

The WTO incompatibility
of the Lomé Convention
trade provisions

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Abbreviations

ACP	African, Caribbean and Pacific states
BFA	Framework Agreement on Bananas
CAP	Common Agricultural Policy (of the EU)
DSB	Dispute Settlement Body (of the WTO)
EEC	European Economic Community
EU	European Community
FTA	free trade area
GATT	General Agreement on Tariffs and Trade
GDP	gross domestic product
GSP	Generalised System of Preferences
MFN	most favoured nation
SEM	single European market
UK	United Kingdom
US	United States
WTO	World Trade Organisation

The WTO incompatibility of the Lomé trade provisions

This paper considers the issues involved in the Lomé Convention's trade preference system and what possible avenues are available to the European Union (EU) and the seventy-one African, Caribbean and Pacific (ACP) states in assuring the World Trade Organisation (WTO) compatibility of the post-Lomé trade arrangement.¹ The implicit assumption behind the analysis is that the EU still wishes to maintain the trade preference arrangements or the political and economic relations that currently exist between the ACP and the EU. There is ample evidence that the EU has greatly diminished political and economic interests in the continuation of this trade regime² which maintains the ACP states at the peak of its 'pyramid of EC trade privilege'.³ The 1991 European Commission Green Paper on the future of EU relations with the ACP countries has considered some of the options and these form the basis for this paper.⁴

The end of the cold war and the resulting eastern orientation of the EU combined with the fact that the ACP states have demonstrably failed to develop either as significant exporters or as markets for EU products is at the heart of the change in the EU position found in the Green Paper. The economic factors that have underpinned the relationship between the ACP states and the EU since Lomé I in 1975 have come to an end. The Lomé Convention was very much a product of the ideology of the 1960s and the perceived resource constraints of the 1970s. The essential economic justification for the Lomé Convention's trade provisions was to assure national sources of supply for European markets.⁵ From the European perspective there is no longer a perceived or potential commodity shortage that cannot be dealt with within the context of the global market. Thus the state-to-state economic relationship at the heart of the Lomé relationship is probably redundant and possibly incompatible with the economics of the global market.

While the apparent WTO incompatibility of the Lomé trade provisions⁶ causes enormous difficulties for ACP exporters and governments it is a *deus ex machina* for those wishing to find a convenient way to end the colonial system of trade preference that, from the EU perspective, had long ceased to serve a useful purpose. Rather, the WTO compatibility issue may be resolved through structures and institutions that are more generalised. This is fortuitously consistent with the aid objectives of some of the Nordic members of the EU as well as Germany and Holland⁷ who wish to see a more general and global system and not one based principally on ties with former British and French colonies. Thus the question of WTO incompatibility happens to be consistent with the desire of this northern group of EU states to downgrade the trade relationship to one based either on generality and hence covering all countries of a similar development status and/or one based on reciprocity which would be of direct benefit to EU exporters.

The EU–ACP trade relationship and the Pacific island states

In order to understand fully the shift in EU policy it is necessary to see it in the context of the decline in the significance of the ACP states as trading partners. The Pacific countries constitute approximately 0.1 per cent of total EU imports and while this has not declined as much as total ACP imports, Pacific ACPs are, at best, of only the most marginal relevance to the EU (Table 1). However, given the enormous and largely underutilised marine resources of the Pacific islands, this may not necessarily be the case in future—especially given the needs of a restructured, outward-looking European fishing fleet.

Table 1 Developing countries' share of EU imports (1976–94)

	1976	1980	1985	1990	1992	1994
ACP	6.7	7.2	6.7	4.7	3.7	2.8
Asia	4.2	5.9	6.5	11	13.6	13.1
Latin America	5.3	5.1	6.5	4.6	5.1	5.4
Mediterranean	6.1	6.1	8.1	6.5	6.2	6.1
All developing countries	44.8	42.4	34.7	31.2	29.2	34.2

Source: Eurostat.

The trade relationship with the EU has been crucial to the island states of the South Pacific, for Fiji the Sugar Protocol has been the lifeblood of the industry since 1975. Exports under the Protocol as well as under the Special Preferential Sugar arrangement have reached over 200,000 tonnes of sugar annually at what are slightly modified EU Common Sugar policy intervention prices. The industry in Fiji has adjusted to the terms of the Sugar Protocol. The terms of the Sugar Protocol are indefinite and contractual in nature and are quite different legally from the other agreements and Protocols of the Convention.

However, for the Pacific ACP states there are other areas where its trade interests in the EU are vital to the development of the region. The most significant case is that of canned tuna. In other ACP countries tuna constitutes a relatively insignificant export but in the island states of the South Pacific, where tuna is the only resource that the region has in relative abundance, this loss of trade preference could devastate an infant industry with every potential to develop a genuine commercial advantage.⁸ The difficulty is that for island ACP states this is a very important export but for the EU imports are insignificant. In large measure because of the trade preference provisions associated with the Lomé Convention and Stabex, the EU, since independence has, despite the vast distances involved in transporting low value exports, remained an unnaturally significant trading partner for the Pacific ACP states (Table 2). For microstates which are at the antipodes of Europe, the trade relationship remains strong even though there have been decreases in the relative importance of Europe since independence.

Table 2 EU exports as a percentage of total Pacific ACP exports (1990–94 average)

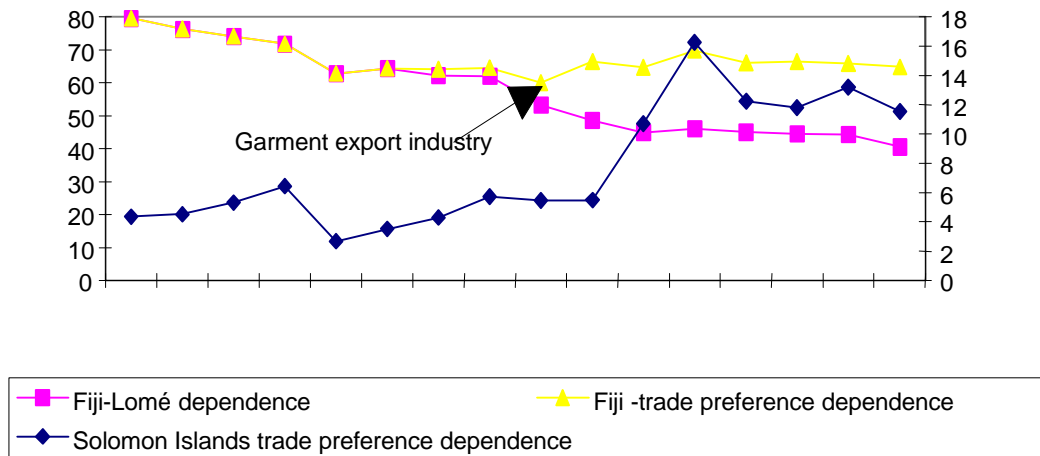
Papua New Guinea	16.4
Solomon Islands	20.5
Vanuatu	50.6
Fiji	25.6
Tonga	2.4
Western Samoa	16.4

Source: National Centre for Development Studies, South Pacific Economic and Social Database, Canberra.

The change in the degree of trade preference dependence over time for the two countries in the region, Fiji and Solomon Islands, that are the most trade-preference dependent is shown in Figure 1. In the case of Fiji, the trade preference dependence estimate is based on the share of total exports dependent upon trade preference and includes the entire value of sugar, garment⁹ and tuna exports. While this is not strictly the case, as some portion of the exports of all these sectors go to non-preferential markets, these non-

preferential exports are sufficiently small that without the trade preference they would also be adversely effected.¹⁰

Figure 1 Trade preference dependence ratios



Source: National Centre for Development Studies, South Pacific Economic and Social Database, Canberra.

Note: Trade preference is defined as the ratio of trade preference dependent exports as a percentage of total exports.

Thus, sugar and tuna constitute the two most important and vulnerable commodities exported to the EU from the Pacific ACP group. While there are exports that are larger in value such as copper from Papua New Guinea and tropical tree crop products, these are less vulnerable because they are no longer trade preference dependent exports and hence not subject to the vagaries of changes in trade policy. In the case of Fiji the degree of trade preference dependence has decreased slightly over time but Fiji is now dependent upon trade preferences under the Lomé Convention as well as under SPARTECA.¹¹ The problem, as we shall see, is that both agreements suffer from similar sorts of potential WTO incompatibilities.

The background to the WTO-Lomé disputes

Historically, the system of colonial trade preferences upon which the Yaoundé Convention¹² and subsequent Lomé Conventions are based contain trade provisions that predate the creation of the General Agreement on Tariffs and Trade (GATT) in 1947. However, whereas the colonial system of trade preference was based on reciprocity, this ended with the independence of the ACP states and the promulgation of the Lomé Convention. As a result of these antecedents the EU argued that the provisions of the GATT 1947 Protocol of Provisional Application, more commonly known, as the Lomé 'Grandfather Clause' rendered it immune from GATT scrutiny.¹³

These Lomé trade provisions include two specific trade instruments that potentially constitute Article I most favoured nation (MFN) violations in their application. The first is the trade preference arrangements in the form of tariff rates that differed not only from the MFN rates then available to GATT contracting parties but subsequently differed from the

generalised system of preferences (GSP) rates that were available to other non-ACP developing countries. The second, and at least at present more pressing, concern is the status of the Commodity Protocols of the Lomé Convention. These four protocols cover beef and veal, rum, bananas and sugar.¹⁴ From the perspective of the Pacific island countries only the Sugar Protocol in the case of Fiji and potentially the Beef and Veal Protocol in the case of Vanuatu¹⁵ are significant. However, the allocation of tariff quotas and import licences constitutes, at least potentially, a more troubling type of WTO incompatibility.

The EU banana market and the cause of the dispute

Production for the global banana market comes largely from three areas—the Caribbean, Central America and the Philippines. These three regions were responsible for 85 per cent of world exports. International trade, however, is dominated by the three large transnational companies: United Brands (formerly United Fruit Co), Castle and Cooke (formerly Standard Fruit) and Del Monte are responsible for almost 60 per cent of world trade (Read 1994:219–35)¹⁶.

