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EU-ACP Economic Partnership Agreements: Modern Colonialism Disguised in Violation of the WTO

Danielle Robertson

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NOTES

EU-ACP Economic Partnership Agreements: Modern Colonialism Disguised in Violation of the WTO

ABSTRACT

The Economic Partnership Agreements (EPAs) between the European Union and the African, Caribbean, and Pacific (ACP) nation-states are the most recent construct in a long history of developing countries' dependency and reliance on developed European countries. Even though Preferential Trade Agreements (PTAs) are widely used by countries party to the World Trade Organization (WTO), the European Union is hiding behind illusions of non-economic trade benefits, such as increased stability and health benefits, in their EPAs with ACP countries. The European Union has the economic bargaining power, creating an upper hand in the trade negotiations with the former colonial countries and other developing countries. The EPAs, like other PTAs, consistently have provisions that should be found to violate the most-favored nation (MFN) clause. Even though GATT Article XXIV allows for PTAs, in order for the WTO to achieve one of its initiatives to liberalize world trade, the MFN clause should penetrate throughout the EU-ACP agreements.

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I. INTRODUCTION

The World Trade Organization (WTO) was formed in 1995 after the close of the Uruguay Round negotiations under the General Agreement on Tariffs and Trade (GATT).¹ The WTO primarily deals with international trade and currently consists of 164 nation-state members from around the world.² Its objectives are to liberalize global trade, negotiate trade agreements, and serve as a forum for parties to settle trade disputes.³ In order to create uniformity in the global market, the WTO established a set of rules, set out in the Marrakesh Agreement and other agreements appended thereto. The Marrakesh Agreement serves as the constitution for the organization and its member states. Article I of the document created the WTO as an organization, superseding the GATT.⁴

The Marrakesh Agreement functions as the foundation of the WTO, where the objectives of the organization are centered on liberalizing trade while working toward global “elimination of discriminatory treatment in international trade relations.”⁵ The cornerstone of the original GATT, carried forward into the WTO, is the most-favored nation (MFN) clause, where “the signatories of a treaty

1. Andrew T. Guzman & Joost H.B. Pauwelyn, *Understanding the WTO, Chapter 1: Basics in INTERNATIONAL TRADE LAW* 84, 84–85 (2d ed. 2012) [hereinafter *WTO Basics*] (establishing an overview of the WTO and its departure from the GATT).

2. *Understanding the WTO: Members and Observers*, WORLD TRADE ORGANIZATION (WTO), https://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm (last visited Mar. 19, 2017) [<https://perma.cc/S8PL-ZM7X>] (archived Jan. 19, 2017) [hereinafter *WTO Members and Observers*].

3. *WTO Basics*, *supra* note 1, at 84–85.

4. Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, 1867 U.N.T.S. 154 [hereinafter *Marrakesh Agreement*].

5. *Id.*

agree to accord each other the same treatment they grant to any other nation.”⁶ Additionally, the other covered agreements of the WTO incorporate the MFN clause as a foundational element.⁷ When the Marrakesh Agreement went into effect on January 1, 1995, most of the 123 participating countries in the Uruguay Round became original parties to the WTO.⁸

Even though the GATT had similar objectives as the WTO, its enforcement process was weak and inefficient.⁹ Still, before the GATT, the incentives for each country to reduce trade barriers for the greater global good, while possibly experiencing short-term losses in their domestic economy, were not enticing.¹⁰ And, if those countries were not experiencing any reciprocal detriment to their barriers, there was little, if any, incentive to stop trading at a preferential or solely domestic level.¹¹ Even after the WTO formed, there remained numerous preferential tariff treatments that violated the new agreement, resulting from years of tradition and historical relationships.¹²

One of the first dispute resolutions filed based on the MFN principle was *EC-Bananas*, originally arbitrated twice under the GATT regime.¹³ When it was filed in 1995 through the WTO dispute resolution process, it became known as *EC-Bananas III*. Ecuador and other Latin American and Caribbean countries with large banana exports filed a complaint against the European Communities (EC) for their favoritism in the Lomé Convention, which was a trade and aid agreement between the EC and certain African, Caribbean, and Pacific

6. Scott Vesel, *Clearing a Path Through a Tangled Jurisprudence: Most-Favored-Nation Clauses and Dispute Settlement Provisions in Bilateral Investment Treaties*, 32 YALE J. INT'L L. 125, 126 (2007).

7. *Principles of the trading system*, WTO, https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact2_e.htm (last visited Jan. 19, 2017) [<https://perma.cc/6HL3-U5VP>] (archived Jan. 19, 2017).

8. *Understanding the Basics: The Uruguay Round*, WTO, https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact5_e.htm (last visited Jan. 19, 2017) [<http://perma.cc/JWX6-2GCZ>] (archived Jan. 19, 2017); *WTO Members and Observers*, *supra* note 2.

9. Douglas Irwin, Petros Mavroidis & Alan Sykes, *The Genesis of the GATT*, in INTERNATIONAL TRADE LAW, *supra* note 1, at 86–87.

10. *See id.* (describing how the Great Depression pushed countries toward domestic protectionism to barrier their own economies from the financial problems of neighboring countries).

11. *See id.* (explaining that despite the multilateral trade efforts of the World Economic Conference in 1933, countries still clung to their “inward-looking antitrade economic policies”).

12. *See* Daniel Marinberg, Note, *GATT/WTO Waivers: “Exceptional Circumstances as Applied to the Lomé Waiver”*, 19 B.U. INT'L L.J. 129, 156 (2001) (explaining the dependency and former relationship between the ACP countries and the EC as a policy reason for preferential treatment).

13. *See id.* (explaining the history of the Bananas dispute).

(ACP) countries.¹⁴ Many of the ACP countries were former colonies to the United Kingdom, France, Belgium, and Portugal.¹⁵ Over twenty other countries were third parties in the proceeding.¹⁶ The Lomé Convention allowed for lower tariff rates on ACP country bananas, whereas non-ACP countries faced a much higher tariff for bananas upon importation into the EC.¹⁷ The Lomé Convention went through four iterations; the final version, Lomé IV, was signed in 1990 and had a ten-year expiration date.¹⁸

The WTO Appellate Body found in favor of Ecuador and the other non-ACP third party complainants in *EC-Bananas III*.¹⁹ However, the EC, later known as the European Union, continued to act preferentially toward post-colonial countries through certain tariff preferences, as seen in the 2004 Appellate Body decision *EC-Tariff Preferences*.²⁰ Additionally, the increase of Regional Trade Agreements (RTAs) and Bilateral Trade Agreements (BTAs) have afforded an easier regime for countries to disguise preferential treatment.²¹ Even though the European Union eventually complied with the *EC-Bananas III* findings through numerous Economic Partnership Agreements (EPAs), the EPAs have long time frames to achieve the goals of the agreement, with vast amounts of discretion afforded to the states party to the agreements.²² Thus, the European Union is not gradually decreasing its preferences toward post-colonized countries in an

14. Panel Report, European Communities—Regime for the Importation, Sale and Distribution of Bananas, Complaint by Ecuador, WTO Doc. WT/DS27/R/ECU (May 22, 1997).

15. *Id.*

16. Dispute Settlement, European Communities—Regime for the Importation, Sale, and Distribution of Bananas, WTO Doc. DS27 (settled Nov. 8, 2012), https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds27_e.htm [<https://perma.cc/7M5S-URFN>] (archived Jan. 19, 2017).

17. Matthew S. Dunne III, Note, *Redefining Power Orientation: A Reassessment of Jackson's Paradigm in Light of Asymmetries of Power, Negotiation, and Compliance in the GATT/WTO Dispute Settlement System*, 34 LAW & POL'Y INT'L BUS. 277, 300 (2002).

18. Marinberg, *supra* note 12, at 130.

19. Dunne, *supra* note 17, at 300–01.

20. See Kevin C. Kennedy, *The Generalized System of Preferences After Four Decades: Conditionally and the Shrinking Margin of Preferences*, 20 MICH. ST. U. COLL. L. INT'L L. REV. 521, 525–26 (2012) (analyzing the post-*Bananas* preferential treatment in the European Union).

21. See generally Cosmas Milton Obote Ochieng, *The EU-ACP Economic Partnership Agreements and the 'Development Question': Constraints and Opportunities Posed by Article XXIV and Special and Differential Treatment Provisions of the WTO*, 10 J. INT'L ECON. L. 363, 377–80 (2007) (explaining how the difference in interpreting *de jure* versus *de facto* special and differentiating treatment provisions in Article XXIV would change the FTA).

22. See EUROPEAN COMMISSION, OVERVIEW OF ECONOMIC PARTNERSHIP AGREEMENTS (2017), http://trade.ec.europa.eu/doclib/docs/2009/september/tradoc_144912.pdf [<https://perma.cc/YF67-RVKX>] (archived Jan. 19, 2017) (stating the negotiating directives for most EPAs started eight to ten years ago).

efficient manner. When those agreements expire, as many of them have ten-year deadlines, the post-colonial countries will experience severe negative economic effects with the severance of EU preferential treatment.²³ Thus, it is unlikely that complete elimination of EU preferential treatment will occur. Additionally, even though any WTO member state may file a complaint against the European Union for violating WTO trade provisions, those third-party member states that are negatively affected as a result of the preferential trade treatment might not have an incentive to do so, as the European Union is both politically and economically influential on the global stage.²⁴

The WTO must take a stronger stand in its role pushing for liberalized international trade. There must be a better monitoring system for a lack of true compliance with a regulatory component that allows the WTO to be proactive. If third parties are not incentivized to complain against a larger, more powerful country or entity, there must still be measures taken to rid the global system of discriminatory trade preferences and to increase global wealth. Additionally, there must be improved transparency in the organization to allow for better oversight by the member states.

This Note argues that, through the use of Article XXIV of the GATT, as well as the adopted Enabling Clause, the European Union is creating agreements, free of trade-barriers, which results in virtually the same entity that was found to be in violation of the MFN clause in the *EC-Bananas* cases. And, even though preferential trade barriers are valid under GATT Article XXIV, the European Union is hiding behind the illusions of non-economic trade benefits, such as increased stability and health concerns, in its EPAs with ACP countries. Additionally, these ACP countries do not experience near as great an increase in trade, as do the European countries. Evidence suggests that some of the regional partnership agreements have even debilitated some ACP countries in their political and economic stances.

Part II of this Note will focus on both the background and structure of the WTO and the historical relationship between the European countries and the former-colonial ACP countries. It will establish the framework of the WTO dispute resolution system, with its advantages and strong disadvantages, such as easy incentives for countries to not comply with GATT or WTO decisions. Additionally, it

23. See *Countries and regions: Africa, Caribbean, Pacific*, EUROPEAN COMMISSION, <http://ec.europa.eu/trade/policy/countries-and-regions/regions/africa-caribbean-pacific/> [<https://perma.cc/YVK7-3CEF>] (archived Jan. 19, 2017) [hereinafter *Countries and regions*].

