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Promises, Promises: A Critical Analysis of Lome III's Private Investment Provisions

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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-

1. Address by Georges Spenale, President of the ACP-EEC Consultative Assembly, before the First Meeting of the Consultative Assembly of the Lomé Convention (EEC-ACP), June 1-3, 1976 *European Parliament Information Series* 10 (spec. ed. 1976).

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.

3. The European Economic Community (EEC or Community) is one of three legally definable, treaty-based Communities in Western Europe. See D. LASOK & J.W. BRIDGE, AN INTRODUCTION TO THE LAW AND INSTITUTIONS OF THE EUROPEAN COMMUNITIES 15-25 (1982). The other two Communities are the European Coal and Steel Community [hereinafter cited as ECSC] and the European Atomic Energy Community [hereinafter cited as Euratom]. B. HAWK, 1 UNITED STATES, COMMON MARKET AND INTERNATIONAL ANTI-TRUST: A COMPARATIVE GUIDE 411 (2d ed. 1986). The ECSC was created in 1951. Treaty Instituting the European Coal and Steel Community, April 18, 1951, 1973 Gr. Brit. T.S. No. (Cmd. 5189), 261 U.N.T.S. 140. The EEC and Euratom were created by treaties signed by France, the Federal Republic of Germany, Italy, Belgium, the Netherlands and Luxembourg at Rome in 1957. Treaty establishing the European Economic Community, Mar. 25, 1957, 1973 Gr. Brit. T.S. No. 1 (Cmd. 5179-II) (official English translation), 298 U.N.T.S. 3 [hereinafter cited as the Treaty of Rome]; Treaty establishing the European Atomic Energy Community, Mar. 25, 1957, 1973 Gr. Brit. T.S. No. 1 (Cmd. 5179-II), 298 U.N.T.S. 167.

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-

cific States⁴ (ACP or ACP States) signed the third Lomé Con-

II); see *Sweet & Maxwell's European Community Treaties* 231 (K.R. Simmonds 4th ed. 1980). See generally Rooks, *The Principal Institutions of the European Common Market*, 4 A.B.A. SECT. OF INT'L & COMP. L. BULL. 8 (1959); Whitlow, *The European Economic Community: Some Aspects of Juridical Personality, Sovereignty and International Obligation*, 13 BUS. LAW. 813 (1957-58).

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.

Id.

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 designed 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.⁵ 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.⁶ The EEC and the ACP intend that their partnership under the Conventions serve as a model for relations between developing and developed countries.⁷

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.

See *COURIER*, Sept.-Oct. 1985, at i.

5. ACP-EEC Convention of Lomé (III), Dec. 8, 1984, ACP-EEC COUNCIL OF MINISTERS, *THE THIRD ACP-EEC CONVENTION SIGNED AT LOMÉ ON 8 DECEMBER AND RELATED DOCUMENTS* 11 (1985), 24 I.L.M. 588 (1985) [hereinafter referred to as Lomé III]. The parties reached agreement on a second Lomé Convention shortly before Lomé I's expiration. Second ACP-EEC Convention of Lomé, 5 *COLLECTION OF THE AGREEMENTS CONCLUDED BY THE EUROPEAN COMMUNITIES (Part II)* 17 (1981), 23 O.J. EUR. COMM. (No. L 347) 2 (1980), 19 I.L.M. 327 (1980) [hereinafter referred to as Lomé II].

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 the 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.⁸ These critics have said that the parties' trade exchange is a continuation of the European countries' exploitation of their former colonies, because Lomé perpetuates interdependence⁹ in at least two ways.¹⁰ First, because the EEC needs the ACP's raw materials,¹¹ it fosters good trade relations with the ACP by means of compensatory financing to minimize fluctuations in export earnings,¹² trade preferences,¹³ and development aid.¹⁴ Second, because the ACP lacks an advanced manufacturing sector, it serves as a market for EEC goods made from ACP raw

8. See, e.g., Vaitos, *From the Ugly American to the Ugly European: The Role of Western Europe in North-South Relations*, in *THE NEW INTERNATIONAL ECONOMY* 167, 187 (H. Makler, A. Martinelli, & N. Smelser ed. 1982); Martin, *Africa and the Ideology of Eurafrika: Neo-Colonialism or Pan-Africanism?*, 20 *J. MOD. AFRICAN STUD.* 221, 223-24 (1982); Rajana, *The Lomé Convention: An Evaluation of EEC Economic Assistance to the ACP States*, 20 *J. MOD. AFRICAN STUD.* 179, 219 (1982); Shaw, *EEC-ACP Interactions and Images as Redefinitions of Eurafrika: Exemplary, Exclusive and/or Exploitive?*, 18 *J. COMMON MKT. STUD.* 135, 151 (1979).

9. See, e.g., F. CARDOSO & E. FALETTO, *DEPENDENCY AND DEVELOPMENT IN LATIN AMERICA* vii, xiv (M. Urquidí trans. 1979) (classical statement of the dependency theory). In the late 1950s and 1960s, Latin American economists developed the theory of economic dependence that has influenced African economists to propose similar models for African and Asian development. *Id.*

10. See, e.g., Dolan, *The Lomé Convention and Europe's Relationship with the Third World: A Critical Analysis*, *JOURNAL OF EUROPEAN INTEGRATION* 369, 393 (1978). Commentators are divided on whether the Lomé Conventions foster dependence of the ACP on the EEC. See, e.g., Shaw, *supra* note 8, at 138. Some prefer to view the relationship between the EEC and the ACP as a part of a decolonization process. See, e.g., Zartman, *Europe and Africa: Decolonization or Dependency?*, 54 *FOREIGN AFFAIRS* 325, 340 (1976). Those critics of the Lomé Conventions who advocate the dependency theory say that EEC aid works against ACP development because it reinforces existing aid partner concentration and the international division of labor. See Rajana, *supra* note 8, at 216.

