



Trade with Africa, the Caribbean and the Pacific: The UK's Economic Partnership Agreements

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1. INTRODUCTION

While in Malawi for action research on the place of small-scale farmers in commercial agriculture, a colleague and I visited the Phata cooperative in the Lower Shire Valley, a wide lowland plain in the south of the country. With support from a management firm, over 1,100 farmers had pooled their small landholdings to set up a collective estate of over 600 hectares and build an irrigation system drawing water from the Shire River. The cooperative was growing sugar cane and selling it to a nearby mill operated by a multinational enterprise.¹

During the visit, we learned about local initiative and innovation, as farmers sought out opportunities and ultimately reaped economic benefits.² We also saw glimpses of changing international arrangements that, in regulating aid and trade, connected

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¹ See also AgDevCo, *A Successful Cooperative Model: Case Study of AgDevCo's Investments in Phata Malawi* (AgDevCo, 2018), https://www.agdevco.com/site/assets/files/1460/agdevco_-_its_phata_case_study.pdf; Landesa, *Case Study: Phata Cooperative* (Landesa, 2019), <https://cdn.landesa.org/wp-content/uploads/Phata-Case-Study-9.6.19-FINAL.pdf>. Information about the Phata Sugarcane Outgrowers Cooperative is also available on the cooperative's website, <https://phatasoc.org/>. The scoping visit was conducted in August 2018, together with my colleague Brendan Schwartz. The project ultimately focused on supporting small-scale tea farmers in the neighbouring Thyolo district, in collaboration with Blantyre-based Women's Legal Resources Centre (WOLREC). I am grateful to Clair Gammage, Federico Ortino and Emily Polack for comments on an earlier draft – though the views expressed and any errors are mine.

² See also Landesa, *Case Study, supra*.

Malawi to 78 other countries in Africa, the Caribbean and the Pacific (ACP), to the European Union (EU) and to the United Kingdom (UK).³

Financing for Phata's irrigation equipment mainly came from two successive EU grants, as part of a programme offering aid to ACP countries adversely affected by the phaseout of an international agreement concluded in 1975 and known as the Sugar Protocol.⁴ Under the terms of this protocol, the European Economic Community (EEC) agreed to import, at guaranteed prices, specific quantities of cane sugar from ACP states.⁵ The protocol was but one element of an elaborate system of aid and trade preferences linking the EU and ACP states.

From the 1990s, this system came under challenge at the World Trade Organization (WTO): first its preferential rules on importing bananas,⁶ and then the EU sugar regime, including arrangements applying the Sugar Protocol.⁷ Defeated in WTO litigation, the EU resolved to restructure ACP-EU trade around 'WTO-compatible' Economic Partnership Agreements (EPAs) to be signed with groupings of ACP states. Meanwhile, unilateral trade preferences would enable states the United Nations classifies as 'least developed countries' (LDCs), such as Malawi, to export most produce to the EU free of duties.⁸

In this wider shift, the EU denounced the Sugar Protocol and provided aid as a transition measure to offset ACP sugar producers' loss of a guaranteed market.⁹ From the

³ This article uses the acronym 'ACP' broadly to identify the states of Africa, the Caribbean and the Pacific that have participated in the ACP-EU partnership. In 2020, the ACP states established the Organisation of African, Caribbean and Pacific States, OACPS, and collectively negotiated the latest partnership agreement with the EU through that organisation. The article refers to the OACPS specifically in connection with the latest OACPS-EU agreement, and to ACP in all other contexts.

⁴ Protocol No. 3 on ACP Sugar, attached to the ACP-EEC Convention signed in Lomé on 28 February 1975 and entered into force on 1 April 1976. The grant programme was known as Accompanying Measures for Sugar Protocol Countries (AMSP); see eg Johnny Kasalika, 'Malawi Sugar Industry Gets K4.8 Billion Boost' *The Nation* (31 October 2012), <https://mwnation.com/malawi-sugar-industry-gets-k4-8-billion-boost/>; and Blessings Chinsinga, 'The Green Belt Initiative, Politics and Sugar Production in Malawi' (2017) *Journal of Southern African Studies* 43(3) 501–15, at 506.

⁵ See particularly Article 1(1) of the Sugar Protocol.

⁶ *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27, Appellate Body Report, AB-1997-3, 9 September 1997, <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=Q:/WT/DS/27ABR.PDF&Open=True>. On this dispute, see Mauricio Salas and John H. Jackson, 'Procedural Overview of the WTO EC – Banana Dispute' (2000) *Journal of International Economic Law* 3(1):145–66.

⁷ *European Communities – Export Subsidies on Sugar*, WT/DS265, WT/DS266 and WT/DS283, Report of the Appellate Body, AB-2005-2, 28 April 2005, <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=Q:/WT/DS/283ABR.pdf&Open=True>. For an overview of the dispute, see South Centre, *The Reform of the EU Sugar Sector: Implications for ACP Countries and EPA Negotiations* (South Centre, 2007), https://www.southcentre.int/wp-content/uploads/2013/08/AN_MA3_The-Reform-of-the-EU-sugar-Sector_EN.pdf, 10–13.

⁸ Regulation No. 978/2012 of the European Parliament and of the Council of 25 October 2012 Applying a Scheme of Generalised Tariff Preferences and Repealing Council Regulation No. 732/2008, Official Journal of the European Union L303/1 (31 October 2012), <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32012R0978&from=EN>.

⁹ Council Decision of 28 September 2007 Denouncing on Behalf of the Community Protocol 3 on ACP Sugar Appearing in the ACP-EEC Convention of Lomé and the Corresponding Declarations Annexed to That Convention, Contained in Protocol 3 attached to Annex V to the ACP-EC Partnership

early 2010s, this aid programme funded Phata's irrigation infrastructure,¹⁰ connecting the tall, slouching stalks and sharp grass blades of the sugar cane on the Phata farm to international legal wranglings and economic reconfigurations.

Visiting the farm after the Brexit referendum also highlighted questions about the UK and its relationship with both the EU and ACP states. The Sugar Protocol was signed in the aftermath of the UK joining the EEC, as part of arrangements designed to integrate former British colonies, including Malawi, into Europe's trade preferences.¹¹ The grouping together of ACP states was itself an outcome of this process. After the Sugar Protocol's demise, concessional loans from a UK-based, government-supported impact investor complemented the EU funding of Phata's irrigation infrastructure,¹² epitomising the synergies the UK developed with European institutions over decades of EU membership.

Having 'repatriated' the competence to regulate its foreign commerce, the UK would now have to redefine its trade arrangements with ACP states, amidst triumphalist rhetoric about 'Global Britain' as a new trade powerhouse and palpable anxiety about its place in the post-Brexit world. Besides establishing unilateral trade preferences for developing countries, including a scheme for LDCs,¹³ the UK government started negotiating EPAs with ACP states not eligible for the LDC scheme, working under tight timelines to secure the 'rollover' of existing ACP-EU EPAs before Brexit took effect.

The resulting network of UK EPAs assured continuity in trade relations. But it also reproduced problems rooted in historical legacies and in the trade talks that led to the conclusion of the ACP-EU EPAs. With the time pressures around the withdrawal process now eased, there is a strong case for revisiting these arrangements and developing a longer-term strategy towards a more inclusive and sustainable future.

Most ACP states account for minor shares of the UK's international trade; in 2022, Malawi was the UK's 157th largest trading partner, making up less than 0.1 per cent of

Agreement (2007/627/EC), available at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32007D0627&from=ES>. The denunciation, justified with the need to ensure compliance with WTO rules and integrate the sugar import regime in the new EPAs, took effect from 1 October 2009 (see particularly preambular paragraphs (2), (3) and (4) and Article 1 of the Decision).

¹⁰ See also Kasalika, 'Malawi Sugar Industry Gets K4.8 Billion Boost', *supra*.

¹¹ Most ACP states eligible for guaranteed market access under the Sugar Protocol of 1975 were former British colonies, including Barbados, Fiji, Guyana, Jamaica, Kenya, Malawi, Mauritius, Swaziland, Tanzania, Trinidad and Tobago, and Uganda. As discussed further in Section 2 below, the ACP-EEC Convention to which the protocol was attached was designed to include former British colonies into a system previously catering for the former colonies of other EEC states.

¹² AgDevCo, *A Successful Cooperative Model*, *supra*, 4–5.

¹³ Trade Preferences Scheme (EU Exit) Regulation of 2020 (SI No. 1438). The UK will apply a new system from early 2023; see Department for International Trade, *Developing Countries Trading Scheme: Government Policy Response* (Department for International Trade, 2022), <https://www.gov.uk/government/publications/developing-countries-trading-scheme-dcts-new-policy-report/developing-countries-trading-scheme-government-policy-response>. While unilateral preferences are a key part of the UK's post-Brexit trading arrangements with the countries of Africa, the Caribbean and the Pacific, space constraints make it necessary to limit this analysis to negotiated agreements.

UK trade.¹⁴ But ACP economies do supply a considerable portion of key imports, for example in the food and agriculture sector, so their trade value is significant for certain commodities – and for UK businesses that rely on the importation of those goods. Also, the UK's relations with Africa, the Caribbean and the Pacific involve more than just commerce; they are deeply embedded in long-term histories of slavery, colonialism and empire. Revisiting those trading relations, then, gives the UK an opportunity to build a new future that acknowledges its past. It also provides the UK and its trading partners with an opportunity to chart new pathways in framing economic relations between higher- and lower-income countries.

