



## Africa and the Multilateral Trading Regime: Re-examining the “Market Access” Mantra

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### Abstract

Much has been written about sub-Saharan Africa and its inability to achieve economic development – a state of affairs often articulated by legal scholars in terms of its inability to realize the core elements of economic and social rights such as healthcare, food, housing, and basic education. Commentators and policy-makers are almost unanimous in blaming factors such as “inadequate” foreign aid, the debt burden, “unfair” multilateral trade rules and protectionism in Western markets. Although some are beginning to challenge the aid/debt hypothesis, the last two suppositions remain an article of faith – the overwhelming opinion being that existing multilateral trade rules and protectionism in Western markets represent *the* impediment to the region’s ability to “trade its way out of poverty.” This paper aims to add to the dissenting voices by arguing that the problem of protectionism has become so overemphasized that its proponents have, quite paradoxically, become the obstacle to the region’s prospects of ever achieving the aim of economic development as proclaimed under the Agreement Establishing the World Trade Organization and indeed, under the main international human rights instruments such as the Covenant on Economic and Cultural Rights – not least because this thesis invariably deflects critical attention from the real impediments to the region’s ability to trade.

**Keywords:** Sub-Saharan Africa, GATT/WTO regime, Economic development, Governance, Economic and social rights

### 1. Introduction

Very little remains to be written or said about Africa’s (Note 1) inability to achieve economic development – a state of affairs often articulated by legal scholars in terms of its inability to realize the core elements of economic and social rights such as healthcare, food, housing, and basic education (Note 2). The prevailing opinion (actively promoted by a combination of influential voices including the global media, the academic fraternity, non-governmental organizations, policy makers, rock stars, and indeed, the region’s rulers) attributes this to certain familiar factors: “inadequate” foreign aid, the debt burden, “unfair” multilateral trade rules and protectionism in Western markets. Some dissenting voices, to be sure, are beginning to challenge the aid/debt hypothesis (Note 3). However, the last two suppositions remain largely uncontested – the overwhelming opinion being that existing multilateral trade rules and protectionism in Western markets represent *the* impediment to Africa’s ability to “trade its way out of poverty.” (Note 4) This paper aims to add to the dissenting voices by arguing that the problem of protectionism has become so overemphasized that its proponents have, quite paradoxically, become the obstacle to the region’s prospects of ever achieving economic development as envisaged under the Agreement Establishing the World Trade Organization (Note 5) (and by extension, of realizing economic and social rights) – not least because this thesis invariably deflects critical attention from the real impediments to the region’s ability to trade.

It naturally begins with a brief contextual overview of the multilateral trading regime, with a view to determining the extent to which they affect the region. It then goes on to acknowledge the reality of protectionism in Western markets, but also highlights the fact that Africa trades effectively on bilateral and preferential terms – outside of the multilateral trading regime. It further assesses the two main preferential regimes, and argues that although these are not without inherent imperfections, they represent the best that can be expected in a global economic regime not built on altruism. The last section attempts to explain the principal reasons why the region has been unable to become integrated within the multilateral trading system.

## 2. The Multilateral Trading Regime: A Brief Overview

The multilateral trading regime is made up of the General Agreement on Tariffs and Trade (GATT), (Note 6) and the various other Agreements that resulted from the Uruguay Round negotiations (about 60 in all).(Note 7) These cover various aspects of economic activity, such as agriculture (through the Agreement on Agriculture), services (through the General Agreement on Trade in Services), intellectual property (through the Agreement on Trade-Related Aspects of Intellectual Property Rights), and foreign direct investment (through the Agreement on Trade-Related Investment Measures). Subsequent negotiations have produced additional legal texts such as the Information Technology Agreement, and the Protocols on Services and Accession. (Note 8) The various agreements are supplemented by a number of Ministerial Decisions and Declarations. Recent last-ditch efforts in the German city of Potsdam to save the Doha Round of negotiations (which was launched in 2001), however, failed to reconcile the interests of developed countries (i.e., lower import tariffs on industrial goods in developing country markets) with the latter's demand for cuts in farming subsidies in the developed economies. (Note 9)

### 2.1 *The Basic Rules of the GATT*

Although the laws that govern interstate trade relations are notoriously complicated, detailed and multi-faceted, it is possible to reduce them, even at the risk of oversimplification, to a number of basic principles which are enshrined in the Preamble to the GATT, which commits Members of the World Trade Organization (WTO) to "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 commerce" (Note 10) To this end, Article I proclaims the most-favoured-nation (MFN) principle, according to which "...any advantage, favour, privilege, or immunity granted by any member to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other members." Also, Article III recognizes the national treatment principle, by virtue of which "[t]he products of the territory of any member state imported into the territory of any other member state shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution, or use..." Article X recognizes the principle of transparency which, in broad terms, is aimed at making each WTO Member's trade policies and practices open and predictable, while Article XI prohibits (subject to exceptions) the imposition of quantitative restrictions (e.g., quotas or licences) on imports and exports.

### 2.2 *Some Relevant Exceptions*

As would be expected, the GATT, like many other multilateral treaties, allows for derogations which apply to all WTO Members. Many of these, however, apply specifically to developing countries, including the least-developed ones (LDCs) amongst them. Given Africa's synonymity with economic underdevelopment, (Note 11) most of these derogations naturally apply to the region. For example, Article XVIII (titled "Governmental Assistance to Economic Development") allows WTO Members whose economies "can only support low standards of living and are in the early stages of development" to adopt certain measures outlined under Sections A-C for purposes relating to economic development: Under Section A, such a Member may withdraw or modify a concession granted under the GATT/WTO framework to another Member, if the aim is to promote a particular industry and to raise its people's living standard. Under Section B, it may impose quotas for balance of payments reasons. Section C permits the granting of governmental assistance for the purpose of supporting an infant industry, with a view to raising living standards, while Part IV (i.e., Articles XXXVI-XXXVIII) calls upon developed countries to grant market access to products originating, particularly from LDCs, on the basis of non-reciprocity.

