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# The EU's Legal Ties with its Former Colonies When Old Love Never Dies

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## ABSTRACT

Most of the world's developing countries have been colonies under one of the EU Member States. Today the European Union pursues preferential policies (in the form of special legal relationships) towards most of these former colonies. These preferential policies however differ rather significantly. This paper pursues two objectives. Firstly, it sets out to examine whether there is a pattern in the European Union's policies towards these former colonies. Since such a structure is identified, it secondly attempts to provide an explanation for this. Regarding the first objective, the paper divides the European Union's relations with its former colonies into four groups: 'Outermost Regions', 'Overseas Countries and Territories', 'ACP countries' and 'other former colonies'. By taking a bird's-eye view on the legal relationship between each of these four groups and the European Union, it is possible to identify two protuberant characteristics: (1) all four groups display two recurring elements, namely trade and aid, and (2) the Union rather overtly offers the most favourable conditions to Outermost Regions followed by Overseas Countries and Territories and ACP countries – and with the group of other developing countries as the one receiving the least preferential treatment. With regard to the second objective of the paper, it is suggested that the most plausible explanation for the disparate treatment between the four groups of developing countries is a combination of the various regions' 'political nearness' to their former colonial power combined with 'historical inertia' (meaning that the original level of preferential treatment is carried on in subsequent schemes). Hence, only within the fourth group of developing countries does *Realpolitik* appear to play the main role.

## 1 BACKGROUND AND OBJECTIVE

In 1951, at the inception of what we today refer to as the European Union, present-day EU Member States held colonies throughout the Global South. In the ensuing decades most of these colonial ties were disbanded. In their place the European Union and its Member States have entered into various types of legal relationships with the former colonies. However, these relationships differ very considerably from one another: some are very generous towards the former colonies, whereas others are much less so. But why is the European Union offering such differential treatment between different groups of developing countries? Why, for example, are some small Caribbean islands offered much better treatment than are developing countries in Asia or Latin America?

This paper sets out, firstly, to identify a structure in the European Union's policies towards the former European colonies. Secondly it attempts to provide an explanation for the structure that is found.

Since the objective of the paper is to examine those countries which have a need for economic assistance and which historically have had colonial ties with Europe, the paper will only consider former European colonies which belong to what is often referred to as the Global South.[1] This means firstly that former European colonies such as the United States of America, Canada and Australia are not included. And secondly it means that a number of developing countries, such as several of the former Soviet republics, which have not been European colonies, are not included either.

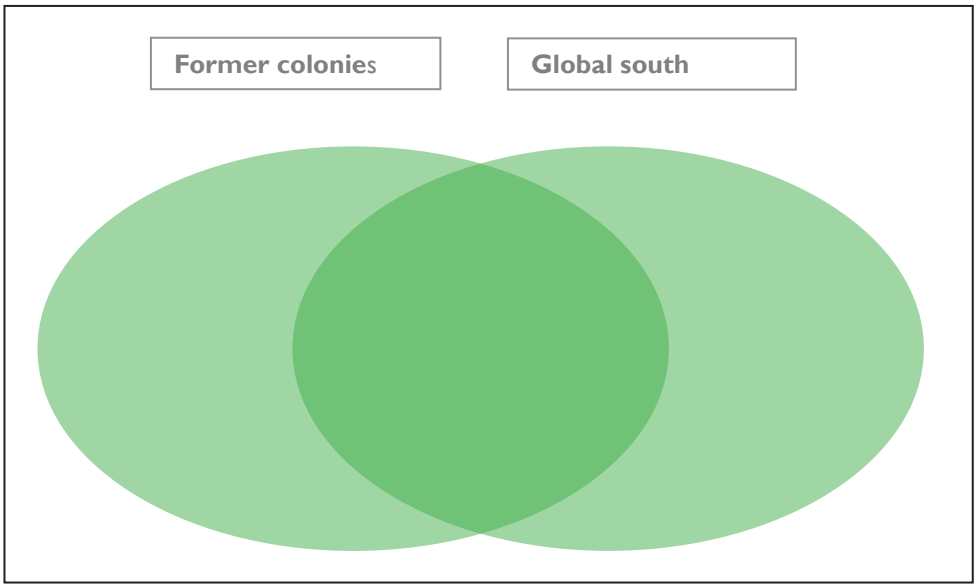



Figure 1. What this paper covers

1 Admittedly, the term "Global South" is ambiguous since some territories – such as Greenland – are not exactly close to Equator.

The European Union has special policies aimed at a number of clearly defined groups of former colonies belonging to the Global South. For the purposes of the present paper, I will divide these countries (policies) into four rather general groups, namely:

- *Outermost Regions* covering for example Guadeloupe and Martinique.
- *Overseas Countries and Territories* (OCTs) covering for example French Polynesia.
- *ACP countries* covering for example Kenya and Tanzania
- *Other former colonies* covering for example Ecuador, Algeria and Vietnam.

These four groups are shown in the map at p. 18 of the working paper

In this paper I first outline the legal relations between, on the one hand, the European Union and, on the other hand, the four above categories of former colonies (sections 2-5). Thereupon I discuss the causes to those differences that are identified in the outline (section 6). Finally, I sum up my findings (section 7).