In these respects, thinking through trade arrangements with countries in Africa, the Caribbean and the Pacific is a key part of the UK finding its new place in the global economic system. It requires understanding how long-term historical trajectories have shaped relations between the UK, the EU and the ACP states (Section 2); interrogating the challenges associated with the EPA model, and the role of the UK in its historical development (Section 3); and considering how to align trade arrangements with current social, environmental and economic challenges, such as tackling climate change and assisting lower-income countries in diversifying exports beyond raw materials (Section 4).

2. THE ACP-EU PARTNERSHIP: A WINDOW OVER HISTORY

The ACP-EU partnership has deep roots in the rise and fall of colonial empires, the founding of the European project and changing relations between the UK and continental Europe. It also originates from the ways in which ACP countries made sense of their shared history of colonisation, built new solidarities and claimed a 'partnership of equals' with the former colonial powers.

Colonisation changed historical trajectories in Europe and the rest of the world. In the territories they occupied, European states tested new techniques for exercising political authority and imposed the large-scale expropriation of labour, including through slavery, and of land, through both sovereignty and property claims.¹⁵ These processes shaped relations not only between the colonisers and the colonised but also between Africa, the Caribbean and the Pacific.

From the 1600s, the Europeans established deep trading connections between Africa and the Caribbean, as part of a triangular trade system that involved brutally

¹⁴ UK Department for International Trade, *Trade & Investment Factsheets: Malawi* (20 September 2022), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1111288/malawi-trade-and-investment-factsheet-2022-10-19.pdf.

¹⁵ See eg Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press, 2005); James Thuo Gathii, 'Imperialism, Colonialism, and International Law' (2007) 54(4) *Buffalo Law Review* 1013–66; Sundhya Pahuja, 'Laws of Encounter: A Jurisdictional Account of International Law' (2013) 1(1) *London Review of International Law* 63–98; Martti Koskenniemi, *To the Uttermost Parts of the Earth: Legal Imagination and International Power 1300–1870* (Cambridge University Press, 2021).

deporting millions of enslaved people from Africa to the Americas, moving sugar, cotton and tobacco from the Americas to Europe, and shipping guns, textiles and alcohol from Europe to Africa.¹⁶ Until Britain outlawed the slave trade in 1807,¹⁷ British merchants were central to this system, ferrying enslaved Africans whose toil on Caribbean plantations – owned by British elites, both old and new – supplied sugar to the metropole; meanwhile, financing by British lenders and insurers foreshadowed London's role as a leading finance hub.¹⁸

Proceeds from slavery and colonialism enabled an unprecedented accumulation of wealth among Europe's merchant, industrial and financial elites, and contributed to the development of capitalism in Europe.¹⁹ In these respects, the story of Europe's relations with Africa, the Caribbean and the Pacific is also the story of how the contemporary economic system came into being and of the rise of Europe as a global powerhouse. Although much of the Americas' mainland had secured independence by the late nineteenth century, Britain, France and other European states consolidated and expanded their colonial empires across Africa, the Caribbean and the Pacific, ultimately controlling most of the territories now constituting the ACP states.

The ACP-EU partnership arose from the demise of this colonial system, as independence struggles gained momentum and empires crumbled from the mid-twentieth century. The 1957 Treaty of Rome – the founding act of the polity that would eventually become the EU, and a treaty to which the colonised were not party – envisaged an 'association arrangement' linking the colonies to the European project.²⁰ In the

¹⁶ On the transatlantic slave trade system, its demise and its continued legacy, see eg Sylviane A. Diouf (ed), *Fighting the Slave Trade: West African Strategies* (Athens: Ohio University Press and Oxford: James Currey, 2003); Jenny S. Martinez, *The Slave Trade and The Origins of International Human Rights Law* (Oxford University Press, 2012); Emily Haslam, *The Slave Trade, Abolition and the Long History of International Criminal Law: The Recaptive and the Victim* (Routledge, 2020); and the book symposium in *London Review of International Law* (2022) 10:1, including contributions by Marie-Bénédicte Dembour ('Critical Legal Thoughts', 135–41), Michael Lobban ('International Criminal law and the Slave Trade: The Past and the Present', 143–50) and Christine Schwöbel-Patel ('The Precarious Agency of Racialised Recaptives', 151–58). See also Ohio Omunu and Alicia Nicholls, 'Introduction to the Symposium – Prospects for Deepening Africa-Caribbean Economic Relations' *Afronomicslaw* (6 September 2021), <https://www.afronomicslaw.org/category/analysis/introduction-symposium-prospects-deepening-africa-caribbean-economic-relations>.

¹⁷ Act for the Abolition of the Slave Trade (commonly referred to as the Slave Trade Act), 25 March 1807, 47^o Georgii III, Session 1, cap. XXXVI; text available at https://www.pdavis.nl/Legis_06.htm.

¹⁸ Ben Richardson, *Sugar: Refined Power in a Global Regime* (Palgrave Macmillan, 2009), 42–57; Matthew Parker, *The Sugar Barons: Family, Corruption, Empire and War* (Windmill Books, 2012).

¹⁹ For a classic study on the role of slavery in the historical development of capitalism in Europe, see Eric Williams, *Capitalism and Slavery* (University of North Carolina Press, 1944). Commodity-specific studies have also highlighted these linkages; see eg Sven Beckert, *Empire of Cotton: A Global History* (Vintage Books, 2014), 88–97.

²⁰ Treaty Establishing the European Economic Community, signed in Rome on 25 March 1957 and entered into force on 1 January 1958 ('Treaty of Rome'), Articles 131–36. Official text available in different versions at <https://www.europarl.europa.eu/about-parliament/en/in-the-past/the-parliament-and-the-treaties/treaty-of-rome>, original text (in French) available at <https://eur-lex.europa.eu/legal-content/FR/TXT/PDF/?uri=CELEX:11957E/TXT&from=EN>. See also the Convention d'Application relative à l'Association des Pays et Territoires d'Outre-mer à la Communauté, which was annexed to the Treaty of Rome.

treaty negotiations, France placed strong emphasis on this arrangement, as it was determined to maintain its 'special relations' with francophone Africa.²¹

The association arrangement applied to the territories administered by Belgium, France, Italy and the Netherlands, four of the six founding members of the EEC. As the colonised obtained independence, the arrangement shifted to a 'contractualised' partnership: 18 newly independent states, primarily in francophone Africa, concluded two successive Yaoundé Conventions with the EEC and its member states. These five-year treaties regulated issues such as trade and aid.²²

The UK's accession to the EEC in 1973 prompted major changes. Like France, the UK was determined to maintain close relations with its former colonies.²³ More than other European countries, its economy relied heavily on imports of commodities from the newly independent territories,²⁴ and sugar imports from the Caribbean proved a sticking point in the UK's accession negotiations with the EEC.²⁵ The resulting Treaty of Accession included a protocol requiring the EEC to offer former British colonies the opportunity to negotiate an association arrangement.²⁶

Two years after the accession took effect, the EEC, its members states and 46 African, Caribbean and Pacific states signed the first Lomé Convention, which governed cooperation in areas ranging from trade to aid for a period of five years, with several

21 Clair Gammage, *North-South Regional Trade Agreements as Legal Regimes: A Critical Assessment of the EU-SADC Economic Partnership Agreement* (Edward Elgar, 2017), 138–39. 'Special relations' ('*relations particulières*') is the term used in Article 131 of the Treaty of Rome.

22 Convention d'Association entre la Communauté Économique Européenne et les États Africains et Malgache Associés à Cette Communauté, signed in Yaoundé on 20 July 1963 and entered into force, for a period of five years, on 1 June 1964 ('Yaoundé Convention I'); text available at https://www.cvce.eu/en/obj/la_convention_de_yaounde_20_juillet_1963-fr-52d35693-845a-49ae-b6f9-ddbc48276546.html (in French); Convention II, signed in Yaoundé on 29 July 1969 and entered into force, for a period of five years, on 1 January 1971. On the Yaoundé Conventions, see also Samuel O. Oloruntoba, *Regionalism and Integration in Africa: EU-ACP Economic Partnership Agreements and Euro-Nigeria Relations* (Palgrave Macmillan, 2016), 69–72; Gammage, *North-South Regional Trade Agreements as Legal Regimes*, *supra*, 140–42; and Rafael Lima Sakr, 'From Colonialism to Regionalism: The Yaoundé Conventions (1963–1974)' 2021 70(2) *International and Comparative Law Quarterly* 449–89.

23 Gammage, *North-South Regional Trade Agreements as Legal Regimes*, *supra*, 141; Oloruntoba, *Regionalism and Integration in Africa*, *supra*, 72.

24 Gammage, *North-South Regional Trade Agreements as Legal Regimes*, *supra*, 141.

25 CVCE, *Decolonisation: Geopolitical Issues and Impact on the European Integration Process* (Centre Virtuel de la Connaissance sur l'Europe, 2017), <https://www.cvce.eu/en/education/unit-content/-/unit/dd10d6bf-e14d-40b5-9ee6-37f978c87a01>.

