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EU Rule of Origin for ACP Tuna Products (HS Chapter 16.04)

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Introduction

This chapter considers the rule of origin (ROO) for canned tuna and tuna loins in the Cotonou Agreement, which is the preferential agreement between the EU and the African, Caribbean, Pacific (ACO) group of countries. This particular rule of origin is much more significant than it would at first appear as it is virtually identical for all EU preferential arrangements and hence the basis for 530,000 tonnes of canned tuna production and trade in the EU. The rule of origin is important for developmental and commercial reasons as it has been the basis of almost thirty years of continual trade disputes and negotiations between the EU and the ACP dating back almost to the very promulgation of the Lomé Convention[1] in 1975. The rule of origin viewed within the context of the significant margin of preference for canned tuna has been a key part of EU fisheries policy, for as we shall see the rule has been instrumental in not only providing tariff protection for EU canneries but also providing a very substantial subvention to ACP states to provide access to their EEZ for EU distant-water fishing fleets. The long dispute over the rule of origin stems from the fact that while the EU's margin of preference has in effect created the ACP canning industry while it has has limited the ability of ACP states to develop their own EEZ in an economically efficient manner.

Under the terms of the Cotonou Agreement the various ACP regions and the EU are in the process of commencing negotiations for Economic Partnership Agreements (EPAs), which are in effect free trade areas. The rules of origin governing the new trading arrangements, are to be integral to the EPA and will be crucial to their success.[2] The purpose of this chapter is to consider the rule of origin within these EPA negotiations.[3] The focus of this study is the ROO for tuna products, specifically canned tuna and tuna loins under HS Chapter heading 16.04, exported from ACP states to the EU.[4] The study also considers, in some detail, the role, consequences and apparent motives behind the EU ROO in an area of significant social, political and economic importance to both the EU and ACP group.

The chapter is organised as follows: The background section establishes the importance of the tuna sector to the EU and ACP group, providing an economic and political economy context for the paper. The ROO in the Cotonou Agreement is then reviewed as both the rules governing current trade in these products, and the likely basis for further negotiation. This section explores how the ROO for canned tuna products is not based on substantial transformation, which is fundamental to the ROO normally imposed on manufactured products. Instead, the Cotonou rule of origin focuses only on the origin of the raw material used in the manufacture of these products, and thus appears to violate the Kyoto Convention. Following this, we analyse the current ROO with respect to three objectives or functions that they may be considered to encompass. This raises questions regarding the legitimate functions of preferential ROO and the potential consequences, whether intentional or otherwise, of fulfilling these functions, on the ultimate objective of the trade preferences that ROO are purportedly designed to facilitate, namely, sustainable economic development in ACP states. The first of these functions is to prevent trade deflection and fraud, thus protecting the integrity of trade preferences by granting them only to beneficiary countries where, in the case of processed products, 'substantial transformation' has occurred. Secondly, in practise, it is difficult to distinguish between this first function and their role in serving strategic trade interests of preference-granting countries. This role may diminish the potential value of trade preferences to the beneficiary countries and this possibility is examined in the final section, which considers the role of ROO in augment-

ing, or at least preserving, the potential developmental impact of trade preferences in beneficiary countries.

This chapter provides no easy resolution to what has become an intergenerational dispute over the tuna rules of origin.[5] The resolution remains economic rather than legal or technical. Only once the EU recognises that there is a need for a fundamental repositioning of its commercial interests in fisheries following the decline of fish stocks in community waters and that its ongoing fisheries policy of exporting its excess fishing capacity to ACP states by negotiating access agreements is unsustainable, will there be a resolution of the issue. The EU needs to recognise that its long-term economic interests lie in a smooth adjustment out of a sector where it has lost its comparative advantage and a move, in the long term, to the supply of fish to the EU market. The EU's real long-term comparative advantage lies in exporting the commercial and technical skills and capacity to the tuna-rich ACP states to develop the ACP's ability to supply tuna fish. Like many such disputes, it is unlikely to be solved but may yet become irrelevant because of a repositioning of EU and ACP industries caused by conscious policy or, more likely, by MFN liberalisation of the tuna tariff following the closure of the Doha Round.

Background

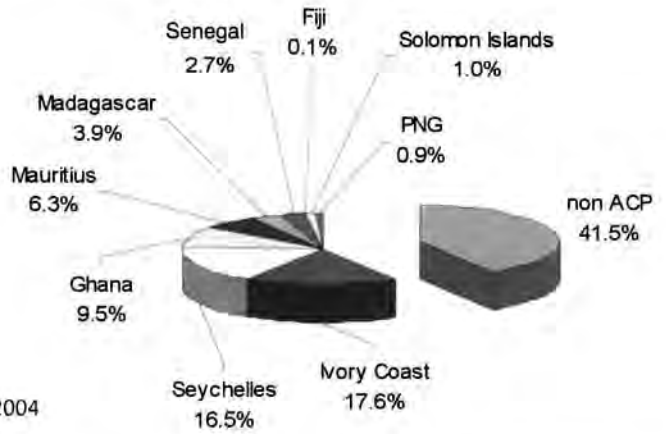
The importance of fisheries to the EU and ACP group

The European market is the leading world market for canned tuna (some 530,000 tonnes, of which 280,000 tonnes are imported) ahead of the United States (400,000 tonnes of which a large share (120,000 tonnes) are imported from Thailand) and Japan (100,000 tonnes, of which 30,000 tonnes are imported). The bulk of the EU's tuna interests are in supplying its existing facilities with raw materials and the rules of origin reflect this commercial reality. Spain remains by far the EU member with the largest interest in tuna products with a catch of approximately 400,000 tonnes in 2000, coming mostly from third country (principally ACP) access agreements.[6] Imports as a percentage of total EU canned-tuna supply are increasing and this presages several developments of importance to the ACP and the EU. First, as the community waters have never been a major source of tuna, the decreased relative importance of domestic production may facilitate an eventual shift in EU attitudes towards rules of origin for tuna. Second, but of even greater significance, is the fact that the decreased relative significance of domestic EU production of canned tuna will make it easier for the EU at the end of the Doha Round to extend even further MFN concessions to WTO members.

The key EU members with an interest in the fisheries sector are Spain, France, Portugal and the UK. With declining fish stocks in community waters combined with overcapacity of fishing fleets and/or processing plants, and the implication of this for rising unemployment,[7] there is significant political pressure to maintain access to the resources of other countries' fisheries. The two biggest EU processed-tuna producers, France and Spain, are also those with these biggest ownership stake in fleets operating in ACP Exclusive Economic Zones (EEZs),[8] indicating the significant supply-chain linkages between the two regions. The majority of the UK's market, for example, is supplied by two multinational companies that do not have vertically integrated fishing fleets but instead have exclusive agreements with companies operating in several ACP states.[9] In terms of global processed-tuna production, Spain and France are among the top 10 producing countries, as are several Asian countries such as Japan, Taiwan, Indonesia, Korea and the Philippines.[10] Consumption as well as production is significant from an EU perspective, the EU market for canned tuna being the world's largest,[11] consuming domestically produced and imported products. Annex I illustrates the current EU MFN tariffs for processed tuna imports. The tariffs for raw tuna imported into the EU for further processing are zero, but for raw tuna imported for any other purpose, and all processed tuna such as loins and cans, the tariffs are extremely high, ranging from 22 to 24%.

Several ACP states have substantial tuna resources in their EEZs. The most important for the EU are the Indian Ocean resources from the Seychelles and Mauritius. The largest segment of the EU distant-water fisheries fleet is now based in the