Before embarking on this examination, it may be suitable to observe that Outermost Regions and Overseas Countries and Territories (OCTs) are, in principle, part of EU Member States and are therefore not, strictly speaking, developing countries. Indeed, in certain of the territories the GDP per capita is rather high. Some may therefore question the wisdom in examining Outermost Regions and OCTs together with, for example, least developed countries in Subsaharan Africa. On the other hand, it is precisely by taking this approach that the structure in the European Union's relations to the Global South will become clearest.

## 2 OUTERMOST REGIONS

The so-called *outermost regions* cover nine specific regions, namely Guadeloupe, French Guiana, Martinique, Réunion, Saint-Barthélemy, Saint-Martin, the Azores, Madeira and the Canary Islands.[2] These regions form part of the European Union as such so that, as a matter of principle, they are subject both to the two European Union Treaties and to secondary EU legislation.

Nevertheless, due to these regions' 'structural social and economic situation … which is compounded by their remoteness, insularity, small size, difficult topography and climate, economic dependence on a few products, the permanence and combination of which severely restrain their development' Article 349 TFEU requires the European Union to 'adopt specific measures aimed, in particular, at laying down the conditions of application of the Treaties to those regions, including common policies'.[3]

Whereas for some of the outermost regions there are exemptions with regard to the appli-

2 Art 349 TFEU. See also Art 355(1) TFEU.

3 These measures in particular concern areas such as customs and trade policies, fiscal policy, free zones, agriculture and fisheries policies, conditions for supply of raw materials and essential consumer goods, State aids and conditions of access to structural funds and to horizontal Union programmes, cf. Art 349(2). For the European Union's most recent strategy regarding the outermost regions, see Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – Strategy for the Outermost Regions: Achievements and Future Prospects, Brussels 12 September 2007, COM(2007)507 final.

cation of EU law,[4] the most important aspect of being an outermost region is that they are offered special preferential treatment by the European Union. Hence, in an action plan aimed at developing the outermost regions, the European Commission has given priority to (i) reducing the main constraints arising from the isolation of the outermost regions, (ii) creating an economic environment that favours the setting up of businesses, and (iii) developing trade in goods and services between the outermost regions and neighbouring non-member countries.[5]

Funding of programmes intended to give substance to these objectives is first of all provided under the European Union's cohesion policy,[6] but the outermost regions may also benefit from the European Fisheries Fund (EFF), from the European Agricultural Fund for Rural Development (EAFRD) and from the Programme of Options Specifically Relating to Remoteness and Insularity (POSEI).

## 3 OVERSEAS COUNTRIES AND TERRITORIES

Of the 27 signatories to the Treaties on the European Union and on the Functioning of the European Union, four have overseas countries and territories (OCTs); namely the Kingdom of Denmark, the French Republic, the Kingdom of the Netherlands and the United Kingdom of Great Britain and Northern Ireland.

Whilst Article 52 TEU in its first section lays down that the EU Treaties apply to the 27 signatories listed in that provision, in its section two the provision goes on to qualify this by laying down that '[t]he territorial scope of the Treaties is specified in Article 355 of the Treaty on the Functioning of the European Union'.[7] Thus, for example, Article 355(5)(a) TFEU provides that the Treaties do not apply to the Faeroe Islands even though these islands form part of the Kingdom of Denmark which is one of the 27 signatories listed in Article 52 TEU.[8] In other words, the territories of the Member States are not congruent with the territories to which the Treaties apply.[9] It follows

4 For example, those outermost regions which are French overseas departments are outside the Schengen area and the European Union Value Added Tax area.

5 One of the objectives of the European Union policies towards the outermost regions is to further economic integration.

6 Thus, the European Commission has explained that the outermost regions will receive EUR 5 billion for the 2007-13 period from the European Regional Development Fund (ERDF), the Cohesion Fund (for the Portuguese outermost regions) and the European Social Fund (ESF). On top of this, the EU's Cohesion Policy has earmarked additional funding to offset higher costs faced by the outermost regions, at the rate of EUR 35 per inhabitant per year making a total of EUR 979 million for all the regions. See further the European Union's brochure 'The Outermost Regions – European regions of assets and opportunities', Brussels 2010, pp. 3-4, available at http://ec.europa.eu/regional_policy/sources/docgener/presenta/rup2010/brochure_rup_en.pdf.

7 See in this regard Opinion 1/03 *(Lugano Convention)* [2006] ECR I-1145, para. 15. It should be noted that before 1 December 2009 the then applicable EU Treaty did not include any limitation as to its geographical scope.

8 With particular regard to the Netherlands, see the Netherlands Government's submission in Case C-300/04 *M.G. Eman and O.B. Sevinger,* [2006] ECR I-8055, paras. 22-25.

9 See Jean Groux, "'Territorialité' et droit communautaire", *Revue trimestrielle de droit européen,* Vol. 23, 1987, pp. 5-33, in particular pp. 16-19 and Delano Verwey, *The European Community, the European Union and the International Law of Treaties,* T.M.C. Asser Press, The Hague 2004, p. 136. See also Annex III to Protocol of amendment to the international convention on the simplification and harmonisation of customs procedures (Revised Kyoto Convention). This annex is available at http://ec.europa.eu/world/agreements/prepareCreateTreaties¬Workspace/treatiesGeneral¬Print.¬do?¬step¬=0&¬. Compare however with Article 198 TFEU which arguably distinguishes between 'Member States' and 'non-European countries and territories'.

that in certain geographic parts of some of the Member States, the Treaties only have a limited application or do not apply at all.[10] With particular regard to the OCTs, Article 355(2) TFEU provides that:

> 2. The special arrangements for association set out in Part Four [of the TFEU] shall apply to the overseas countries and territories listed in Annex II [to the TFEU].[11]
>
> The Treaties shall not apply to those overseas countries and territories having special relations with the United Kingdom of Great Britain and Northern Ireland which are not included in the aforementioned list.