26 Treaty Concerning the Accession of the Kingdom of Denmark, the Republic of Ireland, the Kingdom of Norway and the United Kingdom of Great Britain and Northern Ireland to the European Economic Community and to the European Atomic Energy Community, signed in Brussels on 22 January 1972 and entered into force on 1 January 1973; text available at <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:1972:073:FULL:EN:PDF>. See particularly Article 109 of the Act Concerning the Conditions of Accession and the Adjustments to the Treaties ('Act of Accession'), annexed to the Treaty of Accession, and Protocol No. 22 on Relations between the European Economic Community and the Associated African and Malagasy States and Also the Independent Developing Commonwealth Countries Situated in Africa, the Indian Ocean, the Pacific Ocean and the Caribbean. Annex VI to the Act of Accession lists the countries to which these provisions applied.

countries that had secured independence from Britain now joining those that had participated in the Yaoundé Conventions.²⁷

While the Yaoundé Conventions envisaged reciprocal trade liberalisation, the Lomé Convention codified an asymmetrical trade regime. The EEC granted duty and quota-free access to most ACP goods. The ACP states did not have to reciprocate but had to treat EEC goods no less favourably than those originating from other countries.²⁸ The Lomé Convention also featured protocols on bananas, beef and rum and the Sugar Protocol – the phasing out of which would produce indirect reverberations in Malawi's Lower Shire Valley decades later.²⁹

The first Lomé Convention was followed by two further five-year agreements in 1979 and 1984,³⁰ and a ten-year agreement in 1989.³¹ In 2000, the EU and ACP states signed the 20-year Cotonou Partnership Agreement, restructuring the trade regime around the negotiation of regional EPAs.³² In 2021, they initialled a new accord to govern the partnership beyond the Cotonou Agreement, with separate protocols for Africa, the Caribbean and the Pacific.³³ Over the years since signing the first Lomé Convention, the number of ACP states increased to 79.³⁴

27 ACP-EEC Convention, signed in Lomé on 28 February 1975 and entered into force on 1 April 1976 ('First Lomé Convention'); full text available <https://op.europa.eu/en/publication-detail/-/publication/c973175b-9e22-4909-b109-b0ebf1c26328>.

28 See eg Articles 2(1), 3(1) and 7(1) of the First Lomé Convention, *supra*.

29 Unlike the other protocols, the Sugar Protocol was concluded for an indefinite duration. See Protocol No. 3 on ACP Sugar, *supra*, Article 10.

30 Second ACP-EEC Convention, signed on 31 October 1979 and entered into force on 1 January 1981; text available at <https://op.europa.eu/en/publication-detail/-/publication/f06ebd58-a3d7-4b11-966d-02548c8b918/language-en/format-PDF/source-search>. Third ACP-EEC Convention, signed in Lomé on 8 December 1984 and entered into force on 1 May 1986; text available at <https://op.europa.eu/en/publication-detail/-/publication/851e7cf4-1d67-4c13-9d1a-abb8a220feef/language-en/format-PDF/source-search>.

31 Fourth ACP-EEC Convention, signed in Lomé on 15 December 1989 and entered into force on 1 September 1991; text available at <https://op.europa.eu/en/publication-detail/-/publication/ea62466c-93ce-40ca-87f3-66e196a987ab/language-en/format-PDF/source-search>. This ten-year agreement was subject to revision after five years, leading to the conclusion of the Agreement Amending the Fourth ACP-EC Convention of Lomé, signed in Mauritius on 4 November 1995 ('Mauritius Protocol'); text available at <https://op.europa.eu/en/publication-detail/-/publication/62e2bc33-18c9-4aa5-a1f7-55867a57666d/language-et>.

32 Partnership Agreement between the Members of the African, Caribbean and Pacific Group of States of the one part, and the European Community and its Member States, of the other part, signed in Cotonou on 23 June 2000; text available at https://eur-lex.europa.eu/resource.html?uri=cellar:eebc0bbc-f137-4565-952d-3e1ce81ee890.0004.04/DOC_2&format=PDF. The Cotonou Agreement was revised on 25 June 2005 and on 22 June 2010. Though it was due to expire in February 2020, its application was extended to allow for the negotiation of a follow-on partnership agreement; see <https://www.consilium.europa.eu/en/policies/cotonou-agreement/>.

33 Partnership Agreement between [the European Union / the European Union and its Member States], of the one part, and Members of the Organisation of African, Caribbean and Pacific States, of the other part, text initialled on 15 April 2021 and available at <https://www.europarl.europa.eu/cmsdata/238376/Negotiated%20Agreement%20text%20initialled%20by%20the%20EU%20and%20OACPS%20chief%20negotiators%20on%2015th%20April%202021.pdf>.

34 See <http://acp.int/content/secretariat-organisation-african-caribbean-and-pacific-states-oacps>. Cuba is a member of the Organisation of African, Caribbean and Pacific States but not a party to the ACP-EU partnership agreements.

In important respects, the history of the ACP-EU partnership embodies Europe's approach to confronting its past of racialised colonialism – through aid and preferential trade, rather than reparation – and to projecting continued influence in its former colonies.³⁵ At the same time, ACP states have asserted agency via unity and solidarity, drawing on their shared experience of colonisation and decolonisation,³⁶ and reflected in institutional arrangements for collective bargaining, most recently through the creation of the Organisation of African, Caribbean and Pacific States (OACPS).³⁷ The resulting system became a central pillar of the EU's development aid, while its emphasis on creating a partnership of equals and 'contractualising' aid commitments was long considered a model for North–South collaboration.³⁸

Reading the successive Yaoundé, Lomé and Cotonou agreements together offers a snapshot of economic and intellectual history, and an insight into changing politics and ideologies. The Lomé Convention's non-reciprocal trade preferences and commodity protocols, grounded in collective negotiation by a group of developing countries, echoed the wider efforts developing countries were making at the time to leverage their votes at the United Nations General Assembly and claim a 'new international

³⁵ On the issue of reparations for slavery and/or colonialism, see the CARICOM Ten Point Plan for Reparatory Justice (CARICOM Reparations Commission, 2014), <https://caricom.org/caricom-ten-point-plan-for-reparatory-justice/>; Report of the Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance, Tendayi Achiume, on Reparations for Racial Discrimination, Slavery, and Colonialism (UN Doc. A/74/321, 21 August 2019), <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N19/259/38/PDF/N1925938.pdf?OpenElement>; and Vasuki Nesiah, 'The Law of Humanity Has a Canon: Translating Racialized World Order into "Colorblind" Law', *PoLAR Journal* (15 November 2020), <https://polarjournal.org/2020/11/15/the-law-of-humanity-has-a-canon-translating-racialized-world-order-into-colorblind-law/>.

³⁶ Shridath Ramphal, 'Revisiting the Georgetown Agreement', remarks made at the Inter-Regional High-Level Consultation, held in Barbados on 26 February 2019, available at <http://www.acp.int/content/revisiting-georgetown-agreement>. See also the joint statement delivered by the AfCAR (Africa and Caribbean Community) Group at the United Nations on the occasion of the International Day of Remembrance of the Victims of Slavery and the Transatlantic Slave Trade: Statement by Her Excellency Ambassador Carolyn Rodrigues-Birkett, Permanent Representative of the Co-operative Republic of Guyana on Behalf of the African Group and the Caribbean Community (AfCAR), 25 March 2021, http://svg-un.org/wp-content/uploads/2021/03/DRAFT-AfCAR-Joint-Statement-Remember-Slavery-Programme_3-23-CLEAN.pdf.

³⁷ Georgetown Agreement, as revised by Decision No .1/CX/19 of the 110th session of the ACP Council of Ministers held in Nairobi, Kenya, on 7 December 2019, and endorsed by the 9th Summit of the ACP Heads of State and Government, Nairobi, Kenya, 9–10 December 2019 ('Revised Georgetown Agreement'); text available at http://www.acp.int/sites/acpsec.waw.be/files/user_files/user_15/%20ACP-Brochure%20Revised%20Georgetown%20Agreement-UK%20def.pdf. In its initial form, the treaty was originally concluded in 1975, shortly after the signing of the first Lomé Convention: Georgetown Agreement on the Organisation of the African, Caribbean and Pacific Group of States, opened for signature on 6 June 1975; text available at http://www.acp.int/sites/acpsec.waw.be/files/Georgetown%20Agreement%20%201975_0.pdf.