The GATT/WTO regime has also introduced various measures aimed specifically at addressing the needs of LDCs. To begin with, the Preamble to the WTO Agreement acknowledges "a need for positive efforts designed to ensure that developing countries, and especially the least-developed among them, secure a share in the growth of international trade commensurate with the needs of their economic development." (Note 12) To this end, many of the Uruguay Round Agreements (including those mentioned earlier) contain special provisions aimed at addressing their needs. Moreover, the Ministerial Decisions and Declarations agreed at the Uruguay Round effectively exempt LDCs from all the agreements, including the ones they might have ratified, (Note 13) while the Doha Ministerial Conference reaffirmed the participants' commitment to the needs of LDCs, in such areas as market access and preferential treatment. (Note 14)

A number of other initiatives were also agreed during the Uruguay Round negotiations, such as: the Decision on Measures in Favour of Least Developed Countries, and the Decision on Measures Concerning the Possible Negative Effects of the Reform Programme on Least Developed and Net Food-Importing Developing Countries (WTO 1998, 238-241). Other measures include the follow-up Programme on the High-Level Meeting on LDCs (first held in October of 1997) and its Integrated Plan of Action, the central aim of which is the alleviation of poverty among the LDCs. These include the "Integrated Framework" scheme which aims to increase the benefits that LDCs derive from trade-related technical assistance from multilateral agencies, (Note 15) and the "Mainstreaming" initiative which "involves the

process and methods of identifying and integrating trade priority areas of action into the overall framework of country development plans and poverty reduction strategies.” (Note 16) Add to these the numerous other programmes and initiatives, and it becomes easy to understand why the WTO itself has described them as a “universe of special and differential treatment.” (Note 17) What these demonstrate is that although the effectiveness of these measures is not beyond debate, it is not the case that the GATT/WTO regime (which, after all, came into existence through multilateral negotiations involving rich and poor countries alike) is indifferent to the needs of the latter.

### 3. Acknowledging the Reality of Protectionism

The above measures notwithstanding, there is a need to acknowledge the fact that protectionism in Western markets remains a major obstacle to international trade, as well as exposing the fallacy behind a supposed “liberalized global economic order.” Indeed, although the European Union (EU) and the United States have become the chief culprits in this regard because of their generous domestic farm subsidies, both merely represent a fraction (albeit a significant one) of an overall OECD total of US\$311 billion (as of the year 2001). (Note 18) Moreover, according to a study undertaken for the United Nations Conference on Trade and Development (UNCTAD), the EU, the United States and Japan accounted for 94 percent of agricultural subsidies as of 1997 to the tune of \$264 billion, with the EU alone accounting for 40 percent or \$110 billion. The United States followed closely with \$72.4 billion, and Japan with \$67.3 billion. By 1999, the total amount of agricultural support in OECD countries had risen from \$267 billion to \$361 billion, or 1.4 percent of their collective GDPs. (Supper 2001, 20-22). Yet, even these might not represent the full picture. As noted in a more recent report by the same UN agency, reductions in tariff barriers have in recent years been accompanied by an increase in the adoption of so-called non-tariff measures (NTMs) (e.g., technical regulations and standards), ostensibly aimed at promoting laudable objectives such as human safety, health and environmental protection – a problem compounded by the difficulty involved in quantifying their impact on trade (UNCTAD 2006, 80-81). These include the use of sanitary and phytosanitary (SPS) measures which have been the subject of notifications to the WTO since 1995 (UNCTAD 2006, 81).

In questioning the “market access” mantra, therefore, it is necessary to concede that it is not entirely without foundation. To begin with, these protectionist measures are often adopted in relation to products in which developing countries (including the LDCs) might be said to have a comparative advantage – namely, agricultural produce. Indeed, even if there was no protectionism of the traditional kind in developed-country markets, the use of NTMs, on their own, would still place the LDCs (if not the generality of developing countries) at a distinct disadvantage not least because by their very nature, these countries are those least able to comply with any complicated technical standards. However, to deduce from these, the generalized supposition that Africa is a casualty of protectionism is to ignore certain basic incontestable realities in regard to not just the region’s relationship with the multilateral trading regime (including the various measures offered by the WTO aimed at providing technical assistance to it, (Note 18) but also about its inability to utilize existing preferential trading regimes – which, although not beyond criticism, represent the best that can be expected in a global economic order traditionally defined (rightly or wrongly) by each nation’s self-interest. An examination of the main preferential trading regimes is considered necessary at this stage.

### 4. Trading on the Margins

In its fairly recent *World Trade Report*, the WTO notes that although Africa’s non-oil exports increased by about 6 percent in 2002 (this being the result of a “rebound” from previous years’ decline, by countries such as Morocco, Egypt, the Ivory Coast and Ghana) (WTO 2003, 18), (Note 19) only six of its 53 countries, “achieved a sustained expansion of their exports over the 1999-2002 period.” (WTO 2003, 18). (Note 20) Even in the narrower context of intra-developing country trade, the report noted: “Africa has the smallest share...In 2001, the value of African exports...was estimated to be in the order of \$36 billion, which accounts for slightly less than 6 per cent...” (WTO 2003, 26). And, although the global share of the continent’s merchandise exports increased in 2003, at 2.3 percent, it remained below the level recorded within the previous decade (WTO 2004, 11).