11. See EUROPE, AGENCE INTERNATIONALE D'INFORMATION POUR LA PRESSE DOCUMENTS (No. 985) 2 (Feb. 2, 1978); Note, *Toward Lomé III: Perfecting the European Community's African Partnership*, 16 *CASE W. RES. J. INT'L L.* 459, 465 (1984). The composition of EEC exports to the ACP in 1975 consisted primarily of chemical products (11.5%), manufactured goods (20.2%), machinery (47.8%), and other manufactures (6.2%). During the same period the EEC imported 95-100% of its uranium and 55-60% of its raw sugar, sisal, wood, aluminum ores/concentrates, and alumina from the ACP States. J. RAVENHILL, *COLLECTIVE CLIENTISM* 38-39 (1985). EEC dependence on ACP raw materials grew between 1975, when the ACP exported 82.77% of its most important commodities to the EEC, and 1982, when this figure was 83.95%. *Id.* at 207.

12. Simmonds, *The Second Lomé Convention: The Innovative Features*, 17 *COMMON MKT. L. REV.* 415, 419-23 (1980).

13. Lomé III, *supra* note 5, art. 130(1).

14. *Id.* art. 194(1)(a).

materials.¹⁵

This Note will analyze Lomé III's private investment protection and promotion provisions¹⁶ 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 investors 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 relationship¹⁷ that persisted under the prior Lomé

wherever appropriate, the creation or expansion of such mechanisms in ACP States, if necessary in collaboration with other appropriate agencies;

(e) provide assistance to small and medium-sized enterprises in ACP States in designing and obtaining equity and loan financing on optimal terms and conditions;

(f) explore ways and means of overcoming or reducing the host country risk for individual investment projects that are in themselves viable and could contribute to economic progress;

(g) help ACP States to:

(i) improve the quality of feasibility studies and the preparation of projects with appropriate economic and financial effects;

(ii) introduce integrated project management covering the entire project development cycle within the framework of the development programme of the State.

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." Căstănedă, *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.¹⁸ Part I of this Note will detail the historical relationship between the ACP States and the EEC countries, emphasizing the prior Lomé Conventions.¹⁹ Part II will give the background of Lomé III, and will review the Convention's private investment provisions.²⁰ Part III will analyze the effect of article 243,²¹ regarding investment protection agreements, and article 244,²² concerning investment insurance and guarantees, on the flow of private investment to ACP States.²³ 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.²⁴ 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.²⁵ Second, the rules of origin and the safeguard clause of the Lomé III Convention must be modified.²⁶

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

The present relationship between the EEC and the ACP

bility provides that the state shall be responsible for injuries to an alien's property when the state expropriates or destroys it. See P. JESSUP, *A MODERN LAW OF NATIONS* 104 (1952). The doctrine's historical growth is one aspect of Western colonialism and imperialism. *Id.* at 96.

18. See *infra* note 164 (discussion of the ACP's exports to the EEC during Lomé

I). Martin, *supra* note 8, at 223; Shaw, *supra* note 8, at 151.

19. See *infra* notes 27-212 and accompanying text.

20. See *infra* notes 213-69 and accompanying text.

21. Lomé III, *supra* note 5, art. 243.

22. *Id.* art. 244.

23. See *infra* notes 270-313 and accompanying text.

24. See *infra* notes 299-321 and accompanying text.

25. The Joint Working Party on Investment, which is comprised of EEC and ACP representatives, has not met. This group could not begin any of its studies on investment guarantees until Lomé III is ratified. Lomé III, *supra* note 5, art. 247, see *supra* note 5 (discussion of the ratification procedure for Lomé III). Experts expect the Joint Working Party to spend two years on the report. *EEC-ACP: New Investment Guarantee Scheme May Not See Light of Day Until Lomé IV*, EUROPEAN REPORT (No. 1174 § V), 2 (Nov. 9, 1985) (bi-weekly newsletter published by the European Information Service). Any agreement based on the report will take another year to ratify. *Id.* Negotiations for the successor ACP-EEC Convention would already have begun. This means that any concrete measures would have to be incorporated in Lomé IV. *Id.*

26. See *infra* notes 123 and 160 and accompanying text (discussion of the negative impact of the rules of origin and the safeguard clause).

evolved from the colonial empires developed by the European nations to secure access to needed raw materials.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.²⁸ Under the Treaty of Rome,²⁹ many European nations granted their former colonies "associate status" with the EEC.³⁰ The association continued through two formal agreements, the Yaounde Conventions,³¹ after most of the Associates had already gained independence.³² The Lomé Conventions changed the relationship between the EEC and the ACP from an association to a partnership.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.³⁴

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).

28. Yelapaala, *The Lomé Conventions and The Political Economy of The African-Caribbean-Pacific Countries: A Critical Analysis of The Trade Provisions*, 13 N.Y.U. J. INT'L L. & POL. 807, 812-13 (1981).

29. Treaty of Rome, *supra* note 3, arts. 131-36.

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.

