lomé III, supra note 5, art. 247(1).
268. Id. art. 247(2).
of the ratification of the Convention.\(^{269}\)

III. **INCREASING INVESTMENT IN ACP STATES: AN ANALYSIS OF ARTICLES 243 AND 244**

A. The Obstacles to Investment in ACP States

The biggest obstacle to private investment in ACP States is investors' fear of government expropriation of their investments without adequate compensation.\(^{270}\) Articles 243 and 244 do not deal with this obstacle, because they do not contain detailed provisions on a multilateral investment protection agreement or on an ACP-EEC insurance program, the two most effective means of promoting investor confidence.\(^{271}\)

1. Overt and Covert Government Expropriation

Businessmen prefer to invest in developing countries with a commercial foundation\(^{272}\) upon which they may build their enterprises. Such a foundation may consist of an industrial network, a credit system, political stability, and experienced workers and management.\(^{273}\) Although a deficiency in any of these areas may discourage investment, the possibility of government expropriation is the single most important factor in the investment decision.\(^{274}\)

Government expropriation of foreign-owned enterprises

\(^{269}\) Id. art. 247(3).


\(^{271}\) See id. at 66; Voss, *supra* note 191, at 369. Drafting a multilateral treaty or investment code is difficult primarily because of the compromises required in order for all the parties to agree on a final draft. Most of the efforts to draft multilateral investment protection agreements have been ineffective or meaningless because of the reservations attached by some of the signatories or because they contained vague terms. For a critique of these multilateral investment protection agreements, see Z. KRONFOL, *supra* note 202, at 30-35.


\(^{273}\) See id. at 386. Private investment is not a panacea for all that ails underdeveloped countries. They must overcome other problems such as their lack of institutions, skills, and wealth. Address by Dieter Frisch to the Committee on Developing Countries, *THE LOMÉ CONVENTION: PRACTICAL ASPECTS PAST EXPERIENCE AND FUTURE PROSPECTS* (30 Nov. 1984), *reprinted in* DIRECTORATE GENERAL FOR INFORMATION DEVELOPMENT, *COMMISSION OF THE EUROPEAN COMMUNITIES, EUROPE INFORMATION DEVELOPMENT* (X/57/1985 Mar. 1985), at 14-15; *Group of Seven Ready to Ensure Greater Role of Private Sector in Lomé, EUROPEAN REPORT* (No. 1115) § V, at 6-7 (Mar. 16, 1985) (bi-weekly newsletter published by the European Information Service).

\(^{274}\) See E.I. NWOGUGU, *supra* note 191, at 21-24; Comment, *supra* note 34, at
in developing countries may be either overt\textsuperscript{275} or covert\textsuperscript{276}. Overt expropriation occurs when a government nationalizes an enterprise.\textsuperscript{277} United Nations resolutions and declarations on sovereignty have catalyzed expropriation.\textsuperscript{278} The failure of many ACP States to follow the Hull Doctrine\textsuperscript{279}, which requires an expropriating government to pay adequate compensation for that which it has taken, has discouraged many companies from expending money for major projects in developing countries without some guarantee against expropriation.\textsuperscript{280}

Private investors are more discouraged by covert expropriation.\textsuperscript{275-280} See generally Burton & Inoue, Expropriations of Foreign-Owned Firms in Developing Countries: A Cross-National Analysis, 18 J. World Trade L. 396 (1984).

\textsuperscript{275} See E.I. Nwoagu, supra note 191, at 22-23 (the author uses the term "disguised expropriation" to refer to covert expropriation).

\textsuperscript{276} See id.; Voss, The Protection and Promotion of Foreign Direct Investment In Developing Countries: Interests, Interdependencies, Intricacies, 31 Int'l & Comp. L.Q. 686, 703 (1982).

\textsuperscript{277} See E.I. Nwoagu, supra note 191, at 22-23.


\textsuperscript{279} Letter of Secretary of State Hull to Mexican Ambassador Castillo Najera, reprinted in 5 United States Department of State, Foreign Relations of the United States Diplomatic Papers: 1938 685, 687 (1956). Secretary of State Hull formulated this doctrine in his correspondence during the summer of 1938 with the Mexican Ambassador while addressing the issue of the expropriation of United States owned lands in Mexico. See id. at 685. He stated that the doctrine of equitable-treatment was well established and that "precedents and recognized authorities on international law . . . recognize that no government is entitled to expropriate private property, . . . without provision for prompt, adequate, and effective payment therefor." See id. at 687.