It could be argued that Article 355(2) TFEU merely lays down an exception to the general application of the Treaties, so that the Treaties are fully applicable in the territories of the OCTs listed in Annex II with only those modifications that may be derived from Part Four of the Treaty on the Functioning of the European Union. According to this view, EU rules on for instance competition, State aid, public procurement, internal market, the Structural Funds etc. all apply to the OCTs unless they have been expressly exempted. Such construction, however, appears to be at odds with the fact that Article 199 TFEU expressly establishes that in certain respects the OCTs listed in Annex II shall be accorded the same treatment that otherwise would flow from the Treaties. The same discordance also appears with regard to several of the provisions of the OCT association agreement.[12] Indeed, the whole approach to the OCTs appears to go against the above construction. This is for example reflected in the adoption of Protocol No. 22 to the 'Treaty establishing the European Community' concerning the rights of the Danish National Bank with regard to 'those parts of the Kingdom of Denmark which are not part of the Community'.[13] This Protocol would have been superfluous – at least with respect to Greenland – had the above construction been correct.

Hence, to hold that Article 355(2) TFEU merely lays down a limited exception to the full application of the Treaties does not appear

10 On this, see also C.W.A. Timmermans in "The Law of the European Union and the European Communities", 4th edition (P.J.G. Kapteyn *et al.*, eds.), Kluwer Law International, 2008, pp. 85-86. It should be observed that the Charter of Fundamental Rights of the European Union, [2000] OJ C-364/1, is not limited as to its geographical scope as such. However, Article 51(1) of the Charter states that its provisions only apply through the application of Union law. This effectively limits the Charter's scope to the same as that of Union law.

11 The OCTs listed in Annex II are as follows: Greenland, New Caledonia and Dependencies, French Polynesia, French Southern and Antarctic Territories, Wallis and Futuna Islands, Mayotte, Saint Pierre and Miquelon, Aruba, Bonaire, Curaçao, Saba, Sint Eustatius, Sint Maarten, Anguilla, the Cayman Islands, the Falkland Islands, South Georgia and the South Sandwich Islands, Montserrat, Pitcairn, Saint Helena and Dependencies, the British Antarctic Territory, the British Indian Ocean Territory, the Turks and Caicos Islands, the British Virgin Islands and Bermuda.

12 Council decision of 27 November 2001 on the association of the overseas countries and territories with the European Community, [2001] OJ L314/1. See for instance the Decision's Article 14 or its recital 22 (regarding Bermuda).

13 [2006] OJ C321 E 297.

convincing.[14] Rather it seems more correct to hold that EU law has a much more limited application in the OCTs. According to this interpretation, as a general rule the OCTs do not form part of the European Union.[15] However, with regard to those OCTs that are listed in Annex II to the Treaty on the Functioning of the European Union, Part Four of the Treaty on the Functioning of the European Union applies. In this respect, when reading Part Four due account must necessarily be taken of the legal framework of which it forms part. This means that it is not only Part Four as such that applies, but also, directly or indirectly, those provisions and principles of the Treaties to which Part Four makes reference[16] or which must otherwise be applicable to ensure that Part Four is given full effect.[17] The latter includes the definition and the workings of the European Parliament, the Council and the Commission, as well as for example the possibility of making preliminary references under Article 267 TFEU.[18]

Whilst the Treaties – and EU law in general – have a more limited application in the OCTs than in the metropolitan parts of the Member States, these territories still benefit from preferential treatment based upon their so-called associate status with the European Union.[19] Part Four thus provides that '[t]he purpose of association shall be to promote the economic and social development of the [OCTs] and to establish close economic relations between them and the Union as a whole.'[20] And it continues

14 The view of the present author may be contrasted with that of J. Ziller, "Flexibility in the Geographical Scope of EU Law: Diversity and Differentiation in the Application of Substantive Law on Member States' Territories" in *Constitutional Change in the EU – From Uniformity to Flexibility?* (G. de Burca and J. Scott, eds.), Hart Publishing, Oxford 2000. Ziller at p. 119 observes that there is 'an unresolved dispute on the applicability to OCTs of Treaty provisions other than those of Part IV (Association of The Overseas Countries and Territories). Whereas the ECJ and most scholars seem to limit applicable Treaty provisions to Part IV (Provisions on OCTs) and the Articles formally referred to in this part, I maintain that only Part III (internal market) is not applicable to OCTs and in particular that parts I (general principles), II (citizenship), V (institutions) and VI (general and final provisions) must apply to those territories unless part IV foresees exemptions …'.

15 See in support of this, Case C-390/95 P *Antillean Rice Mills* [1999] ECR I-769, para. 36.

16 For example, Article 198 refers to Annex II to the Treaty on the Functioning of the European Union, Article 200 refers to 'the prohibition of customs duties between Member States in accordance with the provisions of the Treaties', and Article 202 refers to 'the provisions relating to public health, public security or public policy, freedom of movement'.