31. Convention of Association Between The European Economic Community and the Associated African States, July 20, 1963, 7 J.O. COMM. EUR. 1431 (1964), *reprinted in* 2 I.L.M. 971 (1963) [hereinafter referred to as Yaoundé I]; Convention of Association Between the European Economic Community and the African and Madagascar States Associated With the Community, July 29, 1969, 13 O.J. EUR. COMM. (No. L282) 1 (1970), *reprinted in* O.J. EUR. COMM. SPECIAL EDITION SECOND SERIES 7 (Jan. 1974), *reprinted in* 9 I.L.M. 484 (1970) [hereinafter cited as Yaoundé II].

32. See J. MOSS, *THE LOMÉ CONVENTIONS AND THEIR IMPLICATIONS FOR THE UNITED STATES* 8 (1982).

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.

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.³⁵ In the former period, Portugal encouraged exploration along Africa's west coast in order to investigate whether Portuguese gold traders could bypass Moslem middlemen.³⁶ Portugal and other European countries began to exploit Africa during the sixteenth and seventeenth centuries.³⁷ Europeans established trading posts on the west coast to receive slaves, gold, and ivory brought by natives from the interior.³⁸

In the second half of the nineteenth century, political and economic pressures led the European countries to resume their colonial conquests.³⁹ The Industrial Revolution⁴⁰ caused manufacturers to seek new markets for their increased production capacities.⁴¹ Developing countries served the dual function of a market for manufactured goods and a source of raw materials for these manufacturers.⁴² To make this economic relationship possible, Europeans imposed their concepts of administration and finance on the African people through colonial government.⁴³

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.⁴⁴ The colonies served as a base for wielding military power.⁴⁵ 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.⁴⁶ 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.⁴⁷

The European zeal for colonial possessions waned in the twentieth century.⁴⁸ World War I undermined the political and economic basis of European imperialism.⁴⁹ At the end of World War I, the League of Nations⁵⁰ worked to establish the mandate system to administer the former colonies of Turkey and Germany.⁵¹ The mandate system did not end European colonialism.⁵² 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).

45. See D.K. FIELDHOUSE, *supra* note 44, at 65-66.

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 123-25.

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.⁵³ The breakdown of colonialism occurred more rapidly after World War II.⁵⁴ By the early 1960s, most of the former European colonies had gained their independence.⁵⁵

The founding of the EEC in 1957⁵⁶ brought another change in the African territories' relationship with Europe.⁵⁷ France had fought for the association⁵⁸ of its former colonies with the EEC during the negotiations for the Treaty.⁵⁹ France had argued that its efforts to aid the development of its colonies and territories unfairly burdened its national budget and industries.⁶⁰ France had already guaranteed prices to producers in its former colonies.⁶¹ Furthermore, French loans and grants totaling U.S.\$3.1 billion were given to French dependencies between 1956 and 1959.⁶²

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.⁶³ 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).

59. *See* E. FREY-WOUTERS, *THE EUROPEAN COMMUNITY AND THE THIRD WORLD: THE LOMÉ CONVENTION AND ITS IMPACT* 13 (1980). President Charles de Gaulle of France was accused of masquerading as a third world spokesman to mask his effort to preserve Europe's access to minerals. *See* Serfaty, *supra* note 57, at 18.

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 Associates⁶⁴ would reduce imports from other developing countries.⁶⁵ 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.⁶⁶

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.⁶⁷ The Treaty, and the Implementing Convention⁶⁸ set forth the features of the association.⁶⁹ Under the Convention, the EEC received duty-free access to the Associates' markets.⁷⁰ 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.⁷¹ The Member States established the European Development Fund (EDF) to complement the social and economic development efforts of the Associates' governments.⁷² The Community committed U.S. \$581.25 million for the five-year term of the Implementing Convention.⁷³

Many of the Associates gained their independence during the late 1950s and early 1960s.⁷⁴ Soon after the Treaty of

64. See *supra* note 30.

65. See E. FREY-WOUTERS, *supra* note 59, at 13.

66. See *id.* at 13-14.

67. See Treaty of Rome, *supra* note 3, arts. 131-36.

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 Gabon, 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.

Treaty of Rome, *supra* note 3, annex IV.

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 Yaounde 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

B. *The Yaoundé Conventions and Other Euro-African Relationships: 1962-1974*

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.

83. Yaoundé II, *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 preferences⁹⁰ continued under both Yaoundé Conventions.⁹¹ The Community increased its aid to the African Associates to 730 million European Currency Units (ECU) under Yaoundé I⁹² 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.

86. See C. COSGROVE TWITCHETT, A FRAMEWORK FOR DEVELOPMENT: THE EEC AND THE ACP 8 (1981); J. MOSS, *supra* note 32, at 6.

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.⁹⁴ 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.⁹⁵ The Associates' portion of the EEC's total imports had declined from 13.4% in 1958, to 7.4% in 1974.⁹⁶ Furthermore, the Associates had made their greatest gains in exports to markets that did not grant them trade preferences.⁹⁷ The failure of the Yaoundé Conventions to increase the Associates' exports to the Community caused the Commission of the European Community⁹⁸ to recommend that there be no Yaoundé III, and that the Community form a partnership with the Associates.⁹⁹

2. The Lagos Agreement¹⁰⁰ and the Arusha Accord¹⁰¹

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.¹⁰² Great Britain's application for membership in the

94. See J. Moss, *supra* note 32, at 16.

95. See *Partnership, Not Association*, *supra* note 33, at 22. These preferences helped the Associates only to maintain their share of the EEC market. See J. Moss, *supra* note 32, at 12.