The United States has continued to assert that there is an international standard for the protection of the individual and the administration of justice. See P. Jessup, supra note 17, at 101. Latin American and other developing countries have countered this argument by insisting that aliens should be treated by the standard applied to the nationals of the country in which they are doing business. See id. United Nations General Assembly Resolution 3281, supra note 278, states that a nation expropriating an alien's property should provide appropriate compensation and that the expropriating nation's law should apply in a controversy over the amount of compensation. G.A. Res. 3281, supra note 278, art. 2(c).

priation, because, by its very nature, it is more difficult to prove when making a claim under an investment protection agreement.\textsuperscript{281} Governments commit covert expropriation by limiting repatriation rights,\textsuperscript{282} charging prohibitive taxes, forcing sales of majority interests in enterprises to locals, and enacting labor laws that restrict the number of foreigners.\textsuperscript{283} Investment protection agreements and investment insurance specifically tailored to deal with the varieties of covert expropriation are needed in order to increase private investor confidence in the ACP States.\textsuperscript{284}

\section*{2. A Comparison of Bilateral and Multilateral Investment Protection Agreements}

Lomé III's success in increasing the flow of capital to ACP States in the form of direct investment depends on whether its proposed investment protection agreements and insurance plan will effectively promote investor confidence in ACP States.\textsuperscript{285} Lomé III provides for bilateral and multilateral investment protection agreements and for the study of a joint

\begin{itemize}
  \item \textsuperscript{281} See Voss, supra note 276, at 703. A poll by the German Federal Minister of Economics Office showed that 500 German enterprises considered hidden expropriations as a more significant disincentive to investment than nationalization. See id.
  \item \textsuperscript{282} Some of the ACP States are discussed in a Price Waterhouse publication on investment regulation that lists specific government regulations that amount to covert expropriation. For example, the Ivory Coast’s Financing Office requires a month to approve repatriation rights. Price Waterhouse Investment Regulation Around the World 137 (1983) [hereinafter cited as P.W. Guide]. Liberia’s National Bank has additional charges on the outward transfer of funds. Id. at 162.
  \item \textsuperscript{283} See E.I. Nwogugu, supra note 191, at 11-21; Voss, supra note 276, at 702. For example, Papua New Guinea requires investors in major resource projects to offer the government the option of acquiring a stipulated percentage of the enterprise's equity. See P.W. Guide, supra note 282, at 230. Both Kenya and Jamaica regulate foreign ownership in some fields and require licenses for operations. See id. at 141-43, 149-53.
  \item Some ACP States limit the employment of non-residents. All recruitment in the Ivory Coast has to be authorized by the OMOCI (employment office) which will authorize an employer to recruit directly only after it finds no available local candidate for the job. See id. at 138. Fiji allows employers to hire foreigners but requires them to train a native to replace the non-resident wherever possible. See id. at 80. Barbados will issue a work permit to a foreigner only when competent nationals are not available. See id. at 18.
  \item \textsuperscript{284} See Voss, supra note 276, at 705.
  \item \textsuperscript{285} See id. The author states that the investor confidence gap would be narrowed if states established precise standards for investment protection and insurance. See id.
ACP-EEC investment guarantee program. The history of the protection of investment in developing countries shows that bilateral investment protection agreements have proved more effective for providing investors with compensation for their expropriated property. Lomé’s investment provisions will promote investor confidence if the parties concentrate their efforts on bilateral investment agreements and formulate an ACP and EEC insurance plan that allows the ACP to share responsibility for attracting investment.