To be sure, much has been written of late about the region’s general economic growth, which was expected to accelerate to 6.6 percent by 2006 (UNCTAD 2006, 2-3), only missing the UN’s Millennium Development Goals (which are based on a 7 percent growth rate) by less than one percent. Indeed, some observers will understandably point to the so-called “strategic partnership” that has apparently developed between the region and China (allowing the latter access to the region’s natural resources in return for much-needed investment) as evidence of progress (Anderlini 2007). (Note 21) However, it is also necessary to note, firstly, that this growth figure represents an aggregate of countries, including the oil exporters and South Africa – the region’s economic powerhouse. Secondly, some of the individual economies (e.g. Mozambique, Angola and Rwanda) have started from a very low base, having been rendered effectively bankrupt either by war, misrule, or both. It is also the case that much of the region’s exports to China are merely in the form of primary produce (White and Alves 2006) – which, to begin with, are not indicative of any meaningful level of policy-driven economic activity capable of sustaining this trend in the long term. Moreover, such an asymmetrical relationship is already beginning to revive claims of neo-colonialism of the kind that informed the economic

dependency theory which itself defined the region's immediate post-independence trade relations with its former colonizers. (Note 22) At any rate, given that Africa is widely believed to be a casualty of protectionism in Western markets and effectively trades on bilateral and preferential terms with developed countries, the central task in this section is to assess the extent to which it has successfully utilized these preferential arrangements.

## 5. Africa and the Main Preferential Trading Regimes

Africa's marginalization from the global trading system means that it effectively trades on preferential terms with developed countries under the latter's generalized system of preferences (GSP). The GSP came into effect by virtue of a special derogation from the multilateral trading regime. Its legal basis is the so-called "Enabling Clause" which was adopted as part of the Tokyo Round negotiations in 1979, allowing developed countries to trade on preferential terms with developing countries of their choice on the basis of non-reciprocity. (Note 23) Of these, the EU's and the United States' preferential regimes have emerged as the most wide-ranging, at least in relation to Africa. (Note 24)

### 5.1 Trading under the European Union's GSP

The EU scheme, which is widely accepted as the most comprehensive preferential regime, is primarily based on Article 133 of the Treaty Establishing the European Community (as amended) which states: "The common commercial policy shall be based on uniform principles, particularly in regard to changes in tariff rates, the conclusion of tariff and trade agreements..." (Note 25) It operates at several levels: the normal GSP (including the so-called the Everything But Arms (EBA) initiative), and the soon-to-expire African, Caribbean and Pacific-Lome/Cotonou scheme (aimed at certain ex-colonial African, Caribbean and Pacific countries). (Note 26) The first *generalized* EU scheme was implemented in 1971, since when it has undergone numerous revisions (UNCTAD 2002a). A key priority of the current regime is to enable developing countries to benefit from globalization, in particular by linking trade and sustainable development, in line with the Doha Development Agenda. (Note 27)

#### 5.1.1 The General Arrangement

Under the current legal framework, the EU's normal GSP regime is divided into three broad sections: a general arrangement, a special incentive arrangement for sustainable development and good governance, and a special arrangement for LDCs. (Note 28) The general arrangement sets out the general rules for the application of the scheme. Under this arrangement, duties for non-sensitive products are suspended in their entirety, except for agricultural components. (Note 29) For sensitive products, however, duties are reduced by 3.5 percent. This reduction is limited to 20 percent for textiles and clothing. However, a tariff reduction of more than 3.5 percent laid down under the previous GSP regime (i.e. the period preceding 2002 to 2005) still applies, though duties are reduced by 30 percent. (Note 30)

#### 5.1.2 The Special Incentive Arrangement for Sustainable Development and Good Governance

Under the special incentive arrangement for sustainable development and good governance, duties on products listed in Annex II are in principle suspended. Specific duties are also suspended, unless there is also an ad valorem duty. By contrast, specific duties on certain types of chewing gum are limited to 16 percent of the customs value. (Note 31) The beneficiary countries under this arrangement are those that are considered to be vulnerable due to their lack of diversification and insufficient integration into the global trading regime. This applies to countries not classified by the World Bank as high income countries for three consecutive years. These are also countries where the five largest sections of GSP-covered imports to the Community represent more than 75 percent in value of their total GSP-covered imports, and where GSP-covered imports to the Community represent less than one percent in value of total GSP-covered imports to the Community. (Note 32) Eligibility is also conditional on beneficiaries complying with certain obligations relating to the ratification and implementation of core human rights treaties, as well as those pertaining to the environment and governance principles – both outlined under Parts A and B of Annex III to the Regulation. (Note 33)

#### 5.1.3 The Special Arrangement for LDCs

Under the special arrangement for LDCs, duties are entirely suspended for all products - except arms and ammunition - for countries listed Annex I (Column D) to the Regulation, in line with the EBA initiative. (Note 34) Certain products (namely, rice, banana and sugar) are however subject to a phased reduction, with a view to achieving total suspension by 1 September 2009. (Note 35) Of the various EU schemes, the EBA regime is widely acknowledged as being the most wide-ranging in terms of its product coverage (UNCTAD 2002a, xix).

#### 5.1.4 The Lome/Cotonou Scheme

Although the current EU GSP regime began in 1971, its trade relations with (sub-Saharan) African, Caribbean and Pacific (ACP) States date back to the adoption of the original Treaty of Rome in 1957, when many of the latter group of countries were still European colonies. (Note 36) Relations under this scheme have been the subject of various amendments, beginning with the Yaounde I and II Conventions (signed in 1963 and 1969 respectively between the Association of African and Malagasy States) and Lome Conventions which became effective in 1975. (Note 37) The

latter instruments together established what the EU itself describes as “a far-reaching and complex partnership” covering economic and commercial cooperation, as well as development cooperation. (Note 38) A key element of economic and commercial cooperation established under the first Lome Convention was the system of trade preferences, the aim of which was to ensure that products from beneficiary countries were exempt from customs duties and quantitative restrictions, provided they were not in direct competition with products covered by the EU’s Common Agricultural Policy. (Note 39) The Lome regime is not based on reciprocity, but beneficiaries are obliged to apply the MFN principle in their dealings with EU member States. (Note 40) The fourth Lome regime (which expired in 2000) introduced a number of requirements on the beneficiaries such as respect for human rights, (including women’s rights), democratic governance, and environmental protection. (Note 40)