24. See Ruth Grant & Robert Keohane, *Accountability and Abuses of Power in World Politics*, in *INTERNATIONAL TRADE LAW*, *supra* note 1, at 115, 116 (stating the different aspects of accountability that nation-states must retain in being member to the WTO, including the WTO's required reciprocal accountability among nation-states).

will provide evidence of the WTO's foundation on the MFN clause. It will cover the modern timeline following the historical relationship between the EU and ACP countries by explaining the Treaty of Rome (during colonial rule), the Yaoundé Conventions, the Lomé Conventions, the Cotonou Agreement, and the current EPAs between the European Union and different ACP regions.

Part III of this Note will criticize the current EPAs and show similarities between the status of the EPAs today and the Lomé Convention IV that was found in violation of the GATT MFN provision. Additionally, it will explain that even though the Preferential Trade Agreement (PTA) clause in GATT Article XXIV allows for preferential treatment of trade, the EPAs, as they stand, are not consistent with the ideals and foundation of the WTO. Part IV will cover the need for PTAs to incorporate more MFN principles, which is needed for the self-sufficiency of the ACP states, as well as for the good of the global economy.

As the number of PTAs increases, especially PTAs between developed and developing countries, the gap between the world's rich and the world's poor will continue to grow until those developing countries become completely dependent on their relationships with the developed countries. Many of the same countries that were previously colonized by European countries have once again begun losing their economic independence. Therefore, in order to achieve one of the primary goals of the WTO—equality among countries with respect to trade—the WTO must enforce the MFN clause above all other provisions, including Article XXIV, and prohibit the European Union's continuance of "colonial" preferences.

II. BACKGROUND

A. *The WTO*

1. Foundation on Non-Discrimination

The WTO has a foundational desire to uphold the MFN clause in Article I. The MFN clause has been essential to international trade for hundreds of years.²⁵ The WTO aims to incorporate two principles of nondiscrimination.²⁶ First, under GATT Article I, which contains the MFN clause, all contracting parties must be afforded the same treatment as all the other contracting parties. Second, under the GATT

25. See JOHN H. JACKSON, *THE WORLD TRADING SYSTEM* 157, 158 (1997) (explaining that the concept of the MFN obligation has been used since before the Middle Ages, but the phrase can be traced back to the seventeenth century).

26. See *id.* (commenting on the appropriate characteristic of equating MFN with the "concept of multilateralism").

Article III national treatment clause, foreign and domestic goods must be treated the same.²⁷ Thus, all goods from countries in a particular agreement must be treated the same as the goods from any other country, including any domestic country's treatment of its own domestic goods.²⁸

The MFN clause has important policy rationales. On the economic front, an MFN clause helps minimize distortions in the market.²⁹ Additionally, it helps liberalize trade, minimize transaction costs, and increase adherence to the rules via the large participation rate of countries party to the WTO.³⁰ On the non-economic side, the MFN clause also decreases the amount of country-to-country discrimination that can lead to unrest and disputes between countries that feel excluded from certain deals.³¹ Therefore, the MFN clause does not simply liberalize and increase trade; it promotes international peace.

GATT Article I is an unconditional MFN clause: if one member country provides a concession to any other country, it must provide that concession to all the parties to the WTO.³² Comparatively, conditional MFN clauses stipulate that if two countries make concessions to each other, a third country must provide the same or equivalent concessions in order to get the same benefit of the other countries' concessions.³³ Unconditional MFN clauses are beneficial to small countries that are party to the treaty because the clause

27. See *id.* at 213–16. The “national treatment obligation” under GATT Article III is another major nondiscriminatory aspect of the WTO. The national treatment obligation requires that a country not discriminate against foreign goods. A country can either violate Article III on its face, via de jure discrimination, or it can discriminate implicitly, via de facto discrimination. Thus, even if the discrimination by a country is not apparent through its laws explicitly, the country may still participate in discrimination in violation of the GATT through its actions.

28. See *id.* at 160–61 (stating that MFN treatment is “an obligation to treat activities of a particular foreign country or its citizens at least as favorably as it treats the activities of any other country”).

29. See *id.* at 159 (describing the positive efficient effects in a global market if trade is liberalized uniformly).

30. See *id.* (explaining the benefits of generalizing liberalized trade policies).

31. See *id.* (commenting on the political benefits of MFN treatment).

32. See William Davey & Joost Pauwelyn, *MFN-Unconditionality: A Legal Analysis of the Concept in View of Its Evolution in the GATT/WTO Jurisprudence*, in *INTERNATIONAL TRADE LAW*, *supra* note 1, at 305, 305 (providing an unconditional MFN treatment example that explains “if State A has an MFN obligation in favor of State B, then any advantage of the type covered by the obligation that State A grants to State C must also be afforded by State A to State B”).

33. See *id.* at 305–06 (continuing the examples using States A, B, and C, but rather than granting the advantages to State B unconditionally, State A is only obligated to provide advantages if State B grants the same concessions as State C).

automatically multilateralizes all of the large countries' concessions.³⁴ Furthermore, unconditional MFN clauses encourage efficiency in world trade and discourage discriminatory trade barriers.³⁵

Disadvantages also arise from unconditional MFN clauses. For example, there are many free-riding problems: If country A removes trade barriers due to its relationship with country B, country C will also receive the benefits of country A's trade barrier elimination without sacrificing anything.³⁶ Additionally, countries no longer have the advantage of relying on former, historical trade relationships.³⁷ Lastly, the WTO has allowed developing countries to drop their tariffs at slower rates compared to developed countries, so developing countries experience slower tariff decreases.³⁸

The MFN clause covers the entirety of the GATT, as seen in the Preamble to the Marrakesh Agreement and the other WTO agreements, as the WTO's objective is for countries to enter into "reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade and to the elimination of discriminatory treatment in international trade relations."³⁹ The GATT Article I MFN standard holds that a country must immediately and unconditionally extend any advantage that it accords to any product in any country to *all* other WTO countries.⁴⁰ Therefore, transaction and compliance costs can be very high because if a country is making any concession, it must make that concession

34. See *id.* at 306 (explaining that small countries can obtain the advantages of unconditional MFN treatment without having to provide economic concession themselves).

35. See *id.* (stating that "a country's imports will be supplied by the most efficient international supplier" when in an unconditional MFN treatment scenario and that unconditional MFN treatment is a "constraint on the ability of special interests to obtain discriminatory trade measures").

36. See *id.* at 305–07 (explaining that free-riding is a problem because countries that free-ride might make fewer liberalizing concessions, as they already gain a benefit without a cost, and countries that currently make concessions may stop due to the lack of any reciprocal advantage).

37. See *id.* at 307 (elucidating on the issue of "critical mass" and how many major trading countries will only employ unconditional MFN clauses if other countries commit to liberalization; if not, they will continue to trade in small groups of countries that provide liberalized trade reciprocity on a conditional MFN basis).

38. See Nsongurua J. Udombana, *Back to Basics: the ACP-EU Cotonou Trade Agreement and Challenges for the African Union*, 40 TEX. INT'L L.J. 59, 70 (2004) (describing the eight-year interim period for the developing countries that continue to receive preferential access of goods); see also *Special and differential treatment provisions*, WTO https://www.wto.org/english/tratop_e/devel_e/dev_special_differential_provisions_e.htm [<https://perma.cc/M7ZG-WBZQ>] (archived Jan 19, 2017) (explaining how countries that are provided special and differential treatment status are allotted special provisions, including longer time periods for agreement implementation).

39. Marrakesh Agreement, *supra* note 4.

40. Davey & Pauwelyn, *supra* note 32, at 306.

available to all countries member to the WTO, thus losing any premium it might have otherwise received.⁴¹

There are multiple exceptions to the MFN clause in Article I, and about 25 percent of trade is through discriminatory practices exempt from the MFN clause.⁴² Countries can participate in waivers that allow departures from MFN compliance, but this has become less frequently used.⁴³ Also, GATT Article XX holds a list of exceptions to the MFN clause: Countries need not participate in trade that hinders human and animal health, public morals, and other enumerated exceptions. Notably, the formation of customs unions (CUs) and free trade agreements (FTAs), otherwise known as PTAs, are allowed under GATT Article XXIV as an exception to the MFN clause.

2. GATT Article XXIV: Allowance of PTAs

During the Uruguay Round, the negotiating members thought that trade liberalization and creation would be furthered if PTAs were allowed.⁴⁴ PTAs include both CUs and FTAs, and these PTAs have several restrictions. First, duties and internal barriers to trade are eliminated on substantially all trade to members of CUs and FTAs.⁴⁵ Under FTAs, external barriers for any good may not increase.⁴⁶ Whereas under CUs, external barriers, as a whole, may not be higher; therefore, there is more flexibility under a CU to change the trade barriers to certain goods, so long as the amount of trade barriers, as a whole, is consistent.⁴⁷ Also, many countries negate the benefits of worldwide comparative advantage available in the WTO/trade liberalization sphere by joining an FTA.⁴⁸ Furthermore, if FTAs fall apart, those countries that have invested to attain a comparative

41. *See id.*

42. JACKSON, *supra* note 25, at 163 (explaining the diversity of trade exceptions).

43. *See id.* at 164 (citing the United States-Canada Automotive Products Agreement and the United States preferences granted to certain countries in the Caribbean as examples).

44. *See id.* at 166 (describing the requirements of the GATT for establishing CUs and FTAs).

45. Grant & Keohane, *supra* note 24, at 332–33 (quoting Soamiely Andriamananjara, *Custom Unions*, in THE WORLD BANK, PREFERENTIAL TRADE AGREEMENT POLICIES FOR DEVELOPMENT 111 (Jean-Pierre Chauffour & Jean-Christophe Maur eds., 2011) (“A custom union (CU) is a form of trade agreement under which certain countries preferentially grant tariff-free market access to each other’s imports and agree to apply a common set of external tariffs to imports from the rest of the world.”).

46. *See id.* at 333 (explaining that the formation of an FTA must not result in additional duties).

47. *See id.* (stating that CUs must not have higher duties “on the whole”).

48. *See id.* at 334 (discussing that some find the rise in the number of PTAs has created a “least-favored-nation treatment”).

advantage in an insular RTA situation may then be disadvantaged in the world market.⁴⁹ The impact of this disadvantage can be softened with the allowance of “interim agreements,” which gradually allow developing countries to assimilate into the WTO.⁵⁰ Between the two PTAs, “FTAs are easier to create. . . whereas CUs require the negotiation of a common external tariff and coordination of all future trade policy changes.”⁵¹

PTAs are seen as advantageous for those involved because, by removing trade barriers, trade increases among the member parties.⁵² PTAs can increase trade by placing multiple private firms in the same regional marketplace where companies can have exposure to markets they previously had not penetrated.⁵³ Increased competition among private firms will then ensue, which allows for the benefits of increased competition, such as decreased prices, to become available for the consumers in the free trade area.⁵⁴ There are numerous factors that entice two or more countries to establish a PTA: the geographical distance between the countries, “the greater the remoteness from the rest of the world,” and the difference between their specialized industries.⁵⁵ For these reasons, many PTAs are also referred to as RTAs, but an RTA is not necessarily an agreement between regionally proximate countries.

