Chapter XII

The Association of the Overseas Countries and Territories

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I. INTRODUCTION

Four of the E.E.C. Member States have administered overseas dependencies which exceed their mother countries in area. The size and potential of the territories which have been associated with France are, in particular, often vastly underestimated. Former French West Africa alone is, for example, four times larger than the Europe of the Six; if its map were superimposed on that of Europe, its boundaries would run through Brest, Liverpool, Oslo, Warsaw, Moscow, Bucharest, Athens, Rome, and Barcelona. The examples could be multiplied: for instance, the former Belgian Congo is 80 times larger than Belgium and Dutch New Guinea 13 times larger than the Netherlands. These present and former overseas dependencies are together almost 10 times larger than the Europe of the Six and exceed the size of the United States by more than one-third, although their aggregate population of 55 million amounts (roughly) to only one-third that of the Six. Indeed, the vastness, the difficulty of access, and the climate of the African territories justifies the epithet of the Roman geographer, "Africa protentosa." ¹

The idea of European cooperation with the African territories received its first formal impetus in a Recommendation adopted by the Council of Europe on September 25, 1952, the "Strasbourg-Plan." ² The Recommendation was designed to promote trade relations and to assist the territories in their efforts to develop. Yet the Messina Declaration of 1955, charging the intergovernmental

committee under the chairmanship of M. Spaak with the task of drawing up a report on a European community, omitted any reference to the overseas territories. The question was not raised until November 1956 and was solved barely a month before the Treaty was signed in March 1957 by a special meeting of the heads of government.3

The need for some sort of arrangement concerning the overseas territories arose mainly because of the special position of France. France felt that she could not grant economic concessions to her European partners and, at the same time, maintain a costly development program for her overseas territories. She therefore felt Community assistance was needed.

On the other hand, France found herself in a position akin to that of the United Kingdom in the negotiations for a Free Trade Area. She had existing economic commitments to her overseas territories—for instance, a customs union with French West Africa—to which was now to be added a customs union with her European partners. As a result France felt that she was being forced to choose between "divorce" and "bigamy" with regard to her overseas relations.4 A third choice, automatic extension of the E.E.C. Treaty to the overseas territories, met with opposition, particularly that of Germany, which hesitated to undertake new overseas commitments having long been free of them.5 A compromise solution was therefore reached whereby the territories were to be "associated" with the Community.

The territories are, for purposes of association, divided into three groups: (1) those which are constitutionally a part of their metropolitan countries (for example, the overseas department of Réunion); (2) those which are dependent overseas countries (for example, the Republic of Mauritania); and (3) independent countries which have special relations with France (Tunisia and Morocco) and Italy (Libya), as well as the autonomous parts of the Netherlands (Surinam and Antilles). Association is qualitatively different for each of the first two groups in regard to such matters as trade barriers, right of establishment, movement of workers, and availability of investment funds from the specially created over-

seas Development Fund. The third group is invited to negotiate for association.

Association is of obvious political importance in the struggle for the friendship of the uncommitted nations.\(^6\) This and the economic significance of close ties between these producers of primary products and industrial Western Europe account for the lively discussion the association has already sparked both in the United Nations and in G.A.T.T.

Association of the overseas territories with the E.E.C. is of immediate relevance to only a limited group of American businesses—for example, to the extractive industries (such as mining and the oil industry) and to American agricultural (coffee and banana) interests in South America—which will be affected by African competition in the European market. As association becomes a reality, however, business opportunities for a larger group of American enterprises may develop. The territories may eventually offer opportunities for the investment of development capital and for the establishment of companies using local raw materials and manufacturing for local consumption and export to European or other markets.

The purpose of this chapter is to outline the legal status of the territories, the relevant provisions of the Treaty, and some of the legal and economic problems which association creates. The discussion will center mainly on the African territories since they make up the most important area covered by the association provisions, and it will give substantial attention to agricultural problems in contrast to other chapters in this book. The rapid changes taking place on the African Continent necessarily mean that parts of the discussion are tentative.

II. THE POLITICAL AND ECONOMIC STATUS OF THE TERRITORIES

A careful distinction between the different uses of the word "territories" must be made at the outset. When the reference is in a generic, collective sense, this chapter will refer to "territories." On the other hand, the term "Overseas Territories" will be used to denote those of the "territories" which are not, constitutionally, a

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\(^6\) Germany, Bundesrat, \textit{supra} note 3 at 38; also commentary by Fischer-Menshausen, in \textit{von der Groeben and von Boeckh} (editors), \textit{Handbuch für Europäische Wirtschaft} (hereinafter cited as \textit{Handbuch}) IA 59, 4.
part of their metropolitan countries (as are overseas departments of France, for example) and which are associated with the E.E.C. under the Implementing Convention of the Treaty.

A. THE POLITICAL RELATION TO THE METROPOLITAN COUNTRIES

1. THE OVERSEAS TERRITORIES OF FRANCE

Before the Constitution of 1958 went into effect, the French Republic consisted, in addition to metropolitan France including Algeria, of the overseas departments of Guadeloupe, Guiana, Martinique, and Réunion, of the Overseas Territories of French West Africa (Senegal, Mauritania, Sudan (not to be confused with the Sudan which lies south of Egypt), Guinea, Ivory Coast, Volta, Dahomey, and Niger), French Equatorial Africa (Gabon, Congo, Ubangi-Shari and Chad), Madagascar, French Somaliland, St. Pierre, and Miquelon, the Comoro Archipelago, as well as the Territories in Oceania and the Antarctic. The Republic together with the trust-territories of Togo and Cameroon made up the French Union which, expanded by the friendly independent states of the franc area (Tunisia, Morocco) and the Condominium of the New Hebrides, made up the Ensemble Française.

The new Constitution does not alter the relationship of France to its overseas departments, which were and are constitutionally a part of metropolitan France, to the trust territories, nor to the friendly associated states. It does, however, envision a change in France’s relationship to the Overseas Territories. Even before the constitutional changes, the administration of the Overseas Territories had been liberalized. The basic law of 1956 (loi-cadre) had given them internal autonomy and to the territorial assemblies the right to elect responsible ministers to Government Councils. The Government Councils replaced the old “Great Councils” previously elected according to a class system. In July 1958 General de Gaulle transferred the chairmanship of the Government Councils from the Territorial Governors to the elected Prime Ministers.

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7 See the discussion of the “Statut de l’Algérie” of 1947 by Naegelen, L’Algérie, in Bernard et al., La France d’Outre-Mer, sa Situation Actuelle, 1 at 8 (1953).
9 Constitution of 1958 arts. 72-73.
African Territories Associated under the E.E.C. Treaty
Not shown: (a) The former trust-territory of Italian Somaliland, which, with former British Somaliland, now composes the Republic of Somalia, extending south from the easternmost tip of the continent, and (b) the former French trust-territory Cameroon, now independent and considered associated with the E.E.C., located due west of the Central African Republic.
The constitutional referendum of 1958 left the Overseas Territories free to choose independence or membership in a "French Community." All, except Guinea, originally chose the latter. The new Constitution also leaves the Overseas Territories free to choose the form of membership in the new French Community, and provides for a procedure by which they may gain independence at any time. Their first alternative was to retain the status given them by the basic law of 1956, its implementing acts, and the Decree of 1958. In this case the Republic would continue to be responsible for external relations, defense, currency, and finances, the territorial assemblies would continue, and the governor appointed by the Republic would remain chef du territoire. French Somaliland, Oceania, the Comores, St. Pierre, Miquelon, and New Caledonia chose this status. Secondly, the Overseas Territories could choose to become overseas departments. The governor would then be replaced by a prefect, and legislation and administration would become identical with that of metropolitan France, except for modifications necessitated by the peculiar situation of the department. Finally, the Overseas Territories could choose to become member states of the French Community.