The EU market for bananas is the world's largest and is divided into three sources of supply. The first is the ACP states under the terms of the Banana Protocol. The ACP states are granted access to the EU for some 875,000 tonnes of bananas. In 1992 the ACP states exported only 690,699 tonnes or 16.6 per cent of the total market of 4.48 million tonnes. The other important sources of supply were the colonies of the EU states and southern Europe. In 1992, 1.15 million tonnes of bananas were imported from 'dollar zone' countries of Central America.

Costs of bananas differ substantially between the areas. In 1992 the cost per tonne of ACP bananas was ECU 599 while the corresponding cost for dollar zone bananas was ECU 412 (Davenport et al. 199#:17). For the ACP countries of the Caribbean, the regime is crucial to their survival (Table 3).

Table 3 **ACP exports to the EU and the exporters' dependence**

ACP country	Eco '000	per cent of total exports
Cote d'Ivoire	91,570	6.0
St Lucia	76,308	91.2
Cameroon	67,224	6.3
Jamaica	46,654	16.5
St Vincent	42,804	62.5
Dominica	34,275	88.6
Belize	15,668	32.4
Surinam	15,668	9.4
Grenada	3,860	19.5
Cape Verde	1,173	9.0

Source: Eurostat.

The EU banana market has undergone major restructuring and has been challenged at the GATT and subsequently the WTO by the Central American 'dollar zone' producers as well as the United States, both before and after the restructuring which resulted from the creation of a single European market. Prior to the creation of the single market there were multiple marketing arrangements for bananas in Europe with most European countries importing bananas, subject only to import duties with source being a matter of commercial

choice. The countries where this was not the case were France,¹⁷ the United Kingdom,¹⁸ Spain,¹⁹ Italy,²⁰ Greece²¹ and Portugal²² where there were quantitative restrictions to assure that the obligations of these countries to purchase ACP, DOM/TOM and EU bananas made such arrangements necessary. Other countries such as Belgium Denmark, Germany, Luxembourg, Ireland and the Netherlands had no quantitative restrictions and prior to the Single European Market (SEM) imported bananas with a duty rate of 20 per cent.²³

In July 1993, to assure that the EU's obligations in the Banana Protocol of the Lomé Convention²⁴ and to assure that there was a unified European market, the EU created a system of tariff quotas.²⁵ ACP bananas enter the EU duty free, dollar zone and non-traditional ACP banana exports have a quota of 2 million tonnes.²⁶ The allocation of the tariff quota was a direct result of the Framework Agreement on Bananas (BFA) between the EU and the states which had pursued the Second Banana Panel report. In return for increased allocations of in-tariff quotas over time,²⁷ together with the accompanying rents, Colombia, Costa Rica, Venezuela and Nicaragua agreed not to pursue the adoption of the report of the Second Banana Panel.²⁸ The new multi-tiered system of tariff quotas included

- traditional suppliers, which included ACP and DOM/TOM suppliers, entered duty free;
- the BFA tariff quota of 2.0 million tonnes which attracted a duty free rate for non-traditional ACP imports and a specific duty of 100 ECU/tonne for non-ACP suppliers
- outside the quota, tariffs of ECU 750/tonne and ECU 850/tonne are levied on non-traditional ACP and non-ACP sources, respectively.

While this arrangement of tariff quotas could be justified by the EU's objective of attempting to create a single market while fulfilling its obligation to the ACP and DOMs, what became less than transparent was the system of import licences that was created by the EU. The 2.1 million tonne BFA quota was subject to a new import licence distributed in the following manner

- operators marketing third country and non-traditional ACP bananas (category A)²⁹ are allocated 66.5 per cent
- operators marketing traditional ACP and EEC bananas (category B)³⁰ who do not market non-traditional or third bananas, are allocated 30 per cent
- operators established since 1992 who market non-traditional ACP and third country bananas (category C) were given 3.5 per cent of the quota.

Moreover, the system of allocation of licenses was also subject to activity criteria whereby a certain proportion of the tariff quota would be allocated to various categories of activities³¹. What the EU did was to create a system of allocation of the 2.0 million tonne BFA tariff quota but provided some 30 per cent of the import license to EU firms which could then on-sell the import license to US and Central American firms which import lower cost dollar zone bananas. Thus, as a result of the system of import licensing, a portion of the quota rents was captured by EU firms. The argument offered by the EU in support of this regime was that it was necessary to compensate EU importers for importing less profitable ACP bananas, though it has denied that its regime is in any sense discriminatory against US and Latin American firms.³²

WTO consistency of the EU banana regime

The EU's banana regime has resulted in three disputes at the GATT and subsequently the WTO as well as in the European Court of Justice. There have thus far been three WTO panels established to investigate the EU banana regime. The results of the first two panels,

as we shall see below have not been adopted under the old GATT rules. A Third Banana Panel was convened at the behest of the US, after the creation of the WTO³³ with Mexico, Ecuador, Guatemala and Honduras as complainants. Only Ecuador, Guatemala and Honduras are significant banana exporting countries while Mexico and the US had interests by virtue of the fact that their companies had specific interests in the trade, even though they were insignificant exporters.³⁴ In May 1997, the panel produced an interim report which again found the EU banana regime to be incompatible with certain provisions of the WTO. At the request of the parties the panel report has been broken down into several constituent complaints. Moreover, the decision of the panel was appealed to the WTO's Appellate Body.

In the first two panels the dispute has been between the EU on the one hand and five Central American banana producers on the other. There have been numerous commentators arguing that this is in fact a dispute between US banana interests and EU importers and traders. As noted above, at the end of the Second Banana Panel, the EU negotiated for a very favourable allocation of tariff quotas to four Central American complainants in return for an agreement not to pursue the adoption of the second report. The EU however failed to come to an acceptable agreement with Guatemala which became one of the complainants in the third panel.

In February 1994 the Second GATT panel on bananas concluded that the Lomé Convention's Banana Protocol is not GATT consistent because, *inter alia*, it favours one group of developing countries over another. The core of the problem and the basis for the Latin American assault on the banana regime, at least in the Second Banana Panel stemmed from the violation of Article I provisions on tariffs. On this grounds the Central American position was sustained. It was not simply the cross-subsidy nor the quota rents that was at the heart of the conflict—though the loss of these quota rents was certainly significant—but preference arrangements and market share.

On the question of discrimination in favour of ACP supply, the second panel found this to be in violation of Article I.1 (MFN) and in the case of discrimination in favour of EU sources this is a violation of Article III.4 (National Treatment). The Second Banana Panel concluded that the Banana Protocol was not a Non-tariff Measure,³⁵ and hence not in violation of Article XI:1 Banana Panel 1994:40–1). The allocation of quota did not violate Article XIII as traditionally tariff quotas (as opposed to import quotas) had never been deemed to be quantitative restrictions (Banana Panel 1994:41).³⁶ The Second Banana Panel in its conclusion claimed that³⁷

...nothing in this report would prevent the parties to the Lomé Convention from achieving their treaty objectives, including the objective of promoting the production and commercialisation of bananas from ACP countries through the use of policy instruments consistent with the General Agreement (Banana Panel 1994:51).

This conclusion is by no means evident given the economics of ACP banana production and the obligations contained in the Lomé Convention. It should be recalled that the Second Banana Panel also found the tariff preferences to be incompatible with Article I. However, the third panel report upheld the allocation of tariff quotas by virtue of the Lomé waiver even though these tariff quotas were deemed to be inconsistent with Article XIII.1.³⁸ This decision is of particular importance to the Sugar Protocol

The causes of the dispute—quota rents or market share?

Thomas, in a recent review of the impact of WTO on ACP EU trade cooperation argued that the banana dispute is not about ACP preferences but rather about the system of cross-subsidies inherent in the licensing system.³⁹ While there really can be no serious argument about whether the EU has in fact used the import license regime to support domestic firms, it

is not evident that these cross-subsidies are necessarily at the heart of the dispute. The cross-subsidies implicit in the allocation of import licenses are no doubt substantial and have been used as a principal argument by the US and the other third panel complainants. However, in both the second and third panels, the complainants have both argued against the EU's regime on the basis of Article XIII and Article I violations of tariffs and tariff quotas.

One of the substantial and real benefits for the US and Latin American firms involved is the share of the EU market that could be taken by forcing a dismantling of the Lomé trade preferences and forcing the EU market to open to greater competition. In a larger context this has to be seen as an important part of the reform of the EU's Common Agricultural Policy (CAP) as well as the initial shots in the round of multilateral trade negotiations scheduled to begin in 1999. While the emphasis on the import licensing system and the subsequent quota rents as an explanation of both the second and Third Banana Panels is correct it is insufficient, as Thomas has done, to simply assert that it is the cause of the dispute. The complainants in the Second Banana Panel used violations of Article I provisions found in the ACP preferences as the main and certainly most successful point of attack on the EU banana regime. Moreover the Central American complaint against the EU banana regime predates the licensing system. The first Banana Panel was almost exclusively an attack on access provisions for Central American bananas as compared to ACP bananas. This in itself should be adequate to put to rest the argument that this is a dispute about quota rents. The allocation of those quota rents has simply provided a mechanism and an incentive for trying to dismantle the Lomé Convention. However if the DOM and ACP bananas were price competitive the quotas, import licenses and rents would be unnecessary.