PTAs can be seen as beneficial in the greater world market because many times they increase the wealth of the countries that are members to PTAs, which, in turn, increases the amount of worldwide wealth.⁵⁶ PTAs can lead to an increase in global free trade, due to simpler, unencumbered trade transactions.⁵⁷ Additionally, there are political advantages to being a member of a PTA. Members that are party to a PTA typically do not wish to cause political waves with other members of the PTA, as there are considerable economic impacts to

49. *See id.* at 335 (explaining the “deep integration” of many PTAs, where the agreements cover not only trade, but also “services, capital flows, standards, intellectual property, regulatory systems, . . . and commitments on labor and environmental issues”)

50. *Id.* at 334.

51. L. Alan Winters, *Preferential Trading Agreements: Friend or Foe?*, in *PREFERENTIAL TRADE AGREEMENTS: A LAW AND ECONOMIC ANALYSIS* 7, 11 (Kyle W. Bagwell & Petros C. Mavroidis eds., 2011).

52. *See id.* at 8 (explaining the effects of removing trade barriers with countries party to the PTA, while continuing trade barriers with countries not party to the PTA).

53. *See id.* at 9 (commenting on how some view PTAs to be “endogenous” as a catalyst, which increases trade amongst the parties member to a PTA).

54. *See id.*

55. *Id.* at 10.

56. *See generally id.* at 20 (stating that “creating a PTA often entails improving members’ terms of trade vis-à-vis the rest of the world,” and that a PTA could essentially increase the welfare of a country more so than could a multilateral option).

57. *See id.* at 25 (commenting that PTAs can lead to “coordinated coalitions” where countries in a bloc have “greater negotiating power than their members individually” while also allowing for fewer “players” on the global playing field).

rash political decisions.⁵⁸ Political integration can also occur, leading to regional peace. PTAs may include factors that are not governed by the WTO, such as financial investment.⁵⁹

Although there are numerous benefits in being member to a PTA, there are also many drawbacks for nonmembers. For example, PTAs and RTAs lead to trade diversion, PTAs hinder multilateral tariff reductions, and new trade barriers are created or formerly established trade barriers are increased for non-WTO states.⁶⁰

Trade diversion occurs when a country negates global comparative advantage and instead trades with the country in its PTA.⁶¹ Potentially, a dynamic effect could occur because the country from which trade is being diverted may no longer have a comparative advantage. In other words, PTAs can easily affect third-party states not member to the PTA. The converse of trade diversion is trade creation, which “occurs when the reduction of internal barriers leads private persons to import from a supplier that is a lower cost producer than domestic producers” and is thus the basis of completely liberalized free trade.⁶² Also, on a psychological level, the trade creation instances tend to overshadow the trade diversion effects, so the public believes the PTAs are more beneficial than in actuality.⁶³

PTAs hinder multilateral tariff reductions because the countries in PTAs primarily interact with one another, thereby somewhat ignoring the MFN aspect of the WTO.⁶⁴ So PTAs tend to constrict, rather than expand, trade on a global level by reducing the welfare of PTA nonmembers. Under the WTO, Article XXIV states that FTAs cannot increase trade barriers externally.⁶⁵ But, if a country enters into PTAs with other WTO member states, in order to make up for the concessions given to establish the PTAs, the state may raise its tariff

58. See *id.* at 21 (analogizing the amiability between France and Germany during the talks to the EC states).

59. See Joel Trachtman, *International Trade: Regionalism*, in INTERNATIONAL TRADE LAW, *supra* note 1, at 346, 347 (discussing the aspect of the “WTO plus,” where FTAs include additional provisions and obligations involving trade that go beyond those required by the WTO).

60. See Caroline Freund, *Third-Country Effects of Regional Trade Agreements*, in PREFERENTIAL TRADE AGREEMENTS: A LAW AND ECONOMIC ANALYSIS, *supra* note 51, at 40.

61. See Trachtman, *supra* note 59, at 347 (stating trade diversion “occurs when the reduction of internal barriers leads private persons to import from a supplier that is a lower cost producer than domestic producers”).

62. *Id.*

63. See *generally id.* (explaining the public’s reaction to NAFTA).

64. See *id.* at 350 (quoting Bhagwati’s suggestion that many times PTAs create trade diversion, which should be more strictly analyzed by GATT Article XXIV).

65. See General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194 [hereinafter GATT] (stating that the creation of an FTA does not allow the countries member to the FTA to have duties that are higher or more restrictive than they were before the formation of the FTA),

barriers on non-WTO nation-states, which subsequently decreases global wealth.

3. The Waiver System Allowance in the GATT

In order to be exempt from certain GATT obligations, two or more states can request a waiver under “exceptional circumstances.”⁶⁶ Although not defined in the treaty, “exceptional circumstances” was defined in waiver requests by Belgium and Luxembourg in the 1950s.⁶⁷ Elements that must be established to conclude “exceptional circumstances” include: (1) the continuous use of restrictions, (2) the immediate removal would result in serious injury, (3) the absence of alternative measures, and (4) the removal has been contemplated and analyzed by the parties involved.⁶⁸ The Ministerial Conference, which is the highest “decision-making body of the WTO” has the capability to grant or deny the waivers.⁶⁹ However, the waiver process became more lax, and thus waivers became more prevalent when countries strove to comply with the Harmonized System where countries were required to begin scheduling their tariff rates to standardize and classify traded goods.⁷⁰ In more recent Ministerial Conference decisions, the recognition of the historical background and the nature of the relationship between parties has been prevalent in deciding whether or not to grant waivers.⁷¹ Additionally, the Ministerial Conference will consider political circumstances and economic aid when determining whether to grant a waiver.⁷² Despite these various obstacles, as of

66. Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Apr. 15, 1994, Legal Instruments-Results of the Uruguay Round Vol. 1 (1994), art. IX.

67. Marinberg, *supra* note 12, at 140.

68. *Id.*

69.

Ministerial Conferences, WTO, https://www.wto.org/english/thewto_e/glossary_e/ministerial_conference_e.htm (last visited Jan. 10, 2017) [<https://perma.cc/2AA7-BQJH>] (archived Jan. 22, 2017).

70. See Marinberg, *supra* note 12, at 145. Because the Harmonized System (HS) requires countries to schedule tariffs in a standardized way, many developing countries had to change their original systems to match the HS. However, the WTO granted waivers to numerous countries that only stated they “were in the process of implementing the HS and needed time to achieve full conformity,” without including any additional exceptional circumstance. The HS is “[a]n international nomenclature developed by the World Customs Organization, which is arranged in six-digit codes allowing all participating countries to classify traded goods on a common basis.” *Glossary Term: Harmonized System*, WTO, https://www.wto.org/english/thewto_e/glossary_e/harmonized_system_e.htm (last visited Jan. 10, 2017) [<https://perma.cc/CU3F-D6QC>] (archived Jan. 22, 2017).

71. See Marinberg, *supra* note 12, at 150 (citing the WTO decision between the Trust Territory of the Pacific Islands [TTPI] and the US).

72. See *id.* (analyzing the waiver requests from France and the EC to permit preferential trading with Morocco).

2001, no waiver application had ever been denied.⁷³ However, the requests have typically included the same basic criteria, which involve a showing of harmonized tariff measures, historical trade affiliations between countries in a symbiotic dependent relationship, “policy objectives,” and similar industries located in the countries.⁷⁴

4. Generalized System of Preferences

“Tariff bindings, the prohibition on non-tariff barriers, the MFN provisions, and the national treatment obligations, along with the exceptions to those rules, generally apply to developing and developed countries alike.”⁷⁵ However, some provisions in the GATT allow special and differential treatment to countries that are considered “developing,” which is meant to increase their citizens’ quality of life and their countries’ economic situations.⁷⁶ The six categories of special and differential treatment include: (1) “increasing trade opportunities through market access,” (2) requirements of “WTO members to safeguard the interest of developing countries,” (3) flexible rules for developing countries, (4) longer transitional periods, (5) technical aid, and (6) issues concerning least developed countries (LDCs).⁷⁷

The “Generalized System of Preferences” (GSP) was adopted by the GATT in 1971, and was subsequently incorporated into the WTO through the Marrakesh Agreement.⁷⁸ The GSP allows the MFN provisions to be waived so developing countries can benefit from “preferential tariff treatment to products originating in developing countries.”⁷⁹ Specifically, developed countries extend these GSP waivers to developing countries. Although the GSP provision was originally scheduled to expire after ten years, the GATT contracting parties adopted the “Enabling Clause,” which extended the GSP provision indefinitely.⁸⁰ So, even in PTAs subject to Article XXIV restrictions, developing countries can be afforded “special and differential treatment” under the GSP.⁸¹

73. See *id.* at 152 (discussing the WTO exceptional circumstance requirement to obtain a waiver).

74. *Id.* at 153.

75. Grant & Keohane, *supra* note 24 at 675.

76. See *id.* (listing the six provisions).

77. *Id.* at 676–78.

78. *Id.* at 680.

79. Generalized System of Preferences, Decision of the Contracting Parties, L/3545 (June 25, 1971).

80. Grant & Keohane, *supra* note 24, at 680.

81. Joanne Gowa & Raymond Hicks, *The most-favored nation rule in principle and practice: Discrimination in the GATT*, 7 REV. INT’L ORG. 247, 252 (2012).

5. The WTO Dispute Resolution System

The formation of the WTO not only called for a more stringent regime that focused on liberalizing trade for the global benefit, but it also created a stricter dispute resolution process in Annex 2 of the Marrakesh Agreement entitled *The Understanding on Rules and Procedures Governing the Settlement of Disputes* (DSU).⁸² This annex created a judicial mechanism that allowed for automatic adoption of reports and the creation of an appellate body, both of which were unavailable during the GATT era. The formation of a dispute resolution system at an international level created something that international law had been trying to do via *ad hoc* international customary law for decades since WWII.⁸³ The dispute system created a compulsory jurisdiction that, for an international organization, experiences high country participation and high compliance rates.⁸⁴ The DSU has been seen as the WTO's "crown jewel" because of this near impossible task of creating a system with high compliance.⁸⁵ Importantly, the decisions by the panel and the appellate body are not precedential.⁸⁶ The decisions are based on more of a civil law system than the principle of *stare decisis*, but many times the outcomes influence how member states act with similar, future trade issues. Nevertheless, the lack of *stare decisis* can create a divergence of legal outcomes in the WTO DSU.⁸⁷

Even though there is a higher rate of compliance among member states to the WTO than there was during the GATT, countries can be

82. See William Davey, *The WTO Dispute Settlement Mechanism GATT in, INTERNATIONAL TRADE LAW*, *supra* note 1, at 128, 130 (explaining the purpose of the DSU).