17 See in support of this Case C-390/95P *Antillean Rice Mills* [1999] ECR I-769, para. 37, and Case C-260/90 *Leplat* [1992] ECR I-643, para. 10, Case C-110/97 *Netherlands v Council* [2001] ECR I-8763, para. 49, Case C-300/04 *Eman and Sevinger* [2006] ECR I-8055, para. 46 and J.C. Moitinho de Almeida, "La notion de jurisdiction d'un État membre (article 177 du traité CE)" in G.C. Rodríguez Iglesias, O. Due, R. Schintgen and C. Elsen (eds) *Mélanges en hommage à Fernand Schockweiler*, p. 476. Moreover, when Greenland 'withdrew' from the European Community in 1985 in order to become an OCT, this was arguably done on the basis of the construction put forward here. In this respect it should be observed that Article 355 TFEU provides in its first paragraph that, with regard to the so-called outermost regions, the Treaties shall apply; albeit going on to state that this must be 'in accordance with Article 349'. When reading this provision along with the second paragraph of Article 355, the natural construction would appear to accord with the one put forward here. Moreover, the introduction of the new provision in Article 355(6) TFEU was made to enable certain OCTs to become outermost regions (cf. Declaration 43 on Article 355(6)). This arguably makes better sense if an OCT is not generally covered by the Treaties, in contrast to the outermost regions.

18 On this, see further M. Broberg, 'Access to the European Court of Justice by Courts in Overseas Countries and Territories' in Dimitry Kochenov (ed.), *EU Law of the Overseas*, The Hague: Kluwer Law International, forthcoming.

19 Art 355(2)(1) TFEU.

20 Art 198(2) TFEU.

by laying down that 'association shall serve primarily to further the interests and prosperity of the inhabitants of [the OCTs] in order to lead them to the economic, social and cultural development to which they aspire.'[21]

In practice the relations between the European Union and the OCTs are intended to help the latter in three different respects:

- By offering preferential access to the European market
- By providing financial assistance in a number of fields such as trade development and environmental development.
- By helping the OCTs improve economic integration (first of all regional cooperation and integration).

To sum up, OCTs are only partly covered by the European Union Treaties, but are still offered preferential treatment by the Union as well as financial assistance.

## 4 ACP COUNTRIES

During the negotiations leading up to the signing of the Treaty of Rome in 1957, first of all France assigned considerable importance to the geopolitical concept of 'Eurafrica'. In essence, France considered it decisive to bind Africa to Western Europe. The Treaty of Rome therefore contained provisions whereby primarily African colonies were offered 'association status' and thus became Overseas Countries and Territories (OCTs) as explained in the preceding section.[22] However, in the years following the creation of the EEC most of these OCTs gained independence requiring a redefinition of the framework regulating the relationship between the former colonies and the EEC. Hence, in 1964 the first Yaoundé Convention came into force. This was followed, first, by the second Yaoundé Convention and, subsequently, by the so-called Lomé Conventions. In 2000 the fourth Lomé Convention was replaced by the Cotonou Partnership Agreement which will remain in force until 2020. Since the first Yaoundé Convention the number of (non-European) countries covered by the legal scheme has grown from 18 originally to 79 today. The majority are former French and British colonies in Africa, but former colonies in the Caribbean and the Pacific are also parties to the Agreement – hence the name African, Caribbean and Pacific countries (widely referred to as ACP countries).

According to Douglas Williams, essentially, the economic relationship between France (and the United Kingdom) and a number of primarily African countries has to a considerable extent been transferred from the former colonial power and to the supranational European Union. The classical colonial tie between France (and the United Kingdom), on the one hand, and the former African colonies, on the other had, has thereby been replaced by a non-colonial relationship between the European Union and the African countries.[23]

21 Art 198(3) TFEU.

22 The European Union's use of the term 'association' illustrates how the relations to OCTs and ACP, respectively, have developed differently. Whereas the European Union continues to qualify relations with OCTs as one of 'association', this no longer applies to the ACP countries.

23 See also Douglas Williams, "The Specialised Agencies: Britain in Retreat" in *The United Kingdom – The United Nations* Erik Jensen and Thomas Fisher (eds), Macmillan, London 1990, pp. 209-234, in particular at pp. 219-221.

The European Union's relations with the ACP countries are based on two main pillars, namely trade and aid. With regard to the former, the European Union offers the ACP countries preferential access to the European market. Prior to the adoption of the Cotonou Partnership Agreement the preferential access was offered on a non-reciprocal basis. This was however held to violate WTO rules and the Cotonou Partnership Agreement therefore is based on the premise that preferential market access shall be reciprocal – although some degree of asymmetry to the benefit of the ACP countries is envisaged. The provision of continued preferential access to the European market is, in technical terms, made through the creation of so-called Economic Partnership Agreements (EPAs) which also are intended to further regional integration amongst groups of ACP countries. Another important characteristic of EU-ACP relations is that the European Union has insisted on the introduction of so-called 'conditionality' which essentially means that the Cotonou Partnership Agreement allows the European Union to sanction human rights breaches (etc.) in ACP countries.