Article 243 proposes the conclusion of both bilateral and multilateral private investment protection agreements. Capital-exporting countries have found that bilateral agreements provide investor security more effectively than multilateral agreements, because specific terms can be negotiated between two parties more easily than when several parties negotiate. Article 243(2) proposes that the ACP conclude multilateral agreements with the Community and a Member State for specific projects. These multilateral agreements cannot be as effective as the bilateral accords discussed in article 243(1), because their terms would have to be broadly formulated to consider the interests of each Member State and each ACP State. These broader terms would be necessarily

286. Lomé III, supra note 5, arts. 243, 244.
288. Cf. id. at 35-37.
289. See Lomé III, supra note 5, art. 243(1)-(2).
290. See Z. Kronfol, supra note 202, at 30-36. The EEC would have to compromise more in the negotiations than a Member State because the ACP is more sensitive with regard to its members’ sovereignty when dealing with the Community. See Voss, supra note 191, at 382.
291. Lomé III, supra note 5, art. 243(2).
292. Id. art. 243(1).
293. See Voss, supra note 191, at 382-83. The larger Member States have different investment protection interests than the smaller Member States, because the larger Member States have greater bargaining power when negotiating bilateral accords with the ACP States than do the smaller Member States. See J. Ravenhill, supra note 11, at 269-70. Member States will not be willing to strain the relationships that they have established with the ACP States by means of their bilateral agreements in order to carry out another Member State’s entrepreneur’s enterprise. See Voss, supra note 191, at 383.

The ACP is a collection of countries with diverse economic interests. See Chasle, Unity and Cohesion of the ACP Group, Courier, Sept.-Oct. 1985, at 62. For this reason, the Lomé Conventions have specific protocols that accommodate individual ACP States’ interests. See id. at 63.
vague and more difficult to enforce.\textsuperscript{294}

Lomé III's partners have not discussed an ACP-EEC investment insurance program. Among the issues raised by such a plan is the source of its capital.\textsuperscript{295} Because the Member States maintain their own national investment insurance plans,\textsuperscript{296} most would probably be reluctant to divert funds away from their programs to a Community program that would not benefit their trade relations with the ACP States.

B. \textit{The Negative Effect of the Rules of Origin and the Safeguard Clause}

Private investment in ACP States will remain sluggish even if Lomé III's private investment protection and promotion provisions prove successful in improving investor confidence by reducing the risk of expropriation.\textsuperscript{297} This is partly because the rules of origin and the safeguard clause discourage non-EEC operators from engaging in export enterprises in the ACP States.\textsuperscript{298}

1. The Rules of Origin

Because the rules of origin make non-EEC investors' exports to the Community less competitive than those of EEC operators, non-EEC operators will invest in other developing countries before they will make efforts to establish themselves in ACP States.\textsuperscript{299} Developing countries that are not part of the

\textsuperscript{294} See Voss, supra note 191, at 382.

\textsuperscript{295} See Z. Kronfol, supra note 202, at 82-83. Most multilateral investment protection plans have been funded from premiums and capital contributions from participating nations. See id.

\textsuperscript{296} See OECD, \textit{International Investment and Multinational Enterprises, National Treatment For Foreign-Controlled Enterprises} 2 (1985) [hereinafter cited as OECD \textit{National Treatment}]; Voss, supra note 276, at 705 n.71. Almost all OECD (Organisation for Economic Co-operation and Development) countries, which includes all Member States of the EEC, have their own investment insurance schemes. OECD \textit{National Treatment}, supra. Generally, national investment insurance programs are based on a contract between a government agency and an investor. See Z. Kronfol, supra note 202, at 37. The investor pays a premium. See id. Some insurance programs will extend coverage only to investors in countries that have signed investment protection agreements. See id.

\textsuperscript{297} See supra text accompanying notes 271-73 (discussion of the factors that play a role in the investor's choice of a particular country for investment).

\textsuperscript{298} See supra text accompanying notes 152-63.

\textsuperscript{299} See J. Moss, supra note 32, at 31.
ACP now have the same preferential tariff access to the EEC, but unlike the ACP, they need not comply with the rules of origin.\textsuperscript{300} Because of these advantages, non-EEC operators are more likely to invest in those countries rather than in the ACP States.