83. See generally C. O'Neal Taylor, *The Limits of Economic Power: Section 301 and the World Trade Organization Dispute Settlement System*, 30 VAND. J. TRANSNAT'L L. 209, 211–12 (1997) (explaining the creation of the GATT dispute settlement system).

84. See Joost Pauwelyn, *The Transformation of World Trade*, 104 MICH. L. REV. 1, 4–5 (2005) (observing the creation of law generates increased political participation in the GATT and WTO settings).

85. Edward Lee, *Measuring TRIPS Compliance and Defiance: The WTO Compliance Scorecard*, 18 J. INTELL. PROP. L. 401, 403 (2011).

86. See Edward Hayes, *World Trade Organization Intellectual Property Dispute Settlement*, 55 LA. B.J. 274, 276 (2008) (stating that the "WTO dispute-settlement panel (and Appellate Body) rulings apply only to the parties in the case and have no *stare decisis* or precedential effect on other cases"). A WTO Panel is the "first instance" of dispute adjudication at the WTO; if a dispute is not resolved at the Panel stage, it moves to the Appellate Body, which is the final stage of the Dispute Settlement Body of the WTO. *WTO Bodies Involved in the Dispute Settlement Process*, WTO, https://www.wto.org/english/tratop_e/dispu_e/dispu_settlement_cbt_e/c3s4p1_e.htm (last visited Jan. 8, 2016) [<https://perma.cc/M8CG-VGZC>] (archived Jan. 22, 2017).

87. See Alex Canizares, *Is Charming Betsy Losing Her Charm?: Interpreting U.S. Statutes Consistently with International Trade Agreements and the Chevron Doctrine*, 20 EMORY INT'L L. REV. 591, 630 (2006) (stating the "limited precedential value" of WTO dispute resolution decisions).

incentivized to not comply with either WTO regulations or WTO dispute resolution decisions. A country may be incentivized to act in a way similar to the efficient breach remedy in contracts, where countries essentially buy their way out of compliance.⁸⁸ Rather than comply with the dispute resolution decision or the regulation, it might be more advantageous, either economically or politically, to continue violating the GATT and suffer countervailing duties or countermeasures by the offended party.⁸⁹ When a country continues to violate the GATT, it can free up the market share for domestic producers. Additionally, the WTO dispute resolution system does not provide punitive damages as a remedy, and there are no damages for past harms, as decisions are only prospective in nature; therefore, there are even fewer incentives for the offending country to comply with the GATT.⁹⁰

Remedies come in the form of withdrawn concessions. The system for withdrawing concessions differs from what is normally thought of in terms of remedies and is vastly different than in the traditional U.S. court system. First, retaliation is entirely prospective.⁹¹ There is no obligation to comply with a dispute resolution body's recommendation until the deadline to do so expires.⁹² Second, the withdrawn concessions are based not on the economic harm, but simply on the prospective loss of trade, which is typically a smaller amount.⁹³ These withdrawals of concessions are supposed to offset violations with the hope that a country will comply, but, because these measures are not

88. See Warren Schwartz & Alan Sykes, *The Economic Structure of Renegotiation and Dispute Settlement in the World Trade Organization*, in INTERNATIONAL TRADE LAW, *supra* note 1, at 158, 158 (explaining the effect of an efficient breach in a trade agreement context).

89. See *id.* A countervailing duty is a tariff imposed if a country finds another country is providing "subsidized imports," which injures trade of a domestic product. *Subsidies and countervailing measures*, WTO, https://www.wto.org/english/tratop_e/scm_e/scm_e.htm (last visited Jan. 8, 2016) [<https://perma.cc/CC9U-ZWBR>] (archived Jan. 22, 2017). Countermeasures are trade sanctions made by one country against another by that country's failure to comply with a DSU decision and must be permitted by the Dispute Settlement Body. *The process – Stages in a typical WTO dispute settlement case*, WTO, https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c6s10p1_e.htm (last visited Jan. 8, 2016) [<https://perma.cc/6UZL-UX4G>] (archived Jan. 22, 2017).

90. See Schwartz & Sykes, *supra* note 88, at 158 (commenting that the lack of punitive sanctions "allows violations to persist as long as the violator is willing to pay that price, which is the essence of a liability rule approach").

91. See Grant & Keohane, *supra* note 24, at 161–62 (explaining DSU Article 23 "Strengthening of the Multilateral System").

92. See *id.* at 136 (explaining the surveillance of implementation of the dispute settlement by the offending member state to the Dispute Settlement Body).

93. See *id.* at 151–52 (using the *EC-Hormone Beef* arbitration as an example to show the concept of the prospective loss of trade).

punitive, many countries are tempted to participate in an “efficient breach” and face retaliation.⁹⁴

B. *Historical Relationship between Europe and the ACP Countries*

Modern history has shown a continuous, although sometimes tenuous, relationship between European countries and many of the ACP countries. These historical relationships have led to many preferential treaties and trade agreements between the Global North European Union and Global South ACP countries.

1. Treaty of Rome

In 1957, the European Economic Community (EEC) member states of Belgium, France, West Germany, Italy, Luxembourg, and the Netherlands signed the Treaty of Rome.⁹⁵ Annex IV of the treaty induced member states to incorporate closer trade relationships with non-EEC countries that previously held “special relationships,” primarily former colonized relationships, with Belgium, France, Italy, and the Netherlands.⁹⁶ The EEC strived for internal free trade among its member states, and, in practice, the countries had limited market access to many of the enumerated countries.⁹⁷ Countries with little market access became disadvantaged by an “EEC Common External Tariff.”⁹⁸ Thus, the same goods offered to the territories in Annex IV had little to no tariffs placed upon them, whereas those countries that were not on the list had high tariffs on their goods. In 1958, fifteen GATT member countries formed a Working Party and analyzed Part IV of the EEC Treaty, looking to whether it was consistent with Article XXIV of the GATT.⁹⁹ The reviewing party established that the duties *were* eliminated on substantially all trade between parties (a

94. See Schwartz & Sykes, *supra* note 88 (discussing the temptation to perform an efficient breach due to the lack of punitive sanctions).

95. See *Treaty of Rome: Europe [1957]*, in ENCYC. BRITANNICA, <http://www.britannica.com/event/Treaty-of-Rome> (last visited Jan. 19, 2017) [<https://perma.cc/HLR3-B29T>] (archived Jan. 22, 2017) (covering a brief overview of the Treaty of Rome).

96. Lorand Bartels, *The Trade and Development Policy of the European Union*, 18 EUR. J. INT'L L., 715, 720 (2007). The countries listed in Annex IV of the Treaty of Rome were colonies or territories of the member states of the EEC.

97. See *id.* at 721–22 (explaining the details of the Treaty of Rome).

98. *Id.* at 721 (establishing that non-member states such as Brazil, Columbia, and Uganda were disadvantaged in the sale of coffee and cocoa, and Ecuador, Honduras, and Costa Rica were disadvantaged in their sale of bananas).

99. See *id.* at 728–29 (commenting on the criticisms of the Working Party).

requirement of a PTA), and there was no violation of GATT Article 1:2.¹⁰⁰

2. Yaoundé Conventions

Many of the territories and colonies that had been enumerated in Annex IV of the Treaty of Rome declared their independence soon after the signing of the treaty.¹⁰¹ As the countries were no longer territories of the EEC member states, the Yaoundé Conventions were created to, more or less, establish a similar relationship that had been afforded to all territories under the Treaty of Rome.¹⁰² The Yaoundé Convention was signed in 1963, and the Yaoundé II Convention was signed six years later.¹⁰³ Both conventions attempted to reduce, if not abolish, all trade restrictions among the signatories.¹⁰⁴ Additionally, bilateral reciprocity was a main goal of the Yaoundé Conventions.¹⁰⁵ When one country granted concessions to another member state, that state would be afforded the same concessions granted by them.¹⁰⁶ As trade was diverted from non-associated countries to those associated with the Yaoundé Conventions, the trade concessions did not necessarily aid the formerly colonized countries, as “EEC imports declined from 5.6 percent to 4.2 percent.”¹⁰⁷ When the United Kingdom began participating in the EEC trade regime, the EEC eventually expanded its membership during the Lomé Convention to include former British colonies from Africa and the Caribbean in 1975.¹⁰⁸

100. See *id.* at 729 (concluding that the criticisms were either irrelevant or inconsequential due to the “insubstantial amount of trade”).

101. See *id.* at 722 (mentioning the dates of independence for Guinea, Senegal, and Mali in the late 1950’s).

102. See *id.* (explaining that the Yaoundé Conventions reflected the new status of the recently independent countries).

103. See *id.* (covering the timeline of the Yaoundé Conventions).

104. See *id.* at 724 (explaining the importance of the reciprocal nature of the agreements).

105. See generally Patricia Michelle Lenaghan, *Trade Negotiations or Trade Capitulations: An African Experience*, 17 BERKELEY LA RAZA L.J. 117, 129 (2006) (stating the bilateral reciprocity was created in the agreements due to the newfound independence of many of the previously colonized countries).

106. See generally Bartels, *supra* note 96, at 724 (“[I]t benefits the country granting the trade concessions, and it additionally gives this country a means of extracting trade concessions from the other party (which should of course be granting concessions in its own interest).”).

107. *Id.* at 727.

108. See *id.* at 727–33 (commenting on the transition from the Yaoundé Convention to the Arusha Convention as less-developed countries began to establish a greater role in the public eye. After the brief, and somewhat uneventful Arusha Convention, the United Kingdom joined the EEC in 1973 and the Lomé Convention began shortly thereafter).

3. Lomé Conventions

The Lomé Convention became “the largest, the most comprehensive, and the most enduring North-South multilateral accords in the world to date.”¹⁰⁹ The first Lomé agreement was signed in 1975 by forty-six ACP and nine European countries.¹¹⁰ To compare, only nineteen non-European countries were members to the Yaoundé Convention.¹¹¹ Twenty-one former British colonies or countries with strong ties to the United Kingdom, and six other African countries, joined those nineteen countries that were party to the Yaoundé Convention during the Lomé Convention.¹¹² There were four iterations of the Lomé Convention (I-IV), from 1975 to 2000. The Lomé Convention IV, the last iteration, had sixty-eight ACP and twelve EC signatories.¹¹³ Each Convention lasted five years, and each subsequent convention added more ACP countries to the agreement. The Lomé Convention had four main characteristics: “the non-reciprocal preferences for most exports from ACP countries to EEC; equality between partners, respect for sovereignty, mutual interests and interdependence; the right of each state to determine its own policies; and security of relationships based on the achievements of the cooperation system.”¹¹⁴ The Lomé Convention allowed for duty-free access to the European states, sans quota restrictions.¹¹⁵

However, unlike the Yaoundé Conventions, the trade preferences were non-reciprocal.¹¹⁶ Additionally, certain ACP goods were traded with preferential access to European countries, such as sugar, rum, and, most notably, bananas.¹¹⁷ The trade preferences for sugar were based on past preferences agreements, including the 1951 Commonwealth Sugar Agreement, whereas the preferences for the

109. Udombana, *supra* note 38, at 64.

110. *See id.* at 65 (explaining the composition of the Lomé Conventions).