96. See Note, *supra* note 11, at 471, quoting J. MATHEWS, ASSOCIATION SYSTEM OF THE EUROPEAN COMMUNITY 46 (1977).

97. See J. Moss, *supra* note 32, at 11.

98. See *supra* note 3.

99. See *Partnership, Not Association*, *supra* note 33, at 20. The Commission plays a vital role in deciding whether the EEC will conduct negotiations for a particular treaty. See E. FREY-WOUTERS, *supra* note 59, at 23. The Commission, when conducting negotiations for the EEC, presents the Council with reports containing Commission proposals based on the Commission's exploratory talks with the interested state. See *id.* The Council then authorizes the Commission to proceed with negotiations. See *id.*

100. Agreement Establishing an Association between the EEC and the Republic of Nigeria, July 16, 1966, *reprinted in* 5 I.L.M. 828 (1966) [hereinafter cited as Lagos Agreement].

101. Agreement establishing an Association between the European Economic Community and the United Republic of Tanzania, the Republic of Uganda and the Republic of Kenya, 13 O.J. EUR. COMM. (No. L 282) 54 (1970), *reprinted in* O.J. EUR. COMM. SPECIAL EDITION SECOND SERIES 94 (Jan. 1974) [hereinafter cited as Arusha Accord].

102. See, e.g., the Lagos Agreement, *supra* note 100 and the Arusha Accord, *supra* note 101. The Commonwealth countries of Africa were Ghana, Sierra Leone, and

EEC raised the issue of the treatment to be accorded to the Commonwealth countries by the Community.¹⁰³ In 1966, Nigeria and the EEC concluded the Lagos Agreement, which granted Nigeria associate status.¹⁰⁴ This agreement was never ratified because French-Nigerian relations deteriorated during the Nigerian Civil War.¹⁰⁵ In 1969, the Community and Kenya, Tanzania, and Uganda concluded the Arusha Accord, a trade and cooperation agreement.¹⁰⁶ However, the EEC failed to reach trade agreements with other Commonwealth countries in Africa.¹⁰⁷

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.¹⁰⁸ Second, the EEC wanted to establish a new form of relationship with the Associates¹⁰⁹ because of their dissatisfaction with the results of the Yaoundé Conventions.¹¹⁰ Third, the EEC's comprehensive

the territories of East and Central Africa. See I. JENNINGS, *THE BRITISH COMMONWEALTH OF NATIONS* 128 (4th rev. ed. 1961).

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. COLLIS, *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).

107. See Oumar Sy, *The Birth of the ACP Group*, *COURIER*, Sept.-Oct. 1985, at 52.

108. Treaty concerning the accession of Denmark, Ireland, and the United Kingdom of Britain and Northern Ireland to the European Economic Community and to the European Atomic Energy Community, Jan. 22, 1972, 1973 *Gr. Brit. T.S. No. 1* (Cmd. 5179-I), *O.J. EUR. COMM. SPECIAL EDITION* March 27, 1972, at 5 [hereinafter cited as *Treaty of Accession*]. The British Commonwealth Countries could become Associates with the EEC pursuant to Protocol 22 of the Treaty of Accession. See *infra* text accompanying notes 113-14.

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

110. See *Partnership, Not Association*, *supra* note 33, at 20.

development policy¹¹¹ led the Community to expand its relations with developing countries.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.¹¹³ The Community offered the Commonwealth countries three options.¹¹⁴ None of these forms of relationship with the Community proved satisfactory to the Commonwealth countries.¹¹⁵ The Commonwealth countries ignored the EEC's deadline for response, and instead, began talks with the AASM and the Arusha groups¹¹⁶ intending to create a unified bargaining position for talks between the African countries and the EEC.¹¹⁷ These groups met through the Organization of African Unity¹¹⁸ (OAU) and were able to formulate principles for a common relationship with the EEC.¹¹⁹

The Community moved to open negotiations for a new

111. LOMÉ III ANALYSIS, *supra* note 84, at 2.

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.

113. Treaty of Accession, *supra* note 108, Protocol No. 22.

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.

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.

118. Charter of the Organization of African Unity, May 25, 1963, 479 U.N.T.S. 39, 2 I.L.M. 766 (1963). The Organization of African Unity [hereinafter referred to as "OAU"] was founded in 1963 to promote African unity, defend African sovereignty, and to set an agenda for harmonizing international co-operation policies of African governments. *See id.* art. 2. *See generally* Gordenker, *The UN and Cooperation in Africa*, in *AFRICAN REGIONAL ORGANIZATIONS* 13, 17 (D. Mazzeo ed. 1984).

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.¹²⁰ These parties accepted the invitation to negotiate jointly.¹²¹ Throughout the talks, the African, Caribbean, and Pacific States maintained a unified bargaining posture.¹²² The ACP insisted that reciprocal trade preferences be omitted from the convention and that the rules of origin,¹²³ which determined the eligibility of ACP products for tariff preferences, be revised to facilitate ACP industrial development.¹²⁴ 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-

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- 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.

124. *See* J. Moss, *supra* note 32, at 17-18.

pal exports to the EEC.¹²⁵ The EEC was more open to the ACP's demands during these negotiations than during the Yaoundé negotiations, because Europe was experiencing a recession¹²⁶ and was facing the oil crisis of 1973,¹²⁷ which created uncertainty over its access to oil reserves.¹²⁸ Several ACP States had oil reserves or were under exploration by oil companies.¹²⁹ 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.¹³⁰

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

The signing of Lomé I¹³¹ by the EEC and the ACP States marked an important change in their relationship.¹³² The partnership between the EEC and the ACP began with a number of significant gains for the ACP States.¹³³ 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,¹³⁴ create the Centre for Industrial Development¹³⁵ (CID or Centre), and establish a commodity price stabilization plan.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.¹³⁷ The ACP also reminded the Community that the General Agreement on Tariffs and Trade¹³⁸ (GATT) had recognized that developing countries should not be required to grant reciprocal trade preferences to developed countries.¹³⁹ These arguments and the ACP States' strong bargaining position

134. See E. FREY-WOUTERS, *supra* note 59, at 19.

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 co-operation;
- (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.