Following the expiry of the fourth Lome regime, a new agreement was signed in the Benin Republic capital of Cotonou on 23 June 2000, and entered into force on 1 April 2003. (Note 41) While retaining the main features of the previous regime, the new agreement adopts a comprehensive approach which “aims to strengthen the political dimension, provide more flexibility and entrust the ACP States with greater responsibilities.” (Note 42) It has three main dimensions, namely politics, trade and development, supported by five “pillars” namely: reinforcement of the political dimension of relations between ACP countries and the EU; promotion of participatory approaches, involvement of civil society, the private sector and other non-State actors; development strategies and priority for the objective of poverty reduction, and a special focus on the Millennium Development Goals; the establishment of a new framework for economic and trade cooperation; and reform of financial cooperation. (Note 43) Of particular interest is the fourth pillar of the agreement which seeks to enable the beneficiaries to play a full part in the multilateral trading system. (Note 44)

### *5.2 Africa and the United States’ GSP*

The legal basis of US trade relations with Africa is the African Growth and Opportunity Act 2000 (AGOA), introduced by the Clinton Administration to cater specifically for the interests of the region by introducing a new trade and investment policy. (Note 45) The Act gives wide-ranging powers to the President to designate any country in the region as a beneficiary under the scheme, subject to a number of eligibility requirements. Specifically, the President must be satisfied that the beneficiary country has established, or is in the process of establishing: a market-based economy which guarantees property rights, and eliminates interventionist policies such as subsidies and State ownership of economic assets; the rule of law, political pluralism, and the right to due process, a fair trial, and equal protection under the law. They must also:

- 1) eliminate barriers to US trade and investment, including by: (i) the provision of national treatment and measures to create an environment conducive to domestic and foreign investment; (ii) the protection of intellectual property; and (iii) the resolution of bilateral trade and investment disputes;
- 2) promote economic policies to reduce poverty, increase the availability of health care and educational opportunities, expand physical infrastructure, promote the development of private enterprise, and encourage the formation of capital markets through micro-credit or other programs;
- 3) establish a system to combat corruption and bribery, such as signing and implementing the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions; and
- 4) observe internationally recognized worker rights, including the right of association, the right to organize and bargain collectively, a prohibition on the use of any form of forced or compulsory labour, a minimum age for the employment of children, and acceptable conditions of work with respect to minimum wages, hours of work, and occupational safety and health.

Moreover, they must not engage in activities that undermine US national security or foreign policy interests; or engage in gross violations of internationally recognized human rights or provide support for acts of international terrorism. They must support international efforts to eliminate human rights violations and terrorist activities. (Note 46) The Act further empowers the President to terminate the designation of any beneficiary country that “is not making continual progress” in meeting the requirements described above. (Note 47)

In addition to country eligibility, the AGOA has detailed rules on product eligibility. The Act authorizes the President, acting on the advice of the US International Trade Commission, to provide duty-free access for certain products from beneficiary countries, provided the goods are not considered “import sensitive.” (Note 48) Some 1,800 items benefit from the AGOA scheme, and these include about 214 products such as footwear, luggage and handbags, which were excluded under the broader GSP, as are wine, fruits and juices. (Note 49) Moreover, even those non-LDC African countries that enjoyed fewer benefits under the broader GSP now enjoy duty-free treatment on all GSP-eligible products (UNCTAD 2001, 33).

The AGOA also extends duty/quota-free treatment to certain categories of textiles and clothing to the tune of about 17.5 percent (in terms of duty advantage on imports of similar products into the US market), subject, however, to the illegal trans-shipment clause. (Note 50) It further exempts beneficiary countries from the so-called “competitive need

limitations” imposed on other GSP-eligible countries, and extends GSP treatment to eligible countries until 30 September 2008 – seven years longer than the rest of the world (UNCTAD/Commonwealth Secretariat 2001, 29).

The AGOA, like its equivalent EU regime, has undergone a number of amendments since its enactment. On 6 August 2002, President Bush signed the Trade Act of 2002 into law. AGOA II, as it is called “substantially expands preferential access for imports from beneficiary...countries.”(Note 51) It also “clarifies and narrowly expands the trade opportunities for Sub-Saharan African countries under AGOA and encourages more investment in the region. (Note 52)

AGOA II was followed by the AGOA Acceleration Act of 2004 (AGOA III), which was signed by President Bush on 12 July, 2004 and, amongst other things, extends the overall programme from 2008 until 30 September 2015. (Note 53) It also broadens current eligibility to allow non-AGOA produced garment-related imports such as collars, cuffs, and elbow patches, as well as increasing the *de minimis* threshold on fibre and yarn inputs from 7 to 10 percent. (Note 56) It encourages the development of infrastructure projects, and directs the President to assign personnel for the purpose of providing technical assistance to certain countries, and to offer advice on improvements to their SPS standards with a view to enabling them to comply with US import requirements. (Note 57)

The latest amendment, titled the Africa Investment Incentive Act of 2006 (AGOA IV) was signed by President Bush on 20 December 2006. Amongst its key features is the extension of the textile and apparel provisions of the AGOA program until 2015, as well as expanding duty-free treatment for textiles or textile articles originating entirely in one or more lesser-developed beneficiary country. (Note 58)