111. *See* Bartels, *supra* note 96, at 733 (commenting on the transition from Yaoundé II to the Lomé Convention).

112. *See id.* (explaining the addition of many Commonwealth countries and other African countries as the Lomé Convention covered significantly more countries than its predecessor).

113. *See* Udombana, *supra* note 38, at 66 (describing the differences of each iteration of the Lomé Convention).

114. *The Cotonou Agreement: From Lomé I to IV bis*, EC.EUROPA.EU, http://ec.europa.eu/development/body/cotonou/lome_history_en.htm (last visited Jan. 19, 2016) [<https://perma.cc/V6CU-PTRB>] (archived Jan. 22, 2017) [hereinafter *The Cotonou Agreement: From Lomé I to IV bis*].

115. *See* Lenaghan, *supra* note 105, at 130 (explaining the non-reciprocity allotted to “the ACP products entering the European market”).

116. *See id.* at 130–31.

117. *See id.* (explaining that the reason to have preferential access for certain food products was due to the already established presence in the export market, and there would be “guaranteed earnings” with the products for both the ACP and the European countries).

other enumerated goods were based on former trading relationships and practices.¹¹⁸

The *EC-Bananas* disputes arose during the Lomé Convention IV, and the GATT body found that “an arrangement providing for discriminatory non-reciprocal trade preferences, cannot be justified as an RTA under Article XXIV” of the GATT.¹¹⁹ Under *EC-Bananas I* and *II*, the parties needed to “at least facially review” the clauses of the agreement that had raised the dispute about the MFN violations.¹²⁰ However, these disputes’ decisions were under review prior to the establishment of the WTO, in 1993 and 1994 respectively, and they were never actually adopted as GATT panel decisions.¹²¹ Even though there was preferential treatment toward those parties member to the Lomé Convention, many of whom were post-colonial states, a waiver for the MFN clause was applied by and granted to the member states of the Convention.¹²²

Just as during the Yaoundé Conventions, the trade preferences in the Lomé Conventions did not have beneficial trade effects on the ACP countries. Rather, by 1998, ACP goods only made up 3 percent of the EEC market, compared to over 6 percent ten years prior,¹²³ and over half of the ACP exports were comprised of ten goods.¹²⁴ Even though the Lomé Conventions contributed to some humanitarian issues, such as access to drinking water, education resources, and health improvements in the developing ACP countries, the economic ramifications of the Conventions may also be attributed to the “social disintegration, mounting conflicts and humanitarian disasters” in some of the countries.¹²⁵ Additionally, more than half of the ACP countries party to the Lomé Conventions continued to hold LDC status,

118. See Bartels, *supra* note 96, at 734–35 (describing the importance of historical relationship and trade regarding these specific commodities).

119. *Id.* at 735–36 (citing GATT Panel Report, *EC – Bananas II*, DS38/R, circulated Feb. 11, 1994, unadopted).

120. James H. Mathis, *The “Legalization” of GATT Article XXIV – Can Foes Become Friends?*, in *PREFERENTIAL TRADE AGREEMENTS: A LAW AND ECONOMIC ANALYSIS*, *supra* note 51, at 31, 34.

121. See generally Marinberg, *supra* note 12, at 295–98 (documenting *Bananas I* and *Bananas II*, and how in both instances, the EC blocked the adoption of the panel report).

122. See Bartels, *supra* note 96, at 735 (discussing how the EC states were approved a waiver allowing for breach of Article I of the GATT, covering Lomé IV).

123. See *The Cotonou Agreement: From Lomé I to IV bis*, *supra* note 114 (explaining the green paper published by the European Commission in 1997).

124. See *id.* (indicating that only “a handful of nations register[ed] economic growth as a result of trade protocols and preferences,” which included Zimbabwe and the Ivory Coast).

125. *Id.*

even though many of the countries had been in the ACP-European relationship for over twenty-five years.¹²⁶

a. The Bananas Debacle

The Lomé Convention allowed the EC to detract from the MFN clause in the GATT.¹²⁷ The complainants in *EC-Bananas III* claimed that the ACP bananas agreements in the Lomé Convention, which granted preferential tariff rates for bananas to countries party to the Convention, violated three aspects of the GATT: (1) the tariff arrangements violated the GATT Article I MFN clause; (2) the banana agreements did not allow for “permissible quantitative restrictions,” violating GATT Article XIII; and (3) “the import licensing scheme violated the EC’s MFN and national treatment obligations” in GATT Article III.¹²⁸ However, even though the EC lost the arbitration in *EC-Bananas III*, they only superficially complied with the ruling; in other words, the PTA that started the entire dispute remained in place and unchanged.¹²⁹ In 1998, the complaining parties and the EC met to negotiate, but consultations failed to reach a “mutually satisfactory conclusion,” which led to *Bananas IV*.¹³⁰

b. Banana Enforcement

When a member allegedly fails to comply with a previous dispute resolution proceeding’s conclusion, a “21.5 proceeding,” also known as a “compliance panel proceeding,” is held to determine whether that party has, in fact, complied with the previous panel or appellate body’s decision.¹³¹ However, the WTO declined to initiate a compliance panel proceeding with *Bananas IV* because all complaining parties refused to cooperate and the EC failed to convey information showing compliance or lack thereof with the earlier appellate body’s decision.¹³² Instead, the WTO created another panel to arbitrate the situation, and the panel found in favor of almost all of Ecuador’s complaints.¹³³ For Ecuador to actually gain compliance from the EC, Ecuador asked for,

126. Udombana, *supra* note 38, at 67.

127. Dunne, *supra* note 17, at 298–99.

128. *Id.* at 300.

129. *Id.* at 302.

130. *Id.*

131. *Dispute Settlement System Training Module Chapter 6: The process – Stages in a typical WTO dispute settlement case*, WTO, https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c6s7p2_e.htm (last visited Jan. 29, 2017) [<https://perma.cc/X4T5-GHPU>] (archived Jan. 29, 2017).

132. Dunne, *supra* note 17, at 303.

133. *Id.* at 304.

and was allotted, sanctions against the EC in order to encourage compliance with the bananas measure.¹³⁴

Ecuador succeeding in its sanction implementation against the EC is a relatively unusual outcome; there has been a large problem regarding smaller, weaker countries imposing sanctions that were impactful enough to sway a more powerful country or group of countries into compliance.¹³⁵ The state, not the WTO, has the responsibility to file the original complaint and provide the evidence to the panel showing a country's violation.¹³⁶ Even when the complainant wins, many times the violating country will not comply, and the complainant can issue countermeasures against the violating nation.¹³⁷ However, it is often the case that the state cannot afford to impose sanctions or countermeasures against the more economically powerful nation.¹³⁸ Thus, in a cost-benefit analysis, sanctions would damage the economy of the weaker nation more than the potential benefits of the more powerful nation's compliance after such sanctions. Also, compliance is not a black and white adherence to a panel's decision.¹³⁹ "[T]he struggle is equal parts animosity and cooperation, for negotiation does not produce winners and losers."¹⁴⁰ The panel provides suggestions, giving both parties discretion to decide what compliance means to them.¹⁴¹

Because of this imbalance of power, less-empowered states have had more difficulty enforcing compliance by more-empowered states.¹⁴² However, in *EC-Bananas IV*, Ecuador was not only able to succeed in its case, it was also able to create "cross-sectoral retaliation" because it had leverage over the EC through sanctions and global perceived injustice. Cross-sectoral retaliation is provided when a country can "suspend concessions or obligations under another covered agreement or trade sector."¹⁴³ Also, in *EC-Bananas III* and *IV*, the WTO was able to finally issue a binding, legal decision, as opposed to the mere suggestions that had primarily been left unadopted under the GATT regime.¹⁴⁴ Social and political pressures incentivized the EC to

134. *Id.* at 305.

135. *Id.*

136. *Id.* at 315.

137. *Id.*; Grant & Keohane, *supra* note 24, at 427.

138. Dunne, *supra* note 17, at 315.

139. *Id.*

140. *Id.* at 316.

141. *Id.* at 315.

142. *Id.*

143. Andrew Bishop, *The Second Legal Revolution in International Trade Law: Ecuador Goes Ape in Banana Trade War with European Union*, 12 INT'L L. PERSP. 1, 20 (2001).

144. Dunne, *supra* note 17, at 317-18.

comply with the WTO decision.¹⁴⁵ The EC was one of the entities that spearheaded the transition from the GATT to the WTO; it would have been bad policy had they continued to act in oppressive fashion and ignore the need for a more modern international trading organization.¹⁴⁶

4. Cotonou Agreement

In striving for an updated framework for the new millennium, talks ensued in 1998, and the Cotonou Agreement was signed and adopted mid-2000 to succeed the Lomé Convention.¹⁴⁷ The Cotonou Agreement claimed it differed from past European-ACP agreements and relationships in that it was more reciprocal.¹⁴⁸ The agreement allowed for a procedural organization, complete with a Council of Ministers and a Committee of Ambassadors, as well as a dispute settlement provision for mediation, either at the Council of Ministers level or through arbitration.¹⁴⁹ The primary goal for the Cotonou Agreement was to fight poverty in the ACP countries and lead those countries to sustainable development.¹⁵⁰

The Cotonou Agreement was based on five main pillars: “a comprehensive political dimension, participatory approaches, a strengthened focus on poverty reduction, a new framework for economic and trade cooperation, and a reform of financial cooperation.”¹⁵¹ In terms of its trade provisions, it held a similar waiver that was granted for trade preferences in the Lomé Convention IV, and the Cotonou Agreement was set to expire at the end of 2007.¹⁵² Therefore, the non-reciprocal trading preferences continued into 2007. Additionally, the rum and sugar protocols continued in the same preference scheme; the bananas market continued basically unchanged with the weak provision insisting “that the EU shall ‘where necessary take measures aimed at ensuring the continued viability of their banana export industries and the continuing outlet for their bananas on the Community market.’”¹⁵³ The Cotonou Agreement was

145. *Id.* at 321.

146. *Id.*

147. Udombana, *supra* note 38, at 69 (establishing the timeframe from then end of the 90's until the Cotonou Agreement was signed).

148. *Id.* at 70.

149. *Id.* at 70–71.

150. *See id.* at 71 (citing the Cotonou Agreement art. 98(2)(c)).