Figure 1. Sources of EU canned tuna imports (%), 2000

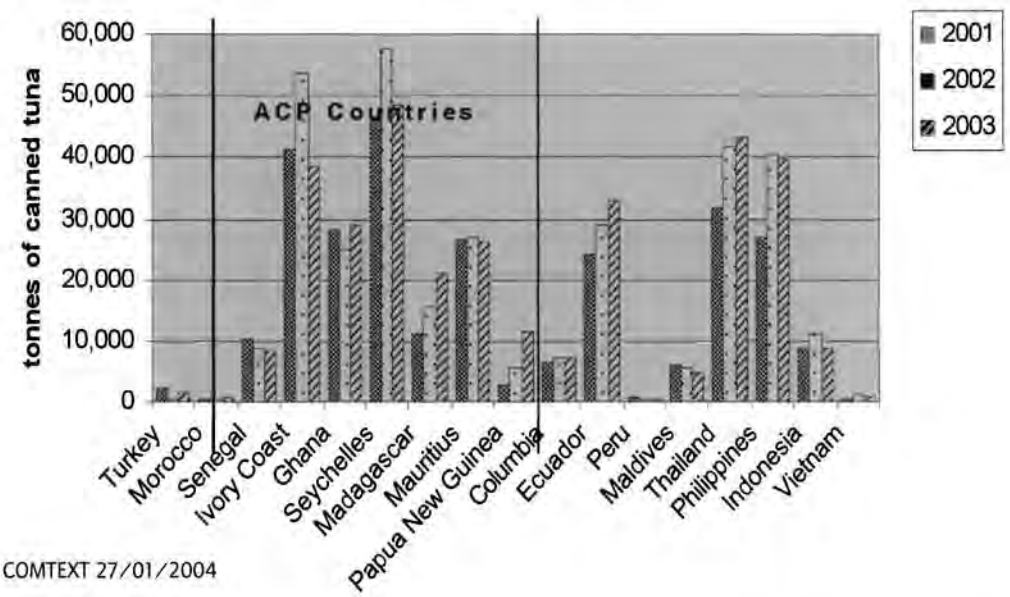


Source: COMTEXT 27 /01/2004

Seychelles. The Pacific tuna fishery in particular being the largest in the world, but the EU has only recently shown interest in this resource, negotiating access agreements with Kimbati and Solomon Islands.[12] This resource supports many locally based fleets and processing operations in the region as well as those abroad. EU interest in Pacific EEZ's has to date centred on gaining access for Spanish and French-owned purse seine vessels which are the 'engine room' of cannery and tuna loin production.[13] There are also significant ACP tuna resources and processing activities throughout coastal countries in Africa that have attracted EU vessels and investment, for example Ghana and Senegal. None of the major ACP tuna producers have the domestic fleet capacity to meet the fish supply needs of their canneries. Those ACP states with domestic processing industries and tuna-rich resources in their EEZs therefore grant access to foreign vessels in order to supply their own canneries as well as receive access fees where foreign vessels do not land their catch.

The importance of the EU market for ACP canned-tuna exports from Africa and the Pacific is illustrated in Figures 1 and 2. The specific relation-

Figure 2. Sources of EU canned tuna imports (tonnes), 2001-03



Source: COMTEXT 27/01/2004

ship with EU fisheries varies between each ACP state depending on country-specific characteristics such as colonial history, tuna resources, location, and the existence and structure of domestically owned fleets and processing industries. What is significant is that the ACP producers remain by far the largest suppliers, but are by no means the most competitive.

Cotonou ROO for fisheries products and the Kyoto Convention

The current ROO governing preferential access for ACP exports into the EU are detailed in the Cotonou Agreement, Annex V, Protocol 1 and its related annexes. The 'wholly obtained' rules governing raw fish (including tuna) are contained in Article 3 of the Protocol, of which the relevant paragraphs are reproduced in Box 1. It should be noted that this is the same rule of origin (with the exception of manning requirements) for wholly originating fish in all EU preferential arrangements, with the notable exception that the manning requirements (normally 75% qualifying area content) are more stringent in non-ACP arrangements. While there have been minor changes with regard to several issues such as derogation, this rule has remained in place since the beginning of the Lomé Convention in 1975.

Subparagraph 1(e) clearly states that fish caught 'there' by any vessel, regardless of its ownership, will be originating within the ACP state. 'There' is taken to mean the territorial sea of the ACP state over which it has sovereignty, which international law[14] defines as the sea within 12 miles of its coast. Complexities arise with the concept of 'their vessels' and 'their factory ships' which are introduced in subparagraphs 1(f) and (g). Fish caught outside the ACP's territorial waters but within and outside its EEZ,[15] will only be granted originating status if the vessels that caught the fish comply with the stringent registration, ownership, flag and employment conditions of paragraph 2. Thus fish caught by an ACP-owned vessel outside its territorial waters and exported under the Cotonou Agreement will be originating, as would be fish caught by an EU vessel. However, fish from an ACP state's EEZ caught by a vessel owned by a third country will not be originating (unless there is significant joint ownership with either an ACP or EU state as detailed in paragraph 2, or the EU has already declined this particular fishing opportunity and several other stringent conditions have been met as required in paragraph 3). It is therefore clear that these wholly originating ROO for fish discriminate between the EU and any third country that may have an interest in fishing in the EEZ or beyond the EEZ of an ACP state. Of key interest is whether, and how, this discrimination distorts the ROO in such a way as to undermine the value of trade preferences and therefore justify their substantive renegotiation under EPAs.[16]

For processed tuna products the ROO are contained in Annex II to Protocol I which lists the working or processing required for non-originating materials to become originating. In the case of processed tuna products (HS Chapter 16 which includes tuna loins and canned tuna) Box 2 below illustrates how the rules require that the starting materials must be raw fish (HS Chapter 3) that is already wholly originating. The stringent conditions for granting wholly originating status to raw fish are therefore paralleled with respect to the originating status of processed tuna products. Prescribing ROO to manufactured products is fundamentally a matter of defining the process through which 'substantial transformation' has occurred. For canned tuna entering the EU market under MFN tariffs there are no restrictions on where the fish comes from.[17] Yet to obtain preferential access to the EU market, the same ACP products must satisfy complex and restrictive criteria regarding the source of their materials that are unrelated to the degree of 'substantial transformation' that the product has undergone.

The rule of origin set out in Box 2 raises serious questions regarding its compatibility with the Kyoto Convention[18] and the EU's obligations to abide by its terms.[19] Annex D1 of the Convention defines the rules pertaining to what remained – until the Uruguay Round agreements the only significant international instrument in this area.[20] Annex D1 and subsequent agreements differentiate between wholly originating products such as unprocessed tuna and products of mixed origin.

Box 1. Cotonou Agreement, Annex V, Protocol I, Article 3 – Wholly Obtained Products

1. The following shall be considered as wholly obtained, in the ACP states or in the Community, or in the overseas countries and territories defined in Annex III, hereafter referred to as the OCT:

(a) mineral products extracted from their soil or from their seabed;

(b) vegetable products harvested there;

(c) live animals born and raised there;

(d) products from live animals raised there;

(e) products obtained by hunting or fishing conducted there;

(f) products of sea fishing and other products taken from the sea outside the territorial waters by their vessels;

(g) products made aboard their factory ships exclusively from products referred to in subparagraph (f);

(h) used articles collected there fit only for the recovery of raw materials, including used tyres fit only for retreading or for use as waste;

(i) waste and scrap resulting from manufacturing operations conducted there;

(j) products extracted from marine soil or subsoil outside their territorial waters provided that they have sole rights to work that soil or subsoil;

(k) goods produced there exclusively from the products specified in subparagraphs (a) to (j).

2. The terms 'their vessels' and 'their factory ships' in paragraph 1(f) and (g) shall apply only to vessels and factory ships:

(a) which are registered or recorded in an EC Member State, in an ACP State or in an OCT;

(b) which sail under the flag of an EC Member State, of an ACP State or of an OCT;

(c) which are owned to an extent of at least 50 per cent by nationals of States party to the Agreement, or of an OCT, or by a company with its head office in one of these States or OCT, of which the Chairman of the Board of Directors or the Supervisory Board, and the majority of the members of such boards are nationals of States party to the Agreement, or of an OCT, and of which, in addition, in the case of partnerships or limited companies, at least half the capital belongs to those States party to the Agreement or to public bodies or nationals of the said States, or of an OCT; and

(d) of which at least 50% of the crew, master and officers included, are nationals of States party to the Agreement, or of an OCT.

3. Notwithstanding the provisions of paragraph 2, the Community shall recognise, upon request of an ACP State, that vessels chartered or leased by the ACP State be treated as 'their vessels' to undertake fisheries activities in its exclusive economic zone under the following conditions:

- that the ACP state offered the Community the opportunity to negotiate a fisheries agreement and the Community did not accept this offer;
- that at least 50% of the crew, master and officers included are nationals of States party to the Agreement, or of an OCT;
- that the charter or lease contract has been accepted by the ACP–EC Customs Cooperation committee as providing adequate opportunities for developing the capacity of the ACP State to fish on its own account and in particular as conferring on the ACP State the responsibility or the nautical and commercial management of the vessel placed at its disposal for a significant period of time.

Box 2. Cotonou Agreement, Annex V, Protocol I, Annex II, Chapter 16 (and 3)

List of working or processing required to be carried out on non-originating materials in order that the product manufactured can obtain originating status

HS Heading No	Description of product	Working or processing carried out on non-originating status materials that confers originating status
Chapter 16	Preparations of meat, of fish or of crustaceans, molluscs or other aquatic invertebrates	Manufacture of animals of Chapter 1. All the materials of Chapter 3 must be wholly obtained
Chapter 3	Fish and crustaceans, molluscs and other aquatic invertebrates	Manufacture in which all the materials of Chapter 3 used must be wholly obtained

The Convention states:[21]

> '... *where two or more countries have taken part in the production of the goods, the origin of the goods shall be determined according to the substantial transformation criterion.*'

Clearly, this applies to the case of canned tuna, which often includes components from a number of countries. Thus, in order to determine the origin of a can of tuna, as opposed to the tuna fish itself, one must determine whether and where 'substantial transformation' has occurred. While the Kyoto Convention does not offer a definitive answer to the question of what is 'substantial transformation', nor is it legally binding like the WTO agreements, it does state that in practice the criterion shall be determined in one of three ways:[22]

1. by a rule requiring a change in tariff heading in a specified nomenclature with lists of exceptions; and/or
2. by a list of manufacturing or processing operations which confer, or do not confer, upon the goods the origin of the country in which the operations were carried out; and/or
3. by the *ad valorem* percentage rule, where either the percentage value of the materials utilised or the percentage of the value added reaches a specified level.