Seven Overseas Territories of French West Africa, the four Overseas Territories of French Equatorial Africa and Madagascar made this choice, and their territorial assemblies became "legislative assemblies." The status of a member state in the French Community requires transfer of certain powers to the Community. Under the Fourth Republic, these policy-making functions (in regard to foreign affairs, defense, economic, and fiscal policy and policies concerning strategic raw materials) were attributes of the Republic. In the French Community, however, France is only one of the partners, although she does enjoy some special privileges: she provides the president; she has a majority in the senate of the Community; she conducts affairs of common interest during an interim period; and she plays a rôle in the modification of the status of any member state.

11 Constitution of 1958 art. 76. For the changes made by the new Constitution, see Massa, Die französische Verfassung vom 5. Oktober 1958 und die überseeischen Gebiete, 14 EUROPA ARCHIV 109 ff. (1959), and Silvera, Passé de l'Union française et avenir de la Communauté, 1958 REVUE JURIDIQUE ET POLITIQUE DE L'UNION FRANÇAISE, 589 ff.
12 Constitution of 1958 art. 86, para. 2.
13 Massa, op. cit. supra note 11, at 112; THE STATESMAN'S YEAR BOOK 1959, 997.
14 Constitution of 1958 art. 73.
15 Constitution of 1958 art. 83.
16 Constitution of 1958 art. 78.
Executive Council, presided over by the President of the Republic and attended by the heads of governments of the member states, the Senate of the Community (not to be confused with the Senate of the Republic), and the Court of Arbitration.\(^\text{18}\)

Apart from the changes in their relationship to metropolitan France, French West and Equatorial Africa also underwent internal changes. Four of the seven Overseas Territories of French West Africa established the Federation of Mali in January 1959; the Voltaic and Dahomey Republics later withdrew leaving only Senegal and Sudan in the Federation.\(^\text{19}\) In August 1960 internal differences developed, resulting in the dissolution of the Federation so that Senegal and Sudan now continue as separate republics. In September 1960, Sudan changed its name to Republic of Mali. While the Ivory Coast, Niger, and Mauritania declined to join the Federation, they agreed to join in a customs union with the states of the Federation on June 6, 1959.\(^\text{20}\) The Ivory Coast, Niger, Dahomey, and Voltaic Republics also entered into a loose association with each other—the Council of the Entente.\(^\text{21}\) The three republics of former French Equatorial Africa, the Congo—not to be confused with the Republic of the Congo on which it borders and which was formerly the Belgian Congo—, Central African (formerly Ubangi-Shari) and Chad Republics, are also grouped in the Union of Central African Republics from which the Gabon Republic has remained aloof, although she maintains close economic ties with the Union.\(^\text{22}\)

On May 11, 1960, an amendment to Articles 85 and 86 of the French Constitution took effect, which permits member states of the French Community to become independent without losing membership in the Community and independent states to become members of the French Community. Accordingly the former Mali Federation became independent on June 20, 1960; the Malagasy Republic (formerly Madagascar) on June 25, 1960. Moreover, France signed accords on July 11, 1960, pledging independence to the four republics of the Council of the Entente (the Ivory Coast, Niger, Dahomey, and Voltaic Republics) and on July 12, 1960, to the Union of Central African Republics (the Congo, Central African,  


\(^{19}\) Massa, *op. cit. supra* note 11 at 118; N.Y. Times, March 2, 1959, 2:5; March 18, 1959, 2:5; April 6, 1959, 10:4.


\(^{22}\) Massa, *op. cit. supra* note 11, at 118.
and Chad Republics). All should be independent by the time this book is published.

The Gabon Republic was also negotiating with France for independence in the summer of 1960 and it was expected that the Republic of Mauritania would have received its independence by 1961.

2. THE OVERSEAS TERRITORIES OF BELGIUM, THE NETHERLANDS, AND ITALY

The two Belgian Overseas Territories to which the Treaty originally applied were the Belgian Congo and the trust territory of Ruanda-Urundi. Since July 1, 1960, the Belgian Congo has been the independent Republic of the Congo, however, and in June 1960, Belgium informed the United Nations Trusteeship Council that she had agreed to hold elections in Ruanda-Urundi early in 1961 as a prelude to discussions by the United Nations General Assembly of independence for this Overseas Territory.

The Netherlands have three Overseas Territories, Surinam, Netherlands New Guinea, and Netherlands Antilles. Of these, the Netherlands could bind only New Guinea by signing the E.E.C. Treaty. The Statute of the Realm of 1954 gives Surinam and the Antilles partnership status with the Netherlands as "members of the realm." Because of this substantial autonomy, the Netherlands could not bind them with regard to the E.E.C. Treaty. A separate agreement of association must therefore be negotiated, to be approved by the Netherlands as well as by the parliamentary bodies of Surinam and the Antilles. Italy, finally, administered the trust-territory of Italian Somaliland which became part of the independent Republic of Somalia on July 1, 1960. A special problem shared by all of the formerly dependent or trust territories is that of continued association with the E.E.C. now that they are independent.

B. ECONOMIC CONDITIONS IN THE OVERSEAS TERRITORIES

The territories in question, and most importantly those in Africa, are still in the early stages of economic development. Incomes per

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25 Leduc, supra note 4, at 203.
capita are low and industry is lacking. The lack of industrial resources results in a lack of investment capital and technical know-how. Large development plans have been undertaken by the metropolitan countries, although most such plans, because of the size of the task, can only be concerned with matters of "infrastructure," that is, roads, hospitals, schools, and the like.

The Netherlands pursue a policy of non-discrimination with regard to imports into New Guinea, and New Guinea exports are granted no preferential treatment in the Netherlands. On the other hand, the French Overseas Territories of the franc area together with France comprise a tightly-knit economic unit (with the exception of French Equatorial Africa which hitherto has accorded no preferences to France). The greatest part of the foreign trade of the French Overseas Territories takes place within the franc area and at prices above the world level.

In 1956, the base year for the establishment of the E.E.C., the total value of the exports of the Overseas Territories amounted to roughly $1.06 billion, of which 71 percent went to the E.E.C. countries. Of all export commodities, unroasted coffee is the most important. It amounted to 17.5 percent of the value of total exports in 1956 and to 21.1 percent of total coffee imports by the E.E.C. countries. The next most important agricultural commodity is cocoa which in 1956 amounted to 4.9 percent of the value of exports. In order of importance, bananas and oil-bearing products represent the next largest percentages of agricultural exports.

The metropolitan countries have established development programs for all the Overseas Territories to raise standards of living and promote some degree of industrialization. The Second Modernization Plan for French Territories, for example, will result in contributions of nearly $250 million annually. In the former Belgian


26 Ibid., 13-14. The annual average of "new investments" (i.e., excluding measures for the renewal of depreciated equipment and for the increase of supplies but including certain "expenses equivalent to an increase in capital") in the French territories between 1951-1953 amounted to approximately $980 million. Doucy and Pouleur-Bouvier, Die Beziehungen zwischen einem integrierten Europa und den überseeischen Hoheitsgebieten seiner Mitgliedsländer, in RACINE (editor), EUROPA WIRTSCHAFTSEINHEIT VON MORGEN (Heft 15 der Schriftenreihe zum Handbuch für Europäische Wirtschaft) 192 at 222 (1960). Referring to La Croix of April 3, 1957, Rubinsky points out that 20 out of every 100 francs of tax money in France go to "Africa." Rubinsky, Imperialist Africa Projects, 1957 INTERNATIONAL AFFAIRS 46 at 47 (No. 7). (Published in U.S.S.R.)
Congo, a 10-year development plan, designed mainly to finance "infrastructure" projects during the years 1948-1958 and totaling about $1 billion went into effect.\textsuperscript{29} The grants of the Netherlands Government to New Guinea average $7.8 million yearly.\textsuperscript{30} Three-quarters of the cost of the Somaliland Economic Development Plan, which envisaged a total investment of $17.4 million between 1954 and 1960, was borne by Italy.\textsuperscript{31}

Other resources for public development have been supplied by the International Bank for Reconstruction and Development. Between 1952 and 1957 two loans of $40 million were given the Belgian Congo, one of $4.8 million to Ruanda-Urundi, and one of $30 million to Belgium to finance exports to the Congo. The second $40 million loan to the Congo involved participation by 14, to a large extent American, investment institutions to the extent of some $6 million.