151. *Id.*

152. Bartels, *supra* note 96, at 736.

153. *Id.*; Trade Regime Applicable During the Preparatory Period Referred to in Article 37(1), Protocol 5: The Second Banana Protocol, ACP/CE/Annex 5, http://ec.europa.eu/development/body/cotonou/pdf/agr03_en.pdf#zoom=100 (last visited Feb. 12, 2017) [<https://perma.cc/23Q9-B8CK>] (archived Feb. 12, 2017).

created to abide by the WTO trading protocols.¹⁵⁴ As the trade provisions of the Cotonou Agreement were set to expire in 2007, EPAs were to be created upon expiration.¹⁵⁵ Thus, when the EPAs were established, the non-reciprocity aspect of the Cotonou Agreement was supposed to revert to a reciprocal scheme.¹⁵⁶

5. EPAs

In September 2007, four months before the trade waiver for the Cotonou Agreement trade preferences was set to expire, there was little to no trade diversification of the ACP countries' exports into the European Union, as most ACP exports were agricultural goods.¹⁵⁷ Since the expiration of the trade provisions of the Cotonou Agreement, there have been seven ACP regions that have created EPAs with the European Union.¹⁵⁸ They include West Africa, Central Africa, Eastern and Southern Africa, the East African Community (EAC), the Southern African Development Community, the Caribbean, and the Pacific.¹⁵⁹ The EPAs originally had a gradual transition timeframe of twelve years.¹⁶⁰ The transition timeframe currently stands between fifteen and twenty-five years.¹⁶¹ The EPAs are allegedly based on reciprocity, regionalism, and special treatment to the LDCs.¹⁶² Because the non-reciprocity aspect of the Cotonou Agreement expired, the ACP countries must remove their import trade barriers after the transition timeframe expires.¹⁶³

Each EPA is "tailor-made' to suit specific regional circumstances."¹⁶⁴ The EPAs allow the EU market to be opened "fully

154. Udombana, *supra* note 38, at 81.

155. *Id.*

156. Lenaghan, *supra* note 105, at 134.

157. See Bartels, *supra* note 96, at 736–37 (laying out the breakdown of the imports in the European Union showing the proportion of preferential imports, many coming from ACP countries).

158. See *Countries and regions*, *supra* note 23 ("ACP EPA countries group themselves into seven regions.").

159. *Id.*

160. Lenaghan, *supra* note 105, at 134.

161. EUROPEAN COMMISSION, THE EU'S ECONOMIC PARTNERSHIP AGREEMENTS (EPAS) WITH COUNTRIES IN AFRICA, THE CARIBBEAN, AND THE PACIFIC (ACP), http://trade.ec.europa.eu/doclib/docs/2013/april/tradoc_151010.pdf [<https://perma.cc/XGU4-YAHU>] (archived Feb. 2, 2016).

162. Udombana, *supra* note 38, at 83.

163. See *id.* at 82 (showing the reciprocal nature of the trading regime needed between the ACP and EU countries).

164. *Economic partnerships: EU trade policy and ACP countries*, EUROPEAN COMMISSION, <http://ec.europa.eu/trade/policy/countries-and-regions/development/economic-partnerships/> (last visited Mar. 19, 2017) [<https://perma.cc/7VF4-CBDF>] (archived Feb. 2, 2017).

and immediately,” but permit gradual openings of ACP markets, depending on the sensitivity of each market.¹⁶⁵ But, because the EPAs currently mirror the Cotonou Agreement due to their non-reciprocity, the MFN component of the GATT is violated, even in light of Article XXIV.

III. GATT ARTICLE XXIV: EPAS VIOLATE THE MFN

A. Problems with the WTO's Governance of PTAs

PTAs are a major exception to the MFN clause of the WTO.¹⁶⁶ Proponents of the PTA and Enabling Clause state that they are reasonable because the difference between the preferential tariff and the MFN tariff, otherwise known as the preference margin, is small.¹⁶⁷ Proponents also claim PTAs are beneficial because of the other aspects that they “fix” outside of trade, like politics, services, and regulatory systems.¹⁶⁸

However, there are very strong disadvantages to the PTA structure in practice. In most contractual trade agreements, there is a strong negotiator and a weak negotiator. By negotiating bilaterally, the stronger party can use its economic bargaining power to gain an upper hand and have the better end of the deal.¹⁶⁹ Additionally, due to the admittance of China as a WTO member state in 2001, there are more economic heavyweights at the bargaining table, leaving developing countries with less say in negotiations.¹⁷⁰

Governments will always state that the PTA will be beneficial for their home countries, as protectionist viewpoints are characterized as increasing domestic production and domestic jobs, so agreements that have few states as parties are normally viewed in a positive light.¹⁷¹ However, from a global perspective, the prevailing view is that multilateral trade regimes are more beneficial than PTAs.¹⁷² Often, developing countries must choose between becoming a member of the WTO and entering into a PTA due to a lack of economic and

165. *Id.*

166. Grant & Keohane, *supra* note 45, at 332.

167. *See e.g., id.* at 335 (stating that “[l]ess than 2 percent of world trade...is eligible for preference margins above 10 percentage points”).

168. *Id.*

169. *See* Martin Jacques, *The Death of Doha Signals the Demise of Globalisation*, in *INTERNATIONAL TRADE LAW*, *supra* note 1, at 352 (explaining the economic power of the United States in its bilateral trade deals).

170. *Id.*

171. Meredith Kolsky Lewis, *The Prisoners' Dilemma and FTAs: Applying Game Theory to Trade Liberalization Strategy*, in 14 *CHALLENGES TO MULTILATERAL TRADE* 21, 23 (Ross Buckley et al. eds., 2008).

172. *Id.*

informational resources.¹⁷³ If a strong, developed country pressures a developing country to join a PTA, it is likely that country will use its minimal resources to join the PTA rather than an organization like the WTO.¹⁷⁴ Additionally, multilateral trade regimes may require human rights and environmental obligations that are less stringent than those in the WTO, which, through a short-term perspective, may seem easier for a developing country to accomplish.¹⁷⁵ Therefore, the developing country would likely decide to join a PTA rather than the WTO.

Many disadvantages arise in relationships between a “North-South” PTA, where one country or bloc of countries is developed (North) and the other country, or countries, is developing (South). Additional rules are normally established to join a PTA, which may be hard for the developing countries to adopt and adapt to. Many times these new “rules” cover intellectual property or labor standards.¹⁷⁶ For example, the North American Free Trade Agreement has more rigid copyright and trademark protections than required in the TRIPS Agreement, the WTO agreement covering intellectual property.¹⁷⁷ Many times developing countries are allotted special and differentiating treatment due to their economic and societal stance.¹⁷⁸ And, especially in smaller countries, it is enticing to enter into an FTA with larger, developed countries when all the countries in the region are joining them.¹⁷⁹ But, because of the nonreciprocal nature of many FTAs and PTAs, the developing country, as defined, initially has a less-developed internal infrastructure, so they are unable to keep up with industry norms and other technological advancements.¹⁸⁰ So, rather than increasing development and welfare, the developing country will be unable to create Global North comparative advantages in any PTA. In most instances, the developing country will be able to receive, but not produce, advanced products, and it will be unable to expand economically.

In relationships with more than two parties, certain aspects of preferences negotiated by a developing party may be struck down by

173. *Id.* at 24.

174. *Id.*

175. *Id.*

176. UNCTAD *Trade and Development Report 2007*, in INTERNATIONAL TRADE LAW, *supra* note 1, at 351 [hereinafter UNCTAD *Trade and Development Report, 2007*].

177. See Laurinda L. Hicks & James R. Holbein, *Convergence of National Intellectual Property Norms in International Trading Agreements*, 12 AM. U. J. OF INT'L L. & POL'Y 769, 793–94 (1997) (explaining that sound recordings and trademark definitions hold a stricter interpretation under NAFTA as compared to the TRIPS Agreement).

178. UNCTAD *Trade and Development Report, 2007*, *supra* note 176, at 351.

179. See *id.* (showing the perceived loss of competitiveness that developing countries fear when facing neighbor countries in similar situations).

180. *Id.*

the influence of the other counterparties.¹⁸¹ Therefore, a “ganging-up” approach exists in some trade negotiations, where developing countries feel pressured, even before negotiations begin, to join a PTA. However, smaller, developing countries have a better chance at being heard at the WTO because multiple developing countries can join a complaint together, thus creating a more substantial economic threat to the offending party.¹⁸²

In multiparty PTAs, after joining an already established PTA and foregoing certain concessions, a country will often attempt to enter into a bilateral trade agreement with a country outside the PTA to regain the concessions that it lost upon joining the multiparty PTA.¹⁸³ This example of “domino regionalism” points to the potentially disruptive nature of PTAs; by increasing the number of PTAs, the impact of the MFN doctrine declines.¹⁸⁴ Additionally, administrative costs are incurred through the many different rules of origin and tariff structures in the numerous PTAs that a country is member to, which is known as the “spaghetti bowl” effect.¹⁸⁵ This “spaghetti bowl has led to increased challenges for customs officials and for manufacturers attempting to satisfy a multitude of agreement-specific, often conflicting, rules.”¹⁸⁶ Administrative costs are high because of the time and money spent determining the rules of origin and the different tariff rates for the numerous goods exported and imported.

The EPAs are designed not just to benefit the relationship between the developed and the developing countries, but also to increase the relationships among the developing countries.¹⁸⁷ However, even though the EPAs have been established for almost ten years, trade volume among the ACP countries, inter-regionally, is incredibly small.¹⁸⁸ For example, before the EPAs were in force, it was estimated that under the EPA, Kenya would face a 15 percent loss in regional trade, with more expensive, “value-added” goods experiencing the largest decline.¹⁸⁹ Considering the fact that these developing countries are geographically proximate to each other, it seems

181. *Id.* at 352.

182. Lewis, *supra* note 171, at 26.

183. *Id.* at 25.

184. *See id.* (explaining why PTAs threaten a country's economy through gaining a comparative advantage and eventually losing that through dissolution or change in the PTA dynamic, as many PTAs evolve or expire).

185. Trachtman, *supra* note 59, at 346.

186. Lewis, *supra* note 171, at 25.

187. *See Countries and regions*, *supra* note 23 (explaining the desire for the EPAs to increase trade between regional neighbors).

188. *Id.*

189. SOPHIE POWELL, ECONOMIC PARTNERSHIP AGREEMENTS: BUILDING OR SHATTERING AFRICAN REGIONAL INTEGRATION? 5 (2007), http://www.stopepa.de/img/traidcraft_et_al_building_or_shattering.pdf [https://perma.cc/3PRR-ALXW] (archived Jan. 30, 2017).

unsatisfactory that the European Union benefits most from trade rather than the developing countries.