The real question as it pertains to the EU's motivation in establishing the SEM for bananas was whether its obligations under the Lomé Convention of guaranteed access for ACP producers was in fact possible without creating a subsidy for EU firms. In setting up its banana regime the EU had as an option to create an import licensing regime for the tariff quota that would be consistent with Article XIII(2). Prior to the 1995 waiver for the Lomé Convention this would have meant that the EU would have to have allocated the tariff quota for duty free bananas according to traditional market shares. This in turn would have meant that a portion of the tariff quota of duty free bananas would have been given to the Central American producers. However, the EU made a point of not allocating the tariff quotas to particular countries and hence there was never an issue of appropriate allocation of those tariff quotas. If the EU had used the provisions of Article XIII(2) it would have not been able to discriminate as it does against dollar zone bananas in terms of allocating duty free quota. The alternative to allocating tariff quotas based upon the provisions of Article XIII was to employ the import licensing regime as a mechanism for fulfilling its Lomé obligations. By allocating import licences to 'traditional suppliers' it was in effect offering preferences to EU firms. Given that these firms had a choice of buying from dollar zone or ACP sources they would have obviously chosen the former had not the EU offered some financial incentive to do otherwise. The cross-subsidy implicit in the allocation of import licenses, and the subsequent rents and hence the Article I and III violations, was simply a result of the need to develop a mechanism for compensating EU firms which bought ACP bananas.

Given that the only companies trading in ACP and DOM bananas were what CR404/93 defines as B group companies, that is, EU or Caribbean-owned firms, then clearly the EU was allocating quotas to its own companies. These quotas are freely tradeable between companies and hence the EU firms could sell them to US and other firms and continue to import from Latin America. The EU has clearly and intentionally been subsidising its own firms

The creation of a quantity-restricted market through a combination of tariffs and quotas results in internal price levels above the world price...[T]his results in a value being attached to licences to import...Reserving a portion of tariff quota licenses for those operators who have marketed ACP and/or EC bananas is a means of transferring some of this quota rent to them...⁴⁰

The Banana regime has also been challenged by the Federal Republic of Germany in the European Court of Justice (ECJ) on the grounds that it, *inter alia*, violates the provisions of the banana protocol of the Treaty of Rome under which the EEC was created. The ECJ recognised the mechanisms of cross-subsidisation.⁴¹ The mechanism of cross-subsidies inherent in the import licensing regime is the only mechanism, short of direct subsidy to the ACP and DOM producers,⁴² that the EU could have used to fulfil its Lomé commitments while simultaneously assuring that firms were compensated because they were purchasing higher cost ACP bananas. With a ECU 75–100 duty margin there is inadequate incentive to import ACP and DOM bananas. However, where Thomas (1994:12)⁴³ is completely correct is to argue that much of this is an implicit and very large subsidy to firms to import from the DOMs. However, it is not 50 per cent of the cross-subsidy that is going to the DOMs but approximately 75 per cent of the subsidy which stems from the inefficiency of the Canary Islands producers. The ACP and DOM issues are quite separate even though the EU has chosen to lump them together. In the final analysis the impetus for this system of import licenses stems not from a desire by the EU to subsidise its firms, *per se*, but rather out of necessity caused by the inefficiency of ACP and DOM suppliers who are unable to compete with dollar zone bananas. If this problem did not exist the entire banana regime would be otherwise and these subsidies would be utterly unnecessary. What was clearly not necessary was to use the quota rents of US transnationals to fund the subsidy.

The Banana Panels in perspective

Several writers have suggested that the appropriate solution to the dilemma confronting the EU rests in the introduction of a system of tariffs and and/or production subsidies (Read 1994:219–53). In their most recent study using 1992 data, Raboy et al. argue that the cost of such a subsidy would be ECU 44 million per year in 1992 prices for ACP bananas and a level of import duty of 47 per cent.⁴⁴ Even at this rate of import duty, dollar zone bananas would be able to compete on the EU market. It may be comforting to think that a simple solution to this problems lies in the establishment of one tariff rate of 47 per cent combined with a direct subsidy. This would involve raising import duties to some of the EU countries that just three years ago had duty free access for bananas or paid no more than 20 per cent. Moreover, despite what is claimed, it is difficult to see agreement from all the dollar zone producers on tariffication at such high levels.

The dispute over the EU banana regime and the ensuing panel reports can be viewed in a number of ways. It is very much about market share in the EU market. The short-term benefit to the complainants is in the form of quota rents from the import licensing regime. These agricultural quota rents are a product of the Lomé Convention. However, since the closure of the Uruguay Round there has been a proliferation of tariff quotas caused by the way liberalisation has occurred in the *Agreement on Agriculture*. In light of the precedent created by the Third Banana Panel report it seems likely that the agricultural tariff quotas and ensuing rents that have been created through the Uruguay Round liberalisation process will be the subject of future disputes. Given the magnitude of the rents involved in some of these tariff quotas, they will almost certainly invite litigation. It may well give rise to a new genre of grey area measures in agriculture measures that were supposed to be prohibited by the Uruguay Round.

What the cross-subsidisation has allowed the EU to do is to avoid overt and politically difficult subsidies to the ACPs and DOMs and instead used the quota rents otherwise derived by the dollar zone producers and traders to cross-subsidise its own production as well as that of the ACP. That such a Byzantine import licensing regime is not WTO consistent should not be surprising but it must be understood that it is the inefficiency of the ACP and, more importantly, DOM banana producers when compared to the dollar zone producers that has made necessary these levels of subsidies and the system of trade that accompanies it. Clearly, by virtue of the arguments employed by the US and the other dollar zone producers it is their intention to try to dismantle the current trading system and thereby obtain a greater share of the EU market.

The experience of the banana protocol should not be lost on the other ACP states that are beneficiaries of the other commodity protocols. The most important lesson is that the new DSM mechanism of the WTO now allows even relatively small developing countries to successfully challenge large developed countries. It should also be clear that the WTO dispute settlement mechanism now becomes an instrument by which countries can 'shake the tree' (bush in the case of bananas). The more the Central American dollar zone producers challenge the EU's banana regime the more access and quota rents they have obtained. The EU, should it lose the appellate case, which seems likely, will probably be left with no option but to negotiate what will certainly be an expensive compensation package for the US firms and Central American complainants. This will put even greater pressure on the EU to devise a new post-Lomé trade arrangement with the ACP that is WTO compatible.

The GATT waiver for the Lomé Convention

WTO law is not entirely clear about what type of trade preference arrangements are legal and GATT consistent. However, there are areas where the actual practice of the application of Part IV and Enabling Clause provisions leaves some room for manoeuvre.⁴⁵ While at least in practice the WTO has accepted the principle that for developing countries there is a justification for a departure from the principle of MFN reductions in tariffs, the principle of MFN remains the ideological core of WTO law. In order to permit the Generalised System of Preference, the developed countries had to seek a waiver from Article 1 provisions (Hudec 1987:108–112). During the Tokyo Round an Article I Enabling Clause was negotiated by the contracting parties that rendered Article XXV waivers redundant for the development of GSP systems. The principle that underlies the WTO and the GATT agreements is that the best way to facilitate trade, even for developing countries, is for contracting parties to the GATT to lower the MFN rate of tariffs, that is, the external tariff that is offered to contracting parties of the GATT. This remains the position of most developed countries and has been repeated frequently by representatives of some of the GSP donor states.⁴⁶ The United States, from the very outset only expressed the most lukewarm acceptance of the WTO provisions with regard to the trade preference and has continually argued in various WTO fora that it views trade preference of transitional value.

Whereas the Enabling Clause allowed the creation of systems of trade preference for developing countries, it did so on an MFN basis. The provisions were such that countries were permitted to depart from Article I.1 obligations on the condition that all developing countries were treated equally. The difficulty with this approach, as we shall see later, is that the definition of a developing country is based upon self-selection within the GATT and WTO whereas the definition of least developed is specified as being the definition employed by the UN. As a result the Enabling Clause, combined with the refusal of the GATT to come to terms with an acceptable definition of a developing country, has allowed countries such as Israel and Singapore to continue to define themselves as developing despite having a GDP/capita

not dissimilar to many OECD countries. The resulting systems of GSP almost certainly gave rise to measures of arbitrary application through graduation,⁴⁷ where developed country donors would exclude countries when they reached threshold levels of income. The absence of a comprehensive definition of a developing country has compounded the situation of the ACP states. However graduation has not been the only form of arbitrary application. Several regional preference arrangements have been notified to the GATT.

The profound difference between developing and developed countries in GATT over the issue of trade preference as opposed to equal MFN reductions for all countries was highlighted in the GATT panel report on the tariff quotas offered to ACP producers of bananas in the EU market. Soon after the completion of the Second Banana Panel report, the draft report of the Working Party on Lomé IV became available.⁴⁸ In the Working Party several of the Contracting Parties had argued that there was a need for a waiver under Article XXV. With the adverse result in the Second Banana Panel, it was fairly evident that the EU and the ACP would require a waiver and it was better to obtain a waiver under the GATT rules rather than the new WTO rules. The EU had long argued in its notification to GATT of the Lomé Convention⁴⁹ that the Lomé Convention in effect created a free trade area.⁵⁰ The EU was perfectly aware that it was not required to adopt the Second Banana Panel report under the GATT rules but the Commission was keenly aware that without a waiver prior to the coming into force the new WTO *Understanding on Rules and Procedures Governing the Settlement of Disputes* it would face similar challenges to Lomé.⁵¹ Moreover, given the failure to come terms with Guatemala over the BFA, a waiver was clearly necessary in order to avoid further complaints. In retrospect, even the waiver was inadequate.

The new Dispute Settlement Body (DSB) established at the end of the Uruguay Round allows for the creation of panels⁵² and also created an Appellate Body. The decisions of the Appellate Body are fundamentally different from that of the panel under the GATT 1947 dispute settlement rules.⁵³ The power of the DSB is increased further by its power to recommend compensation in the event that recommendations of the panel or appellate body are not implemented expeditiously.⁵⁴ Under the GATT 1994 rules, waivers would be granted for a limited duration of one year and would require the agreement of 3/4 of WTO Council membership. This would require agreement from Central Americans which would only be granted in return for improved access to the EU market for Central American bananas and possibly other products. This is exactly the type of situation that the EU wished to avoid.