These three criteria, which are normally applied by all signatories of the Kyoto Convention, do not appear to apply to the Cotonou rule of origin for canned tuna. The only criteria for conferring origin for canned tuna is the wholly originating status of the tuna which is logically akin to defining the country of origin of an automobile. From the nationality of the owners of the mine extracting the iron ore and the nationality of those employed in the mine were of the contracting parties. As the criteria employed by the EU for determining origin of canned tuna which is not a wholly originating product does not appear to conform to any of the three alternative provisions found in the Notes to Provision 3, the European Commission should explain how the rule of origin for canned tuna is understood to comply with, the spirit if not the letter of, its obligations as a contracting party to the Kyoto Convention.

ACP tuna processors have found some reprieve from the restrictive ROO in the value tolerance provisions that allow a certain percentage of non-originating material in an originating manufactured product. This percentage has gradually increased through the history of the Lomé Agreements to 15% under the Cotonou Agreement.[23] Implementation of value tolerance on processed fish products has proved highly contentious, requiring significant negotiation between the ACP and the EU. The EU was initially reluctant to allow value tolerance to apply to canned fish as the manufacturing process dictates that each can contains the meat from only

one fish. Value tolerance with respect to each product (can of fish) should therefore not apply as the fish in one can is either originating or not, percentages are not possible. The EU therefore considers it a concession that they permit this rule to apply on a consignment such that within each consignment, per type of product and per type of fish, 15% of the cans can be made from non-originating fish yet still obtain originating status. This implementation method was the result of a difficult negotiation process between the EU and ACP. The ACP argued for implementation over a specific time period within a given year rather than per consignment, or at least solely per species within a consignment, rather than per product as well. The EU rejected these proposals.[24]

Derogation available to processed tuna producers is also contentious. Paragraph 8 of the derogation provisions[25] enforce global annual quotas of the maximum amount of tuna loins and canned tuna that will be granted derogation, i.e. regarded as originating despite containing non-originating tuna: 2,000 metric tonnes for tuna loins and 8,000 metric tonnes for canned tuna. These quotas provide automatic derogation and as such the normal derogation procedures are waived. However, the non-automatic procedures for processed tuna products are no longer available for derogation requests in excess of the quota amounts. Responsibility for allocating this quota among ACP states has been recently transferred from the EU to the ACP group in an attempt to increase its utilisation. The ACP Secretariat divides the quotas equally between those ACP states that register their interest, and transfer of under-utilised quotas to other countries is easier to facilitate than under the previous procedure which was governed by the European Commission. The global quota allocations under the new procedure are detailed in Annex II.

Cumulation provisions of the Cotonou Agreement[26] further illustrate the unique and stringent treatment of processed tuna products. The general cumulation provisions of the Cotonou Agreement are the most 'generous' of the EU's preferential ROO, including those governing the Generalised System of Preferences (GSP) and the Everything But Arms (EBA) initiative.[27] The Cotonou Agreement provisions allow cumulation between the ACP states, the EU, Overseas Countries and Territories (OCT),[28] South Africa and neighbouring developing countries. However, with respect to tuna products these generous cumulation provisions are severely curtailed. Cumulation with South Africa[29] is 'temporarily inapplicable' to hundreds of fishery products,[30] of which fresh and processed tuna products are included. This is because the EU and South Africa failed to negotiate fish products into their free trade agreement.[31] Expected elimination of this measure 'temporarily' applied to prevent trade deflection of South African fish products through ACP states will only occur if and when the EU grant sufficient tariff concessions to South African fish products. At the request of ACP states the Cotonou Agreement also permits cumulation with other developing countries.[32] Specifically though, this provision 'shall not apply to tuna products classified under Harmonised System Chapters 3 or 16.'[33]

This issue of fisheries rules of origin have also been addressed at the now-stalled WTO (non-preferential) Rules of Origin Committee.[34] The EU, among other countries, has recommended that the origin of fish taken from an EEZ should be based on the country of the flag of that vessel. The ACP declaration in the Cotonou Agreement, however, lends support to the WTO position of India and Ecuador, which contend that fish 'taken from the sea outside the territorial sea of a country but within its EEZ, are considered to be wholly obtained in that country.'[35] Even though a resolution of the existing disagreements between WTO members on non-preferential rules seems unlikely at this point and this would not directly produce a resolution, it would certainly facilitate discussions on rules of origin in preferential agreements

Analysis of the ROOs

Trade deflection, fraud and protection

Preferential ROO play a legitimate role in preventing trade deflection – countries outside preferential trading arrangements circumventing MFN tariffs by diverting their exports through preference-receiving countries. However the dividing line between measures aimed at addressing legitimate concerns

pertaining to deflection and fraud are at times confused with domestic commercial interests of the preference-giving country. Trade deflection has two major implications for preference-granting countries. It reduces tariff revenues, and more significantly in the case of high MFN rates (which create a larger incentive for trade deflection), the protectionist function of tariffs disappears. In preference-receiving countries, trade deflection can nullify the intended competitive export advantage created by preferences. Central to the difficulty in reaching consensus on ROO for processed tuna products is the implicit interpretation of trade deflection created by the ROO. This shifts the analysis from the legitimate and uncontroversial role of preventing trade deflection firmly into the political arena.

Both the EU and ACP have incentives to ensure tuna caught by foreign-owned vessels in ACP EEZs and manufactured by these same countries do not receive EU trade preferences. This could happen for example with foreign-owned factory ships operating within ACP EEZs. This clearly constitutes trade deflection and as such the ROO should protect against it. However, the current ROO for processed tuna implies that a third-country-owned vessel catching fish in an ACP's EEZ and supplying it to a (domestically or foreign-owned) cannery in the ACP country for processing also constitutes trade deflection, as does the ACP processing fish that was caught outside their EEZ. Evidently, if these finished products were granted originating status part of the value of the preference would be channelled to the third country that owned the vessel that caught the fish, and possibly the cannery that processed it. In reality many of the canneries supplying tuna to the EU market are of US and Asian origin and very often the margin of preference is captured by such vertically integrated companies.[36] However, that the manufacturing activity occurred within an ACP state implies that 'substantial transformation' of the tuna fish occurred there, creating considerable positive spillover effects in the economy (employment, etc.), precisely the phenomena that trade preferences are supposed to encourage.

Trade deflection generally refers to assembly industries with little value added being established in preference-receiving countries. Fundamentally it is a process that occurs when the act of substantially transforming raw materials into a manufactured product has not been undertaken in the country which is claiming origin on the final product. This is however, not the case with fish caught by a non-ACP or EU vessel but processed within an ACP state. This linking between the implied definition of 'substantial transformation' to the sourcing of raw materials in the current ROO for processed tuna products distorts the examination of trade deflection.

This observation also complicates the analysis of ROO fraud for processed tuna products. Fraud undisputedly occurs when no transformation, substantial or otherwise, has taken place and rent-seeking behaviour leads to declarations of origin in order to obtain preferences. This can be referred to as criminal fraud induced by the preference rather that the rule of origin. In other words it is the margin of preference *per se* that induces the fraud rather than any specific rule of origin. However, the implied definition of trade deflection with these ROO creates a form of 'ROO-induced' fraud whereby an ACP cannery is sourcing its raw material from a non-EU or ACP source in order to substantially transform it into a manufactured product. This is not to excuse or deny any intended 'ROO-induced' fraud but that the fraud would not have occurred if the rule of origin were based on another definition of 'substantial transformation' of the unprocessed tuna rather than the origin of the vessel catching that tuna. In other words there is a strong grounds to support the argument that the observed 'ROO-fraud' in the sector are a by-product of the EU using the rule of origin as a trade instrument that facilitates EU fisheries' access into the EEZ of ACP states.

It is essential that the relevant authorities within both preference-receiving and granting countries install adequate defences against ROO fraud and trade deflection, intentional or otherwise, through establishing and maintaining adequate 'management procedures and supervisory and safeguard mechanisms'. However, in the recent EU Green Paper (consultation document)[37] on preferential ROO the acute focus on these mechanisms is questionable. The paper fails to adequately acknowledge the significant costs of ROO compliance and verification on exporters and resource-

constrained customs authorities within ACP states. These costs should be kept to a minimum and be as consistent as possible with the real risk of fraud and trade diversion.