During the same period, Algeria benefited from a $10 million loan for the development of electrical facilities and French West Africa obtained $7.5 million for the modernization of railroads.\textsuperscript{32} In 1959, a $35 million loan was extended to Comilog, a company established in Gabon (French Equatorial Africa) for the development of extensive high-grade manganese deposits.\textsuperscript{33} Finally, $5 million were made available by the High Authority of the European Coal and Steel Community to assist the Bureau Minier de la France d'Outre-Mer in its five-year program of prospection for iron and manganese ores in certain African territories.\textsuperscript{34}

The Republic of the Congo is inhabited by roughly 13 million people of which less than one percent were, prior to its independence, Europeans, giving it the low density of 5.5 persons per square kilometer.\textsuperscript{35} The activities of Europeans centered mainly around mining and the raising of cash crops. The Congo has rich deposits of min-

\textsuperscript{29} Beaulieu, \textit{supra} note 1, at 394.
\textsuperscript{30} U.N., \textit{supra} note 27, at 14.
\textsuperscript{31} O.E.E.C., \textit{ECONOMIC DEVELOPMENT OF OVERSEAS COUNTRIES AND TERRITORIES ASSOCIATED WITH OEEC MEMBER COUNTRIES} 139 (1958).
\textsuperscript{33} International Monetary Fund, \textit{XII INTERNATIONAL FINANCIAL NEWS SURVEY} 9 (No. 2, July 10, 1959).
\textsuperscript{34} European Coal and Steel Community, \textit{HIGH AUTHORITY, SEVENTH GENERAL REPORT ON THE ACTIVITIES OF THE COMMUNITY} 209-210 (1959).
\textsuperscript{35} Adjacent Ruanda-Urundi has a density of more than 80 persons per square kilometer which is only paralleled in Nigeria in the agricultural areas. O.E.E.C., \textit{op. cit. supra} note 31, at 13.
erals amounting to 65 percent of the export receipts with copper being the most important. A large part of the world’s reserve of uranium is in the Congo, and it is the world’s largest producer of industrial diamonds. However, the greater part of the African population still depends on subsistence agriculture for livelihood, and the development of the area remains uneven. In spite of technical assistance, much of African agricultural activity is still primitive. 36

The economies of the territories of France 37 are all essentially agricultural and progress in agricultural production is slow. In Algeria four-fifths of the population still depend entirely on agriculture, with wine, cereals, and vegetables leading other commodities. More striking progress is being made in mining. Until recently Algeria’s mineral reserves were considered small, but new drillings in the Sahara, particularly in the Hassi-Messaoud region, have uncovered large crude oil reserves. Indeed, this fact has been reported to pose serious competitive problems for Venzuelan and Middle Eastern oil since Algerian oil may eventually permit France to become self-sufficient and to supply some of her E.E.C. partners, notably Germany. 38 Exploitation of Algerian oil is now in the hands of the French companies C.F.P.A. and REPAL. 39 Algeria has a fairly substantial processing industry, recent advances having been made particularly in the foodstuffs, building materials, and chemical industries.

French Africa south of the Sahara includes the most primitive and underdeveloped of the territories considered here. Agricultural produce amounted to over 90 percent of the total value of exports in 1955 whereas mining products represented less than 4 percent. Coffee, peanuts, and cocoa are the most important agricultural exports. Madagascar and the Comoro Archipelago in addition produce and export vanilla, sugar, tobacco, and cloves. Significant deposits of bauxite are found in Guinea (formerly French West Africa) and of manganese ore in Franceville, which is reputed to consist of up to 150 million tons of marketable ore with 50 percent manganese content.

38 Carmichael, Problems Posed by Algerian Oil, N.Y. Times, Sept. 13, 1959, Sec. 3, 1:1, 7:3. Cf. Rauchfuss, Erdöl in den assoziierten Gebieten, 3 Europäische Wirtschaft 406 (1960). It was reported on October 9, 1960, that six million metric tons of Saharan petrol have been delivered to the Algerian port of Bougie by the new pipeline since pumping began in December of 1959. Brady, supra note 32, at col. 5.
As a result of the dependence on agricultural products these areas are often severely affected by oscillating world prices. To remedy this situation a number of price stabilization funds have been established. The latest, the National Equalization Fund for Overseas Products established in 1955, alone received an initial allocation of approximately $13.7 million under the 1956 budget.

III. ASSOCIATION WITH THE EUROPEAN ECONOMIC COMMUNITY

A. In General

1. The Policy of the Treaty

Integration of the Overseas Territories into the Community and the resultant application of all provisions of the Treaty would have been disastrous for the less developed economies of the Territories. Instead, the Treaty therefore extends to them most of the trade advantages of the Common Market and provides for public investment capital to further development, at the same time protecting them from the full brunt of European competition by permitting the retention of certain trade barriers. In many areas other than trade the Treaty does not go beyond affirmation of a general policy of association, leaving details to further negotiation. This contrasts with other parts of the Treaty where the drafters took an intermediate step, creating a legal framework (a loi-cadre) to be filled in by the Community organs. The conservatism of the drafters in this regard is probably explained by the fear of some of the E.E.C. partners, notably Germany, that close association with the Overseas Territories would involve them in problems they did not wish to face. It was this fear which prompted inclusion of a reference in the substantive provisions of the Treaty to the Pre-amble, which in turn refers to the principles of the United Nations Charter, the right to self-determination as a principle of the association being thereby incorporated by reference. This fear should now be alleviated by the provision in the new French Constitution

30a See generally, Coute, L'ASSOCIATION DES PAYS d'OUTRE-MER à LA COMMUNAUTÉ ÉCONOMIQUE EUROPÉENNE (1959).
41 Reuter, ASPECTS DE LA COMMUNAUTÉ ÉCONOMIQUE EUROPÉENNE, 1958 REVUE DU MARCHE COMMUN 161 at 164. Examples are arts. 135 and 136(2) of the Treaty.
43 In art. 131(3).
48 Art. 73, U.N. CHARTER. Germany, Deutscher Bundestag, SCHRIFTLICHER BERICHT DES 3. SONDERAUSSCHUSSES-GEMEINSAMER MARKT/EURATOM-DRUCKSACHE 3660, 56 (1957). The
allowing the Overseas Territories to become independent, either leaving or remaining within the French Community.44

The association of these areas which are producers of primary products with industrialized nations under a treaty establishing a system of trade preferences has been likened to the British Commonwealth 45 with its system of imperial preferences. To what extent such a system may bring about a contraction of world trade will be discussed after consideration of the association provisions of the Treaty.

2. THE TREATY PROVISIONS IN DETAIL

Because the legal status of the territories differs, the Treaty differentiates among them.

1) Article 227 describes the territorial scope of the Treaty and includes in it Algeria and the French overseas departments, since constitutionally they are part of metropolitan France. It lists the modifications which were thought necessary.