³⁸ See eg Jean Bossuyt with Niels Keijzer, Alfonso Medinilla, Andrew Sherriff, Geert Laporte and Marc de Tollenaere, *ACP-EU Relations Beyond 2020: Engaging the Future or Perpetuating the Past?* (European Centre for Development Policy Management, 2017), <https://ecdpm.org/work/acp-eu-relations-beyond-2020-engaging-the-future-or-perpetuating-the-past>, at 3.

economic order' that would enable them to match political with economic independence.³⁹

Successive ACP-EU agreements integrated new elements that reflected or even anticipated the evolving policy context and thinking, with later treaties referencing human rights, the environment, the roles of non-state actors, of local government bodies and of private investment,⁴⁰ gender issues in trade relations,⁴¹ and most recently climate change and international migration.⁴²

The non-reciprocal trade regime of the Lomé Conventions did not survive the neo-liberal era, as opening up trade became synonymous with economic growth and the establishment of the WTO deepened trade liberalisation and strengthened trade dispute settlement. Multilateral liberalisation eroded trade preference margins for ACP states, and there were increasingly vocal questions about the consistency of non-reciprocal trade preferences with WTO rules.⁴³

After the EU lost a WTO dispute over the Lomé Convention's preferential banana import regime, it pushed through a major reconfiguration of the ACP-EU trade arrangement.⁴⁴ According to the now official interpretation of WTO rules,⁴⁵ preferential trade agreements had to be reciprocal, even with developing countries, and reciprocally liberalise 'substantially all the trade' between the parties,⁴⁶ to qualify for an exception to the WTO's cardinal principle: that trading arrangements must not treat some countries more favourably than others.⁴⁷ Following a transition governed by

39 On these aspects, see Muthucumaraswamy Sornarajah, 'Power and Justice in International Law' (1997) 1 *Singapore Journal of International & Comparative Law* 28–68; Margot E. Salomon, 'From NIEO to Now and the Unfinishable Story of Economic Justice' (2013) 62(1) *International and Comparative Law Quarterly* 31–54; Julia Dehm, 'Highlighting Inequalities in the Histories of Human Rights: Contestations over Justice, Needs and Rights in the 1970s' (2018) 31(4) *Leiden Journal of International Law* 871–95.

40 Eg Articles 5 (human rights), 20–2 (decentralised cooperation), 27 (private sector), 33–41 (the environment) and 258–62 (private investment) of the Fourth Lomé Convention, *supra*.

41 Articles 1, 8(3), 20(1)(b), 20(2) and 31 of the Cotonou Partnership Agreement.

42 Articles 57–9 (climate change) and 62–76 (migration) of the post-Cotonou Agreement, *supra*.

43 Melaku Gebeye Desta, 'EC-ACP Economic Partnership Agreements and WTO Compatibility: An Experiment in North-South Inter-Regional Agreements?' (2006) 43(5) *Common Market Law Review* 1343–79, at 1344–45.

44 *European Communities – Regime for the Importation, Sale and Distribution of Bananas, supra*. On the implications of this WTO dispute for ACP-EU negotiations, see Roman Grynberg, *Negotiating a Fait Accompli: The WTO Incompatibility of the Lomé Convention Trade Provisions and ACP-EU Negotiations* (European Centre for Development Policy Management, 1997), Working Paper No. 38.

45 Panels constituted prior to the WTO era interpreted the pre-existing General Agreement on Tariffs and Trade (GATT) in a similar way but their reports were never officially adopted. See particularly *European Economic Community – Member States' Import Regimes for Bananas*, Report of the Panel, DS32/R (3 June 1993), https://www.wto.org/english/tratop_e/dispu_e/gatt_e/93banana.pdf, paras. 364–72; and *EEC – Import Regime for Bananas*, Report of the Panel, DS38/R (11 February 1994), https://www.wto.org/english/tratop_e/dispu_e/gatt_e/94banana.pdf, paras. 156–64.

46 Article XXIV(8) of the GATT. On this aspect, see Desta, 'EC-ACP Economic Partnership Agreements and WTO Compatibility', *supra*, at 1351; and Gammage, *North-South Regional Trade Agreements as Legal Regimes, supra*, at 158.

47 Article I(1) of the GATT (most-favoured-nation clause).

the Cotonou Agreement, separate EPAs between the EU and regional economic blocs of ACP states would reorganise the trade regime around compliance with these rules.

Overall, the universe of agreements and institutions associated with the ACP-EU partnership has delivered mixed economic outcomes. Financial assistance and favourable trade terms proved a valuable resource for ruling elites in Africa, the Caribbean and the Pacific.⁴⁸ But few would argue that the arrangement has been economically transformative for the ACP states. The rhetoric of partnership belied imbalances in negotiating power and a continuation of neo-colonial divisions of labour, with commodities accounting for a large share of ACP exports to the EU, in exchange for services and manufactured goods from the EU.⁴⁹

Meanwhile, the shift to regional EPAs removed trade rules from the purview of the overarching ACP-EU agreement, restructuring it into a framework treaty with limited practical import. The emphasis on reciprocal liberalisation transformed the trade regime from an instrument of international development cooperation to negotiated arrangements that largely respond to commercial considerations.⁵⁰ In practice, the process of establishing EPAs fell short of the EU's expectations, and the treaties became a fraught issue in the history of the ACP-EU partnership.

3. THE ACP-EU EPAS: VARIABLE GEOMETRIES AND INCOMPLETE PROCESSES

The Cotonou Agreement envisaged that the EU and regional blocs of ACP states would conclude comprehensive EPAs and liberalise trade on a reciprocal basis. Besides trade in goods, the EPAs would also cover other aspects, such as services. Presented as 'reciprocal but asymmetrical', the EPAs would recognise the two sides' unequal economic circumstances and provide flexibility for ACP state parties – for example, through a less comprehensive scope of tariff commitments, longer timeframes for phased implementation and safeguard measures for circumstances such as import surges.⁵¹

The Cotonou Agreement extended the Lomé non-reciprocal trade preferences for a transition period lasting until the end of 2007, with the new EPAs expected to come into

⁴⁸ See eg Michael E. Odijie, 'Unintentional Neo-colonialism? Three Generations of Trade and Development Relationship between EU and West Africa' (2022) 44(3) *Journal of European Integration* 347–63.

⁴⁹ David Luke, Simon Mevel and Melaku Geboye Desta, *EU-Africa Trade Arrangements at a Crossroads: Securing Africa's External Frontier* (Stiftung Entwicklung und Frieden, 2020), https://www.sef-bonn.org/fileadmin/SEF-Dateiliste/04_Publikationen/GG-Spotlight/2020/ggs_2020-03_en.pdf, 1–2. See also Oloruntoba, *Regionalism and Integration in Africa*, *supra*.

⁵⁰ This aspect was also reflected in changes in the European Commission's representation in the EPA negotiations: while the Directorate-General responsible for development was in charge of overall ACP relations under the Cotonou Agreement, responsibility for trade negotiations shifted to the Trade Directorate-General; Niels Keijzer and Lorand Bartels, *Assessing the Legal and Political Implications of the Post-Cotonou Negotiations for the Economic Partnership Agreements* (Deutsches Institut für Entwicklungspolitik, 2017, Discussion Paper 4/2017), https://www.idos-research.de/uploads/media/DP_4.2017.pdf, 5.

⁵¹ Cotonou Partnership Agreement, *supra*, Articles 34(4), 36, 37 and 41.

effect by 1 January 2008 at the latest.⁵² As trade preferences deemed inconsistent with WTO rules would continue to apply during the transition phase, the EU secured a special waiver from the WTO,⁵³ renewing an earlier waiver granted in the mid-1990s, at the time of the first banana disputes.⁵⁴ But setting up the EPAs took longer than originally envisaged,⁵⁵ and the process remains incomplete.

The Caribbean states organised in the CARIFORUM grouping established a regional EPA with the EU, covering trade in goods, services, investment, intellectual property, competition and public procurement.⁵⁶ 'Interim' EPAs apply to relations between the EU and several Southern African Development Community (SADC) member states,⁵⁷ as well as Cameroon,⁵⁸ Côte d'Ivoire,⁵⁹ Ghana⁶⁰ and certain states in the Pacific and eastern and southern Africa.⁶¹

⁵² Cotonou Partnership Agreement, *supra*, particularly Article 36(1) and (3).

⁵³ Doha WTO Ministerial 2001: The ACP-EC Partnership Agreement, Decision of 14 November 2001, WT/MIN(01)/15, text available at https://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_acp_ec_agre_e.htm.

⁵⁴ On this issue, see Desta, 'EC-ACP Economic Partnership Agreements and WTO Compatibility', *supra*, 1345.

⁵⁵ On EPA negotiations, see eg Abigail Namasaka and Etale Reagan, 'Fragmentation and Dilution of ACP Countries' Negotiating Positions During the ACP-EU Economic Partnership Agreements Negotiations' *Afronomicslaw* (10 September 2021), <https://www.afronomicslaw.org/index.php/category/analysis/fragmentation-and-dilution-ACP-countries-negotiating-positions-during-ACP-eu>.

⁵⁶ Economic Partnership Agreement between the CARIFORUM States, of the one part, and the European Community and its Member States, of the other part, signed at Bridgetown on 15 October 2008 and at Haiti on 10 December 2009 and provisionally applied from 29 December 2008; text available at https://publications.europa.eu/resource/cellar/8bcaf1bd-fc10-4309-9663-93215df1fc56.0006.06/DOC_1. The CARIFORUM EPA states are the member states of the Caribbean Community (CARICOM) plus the Dominican Republic. On the CARIFORUM EPA, see Gammage, *North-South Regional Trade Agreements as Legal Regimes*, *supra*, p268–301.