The well-documented[38] under-utilisation of Lomé trade preferences may indicate these risks are not as grave as the EU fear. After all, 'deflected trade would request preferences'.[39] The reality of preferential trade between the EU and the ACP states is that the apparently low rate of preference take-up observed most recently by the EU, with only 18.8% of ACP exports receiving preferences,[40] indicates that the ACP has remained confined to a narrow range of primary, base metal and oil exports where margins of preference either do not exist or are so low that the compliance cost does not warrant their commercial use. However, the preferences for processed tuna products are highly valuable and heavily used. Especially during the 1990s the EU reported several incidents of ROO fraud of processed tuna from ACP states.[41] The existence of fraud still raises the question as to whether it is best dealt with through simplification of the ROO, improved compliance and verification procedures, or both. The ACP states argue that fraud is primarily due to knowledge or resource gaps rather than the criminal circumvention of MFN tariffs. This is difficult to prove as simplification of the ROO to alleviate this problem would reduce the incentive for fraud.

Compliance with preferential ROO is ultimately a cost–benefit decision made by each ACP exporter regarding the administrative and production costs of compliance relative to the value of the preference. Any increases in the monetary and real resource costs to both the ACP public and private sectors of compliance and verification procedures must be carefully balanced with the declining value of preferences as the EU proceeds with multilateral liberalisation.[42] The inability to predict the magnitude of the eventual decline in margins of preference following the completion of the WTO Doha Round creates an uncertain, and therefore potentially costly, context in which the EU and ACP must assess possible reforms of ROO compliance and verification procedures. The decline in margins of MFN tariff rates will also decrease the incentive to the incidence of either criminal or ROO-induced fraud.

ROO as a strategic trade policy tool for preference-granting countries

This section examines how the ROO are used to protect the EU's strategic trade interests in the fisheries sector. The high margins of preference read in light of the rules of origin indicate that there are two distinct aspects to this trade interest, the first being the protection of the EU's domestic canneries and second, the provisions of subventions to access to the EU's distant-water fleets. In turn, both these interests are served by maintaining EU access to foreign fishery resources. As one source observes, 'the EU is becoming increasingly dependent on external fish supplies to meet both its market (processing and consumption) and fishing sector (employment and investment) demands.'[43] The strategic importance of tuna to the EU, combined with the substantial trade preferences available to the ACP states, explains the EU's motive for highly restrictive ROO which limit any possible conferring of preference to third countries, while conferring maximum benefit to themselves. After all, effective trade preferences only exist where domestic protectionist pressures, in the donor country, have resulted in high MFN tariffs.

The ROO grants the EU protection through preventing trade deflection of fish from ACP EEZs that have been caught by a third country. However there is nothing in the ROO that prevents third countries from owning processing facilities and hence the EU is willing to see investment deflection for the canneries but not the capture fishery. Indeed many of the canneries that do operate in ACP states are owned by non-ACP/EU interests. That the benefits from the canning process, which provides the bulk of the value addition, do not accrue to ACP/EU interests has raised no concern from the EU indicates precisely where the EU interest lies in this particular product. The MFN rates offer direct protection to EU canneries through the MFN tariffs applied to imports from these third countries. This protection is extended, through the stringent requirements of Article 3, which prevent ACP states using fish caught by foreign (non-EU) vessels to produce originating tuna loins or canned tuna. This protects EU fleets through creating an incen-

tive for ACP states which have canneries or sell to ACP canneries in the region, to grant EEZ access to EU vessels over those from third countries, so as to facilitate the supply of originating fish to their domestic canneries. The 24% preferential margin offered to the ACP states can therefore also be considered a form of subvention to EU vessels via fisheries access agreements. The ROO for the final processed good therefore also protects the EU's intermediate producers (where the intermediate product is the fish and the 'producer' the country whose vessels caught them). This is a direct result of the overly restrictive ROO which inexorably links the substantial transformation rule for processed tuna to the sourcing of its raw material.

This link also provides a more opaque form of protection to EU-produced and processed tuna. The EU does not require that their domestically processed tuna products use EU caught fish. Instead, through zero MFN tariffs on fish imported for further processing (refer to Annex I), EU producers are granted full flexibility in sourcing their supply from the most competitive source available. However, for ACP-processed tuna products to enter the EU duty free and therefore, with respect to market access, 'on a level playing field' with EU produced products, they have to have used EU/ACP-caught fish. This may not have been the most competitive supply source available and therefore reduces the competitiveness of the ACP product relative to the EU one. It is therefore evident how the EU uses the ROO to protect their domestic fleets without creating a disadvantage for their domestic canneries by obliging ACP canneries to use EU/ACP fleets. This raises the question of how ACP canneries, which are frequently not owned or managed by ACP/EU interests, are disadvantaged by a rule of origin which forces them to purchase fish from ACP/EU-owned vessels. If tuna is purchased by canneries based on world market reference prices such as those available for Bangkok or Pago then a cannery that is not vertically integrated should not be commercially disadvantaged by the ROO. However, for those canneries that are based on fully integrated operations the rule of origin would result in a diminution of profitability as the value addition of the capture fishery activity would be taken up by EU vessels. More significantly, as we shall see below there is some anecdotal evidence that EU fleets are able to obtain a premium for fish because of the margin of preference. In such cases this would diminish the profitability of the cannery and transfer a portion of the margin of preference to the EU distant-water fleet.

The complexity of existing ROO compliance and verification procedures may also afford additional protection to EU domestic canneries through acting as non-tariff barriers to the import of competing ACP products. Significantly, the risk of non-compliance with such complex rules of origin falls on the importer who will only risk such trade where there can be assurance that the exporter will agree to bear some of that risk and ensuing cost. There are additional protectionist dimensions to the ROO. The EU argues that the derogation quotas for tuna products should be regarded as a concession to ACP states due to their automatic nature. However, these binding quotas create an EU-imposed maximum limit for the amount of fish caught by third countries that can benefit from preferences. Additionally, the exclusion of fish from cumulation provisions with neighbouring developing countries[44] appears to be a protectionist measure in the face of actual and potential developing-country competitors in this sector.

A further protectionist spin-off is that the ROO, combined with the substantial trade preferences available, is the ability of the EU fleets in some ACP states to obtain a higher price for fish supplied to ACP canneries from EU vessels compared with those from third countries. ACP canneries may still benefit from absorbing this higher cost in order to obtain the preferential tariff.[45] This price differential is due to EU labour, environmental, sanitary standards and other regulations that EU vessels must comply with compared to third countries.[46] In this situation a share of the preference is transferred from the ACP state to subsidise the EU for the higher cost of operating their fleet. The need to qualify with the ROO, to obtain preferences, through supplying ACP canneries with EU-caught fish that is not always the most competitive source, is articulated by an advisor of the Seychelles Fishing Authority who states that 'the benefit to Seychelles

in granting fishing licences to EU vessels may be reduced if the country benefits from fewer commercial advantages from the EU'.[47]

The heart of the protectionist role of the ROO for processed tuna products is found in the ROO for wholly originating tuna. The allocation of ownership rights of the fish in an EEZ dictates what ACP states can consider as 'their fish'. Declarations XXXVIII[48] and XXXIX[49] in the Cotonou Agreement reflect the disagreement between the ACP and EU in this regard. Both interpretations are consistent with the UN International Law of the Sea. The EU insists that only fish within an ACP state's territorial waters will be considered originating regardless of who caught the fish. The ACP, however, believe that while they only have sovereign rights, rather than sovereignty, over fish within their EEZ, they should have the same rights regarding originating status of fish caught there as in their territorial waters.

The European Commission argues that agreeing to ACP demands on the recognition of the fish caught in the EEZ would not necessarily increase value-added activities in ACP fisheries, for example through increasing the activity of factory ships in ACP's EEZ, putting immense pressure on the sustainability of fishing within the EEZ, with little in return. However, the ACP Declaration XXXIX specifically alludes to granting wholly originating status to fish caught by foreign vessels within their EEZ, which is 'obligatorily landed in ports of the ACP states for processing.' The EU's legitimate environmental concerns[50] would be better tackled through caveats such as that suggested by the ACP in the wholly originating criteria, improved management of EEZs, and fisheries partnership agreements which may include such obligatory landing provisions, rather than using those environmental concerns as justification of current fish-ownership rights within EEZs.

The EU view on this issue serves its commercial interests. Amending the definition of wholly originating fish in line with ACP demands would effectively eliminate the subvention to EU vessels in the current ROO as fish caught by any vessel within an ACP state's EEZ would be wholly originating in the spirit of ROO Article 3(1) subparagraph (e). Article 3 paragraphs 2 and 3 which serves EU protectionist purposes in the form of providing ACP states with an incentive to grant EU vessels access to their EEZs would become worthless.