2) A special, and separate, part of the Treaty (Articles 131-136) deals with the association of the Overseas Territories and is supplemented by an Implementing Convention annexed to the Treaty. These provisions are then further modified by special protocols. Annex IV of the Treaty lists the Overseas Territories concerned.

3) Finally, “Declarations of Intention” open the door to negotiations for association with the autonomous parts of the Netherlands (Surinam and the Antilles), with the independent countries of the franc area (Morocco, Tunisia), and with Libya with which Italy has special relations.

The association provisions will hereafter be considered without differentiating among the types of territories, except where differences exist in the treatment of the departments and the Overseas Territories.

Socialist Representative Metzger thought, however, that the use of the word “entsprechend” in art. 131 did not make this a self-evident incorporation by reference, but that it was a question of extensive versus restrictive treaty interpretation. Deutscher Bundestag, Sitzungsbericht 224. Sitzung, July 5, 1957, 13344. The extensive interpretation, however, was undoubtedly the intent of the parties. Cf. Erläuterungen der Bundesregierung in Bundestags-Drucksache 3440 (2. Legislaturperiode) in HANDBUCH IA 30, introductory comment to arts. 131-136. Cf. also Bundesrat, Niederschrift über die Sitzung des Sonderausschusses “Gemeinsamer Markt und Euratom” vom 24. April 1957, 41.

44 Constitution of 1958 art. 86, para. 2.
B. THE SUBSTANCE OF THE ASSOCIATION

1. REMOVAL OF TRADE BARRIERS

a. Tariffs

One of the introductory Treaty articles states that the "objects" of the association include extension to the Overseas Territories of the trade benefits which the Member States accord each other (gradual abolition of tariffs and quotas) and extension of most-favored-nation treatment by the Overseas Territories to the E.E.C. Member States. It will be noted that the "objects" of this Article concern only the Overseas Territories. Algeria and the overseas departments of France are governed by the same provisions relating to the free movement of goods as are the E.E.C. Member States. The following Treaty provisions are designed to implement these "objects."

The Overseas Territories benefit from the same reductions in tariffs as apply to trade among Member States. The Overseas Territories are also bound to abolish their customs duties with regard to imports originating in Member States or other associated Overseas Territories in conformity with the Treaty provisions relating to the free movement of goods. This obligation is modified, however, insofar as the Overseas Territories may continue to impose duties, if this is necessitated by their level of development or fiscal needs. This authorization extends both to protective and revenue tariffs.

These protectionist safeguards are limited, however. On the one hand, the tariffs which are maintained under this authorization must be progressively reduced to the level of duties levied on imports originating in the Overseas Territory's mother country. New preferences may not be granted the metropolitan country. The pace of these reductions is to be that of tariff reductions among the

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46 "Objects" is actually an incorrect heading for art. 132, since in reality it sets out the "contents" of the association. HANDBUCH IA 59, 11.
47 Art. 227(2).
48 Art. 133(1).
49 Art. 133(2). Express reference is made to the provisions of arts. 12, 13, 14, 15 and 17.
50 Because they are subject to the ordinary provisions relating to the free movement of goods, the overseas departments may not use these safeguard measures. They may only avail themselves of those safeguard measures which are also open to the Member States, particularly those of arts. 108-109, 226. Cf. Leduc, supra note 4 at 209, n. 1.
51 Art. 133(3).
Member States. Consequently, if the stages of the transitional period applying to tariff reductions among the Member States are extended, the progression of reduction in the Overseas Territories will also be affected. The practical result of these provisions is, then, that imports originating in the Member States will be accorded what is essentially most-favored-nation treatment. On the other hand, the continued imposition of duties by the Overseas Territories is limited in time. They may only be imposed as long as they are economically necessary. Theoretically, therefore, the Treaty envisages total abolition of duties for trade in both directions at a time when the Overseas Territories are able to meet the increased competition. The compatibility of the association provisions with G.A.T.T. will primarily depend on whether the association is an arrangement designed to bring about a free-trade area “within a reasonable length of time” within the meaning of Article 24(5) (c) of G.A.T.T. The creation of a free-trade area is theoretically possible, although the Overseas Territories will be able to impose safeguards during the foreseeable future. Despite this it is arguable that the test of “a reasonable length of time” should be interpreted more leniently in the case of presently underdeveloped countries than would be justifiable in the case of developed countries.

In order that the principle of non-discrimination, which forms the basis of the tariff provisions, will not be illusory, a special paragraph prohibits all other discrimination whereby preferences could be granted a given metropolitan country by any Overseas Territory. Included in this prohibition are measures whereby duties are established on the basis of artificial distinctions between products to the end that a preferential tariff is established for goods from the metropolitan country.

Not affected by the obligation to extend at least most-favored-nation treatment to E.E.C. countries were those Overseas Territories which already had internationally established customs regimes requiring non-discriminatory treatment and which therefore could not extend preferences to the metropolitan country. This was

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52 Cf. arts. 8 and 13. HANDBUCH IA 59, 15.
54 Art. 133(5).
55 HANDBUCH IA 59, 18.
true of the United Nations trust-territories of Togo, Cameroons, Ruanda-Urundi, and Italian Somaliland. It was also true of all Overseas Territories situated in the Congo basin (the Belgian Congo and parts of French Equatorial Africa) which were covered by the Act of Berlin and subsequent international agreements. In accordance with their international obligations, these Overseas Territories applied non-discriminatory duties; they were therefore not bound to make reductions since no preferences were extended to metropolitan countries. Consequently, only those Overseas Territories which actually accorded preferences to their metropolitan countries lowered their tariffs on January 1, 1959, with respect to other E.E.C. countries by 10 percent of the difference between the existing tariff and the preferential tariff.

Provision is also made for the possibility that association of the Overseas Territories may cause trade diversions ("diversions of commercial traffic"). In this case, a Member State adversely affected may request the Commission to propose appropriate measures to the other Member States. As one commentator pointed out, this procedure may prove inadequate and consideration should therefore be given to application by analogy of the provisions relating to similar situations in the E.E.C. Under those provisions the Commission could authorize the Member State affected to take protective measures.

No mention is made of the external duties of the Overseas Territories, that is, those on goods from third countries. There is no problem if the Overseas Territory is a member of a customs union to which the metropolitan country belongs. In this case the E.E.C. external tariff will apply. Absent such a customs union, territories,

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56 Cf. art. 76(d), U.N. Charter.
58 E.g., in Cameroon, duties on most imports were 12% ad valorem in 1957 plus a small turnover tax. Some capital goods were admitted free of duty. Bureau of Foreign Commerce, WTIS, Part 1, No. 57–63, 15. In the Congo and Ruanda-Urundi duties were also levied on an ad valorem basis ranging from complete exemption to 50%, the average rate being 22%. Special provisions, often exemptions, applied to foodstuffs, farm machinery and equipment, and raw materials for local industry. No customs surtaxes were levied with the exception of a statistical tax of 0.05% ad valorem which was imposed on all imports and exports. Ibid., Part 2, No. 57–59, 1.
60 Those would be the provisions of art. 115, paras. 1 and 3. Handbuch IA 59, 19.
61 Handbuch IA 59, 15. This would fall under art. 18 ff.
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other than the French departments, remain free with respect to their external tariffs. Insofar as measures adopted by them cause diversion of trade the provision discussed in the preceding paragraph becomes applicable.