⁵⁷ Economic Partnership Agreement between the European Union and its Member States, of the one part, and the SADC EPA States, of the other part, signed at Kasane on 10 June 2016 and provisionally applied since 10 October 2016; text available at [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:22016A0916\(01\)&from=EN](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:22016A0916(01)&from=EN). The SADC EPA states are the members of the Southern African Customs Union (SACU), ie Botswana, Eswatini, Lesotho, Namibia and South Africa, plus Mozambique. On the SADC EPA, see Gammage, *North-South Regional Trade Agreements as Legal Regimes*, *supra*, 231–67.

⁵⁸ Interim Agreement with a View to an Economic Partnership Agreement between the European Community and its Member States, of the one part, and the Central Africa Party, of the other part, signed at Yaoundé and Brussels on 15 January 2009 and provisionally applied between the European Union and the Republic of Cameroon as from 4 August 2014; text available at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:L:2009:057:FULL&from=en>.

⁵⁹ Stepping Stone Economic Partnership Agreement between Côte d'Ivoire, of the one part, and the European Community and its Member States, of the other part, signed at Abidjan on 26 November 2008 and at Brussels on 22 January 2009 and provisionally applied as from 3 September 2016; text available at [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:22009A0303\(01\)&from=EN](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:22009A0303(01)&from=EN).

⁶⁰ Stepping Stone Economic Partnership Agreement between Ghana, of the one part, and the European Community and its Member States, of the other part, signed in Brussels on 28 July 2016 and provisionally applied as from 15 December 2016; text available at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:L:2016:287:FULL&from=en>.

⁶¹ Interim Partnership Agreement between the European Community, of the one part, and the Pacific States, of the other part, signed in London and Copenhagen on 30 July 2009 and 11 December 2009. The Agreement is applied provisionally between the EU and Papua New Guinea as from 20 December 2009, and between the EU, Papua New Guinea and Fiji as from 28 July 2014. Samoa has approved provisional application as from 31 December

The interim agreements only liberalise trade in goods, though they envisage future negotiation in other areas, such as intellectual property, competition and public procurement.⁶² The agreements aimed to avoid trade disruption as the Cotonou preferences and WTO waiver expired,⁶³ and to pave the way for more comprehensive regional agreements. In practice, the ‘actual and enforceable commitments’ included in these agreements,⁶⁴ and the lack of progress with further negotiations, have made the interim arrangements more lasting than their framing suggested.

Meanwhile, many ACP governments opted not to conclude EPAs that would liberalise imports from Europe, amid concerns about competition from European products and about loss of customs duties – an important source of public revenue in countries where the domestic base for personal income taxation is often constrained.⁶⁵

2018 and Solomon Islands as from 17 May 2020. The text of the agreement is available at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:L:2009:272:FULL&from=en>. Interim Agreement establishing a Framework for an Economic Partnership Agreement between the Eastern and Southern Africa States, on the one part, and the European Community and its Member States, on the other part, signed at Grand Baie on 29 August 2009 and provisionally applied, as from 14 May 2012, by Madagascar, Mauritius, Seychelles and Zimbabwe (Comoros signed the agreement in 2017 and started applying it as from 7 February 2019). The text of this agreement is available at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A02012A0424%2801%29-20200331>.

⁶² See eg the Interim Agreement establishing a Framework for an Economic Partnership Agreement between the Eastern and Southern Africa States, on the one part, and the European Community and its Member States, on the other part, *supra*, Articles 16–18.

⁶³ From January 2008, the EU unilaterally applied a further transitory arrangement providing duty-free, quota-free access to the EU market for goods (except arms and ammunition) originating from ACP states that had taken steps to develop EPAs. See Council Regulation (EC) No. 1528/2007 of 20 December 2007 Applying the Arrangements for Products Originating in Certain States which are part of the African, Caribbean and Pacific (ACP) Group of States Provided for in Agreements Establishing, or Leading to the Establishment of, Economic Partnership Agreements, text available at <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex%3A32007R1528>; repealed and ‘recast’ as Regulation (EU) 2016/1076 of the European Parliament and of the Council of 8 June 2016 Applying the Arrangements for Products Originating in Certain States which are Part of the African, Caribbean and Pacific (ACP) Group of States Provided for in Agreements Establishing, or Leading to the Establishment of, Economic Partnership Agreements (Recast), text available at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A02016R1076-20200820>.

⁶⁴ Interim Agreement with a View to an Economic Partnership Agreement between the European Community and its Member States, of the one part, and the Central Africa Party, of the other part, *supra*, Article 1.

⁶⁵ See eg James Thuo Gathii, ‘The Cotonou Agreement and Economic Partnership Agreements’, in OHCHR, *Realizing the Right to Development* (Office of the High Commissioner for Human Rights, 2013), <https://www.ohchr.org/en/development/realizing-right-development-ebook>, 259–73, at 262. These concerns arose from early on in EPA negotiations; see Sanoussi Bilal, *The Future of ACP-EU Relations: An Overview of the Forthcoming Negotiations* (European Centre for Development Policy Management and Overseas Development Institute, 2002), <https://ecdpm.org/application/files/3216/5547/2941/DP-1-Future-of-ACP-EU-Trade-Relations-Forthcoming-Negotiations-2002.pdf>, 12. On concerns about protecting ‘infant industries’ and customs duty revenues, see also Benjamin William Mkapa, ‘Why the EPA Is Not Beneficial to Tanzania’ (28 July 2016) *Daily News of Tanzania*, republished by South Centre at <https://www.southcentre.int/question/why-the-epa-is-not-beneficial-to-tanzania/>; and Brice R. Mbodiam and Sylvain Andzongo, ‘EPA: Cameroon Set on Suspending Tariff Dismantling till the End of 2020 Despite the EU’s Protests’, *Business in Cameroon* (12 November 2020), <https://www.businessincameroon.com/economy/1211-11015-epa-cameroon-set-on-suspending-tariff-dismantling->

As of early 2022, EU EPAs were in application with 32 out of 79 ACP countries.⁶⁶

LDCs had little incentive to sign the EPAs: the EU's unilateral system of preferences for developing countries, particularly its 'Everything But Arms' (EBA) component, already granted duty-free access to the EU market for most of their products.⁶⁷ This caused fragmentation within regional groupings of ACP states comprising both LDCs and middle-income countries, such as the Economic Community of West African States (ECOWAS) and the East African Community (EAC). States in the same grouping would now have differential access to the EU market, based on EPAs or unilateral preferences. At the same time, EPAs liberalising trade between the EU and individual ACP countries created tensions, as the latter's membership of customs unions required them to apply common tariffs with external trading partners.⁶⁸

At a deeper level, the emphasis on regional trading blocs as the cornerstones of the EPAs followed a Eurocentric understanding of regional integration, neglecting the more flexible and often overlapping nature of regional arrangements in Africa.⁶⁹ Some EPA negotiations departed from the membership of existing regional organisations or even 'invented' new ACP blocs.⁷⁰ And although states in Africa have increasingly organised their trading arrangements around continent-wide processes, particularly through the African Continental Free Trade Agreement and its protocols,⁷¹ the ACP-EU arrangement excludes northern African countries, which have separate partnership agreements with the EU, inspired by principles of cooperation across the Mediterranean.⁷²

till-the-end-of-2020-despite-the-eu-s-protests. For a discussion of the fraught history of EPA negotiations, see Keijzer and Bartels, *Assessing the Legal and Political Implications*, *supra*, 3–6.

66 European Commission, *Overview of Economic Partnership Agreements (Updated February 2022)*, available at <https://circabc.europa.eu/ui/group/09242a36-a438-40fd-a7af-fe32e36cbd0e/library/55adb90e-39c9-4040-aa7a-f1af9fec8b37/details>.

67 Regulation No. 978/2012 of the European Parliament and of the Council of 25 October 2012, *supra*. The EBA component of this scheme, applicable to LDCs, came into effect in 2001. On the complications created by the EBA scheme for EPA negotiations, see also Keijzer and Bartels, *Assessing the Legal and Political Implications*, *supra*, 4–5.

68 Harrison Mbori and James Thuo Gathii, 'Bilateralizing the EU-EAC EPA: An Introductory Legal Analysis of the Kenya-UK Economic Partnership Agreement' *Afronomicslaw* (26 February 2021), <https://www.afronomicslaw.org/index.php/category/analysis/bilateralizing-eu-eac-epa-introductory-legal-analysis-kenya-uk-economic>.

69 James Thuo Gathii, *African Regional Trade Agreements as Legal Regimes* (Cambridge: Cambridge University Press, 2011), esp. 1–64.

70 See eg the Interim Agreement establishing a Framework for an Economic Partnership Agreement between the Eastern and Southern Africa States, on the one part, and the European Community and its Member States, on the other part, *supra*.

71 Agreement Establishing the African Continental Free Trade Area, signed at Kigali on 21 March 2018; text available at https://au.int/sites/default/files/treaties/36437-treaty-consolidated_text_on_cfta_-_en.pdf.