The rules of origin compromise the effectiveness of article 242(1)(a), which provides for exploring credit lines to finance the importation of intermediate materials needed for ACP export industries.\textsuperscript{301} The rules of origin put pressure on the ACP States to import their intermediate materials from the EEC in order to preserve preferential access for their exports to the Community.\textsuperscript{302} The rules thus discourage ACP States from looking for the least expensive supplier of intermediate materials and make ACP exports more expensive than products from other developing countries.\textsuperscript{303} The rules of origin must be modified to limit them to their intended role of preventing trade deflection.\textsuperscript{304} They must not become a device that discourages non-Community investment in ACP States.\textsuperscript{305}

2. The Safeguard Clause

The safeguard clause, like the rules of origin, discourages non-EEC investor activity in ACP States.\textsuperscript{306} The clause is a threat to EEC and non-EEC investors, because it enables the Community or a Member State to block ACP exports to the EEC when the Community or that Member State suffers a serious disturbance in a sector of its economy or in its external financial stability.\textsuperscript{307} The clause as it is now worded would be triggered by competition from ACP exports with goods pro-

\textsuperscript{300} The ACP States said that the 1986 Generalised System of Preferences granted other developing countries' exports to the EEC the same treatment accorded ACP exports to the Community. \textit{See Ambassadors Committee Touches On a Series of Problems, European Report} (No. 1179) § V, at 6-7 (Nov. 27, 1985) (bi-weekly newsletter published by the European Information Service).

\textsuperscript{301} \textit{See infra} text accompanying notes 302-03; Lomé III, \textit{supra} note 5, art. 242(1)(a).

\textsuperscript{302} \textit{See J. Ravenhill, supra} note 11, at 166-67.

\textsuperscript{303} \textit{See id.} at 167, 175.

\textsuperscript{304} \textit{See id.; see supra} note 123 (discussion of the operation of the rules of origin).

\textsuperscript{305} \textit{See J. Ravenhill, supra} note 11, at 171.

\textsuperscript{306} \textit{See Yelpaala, supra} note 28, at 850, 878-79.

\textsuperscript{307} Lomé III, \textit{supra} note 5, art. 139(1).
duced by weaker Community industries.\textsuperscript{308} Thus, an increased flow of ACP exports stimulated by increased investment would bring the clause into effect.\textsuperscript{309}

The Community’s promises not to use the safeguard clause as a protectionist measure, and to use safeguard measures only to the extent necessary to remedy economic difficulties,\textsuperscript{310} do not offer EEC and non-EEC investors objective criteria for judging when the EEC will invoke the clause. Curiously, the Community pledged only not to invoke the clause when it does not need to invoke the clause. The classification of measures as either protectionist, or as vital to the stability of an economic sector, is entirely subjective. A more objective standard for invoking the safeguard clause is necessary in order to assure EEC and non-EEC operators that their products will have access to the EEC.\textsuperscript{311}

IV. \textit{RECOMMENDATIONS FOR IMPLEMENTING ARTICLES 243 AND 244}

Articles 240 to 247 are not self-executing investment provisions. Rather, the articles are a series of promises to study methods for approaching the problems that discourage private

\textsuperscript{308} See McQueen, \textit{supra} note 123, at 120 n.6. The clause has not been invoked by the Community. However, the EEC has threatened to use the clause and as a result restricted the flow of ACP cotton textiles to the Community. See \textit{id}.

\textsuperscript{309} The safeguard clause may be invoked when Lomé III’s trade provisions cause a serious disturbance in a sector of the economy of the Community or of one or more of the Member States. Lomé III, \textit{supra} note 5, art. 139(1). Western Europe experienced an economic slowdown and serious structural unemployment in the 1970’s. See Vaitos, \textit{supra} note 8, at 178-79. ACP exports of manufactured goods would be viewed as a threat to the EEC’s recovering manufacturing sector. See \textit{id.} at 181, 185-86. EEC Member States’ governments will be under pressure from political parties, businesses, management and unions to invoke the clause in order to preserve jobs in traditional manufacturing industries. See \textit{TRANSCONTINENTAL CORPORATIONS}, \textit{supra} note 249, at 98-99. The EEC has spoken out against protectionism, stating that protectionism is not in the best interest of the world economy. See \textit{COMMISSION OF THE EUROPEAN COMMUNITIES DIRECTORATE GENERAL FOR INFORMATION, THE EEC AND INDUSTRIAL COOPERATION WITH DEVELOPING COUNTRIES}, 35 (COM X/116/84 Aug. 1984). The United Nations General Assembly has also moved to stop protectionist measures of developed countries by calling for an international program dealing with the problems of protectionism that would allow the world economy to undergo structural adjustment. \textit{United Nations Conference on Trade and Development, Report of the Trade and Development Board, U.N. GAOR Supp. (No. 15) at 44, U.N. Doc. A/39/15 (1984)}.