If these tariff provisions are viewed in context, it becomes apparent that the Overseas Territories enjoy a twofold benefit. The participation in the intra-European tariff reductions and eventual abolition of tariffs will open a larger market for raw materials supplied by the territories. Secondly, this position is strengthened by the protection the territories will enjoy by virtue of the E.E.C. external tariff on goods from third countries, some of them also suppliers of primary products. This effect is quite important, as some examples will show. The Six imported 41.6 percent of their cocoa requirements in 1954 from the Overseas Territories. While the previous tariffs will be reduced and eventually abolished with regard to the Overseas Territories, List F of the Treaty envisages a tariff of 9 percent on cocoa imported from third countries. A more striking example, and one with more far-reaching effects, is that of coffee. The Six imported only 27 percent of their coffee needs in 1956 from the Overseas Territories, but envisage an external tariff of 16 percent on coffee. So far, the Six have mainly imported the arabica variety of coffee from Brazil and Columbia. Since arabica can be mixed with the robusta variety for the production of instant coffee, imports of robusta from the Overseas Territories will undoubtedly increase, especially in view of the fact that robusta will enjoy tariff reductions in the Six (while arabica is faced with a duty of 16 percent). Robusta will therefore not only be cheaper but, at the same time, protected.

A similar trade-diverting effect may occur with respect to bananas; in 1956 the Six imported only 21 percent (approximately)

63 See Bourcier de Carbon, supra note 40 at 285.
64 The import figures for both coffee and cocoa were taken from Bourcier de Carbon, id., 294, n. 11. In 1956, the coffee imports from the Overseas Territories amounted only to 21.1% of total coffee imports. U.N., supra note 27 at 7. Cf. also G.A.T.T. supra note 53, Report on Coffee, Doc. L/805/Add. 2.
of their banana requirements from the Overseas Territories, but propose an external tariff of 20 percent on bananas from third countries.

These potentially dislocating effects on world trade of certain tropical products must, however, be viewed in the light of special provisions contained in two Protocols annexed to the Treaty. These Protocols reduce somewhat the dislocating effect of the Treaty provisions concerning coffee and bananas, although their inclusion was not primarily due to a desire to shield third countries from the effect of the Treaty; it was necessitated by the economic position of several of the E.E.C. Member States. Germany had been importing large quantities of bananas duty-free from Ecuador, Colombia, Guatemala, and Honduras. The Protocol therefore provides that Germany will be entitled to continue to import duty-free, until the end of the second stage of the transitional period, an amount equal to 90 percent of its 1956 imports of bananas less the amount imported from the Overseas Territories. At the end of the third stage, the duty-free quota will be decreased to 80 percent, and at the end of the transitional period to 75 percent. It can be augmented by 50 percent of the difference between the 1956 imports and the increase in successive years, but will be 80 or 90 percent of the imports of the years after 1956, if the 1956 level of imports is not attained. Similar provisions apply to imports of unroasted coffee into Italy and the Benelux countries. The effect of protection by the external tariff is also lessened by the right of the Member States to substitute non-discriminatory internal fiscal taxes for the reduced tariffs; such action by Germany with respect to coffee has already caused some concern in the Overseas Territories.

One result of these provisions is that serious changes in the exist-
ing patterns of supply of coffee and bananas may not occur in the near future during which the high quotas of the Protocols apply. However, as the larger European market raises the general standard of living and results in increased consumption, the special quotas under the Protocols will steadily decrease to fixed levels. To the extent that the high E.E.C. external tariff makes it unprofitable for third countries to export to the E.E.C., much of the increase in consumption could be satisfied by the Overseas Territories.

c. Quotas

The Treaty provisions relating to import quotas of the territories and to quotas applicable to their goods resemble the tariff provisions, although their effect is different because there is no quota equivalent of the common external tariff of the Six. The provisions require Member States to apply the same quota increases to imports coming from the Overseas Territories as they apply to imports from other Member States. To the extent that present quotas of the Member States encompass imports both from an Overseas Territory and its metropolitan country, the percentage of the imports from the Overseas Territory has to be determined on the basis of import statistics. This will determine the quota of the Overseas Territory which will then be converted into a global quota and will follow the Treaty provisions as to annual increases. The obligation imposed on the Member States, however, does not preclude them from imposing such restrictions as are warranted by public morals, order, security, and health, or by the protection of national treasures or of commercial and industrial property.

These provisions ensure participation by the Overseas Territories in all intra-Community trade liberalization. The Overseas Territories, on the other hand, must “globalize” the quotas open to Member States other than the metropolitan country and extend them to all Member States. As a result, any preferences which the metropolitan country enjoys continue in existence; yet the “global quota” open to the other Member States will eventually reach the same degree of liberalization because the Overseas Territories must increase the global quotas annually by the same percentages which apply to the liberalization among the Six, that is, an annual increase by 20 percent of total value of the quotas, but no less than 10 percent for

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70 The provisions are found in arts. 9-14 of the Implementing Convention, annexed to the Treaty.
71 Art. 12, Implementing Convention.
72 Art. 13, Implementing Convention.
each product. Where a global quota would represent less than 7 percent of a Territory's total imports of the product, a 7 percent quota must be established and increased according to the same scheme. In the cases where the Overseas Territories had heretofore offered no quota, the Commission is to determine the size of the quotas as well as the scale of increases.

With respect to these quota measures several points must be noted. In the first place, the obligation of the Overseas Territories to extend globalized quotas to the Member States is, like their obligation in the tariff field, a relatively small burden. Quotas, like tariffs, are covered by the open-door policy of the Act of Berlin and of the trusteeship provisions of the United Nations Charter; the Overseas Territories of the Congo Basin and the trust territories were therefore already required to accord non-discriminatory treatment to the Six. Theoretically, the quota provisions go further than the tariff provisions in that they not only require reduction of discriminatory treatment to the level of the advantages accorded the metropolitan country but envisage total abolition eventually. However, considering that tariffs may only be maintained as long as economically necessary, the end effect supposedly will be total abolition of barriers in both cases.

Secondly, just as the tariff provisions leave the Overseas Territories free to determine their own external tariffs, so the Overseas Territories are unaffected by the commercial policy of the E.E.C.; they are free to determine their own quotas with regard to third countries subject to the above-mentioned international obligations. There is an interesting—and unexplainable—difference between the provisions applicable to the departments on the one hand, and to the Overseas Territories on the other. The Overseas Territories continue to be free, from the point of view of the E.E.C. Treaty, to set their own external quotas and tariffs. Yet, while external

73 Art. II, Implementing Convention, which refers expressly to the percentages of art. 33. Reference is also made to art. 32; its provisions—that no new more restrictive quotas may be imposed and that the objective is the total abolition of quotas by the end of the transitional period—are therefore also applicable to the Overseas Territories.

74 A difficult question of interpretation has arisen. Since art. 11 of the Implementing Convention refers to art. 33 of the Treaty, the question arises whether the 7% of "total imports" (art. 11(2)) shall replace or be added to a quota of 3% of national output. The Commission has taken the position that it is in addition to the 3% because of the express reference in art. 11. If the Overseas Territories are prejudiced thereby, they can levy protective tariffs under art. 135(3). Press Bulletin Europe, No. 339, item 1820, Feb. 16, 1959.