The waiver mechanism available under the rules of the GATT 1994 is that these waivers are only available on a year to year basis. Renewal of the waiver is dependent upon progress being made by the country receiving the waiver towards the elimination of the conditions which made it necessary in the first place. The provisions of the GATT 1947 allowed for waivers of ten year duration or longer.⁵⁵ The GATT 1994 arrangement could leave the Lomé Convention open to annual attack as the non-ACP developing countries seek further access concessions from the EU. Moreover, all GATT waivers granted under GATT 1947 were scheduled to be reviewed within a maximum of two years following the creation of the WTO.⁵⁶

In October 1994 the EU, in one of the last acts of the GATT under the 1947 rules, formally sought a waiver for the Lomé Convention.⁵⁷ In part the reason for the EU waiver was the widely held view that if it were not granted the Lomé Convention would come under closer scrutiny following the entry into force of the GATT 1994 rules. Moreover, given the legal precedent that had been established by the Second Banana Panel Report, it was almost inevitable that other aspects of the treaty would come under closer scrutiny.⁵⁸ On December 9th a five year derogation was granted.⁵⁹ However, it should be noted that the waiver, while for five years, was not for all the trade provisions of the Lomé Convention⁶⁰.

The decision adopted by the contracting parties unanimously did not provide for waiver from Article XI or Article XIII provisions. Moreover, the Article I waiver comes with the usual GATT proviso that preference only be granted 'to the extent necessary'. There is a long GATT legal tradition regarding the generally narrow interpretation of this clause. Of greater significance is the fact that the waiver, in order to receive unanimous passage, was appended with the further proviso that contracting parties still have recourse to the nullification and impairment provisions of Article XXIII.⁶¹ The provisions in effect allowed the remaining Central American complainants in the Banana Panel to raise the issue at their discretion. The Guatemalan Delegate to the GATT council said

Guatemala would not oppose the consensus, but he made it clear that the waiver would not liberate the Community from its obligation to bring the banana import regime into conformity with GATT obligations. He added that the extension of the Lomé Convention which was of a transitional nature would in no way prejudice Guatemala's rights under the General Agreement nor in the WTO.⁶²

It was evident that the validity of the waiver would be challenged as it applied to the EU's banana regime. The comments of the US Delegate to GATT during the council discussions on the waiver give some indication of the interests involved and what lay ahead:

...the United States along with many other contracting parties had long believed that the Community should seek a waiver for the tariff preferences which it provided to the ACP countries. Tariff preferences were an appropriate tool in fostering economic development. However, the United States wished to make clear that the United States and other contracting parties had problems with the Community's banana regime...several provisions (*of the banana regime*) rather than help ACP banana exports, had been designed to protect the economic interest of certain community companies at the expense of non-community companies (italics added).⁶³

It is not entirely correct as the EU has argued that the US, by subsequently challenging the banana regime, has challenged the waiver that it agreed to in GATT Council.⁶⁴ It has convincingly argued before the Third Banana Panel that the tariff quotas created by the EU for the importation of bananas were necessary to support those preferences which had been granted the Article I waiver. No doubt there is some veracity in this argument, especially as it pertains to the import licensing regime.

The Sugar Protocol

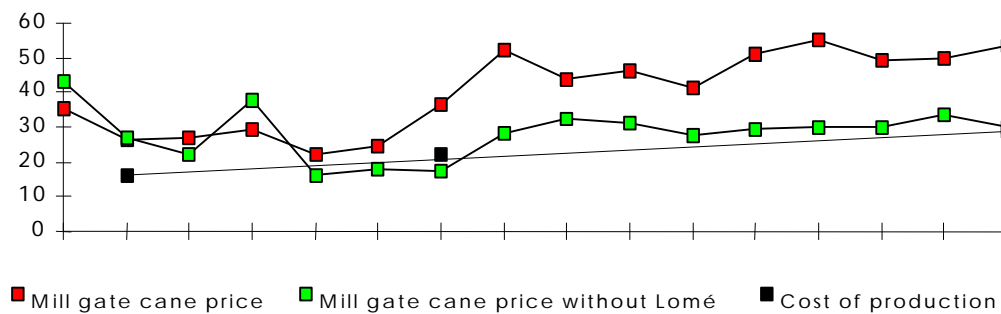
Like the Banana Protocol the Sugar Protocol is, at one level, about the interests of ACP producers but at another level it is also very much about the interests of EU firms. The Sugar Protocol was designed to assist the British sugar industry when the UK negotiated its entry into the EEC in 1973. In particular the firm of Tate & Lyle which had been the traditional refiner of colonial cane sugar had substantial economic interests in assuring the continued supply of cane sugar, despite what was to become a massive EU sugar surplus. Its two refineries in Liverpool and London employed some 2000 workers,⁶⁵ and hence the British government negotiated a very favourable supply agreement with ACP producers (Chalmin 1990:474–5).⁶⁶ In theory the arguments employed by the Central Americans in their case against the MFN and Article XIII violations of the EU's banana regime, and by extension the Lomé Convention, could be applied to the clauses of the quota-based trade preference sections of the Lomé Convention.

Since 1975 Fiji has had a quota of 163,000 tonnes of sugar into the EU market under the terms of the Lomé Convention. This sugar has been sold at the EU's intervention price which in most years is two to three times the world price of sugar. In 1995 the quota was increased by some 40,000 tonnes.⁶⁷ The result has been that in 1995 Fiji received a net

transfer from the EU of \$110 million, or approximately 5 per cent of GDP. For the average Fiji sugar farmer the Sugar Protocol translates into a net addition to operating profit of about \$20/tonne of cane.

Following the Uruguay Round it was expected that the price of EU sugar would decline by approximately 12 per cent by the year 2000 as a result of the Uruguay Round agreements.⁶⁸ This would have meant a once and for all decrease of GDP of approximately 1 per cent. However, subsequently it was determined that the EU could accommodate the agricultural reforms agreed in the Uruguay Round without a price decrease. While effects of the Uruguay Round on EU sugar prices proved limited, of far greater concern is the possible effects on Fijian producer price if the Sugar Protocol were ever to be removed or struck down. The average Fiji sugar farmer would move from being profitable to being economic (Figure 2).⁶⁹

Figure 2 **Average mill gate prices—with and without the Lomé Convention, compared to mill gate costs of production (F\$ per tonne of cane)**



Source: Fiji sugar Marketing Corporation, Sugar Commission of Fiji.

One of the few immediately beneficial effects for ACP states of the Uruguay Round has been that the EU in its offer to the GATT has included the Sugar Protocol, which means that it will be even more difficult for the EU to remove the Sugar Protocol because the minimum access provisions of GATT prohibit the EU from decreasing access from current levels.⁷⁰ This does not preclude the EU from decreasing intervention prices which are paid to Fiji and other ACP imports, nor does it preclude a challenge to the legality of the Sugar Protocol.⁷¹

The sugar quota, as mentioned previously, was created largely to assist Tate & Lyle in the UK, which needed a supply of cane sugar for its refineries in London and Liverpool at a time when sugar was not available.⁷² This dependence on imported cane sugar led the EC to agree to the Sugar Protocol in 1975. The Sugar Protocol now costs the EU between 500 and 700 million ECU per annum,⁷³ 25 per cent of the annual cost of the entire Lomé Convention.⁷⁴ Moreover, the EU is now one of the world's largest sugar exporters, so it is importing sugar from the ACP states only because of the interests of Tate & Lyle and the other smaller cane refiners in the EU.⁷⁵ However, there exists an important legal imperative that may require the EU not to abrogate its obligations under the terms of the Sugar Protocol even should political reasons exist to do so.⁷⁶

It is widely expected that the EU sugar intervention prices will decline by approximately 25 per cent by 2005. The reason for this comes largely from the EU plans to widen the union to include the Visegrad states. The agricultural production capabilities of the three Visegrad states are such that unless there is a reform of agricultural pricing when they enter the EU, the fiscal consequences will be most onerous and the resulting increase in exportable surplus of the EU will be such that it could easily result in a further subsidy war between the EU and the US. There is, however, a secondary reason which stems from the pressures that will be felt on the CAP when the next round of multilateral trade negotiations commence in 1999. Thus the confluence of external and internal pressures will cause decline in prices of EU sugar.

The WTO compatibility of the Sugar Protocol

As is almost universally argued by both ACP and EU 'sucrocrats', the Sugar Protocol and the Banana Protocol are legally quite different. The Sugar Protocol is contractual in nature and indefinite in duration while the Banana Protocol is a trade preference arrangement. They argue for instance that the system of import licensing within the tariff quota is automatic for firms importing cane sugar for refining purposes. Thus the system of import licensing is WTO compatible. This argument would appear to be correct. They also argue that the tariff quotas are embedded in the EU offer of the Uruguay Round. This, however, is not a defence as the access provisions of CR404/93 that is, the EU banana regime, were also in the Uruguay Round offer and this did not prevent a WTO challenge. Moreover, it is precisely the allocation of the tariff quotas for sugar that could be used as an argument by a possible complainant.

There is one way in which the situation of bananas is fundamentally different from that of sugar. Leaving aside German consumer fixations, bananas are a commodity of peripheral concern to the EU. Nothing could be further from the truth in the case of sugar. Sugar is at the very heart of the CAP and any threat to its security would cause a major crisis in EU agriculture. However, this should not be a cause for complacency among ACP states—if a threat to the domestic beet sector came from a possible challenge to the sugar import regime, the EU reaction may not necessarily be a strong defence of the Sugar Protocol but rather an abrogation in order to defend its core domestic interests.

Where then does the possible threat lie to the Sugar Protocol? The interests are quite different than in the case of bananas but the allocation of the tariff quota using Article XIII.2(d) as a basis for justifying the Sugar Protocol constitutes a strategy of considerable legal risk. It has been used in dealing with the relatively small Finnish quota (85,463 metric tonnes) when Finland joined the EU in 1995.⁷⁷ There the allocation of quota was simple as the parties with access to the EU market and with initial negotiating rights were limited. Thus a quota could easily be allocated to Cuba and Brazil as well as ACP states without affecting the balance of existing trade interests. There is no guarantee that using these provisions of Article XIII(2)d to justify the tariff quotas of the Sugar Protocol would be at all as easy, for a number of reasons.