The European Union also offers the ACP countries a particularly preferential status when it comes to development assistance; although in relative terms (i.e. amount per capita) the assistance is not as favourable as the one offered to outermost regions and OCTs. At the inception of the EEC a special financing mechanism (providing a sharing of the financing obligation that differed from the Member States' sharing of the general budget) was created – the so-called European Development Fund (EDF). The EDF continues to be the most important financing mechanism with respect to the ACP countries whereas financing over the general budget plays a much less prominent role with regard to these countries.

Over the years the topics covered by the agreements between the European Union and the ACP countries have steadily expanded. Most recently the European Union's increased attention accorded to security issues has spilled over into its development agenda, in that greater attention has been given to conflict prevention and political emergencies taking place well beyond the European borders. This is also reflected in the relations with the ACP countries.

Nevertheless, just like the EU-OCT relationship, the Union's relations with the ACP countries is characterised by the same three main aspects, namely:

- Preferential access to the European market (trade)
- Financial assistance (aid)
- Economic integration (regional cooperation and integration).

Arguably, the most important difference regarding the European Union's approach to the OCTs as compared with its approach to the ACP countries is that the former are given an appreciably more favourable treatment than are the latter.

## 5 OTHER FORMER COLONIES

Not least the inclusion of Member States such as Spain and Portugal in the European Union has been instrumental in a widening of the geographic coverage of the European Union's development assistance. The European Union has therefore established special programmes aimed at former colonies first of all in Latin America, around the Mediterranean and in

Asia.[24] In the European Union's relations with these – rather heterogenous – groups of developing countries, two pillars stand out as particularly important, namely trade and aid.

With regard to trade, the European Union has put into place a so-called General Scheme of Preferences (GSP). This scheme basically provides three different categories of preferences of which in principle only the most attractive is open to the least developed countries (LDCs) whereas the least attractive is open to all developing countries. The GSP scheme is also open to ACP countries so that if an ACP country qualifies for the most attractive GSP category, it may choose to take advantage of the GSP scheme rather than of the preferences available under the Cotonou Partnership Agreement. The same choice between the GSP scheme and schemes offered under the Cotonou Partnership Agreement is not open to non-ACP countries.

The European Union also provides development cooperation assistance to this fourth group of former colonies in the Global South. This assistance differs considerably amongst the different developing countries, but is in general less generous compared with the assistance provided to the ACP countries. One reason for this is that financing of development assistance to non-ACP countries can only go via the general budget, whereas assistance to the ACP countries may also be made via the European Development Fund.

As with the previous groups, it is possible to identify some main pillars upholding the relationship between the European Union and the present group of former colonies. In this situation the pillars are:

- Preferential access to the European market (trade)
- Financial assistance (aid)

However, in contrast to the three previous groups, regional integration does not constitute a main pillar with regard to the fourth group of former colonies.

As noted, the group of 'other former colonies' is rather heterogeneous. Indeed, the principal common denominator for the different legal measures, applying to those countries that fall within this fourth group of former colonies, would seem to be that to a much higher degree they are reciprocal in nature than are the legal measures applying to the three first groups. In particular factors such as (mutual) trade, security and immigration (to Europe) play important roles in the legal schemes governing relations between the European Union and these other former colonies. In other words, there is an important element of *realpolitisch quid pro quo* in the legal schemes regulating relations between the European Union and the countries falling within the group of 'other former colonies'. For example, in the European Union relations with the Mediterranean countries[25]European interests in fields such as security, stability and immigration[26] are occupying prominent positions. In return, the privileges offered by the European Union to the Mediterranean countries in many regards parallel those offered by the Union to the ACP-countries.

24 The European Union's neighbourhood policy (*vis-à-vis* its eastern neighbours) has not been included here, since these countries are not as such former colonies.

25 Covering Algeria, Egypt, Israel, Jordan, Lebanon, Morocco, Occupied Palestinian Territory, Syria and Tunisia. See further EuroMed homepage accessible at http:// www.enpi-info.eu/indexmed.php?lang_id=450.

26 Regarding migration, see the presentation of the EuroMed Migration II Project accessible at http://www.enpi-info.eu/mainmed.php?id=9&id_type=10 regarding combating of illegal immigration.

## 6 WHAT IS THE DIFFERENCE?

### 6.1 The closer to Europe, the better

The above presentation of the four groups of former European colonies presents a picture where those territories or countries that have the closest ties to, first of all, France and the United Kingdom are offered the most attractive treatment.

| | Trade (preferential access) | Aid (financial assistance) | Economic integration (regional cooperation and integration) |
|---|---|---|---|
| Outermost Regions | ++++ | ++++ | ++++ |
| OCTs | +++ | +++ | +++ |
| ACPs | ++ | ++ | +++ |
| Other former colonies | ++ | + | |

Figure 2: Differences in treatment between the four groups

Figuratively speaking, the four groups constitute 'concentric circles' where, in legal (i.e. non-geographic) terms, the *Outermost Regions* are the closest to the European Union, whereas *other former colonies* are the furthest away. This may be illustrated as follows:

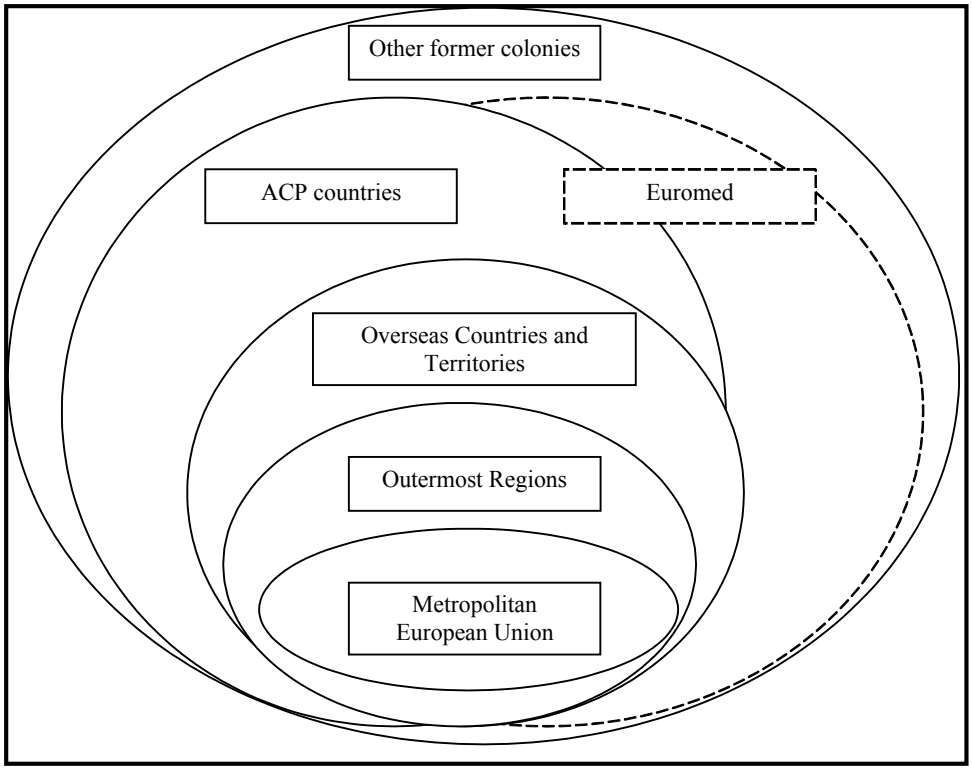



Figure 3. Former colonies as concentric circles

### 6.2 What distinguishes the different groups?

Perhaps it is not surprising that territories and countries that have had colonial ties to Member States of the European Union are offered better treatment than those territories and countries that have not had such ties. Nonetheless, there would seem to be a number of factors which *prima facie* would appear to have considerable significance, but which do not seem to be duly reflected in the pattern outlined in the previous sections. In particular the following factors may make one wonder:

- Former Spanish and Portuguese colonies in Latin America have not been included in the ACP group, and arguably are given less favourable treatment than are the ACP countries.
- Former British and French colonies outside Sub-Saharan Africa are generally offered less attractive conditions than are the ACP countries.
- From an economic and security point of view it would seem natural that, generally speaking, countries falling within the last of the four groups identified above (i.e. other former colonies) are those which should attract the most attention whereas the outer regions and the OCTs should attract the least. Nevertheless, the situation is more or less the exact opposite.
- It is difficult to point to any contemporary *realpolitische* factors that can explain the different development cooperation approaches to the four groups of former colonies.
- The fourth group appears to be rather heterogeneous – and reciprocity appears to be much more pronounced within this group. Arguably, the factors that weigh in with regard to this reciprocity have a much more *realpolitisch* connotation.

The better explanation for the European Union's prioritising arguably seems to be attributable to the *special relationship,* which France had to first of all its African colonies at the time when the Rome Treaty was signed, combined with what may be termed *'historical inertia'* – meaning that where a given group of countries was offered better conditions than were other groups, there would be a certain inertia that appeared to hinder redressing this differential treatment, even if the original justification for this has dwindled or perhaps even completely disappeared. In addition the special relationship is also likely (to continue) to be reflected in economic ties between for instance France (French businesses) and the former colonies – in the form of trade and outright ownership relations. Such economic ties may materialise as active lobby groups promoting precisely the type of legal relations that we find between the European Union and former colonies.

In other words, outer regions and Overseas Countries and Territories continue to be part of the relevant EU Member States and thus have very close ties to Metropolitan Europe (in cultural and – in particular – legal terms). These non-European regions and territories in other words continue to be so 'near' to EU Member States that it makes sense that they are offered preferential treatment by the Eu-

ropean Union.[27] Only if the regions and territories give up their close relationship with the European Member State will they lose their preferential treatment.[28]

This 'nearness explanation' also appears to be valid with regard to the preferential treatment originally offered to the ACP countries. Today, however, the ties between many ACP countries and EU Member States do not necessarily appear to be much stronger than the ties between several other former colonies and EU Member States. Perhaps historical inertia (as defined above) is the best explanation of the fact that the 79 ACP countries continue to be offered more favourable conditions *vis-à-vis* the European Union than do other former colonies.[29]

Over the years the ACP group of countries has grown on several occasions; primarily in Sub-Saharan Africa. Perhaps this 'geographical focus' is due to the fact that it is difficult to exclude, for instance, a former Spanish colony in Sub-Saharan Africa, such as Equatorial Guinea, if virtually all other Sub-Saharan African countries have been admitted to the ACP group of countries. At the same time, however, the many former Spanish colonies in South and Central America have not been admitted.[30]

In other words, the earlier the ties have been established between the developing countries and the European Union (i.e. the closer to the colonial period), the more preferential treatment is the Union likely to offer the former colonies. This is particularly important because subsequent agreements are influenced by the level of preferential treatment offered under the original agreement (historical inertia). This mechanism is illustrated in figure 4 below.