72 However, the Africa Regional Protocol attached to the post-Cotonou Partnership Agreement discusses the articulation with the role of the African Union (AU), the African Continental Free Trade Area, pan-African processes and EU-AU cooperation (eg Articles 3, 16, 17(2) and 18(2) of the Protocol). On this aspect, see also Jean-Claude Boidin, *ACP-EU Relations: The End of Preferences? A Personal Assessment of the Post-Cotonou Agreement* (European Centre for Development Policy Management, 2020),

African scholars and practitioners have noted the irony of a concept that was meant to support regional integration but instead unsettled regional groupings.⁷³ These developments also highlight questions about where agency lies – that is, whether Africa-Europe trade arrangements respond to the priorities set by African states or to approaches primarily promoted from Brussels – and about the contemporary relevance of the ACP grouping as a political construct.⁷⁴

Over the years, the EPAs have attracted controversy, with public authorities and social movements in several ACP states raising concerns about their content, effectiveness and pressures on ACP states to sign.⁷⁵ In fact, concerns over the appropriateness of reciprocal trade liberalisation in relations with poorer countries also led to divisions among EU member states. In the run-up to the negotiation of the Cotonou Agreement, the UK – while eager to preserve the special relationship with the ACP states – initially opposed the EPA approach, deeming it not feasible for all ACP states.⁷⁶ The British government ultimately rallied behind the position supported by the majority of EU member states, but the concerns contributed to the introduction, in 2001, of the EU's EBA initiative.⁷⁷

The important place of the EPAs in the legal architecture that emerged from the Cotonou agreement indicates that much of the action in the ACP-EU partnership has shifted towards more decentralised arrangements – a trend compounded, in the post-Cotonou framework agreement, by the separate regional protocols for Africa, the Caribbean and the Pacific. This development reflects the widely diverse socio-economic and geopolitical realities of ACP states. But with trade a central pillar of the ACP-EU partnership, it also raises questions about the practical significance of the framework agreement.

<https://ecdpm.org/application/files/7816/5546/8592/ACP-EU-Relations-End-Preferences-Personal-Assessment-Post-Cotonou-Agreement-ECDPM-Discussion-Paper-289-2020.pdf>, 6–7.

⁷³ Luke, Mevel and Desta, *EU-Africa Trade Arrangements at a Crossroads*, *supra*, 3; Melaku Desta, 'The Normative Mess Governing Africa-EU Trade Relation Granted a New Lease of Life' *Völkerrechtsblog* (16 November 2021), <https://voelkerrechtsblog.org/the-normative-mess-governing-africa-eu-trade-relation-granted-a-new-lease-of-life/>.

⁷⁴ See also Bossuyt et al, *ACP-EU Relations Beyond 2020*, *supra*, at 3–4; Alfonso Medinilla, *New Beginning or a Last Hurrah? The OACPS – EU Partnership in 2021–2041* (European Centre for Development Policy Management, 2021), <https://ecdpm.org/work/new-beginnings-or-a-last-hurrah-the-oacps-eu-partnership-in-2021-2041>.

⁷⁵ Mkapa, 'Why the EPA Is Not Beneficial to Tanzania', *supra*; *Civil Society Statement on the EU-EAC EPA and the Rendezvous Clause negotiations: A Call to the EAC Partner States to Rethink the Signature and Ratification of the EU-EAC Economic Partnership Agreement (EPA)*, 1 July 2016, <http://eacsof.net/EACSOFWP-content/uploads/2016/08/CSO-EU-EPA-1.pdf>; Econews Africa, *The EAC-EU EPA Negotiations – Unpacking Trade and Sustainable Development* (Econews Africa, 2 March 2022), webinar available at <https://econews-africa.org/the-eac-eu-epa-negotiations-unpacking-trade-and-sustainable-development/>. See also Stephen R. Hurt, Donna Lee and Ulrike Lorenz-Carl, 'The Argumentative Dimension to the EU-Africa EPAs' (2013) 18 *International Negotiation* 67–87, esp. at 81 (citing serious concerns raised by ACP states about pressures to sign the EPAs).

⁷⁶ Ginevra Forwood, 'The Road to Cotonou: Negotiating a Successor to Lomé' (2001) 39(3) *Journal of Common Market Studies* 423–42, at 429 and 435.

⁷⁷ Keijzer and Bartels, *Assessing the Legal and Political Implications*, *supra*, at 4.

Meanwhile, the post-Cotonou agreement transferred the aid component from the contractualised partnership to the EU's unilateral and more generalised Neighbourhood, Development and International Cooperation Instrument (NDICI).⁷⁸ Beyond the lengthy text of the post-Cotonou agreement and the rhetorical pull of a comprehensive 'contractualised' partnership,⁷⁹ key parameters are increasingly defined in separate economic treaties, such as the EPAs, and in EU unilateral instruments, such as NDICI and the EBA scheme.

Trade arrangements remain unfinished business, reflected in the variable geometries of the EPAs and unilateral preferences, the 'interim' nature of several agreements, the stated aspiration to develop more comprehensive yet thus far elusive treaties, and the uncertainties surrounding the interface between the EPAs and regional integration processes, particularly in Africa.

4. THE UK'S POST-BREXIT ARRANGEMENTS

The months in the run-up to the UK leaving the EU saw frantic negotiations between the UK and both the EU — to work out an agreement regulating their new relationship — and the many states that had trade agreements with the EU, to ensure continuity of existing trading arrangements.

From the start, UK policy on ACP trade presented both ruptures and continuities with the history of the ACP-EU partnership. Unlike the EU, which in initialling the post-Cotonou agreement reiterated its commitment to a comprehensive, collective partnership with the OACPS states — albeit one diminished in practical relevance — the UK did not pursue negotiating a framework agreement with OACPS. On trade, however, UK policy closely followed the EU approach: ACP LDCs could export produce — but not armaments — to the UK both duty- and quota-free, as part of a unilateral scheme resembling the EU EBA initiative;⁸⁰ and 'rollover' agreements would continue the effects of the ACP-EU EPAs.⁸¹

Between early 2019 and early 2021, the UK concluded EPAs with the eastern and southern African EPA states,⁸² Pacific EPA states,⁸³ the CARIFORUM

⁷⁸ See also Medinilla, *New Beginning or a Last Hurrah?*, *supra*, 5.

⁷⁹ *Ibid*, 2–3.

⁸⁰ Trade Preference Scheme (EU Exit) Regulations, *supra*, Sections 10(2) and 12. As discussed, the UK will apply a new system, the Developing Countries Trading Scheme (DCTS), from early 2023; this will continue providing duty-free, quota-free trade to LDCs on everything but arms.

⁸¹ Importation of goods falling outside the UK's Generalised System of Preferences for developing countries and the preferential trade agreements negotiated between the UK and its trading partners is governed by the UK Global Tariff (UKGT).

⁸² Agreement establishing an Economic Partnership Agreement between the Eastern and Southern Africa States and the United Kingdom of Great Britain and Northern Ireland, signed at London on 31 January 2019; text available at <https://www.gov.uk/government/publications/ms-no42019-agreement-establishing-an-economic-partnership-agreement-between-the-eastern-and-southern-africa-states-and-the-uk>.

⁸³ Interim Economic Partnership Agreement between the United Kingdom of Great Britain and Northern Ireland, of the one part, and the Pacific States, of the other part, signed at London on 14 March 2019, text

states,⁸⁴ Mozambique and members of the Southern African Customs Union,⁸⁵ Côte d'Ivoire,⁸⁶ Kenya,⁸⁷ Ghana,⁸⁸ and Cameroon.⁸⁹ Non-binding memoranda of understanding regulated transitional arrangements to minimise trade disruption where the EPA could not be finalised before Brexit came into effect – in the case of Cameroon, for example.⁹⁰ Some disruption still occurred; for instance, a hiatus in trading arrangements led to the temporary application of UK tariffs on Ghanaian imports.⁹¹

available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/787355/MS_15.2019i_Pacific_States_Eco_Partnership.pdf.