First, the definition of 'parties having substantial interest' will be problematic as there are parties which currently do not trade with France and the UK such as Brazil and Cuba which would almost certainly argue that the only reason they do not trade is because they are restricted from doing so by virtue of the Sugar Protocol. Second, the definition of 'representative period' will also cause difficulties. The reason is that there has been no representative period for the last twenty-three years by virtue of the Sugar Protocol and hence there is no way to allot tariff quotas on an MFN basis.⁷⁸ This was not the case with the Finnish accession to the EU as countries such as Brazil and Cuba had market shares that were determined by commercial considerations. Third, the interpretation of 'special factors' will also have considerable impact upon the success of an attempt to use Article XIII.2(d) as a

justification for the allocation of existing tariff quotas. In the interpretative note the question of what constitutes special factors that may have effect is discussed.⁷⁹ The note specifically rejects changes in market share artificially brought about by means not permitted under the agreement.

It is here that the decision of the Third Banana Panel is crucial as a starting point for understanding whether a challenge to the sugar protocol based on tariff quota allocation would be successful.⁸⁰ In the Banana Panel report the panel felt that the EU had operated inconsistently with the provisions of Article XIII.2(d) by offering quota to some countries which did not have a substantial interest (that is, more than 10 per cent of the market) such as the four Central American countries and not others for example, Guatemala. Moreover the EU had allocated specific quota to countries. It is argued that

...even though the EC did negotiate an agreement as foreseen in article XIII(2). First sentence, it is necessary to keep in mind that the goal of any such agreement is provided in the general rule in the *chapeau* to articles XIII(2). We would not rule out the possibility that an agreement that does not generally achieve this goal may be open to challenge by Members who are not parties to the agreement, even if there is no requirement to include such Members in the negotiations because they do not have a substantial interest in supplying the product concerned.⁸¹

The *chapeau* to Article XIII(2) is clear in that the purpose of the allocation of tariff quotas must be ‘...a distribution of trade in such product approaching as closely as possible the shares which the various contracting parties might be expected to obtain in the absence of such restrictions...’ What could be argued by a complainant is that the Sugar Protocol is in violation of the *chapeau* as it results in an allocation whereby sugar producing countries, even those without a substantial interest are denied access that they could reasonably expect in the absence of the Sugar Protocol.

What is significant is the decision of the panel regarding the waiver of GATT obligations regarding Article I and whether this also implies for Article XIII. The panel concluded that ‘to the extent necessary’ to fulfil its Lomé obligations, country-specific quotas were permitted, even if they were inconsistent with Article XIII obligations.⁸² However this is only the case as long as the waiver holds. Once the waiver lapses and if it is not renewed then the tariff quota allocations could easily be seen to be in violation of the *chapeau* of Article XIII(2).

The question that obviously arises is who would challenge the preferential access arrangements. Brazil and Cuba are the two most obvious candidates. These countries have access to Finland’s market and could argue that the only reason that they have not been able to increase their market share is because the quotas have been allocated for the last twenty-two years and do not in any way reflect the share that would arise in the absence of Sugar protocol. There are two reasons why Cuba would be unlikely at this point to challenge the Sugar protocol. The first is that it is politically isolated and would probably be unwilling to annoy many of its Caribbean neighbours who would lose access if its challenge were successful. Second, any attempt to increase its access to the EU market in so high profile a manner would almost certainly not go unnoticed in the US. As this sugar is being produced in large measure on nationalised land, Cuba may face the very undesired attention of the US Congress by way of the infamous ‘Helms-Burton Act’.

Brazil is a far more likely candidate as it has the sugar and the ability to challenge the Sugar Protocol. It certainly would have a far larger share of the EU market in the absence of the Sugar Protocol by virtue of its proximity to the French and UK refineries. Whether Brazil would chose to do this is not known but there are substantial economic rents at stake. For every tonne of sugar that a challenge could wrest from the ACP would generate 300–400

ECU over the world price for the successful challenger. However, faced with a challenge that may undo the CAP, the risk is that the EU will abandon the entire system of Lomé preference in order to protect its own agricultural interests.

Options for WTO compatibility of Lomé trade provisions

The principal issue that pertains to trade and Lomé is the perplexing question of what to do with trade preferences and how to render them WTO consistent after the current Lomé waiver expires in the year 2000. In the EU's Green Paper on the future of its relations with the ACP countries, numerous solutions are considered.⁸³ Broadly the options include

- creating a free trade area (consistent with article XXIV.5)
- generalising the system of Lomé trade preferences to other non-ACP countries
- seeking a waiver (under Article XXV.5).

Reciprocity and an ACP-EU free trade area?

The EU's position on trade matters, especially as it pertains to the Pacific ACP states, appears less than transparent in the draft Green Paper. On the one hand, in one of the few references it makes to the Pacific the EU says

Effective cooperation with this region (*the Pacific ACPs*) would mean extending the framework of cooperation to other island states in the Pacific. In this extended framework, the Community's interests lie in two specific areas: preservation of the environment and of the region's considerable natural resources and trade promotion, especially with the APEC countries (*italics added*).⁸⁴

With the exception of Papua New Guinea, none of the Pacific ACP states or the other island states are members of APEC.⁸⁵ Moreover, even though some of the Pacific ACP states have expressed an interest in joining APEC and there has been a South Pacific Forum declaration regarding the importance of the relationship there remains a moratorium on new members in the organisation.

What is not transparent about the EU statement is whether the EU sees its own trade interests or that of the Pacific ACP being promoted into the APEC region as a result of the Pacific islands joining APEC. It would be heartening to believe that the EU may actually be considering the Pacific ACP states as somehow a part of an EU strategy of developing relations with the APEC region. But after twenty-five years of benevolent disinterest this constitutes an improbable interpretation of the EU's intentions.⁸⁶ Irrespective of the interpretation and motivation for the EU's suggestion the accession of the Pacific ACP countries to APEC would entail granting free trade access to all developed countries such as Japan, US and Australia by the year 2020 when the APEC countries are supposed to have created a free trade area under the Bogor Declaration.⁸⁷ While at present APEC remains based upon the principle of MFN liberalisation it is by no means evident that it will remain so in future, especially if the EU, the principal 'free-rider', does not reciprocate towards APEC. The EU has said in another context in the Green Paper that it would be unwilling to accept being discriminated against in ACP markets relative to other developed countries.⁸⁸ Moreover, the Lomé Convention prohibits such discrimination through the MFN clause.⁸⁹

The Green Paper is not meant for the Pacific—it is meant for Africa which is the only regional grouping in the ACP where the EU does have strategic trade interests and where reciprocity is clearly in the EU's immediate economic and trade interests. Reciprocity has by no means been rejected by ACP states as an option, especially in light of the reciprocal trade agreement with South Africa. The Caribbean states are actively considering the option of reciprocal trade agreements with North America through NAFTA as well as to the EU.⁹⁰

Moreover, assuming for a moment that the EU does want to include the Pacific in a free trade area, this would not be politically feasible as the Pacific island countries have non-reciprocal agreements with Australia and New Zealand in the form of PACTRA⁹¹ and SPARTECA⁹² treaties. Just like the EU, Australia and New Zealand would be unlikely to countenance being discriminated against in Pacific markets. Reciprocity with the EU is certainly not an issue when it comes to the Pacific.

The EU has proposed in the Green Paper essentially two options with regard to reciprocity. The first is a uniform reciprocity and the second a differentiated reciprocity with differing rates of liberalisation for different countries regions. The EU has stated that under this latter option it would have difficulties maintaining the commodity protocols.⁹³ The EU offers no explanation for why this would be the case, but the reason presumably is that the commodity protocols, as they currently exist, are ACP-wide in nature and would not fit into a regional differentiated free trade area (FTA). Moreover, members of the FTA would, in all likelihood, find such discrimination unacceptable.

Generalisation of trade preference arrangements

The most important question is whether the EU has any interest in the continuation of trade preference. In light of the declining importance of ACP trade, the short answer must be—not in their present form. No doubt the EU does consider trade preference as a useful instrument of trade policy but one that is of greatly diminished commercial significance in light of the decline in MFN tariff rates that occurred with the closure of the Uruguay Round. The extent to which the EU is willing to continue with trade preference would be determined by the importance of the trading partner. The EU is now seriously considering the possibility of generalising the system of preference in Lomé to all countries of a similar development status, thus rendering it consistent with its MFN obligations vis-à-vis Part IV of the GATT. The recent decisions in the Banana Protocol panels and the resultant need for a WTO waiver is very much in line with the EU's overall interests of creating a much broader association with all developing countries.⁹⁴

Trade preference is widely seen as having passed the point of having a long-term commercial value. While the current pace of globalisation and trade liberalisation certainly would seem to vindicate such a position, it may be premature to pronounce *rigor mortis* on the concept of trade preference. Trade preference will be of no commercial value if globalisation results in the end of all tariff barriers. While this is not an impossible outcome, one would be somewhat imprudent to assume this to be *fait accompli*. Given the recent and heightened reluctance of several APEC members to implement their obligations to liberalisation, a measure of scepticism is justified.

The first question one has to ask in dealing with the trade preference arrangements in Lomé is whether generalisation is actually necessary in light of the strong precedent in the application of trade preference arrangements under The Tokyo Round Enabling Clause which created the legal foundation for GSP systems. Several agreements notified to the WTO are in clear violation of the Article I (MFN) obligations that are, at least perceived to be the foundation for the application of the Part IV preference arrangements. Only one trade arrangement, SPARTECA,⁹⁵ which is also of crucial importance to the Pacific island countries, also could be construed to violate the Enabling Clause provisions as it gives greater levels of preference to Pacific island countries than to other developing countries.⁹⁶ There are several other important trade preference initiatives by developed countries that are in apparent violation of MFN application and that post-date the Enabling Clause, by the Canadian Caribbean Initiative,⁹⁷ the US Caribbean Basin Initiative⁹⁸ and the Andean Trade Preference Act.⁹⁹ However, the EU maintains a system of trade preference with numerous regions with which it has association agreements and these trade agreements greatly differentiate

between WTO members. The entire trade preference regime of the EU, not just Lomé, is in conflict with the provisions of WTO and the interesting question is whether the EU now intends to undertake WTO-consistent reforms of its trade regime with all of its associates.