27 Similar observations apparently can be made in the field of European economic and monetary Union as well as in the field of European citizenship, cf. F. Amtenbrienk, 'Bits of Economic and Monetary Union Everywhere', in Dimitry Kochenov (ed.), *EU Law of the Overseas*, The Hague: Kluwer Law International, forthcoming, D. Kochenov, 'The Impact of European Citizenship on the Association of the Overseas Countries and Territories with the European Community', *Legal Issues of European Integration,* 2009 pp. 239-256, and the same author, 'EU Citizenship in the Overseas' in Dimitry Kochenov (ed.), *EU Law of the Overseas*, The Hague: Kluwer Law International, forthcoming.

28 Such as Belize and Indonesia which are former outer regions and Suriname which is a former OCT.

29 A spot of French *Gloire* would also seem to be part of the explanation of the special treatment given to the ACP countries, cf. Anne-Sophie Claeys, '"Sense and sensibility': the role of France and French interests in European development policy since 1957" in *EU development cooperation – From model to symbol*, Karin Arts and Anna K. Dickson (eds.), Manchester University Press, Manchester 2004.

30 For an overview of how the ACP group of countries has developed, see The Courier, Special Issue, no. 1, March 2008, available at http://acp-eucourier.info/The-ACP-EU-Agreement.214.0.html.