In summary, the complex ROO for preferential tuna products is due to its legitimate role in preventing trade deflection and somewhat less legitimate role in protecting EU strategic trade interests, between which a fine line exists. In the next section this fine line is crucial in determining how the developmental implications of these ROO should shape the ACP negotiating strategy for preferential ROO under EPAs. While trade-deflection concerns are legitimate they must be defined as distantly as possible from protectionist motives to ensure that they do not become a form of 'tied trade'[51] that impedes the objective and dynamic value of the trade preferences.

ROO to encourage economic development in preference-receiving countries

The overarching economic objective of the current Economic Partnership Agreements that are being negotiated with the EU is to foster trade-induced economic growth and development in ACP economies. It follows from the development objectives of Cotonou that those ACP states with an abundance of fish (including those in their EEZs) should export this resource (in a sustainable manner) and the ROO should provide these states with the flexibility to do so as efficiently as possible. However, the current wholly originating criteria for fish within EEZs does not provide this flexibility. The EU and ACP clearly have diverging views on this issue, each in line with their commercial interests in exploiting their particular area of actual or perceived commercial advantage. The EU has a long historic commercial interest in the fisheries sector (processing and fishing), while the ACP has an abundance of the natural resource. However, the EU, as well as the ACP, is facing rising competition both in canning and in the capture fisheries from highly competitive producers in Asia who are eroding any comparative advantage they may have in these sectors. It is difficult to justify the EU's position on fisheries ROO from a developmental

perspective as the current ROO constrains the ACP states in exploiting their comparative advantage without an investment relationship with the EU.

To fully understand the development implications of the ROO for tuna it is necessary to understand the global market for canned-tuna products. Thailand and Philippines are presently amongst the world's most competitive canned-tuna producers and few analysts doubt that without significant margins of trade preference both the ACP and the EU canneries would be under extreme commercial pressure. Yet the paradox of their competitive advantage is that neither of these countries are particularly resource rich in tuna fish. Having a natural abundance of tuna in close proximity to one's land mass does not necessarily confer a competitive advantage in canning tuna, just as having iron-ore deposits does not confer a competitive advantage in steel or automobile production. Both Thailand and the Philippines import skipjack tuna from the Central and Western Pacific for canning in their facilities. Their proximity to producers of cans, edible oils and salt along with low-cost productive labour and abundant water and efficient shipping links to EU markets are sufficient to overcome any commercial disadvantage faced by canners from having to import tuna. The Pacific islands , with the possible exception of Papua New Guinea, with up to 45% of the world's tuna landings, has not, even with Lomé and Cotonou preferences, been able to develop a sustainable commercial advantage in canning.[52] The shipping cost of cans, oil and other materials to the Central and Western Pacific, and the high cost of shipping canned tuna to the EU, are greater than the cost disadvantages of shipping unprocessed tuna to South-East Asia.[53]

Indeed this raises the most difficult of development questions, of whether countries so inherently disadvantaged by size and remoteness should necessarily abandon attempts at down-stream processing and confine their economic activities to the collection of rents from their natural resources as was advocated by the Bretton Woods institutions and the WTO in the 1990s. The disadvantages faced by the Pacific in processing tuna are identical to those faced in other extractive sectors in the region and in most of the ACP. No simple response to so profound a development problem is possible except that a trade policy aimed at making such an economic transformation is costly, difficult and has usually been unsuccessful. Nevertheless, for those ACP states that decide that they have few realistic alternatives to attempting this difficult transformation, minimising the economic cost of imports to the industry is essential for any chance of long-term survival. There is little in the rule of origin for canned tuna that enhances the flexibility needed to make this transformation from raw material supplier to processor. While the EU's margin of trade preferences have without doubt created the canning industries in the ACP, the rule of origin has diminished the industry's ability to become competitive because it has raised costs at the one stage of the value chain where ACP states have a demonstrable commercial advantage, i.e. the unprocessed tuna.

It could be argued that the ROO do not comprehensively prohibit ACP states granting foreign vessels access to their waters to catch fish for processing into originating products. However, in reality the highly restrictive conditions of Article 3(2), means they are unlikely to be met. For example, the seemingly simple condition regarding crew nationality is a sheer impossibility for several small-island coastal ACP states.[54] ACP-processed fish caught by foreign vessels is therefore either exported under derogation quotas or to another market. Derogation allowances combined with such valuable trade preferences have proved to be valuable in this regard, providing a significant stimulant to inward investment from third countries in order to gain access to the EU market.[55] A study on tuna canneries within several key ACP states found that 'without the derogation to the ROO, production would be very difficult.'[56]

The ROO creates a bias between sources of investment in ACP states, providing an incentive for ACP states to grant EU access to their EEZ over other countries. There may be circumstances, however, where the EU is not interested in such opportunities. The remoteness of most ACP states from the EU, particularly those in the Pacific with substantial tuna resources, have in the past represented such instances. This may effectively exclude these countries from the trade preferences to which they are eligible.[57] However, the recently concluded

bilateral EU fisheries agreements with Kiribati and the Solomon Islands reduces the likelihood of this situation occurring. Despite this trend, the possibility that the EU may withdraw from an EEZ in which its vessels currently fish presents a constant threat to the viability of ACP-processing operations that export to the EU. ROO-induced bias towards granting access to EU vessels may also reduce the leverage ACP states have over subsequent EU investment,[58] for example possibly contributing to the difficulties some ACP states experienced in enforcing appropriate monitoring systems on EU vessels within their EEZ's.[59]

The ROO do not discriminate between the type of investment in ACP states which, similar to the fact that they do discriminate between the source of investment, favours EU fishery interests over those of the ACP. The ROO bias creates incentives for ACP states to grant EU access to their EEZs but in return provides little promise of any benefits to an ACP state which has or is hoping to develop shore-based value-added processing activities. The negligible developmental impact (beyond the collection and use of access fees by the ACP states) from this form of EU investment has been noted with respect to Senegal.[60] Similarly, it has been observed that the development of further tuna-processing activities in the Seychelles would be constrained by limited supplies of EU-caught fish because despite the presence of EU vessels in its EEZ, the landings of these vessels has not grown with the increased canning capacity of the Seychelles. The majority of their catch supplies EU canneries.[61] This may prevent the actual establishment of further processing activities in the Seychelles.

The current ROO therefore contributes to trade and investment diversion and reduced trade creation within a preferential trading area, undermining their purpose as a 'building block' to achieving competitiveness on the global market. This effect may be exacerbated in the smaller and least-developed of the ACP states as these are the least likely to be able to develop domestically owned fishing fleets to assist in supplying any domestic canneries with originating fish.

The ACP group has objected to the one clause in the ROO that specifically relates to development. Article 3(3) states that if an ACP state catches fish within its EEZ with a leased or chartered vessel from a third country the fish caught will only be originating if the ACP–EU Customs Cooperation Committee has accepted the lease or charter as 'providing adequate opportunities for developing the capacity of the ACP state to fish on its own account.' The EU argue that this paragraph was intended for temporary situations where an ACP state was developing sufficient capacity to fish its own EEZ. Such a provision permits the EU to in effect decide on what basis leasing or chartering a foreign vessel would contribute to the development of ACP domestic capacity. The first requirement of this provision requiring that 'the ACP state offered the Community the opportunity to negotiate a fisheries agreement and the Community did not accept this offer' perhaps indicates the EU's prioritisation of securing fisheries access for its vessels over development concerns in ACP states. It has indeed been the contention of this chapter throughout that a central intention of the fisheries ROO is to provide a subvention to EU fisheries access. This provision states this openly and unambiguously.

The desirability of FDI is a decision to be made solely by the recipient country, based on their national economic, political, social and cultural objectives, and without pressure from external sources such as ROO. Developmental objectives relating to fisheries should be conveyed through national investment policy and fisheries agreements, some measures may be justifiably incorporated into the ROO such as linking wholly originating criteria for fish within an ACP EEZ to its obligatory landing in an ACP state. Indeed had development concerns been an overarching consideration in the crafting of these rules of origin the EU could well have made compulsory landing a key component of helping the ACP to 'grow' their commercial advantage in fisheries and extend the economic benefits beyond the payment of access fees.