The EU is considering the possibility of offering trade preference to only the least developed countries. The way in which the Part IV provisions have been written suggest that some measure of graduation and differentiation of preference is possible between developing and least developed countries. Brazil, which has long been among the first victims of trade preference graduation by developed countries, has opposed the concept.¹⁰⁰ However, there is a GATT precedent for differentiating between developing and least developed countries. There is a very important problem with any post-Lomé system based upon trade preference for only the least developed countries. The least developed countries are not necessarily those countries that are able, by virtue of their under-developed factor markets and infrastructure, to take advantage of the possibilities created by a system of trade preference.¹⁰¹ Certainly what evidence there is of those countries that have benefited from trade preference in Lomé, it has not been the least developed ones but rather the higher income countries or countries that have abundant resources. No doubt the EU is aware that its proposal before the WTO to offer Lomé-type preferences to all the least developed countries is likely to have little impact and poses only very limited threats to its domestic interests.¹⁰²

One option that is not considered is to reform the WTO provisions and allow for further graduation beyond the categories of developing and least developed for dealing with the need for trade preference. Perhaps other concepts of disadvantage may be more productive in assisting countries in their integration into the global trading system. The problem is that the WTO, which is a legal body, would require an unambiguous and general category of nations to avoid the possibility of *ad hoc* departures from MFN which create possibilities for protectionism and discrimination. One category that already has international acceptance is that of 'island, landlocked and least developed', a category that covers disadvantage more adequately than the usual UN definition of least developed.

There are other definitions and quantitative measures that are also useful. These could include the new Vulnerability Index currently being constructed by the UN.¹⁰³ However, given the very limited shelf life of trade preference arrangements and the economic reality that trade preference does not benefit the least developed, the legal imperative in the GATT for MFN treatment through one definable category of disadvantaged nations in effect renders trade preference of even less value as a useful tool for assisting the most disadvantaged. If trade preference is to have any, even transitional, value in terms of economic development then some form of *ad hoc* differentiation is the key. However, once again this leaves open the possibility of arbitrary behaviour by donor nations, protectionism and rent seeking behaviour and contradicts the MFN principle.

The problem with employing any other concept of graduation or differentiation other than those found in the Enabling clause and the Uruguay Round definitions, that is, developing and least developed, would mean that the EU and the ACP countries would have to go to the WTO and seek the introduction of such a category. Even assuming an acceptable definition could be found, and it is by no means evident that this is possible, the countries that would be likely losers from any measure of increased differentiation that is, Brazil, Philippines and Thailand, would oppose such a measure and as unanimity is needed for changes in basic concept then it would not meet with success.

There is an important practical aspect of generalising the system of preference to all developing countries of a similar development category. Take the case where trade preference has been particularly successful in terms of stimulating ACP exports in general

and Pacific ACP exports in particular, namely canned tuna exports. In this case the margin of trade preference into the European market between ACP exports and that of the MFN and GSP countries is 24 per cent. This margin of trade preference has been the mid-wife of the Pacific ACP canned tuna industry. If a new post-Lomé trade arrangement were struck which included putting all WTO members of a similar development status on the same level, this would almost certainly mean that Thailand and Philippines would enjoy the same level of trade preference as Fiji. Under such an arrangement Fiji would lose its preferential access.

However, if the EU creates its 'super GSP' for the least developed, Solomon Islands would continue to have access to the EU for its canned tuna products. However, countries such as Cambodia and Bangladesh also would also be granted access. The Southeast Asian tuna capacity would migrate to least developed countries in search of rents. Production capacity would increase and the EU market would see a huge surge of imported tuna. In response to this situation the EU would be unlikely to accept the damage to the Spanish and Italian canning industries and as a result the EU would eliminate the access for the least developed. Thus the price of WTO consistency in the Pacific tuna industry is either the European or the ACP canning industry. The choice is purely academic as obviously the victim would be the ACP industry. This is precisely why the final option of seeking a transitional waiver arrangement and a standstill agreement remains the best option.

Waiver, structural reform and a standstill agreement

The last option that exists for dealing with the apparent incompatibility of WTO provisions with Lomé is the *status quo ante*, namely a continuation of the present waiver provisions. Politically this is a very unattractive option as it involves going to the EU and asking for the continuation of a trade regime that is not WTO consistent but it is also the one option likely to cause the least disruption to ACP production and exports.

Several types of waiver arrangements are possible to deal with Lomé trade preferences. The most general would be to attempt to have the entire system of trade preference waived from Article I violations under Article XXV(5) of the GATT. Article IX of the WTO agreement allows members to seek waivers for any of the obligations imposed by the Multilateral Trade Agreement. However, there are a number of problems with this particular approach. The first is that a waiver already exists and it will almost certainly be more difficult to return to the WTO in the year 2000 to seek renewal for the entire system unless there is evidence shown of progress in eliminating the cause for the waiver.

However, the nature of the waiver arrangement itself constitutes a more serious problem. Waivers are no longer of an indefinite duration and are subject to annual review.¹⁰⁴ This, as the European Commission has quite correctly pointed out, greatly diminishes the commercial value of any waiver arrangement as commercial interests will be unwilling to undertake new long term investments when trade arrangements can be so readily terminated. It is however extremely conducive to rent seeking behaviour. Thus it is extremely unlikely that, leaving aside the diminution in margins of trade preference, a Lomé system that is subject to continual scrutiny and annual review will constitute a foundation for investment in ACP states. Without generalisation of trade preferences, which in the case of the Pacific would lead to severe difficulties in key sectors, but would eliminate the need for WTO scrutiny, the system of preference is of the most dubious nature in the longer term.

European preference policy has, by virtue of Europe's changed policy since the end of the cold war towards other regions of the world, already diminished the value of ACP trade preference. For example, the extension of trade preference arrangements for tropical tree crop products such as coffee to Southeast Asian countries as well to Central America means

that only coffee from a few countries such as Brazil now enters the EU subject to any duty whatsoever. Thus the Lomé trade preference arrangements in this key sector are in effect of no commercial value. The trade preference is thus being eroded by not only the WTO provisions but also by the EU's political preferences.

Under such circumstances, to expend a great deal of goodwill on attempting to perpetuate a system of trade preferences that is of diminished commercial value is futile. However, this raises the immediate question of what one does with those sectors such as tuna, tree crop products and sugar where there is either a great deal of commercial value in the current Lomé arrangements or where commercial value could arise in the near future. One solution is to seek a waiver for these products only. There are several important counter-arguments to this. First, the EU will not expend political capital in the WTO on a further waiver arrangement; but without such an agreement the Pacific ACP industries would be subject to enormous financial pressure and several may well collapse. Given that tuna canning in particular is an area where it is possible for Pacific ACP states to develop a comparative advantage, the loss would be a major blow to the development of some of the most disadvantaged nations on earth. Second, obtaining a waiver for specific tariff lines will only invite further investigation by those who have trade interests in the products where obligations are waived.

A ten-year waiver for trade preferences that are in violation of Article I provisions with the possible annexure of a World Bank agreed sectoral adjustment programme may well be acceptable to WTO General Council and Ministerial Conference for an extension of the waiver for these sectors only. This waiver arrangement would require a 75 per cent vote¹⁰⁵ which is possible. Thus the most that the Pacific should realistically hope for is a ten-year extension of the preference arrangements that are not consistent with Article I provisions. This would, in effect, constitute a standstill arrangement of the existing system and could constitute adequate progress towards the elimination of the inconsistency with WTO obligations.

Conclusion

The developing countries of the Pacific are peculiarly disadvantaged by the coincidence of diseconomies of scale and their isolation from developed country markets. These two sources of disadvantage, when combined with the paucity of natural resources and relatively poorly developed education systems, constitute a severe and almost binding constraint to the development of international trade. The lessons of the history of international trade in the Pacific island states have been quite clear—only when the price of a commodity reaches the point where quasi-rents are being earned elsewhere will production be even minimally profitable in the remotest corners of the globe. This is true of copra, sugar, timber, cocoa, bêche-de-mere and tuna.

One of the principal factors that has mitigated the disadvantage associated with the predicament of the Pacific island states has been the trade preference arrangements developed since independence. While these trade preference arrangements may have been of marginal use in other regions this has not been the case in the Pacific. They have been one of the few sources of commercial advantage that have been available to exporters and have resulted in the creation of the tuna canning and garment industries which are among the few success stories in the region. The premature demise of trade preference caused by accelerated global liberalisation and the shift in EU policy has not allowed trade preference to perform a useful historical function in the development of important infant industries in the region. It is crucial for the survival of these sectors that arrangements be developed that will

permit the extension of trade preference for a further ten years to allow the industries to achieve a level of maturity where competition on a global market is even remotely possible.

If for reasons of international policy these trade preferences cannot be extended, then the Pacific ACP states will likely face increased poverty and the sectors most likely to result in the development of more trade—which the WTO is supposed to foster—will be destroyed as a consequence of an excessively rigid application of WTO provisions. In light of the fact that for the last 40 years the most powerful nations in the WTO—the US and the EU—have, in key sensitive sectors such as agriculture and garments, exempted themselves from the very disciplines that they now expect to be rigidly applied by other parties, should in itself be justification of some transitional waiver provisions for Lomé trade preferences under the WTO agreement.

Without this waiver, two decades of development efforts of the Pacific island nations will be needlessly retarded and possibly lost. They will be lost for the sake of conformity with principles that are frequently and legally flaunted by members of the WTO which are much larger and better able to make the adjustments to a more a liberal environment than the micro states of the South Pacific. It would, under such circumstance be an imposition of power rather than principle to have ACP states accept WTO disciplines in these areas while the richest and most powerful developed countries still do not.

Endnotes

¹ The text of the Lomé IV Convention can be found in *The Courier: Africa-Caribbean-Pacific*, 120:March–April 1990. The latest version of the Lomé Convention which had minor modifications in 1995 is contained in *The Courier: Africa, Caribbean-Pacific-European Union*, 155:January–February 1996. In 1997 South Africa became the seventy-first signatory to the Lomé Convention under special trade arrangements that lead to a reciprocal trade agreement.