## 6. An Evaluation of Both Preferential Regimes

### 6.1 Some General Concerns

Any attempt to evaluate the usefulness of the above preferential regimes for Africa must begin by noting that quite aside from being a special derogation from the core GATT principles, they are, in essence, instruments of bilateral relations between the granting countries and the beneficiaries – the fact that the EU scheme involves significant multilateral features notwithstanding. And, because they are largely discretionary, some commentators have suggested that they are subject to arbitrary withdrawal (Trebilcock and Howse 2000, 373). Indeed, as with the AGOA, the EU’s GSP Regulations allow for the withdrawal of preferential arrangements, though under certain defined conditions, thus highlighting the inherent precariousness of trading outside the rules-based multilateral trading regime. (Note 59) Nor should it be forgotten that preferential regimes are subject to so-called “safeguard clauses,” the essence of which is that the importing country reserves the right to impose normal MFN tariffs on imports from a beneficiary country where the latter’s products are deemed to present a threat to similar products made within the former’s economy. (Note 60) Indeed, two eminent commentators once questioned the very desirability of preferential trading regimes, based on the fact that each successive GATT Round has generally resulted in reductions in global tariff levels (Greenway and Milner 1996, 35). Nevertheless, one study conducted (though before the latest preferential regimes) by both UNCTAD and the WTO maintains that the GSP “remains a valuable tool for promoting developing country exports” (UNCTAD/WTO 1997, 9).

### 6.2 The Non-trade-related Requirements

Criticisms are also often levelled at the eligibility criteria imposed under these preferential regimes. For example, an UNCTAD study alludes to the “several non-trade” criteria under the AGOA (UNCTAD 2001, 33), some of which, it has to be acknowledged, are not dissimilar to the much-criticized policies of “structural adjustment” imposed on many developing countries by the international financial institutions – particularly those requiring wide-ranging market-driven economic reforms. (Note 61) However, not all eligibility criteria are so susceptible to criticism. For example, the requirement that beneficiary countries implement internationally recognized labour rights, or that they take steps to tackle corruption can only be to the benefit of the poor in the countries concerned – and are therefore in consonance with core principles of international human rights law. Indeed, those familiar with international instruments such as the United Nations Charter and the Economic and Social Rights Covenant will recognize the legal exhortation to countries to act both individually and through international cooperation to address the problems associated with underdevelopment and poverty. (Note 62) At any rate, there is a need to keep in mind the fact that by their very nature, preferential trading regimes are voluntary arrangements, and therefore cannot possibly amount to an imposition of these criteria (whether desirable or not) on the beneficiary countries.

### 6.3 Rules of Origin: The EU Regime

Some of the most trenchant criticisms of preferential trading regimes relate to their notoriously detailed and complicated rules on the origin of imports. For example, according to a recent inter-agency report compiled for the United Nations, “...restrictive conditions – including rules on origins of products and other administrative obstacles – often make these preferences difficult to take advantage of” (United Nations 2007, 30). In their simplest terms, these rules exist for the purpose of identifying the goods produced in the beneficiary country as well as ensuring that the benefits provided through the preferential regime are confined to those products originating in the beneficiary country (UNCTAD 2002, xxxi).

Although the rules remain as detailed as ever, both the EU and US schemes have been subject to modifications in favour of preference-receiving countries. For example, according to the European Commission, “the need for change is widely recognised: in form (simplification), in substance (amendment of the origin criteria and cumulation rules) and in procedures (formalities and controls). (Note 63) Hence, the relaxation of the EU regime to allow for inputs from other countries to be considered as originating in the beneficiary country, subject to certain conditions. Upon request, this arrangement extends to members of regional organizations – although the list of beneficiaries does not currently include any of Africa’s regional groupings. (Note 64) Under this arrangement, all imports under the GSP are entitled to entry based on the “bilateral cumulation of origin” principle (also known as “donor country content”) – an arrangement which allows for the incorporation of inputs from the EU itself in the manufacturing process. (Note 65)

#### *6.4 Rules of Origin: The AGOA Regime*

Beneficiaries under the AGOA must meet the broader United States GSP rules of origin initially outlined under §503(a) (2) of the Trade Act of 1974. Under the AGOA, these have been amended to allow: (a) the cost or value of materials produced in the customs territory of the United States to be counted towards the 35 percent requirement (up to a maximum amount not to exceed 15 percent of the article’s appraised value); and (b) the cost or value of the materials used that are produced in one or more AGOA-designated sub-Saharan African countries to be counted towards the 35 percent requirement. (Note 66) The AGOA also removes the so-called “competitive need limitation,” (Note 67) which aims to prevent the extension of preferential treatment to countries that are already competitive in the production of the item in question. The obvious implication of these is therefore that although the impact of complicated rules of origin on potential exports from African countries cannot be discounted, it is also the case that the major preference-giving countries have made some effort towards alleviating it.

### **7. Explaining Africa’s Inability to Trade**

#### *7.1 The Capacity Problem*

By overemphasizing the issue of protectionism in Western markets, commentators on Africa often ignore one of the region’s defining problems: its lack of basic infrastructural and institutional capacity. To be sure, the World Bank did highlight this in a major and comprehensive report published in 1997, which noted: “Many countries in Sub-Saharan Africa are suffering from a crisis of statehood – a crisis of capability. An urgent priority is to rebuild state effectiveness through an overhaul of public institutions...” (World Bank 1997, 14). The report cited Nigeria, Tanzania, and Guinea as examples of countries where there is an inability to make budget forecasts based on sound and realistic assumptions, and where no system exists for costing out policy proposals or subjecting them to scrutiny (World Bank 1997, 83-84). The region’s lack of infrastructure was recently highlighted in another World Bank report (World Bank 2006, 36).