- ⁸⁴ Economic Partnership Agreement between the CARIFORUM States, of the one part, and the United Kingdom of Great Britain and Northern Ireland, of the other part, signed at Saint Lucia on 22 March 2019; text available at <https://www.gov.uk/government/publications/ms-no182019-economic-partnership-agreement-between-the-cariforum-states-of-the-one-part-and-the-united-kingdom-of-great-britain-and-northern-ire>.
- ⁸⁵ Economic Partnership Agreement between the Southern African Customs Union Member States and Mozambique, of the one part, and the United Kingdom of Great Britain and Northern Ireland, of the other part, signed at London on 9 October 2019; text available at <https://www.gov.uk/government/publications/uksacu-and-mozambique-economic-partnership-agreement-ms-no342019>.
- ⁸⁶ Stepping Stone Economic Partnership Agreement between the United Kingdom of Great Britain and Northern Ireland, of the one part, and Côte d'Ivoire, of the other part, signed at London on 15 October 2020; text available at <https://www.gov.uk/government/publications/ukcote-divoire-stepping-stone-economic-partnership-agreement-cs-cote-divoire-no12020>.
- ⁸⁷ Economic Partnership Agreement between the United Kingdom of Great Britain and Northern Ireland, of the one part, and the Republic of Kenya, a Member of the East African Community, of the other part, signed at London on 8 December 2020; text available at <https://www.gov.uk/government/publications/economic-partnership-agreement-between-the-united-kingdom-of-great-britain-and-northern-ireland-of-the-one-part-and-the-republic-of-kenya-a-member>.
- ⁸⁸ Interim Trade Partnership Agreement between the United Kingdom of Great Britain and Northern Ireland, of the one part and the Republic of Ghana, of the other part, signed at London on 2 March 2021; text available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/978684/CS_Ghana_1.2021_UK_Ghana_Interim_Trade_Partnership_Agreement.pdf.
- ⁸⁹ Interim Agreement establishing an Economic Partnership Agreement between the United Kingdom of Great Britain and Northern Ireland, of the one part and the Republic of Cameroon, of the other part, signed at London on 9 March 2021; text available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/978691/MS_2.2021_UK_Cameroon_Interim_Agreement_Economic_Partnership.pdf.
- ⁹⁰ The UK concluded negotiations with Cameroon in December 2020 but this treaty did not become operational before Brexit came into effect. The UK and Cameroon therefore concluded a temporary Memorandum of Understanding to ensure continuity of trading arrangements by maintaining the effects of the EU-Central Africa EPA, as between them, pending entry into effect of the United Kingdom-Cameroon EPA. See Memorandum of Understanding between the United Kingdom of Great Britain and Northern Ireland and the Republic of Cameroon Concerning the Arrangements for Applying the Effects of the Interim Agreement Establishing an Economic Partnership Agreement between the United Kingdom of Great Britain and Northern Ireland, on the one part, and the Republic of Cameroon, on the other part, <https://www.gov.uk/government/publications/memorandum-of-understanding-between-the-uk-and-cameroon-on-the-economic-partnership-agreement/memorandum-of-understanding-between-the-uk-and-cameroon>.
- ⁹¹ 'Ghana's Duty-Free Access to UK Market Restored', *EPA Monitoring* (4 March 2021), <https://epamonitoring.net/ghanas-duty-free-access-to-uk-market-restored/>.

In line with the aim of 'ensuring continuity in the United Kingdom's existing trade relationships', the terms of the UK's EPAs 'replicate, as far as possible, the effects' of the ACP-EU EPAs.⁹² Like most EU arrangements, several UK EPAs are interim 'goods-only' agreements meant to pave the way to deeper negotiations with the country signing the EPA or its regional grouping.⁹³ Several UK EPAs explicitly refer to previous EU agreements, particularly in their preamble,⁹⁴ and their substantive provisions align with those of the EU agreements, including the principle of reciprocal liberalisation based on asymmetrical modalities and timeframes.⁹⁵ Even the wording of many UK EPAs closely follows the earlier ACP-EU EPAs, with some textual simplifications made possible by decoupling from the framework and regional structures of the OACPS-EU system.⁹⁶

Faced with the need to minimise trade disruptions as Brexit took effect, and with tight timelines to deliver continuity agreements, it was perhaps inevitable that UK policy would follow earlier EU approaches so closely. But as a result, the 'new' trade arrangements reflect long-term legal sedimentation in the ACP-EU partnership, with the shift to the EPAs being the latest chapter of a historical trajectory rooted in colonialism, the European project and the UK's accession to it.

The UK EPAs resulted from years of trade talks conducted under time pressure – first from the expiry of the Cotonou preferences, leading to the EU's interim EPAs, then in the context of Brexit, leading to their rollover. In addition, the network of

⁹² UK Department for International Trade, *Continuing the United Kingdom's Trade Relationship with Côte d'Ivoire: Report to Parliament* (Department for International Trade, 2020), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/933839/trade-agreement-uk-cotedivoire-parl-report-2020.pdf, paras. 2–3.

⁹³ Interim Economic Partnership Agreement with the Pacific States, *supra*, third preambular paragraph ('REAFFIRMING their continuing commitment to the ongoing negotiations aiming at the conclusion of a comprehensive EPA which will contain all relevant elements and include all interested Pacific Island'). See also the Interim Trade Partnership Agreement with Ghana, *supra*, ninth to fourteenth preambular paragraphs (referring to the prospect of a trade agreement between the UK and ECOWAS, of which Ghana is a member, which would supersede the bilateral interim agreement with Ghana).

⁹⁴ For example, the Interim Agreement establishing an Economic Partnership Agreement between the UK and Cameroon, *supra*, 'notes' the experience under the EU interim EPA with the 'Central African Party' and 'recognises' that the UK EPA 'builds on the experience of the Partnership Agreement between the Members of the African, Caribbean and Pacific ("ACP") Group of States, of the one part, and the European Community ("EC") and its Member States, of the other part' (first and second preambular paragraphs).

⁹⁵ See also, for example, the Explanatory Memorandum on the Interim Agreement establishing an Economic Partnership Agreement between the United Kingdom of Great Britain and Northern Ireland, of the one part, and the Republic of Cameroon, of the other part, available at <https://www.gov.uk/government/publications/ukcameroon-interim-agreement-establishing-an-economic-partnership-ms-no22021>, para. 24.

⁹⁶ Eg the UK-Cameroon EPA (Interim Agreement establishing an Economic Partnership Agreement between the UK and Cameroon, *supra*) is concluded directly with Cameroon, rather than with the 'Central African Party' and then only signed by Cameroon, as is the case of the EU interim EPA. The UK EPA is also decoupled from the objectives of the Cotonou agreement, with implications for the formulation of several provisions, such as Articles 1 (which defines the EPA), 2 ('General objectives and scope') and 3 ('Specific objectives').

UK EPAs mirrors that of the pre-existing EU treaties; it does not reflect a strategic prioritisation based on the UK's trading patterns and aspirations. For example, while sub-Saharan Africa accounts for a relatively minor share of UK trade, Nigeria is one of the UK's main trading partners in the region;⁹⁷ yet no EPA applies between the two countries, and Nigeria is not eligible for duty-free access under the UK's unilateral scheme for LDCs.

The UK arrangements also inherited problems associated with the EU approach, including concerns about the transition to reciprocity in trade liberalisation, albeit gradual and asymmetrical, and the treaties' potential to undermine regional integration initiatives.⁹⁸ The UK EPAs thus faced a degree of public contestation from early on. In Kenya, non-governmental organisations and federations of small-scale rural producers conducted advocacy and litigation around the Kenya-UK EPA, securing disclosure of key information as parliament debated the treaty and delaying ratification.⁹⁹ This advocacy also raised concerns about the ways in which the tight timelines to get the EPA into force were affecting space for public participation in decision making.¹⁰⁰

With pressures to secure continuity agreements now eased, there are opportunities for a more proactive and strategic approach to economic relations between the UK and countries in Africa, the Caribbean and the Pacific. This would involve reviewing the EPAs already concluded and developing a longer-term policy strategy that aligns trade arrangements with contemporary social, environmental and economic challenges – from tackling climate change to enabling lower-income countries to diversify from commodity exports.

Malawi illustrates these issues vividly. It is considered one of the poorest countries in the world, according to United Nations statistics,¹⁰¹ with significant geographic variation as well as social and gender disparities.¹⁰² In order to grow and diversify the

97 See the interactive map at (UK) Office for National Statistics, *UK Trade: August 2022* (ONS, 12 October 2022), <https://www.ons.gov.uk/economy/nationalaccounts/balanceofpayments/bulletins/uktrade/august2022>.

98 See also Mbori and Gathii, 'Bilateralizing the EU-EAC EPA', *supra*, writing about the UK-Kenya EPA.

99 'Group of Farmers Petition Court over Kenya, UK Deal' (Econews Africa, 2 March 2021), video available at <https://econews-africa.org/group-of-farmers-petition-court-over-kenya-uk-deal/>; 'Trade Ministry Put to Task on Kenya-UK Deal' (Econews Africa, 3 March 2021), video available at <https://econews-africa.org/trade-ministry-put-to-task-on-kenya-uk-deal/>; and 'Kenya-UK Trade Deal: Kenya Legislators Sign off Pact despite Pushback from MPs and Farmers' (Econews Africa, 11 March 2021), video available at <https://econews-africa.org/3091-2/>. On the experience of Nairobi-based non-governmental organisation Econews Africa in promoting public scrutiny of both EU and UK EPA negotiations, see Edgar Odari, 'Championing Public Participation in Kenya's Trade Negotiations', *International Institute for Environment and Development* (29 June 2022), <https://www.iied.org/championing-public-participation-kenyas-trade-negotiations>.

100 See Odari, 'Championing Public Participation in Kenya's Trade Negotiations', *supra*; and Mbori and Gathii, 'Bilateralizing the EU-EAC EPA', *supra*.

101 UNDP, *Human Development Report 2021/2022* (United Nations Development Program, 2022), https://hdr.undp.org/system/files/documents/global-report-document/hdr2021-22pdf_1.pdf, 274.