Id.

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.

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.

138. The General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. 5, T.I.A.S. No. 1700, 55 U.N.T.S. 188 (1950). Its purpose was to reduce tariffs and other barriers to trade and to eliminate discriminatory treatment in commerce. *Id.* preamble.

139. Protocol Amending the General Agreement on Tariffs and Trade to Introduce a Part IV on Trade and Development, Feb. 8, 1965, 17 U.S.T. 1977, T.I.A.S. No. 6139, 572 U.N.T.S. 320 art. 36 (1965).

caused the EEC to agree to eliminate reciprocal trade preferences.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.¹⁴¹ The Centre gathers and disseminates, in the Community and the ACP States, information on opportunities for industrial cooperation.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.¹⁴³

The third achievement of Lomé I was a price stabilization plan, popularly known as Stabex,¹⁴⁴ for the ACP States' commodity exports¹⁴⁵ to the Community. One of the ACP States' major exports to the EEC is commodities¹⁴⁶ and the ACP had been adversely affected by the full force of world market price fluctuations.¹⁴⁷ The purpose of Stabex is to remedy the harmful effects of instability of export earnings on the ACP States' economies.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 earnings¹⁴⁹ and the price for the product falls

140. See *supra* notes 126-30 and accompanying text.

141. See Lomé I, *supra* note 4, art. 36.

142. *Id.* art. 36(a).

143. *Id.* art. 36(b)-(c).

144. *Id.* arts. 16-19.

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.*

146. See K. FOCKE, FROM LOMÉ I TOWARDS LOMÉ II 13 (1980). During the period between 1975 and 1978, 30.6% to 41.6% of the ACP's exports to the Community were foodstuffs. See *id.*

147. See J. RAVENHILL, *supra* note 11, at 72.

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).

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.*

7.5% below the reference level established by Stabex.¹⁵⁰

Lomé I also contained two features that the ACP States perceived as obstacles to their development goals.¹⁵¹ These features, the rules of origin¹⁵² and the safeguard clause,¹⁵³ were objectionable to the ACP States because they discouraged investment by third countries in ACP States.¹⁵⁴

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.¹⁵⁵ Originating products were those whose value was added entirely in one or more ACP States or in the Community.¹⁵⁶ According to the rules, a third country investor¹⁵⁷ 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.¹⁵⁸ Thus, under the rules of origin, the investor from a third country was at a competitive disadvantage with EEC investors in an ACP State.¹⁵⁹

The safeguard clause discouraged third country investment in ACP States.¹⁶⁰ 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 disturbances¹⁶¹ caused by Lomé I's trade provisions.¹⁶² The EEC

150. *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).

151. See Note, *supra* note 11, at 461; see *infra* text accompanying notes 157-59.

152. Lomé I, *supra* note 4, Protocol 1; see *infra* notes 155-59 and accompanying text.

153. *Id.* art. 10; see *infra* notes 160-63 and accompanying text.

154. See McQueen, *supra* note 123.

155. Lomé I, *supra* note 4, Protocol 1, art. 1.

156. *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.

157. 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.

158. Lomé I, *supra* note 4, Protocol 1, art. 1.

159. EEC exporters from ACP countries are exempt from the rules of origin. See *id.*

160. See Yelapaala, *supra* note 28, at 850-51.

161. Lomé I, *supra* note 4, art. 10.

162. See *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.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.¹⁶⁴ This development was attributed in part by the ACP States to the institution of the EEC's Generalized System of Preferences¹⁶⁵ (GSP) in 1971, which lessened the tariff advantage of ACP States¹⁶⁶ over other less developed countries.¹⁶⁷

D. Lomé II

The second Lomé Convention (Lomé II) took effect on March 1, 1980.¹⁶⁸ The ACP and the EEC were both disappointed with the terms of the Convention.¹⁶⁹ Each of these

163. See Yelapaala, *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.¹⁷⁰

1. The ACP's Negotiating Demands

The ACP States entered the Lomé II negotiations demanding modification of the rules of origin,¹⁷¹ clarification of the safeguard clause,¹⁷² and an insurance program for mineral export earnings.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.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.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.¹⁷⁶ The EEC Member States disagreed on the form of the invest-

Lomé II a "1975 Lomé model which was retreaded and put forward for dealing with the problems of the 80's [which] could not withstand the task." *See ACP President hints at possibility of no Lomé III*, EUROPEAN REPORT, No. 904, § V, at 3 (Nov. 10, 1982).

The ACP States were disappointed with the Stabex program under Lomé II. *See Kibola, Stabex and Lomé III*, 18 J. WORLD TRADE L. 32, 41 (1984). The ACP States made requests for ECU 453 million that met the Stabex requirements, but these were not satisfied because only ECU 112 million was available. *See id.* Overall, Lomé II's Stabex resources equaled only 24% of the requests submitted by the ACP States. *See id.*

170. *See* C. COSGROVE TWITCHETT, *supra* note 86, at 95-96.

171. *See* J. RAVENHILL, *supra* note 11, at 170.