² There are no official statements but all the EU's sponsored publications point clearly in this direction. See Davenport, M. et al. 'Europe's Preferred Partners? The Lomé Countries in World Trade', Overseas Development Institute, London. Such positions have been reiterated in the EU's Green Paper as well as at recent conferences in Europe on the future of ACP-EU relations; see Bossuyt J. et al., 1996. *Beyond Lomé IV—Exploring Options for the Future ACP-EU Cooperation*, ECDPM, Policy Management Report 6, Maastricht.

³ The system of preferences with regard to the ACP states and the other groups with whom the EU is associated was called the 'pyramid of privilege' in Mishalani, P., Roberts C., Stevens C. and Westen, A., 1981. 'The pyramid of privilege' in C. Stevens, C., *EEC and the Third World: A survey 1*, Holmes & Meier Publishers, New York:60–82; and Grilli, E., 1993. *The European Community and the Developing Countries*, Cambridge University Press, Cambridge.

⁴ European Commission, Directorate General VIII, Green Paper on relations between the European Union and the ACP countries on the eve of the 21st Century—Challenges and Options for a new Partnership, 14 November 1996.

⁵ In the early 1970s Stabex, was deemed as the most innovative instrument then devised for commodity price stabilisation of primary products. The scheme, one of the cornerstones of Lomé I was based upon restitution, in part, for changes in output and export prices but only for those exports going to Europe. However, through subsequent conventions the requirement to export to Europe has been provided with derogation for some of the most disadvantaged ACP states. This derogation has in part reflected the diminished EU interest in assuring sources of supply of its raw materials. Perhaps no other instrument of the Lomé trade regime is more reflective of the dual nature of the Convention.

⁶ Certain provisions of the Lomé Convention are now considered to be inconsistent with GATT agreements such as the commodity protocols. However, this was never accepted by the ACP or the EU for the longest time. In 1988 a GATT Working Party was established into the 'Third ACP-EEC Convention of Lomé' the position was expressed by the ACP spokesman that the trade provisions of Lomé were compatible with the General Agreement including Part IV. This has been the position that the EU has consistently maintained regarding the Convention, even in the face of the 1995 waiver.

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⁸ In their review of the development of new exports from the ACP countries to the EU, McQueen and Stevens point to the development of canned tuna exports to the EU as one of the areas where ACP countries have been most successful in terms of EU market penetration. They argue:

This is by far the most valuable single product identified in this study and has grown in real (volume) terms by over 10 per cent per annum over the period (1976–1987). Growth was particularly rapid in 1976–83, with exports from the major suppliers falling thereafter. The natural resource base of the countries concerned clearly determines the product's importance, but *the large margin of preference over most other suppliers has probably assisted the export growth.*

McQueen, M. and Stevens, C., 1989. 'Trade preference and Lomé IV: non-traditional ACP exports to the EU', *Development Policy Review*, 7(3):239–61.

⁹ The Fiji garment industry is dependent largely upon trade preferences into Australia and New Zealand under a similar non-reciprocal trade agreement to that of the Lomé Convention. A portion of the trade is with the US but results from MFA quota rents which will diminish over time with the phase-out of MFA under the Uruguay Round Agreement on Textiles and Clothing

¹⁰ While estimates for Fiji may slightly over-estimate the degree of trade preference dependence, in the case of Solomon Islands the degree of dependence is probably slightly underestimated as by the early 1990s the entire Solomon Island fishing industry had become dependent upon canned exports and thus a loss of trade preferences would affect non-trade preference dependent trade.

¹¹ SPARTECA (The South Pacific Regional Trade and Economic Co-operation Agreement) is a multilateral non-reciprocal trade agreement between Australia and New Zealand as donors and the 14 island states of the South Pacific Forum as recipients.

¹² The Yaoundé Convention was the immediate precursor of Lomé from 1963–69 (Yaoundé I) and from 1969–75 (Yaoundé II) which created an association between the former French colonies and the then EEC. Even in the Treaty of Rome there was an association agreement between the EEC and the French colonies. Yaoundé contained no fundamental changes of access to the traditional markets for the French colonies and thus historically it could be argued that the trade access privileges were in effect a continuation of 'existing legislation'.

¹³ Protocol of Provisional Application to the General Agreement on Tariffs and Trade, 30 October 1947, 61 Stat. Pts.5,6 TIAS No.1700, 55 UNTS 308.

¹⁴ Protocol 7 on Beef and Veal. Protocol 6 on Rum. Protocol 5 on Bananas. Protocol No 8 as Protocol No 3 of Lomé I.

¹⁵ For many years Vanuatu had aimed to obtain a quota under the Beef and Veal Protocol but has not succeeded in doing so because of the quarantine and health issues involved in entry to the EU market.

¹⁶ The market power of US firms in the global banana market should not be exaggerated. There has in the last ten years been a shift of production capacity away from US ownership. This was particularly the case with the sale of Del Monte to Mexican interests. There are, however, a number of significant Central American firms in the industry which diminish the image of the banana industry as a US dominated industry which is the way in which the EU has attempted to portray the situation in order to justify the licensing regime.

¹⁷ France was supplied principally by Martinique and Guadeloupe and also by Côte d'Ivoire and Cameroon.

¹⁸ The UK restricted trade by the use of various quantitative restrictions and license arrangements.

¹⁹ Spain maintained a *de facto* ban on imports and traded only with the Canary Islands. See Panel on EEC-Import regime of bananas', DS38/R (not adopted) paras. 17 *et seq.*

²⁰ Italy offered preferential access to bananas from Somalia.

²¹ Greece was supplied by Crete and Lakonia.

²² Portugal was supplied by Madeira.

²³ Germany paid no import duties on bananas as these were to be imported duty free under the terms of the Banana Protocol of the Treaty of Rome.

²⁴ Protocol 5 of Lomé IV states that 'no ACP state will be placed in a less favourable situation than in the past or present as regards exports of bananas to the EU market'. The obligations under the Single Europe Act prohibit the creation of separate markets.

²⁵ European Commission, Council Regulation No 404/93.

²⁶ The EU quota has increased to 2.5 million tonnes following the accession of Sweden, Finland and Austria to the EU.

²⁷ Davenport et al., *op cit.* p.16 argue

In order to persuade the Latin Americans to withdraw their complaint, the EU finally increased the tariff quota for third country and non-traditional suppliers 100,000 tonnes for 1994 and 200,000 for 1995.

It should also be noted that the EU agreed to decrease the tariff quota from ECU100 per tonne to ECU 75 per tonne.

²⁸Report of the Panel 'European Communities-Regime for the Importation, Sale and Distribution of Bananas, Complaint of Ecuador' WT/DS27/R/ECU, p. 25 (hereinafter the Third Banana Panel).

²⁹Category A includes Chiquita (US), Dole (US), Noboa (Ecuador), Del Monte (Mexico), Uniban (Colombia) and Banacol (Colombia).

³⁰Category B include Fyffes (Irish), Geese (UK), Pomona (France), Coplaca (Spain) CDB/Duran (France), Jamaica producers (Jamaica), and Winban/Wibdeco (Windward islands).

³¹The category system is based on 57 per cent weighting for primary importers, 15 per cent for secondary importers and 28 per cent for 'ripeners'.

³²The EU somewhat disingenuously denies that it is subsidising or favouring its own companies:

There is no discrimination in any of the EU banana policy measures between companies according to their ownership. The EU and national authorities are not even aware of the ownership of the majority of the companies trading in the banana sector. Import licences for bananas are distributed on the basis of established, transparent and objective criteria which are related to the past and have nothing to do with the nationality of a company's owners.

European Commission EU: Background note on Caribbean Bananas and WTO-EU Press Release: memo/97/28, March 18th, 1997 p. 4.

³³The EU argued that the US pressured the Central American countries into pursuing this third panel: 'The US interest in European banana policy stems from a complaint to the USTR made jointly by Chiquita Brands International Inc. and Hawaii Banana Industry Association in September 1994. Ralph Nader's Public Citizens 'Trade Watch' has pointed to the significant campaign contributions paid by US banana trading firms as the real reason for the US challenge (quote taken from the *Daily Observer*, 4 December 1996). Trade watch has also claimed that the four banana producing countries who are also complaining about EC policy (Ecuador, Guatemala, Honduras and Mexico) were threatened with trade sanctions if they did not support Washington's position.

European Commission Press Release 'Note on Caribbean Bananas and WTO', Memo/97/28, 18 March 1997.

³⁴The question of whether the US and Mexico could in fact bring a dispute before the WTO, given that the countries themselves did not export bananas, was an issue of some importance raised by the EU before the Third Banana Panel. The fact that Article II obligations under the GATS were successfully used as an argument by the US and Mexico in effect opens up an entirely new area of litigation for countries that have no or insignificant trading interests.

³⁵Second Banana Panel Report, 1994 DS38/R, pp.40–1. It should be noted that the first Banana Panel did in fact find the pre-SEM regime to be based upon quantitative restrictions and prohibitions that were in violation of GATT obligations under Article XI.

³⁶Ibid, p. 41

³⁷Ibid, p. 51

³⁸Third Banana Panel Report WT/DS27/R/ECU para. 7.110.

³⁹Thomas, R.H., 1997. *The WTO and Trade Cooperation Between the ACP and the EU: assessing the options*, European Centre for Development Policy Management, Maastricht Working Paper 16, Maastricht:11–12:

The problem with the EU's banana regime is that it uses ACP preferences as a 'smoke-screen' to mask discriminatory trade practices such as 'cross-subsidisation' which are intended to benefit big business interests in the EU. As long as ACP preferences are misused in this way and impact negatively on WTO third country interests, they will continue to be challenged at the WTO.

⁴⁰'Note for Information-Impact of Cross-Subsidisation within the Banana Regime', European Commission, pp. 1–2 quoted in WT/DSU/R/ECU para. 4.681.