75 Arts. 110 ff.
E.E.C. tariffs apply immediately to Algeria and the departments, the provisions concerning the E.E.C. common commercial policy apply only after the Council renders a decision by unanimous vote within two years after the entry into force of the Treaty. A third problem results from the fact that the level of economic development of the French Overseas Territories necessitates stabilization and subsidy measures by France. A special protocol therefore authorizes continued export subsidies and import charges up to the level existing on January 1, 1957. The Council and Commission may examine these systems periodically, and, if their lack of uniformity prejudices industry, may request France to take appropriate measures in the areas of raw materials, semi-finished products, and finished products. Member States may take safeguard measures, if France does not comply. Since the purpose of this Protocol is the maintenance of an equilibrium in the balance-of-payments of the franc zone, the Council may decide by a qualified majority vote that the system must be discontinued, if equilibrium is reached and monetary reserves are satisfactory. If no agreement can be reached, the Protocol—deviating from the usual procedure of the Treaty—envisages arbitration by a mutually appointed arbitrator, or, in case of disagreement, by an arbitrator appointed by the President of the Court of Justice.

d. Problems of Third Country Preferences and Origin of Goods

Two further problems are closely connected with each other. They arise because some of the Member States have special relations with countries which are independent and therefore could not be affected by the Treaty. Although the customs union between France and Tunisia has terminated, France accords trade preferences to, and enjoys preferences of, Tunisia as well as Morocco, Cambodia, Laos, and the Condominion of the New Hebrides. Similarly,

76 Cf. Carstens, supra note 62.
77 Art. 227(2).
79 The only other use of arbitration is found in art. 8(4) of the Treaty with respect to the extensions of the stages of the transitional period. Otherwise arbitration of differences among Member States concerning the interpretation or application of the Treaty is expressly precluded by art. 219, and the procedures of arts. 169 or 170 become applicable.
80 N.Y. Times, Aug. 21, 1959, 1:1.
Italy grants preferences to Libya, and the Netherlands to the autonomous parts of its Kingdom, Surinam, and the Antilles. These countries could not be included in the association, but Declarations of Intention invite those countries to negotiate for association. Negotiations have already started with Tunisia. An interim solution was therefore necessary with respect to products entering the metropolitan countries on a preferential basis. A special protocol therefore expressly declares the provision concerning *libre pratique* inapplicable to these imports. That provision accords duty-free entry into a Member State to goods which have entered another Member State and have been subject there to imposition of duty and have not enjoyed any drawbacks of such duties or charges on leaving this second state. Thus, the effect of the Protocol is that, because of preferences enjoyed by these products upon entry into the metropolitan country, they cannot benefit from the removal of intra-Community duties.

Closely connected with this is the general problem of how to determine whether a particular shipment of goods benefits from the Treaty reductions. In the Community, including Algeria and the overseas departments, a Certificate of Commercial Traffic (*Warenverkehrsbescheinigung*) must accompany all shipments. For trade with the Overseas Territories, Certificates of Origin must also accompany shipments; these will serve to certify both the fact that the shipment is entitled to benefit from the percentage reduction currently in effect and that the goods originated in the Community or the Overseas Territories. Since all Overseas Territories benefit from the intra-Community reductions, this certificate must accompany all shipments to the Community. On the other hand, it need only accompany Community shipments to the Overseas Territories where the Member States will benefit from the preferences extended by an Overseas Territory to its metropolitan country. Such a certificate must therefore accompany products exported to French West Africa, New Caledonia, St. Pierre and Miquelon, and the French Settlements in Oceania. Since the other Overseas Territories do not extend preferences to their metropolitan countries, other Member

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81 Press Bulletin *EUROPE*, No. 416 item 2460, 23 May 1959. Indications are that Tunisia is not seeking association on the basis of the Declaration of Intention but rather under art. 238 of the Treaty.

82 Protocol Relating to Goods Originating in and Coming from Certain Countries and Enjoying Special Treatment on Importation into One of the Member States.

83 Art. 10 of the Treaty.

States will not benefit from reductions, and no certificates need accompany shipments to those Territories.

e. Special Problems: Duration of the Association; Relation to the Coal-Steel and Euratom Treaties

Two problems remain. One concerns the duration of the association, the other the relation of the E.E.C. Treaty to that of the Coal-Steel Community and to that of the European Atomic Energy Community.

While Article 227 extends the application of the Treaty, with modifications, to Algeria and the overseas departments—and thus for an unlimited time—, the association of the Overseas Territories is accomplished partly by means of provisions in the body of the Treaty and partly by means of the Implementing Convention. The latter expires five years after the entry into force of the Treaty (December 31, 1962). At that time, the Council must determine by unanimous vote the form of continued association. The Council may pass only on the form of association, however, and not on whether to continue it. The result of the two separate Treaty sources for association is that the provisions for reduction, and eventual abolition, of tariffs continue to be in force after five years since they are contained in the main body of the Treaty, while the quota increases will freeze at the point of liberalization reached by the fifth year, pending extension by the Council. The reason for the difference in treatment was probably the desire to evaluate the political impact of the association before entering into a long-range commitment. Nevertheless, it would seem that, except for slight or non-existent quotas whose liberalization starts at a low level, the annual liberalization of quotas according to the “20 percent-of-total-imports—10 percent-minimum-per-product” scheme will have reached substantial enough proportions at the end of the fifth year to make continued liberalization of tariffs meaningful.

The second problem concerns the effect of the association on coal and steel products and products covered by the Euratom Treaty.

\[85\] Ibid.
\[86\] Art. 240.
\[87\] Art. 17, Implementing Convention, art. 136 Treaty.
\[88\] HANDBUCH IA 59, 22. The Council must take into account the principles of arts. 131 and 132.
\[89\] Cf. art. 14, Implementing Convention; HANDBUCH IA 59, 21.
Coal and steel products \(^90\) are subject to the Coal-Steel Treaty \(^91\) which only applies to the European territories of the Member States.\(^92\) The E.E.C. Treaty, moreover, expressly provides that its provisions shall not "modify" those of the Coal-Steel Treaty.\(^93\) A protocol promises future negotiation on the extension of the Coal-Steel Treaty to the overseas departments.\(^94\) The problem therefore arises: to what extent do the movement-of-goods provisions of the association also apply to coal and steel products? In the first place it is necessary to emphasize again that the problem exists only with respect to coal and steel products as defined by that Treaty; thus tin, of which the Belgian Congo supplied 9 percent of world exports at last report, is not covered by the Coal-Steel Treaty and can, therefore, be considered to be covered by the movement-of-goods provisions of the E.E.C. Treaty. On the other hand, tin-plate is covered by the Coal-Steel Treaty. It is with respect to such products that the problem exists.

The relation of the Coal-Steel Treaty to the E.E.C. Treaty is that of a special law to a general law.\(^95\) To the extent that the Member States retained powers in regard to products covered by the Coal-Steel Treaty after the establishment of the Coal-Steel Community, they were free to delegate them in a new treaty. The general assumption must be, then, that because of the comprehensive scope of the E.E.C. Treaty the residual powers remaining with the Member States under the Coal-Steel Treaty were delegated by them under the new treaty. A case-by-case analysis must determine whether: (1) such residual powers exist under the Coal-Steel Treaty, and (2) whether their coverage by the E.E.C. Treaty is precluded by an express reservation in that Treaty, or (3) whether their coverage by the E.E.C. Treaty would prejudice the Coal-Steel Treaty.\(^96\) For instance, the question arises whether the E.E.C. ex-

\(^{90}\) Listed in Annex 1, as qualified by Annexes II–III of the E.C.S.C. Treaty.

\(^{91}\) Art. 81, E.C.S.C. Treaty.

\(^{92}\) Art. 79, E.C.S.C. Treaty. Paragraph 2 of that Article obligates Member States to extend to each other any preferential treatment which they enjoy in their Overseas Territories. This provision is immaterial for our purposes since we are here concerned with movement of such products from the Overseas Territories to the Six.

\(^{93}\) Art. 232. Author's translation from the German, since the English term used in the extant translation seems inadequate.

\(^{94}\) Protocol Relating to the Treatment to be Applied to Products within the Competence of the European Coal and Steel Community in Respect of Algeria and the Overseas Departments of the French Republic.

\(^{95}\) Carstens, supra note 62 at 462.