In a sense, it could be argued that the region’s inability to create the necessary institutions and infrastructure is a direct function of resource constraints. Yet, this would ignore the fact that in many cases, resources are either stolen by the ruling elite, or diverted into inappropriate projects, (Note 68) while public institutions are constantly undermined by what media commentators sometimes describe as “bad politics.” Or as (South African) President Mbeki’s brother is reported to have once asserted, “Africa is not badly governed because it is poor. It is poor because it is badly governed” (La Guardia, 2005). Moreover, the tendency on the part of the region’s rulers to instinctively search for supranational solutions to problems that are inherently domestic makes it impossible to assume that the capacity problem is being tackled with the degree of seriousness it deserves. One result of this obsession with supranationalism is the so-called New Partnership for African Development – one of the countless initiatives supposedly aimed at encouraging good governance in the region; (Note 69) the second is the recent proposal for a United States for Africa. (Note 70) While few would criticize any attempt at bringing about development through such coordinated efforts, fewer still would expect them to succeed without the domestic capacity to translate them into concrete results.

#### *7.2 The Underutilization of Preferences*

Closely related to Africa’s capacity problem is its inability to utilize the preferential regimes offered by developed countries. Indeed, the relationship between both might be articulated in terms of cause and effect, at least insofar as this capacity problem naturally frustrates any effort aimed at taking advantage of available preferential schemes in the same way that certain former LDCs (such as Singapore, Hong Kong and Taiwan) not only benefited from the various OECD GSP regimes, but in fact graduated from them (Ng and Yeats 1996, 16).

At any rate, a snapshot of the two main regimes reveals the extent of this underutilization: According to the latest available figures for the region’s utilization of the EU’s GSP, only Lesotho has managed to attain a rate of 67.3 percent, with the overwhelming majority only able to reach below 16 percent. (Note 71) The latest available figures for the AGOA regime are no less instructive: Quite aside from the fact that petroleum products accounted for the largest proportion of imports with a 93 percent share (itself a clear indication of a lack of policy-driven or sustainable economic activity), it is also noticeable that “[t]rade between the United States and the region is highly concentrated, with a small number of countries accounting for an overwhelming share of the total...” (US Department of Commerce 2007, 1-2).

These figures, it is necessary to note, are consistent with earlier studies. Indeed, an UNCTAD report published in 2002 suggests that the underutilization of these schemes by African countries might explain why Asian firms had relocated to such countries as Senegal, Mauritius, South Africa, Malawi, and Tanzania, to take advantage of the temporary benefits (UNCTAD 2002b, 54-55 and 199). Again, what these demonstrate is the need to abandon the “market access” mantra, if only because it constitutes a hindrance to any attempt to focus on the real causes of Africa’s marginalization from the global trading regime.

## 8. Conclusions

This short critique was an attempt at challenging the supposition that protectionism in Western markets and global trade rules are the twin causes of Africa’s inability to “trade its way” out of its state of economic underdevelopment. It was therefore necessary to offer a brief overview of the global trade rules, as a result of which it became evident that the rules themselves are littered with derogations and measures aimed at assisting poor countries generally. Although it was noted that protectionism is a living reality and represents an indictment of a supposed liberalized global trading order, it also became clear that the region effectively trades outside the multilateral trading regime. It was further noted that even within the context of the preferential regimes, there was a largely unacknowledged problem of gross underutilization. While one might be prepared to accept that the inordinate focus on supposed external causes is driven merely by understandable ideological concerns about the liberal economic policies promoted by Western nations (through the agency of multilateral institutions such as the WTO), there can be little doubt that an ideological conviction which ignores rational, scientific counterarguments is, by its very nature, a very dangerous one, especially if the impact is the consignment of a whole mass of long-suffering people to a life of eternal misery.

What these mean is that the “market access” thesis needs an urgent re-evaluation, for several important reasons. To begin with, its continued proclamation invariably reinforces the stereotypical image of Africa as a region (and indeed, of Africans, as a people) either predestined to depend eternally on Western altruism or inherently incapable of self-governance – the same visceral racist mindset that not only informed, but underpinned the colonization of the region. Moreover (and at a more practical level), those who seek to perpetuate this thesis have not only succeeded in deflecting critical attention from the main impediment to the region’s ability to trade, but have – quite paradoxically – become that impediment themselves. And whether this is deliberate or not is not of much relevance, given the level of human suffering that invariably flows from it.

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### Notes

Note 1. In this paper, the word "Africa" refers to sub-Saharan Africa, except as otherwise indicated.

Note 2. These have been identified as the core elements of the International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976, G.A. Res. 2200A (XXI) UN Doc.A/6316 (1966), 993 UNTS 3, reprinted in 6 ILM 360 [hereinafter, the ICESCR].

Note 3. E.g., Calderisi, R (2006) *The Trouble With Africa: Why Foreign Aid Isn't Working*, New Haven: Yale University Press.

Note 4. The most influential voice in this regard is probably that of the NGO Oxfam, particularly its "Make Trade Fair" campaign, which receives the support of 13 other organizations (information available at: <http://www.oxfam.org/en/programs/campaigns/maketradeair> (September 10, 2007).

Note 5. See World Trade Organization, *Legal Texts: Agreement Establishing the World Trade Organization*, at Preamble, available at: [http://www.wto.org/english/docs\\_e/legal\\_e/legal\\_e.htm#wtoagreement](http://www.wto.org/english/docs_e/legal_e/legal_e.htm#wtoagreement) (September 10, 2007).

Note 6. See World Trade Organization, *Legal Texts: The General Agreement on Tariffs and Trade 1947* (as amended), available via: [http://www.wto.org/english/docs\\_e/legal\\_e/gatt47\\_e.doc](http://www.wto.org/english/docs_e/legal_e/gatt47_e.doc) (August 15, 2006).

Note 7. See WTO, *Legal Texts*, at: [http://www.wto.org/english/docs\\_e/legal\\_e/legal\\_e.htm](http://www.wto.org/english/docs_e/legal_e/legal_e.htm) (August 15, 2006).