As mentioned above, the WTO is fundamentally established on the MFN clause.¹⁹⁰ And, the WTO was only established for *trade*. But, the WTO body is “no longer simply a contract,” as the WTO is “dabbling in non-trade issues” in its dispute resolutions.¹⁹¹ Even though Article XXIV explicitly allows for member states to depart from the MFN clause, the EPAs between the ACP countries and the European Union are not what were envisioned in 1995 during the Marrakesh Agreement and the birth of the WTO. First, in order to fulfill the purpose of a PTA, the relationship between the two (or more) countries must “increas[e] freedom of trade by the development, through voluntary agreements, of closer integration between the economies of the countries [party] to such agreements.”¹⁹² Rather than increasing the freedom of trade, the EPAs are making the developing ACP countries more dependent and limited in their trade capacities.¹⁹³ Second, the large number of FTAs and PTAs has led to the MFN clause being virtually unimportant.¹⁹⁴ It is unlikely that an ACP country would join the WTO if it already enjoys a cushy PTA with a set dispute settlement process and tariff barriers lower than the MFN tariffs under the WTO. In this instance, the PTA’s presumed benefits likely eclipse the advantages of the WTO.

To regulate the creation of PTAs, the WTO created the Committee on Regional Trade Agreements in 1996.¹⁹⁵ However, there has been no examination report since 1995 because of a lack of consensus at the WTO.¹⁹⁶ Therefore, there is virtually no oversight to police the PTAs; the only way the WTO can hear a problem is if a member state complains. Finally, many PTAs lack transparency, so it is virtually impossible to establish if they are in violation of Article XXIV.¹⁹⁷

190. Vesel, *supra* note 6, at 128.

191. Udombana, *supra* note 38, at 92 (citing Debra P. Steger, *Afterword: The “Trade and . . .” Conundrum—A Commentary*, 96 AM. J. INT’L L. 135, 135 (2008)).

192. GATT, *supra* note 65, Art. XXIV:4.

193. See *Countries and regions*, *supra* note 23 (showing the lack of trade amongst the ACP countries, highlighting that only 3 percent of Ghana’s total trade exports go to neighboring Benin).

194. Lewis, *supra* note 171, at 24.

195. *Work of the Committee on Regional Trade Agreements (CRTA)*, WTO, https://www.wto.org/english/tratop_e/region_e/regcom_e.htm (last visited Jan. 20, 2016) [<https://perma.cc/4FEG-Q7FD>] (archived Jan. 30, 2017).

196. *Id.* A consensus of all member states at the WTO must be granted in order for change to occur in the organization.

197. See generally Bernard Hoekman & Petros Mavroidis, *WTO ‘à la carte’ or ‘menu du jour’? Assessing the Case for More Plurilateral Agreements*, 26 EUR. J. INT’L L. 319, 328 (2015) (stating that even with the Transparency Mechanism for Regional Trade Agreements, WTO member states might not know what are in PTAs held by other countries).

B. Problems with the WTO's Governance of GSP Relationships

EC-Tariff Preferences is the only case that has addressed the GSP system.¹⁹⁸ In the dispute, the EC was found in violation of the Enabling Clause, as it was granting trade preferences for non-trade reasons.¹⁹⁹ However, there is no other case or document that further clarifies the difference or the relationship between the Enabling Clause and GATT Article XXIV. The only requirement is that the Enabling Clause be primarily for the benefit of LDCs.²⁰⁰ Thus, preferences given in addition to those already set in the GSP scheme must only be provided to LDCs by showing need through “development, financial or trade need[.]”²⁰¹ The showing of need is somewhat flexible, and the EC has changed its grant of preferences.²⁰² Thus, in order to show “need” in the EC, the only necessary factors to establish are “export non-diversification and less than 1 percent share of EU GSP imports.”²⁰³

ACP LDCs had equivalent market access and duty-free access on all goods, save for firearms.²⁰⁴ The European Union claims that many of the goods that were, at one time, completely preferential and duty-free have now been liberalized, such as bananas.²⁰⁵ In 2011, thirteen WTO member states had GSP preferences set for developing countries.²⁰⁶ However, many critics doubt whether these schemes are, in fact, effective. Many of the GSPs are limited by rules of origin that diminish the value originally seen in the preferential tariff.²⁰⁷ Some of these rules of origin limit what a certain country can ultimately export. And, because the GSP preferences are established by the individual countries and not a set organization, they are unpredictable and can change based on a country's policy toward a good or the benefited country.²⁰⁸ Also, the GSP provisions can lead to developing countries' dependence on the preferences, limiting their liberalization in the global market.²⁰⁹

198. Grant & Keohane, *supra* note 24, at 682.

199. Bartels, *supra* note 96, at 741–42.

200. Grant & Keohane, *supra* note 24, at 345.

201. Bartels, *supra* note 96, at 742.

202. *Id.* at 743.

203. *Id.* at 742.

204. *Id.* at 743 (showing the clause through the Everything But Arms program).

205. *See id.* (mapping out the future plans for the European Union to fully liberalize rice and sugar in 2009, but the liberalization had not yet occurred at the date of the article's publication).

206. Grant & Keohane, *supra* note 24, at 692.

207. *Id.* at 693.

208. *Id.*

209. *Id.* at 693–94 (quoting Caglar Ozden & Eric Reinhardt, *The Perversity of Preferences: GSP and Developing Country Trade Policies, 1976-2000*, 78 J. DEV. ECON. 1 (2005)).

C. Problems with EPAs

In order for the ACP countries to be fully economically independent, they “must get out of the mentality of dependence on foreign resource transfers and commit themselves toward new and radical ideas.”²¹⁰ Even though the Cotonou Agreement and EPAs strive to push the ACP countries toward liberalization and stability, many of the provisions are established with the needs of the European Union answered first, without true negotiating powers for the ACP countries.²¹¹ The ACP countries are essentially tied to European preferences. Many ACP countries are pushed to either ignore or concede certain economic and debt issues in their negotiations of the EPAs and the underlying rules in them.²¹² Many times, “[ACP] countries are compelled to accept aid and loans because of their continued weakness and economic vulnerability and their urgent short-term needs.”²¹³

There are several problems that the EPAs face that invalidate their status under Article XXIV. Often the weakest countries that are party to the EPAs will be negatively affected.²¹⁴ LDCs have less negotiating power.²¹⁵ Additionally, many of the ACP countries have corrupt or suspect political regimes that may not operate in the best interest of their citizens.²¹⁶ Also, even though trade agreements help developing countries, developed countries (in this case, the European Union) tend to gain the greater benefit;²¹⁷ especially when there is a

210. Udombana, *supra* note 38, at 101.

211. *See id.* at 100 (explaining the paradox of the European Union establishing aid and its push toward ACP self-sufficiency).

212. *Id.*

213. *Id.* at 100–01.

214. Lenaghan, *supra* note 105, at 136.

215. *See generally id.* at 136–37 (establishing the contrast between the economic statuses of South Africa and the rest of the continent).

216. *See, e.g.,* Jeffrey Gettleman, *As President Joseph Kabila Digs In, Tensions Rise in Congo*, N.Y. TIMES (Dec. 17, 2016), https://www.nytimes.com/2016/12/17/world/africa/congo-joseph-kabila-corruption.html?_r=0 [<https://perma.cc/V9NR-DWQN>] (archived Jan. 20, 2017) (showing that even though regulation is more strict, corruption is still rampant in the Democratic Republic of Congo); Nicolas Kristof, *An Unsettling Complicity*, N.Y. TIMES (Mar. 26, 2015), <https://www.nytimes.com/2015/03/26/opinion/nicholas-kristof-an-unsettling-complicity.html> [<https://perma.cc/23J3-CJL6>] (archived Jan. 20, 2017) (documenting the corruption in Angola); Adam Nossiter, *For Mali's New President, Corruption Issue Lingers*, N.Y. TIMES (Aug. 21, 2013), <http://www.nytimes.com/2013/08/22/world/africa/for-malis-new-president-corruption-issue-lingers.html> [<https://perma.cc/X4CX-54KP>] (archived Jan. 20, 2017) (explaining that corruption and poor country management has plagued Mali since colonial independence).

217. *See* Udombana, *supra* note 38, at 83 (describing that multilateralism is not always in the best interest of developing countries).

“two-tier” trade arrangement, the industrialized-country, not the developing country, disproportionately benefits.²¹⁸

The disproportionate allowance of benefits is easily examined in the EPA between the European Union and the EAC, which includes Kenya, Rwanda, Burundi, Tanzania, and Uruguay. Products originating from these East African countries are imported into the European Union free of customs duties, whereas products originating from the European Union that are imported into the EAC are subject to various conditions in the agreement.²¹⁹ Many, but not all, EU imported goods to the EAC are subject to customs duties that have an eventual abolishment.²²⁰ However, the time frame for the “progressive” abolishment, or phase-outs, appears to have been arbitrarily set. This scenario is unacceptable, as is, because in order for the supplier to cover the cost of custom duties, the supplier will need to increase the cost of the good, and the end customer must pay the difference.²²¹

The EPAs have long phase-outs, similar to most FTAs that include the “liberalization of sensitive sectors.”²²² Some phase-outs in the EPAs are on a time schedule that will take over two decades.²²³ But rather than aiding the ACP countries in adapting to the trade measures, there is evidence that the European Union is “more concerned with trying to make Africa adhere to its trade policy.”²²⁴ And, many indicators show that previous trade agreements have not only limited ACP countries’ intra-regional trade but have also not enhanced the countries’ economic growth.²²⁵

In order to establish an “Integrated Framework for Trade-Related Assistance” for LDCs, six multilateral agencies and twenty-three

218. Gowa & Hicks, *supra* note 81, at 255.

219. Economic Partnership Agreement Between the East African Community Partner States, of the One Part, and the European Union and Its Member States of the Other Part arts. 10–11 (2010) http://trade.ec.europa.eu/doclib/docs/2015/october/tradoc_153845.compressed.pdf [<https://perma.cc/8Q8U-HHPB>] (archived Feb. 12, 2017) [hereinafter EAC-EU EPA].

220. *Id.* at Annex II.

221. See Marc Wu, *Rethinking the Temporary Breach Puzzle: A Window on the Future of International Trade Conflicts*, 40 YALE J. INT’L L. 95, 121 (2015) (explaining how increasing tariffs or duties of a product passes in the pricing of that product to the domestic consumer).

222. See Lewis, *supra* note 171, at 24 (explaining the problems with developing countries entering into FTAs).

223. See EAC-EU EPA, *supra* note 219, at Annex II(4), Annex II(d) (where customs duties on certain goods are subject to a phase out of twenty-five years; others [in Annex II (d)] plan on keeping tariffs at the same level, indefinitely).

224. TRADCRAFT, ECONOMIC PARTNERSHIP AGREEMENTS – STILL PUSHING THE WRONG DEAL FOR AFRICA? (May 2012), http://www.stopepa.de/img/EPAs_Briefing.pdf [<https://perma.cc/BB2Y-L7CK>] (archived Jan. 20, 2017).