102 UNDP, *Malawi National Human Development Report 2021: Delivering Sustainable Human Development and Accountability at the Local Level: The Experience of Decentralisation in Malawi* (United Nations Development Program, 2021), <https://hdr.undp.org/system/files/documents/national-report-document/malawinhdr2022pdf.pdf>, 20–35.

economy – agricultural commodities such as tobacco, tea and cane sugar account for some 70 per cent of exports¹⁰³ – the government has made industrialisation a main pillar of its development strategy.¹⁰⁴ This approach resonates with wider policy trends in Africa, including as part of continent-wide economic integration processes.¹⁰⁵ Further, Malawi is considered one of the countries most vulnerable to climatic changes, due to the effects of extreme weather events,¹⁰⁶ and its reliance on rain-fed agriculture.¹⁰⁷

The Lower Shire Valley is particularly vulnerable to climate shocks,¹⁰⁸ while also hosting indigenous knowledge systems that can help local agriculture adapt to climate change.¹⁰⁹ Research highlighted the considerable adaptive capacity of the Phata cooperative in the face of extreme weather events such as floods and prolonged dry spells; but the increasing frequency of these events will tend to give small-scale farmers less time to reorganise and recover between crises.¹¹⁰ Most people in the surroundings depend on agriculture for their livelihoods (from subsistence maize and sorghum farming to jobs with Phata and large sugar estates), while off-farm employment opportunities are very limited.¹¹¹ And with average incomes below the national trend, many families struggle to secure adequate food, housing and healthcare.¹¹²

These challenges are eminently relevant to trade policy. As regards climate change, for example, international investment protection rules can make it more difficult for

¹⁰³ Figure calculated from UN data for 2019 (<https://comtrade.un.org/data/>). The figure includes exports of tobacco, tea, sugar, rice and fruit and nuts.

¹⁰⁴ Malawi 2063: Malawi's Vision – An Inclusively Wealthy and Self-reliant Nation (Lilongwe, Government of Malawi, National Planning Commission, 2020), <https://malawi.un.org/sites/default/files/2021-01/MW2063-%20Malawi%20Vision%202063%20Document.pdf>, 17–20.

¹⁰⁵ See eg the African Union Summit on Industrialization and Economic Diversification (Niamey, 20–25 November 2022), <https://au.int/en/summit-africa-industrialization-economic#:~:text=The%20African%20Union%20Summit%20on%20Industrialization%20and%20Economic%20Diversification%20aims,Agenda%202063%20and%20Agenda%202030>.

¹⁰⁶ See eg UN, 'Tropical Cyclone Idai Affects 1.5 Million Across Mozambique and Malawi, As UN Ramps Up Response' (United Nations, 15 March 2019), <https://news.un.org/en/story/2019/03/1034741>.

¹⁰⁷ Erika A. Warnatzsch and David S. Reay, 'Temperature and Precipitation Change in Malawi: Evaluation of CORDEX-Africa Climate Simulations for Climate Change Impact Assessments and Adaptation Planning' (2019) 654 *Science of the Total Environment* 378–92, at 379.

¹⁰⁸ Jeanne Yekeleya Coulbaly, Cheikh Mbow, Gudeta Weldesemayat Sileshi, Tracy Beedy, Godfrey Kundhlande and John Musau, 'Mapping Vulnerability to Climate Change in Malawi: Spatial and Social Differentiation in the Shire River Basin' (2015) 4 *American Journal of Climate Change* 282–94, at 288–91.

¹⁰⁹ Emmanuel Charles Nkomwa, Miriam Kalanda Joshua, Cosmo Nsongondo, Maurice Monjerezi and Felistus Chipungu, 'Assessing Indigenous Knowledge Systems and Climate Change Adaptation Strategies in Agriculture: A Case Study of Chagaka Village, Chikhwawa, Southern Malawi' (2014) 67–9 *Physics and Chemistry of the Earth* 164 – 172, at 171–72.

¹¹⁰ Rebecca Henriksson, Katharine Vincent and Kivana Naidoo, 'Exploring the Adaptive Capacity of Sugar-cane Contract Farming Schemes in the Face of Extreme Events' (2021) 3 *Frontiers in Climate*, <https://www.frontiersin.org/articles/10.3389/fclim.2021.578544/full>, esp. at 9–11.

¹¹¹ *Socio-Economic Profile 2017–2022* (Chikhwawa District Council, 2020), https://global-uploads.webflow.com/6061a9d807f5368139d1c52c/60dab86e086fd16cb3ca28eb_Chikhwawa%20District%20Council%20Socio-Economic%20Profile%202017%20-%202022.pdf, at 50 and 88–92.

¹¹² *Ibid.*, at 47.

states to phase down fossil fuels.¹¹³ Although the ACP-EU system has long featured provisions on foreign investment,¹¹⁴ it has remained separate from the network of bilateral investment treaties (BITs) between individual EU and ACP states. This partly resulted from EU rules apportioning competences over trade and investment between the EU and its member states. And although the CARIFORUM EPA covers investment, many ACP states resisted the inclusion of investment issues in their EPAs.¹¹⁵ Since the 1970s, successive ACP-EU agreements have evolved with changing times; but the network of BITs has proved more static and is increasingly at odds with contemporary policy concerns, including the need to move away from fossil fuels in the face of climate change.

As a major source of foreign investment, post-Brexit UK has placed significant emphasis on investment policy, particularly in its relations with Africa.¹¹⁶ Mirroring the ACP-EU EPAs, several UK EPAs list investment as an issue for future negotiation,¹¹⁷ which could provide openings to renegotiate the UK's network of BITs with African, Caribbean and Pacific states.¹¹⁸ Broad notions of economic partnership can also create space for conversations about other climate-related challenges, such as ways to support local adaptation and address losses that adaptation alone cannot offset.¹¹⁹

As regards trade in goods, the EPAs assume that trade liberalisation and economic development go hand in hand, provided reciprocity is gradual and asymmetric. But empirical evidence is patchy on the impacts of reciprocal trade agreements between higher- and lower-income countries.¹²⁰ And in contrast with Africa's aspirations to

¹¹³ UNCTAD, *The International Investment Treaty Regime and Climate Action* (United Nations Conference on Trade and Development, 2022), https://unctad.org/system/files/official-document/diaepcbinf2022d6_en.pdf.

¹¹⁴ See eg Cotonou Partnership Agreement, *supra*, Article 78, referring to the 'importance' of concluding investment protection agreements.

¹¹⁵ Namasaka and Reagan, 'Fragmentation and Dilution of ACP Countries' Negotiating Positions', *supra*.

¹¹⁶ See eg the UK's convening of the UK-Africa Investment Summit in 2020 and subsequent conferences on the same theme. See UK-Africa Investment Summit 2020 (London, 20 January 2020), <https://www.gov.uk/government/topical-events/uk-africa-investment-summit-2020/about>.

¹¹⁷ See eg Agreement establishing an Economic Partnership Agreement between the Eastern and Southern Africa States and the United Kingdom of Great Britain and Northern Ireland, *supra*, Article 52 (mirroring Article 53 of the relevant EU EPA); and Stepping Stone Economic Partnership Agreement between the United Kingdom of Great Britain and Northern Ireland, of the one part, and Côte d'Ivoire, of the other part, *supra*, Article 44 (mirroring Article 44 of the EU EPA).

¹¹⁸ Thirty-five of the UK's 110 known BITs are with countries that have participated in the ACP-EU partnership. See UNCTAD, *International Investment Agreements Navigator: United Kingdom* (United Nations Conference on Trade and Development), <https://investmentpolicy.unctad.org/international-investment-agreements/countries/221/united-kingdom>.

¹¹⁹ On 'loss and damage' in international climate diplomacy, see eg Clara Gallagher and Simon Addison, Financing Loss and Damage: Four Key Challenges (International Institute for Environment and Development, 2022), <https://www.iied.org/sites/default/files/pdfs/2022-10/21141iied.pdf>.

¹²⁰ Christopher Stevens, Muhammad Irfan, Isabella Massa and Jane Kennan, *The Impact of Free Trade Agreements between Developed and Developing Countries on Economic Development in Developing Countries: A Rapid Evidence Assessment* (Overseas Development Institute, 2015), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/448862/REA_FreeTradeAgreements.pdf.

industrialise, UK imports from the continent mainly involve oil, minerals and farm produce,¹²¹ highlighting questions about how trade arrangements could support industrialisation policies. These circumstances illustrate the case for reconsidering the trade regime inherited from the EU. Meanwhile, the geopolitical considerations that led the EU to develop separate arrangements with northern Africa are less relevant to the UK, increasing scope to explore trade arrangements that are more supportive of Africa's continent-wide integration processes.¹²²

Experience with the ACP-EU EPAs suggests that long-term policy effectiveness will partly hinge on an ability to listen and co-develop a trade agenda that responds to the diverse needs and aspirations of countries in Africa, the Caribbean and the Pacific. This interrogates substantive trade rules but also the process through which those rules are developed as well as the primary interlocutors in trade matters – for example, as regards the role of continent-wide trade institutions in Africa and available space for public participation in trade policy making. The UK's accession to the EU catalysed policy innovation in the history of the ACP-EU partnership; it remains to be seen whether its withdrawal will lead to new, imaginative approaches to framing economic relations between higher- and lower-income countries.

¹²¹ Office for National Statistics, *UK Trade: August 2022*, *supra*.

¹²² As advocated by David Luke, 'Defining a New UK-Africa Trade Partnership', in Emily Jones and Conrad Copeland (eds), *Making UK Trade Policy Work for Development Post-Brexit: Workshop Report* (Global Economic Governance Programme, 2017), <https://www.geg.ox.ac.uk/sites/default/files/Making%20UK%20trade%20work%20for%20development%20post-brexit.pdf>, 31–3, at 32. See also Desta, 'The Normative Mess Governing Africa-EU Trade Relation', *supra*.