\(^{96}\) As Carstens, ibid., 465–466, observes, the Protocol, supra note 94, does not change this. It is merely an expression of the willingness to negotiate an agreement which
ternal tariff applies to coal and steel products, given the fact that the Coal-Steel Treaty does not make provision for an external tariff. Since coal and steel products have been expressly excluded by the E.E.C. Treaty, the conclusion must be, however, that the external tariff does not apply to coal and steel products in Algeria and the departments—the only territories where the E.E.C. external tariff applies at all. Similarly, the reduction and abolition of internal trade barriers between the Community and the territories, including the departments, does not apply to coal and steel products. Although this conclusion is not based on a Treaty provision expressly dealing with the problem, it is plainly justified since an extension of the reach of the E.E.C. Treaty to include coal and steel products would constitute a substantial change in the Coal-Steel Treaty, and would thereby violate Article 232 of the E.E.C. Treaty.

For practical purposes, then, the E.E.C. provisions on movement of goods in the territories do not apply to coal and steel products. The theoretical conclusion that it is at least conceivable that the two treaties complement each other, is significant, however, in regard to two contingencies.

The tariff provisions, and the quota provisions upon extension by the Council, share the E.E.C. Treaty's unlimited duration. In contrast the Coal-Steel Treaty is limited to 50 years (that is, it expires in the year 2002). If the Coal-Steel Treaty should expire at that time, the prohibition of Article 232 of the E.E.C. Treaty would become superfluous; absent a lex specialis, the E.E.C. provisions would apply. Secondly, it has been suggested that Coal-Steel Community commercial policy will to a large extent become part of E.E.C. commercial policy. This results from the Coal-Steel Treaty provision that the Member States remain responsible for this policy except where the Treaty provides otherwise. While the Coal-Steel Treaty in fact regulates some details of commercial policy, no provision comparable to the E.E.C. Treaty chapter on commercial policy exists. When the E.E.C. institutions assume responsibility for the commercial policy of the Community—and that

would eliminate the “problems.” Up to that time, the effects of the Treaties on each other must be determined in accordance with what they themselves provide.

99 Carstens, supra note 62 at 463.
100 Ibid., 520–522.
of Algeria and the overseas departments \(^\text{102}\) at the end of the transitional period, \(^\text{103}\) this commercial policy will include, therefore, that residual competence of the Member States with respect to coal and steel products in the departments. The Council and Commission can then conclude agreements with third countries affecting coal and steel, after consultation with the High Authority. \(^\text{104}\)

The Euratom Treaty—also, in relation to the E.E.C. Treaty, \textit{lex specialis} \(^\text{105}\)—applies fully to all "non-European territories under the jurisdiction of a Member State." \(^\text{106}\) It thus applies to some very important products of the Overseas Territories, such as uranium. \(^\text{107}\) To the extent that they are to be used for nuclear purposes, other products, such as aluminum and manganese, \(^\text{108}\) may also be subject to the Euratom Treaty. In the latter case it must be noted that the E.E.C. Treaty is applicable until a determination is made that the products are intended for nuclear purposes.

In contrast to the manner of association under the E.E.C. Treaty, the Euratom Treaty contains few special rules applicable only to the territories. This difference between the Euratom and E.E.C. Treaties is probably accounted for by the fact that fewer protective and transitional measures are necessary to integrate incipient atomic industries than to achieve a common market in all sectors of the economy. This is illustrated by the Euratom provision allowing the Overseas Territories to continue to levy revenue tariffs on imports from the Six. \(^\text{109}\) A counterpart of the far-reaching E.E.C. provision \(^\text{110}\) allowing the territories also to impose protective tariffs is, however, lacking in the Euratom provision.

2. OTHER PROVISIONS: AGRICULTURE, RIGHT OF ESTABLISHMENT, LIBERALIZATION OF SERVICES, AND FREE MOVEMENT OF WORKERS

a. Agriculture

For purposes of trade among the Member States, the Treaty contains two groups of provisions concerning agriculture. First, agric-
cultural products are included in the general movement-of-goods provisions; and second, a special part of the Treaty, applying to agricultural products specified in Annex II of the Treaty, provides for a common agricultural policy. This common policy is to be based on a common organization which will differ from product to product and might take the form of common rules of competition, or of compulsory coordination of the various existing national market organizations, or even of a single "European" market organization for the particular product. Any one of these forms may comprise price controls, production and marketing subsidies, stockpiling and other arrangements, as well as special loan and guarantee funds. Proposals for a common policy are under consideration by the institutions of the Community. While agricultural products are also included in the movement-of-goods provisions relating to the overseas departments and Overseas Territories the question is whether the special chapter on a common agricultural policy applies to them also. The Treaty gives an affirmative answer with regard to Algeria and the overseas departments, excluding only the provision concerning the agricultural funds and organizations mentioned above. The provisions governing the association with the Overseas Territories do not mention the chapter; since the association extends only to matters expressly mentioned, the application of that chapter is therefore precluded. Exclusion of the Overseas Territories from the common agricultural policy does not mean, however, that they cannot be affected by it. This is true because the provisions of the special chapter on common agricultural policy apply to the products specified in Annex II (including, for example, coffee, cocoa, cane sugar) rather than to a particular geographic area. Measures taken, for instance, by a European marketing organization or by the Member States (such as the invocation of the safeguard clause permitting, for the duration of the transitional period, the temporary suspension of imports or the fixing of minimum prices on imports) may therefore affect the Overseas Territories.

b. The Right of Establishment

The right of companies and nationals of the Member States to establish themselves in the Overseas Territories and overseas de-
Departments and vice-versa is treated in three different provisions.

The right of establishment of nationals of the Member States in Algeria, the overseas departments, and Overseas Territories is regulated by a provision in the Implementing Convention. It provides that the Council, acting by qualified majority vote on a proposal of the Commission, must determine the particulars of an extension of the right within one year from the entry into force of the Convention (January 1, 1958). The material content of the right of establishment will be determined by the general chapter on the right of establishment in the Member States (Articles 52–58); it is limited, however, to an abolition of discrimination between the right of establishment enjoyed by nationals of the metropolitan country of the department or Overseas Territory and the right of establishment enjoyed by nationals of other Member States. The Council took the required action by issuing a Directive in November 1959. One difficult question of interpretation is whether the right of establishment also includes the right of investment of capital necessary for establishment. A possible view is that, since the provision dealing with the right of establishment in the departments and Overseas Territories refers as to substance to the general right-of-establishment provision (Article 52) which in turn expressly excludes matters dealt with in the chapter concerning free movement of capital, the right to invest is not included in the right to establish. Moreover, the free-movement-of-capital provisions may be extended to Algeria and the departments by the Council under Article 227, although no such provision exists with regard to the Overseas Territories. These facts suggest that no Treaty right to invest capital in the Overseas Territories exists and that the right of establishment could be virtually meaningless. It has therefore been suggested that the limitation of Article 52 should

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117 Cf. Art. 16, Implementing Convention.
118 Art. 8, Implementing Convention.
119 Cf. Art. 148, para. 2.
121 Kommentar Vol. 1, 551.
121a [1960] J.O. 147. The Directive envisions extension of the right of establishment by stages according to the type of activity involved.
122 Art. 132(5).
123 This was done by decision of the Council, [1960] J.O. 919–20.
not be applied to the right-of-establishment provision relating to the Overseas Territories and that the provision should be interpreted extensively to include the right to invest capital as a necessary concomitant to the right of establishment.\textsuperscript{124}

The right of establishment of nationals of the Overseas Territories in Member States is not as explicitly regulated as the right of nationals of the Member States to establish in the Overseas Territories, and is also different from that of nationals of the departments. Article 132(5) of the Treaty provides only that

\begin{quote}
In relations between Member States and ... the Territories, the right of establishment ... shall be regulated in accordance with the provisions ... in the Chapter relating to the right of establishment [Articles 52–58].
\end{quote}

The absence of a specific provision like that concerning the right of nationals of the Member States to establish themselves in the Overseas Territories has led some to conclude that no right of establishment in the Member States is given to nationals of the Overseas Territories.\textsuperscript{125} Another possible interpretation is that as long as no special provision is made, the general provision of Article 132(5) applies, so that the intra-Community right of establishment as provided by Articles 52–58 extends to nationals of the Overseas Territories.\textsuperscript{126} Furthermore, it has been argued, that a right of establishment in the Member States could accrue to nationals of the Overseas Territories under Article 52 of the Treaty because nationals of the French Territories have French citizenship and thus satisfy the nationality requirements of Articles 52 and 58.\textsuperscript{127} The latter interpretation is preferable to one denying a right of establishment of nationals of the Overseas Territories, since the object of the association is the furthering of the interests of the Overseas Territories \textsuperscript{128} and since the policy of Article 132(5) seems clearly to indicate that reciprocity was desired in matters relating to the right of establishment.