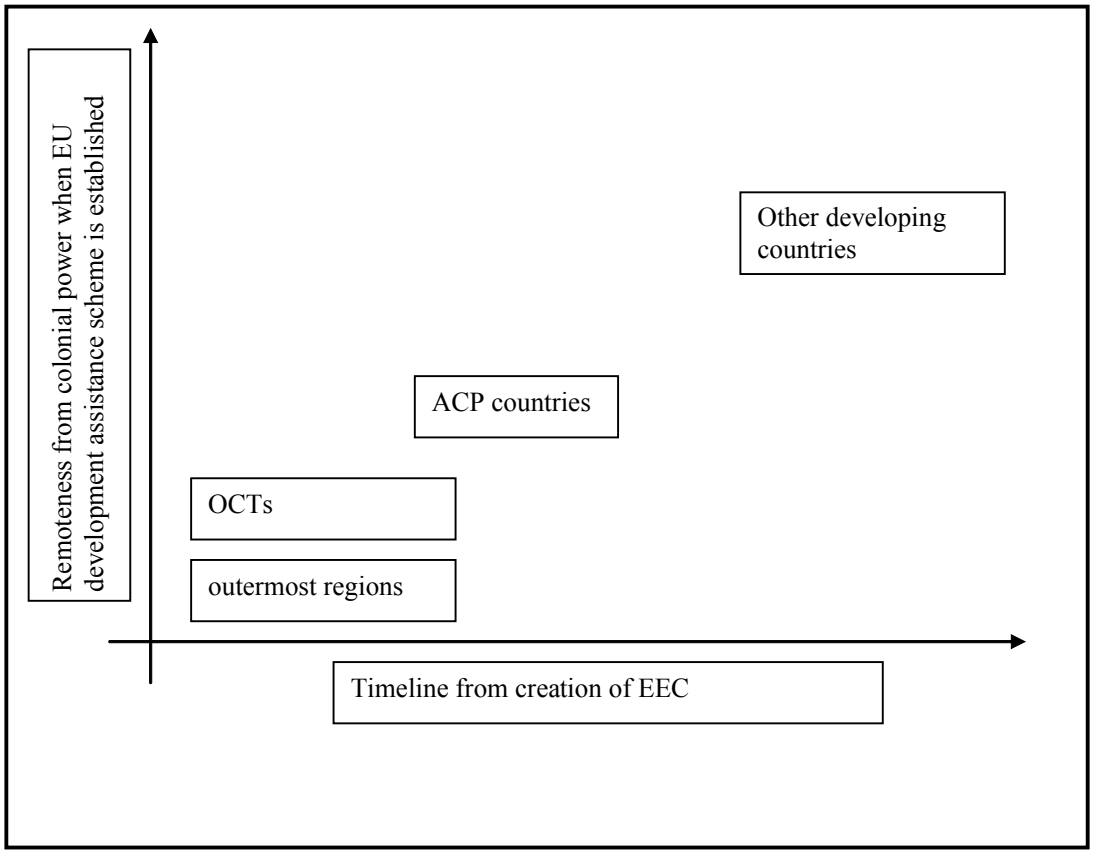



Figure 4: Time when 'special scheme' with European Union was established

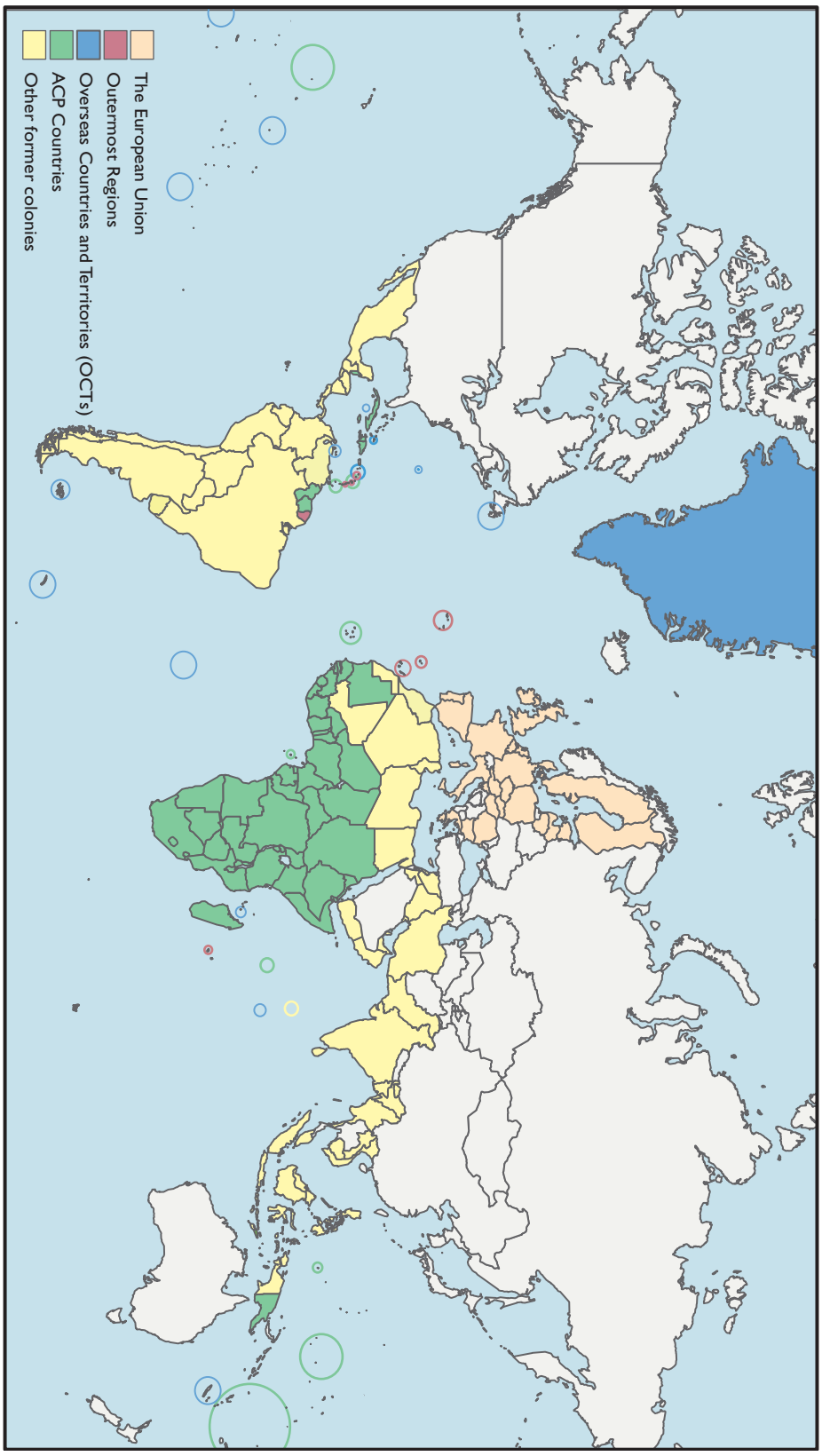
## 7 DRAWING A WIDER PERSPECTIVE

Broadly speaking it is possible to group the European Union's relations with developing countries into four groups, namely *outermost regions*, *Overseas Countries and Territories*, *ACP countries* and *other developing countries*. In the legal relationship between each of these four groups and the European Union two central elements are recurring, namely trade and aid. The four groups however also differ, since the European Union offers the most favourable conditions to outermost regions followed by Overseas Countries and Territories and ACP countries – and with the group of other developing countries as the one receiving the least preferential treatment.

To the extent that the agreements are considered from the perspective of the best promotion of the European Union's *contemporary* interests in the world, this may appear rather surprising. However, it is suggested that a possible way of explaining the differences is by focusing on the 'nearness' between specific EU Member States and the (original) members of the four groups of developing countries at the time when the European Union first set up a scheme directed at that specific group. It is argued that due to a certain measure of 'historical inertia' (combined with specific economic interests that may spill-over into active lobby-

ing by affected European groups), the original level of preferential treatment is carried on in subsequent schemes.

Perhaps the above assumption may be tested against more recent developments affecting the European Union's behaviour on the international scene. Namely firstly the eastern enlargement whereby the European Union now has a large number of new Member States with no particular relations to Sub-Saharan Africa (ACP countries) and secondly the end of the Cold War as well as the subsequent appearance of the 'fight against terror' which together mean that the European near-abroad becomes increasingly important from a development cooperation perspective. From the perspective of *Realpolitik* it would be natural to assume that the European Union would direct its efforts (i.e. preferential treatment) towards the Mediterranean and Eastern European/Central Asian developing countries at the cost of the ACP countries. Nevertheless, so far it appears that whilst the Mediterranean and Eastern European/Central Asian regions clearly have gained in importance within the European Union's development policy, the ACP countries arguably continue to be offered particularly favourable treatment.




World map showing The European Union and the four categories of countries referred to in this paper

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