225. See POWELL, *supra* note 189, at 15 (stating that much is due to the lack of “appropriate infrastructure, human resources, and political support”).

donors have contributed to the Enhanced Integrated Framework (EIF), Trade for LDC Development.²²⁶ The EIF is a neutral, trade-development non-profit that runs under the WTO. It helps to establish trade regimes in these developing countries that will enable the countries to lessen, and eventually abolish, their reliance on preferential trade agreements under the GSP regimes.²²⁷ In reality, however, the organization has done very little for the advancement of trade in LDCs. The program was designed to create “harmonization between the providers of trade assistance and place trade within the context of a country’s overall development strategy.”²²⁸ Forty-eight of the total forty-nine LDCs joined the EIF in order to take advantage of its benefits.²²⁹ The Integrated Framework was started in 1997 at the WTO, and the EIF was re-evaluated in 2007 with a goal to raise \$250 million within five years.²³⁰ However, the funding for the project took longer than anticipated, and the projects established by the fund have had little, if any, effect on the LDCs.²³¹ The commitment to this idea was never fully realized because the monetary goal was never met.²³² Specific industries in a few countries have been affected, but it seems to have little impact on the overall trade in many of these LDCs, as the amount raised, while distributed amongst the dozens of LDCs, provides little funding for each project.²³³

IV. BREAKING THE COLONIAL TIES, ONCE AND FOR ALL

The WTO was based on a foundation of nondiscrimination with respect to trade among all countries. But, because of its lack of tangible enforcement, many countries are easily dissuaded from fully complying

226. ENHANCED INTEGRATED FRAMEWORK, EIF ANNUAL REPORT 2014 13 (2014) <https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=6&ved=0ahUKEwjcj5-UlKPLAhXM7yYKHSS3D4sQFgg5MAU&url=http%3A%2F%2Fwww.enhancedif.org%2Fen%2Ffile%2F1317%2Fdownload%3Ftoken%3DppJT-6Sw&usg=AFQjCNHioiQIvgbMjQJNtKc2y0M2PQkTDg&sig2=xZaJggXdkJ3LOu70RjTChQ> [https://perma.cc/L95W-2LR7] (archived Jan. 20, 2017) [hereinafter EIF Annual Report 2014].

227. Bernard Hoekman & Susan Prowse, *Economic Policy Response to Preference Erosion: From Trade as Aid to Aid for Trade* 15 (World Bank Policy Research Working Paper Series, Paper No. 3721, 2005).

228. *Id.* at 15.

229. EIF Annual Report 2014, *supra* note 226, at 13.

230. *About the Enhanced Integrated Framework (EIF)*, ENHANCED INTEGRATION FRAMEWORK, <http://www.enhancedif.org/en/about> (last visited Mar. 19, 2017) [https://perma.cc/ZG5C-8PV5] (archived Jan. 20, 2017).

231. See EIF Annual Report 2014, *supra* note 226, at 20 (stating that in the DRC, “[p]lans are under way to launch an implementation plan” showing the incompetency and law of efficiency at the EIF).

232. *Id.* at 46.

233. See *id.* at 33 (explaining the \$1 million donation for the improvement of the shea nut industry in Burkina Faso).

with all the rules. And, even though many of the colonial states gained their independence over fifty years ago, many different organizations have been established to help ease the developing countries on a track to financial stability, trade liberalization, and global independence. However, even though much has been accomplished, the ACP countries have much left to achieve in order to gain total independence from the EU member states, as the GSP and the EPAs are primarily for the benefit of the European Union and not that of the ACP countries. Rather, the ACP countries that are party to EPAs with the European Union are dependent on the preferential tariffs and the economic aid embedded in those EPAs. The longer the ACP countries depend on the European Union, the more reliant the developing countries become.

As it is unreasonable to establish a fully functioning EIF within a short time frame, the tariff rates in the EPA need to be liberalized more quickly. Instant MFN liberalization for many ACP countries would not be ideal, as a tariff rate decrease could very easily shock the economies of the LDCs, causing an economic crisis.²³⁴ Thus, the harmonization of tariffs need to not occur all at once, and some phase-out period is necessary. However, current EPA phase-outs dates are arbitrary and are not viable, as some plans are scheduled to last for over twenty years after the execution of the EPA.²³⁵ Additionally, there are no measures to transition ACP countries to becoming more advanced markets. And, because the EPAs encourage the European Union to hold the comparative advantage of advanced manufactured products, like machinery and chemicals, and the ACP toward agricultural, primary products, the ACP countries will continue to be dependent on the European Union in order to survive in a modern world.²³⁶ But, with a fully functional EIF, ACP countries may be able to evolve from developing to developed countries, and the eventual reciprocal nature of EPAs may actually then put all countries on a level playing field.²³⁷

Also, there should be stronger enforcement measures in the WTO dispute resolution system. First, the Committee on Regional Trade Agreements that the WTO envisioned, but never fully created, must actually become a fully functioning body that provides substantive regulation and protection to developing countries, as the number of

234. See generally Bernard Hoekman, Constantine Michalopoulos, & L. Alan Winters, *More Favorable and Differential Treatment of Developing Countries: Towards a New Approach in the WTO* 5–6 (World Bank Policy Research, Working Paper No. 3107, 2003) (explaining the obstacles and issues, including market failures, that are coupled with developing countries' involvement in global trade).

235. See, e.g., EAC-EU EPA, *supra* note 219, at Annex II (listing the progressive customs duties schedule); see also *supra* Part II (explaining the gradual opening of the ACP markets, but the automatic exposure to the EU markets).

236. See *supra* Part III (discussing the developing countries' lack of modern comparative advantage, as the EU countries hold the Global North economic advantage of industrialization).

237. See *id.* (showing the goals of the EIF framework).

PTAs worldwide is ever growing. There must be oversight in order to protect the developing countries involvement with PTAs, as it is likely that the PTA trend will not decline, even with the current anti-trade sentiment across many western countries.²³⁸ Even though both have stalled due to the transitioning political environment in the United States, the U.S.-Asia Trans-Pacific Partnership and the U.S.-EU Transatlantic Trade and Investment Partnership continue to be in the public eye.²³⁹ And, with the economic bargaining power many developed, industrialized countries hold, it is likely that developing countries will receive a worse arrangement if the powerful country has no accountability. In order to have an effective Committee on Regional Trade Agreements at the WTO, the Committee should receive details on the agreements when the countries first begin initiating negotiations. It would also be ideal to have a neutral party participate as a sort of moderator between the two or more countries involved in the PTA. Thus, there is a lesser likelihood that the developed country would take advantage of the situation.

As the WTO stands now, except under certain circumstances, the complainant has the burden of proof to establish a violation of one or more of the GATT articles. Bolstering the Committee on Regional Trade Agreements will increase the amount of transparency in WTO member state negotiation and eventual PTAs. Thus, the affected third-party states will be able to easily see MFN violations, especially in regards to preferential treatment. Additionally, as there has only been one case that specifically addresses the Enabling Clause, the WTO has not established a strict set of parameters to protect the LDCs in the Enabling Clause context. No other case has been brought before the WTO to clarify and limit aspects of GATT Article XXIV.²⁴⁰ Because of the ever-growing number of PTAs, a stronger emphasis on the MFN clause in regards to GATT Article XXIV must be constructed. The ACP countries must become self-sufficient.

238. See, e.g., Peter S. Goodman, *More Wealth, More Jobs, but Not for Everyone: What Fuels the Backlash on Trade*, N.Y. TIMES (Sept. 28, 2016), <https://www.nytimes.com/2016/09/29/business/economy/more-wealth-more-jobs-but-not-for-everyone-what-fuels-the-backlash-on-trade.html> [<https://perma.cc/AX22-CR74>] (archived Jan. 20, 2017) (covering the recent trend toward protectionist manufacturing and fear toward globalization due to domestic employment issues post-2008 recession).

239. See, e.g., Randi Brown, *TPP? TTIP? Key trade deal terms explained*, BROOKINGS (May 20, 2015, 4:00 PM), <http://www.brookings.edu/blogs/brookings-now/posts/2015/05/20-trade-terms-explained> [<https://perma.cc/RUG6-DL4F>] (archived Jan. 20, 2017) (commenting on the aspects of the different current viable trade agreements).

240. See *supra* Part III (describing *EC-Tariff Preferences* and its ramifications).

As the system currently stands, punitive measures are non-existent, and efficient trade breaches are common.²⁴¹ Proponents of allowing punitive damages in the WTO have two rationales for why they would be beneficial: the punishment rationale and the economic rationale.²⁴² Under the punishment rationale, the country would be socially and politically punished.²⁴³ Under the economic rationale, the harsh monetary penalty pushes the country to engage in good conduct.²⁴⁴ Both the punishment and the economic rationales would influence the European Union in these EPA Article XXIV cases. As the European Union is constantly in the public limelight, negative punitive measures would influence strict and swift compliance. Additionally, if punitive remedies were allowed, ACP countries could use the proceeds to better establish self-sufficient trading regimes by building up the infrastructure to create more value-added goods, as opposed to raw, natural goods that currently characterize the bulk of the ACP exports.

In order to ensure that the ACP countries, primarily those that are LDCs, reach sustainability, there must be a worldwide effort that will have high short-term costs, but will eventually create a richer global population. The EIF needs to become a more effective, reputable agency that effectively acquires and distributes its funds.²⁴⁵ It should better manage funds to diversify and expand LDC exports.²⁴⁶ Therefore, the African countries that are currently dependent on the European Union through preferential agreements will have a more fluid transition toward self-sustainability as "more efficient and effective instruments to support poor countries could both improve development outcomes and help strengthen the multilateral trading system."²⁴⁷ Trade preferences will not be as necessary, so long as economic trade aid is available to implement global trade growth from the government level. As the EIF is under the WTO, there should be world-wide country involvement, as it is in all countries' best interests to have a stronger global economy.

V. CONCLUSION

Since its development of the current dispute resolution system, the WTO has been greatly effective in liberalizing trade. But, with the recent upswing in PTA formations, allowable under GATT Article

241. See *supra* Part II (discussing the lack of punitive measures in the dispute resolution system at the WTO, which creates possible poor incentives for offending countries).

242. Schwartz & Sykes, *supra* note 88, at 158.

243. *Id.*

244. *Id.*

245. See *supra* Part III (commenting on the ineffectiveness of the current EIF).

246. Hoekman & Prowse, *supra* note 227, at 19–20.

247. *Id.* at 19.

XXIV, trade liberalization has plateaued, and, in some ways, countries have become more protectionist. As the European Union establishes EPAs with former colonies and other ACP countries, it is creating structures that only increase ACP dependence. In order for the ACP countries to become sustainable, for the global trade to once again be on the liberalization track, and for the best compliance with the WTO, MFN ideals must be established in GATT Article XXIV PTAs. The Committee on Regional Trade Agreements must be revived, and punitive damages must become a form of remedy to coerce country compliance to the dispute resolution system at the WTO.

**Danielle Robertson*

* J.D./M.S.F. Candidate, Vanderbilt University, 2017; B.B.A. Southern Methodist University, 2012.