The EU stresses that the automatic derogation procedures for tuna products represents a concession to the ACP states. To the extent that, in the absence of these quotas, the EU would not grant derogation to volumes any higher than the quota amounts, the automatic nature of the quotas over

the non-automatic and burdensome derogation procedures[62] do indeed provide a form of concession. However, the increase in the quota-based derogations under the Cotonou Agreement were accompanied by a withdrawal of the option to use normal derogation procedures for these products. Quotas may also reduce the uncertainty of being granted derogation which could impede long-term production decisions. Despite the improved quota allocation process, quota recipients still face uncertainties over their quota share as there is always the possibility that an another ACP country will request a share in the global quota. More fundamentally, the highly migratory nature of the tuna species makes it difficult for ACP producers to predict whether the supply arrangements in their EEZ will be sufficient in a particular time period and so may require additional derogation to account for supplies of tuna from outside their EEZ. The unpredictable and short-term annual nature of these quotas may therefore contribute to their under-utilisation. Such under-utilisation, however, masks the forgone trade creation (potential investment not realised or the bypassing of the EU market) that the ROO may have induced in the past or will do so in the future. Fundamentally, derogation presents a second-best option to appropriate ROO. For the efficient development of their domestic industries ACP states must have full flexibility in their sourcing decisions, central to which is the use of competitive 'non-originating' fish in the production process.

The complexity of the ROO undoubtedly raises the related administrative and production costs for ACP exporters. Although the new derogation quota allocation system should be less burdensome than the one it replaced, it still requires administrative procedures and the opportunity cost of the ACP Secretariat administering this quota rather than using its resources to serve its members elsewhere must be considered. Moreover, the current implementation of value tolerance required by the EU creates a higher burden on ACP producers than would be necessary under the ACP proposed reference period method.[63] One of the reasons the EU grants trade preferences is the recognition of the supply side constraints and inherent cost disadvantages that producers in many of the ACP states face. It is therefore ironic that the administration of these preferences through the ROO appears to be more costly than is necessary due to the role of the ROO in protecting EU strategic trade interests. Simplification of the ROO, for example to a Change in Tariff heading (CTH) criteria, would reduce the role and cost of both derogation and value tolerance from ACP production processes and also simplify and therefore reduce the cost of compliance and verification procedures to all parties.

One of the central challenges for the ACP states will be in how to apply special and differential treatment (SDT) principles to EPA ROO.[64] The EU point to existing SDT in the current ROO through relaxation of specific provisions. For example the Cotonou ROO contains a 50% local-crew composition requirement while in many other preferential trading arrangements the corresponding requirement is 75%. The Cotonou ROO also allows 15% value tolerance for fisheries products while the corresponding figure in the EU–South Africa Trade Development and Cooperation Agreement (TDCA) is only 10%. The ACP states must consider whether these minor concessions are sufficient in the face of their specific constraints in developing globally competitive industries. The EU also regards the derogation quotas as an example of SDT due to their automatic nature, but perhaps SDT concerns should be used to tackle the issues at the heart of derogation, the degree to which ACP states should be allowed to use non-originating fish or the very definition of originating fish. The issue of ROO harmonisation is also important in this context. The EU has nearly accomplished its objective of harmonising the preferential ROO across all its regional trading agreements. This harmonisation reduces EU ROO-related costs and facilitates cumulation provisions but to what degree does it reduce the scope for introducing SDT-type provisions in EPA ROO?

In conclusion, discrimination between the EU and third countries in the ROO is not conducive to the developmental role of trade preferences. Developing coastal states that seek to efficiently develop their marine resources should be provided with full flexibility to do so in a manner that develops a competitive domestic industry. It is not suggested that

the ROO have been constructed specifically to impede this process, but that the EU's use of the ROO for protectionist purposes has had unintended negative consequences on the potential of trade preferences to facilitate trade-induced economic growth and development in ACP states. The biases created in the ROO limits the flexibility of ACP production and sourcing decisions, raising production costs and impeding the long-term competitiveness of their industries. Further reducing the possibility that these industries will reach a point where they no longer need trade preferences. The welfare loss of third countries due to trade diversion created by these ROO must also be considered, especially as some of these third-country producers are developing countries themselves. While the current ROO may appear justifiable on the basis that it is the EU market to which these ROO provide preferential access, the open and export-oriented regional trading arrangements, such as EPAs, that developing countries are being encouraged to join as a 'building block' towards global trade integration will only serve this purpose if such arrangements facilitate the development of globally competitive industries within its developing-country members.

Conclusions

The erosion of trade preferences is a reality arising from multilateral liberalisation and the increasing need for WTO compatibility of existing preferential trading arrangements.[65] The EU has put in place a rule of origin for processed tuna products that at very least violates the spirit of the Kyoto Convention. Moreover, the purpose of the rule of origin is to provide an indirect subvention to EU fishing vessels by providing further incentives for ACP states to provide access. This is of course most significant where those ACP states are both tuna rich and have canning capacity. While the margin of preference has been instrumental in creating the ACP canning sectors, the rule of origin has retarded its development by imposing what are in effect EU-caught fish for ACP canneries. Moreover, there appears to be anecdotal evidence from ACP states that some canneries are willing to pay higher prices for EU-caught fish, which raises costs and decreases profitability.

Significantly, the incidence of ROO-fraud in the sector stems from the way in which rules of origin have been written to provide these subventions to the EU's distant-water fishing fleets. Had the rules of origin for canned tuna been written in a manner more consistent with that normally found for manufactured goods, i.e. based on a change in tariff heading, then the use of non-originating tuna fish in canneries would have been less of an issue than it has been over thirty years. It is significant that ACP canned tuna would be originating even at a 2-digit level using the CTH criteria.

The current negotiations for Economic Partnership Agreements between the EU and the ACP regions constitutes an excellent opportunity for ACP states to rectify the many trade- and investment-diverting effects of the current rule of origin. The only question that arises is whether the EU would countenance a wholesale reform of the rule of origin for canned tuna given the impact that such an arrangement would have upon access agreements between EU distant-water fleets and tuna-rich ACP states such as Papua New Guinea, Seychelles and Senegal. As an interim measure leading to eventual wholesale reform of the rule, a progressive liberalisation of the rule of origin through an annual expansion of automatic derogation quotas would facilitate the competitive development of the ACP tuna-canning industry given the inevitable decline in MFN tariffs at the end of the Doha round. However, as long as the EU maintains a strategic interest in gaining access for its fleets into the EEZ of ACP states the fundamental character of the rule of origin which defines the origin of the canned tuna by the nationality of the vessels catching the fish is unlikely to change.

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Annex I. Selected EU MFN tariffs on tuna products

		Product description	HS tariff classification	MFN tariff
fresh fish		**Fish and crustaceans, molluscs and other aquatic invertebrates**	**Chapter 3**	
	for processing	Fish, fresh or chilled, excluding fish fillets and other fish meat of , heading 0304	0302	
		Albacore or longfinned tunas (Thunnus alalunga)	0302 31 10	0%
		Yellow fin tunas	0302 32 10	0%
		Skipkack or stripe-bellied bonito	0302 33 10	0%
		Bigeye tunas (Thunnus obesus)	0302 34 10	0%
		Bluefin tunas (Thunnus thynnus), for the industrial manufacture of products falling within heading 1604.	0302 35 10	0%
	not for processing	Fish, fresh or chilled, excluding fish fillets and other fish meat of heading 0304,	0302	
		Albacore or longfinned tunas (Thunnus alalunga)	0302 31 90	22%
		Yellow fin tunas	0302 32 90	22%
		Skipkack or stripe-bellied bonito	0302 33 90	22%
		Bigeye tunas (Thunnus obesus)	0302 34 90	22%
		Bluefin tunas (Thunnus thynnus), for all other uses.	0302 35 90	22%
processed fish		**Preparations of meat, of fish or of crustaceans, molluscs or other aquatic invertebrates**	**Chapter 16**	
	loins	Prepared or preserved fish - whole or in pieces, but not minced	1604 11	
		Tunas and skipjack 'loins'	1604 14 16	
		Bluefin tunas (Thunnus thynnus) - for industrial manufacture or other	1604 14 16 20/25	24%
		Atlantic bigeye tuna (Thunnus obesus) - for industrial manufacture or other	1604 14 16 30/35	24%
		Other fish of 1604 14 11 not listed above – for industrial manufacture or other	1604 14 16 95/99	24%
		Prepared or preserved fish - whole or in pieces, but not minced	1604 11	
		Tunas and skipjack, not in cans or loins (other)	1604 14 11	
		Bluefin tunas (Thunnus thynnus) – Preserved	1604 14 18 20	24%*
		Bluefin tunas (Thunnus thynnus) – Other (not preserved)	1604 14 18 25	24%
		Atlantic bigeye tuna (Thunnus obesus) – Preserved	1604 14 18 30	24%*
		Atlantic bigeye tuna (Thunnus obesus) – Other (not preserved)	1604 14 18 35	24%
		Other fish of 1604 14 11 not listed above - Preserved	1604 14 18 95	24%*
		Other fish of 1604 14 11 not listed above – Other (not preserved)	1604 14 18 99	24%
	cans	Prepared or preserved fish - whole or in pieces, but not minced	1604 11	
		Tunas and skipjack in vegetable oil	1604 14 11	
		Bluefin tunas (Thunnus thynnus) – Preserved	1604 14 11 20	24%*
		Bluefin tunas (Thunnus thynnus) – Other (not preserved)	1604 14 11 25	24%
		Atlantic bigeye tuna (Thunnus obesus) - Preserved	1604 14 11 30	24%*
		Atlantic bigeye tuna (Thunnus obesus) – Other (not preserved)	1604 14 11 35	24%
		Other fish of 1604 14 11 not listed above – Preserved	1604 14 11 95	24%*
		Other fish of 1604 14 11 not listed above – Other (not preserved)	1604 14 11 99	24%