Note 8. *ibid.*

Note 9. See C. Mortished, "Talks to Rescue Trade Deal Fail Amid Recriminations" *The Times*, June 22, 2007, available at <http://business.timesonline.co.uk/tol/business/economics/article1969093.ece> (July 20, 2007).

Note 10. See General Agreement on Tariffs and Trade, above, n.6, at Preamble.

Note 11. An analysis of latest UN figures reveals that 68% of all LDCs (34 out of a total of 50) are in sub-Saharan Africa (See UNCTAD (2005), *Statistical Profiles of the Least Developed Countries*, New York: United Nations, p.5.

Note 12. See *Agreement Establishing the WTO*, above, n.5.

Note 13. See Uruguay Round Agreement: Decision on Measures in Favour of Least-Developed Countries, at [http://www.wto.org/english/docs\\_e/legal\\_e/31-dlldc\\_e.htm](http://www.wto.org/english/docs_e/legal_e/31-dlldc_e.htm) (September 9, 2007), s.1 of which provides that "...if not already provided for in the instruments negotiated in the course of the Uruguay Round, notwithstanding their acceptance of these instruments, the least-developed countries...will only be required to undertake commitments and concessions to the extent consistent with their individual development, financial and trade needs, or their administrative and institutional capabilities...".

Note 14. See WTO, Ministerial Conference, Fourth Session, Doha, 9-14 November 2001 (WT/MIN(01)/DEC/1, 20 November 2001), Ministerial Declaration, adopted on 14 November 2001, para.32, paras.42-44, at [http://www.wto.org/english/thewto\\_e/minist\\_e/min01\\_e/mindecl\\_e.htm](http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_e.htm) (May 15, 2003).

Note 15. See WTO, *Integrated Framework for Trade-Related Technical Assistance to Support Least Developed Countries in their Trade-Related Activities* (Doc. WT/LDC/SWG/1F/1) of 29 June 2000, at 10. The agencies involved include the IMF, World Bank, ITC, WTO, UNCTAD, and UNDP.

Note 16. See WTO, Integrated Framework (IF) Seminar, 'The Policy Relevance of Mainstreaming Trade into Development Strategies: Perspectives of Least-Developed Countries' (Doc.WT/LDC/SWG/IF/9/Rev.1), 29-30 January 2001. The IF was redefined at the Doha Ministerial Conference to 'mainstream' international trade policy and priorities in the overall sustainable development and poverty reduction goals of LDCs. (See WTO, *A New Strategy for WTO*

*Technical Cooperation: Technical Cooperation for Capacity Building, Growth and Integration* WT/COMTD/W/90, September 21, 2001, Note by the Secretariat).

Note 17. These consist of 145 provisions spread across the different Multilateral Agreements. Of these, it is further noted, 22 apply to LDC Members. See WTO Secretariat, *Note on Implementation of Special and Differential Treatment Provisions in WTO Agreements and Decisions*, Doc.WT/COMDT/W/77, of 25 October 2000, at 3.

Note 18. See WTO Trade Policy Review Body, *Overview of Developments in the International Trading Environment: Annual Report by the Director-General* (WT/TPR/OV/8), 15 November 2002, 2.

Note 19. For which, see: *WTO Assistance for Developing Countries*, available at [http://www.wto.org/english/tratop\\_e/devel\\_e/teccop\\_e/tct\\_e.htm](http://www.wto.org/english/tratop_e/devel_e/teccop_e/tct_e.htm) (10 June 2006).

Note 20. Morocco and Egypt, it will be noted, are not sub-Saharan African countries, while the “rebound” in the performance of the Ivory Coast and Ghana was due to increases in the global prices of gold and cocoa.

Note 21. The six countries are: Equatorial Guinea, Lesotho, Mozambique, Seychelles, Sierra Leone and Tanzania.

Note 22. Incidentally, the Chinese government is reported to have adopted the much-discredited policy of “tied aid” under which its \$5billion China-Africa Development Fund will be invested exclusively in Chinese enterprises and projects on the continent (See J. Anderlini, “China Insists on ‘Tied Aid’ in Africa,” *Financial Times*, June 25, 2007, available at: <http://www.ft.com/cms/s/908c24f2-2343-11dc-9e7e-000b5df10621.html> ) (August 20, 2007).

Note 23. See, e.g., Council on Foreign Relations, “Is Chinese Investment Good for Africa”? Online Debate, February 20, 2007, available at <http://www.cfr.org/> (September 13, 2007).

Note 24. See Agreement on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries, Decision of 28 November 1979, (L/4903), available at [http://www.wto.org/english/docs\\_e/legal\\_e/tokyo\\_enabling\\_e.doc](http://www.wto.org/english/docs_e/legal_e/tokyo_enabling_e.doc)

Note 25. Many developed countries administer their own independent schemes. The focus on the US and EU schemes is merely a recognition of the dominance of the global trading regime by these countries. Information regarding other GSP schemes is available at: <http://www.unctad.org/Templates/Page.asp?intItemID=2309&lang=1>

Note 26. See European Union, Consolidated Versions of the treaty on European Union and of the Treaty Establishing the European Community, *Official Journal of the European Union*, C 321 E/2 EN, 29.12.2006, available at: <http://eur-lex.europa.eu/LexUriServ/site/en/oj/2006/ce321/ce32120061229en00010331.pdf>

Note 27. Its Expiry, by the end of the year 2007, follows the WTO Appellate Body’s ruling in: *European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries*, Report of the Appellate Body (WT/DS246/AB/R), 7 April 2004, declaring it discriminatory.

Note 28. See EC Regulation 980/2005, *Official Journal of the European Union*, L 169 of 30/06/2005. See also Commission of the European Communities, *Developing Countries, International Trade and Sustainable Development: The Function of the Community’s [GSP] for the Ten-year Period from 2006 to 2015*, Brussels, 7.7.2004, COM(2004) 461, at 3.