⁴¹Opinion of the Advocate General Gulmann, 8 June 1994. *Federal Republic of Germany v. Council of the European Union*,

The [EC] Council does not deny that the 30 per cent share of the quota involves a transfer of resources to traders in Community/ACP bananas...The Spanish Government mentions in that connection that the transfer of a part of the quota to operators other than traditional dealers in third country [that is, Latin American] bananas helps also to reduce the dominant role which certain non-European companies have played in connection with marketing (pp. 22–3).

⁴² The US trade representative, Mr Mickey Cantor, wrote to the European Commissioner for Trade, Sir Leon Brittain, suggesting that the entire policy be scrapped and replaced with a single tariff and direct subsidy (5th April, 1994) quoted in Raboy *op cit* p. 579. Cantor must have been keenly aware that tariffication of the banana regime together with a subsidy would not have been politically acceptable.

⁴³ Thomas, R., *op. cit.* p.12:

The EU has argued that the cross-subsidy is necessary to rectify the market inefficiencies affecting ACP bananas' competitiveness and to allow them to retain market share. If this 'cross-subsidy' indeed benefited ACP States, it might provide a possible mitigating factor for the complainants. But the ACP States are not the beneficiaries of this particular scheme. EU operators based in the territories of the EU are clearly the only beneficiaries. Second only 50 per cent of the bananas benefiting from this cross-subsidy are ACP bananas. The other 50 per cent are coming from EU territories and fall within the CAP. This is therefore obvious protectionism which has little to do with the ACP.

⁴⁴ Raboy, R. et al. *op cit.* p. 577, 579 This level of subsidy includes ECU 97 million for Canary islands bananas, 12 million ECU for Martinique, 4 million ECU for Guadelope

⁴⁵ Decision of the Contracting Parties of 28th November, 1979 26S/203.

⁴⁶ At the 58th Session of the Committee on Trade and Development, one representative stated that in the view of her authorities 'the Enabling clause has provided a useful mechanism for permitting temporary departures from the m-f-n principle, and this had been achieved with the minimum of damage to the integrity of the General Agreement. However, this would only be the case if the use of preferential treatment were phased out', L/5913.

⁴⁷ The US, for example, graduates countries out of the status of developing country when their GDP/capita reaches US\$7,000.

⁴⁸ Draft Report of the Working Party on the Fourth ACP-EEC Convention of Lomé, Spec (93)53/Rev.1, 31 May 1994.

⁴⁹ L/7153 and Add 1, 15 December 1989.

⁵⁰ The second panel report concluded, *inter alia*, that

the preferential tariff rates on bananas accorded by the EEC to the ACP countries are inconsistent with Article I and could neither be justified by Article XXIV nor by Article XX (h).

⁵¹ GATT Secretariat "Results of the Uruguay Round " *op cit.* pp. 404–38.

⁵² *ibid.*, Article 6 and 8, Annex 2.

⁵³ *ibid.*, Article 17(14), Annex 2.

An Appellate Body report shall be adopted by the DSB and unconditionally accepted by the parties to the dispute unless the DSB decides by consensus not to adopt the Appellate Body report within 30 days following its circulation to the Members

⁵⁴ *ibid.*, Article 22(1), Annex 2.

⁵⁵ Some of the early waivers that were granted were indefinite though waivers were normally granted for periods of ten years.

⁵⁶ See 'Understanding in Respect of Waivers of Obligations under the GATT 1994' in Gatt Secretariat, 1995. 'The Results of the Uruguay round of Multilateral Trade Negotiation—The Legal Texts', Geneva

⁵⁷ 10th October 1994, L/7539 and Corr.1.

⁵⁸ Following the Banana Protocol Decision the government of Brazil was considering a legal challenge to the Sugar Protocol of the Lome Convention.

⁵⁹ L/7604. December 19th, 1994, Gatt Secretariat. The terms of derogation state
Subject to the terms and conditions set out hereunder, the provisions of paragraph 1 of Article 1 of the General Agreement shall be waived, until 29th February 2000, to the extent necessary to permit the European Communities to provide preferential treatment for products originating in ACP States as required by the relevant provisions of the Fourth Lomé Convention, without being required to extend the same preferential treatment to like products of any other contracting party.

⁶⁰ *Ibid.*, p. 2.

⁶¹ L/7604, Item 6, p. 2. These provisions state that a contracting party has recourse in the event that it feels that benefits accruing to it under the agreement are being nullified or impaired by the actions of another party.

⁶² SR.50/1 1995, p. 14.

⁶³ *Ibid.*, pp. 14–15.

⁶⁴ EU Press Release Memo/97/28 p. 1.

⁶⁵ The Liverpool plant was subsequently closed.

⁶⁶ Chalmin, P. 1990. *The Making of a Sugar Giant—Tate & Lyle, 1859-1989*, Harwood Academic Publishers, Switzerland:474–5

Let there be no mistake: *the sugar protocol of the Lomé Convention was first and foremost a Tate & Lyle Protocol*. The British firm was the main partner of the ACP countries which could not afford to take too many liberties. The skill of Tate & Lyle lay in never appearing directly in the controversy unless it was to play a conciliatory role...Thanks to the support lent by the various British governments, concerned by the possible consequences of the closures of refineries in zones already affected by unemployment such as London and Liverpool, thanks also to the paradoxical support of militant pro-third world circles, Tate & Lyle managed to maintain an illogical compromise in the face of all odds (emphasis added).

⁶⁷ The extra 40,000 tonne quota stems from commitments under Lomé IV to allocate extra quota to sugar producing ACP states as European countries with cane refining capacity join the EU. Portugal and Finland both have such capacity and it is from this that the increase in quota is allocated. It should however be noted that the access to the Portuguese market is on terms and conditions less favourable than the access provided to the UK and French markets. See *Joint Declaration on Sugar in the Portuguese Market*, Article XXVIII, Lomé IV.

⁶⁸ Pers comm., London Sugar Group, 1994. The precise effect upon EU prices of the Uruguay Round commitments remains an internal EU policy decision because of the discretion permitted under the Blair House Agreement and hence the precise decrease in prices is uncertain. The magnitude of the decrease could be as low as 5–10 per cent as suggested in World Bank, 1995. ‘

in a Changing Global Environment, Report 13862-FIJ, 20 June:29.

⁶⁹ The average cane farmer made an operating profit of F\$20 per tonne in 1992.

⁷⁰ See Article 4, Part III, *Agreement on Agriculture*, GATT 1994.

⁷¹ The inclusion of the Sugar Protocol terms in the EU's offer does not legally preclude a subsequent GATT challenge to the Sugar Protocol.

⁷² The Sugar Protocol was negotiated when sugar prices were at their highest point in this century and there was substantial insecurity of supply.

⁷³ The actual 1993 cost of the Sugar Protocol to the EU is estimated to be 600 million ECU. See World Bank *op. cit.* p. 21

⁷⁴ The funding for the Sugar Protocol and the other commodity protocols that are part of the Lomé Convention does not come through the normal channel of the European Development Fund.

⁷⁵ On the basis of pure financial calculations, the EU could close the EU refineries, pay compensation and within the space of ten to fifteen years all parties, with exception of the ACP states, would be better off with UK sugar needs being met from continental European surpluses.

⁷⁶ Article 10, Protocol 8, Lomé IV, 1990

The provisions of this Protocol shall remain in force after the date specified in Article 91 (*the expiry date of the Lomé IV Convention*) of the Convention. After that date the Protocol may be denounced by the Community with respect to each ACP State and by each ACP State with respect to the Community, subject to two year's notice (emphasis added).

The interpretation of this Article is crucial because it has been interpreted to mean that the EU cannot abrogate the agreement unilaterally but must seek the agreement of the sugar producing ACP states. Given that current intervention prices remain between two and three times the world price, such agreement is unlikely to be forthcoming without significant compensation.

⁷⁷ Article XIII2(d) states

In cases in which a quota is allocated among supplying countries, the contracting parties applying the restriction may seek agreement with respect to the allocation of shares in the quota with all other contracting parties having a substantial interest in supplying the product concerned. In cases in which this method is not reasonably practicable, the contracting party concerned shall allot to contracting parties having a substantial interest in supplying the product shares based upon the proportions, supplied by such contracting parties during a previous representative period, of the total quantity or value of imports of the product, due account being taken of any special factors which may have affected or may be affecting trade in the product.

⁹⁵ Notified at L/5100, L/5488.

⁹⁶ Australia also maintains a GSP system which is not as generous as SPARTECA. Pacrta, Australia's bilateral agreement with PNG, has never been formally submitted to GATT for notification because there were several difficulties associated with it when Australia tried to bring it to GATT in the mid-1970's.

⁹⁷ November 1986, L/6102 expiring 1998.

⁹⁸ February 1985-95, 31s/20 e.

⁹⁹ June 1992, L/6991 expiring December 2001.

¹⁰⁰ See GATT' Guide to Gatt Law and Practice-Analytical Index' 6th Edition, Geneva, 1994, p. 58.

¹⁰¹ While the debate on the impact of trade preference has been extensive there is widespread agreement that it has not halted the process of marginalisation of least developed countries - especially the ACP group. See E.R. Grilli, E., 1993. *The European Community and the Developing Countries*, Cambridge University Press, Cambridge; and Davenport, M. et al., 1995. *Europe's Preferred Partners? The Lomé Countries in World Trade*, ODI, London.

¹⁰² It should be noted that Uruguay Round disciplines do not extend to the fisheries sector which is where a number of Pacific least developed countries have interests.

¹⁰³ Recently Oxfam has proposed to NGOs that Lomé cover only countries which have a HDI<0.8. This is consistent with commonly used definitions but would exclude eight of the most developed ACP states including Fiji.

¹⁰⁴ The most infamous waiver is the one granted to the USA in 1955 for an indefinite duration for Section 22 of the US Agricultural Adjustment Act (see 14s/37). This waiver granted complete licence to the US to employ quantitative import restrictions in violation of Article XI. The waiver finally expired under the terms of the WTO agreement on January 1, 1997.

¹⁰⁵ Article IX(4), WTO Agreement.

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