		Product description	HS tariff classification	MFN tariff
		Preparations of meat, of fish or of crustaceans, molluscs or other aquatic invertebrates	**Chapter 16**	
	other	Other prepared or preserved fish of tunas	1604 20 70	
		Bluefin tunas (thunnus thynnus) - Preserved	1604 20 70 30	24%*
		Bluefin tunas (Thunnus thynnus) – Other (not preserved)	1604 20 70 35	24%
		Atlantic bigeye tuna (Thunnus obesus) - Preserved	1604 20 70 40	24%*
		Atlantic bigeye tuna (Thunnus obesus) – Other (not preserved)	1604 20 70 45	24%
		Other fish of 1604 14 11 not listed above - Preserved	1604 20 70 95	24%*
		Other fish of 1604 14 11 not listed above – Other (not preserved)	1604 20 70 99	24%

*denotes product for which the Asian tariff quota (EC Council Regulation 957/2003 of 5 June 2003) of 25,000MT at 50% of the MFN rate applies.

Source: EU TARIC database, accessible at: http://europa.eu.int/comm/taxation_customs/dds/en/tarhome.htm

Annex II. Table of allocation of the automatic derogation quotas

Country	Quantities (metric tonnes)		Period
	Cans	Loins	
Côte d'Ivoire	1,000	333	01/10/02 – 30/09/03
	1,000	400	01/10/03 – 30/09/04
	416	176	01/10/04 – 28/02/05
Fiji	1,000	0	01/10/02 – 30/09/03
	1,000	0	01/10/03 – 30/09/04
	416	0	01/10/04 – 28/02/05
Kenya	0	333	01/10/02 – 30/09/03
	0	400	01/10/03 – 30/09/04
	0	167	01/10/04 – 28/02/05
Madagascar	1,000	0	01/10/02 – 30/09/03
	1,000	0	01/10/03 – 30/09/04
	416	0	01/10/04 – 28/02/05
Mauritius	1,000	333	01/10/02 – 30/09/03
	1,000	400	01/10/03 – 30/09/04
	416	167	01/10/04 – 28/02/05
Papua New Guinea	2,000	0	01/10/02 – 30/09/03
	1,000	0	01/10/03 – 30/09/04
	416	0	01/10/04 – 28/02/05
Seychelles	1,000	1,000	01/10/02 – 30/09/03
	1,000	400	01/10/03 – 30/09/04
	416	167	01/10/04 – 28/02/05
Senegal	1,000	0	01/10/02 – 30/09/03
	1,000	0	01/10/03 – 30/09/04
	416	0	01/10/04 – 28/02/05
Ghana	0	0	01/10/02 – 30/09/03
	1,000	400	01/10/03 – 30/09/04
	416	167	01/10/04 – 28/02/05

Source: Information provided by ACP Secretariat, Brussels.

Endnotes

1. The Lomé Convention was replaced by the Cotonou Agreement in 2000.
2. The aim of Economic and Trade Cooperation between the ACP and EU as detailed in Article 34(1) of the Cotonou Agreement is 'fostering the smooth and gradual integration of the ACP states into the world economy, with due regard for their political choices and development priorities, thereby promoting their sustainable development and contributing to poverty eradication in the ACP countries'. Article 34(2) states the ultimate aim of this co-operation as being 'to enable the ACP states to play a full part in international trade' and for co-operation to be directed at 'enabling the ACP states to mange the challenges of globalisation and to adapt progressively to new conditions of international trade thereby facilitating their transition to the liberalised global economy'. This will include enhancing the production, supply and trading capacity of the ACP countries as well as their capacity to attract investment (Article 34(3)). Finally, article 34(4) requires that this co-operation be 'implemented in full conformity with the WTO, including special and differential treatment'.
3. The EU and ACP have agreed to continue Phase I all-ACP–EU negotiations on a limited number of issues throughout 2004. The possible inclusion of ROO in these negotiations will be discussed after a ROO experts meting scheduled for February 2004 in Brussels. See ACP document *Proposed Subjects for Initial Discussion at the "All ACP" Phase of the EPA Negotiations*, 10 December 2003, Reference ACP/00/125/03. There is therefore at present uncertainty as to whether the ROO for EPAs will be negotiated on an ACP-wide or regional level.
4. There have been suggestions from some ACP states that given the reciprocal nature of the EPAs there may be a need to negotiate a separate and 'asymmetric ROO' for EU products entering ACP markets if preferential access is granted.
5. There has been a long history of analysis of tuna rules of origin in ACP–EU relation see, McQueen, M. (1982) *Lomé and the Protective Effect of Rules of Origin*, Journal of World Trade Law, Vol. 16, No.2; Bourgeois, J. *Rules of Origin: an Introduction* in Vermulst (1994) et al. *Rules of Origin*, University of Michigan Press, Ann Arbor, p.3.
6. This made Spain the third-largest tuna-fishing nation after the USA and Thailand.
7. Between 1990 and 1998 there was a 22% decrease in employment in the EU capture fisheries sector and a 14% decrease in the employment processing sector. Gorez, B. and O'Riordan, B. (2003) *The Future of European Union-ACP Countries Fisheries Relations, in Fisheries Issues in WTO and ACP–EU Trade Negotiations*, Grynberg, R. (ed), Commonwealth Secretariat, London, pp.8.
8. IDDRA UK Ltd (2004) *Impact of the Opening up of the European Market for Canned Tuna from Asia – The Cases of Ghana, Senegal, Seychelles and Mauritius*, study commissioned by the Commonwealth Secretariat and CTA , London. pp.23.
9. ibid. pp.28
10. ibid pp.14.
11. ibid pp.20
12. Cartwright, I. (2003) *A Preliminary Negotiating Framework for Economic Partnership Agreement Negotiations with the European Union : Fisheries*, Study commissioned by the Pacific Island Forum Secretariat, Suva, pp.vi.
13. ibid.
14. UN Convention on the Law of the Sea (UNCLOS). Part II, Section II, Article 3.
15. The UN Convention on the Law of the Sea (UNCLOS) defines the Exclusive Economic Zone (EEZ) of a country as its waters within 200 miles of the coast but beyond the 12-mile limit of the Territorial Sea. Any fish caught beyond the EEZ is undisputedly the origin of the country whose vessel caught the fish.
16. As a result of the rule of origin ACP processors are required to not only note the location of where each of their fish is caught they are also required to physically separate tuna caught in the territorial sea, from originating and non-originating tuna caught outside the Territorial Sea. Thus tuna, a highly migratory species which traverses hundreds and often thousands of kilometres of ocean, must be separated according to the place of its capture and the ownership of the vessel used in its capture.
17. The source of the tuna used for processing is only relevant where the tuna is exported to another region with which the EU maintains preferential access such as EFTA. Thus the origin of the tuna used in processing in the EU is not significant in conferring origin if the product is exported from say Italy or Spain to Germany, but if the tuna used for processing is not of EU origin it would not have EU originating status if exported to Switzerland under EFTA, (perscom DG Trade, February, 2004)
18. International Convention on the Simplification and Harmonization of Customs Procedures concluded in Kyoto (Kyoto Convention), 18th March, 1973, entered into force 25th September 1974
19. European Communities signed Annex D1 without reservation, 26th June 1974
20. See WTO Agreement on Rules of Origin
21. Provision 3, Annex D1, Kyoto Convention, 1973
22. See Notes to Provision 3, Annex D1, Kyoto Convention, 1973
23. Cotonou Agreement, Annex V, Protocol I, Article 4, Paragraph 2.
24. European Commission and ACP Secretariat, (perscom).
25. Cotonou Agreement, Annex V, Protocol I, Article 38.
26. Cotonou Agreement, Annex V, Protocol I, Article 6.
27. Brenton, P. (2003) *Integrating the Least Developed Countries into the World Trading System: The Current Impact of EU Preferences under Everything But Arms*, International Trade Department, The World Bank, Washington DC, pp.4 and 21.
28. A full list of the OCTs can be found in the Cotonou Agreement, Annex V, Protocol I, Annex III.
29. Cotonou Agreement, Annex V, Protocol I, Article 6.3.
30. Cotonou Agreement, Annex V, Protocol I, Annex XIV.
31. The EU–South Africa Trade, Development, and Cooperation Agreement (TDCA) Agreement which came into force in 2000.
32. Cotonou Agreement, Annex V, Protocol I, Article 6.11.
33. Cotonou Agreement, Annex V, Protocol I, Article 6.11.
34. WTO document (2002) *Committee on Rules of Origin – Report by the Chairman of the Committee on Rules of Origin to the General Council*, G/RO/52, pp.6
35. Footnote, G/RO/52
36. In the late 1990s when the Solomon Taiyo canning facility in the Western province of the Solomon Islands was owned (51%) by the Solomon Islands government but operated by Taiyo Gaigyo (49% – subsequently Maruha) tuna was exported through a Taiyo Gaigyo subsidiary in the UK which set the price of tuna to wholesalers based upon the price of Thai substitutes plus 24%. Thus the wholesale price in the UK was determined by the price established by what was then the market leaders plus the margin of preference and without reference to the CIF price. In other words the margin of preference did not benefit UK consumers.
37. Commission of the European Communities (2003) *Green Paper on the Future of Rules of Origin in Preferential Trade Arrangements*, Brussels, COM(2003)787 final.