Note 29. See Art.2, Council Regulation 980/2005, *ibid*.

Note 30. See *ibid*, Art.7 (1).

Note 31. *ibid*, paras.2-4.

Note 32. See *ibid*, Art. 8 (1) and (2). This section also draws heavily on an official summary of this Regulation, available at: <http://europa.eu/scadplus/leg/en/lvb/r11020.htm> (September 10, 2007).

Note 33. See Council Regulation 980/2005, *ibid*, Art. 9(1)-(3).

Note 34. *ibid*, para.1 (a)-(e).

Note 35. See Regulation (EC) 416/2001, as subsequently incorporated into Council Regulation (EC) No 2501/2001, *Official Journal of the European Communities* L 346/1, 31/12/2001 of 10 December 2001.

Note 36. See Council Regulation 980/2005, above, n.34, Art.12 (1)-(4).

Note 37. See Europa, *Summaries of Legislation: African, Caribbean and Pacific states (ACP): Introduction*, available at: <http://europa.eu/scadplus/leg/en/lvb/r12100.htm> (September 10, 2007).

Note 38. *ibid*.

Note 39. *ibid*.

Note 40. *ibid*.

Note 41. *ibid.*

Note 42. *ibid.*

Note 43. See Agreement Amending the 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, *Official Journal of the European Union* L 209/27, 11. 8. 2005.

Note 44. See Europa, *Summaries of Legislation: Cotonou Agreement*, at <http://europa.eu/scadplus/leg/en/lvb/r12101.htm> (September 14, 2007).

Note 45. *ibid.*

Note 46. *ibid.*, though as already noted, the ACP scheme will expire in 2007 following the above decision (n.27) by the WTO Appellate Body.

Note 47. The AGOA is a constituent part of the Trade and Development Act 2000 and was signed into law on May 18, 2000. Of particular interest is Title I (Extension of Certain Benefits to Sub-Saharan Africa). The full text of the Act is available at [http://www.agoa.gov/agoa\\_legislation/agoatext.pdf](http://www.agoa.gov/agoa_legislation/agoatext.pdf) (September 10, 2007).

Note 48. See §104(a), *ibid.*

Note 49. See §104(b), *ibid.*

Note 50. Per §111(a)(1) of the 2000 Act.

Note 51. Per §112(a) and (b) of the 2000 Act, although subsection (c) imposes detailed rules on beneficiary countries aimed at preventing unlawful trans-shipments.

Note 52. *ibid.*, at 35.

Note 53. African Growth and Opportunity Act, *Summary of Amendments to AGOA*, at [http://www.agoa.gov/agoa\\_legislation/AGOII\\_summary.pdf](http://www.agoa.gov/agoa_legislation/AGOII_summary.pdf) (September 20, 2007).

Note 54. *ibid.*.

Note 55. See African Growth and Opportunity Act, *Summary of AGOA Acceleration Act of 2004*, at [http://www.agoa.gov/agoa\\_legislation/agoa\\_legislation3.html](http://www.agoa.gov/agoa_legislation/agoa_legislation3.html) (September 20, 2007).

Note 56. *ibid.*

Note 57. *ibid.*

Note 58. See African Growth and Opportunity Act, *Summary of Africa Investment Incentive Act of 2006*, at [http://www.agoa.gov/agoa\\_legislation/agoa\\_legislation4.html](http://www.agoa.gov/agoa_legislation/agoa_legislation4.html) (September 20, 2007).

Note 59. See Chapter III of Council Regulation 980/2005, above, n.36.

Note 60. See e.g., Art.21, *ibid.*, for the EU's Safeguard Clause.

Note 61. For a critique of which, see J.E. Stiglitz (2002), *Globalization and its Discontents*, London: Penguin.

Note 62. See: Arts.55 and 56 of the Charter of the United Nations, adopted 26 June 1945, entered into force 24 October 1945, as amended (892 UNTS 119), and Art.2(1) of the ICESCR, above, n.2.

Note 63. See Commission of the European Communities, *Developing Countries, International Trade and Sustainable development: The Function of the Community's Generalised System of Preferences (GSP) for the Ten-year Period from 2006 to 2015*, at 10.

Note 64. See Art.72, Commission Regulation (EC) No 1602/2000 of 24 July 2000 amending Regulation (EEC) No 2454/93 laying down provisions for the implementation of Council Regulation (EEC) No 2913/92 establishing the Community Customs Code, *Official Journal of the European Communities*, L 188, 26.7.2000, p.1.

Note 65. See Art.67(2) *ibid.*

Note 66. See §111(a) of the AGOA, n.50, above.

Note 67. See *ibid.*, paragraph (b).

Note 68. One example of this is the decision by the Nigerian government to embark on its own space project, while unable to provide its long-suffering people with basic amenities such as electricity and pipe-borne water (See "Nigeria Enters Space Age" BBC News 24, September 27, 2003, available at <http://news.bbc.co.uk/1/hi/world/africa/3141690.stm>) (October 9, 2003).

Note 69. For an excellent critique of which, see I. Taylor (2005), *NEPAD: Towards Africa's Development or Another False Start?* Boulder, CO & London: Lynne Rienner.

Note 70. For a critique of which, see: R. Righter, "For the US of Africa, Read Cloud Cuckoo Land" *The Times*, July 9, 2007, at [http://www.timesonline.co.uk/tol/comment/columnists/rosemary\\_righter/article2045509.ece](http://www.timesonline.co.uk/tol/comment/columnists/rosemary_righter/article2045509.ece) (October 2, 2007).

Note 71. Information deduced from figures supplied via email communication by M. Mortier of the Trade Department of the European Commission, for which the author is most grateful.