\textsuperscript{310} Lomé III, \textit{supra} note 5, art. 139(1)(2).

\textsuperscript{311} See \textit{Note, supra} note 11, at 478-79.
investment in the ACP States. However, these articles provide a framework for greater cooperation between the EEC and the ACP in the field of investment protection and promotion. The responsibility for the ultimate success of articles 243 and 244 rests with the EEC and the ACP, who must agree on appropriate action based upon the results of the planned studies. The following are recommendations for the implementation of articles 243 and 244.

The bilateral investment protection agreements proposed in subdivision one of article 243 will be more effective in promoting investment in ACP States than the multilateral agreements proposed in article 243(2). Bilateral agreements, by their nature, allow the negotiation of precise terms that are easier to enforce. Accordingly, the Community should drop its pursuit of multilateral investment protection agreements for special projects, and instead establish uniform minimum standards for all Member States' investment agreements by harmonizing the terms of its Member States' investment protection agreements.

The implementation of a joint ACP and EEC investment insurance program requires the resolution of questions concerning the form of its coverage and the source of its capital. The limitation in article 244 seems to answer these questions. Article 244 stipulates that an ACP and EEC insurance program must complement the Member States' insurance programs. This limitation would restrict ACP and EEC insurance to a form of secondary coverage for the portion of the risk not compensated for by Member States' insurance programs.

The future ACP and EEC joint insurance program needs a capital fund. All the participants in the investment process should contribute to this fund. Accordingly, investors should

---

312. See supra note 16.
313. See supra note 25 (discussion of the present state of the studies).
314. See supra text accompanying notes 292-94. For a list of some Member States' bilateral investment protection agreements, see supra note 179.
315. Precise terms will make the investor's legal rights clear; thus, the terms will bind the capital importing host country. See Voss, supra note 191, at 382.
316. The Community has discussed pursuing such a course of action. See Council Decision No. 69/494, supra note 240 (decision on the progressive standardization of agreements concerning commercial relations between Member States and third countries); see Voss, supra note 191, at 392.
317. Lomé III, supra note 5.
pay premiums based on the type of coverage required for their enterprise.

Two factors must be considered when calculating the Member States' contributions to the fund. First, each Member State has its own investment insurance plan, and the joint insurance will be limited to the portion of risk not covered by the Member States' insurance plans. The Member States' contributions should reflect the amount of this uncovered risk. Second, the contribution of each Member State should also reflect the volume of its trade with the ACP States.

The ACP States must participate in the capital formation for the ACP and EEC joint insurance plan in order for the plan to be effective. ACP participation would make the drive to attract investment to ACP States a partnership effort.

The ACP States' contributions should be based on the same factors used to compute each Member States' contribution to the fund. However, the ACP States' contribution should be a small percentage of the EEC's contribution, because of the parties' disparate levels of economic development. In addition, each ACP State should be required to pay an annual premium based on its past performance under investment protection agreements. Because an expropriating ACP State would have to replenish the capital fund, it would be deterred from expropriating foreign investments at the expense of the other contributors to the insurance fund.

CONCLUSION

Lomé III does not perpetuate the interdependence that was a principal feature of the historical trade relationship between the EEC and the ACP. Instead, articles 240 through 247 provide a framework in which Lomé's partners may formulate investment protection and promotion measures that will enable the ACP States to attract private capital in order to achieve their development goals. The articles will have an impact on the level of private investment if three conditions

318. Id.; see supra note 296 (discussion of the Member States' investment insurance programs).
319. See supra text accompanying note 317 (discussion of the limitation on the ACP and EEC insurance program).
320. See supra notes 9-10 and accompanying text.
are met. First, the parties must fulfill their obligations to complete the studies required by the Convention. Second, the ACP and the EEC must agree on concrete measures based on those studies. Finally, the rules of origin and the safeguard clause must be modified to allow the investment protection and promotion measures to increase investment in the ACP States.

Theresa I. Yard