38. See Brenton, P. (2003) *Integrating the Least Developed Countries into the World Trading System: The Current Impact of EU Preferences under Everything But Arms*, International Trade Department, The World Bank, Washington DC.
39. Brenton, P. (2003) *Integrating the Least Developed Countries into the World Trading System: The Current Impact of EU Preferences under Everything But Arms*, International Trade Department, The World Bank, Washington DC, pp. 17.
40. See Green Paper, op cit. p.31. While the commission does not provide a breakdown of the rate of preference up-take by HS chapter for ACP states, the volume of preferential trade is only 7% of total trade. This indicates that non-preferential trade is more significant by weight than value.
41. Various reports of the OLAF, European Anti-Fraud Office available at http://europa.eu.int/comm/anti_fraud.
42. The WTO non-agriculture market access (NAMA) within the Doha Round have not yet progressed to members specific offers on individual products. However, the EU's lack of indicative figures for fisheries products, and very high existing MFN rates, suggest value erosion of preferences due to this factor will occur at a slow pace.
43. Gorez, B. and O'Riordan, B. (2003) *The Future of European Union-ACP Countries Fisheries Relations*, in *Fisheries Issues in WTO and ACP-EU Trade Negotiations*, Grynberg, R. (ed), Commonwealth Secretariat, pp.4.
44. Cotonou Agreement. Annex V, Protocol I, Article 6(11) on Cumulation with neighbouring developing countries states that 'this paragraph shall not apply to tuna products classified under Harmonised System Chapters 3 or 16'.
45. The ROO-related constraint to source the cheapest raw materials (non-EU or ACP caught fish) for canneries, and the identification of this as a constraint to their competitiveness, has been noted with respect to Ghana, Seychelles and Mauritius. IDDRA UK Ltd, (2004) *Impact of the Opening up of the European Market for Canned Tuna from Asia – The Cases of Ghana, Senegal, the Seychelles and Mauritius*, study commissioned by the Commonwealth Secretariat, London. pp. 74, 84 and 90 respectively.
46. Michaud, P. (2003) *Experience from the bilateral fisheries access agreement, impact on the economy and implications for Seychelles of the outcome of the WTO mediation on the case of tuna between the EU and Thailand and the Philippines*, available at http://www.cta.int/events2003/fisheries/Michaud-full-EN.pdf, pp.10.
47. Michaud, P. (2003) Experience from the bilateral fisheries access agreement, impact on the economy and implications for Seychelles of the outcome of the WTO mediation on the case of tuna between the EU and Thailand and the Philippines, available at http://www.cta.int/events2003/fisheries/Michaud-full-EN.pdf, pp.11.
48. Cotonou Agreement DECLARATION XXXVIII – Community Declaration relating to Protocol 1 of Annex V on the extent of territorial waters. 'The Community, recalling that the relevant acknowledged principles of international law restrict the maximum extent of territorial waters to 12 nautical miles, declares that it will take account of this limit in applying the provisions of the Protocol wherever the latter refers to this concept'.
49. Cotonou Agreement DECLARATION XXXIX – Community Declaration relating to Protocol 1 of Annex V on the origin of fishery products. 'The ACP States reaffirm the point of view that they expressed throughout the negotiation on the rules of origin in respect of fishery products and consequently maintain that following the exercise of their sovereignty rights over fishery resources in the waters within their national jurisdiction, including the exclusive economic zone, as defined in the United National Convention on the Law of the Sea, all catches effected in those waters and obligatory landed in ports of the ACP states for processing should enjoy originating status'.
50. The EU has never undertaken a systematic review of the effect that the current rules of origin may have on marine habitats in the 12 nautical mile territorial sea. Indeed in many ACP states the Territorial Sea attracts a disproportionate amount of fishing effort from both artisanal and foreign commercial fishing vessels. It could as well be argued that the current rule of origin further compounds the unsustaianability of the in-shore fishery.
51. McQueen, M. (1982) *Lomé and the Protective Effect of Rules of Origin*, Journal of World Trade Law, Vol. 16, No. 2, pp. 131.
52. Both Solomon Islands and Fiji have canneries. Solomon Islands production has been dramatically curtailed since the civil conflict of 2000–03 and Fiji only exports to the EU under derogation provisions. PNG is greatly expanding its capacity given it very large EEZ and abundant tuna resource.
53. In the late 1990s it was estimated that the cost advantage of Pacific islands over Thai and Philippines producers stemming from proximity to the tuna grounds was approximately US$150/tonne of tuna i.e. the cost of shipping tuna from the Central Pacific to Bangkok. As against this advantage was the cost of shipping all components to the pacific islands and then shipping the final product to the EU from the Pacific as opposed to Bangkok.
54. For example the tuna resource rich Pacific States of Tuvalu and Kiribati which have EEZ's of 900,000km^2 and 3,550,000km^2 respectively but populations of just 10,1000 and 86,900 respectively. Information downloaded from the Secretariat of the Pacific Community (SPC) Fisheries address book 2003, available at: http://www.spc.int/coastfish/News/Address_Book_2003/Address_book_2003.htm
55. For example the ownership (in conjunction with the national government) of the second largest tuna cannery in the world by Heinz (and American owned company) in the Seychelles. Michaud, P. (2003) *Experience from the bilateral fisheries access agreement, impact on the economy and implications for Seychelles of the outcome of the WTO mediation on the case of tuna between the EU and Thailand and the Philippines*, available at http://www.cta.int/events2003/fisheries/Michaud-full-EN.pdf, pp. 5 and 9.
56. IDDRA UK Ltd, (2004) Impact of the Opening up of the European Market for Canned Tuna from Asia – The Cases of Ghana, Senegal, The Seychelles and Mauritius, study commissioned by the Commonwealth Secretariat (London), pp.90.
57. Fiji tried unsuccessfully to attract Spanish fleets and this failure is at least partly attributable to its distance from the EU market. Fiji's one national cannery eventually formed a partnership with an American company and as a result none of its canned tuna products (beyond those covered by its derogation quota) are granted trade preferences. However, the future of this types of situation may be changing with the recently concluded bilateral fisheries agreements between the EU and Kiribati and Solomon Islands and declared intention of the EU to examine the possibilities of similar arrangement with the Cook Islands and Papua New Guinea. (Perscom).
58. See McQueen, M. (1982) 'Lomé and the Protective Effect of Rules of Origin', *Journal of World Trade Law*, Vol. 16, No. 2, pp. 129 with respect to investment in ACP state's manufacturing sectors.
59. For an example see Gorez, B. and B. O'Riordan (2003) *The Future of European Union-ACP Countries Fisheries Relations, in Fisheries Issues in WTO and ACP-EU Trade Negotiations*, Grynberg, R. (ed), Commonwealth Secretariat, London, pp. 31 with respect to EU vessels in the Seychelles EEZ. However, it does appear these Monitoring/Control/Surveillance issues are being

increasingly addressed through fisheries agreements between the relevant Parties.

60. ibid, p.13.
61. ibid, p.30.
62. See Cotonou Agreement, Annex V, Protocol I, Article 38.
63. ACP Secretariat, (Perscom).
64. The principle of asymmetrical ROO that may be argued from a SDT perspective is not considered here as this study is concerned with improving the ROO of ACP products into the EU *per se*, rather than relative to the ROO for EU exports entering the ACP group. However, any possible impacts of these issues on the actual ROO faced by ACP products under an EPA should be examined in the preparation of an ACP negotiating strategy.
65. This led to the introduction of an annual 25,000-tonne tariff quota of 12% (50% of the MFN rate) for Asian canned tuna from 1 July, 2003.