172. *See id.* at 181.

173. C. COSGROVE TWITCHETT, *supra* note 86, at 112.

174. *See* text accompanying notes 151-63.

175. *See* Lomé II, *supra* note 5, art. 49.

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.¹⁷⁷ The smaller Member States wanted Lomé II's investment provisions to call for the establishment of a multilateral protection agreement on the Community level.¹⁷⁸ Great Britain, France, and the Federal Republic of Germany, which had earlier concluded satisfactory bilateral investment protection agreements with ACP States,¹⁷⁹ 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:

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

See ICSID, INVESTMENT PROMOTION AND PROTECTION TREATIES, Binder 2, indices, at 3-4 (compilation 1983).

Community.¹⁸⁰ After a difficult period of talks, the EEC achieved a unified position.¹⁸¹ 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.¹⁸² The proposal would have applied to both old and new agreements.¹⁸³

3. The Lomé II Negotiations

During the negotiations for Lomé II, the ACP lacked the bargaining strength it had had during the negotiations for Lomé I.¹⁸⁴ In the late 1970s, several important dialogues between developed and developing countries took place without success.¹⁸⁵ 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.¹⁸⁶ 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.

183. See J. RAVENHILL, *supra* note 11, at 271, quoting JOSE ALAIN FRALON, *THE NEW EEC-ACP CONVENTION: FROM LOMÉ I TO LOMÉ II* 208 (Brussels: Agence Europeenne d'Informations, 1979).

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 conferees 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,¹⁸⁷ was primarily the result of the EEC's mineral dependence, rather than the ACP's bargaining power.¹⁸⁸

The EEC succeeded in achieving its major negotiating objectives.¹⁸⁹ Lomé II contained both the main features of Lomé I and investment protection provisions.¹⁹⁰ Each of Lomé II's partners had an interest in drafting effective investment protection provisions.¹⁹¹ The EEC wanted to encourage its investors to develop ACP mineral exports.¹⁹² 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.¹⁹³ The ACP's members showed a willingness to encourage investment, as long as investment protection measures did not infringe upon their sov-

ing 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.

191. See E. I. NWOGUGU, *THE LEGAL PROBLEMS OF FOREIGN INVESTMENT IN DEVELOPING COUNTRIES* 33 (1965). The Lomé II negotiations nearly collapsed because of the Community's insistence on the acceptance of its proposal. See Voss, *The Protection and Promotion of European Private Investment in Developing Countries—An Approach Towards a Concept For a European Policy on Foreign Investment: A German Contribution*, 18 COMMON MKT. L. REV. 363, 381 (1981).

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 33.

ereignty.¹⁹⁴ However, the ACP viewed the EEC's proposed investment provisions as doing just that,¹⁹⁵ insofar as they would have allowed the EEC Member States to obtain new rights under their bilateral investment agreements.¹⁹⁶ The ACP would have preferred that the EEC Member States enter new negotiations to acquire these rights.¹⁹⁷

4. Lomé II: Ambiguous Investment Provisions

As a result of the ACP States' failure to accept the EEC's proposal,¹⁹⁸ and the compromises the parties made in agreeing on a provision,¹⁹⁹ Lomé II contains ambiguous articles on investment protection and promotion. Article 64 states that the joint declaration²⁰⁰ governed the treatment of investors.²⁰¹ 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.²⁰² Therefore, investment protection agreements entered into before the Convention would not be covered by the "right" of non-discriminatory treatment.²⁰³

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. KRONTOL, 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 Stabex²¹³ and the Sysmin²¹⁴ programs, financial and technical cooperation,²¹⁵ and the ACP States' preferential access to the EEC,²¹⁶ it differs from Lomé I and Lomé II,²¹⁷ insofar as the parties were able to agree on more detailed private investment protection and promotion provisions.²¹⁸ The final provisions, set forth in articles 240 to 247, are the product of a great compromise between the ACP and the Community.²¹⁹ As a result, these articles are not self-executing.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.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.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.²²³

1983-1984 EUR. PARL. DOC. (No. 605) 97 (1983).

213. Lomé III, *supra* note 5, arts. 147-74.

214. *Id.* arts. 176-84.

215. *Id.* arts. 185-239.

216. *Id.* arts. 129-30.

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.*

218. *Id.* arts. 240-47.

219. *See infra* notes 236-37 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.

220. *See* Lomé III, *supra* note 5, art. 240 (article implementing the investment title).

221. *See id.* art. 247(3).

222. *See id.* arts. 240-47.

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.²²⁴ The reasons for the parties' dissatisfaction with Lomé II varied, as did their proposed remedies.²²⁵

The ACP leaders criticized Lomé II, because the Convention failed to halt the decline in the level of ACP exports to the EEC.²²⁶ The ACP States also complained that the financial aid that they had received under the Stabex program during Lomé II was unsatisfactory.²²⁷ The fund was unable to satisfy a large percentage of requests for fund transfers,²²⁸ and the ACP leadership hinted that there would be no Lomé III.²²⁹

The EEC Commission recognized that renegotiating the Lomé Conventions every five years unnecessarily called into question the stability of the ACP-EEC relationship.²³⁰ The Commission said that a permanent convention would provide a lasting framework for relations and development cooperation between the EEC and the ACP.²³¹ 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).

225. See *ACP President hints at possibility of no Lomé III*, EUROPEAN REPORT (No. 904) § V, at 3 (Nov. 10, 1985); MEMORANDUM ON THE COMMUNITY'S DEVELOPMENT POLICY, BULL. EUR. COMM. 20 (Supp. 5/82 4 Oct. 1982).

226. O.J. EUR. COMM. (No. C 39) 10 (1983) (Statement by the EEC-ACP Consultative Assembly at its Nov. 3, 1982, meeting).

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 1. 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.*

230. MEMORANDUM ON THE COMMUNITY'S DEVELOPMENT POLICY, BULL. EUR. COMM., Oct. 4, 1982, at 20 (Supp. 5/82). The Commission said that renegotiation of the entire ACP-EEC relationship every five years was unnecessary because the EEC and the ACP would not fail to renew their relationship. *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 of 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.*

233. See *Structure of the ACP-EEC Negotiations*, COURIER, Jan.-Feb. 1985, at 26-27.

234. ACP-EEC Consultative Assembly, Luxembourg Sept. 19-21, 1984, Resolution taking into account the Eighth Annual Report of the ACP-EEC Council of Ministers on the state of implementation of the Lomé Convention and the prospects for the subsequent new Convention, 27 O.J. EUR. COMM. (No. C 282) 15 (1984). During the negotiations, both the ACP and the EEC recognized that Community aid could represent only a small percentage of the capital requirements of ACP States' development needs. See Namaliu, "In the end the dictates of mutual self-interest and interdependence which characterize ACP-EEC economic relations prevailed," COURIER, Jan.-Feb. 1985, at 4, 5. Private investment in ACP enterprises was found to be essential to the development of ACP States. See Thorn, "A sense of responsibility," COURIER, Jan.-Feb. 1985, at 9, 11. The ACP/EEC Consultative Assembly passed a resolution calling for measures related to the promotion of investment. 27 O.J. EUR. COMM. (No. C 282) 15 (1984).

235. Statement by Edgard Pisani, Commissioner for Development, to the ACP-EEC Consultative Assembly, September 20, 1984, reprinted in EUROPE AGENCE D'INFORMATION POUR LA PRESSE DOCUMENTS (No. 1323) 6-7 (Sept. 26, 1984).

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 INTERNATIONALE 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.²³⁹ 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.²⁴⁰ Despite these limitations and differences, the Lomé partners were able to reach a compromise on private investment provisions.²⁴¹

B. *The 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.²⁴² The EEC and the ACP will implement measures²⁴³ to encourage "private economic operators"²⁴⁴ who complement their development priorities and objectives to participate in their development efforts.²⁴⁵ 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.

239. Treaty of Rome, *supra* note 3, art. 113.

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.L 326), 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).

uitably once the Convention has been ratified.²⁴⁶

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.²⁴⁷ 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 materials²⁴⁸ needed for ACP export industries, and ways to create national or regional institutions²⁴⁹ to finance exports.²⁵⁰ The EEC conceded to the ACP on the issue of ACP access to EEC capital markets,²⁵¹ and studies are planned to determine how interested ACP States may gain access to international financial markets.²⁵²

In article 243(1), the ACP and the EEC reiterate the need to promote investment in their respective territories.²⁵³ That article calls for both bilateral²⁵⁴ and multilateral²⁵⁵ investment protection agreements:²⁵⁶ agreements may take a multilateral form only when there are specific projects to which the Community and a European enterprise have contributed financing.²⁵⁷

Article 244 of Lomé III authorizes the ACP and the EEC

246. *Id.* art. 240(b)-(d).

247. *Id.* arts. 241-42.

248. *Id.* art. 242(1)(a). Intermediate materials are semi-finished products. *See* McQueen, *supra* note 123, at 127. ACP States do not have the manufacturing capacities needed to provide each other with intermediate products for finishing. *See id.* They must therefore look to the Community and third countries for these products. *See id.*

249. Studies to establish such institutions may prove inconclusive, because most developing countries do not have large outflows of direct investment capital. *United Nations Centre on Transnational Corporations, Transnational Corporations in World Development Third Survey*, U.N. Doc. ST/CTC/46, 31 (1983) [hereinafter cited as *Transnational Corporations*].

250. Lomé III, *supra* note 5, art. 242(2)(a).

251. *See supra* note 237 and accompanying text (discussion of ACP's States' demand for access to EEC capital markets).

252. Lomé III, *supra* note 5, art. 241(1)(b).

253. *Id.* art. 243(1).

254. Bilateral investment protection agreements are agreements between a capital exporting country and a capital importing country. Z. KRONFOL, *supra* note 202, at 30.

255. Multilateral investment protection agreements are agreements between more than two capital exporting and capital importing countries. *See id.*

256. Lomé III, *supra* note 5, art. 243(1)-(2).

257. *Id.* art. 243(2).

to undertake a study of the scope of and appropriate mechanisms for a joint investment insurance program.²⁵⁸ However, the joint study of such a system was limited by the stipulation that such a system complement existing national systems.²⁵⁹

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.²⁶⁰ The ACP and the EEC will organize investment promotion meetings to establish contacts between financial and development finance institutions,²⁶¹ and investors and agencies handling investment guarantee systems.²⁶² 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.²⁶³ They also promised to conduct a study to identify measures for making the least developed ACP countries²⁶⁴ more attractive for investment.²⁶⁵

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 Ministers²⁶⁶ on the flow of investment, lending, payment arrears and capital movement between the EEC and the ACP States.²⁶⁷ 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.²⁶⁸ 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 foundation²⁷² 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).

270. See E.I. NWOGUGU, *supra* note 191, at 21-24.

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.

272. See C. GOYBET, *THE SECOND CONVENTION OF LOMÉ 4* (1982).

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 overt²⁷⁵ or covert.²⁷⁶ Overt expropriation occurs when a government nationalizes an enterprise.²⁷⁷ United Nations resolutions and declarations on sovereignty have catalyzed expropriation.²⁷⁸ The failure of many ACP States to follow the Hull Doctrine,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.²⁸⁰

Private investors are more discouraged by covert expro-

385-86. See generally Burton & Inoue, *Expropriations of Foreign-Owned Firms in Developing Countries: A Cross-National Analysis*, 18 J. WORLD TRADE L. 396 (1984).

275. See E.I. NWOGUGU, *supra* note 191, at 22-23 (the author uses the term "disguised expropriation" to refer to covert expropriation).

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).

277. See E.I. NWOGUGU, *supra* note 191, at 22-23.

278. See Voss, *supra* note 276, at 692. Expropriations by developing countries occurred more frequently after the United Nations General Assembly's formal recognition of the sovereign right to expropriate alien properties in a nondiscriminatory fashion. See *id.*; United Nations Resolution of Permanent Sovereignty Over Natural Resources, G.A. Res. 1803, 17 U.N. GAOR Supp. (No. 17) at 15, U.N. Doc. A/5217 (1962); Declaration on the Establishment of a New International Economic Order, G.A. Res. 3201, U.N. GAOR Supp. (6th Special Session) (No. 1) at 3, U.N. Doc. A/9559 (1974); Charter of the Economic Rights and Duties of States, G.A. Res. 3281, 29 U.N. GAOR Supp. (No. 31) at 50, U.N. Doc. A/9631 (1974) [hereinafter cited as G.A. Res. 3281].

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).

280. See W. BRANDT, NORTH-SOUTH: A PROGRAM FOR SURVIVAL 155-56 (1980) (Report of the Independent Commission on International Development Issues).

priation, because, by its very nature, it is more difficult to prove when making a claim under an investment protection agreement.²⁸¹ Governments commit covert expropriation by limiting repatriation rights,²⁸² charging prohibitive taxes, forcing sales of majority interests in enterprises to locals, and enacting labor laws that restrict the number of foreigners.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.²⁸⁴

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.²⁸⁵ Lomé III provides for bilateral and multilateral investment protection agreements and for the study of a joint

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.*

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.

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.

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.

284. See Voss, *supra* note 276, at 705.

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.²⁸⁶ 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.²⁸⁷ 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.²⁸⁸

Article 243 proposes the conclusion of both bilateral and multilateral private investment protection agreements.²⁸⁹ 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.²⁹⁰ Article 243(2) proposes that the ACP conclude multilateral agreements with the Community and a Member State for specific projects.²⁹¹ These multilateral agreements cannot be as effective as the bilateral accords discussed in article 243(1),²⁹² because their terms would have to be broadly formulated to consider the interests of each Member State and each ACP State.²⁹³ These broader terms would be necessarily

286. Lomé III, *supra* note 5, arts. 243, 244.

287. See Z. KRONFOL, *supra* note 202, at 30-36.

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.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 fund.²⁹⁵ Because the Member States maintain their own national investment insurance plans,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. *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.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.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.²⁹⁹ Developing countries that are not part of the

294. See Voss, *supra* note 191, at 382.

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.*

296. See OECD, INTERNATIONAL INVESTMENT AND MULTINATIONAL ENTERPRISES, NATIONAL TREATMENT FOR FOREIGN-CONTROLLED ENTERPRISES 2 (1985) [hereinafter cited as OECD 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 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.*

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).

298. See *supra* text accompanying notes 152-63.

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.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.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.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.³⁰³ The rules of origin must be modified to limit them to their intended role of preventing trade deflection.³⁰⁴ They must not become a device that discourages non-Community investment in ACP States.³⁰⁵

2. The Safeguard Clause

The safeguard clause, like the rules of origin, discourages non-EEC investor activity in ACP States.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.³⁰⁷ The clause as it is now worded would be triggered by competition from ACP exports with goods pro-

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. 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).

301. See *infra* text accompanying notes 302-03; Lomé III, *supra* note 5, art. 242(1)(a).

302. See J. RAVENHILL, *supra* note 11, at 166-67.

303. See *id.* at 167, 175.

304. See *id.*; see *supra* note 123 (discussion of the operation of the rules of origin).

305. See J. RAVENHILL, *supra* note 11, at 171.

306. See Yelapaala, *supra* note 28, at 850, 878-79.

307. Lomé III, *supra* note 5, art. 139(1).

duced by weaker Community industries.³⁰⁸ Thus, an increased flow of ACP exports stimulated by increased investment would bring the clause into effect.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,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.³¹¹

IV. *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

308. See McQueen, *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 *id.*

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, *supra* note 5, art. 139(1). Western Europe experienced an economic slowdown and serious structural unemployment in the 1970's. See Vaitos, *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 *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 TRANSNATIONAL CORPORATIONS, *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 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. *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).

310. Lomé III, *supra* note 5, art. 139(1)(2).

311. See Note, *supra* note 11, at 478-79.

investment in the ACP States.³¹² 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.³¹³ 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).³¹⁴ Bilateral agreements, by their nature, allow the negotiation of precise terms that are easier to enforce.³¹⁵ 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.³¹⁶

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.³¹⁷ 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,³¹⁸ and the joint insurance will be limited to the portion of risk not covered by the Member States' insurance plans.³¹⁹ 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.³²⁰ 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.³²¹ 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.

321. See *supra* text accompanying notes 312-13.

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.

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