The right of establishment of nationals of Algeria and the departments in the Member States, finally, is left open by the Treaty. Like all other matters not expressly mentioned in Article 227(2),

\textsuperscript{124} \textit{Kommentar} Vol. I, 550.
\textsuperscript{125} Cf. Lussan, \textit{supra} note 116 at 227.
\textsuperscript{126} \textit{Ibid.} 228, 229; \textit{Kommentar} Vol. I, 489.
\textsuperscript{127} Lussan \textit{supra} note 116 at 228–232. Cf., however, the impact of independence of many Territories on this argument.
\textsuperscript{128} Arts. 131, paras. 2–3 and the Preamble.
its extension to the departments was to have been affected by the Council before January 1, 1960.

c. **Free Movement of Workers**

This area is again left to further implementing action by the Council in the cases of Algeria and the overseas departments. In the case of the Overseas Territories, the Member States have only affirmed a desire that free movement of workers be achieved.\(^{129}\) In contrast to the procedure envisaged for the departments, implementation will not be effected by a Community institution but by means of international conventions. Since bilateral conventions could seriously affect non-participating Member States, every convention requires unanimous agreement of all Member States.\(^{130}\)

d. **Freedom to Perform Services and Other Provisions**

The Treaty's provisions concerning services, rules of competition, and institutions are immediately applicable to Algeria and the overseas departments; all other provisions become applicable in the departments upon decision of the Council.\(^{131}\) None of these provisions, with the exception of some financial provisions to be mentioned later, are applicable to the Overseas Territories nor is their extension envisaged for a later time. This difference in treatment is explainable by the fact that the overseas departments, belonging structurally to the metropolitan country, are to become part of the Community subject only to those modifications which their particular economic situations necessitate. In contrast, association alone is envisaged between the Community and the Overseas Territories. Since the main aim of this association is to raise the level of economic development in the Overseas Territories, the trade provisions are supplemented by special provisions, including those noted earlier and particularly those concerning financial assistance to be discussed presently. Since this system of association is limited to five years, a closer association is possible thereafter. However, even if a closer association should come about, the Treaty drafters were careful to indicate that it is the economic interest of the Territories which will primarily determine its form.\(^{132}\)

\(^{129}\) Art. 135.
\(^{130}\) **Handbuch** IA 59, 19–21.
\(^{131}\) Art. 227(2). Cf. also note 123 and preceding text.
\(^{132}\) See the implied reference in art. 136, para. 2 to the principles of arts. 131 and 132. Cf. **Handbuch** IA 59, 22.
3. FINANCIAL PROVISIONS

The two main reasons why France pressed for inclusion of the territories were her desire to avoid membership in two competing systems of trade preferences and her belief that she could not extend trade concessions to her European partners without receiving their assistance in financing economic development in the territories. The establishment of the Development Fund was the response to France's position on the second point. Demands by France and Belgium that the expenses of the territories be shared by the Member States on a pro rata basis of national income were rejected early in the negotiations by the other four. Similarly, it was made clear that any assistance given should not serve to finance "sovereignty expenses" (police, administration, defense) of the powers directly involved. Thirdly—and as a further safeguard against too direct involvement—Germany demanded that any assistance given by a development fund to which she would contribute should only be given on a project-by-project basis, and that approval of local authorities in the territories would be required for every project.

Established along these lines, the Development Fund provides for a total contribution of $581,250,000 by the Member States, of which Germany and France will contribute $200 million each. Throughout its duration (geared to the five-year duration of the Implementing Convention) France will be the major beneficiary, receiving $511,250,000 for her affiliated territories. The projects to be financed fall into two categories: "economic," including "productive and specific development projects," and "social," such as schools, hospitals and the prevention of soil erosion. Each year the Council must determine by qualified majority vote, after consulting the Commission, what proportions of the amounts available for the year are to be allocated to the two categories. In 1958 two-thirds of the available $58 million were allocated to social, and one-third to economic, projects. In 1959 the Council changed the

133 Arts. 1-7, Implementing Convention.
136 Art. 4, Implementing Convention. Annex B to the Convention sets out the amounts available to each metropolitan country for its territories in each of the five years of the association.
137 Wirsing, supra note 135 at 233.
percentage allocation to allow 25–30 percent of the available funds to be used for social investments while 70–75 percent were to be used for economic projects. The qualified majority vote is based upon a special weighing of votes according to the size of contribution to the Fund. Thus, France and Germany, as the two largest contributors, command 33 votes each, Italy, Belgium, and the Netherlands 11 each, and Luxembourg 1. The qualified majority necessary for a decision constitutes 67 out of the 100 possible votes. The country with the strongest political misgivings about the association, Germany, can easily prevent a vote with the support of only one like-minded state such as Luxembourg or the Netherlands, while only the votes of France, Germany, and Luxembourg are needed to adopt any measure.

After the Council has established the yearly quotas, the Commission may consider project proposals which have been drawn up by the competent authority in the Member State together with the local authorities in the territories. The Commission may then approve “social projects.” “Economic projects” must be communicated to the Council which may pass on them within two months by qualified majority vote; if no Member State has requested the Council to consider the project proposal within one month, the projects are regarded as approved. In fact, several projects have already been approved. Among them are social and economic projects for the former Belgian Congo and for Ruanda-Urundi and economic projects for the disaster-stricken Malagasy Republic (formerly Madagascar). Participation in the work on these projects is open to all nationals and companies of the Member States without discrimination.

The provisions of the Development Fund apply both to the Overseas Territories and to the departments. However, the head of the French delegation declared that his government intended to make project applications only for the Overseas Territories and not

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131 Art. 7, Implementing Convention.
132 The qualified majority feature was also included on German insistence. Bundesrat, supra note 134 at 43.
133 Art. 2, Implementing Convention.
134 Art. 5, Implementing Convention.
136 Art. 132(4).
137 Art. 16, Implementing Convention.
for the departments.\textsuperscript{146} It is also the understanding that the assistance of the Fund shall not replace, but shall be complementary to, the assistance rendered by the metropolitan countries.\textsuperscript{147}

As important as the Fund is for the economic development of the Overseas Territories, it leaves many questions unanswered. If one agrees with the basic political objective—that the Overseas Territories should be freed from economic dependence and should be assisted in achieving a level of economic development which would enable them both to maintain independence and to associate themselves with the Community as partners\textsuperscript{148}—the provisions of the Treaty concerning investment appear to be merely a preliminary step and, as such, insufficient. Early in 1959 the Commission had already received approximately 200 official project applications and was unofficially informed of several more.\textsuperscript{149} Moreover, the Development Fund, by its nature, provides funds only for public investment. It is not designed either to facilitate private investment or to provide funds for it. The Treaty’s provisions for the free movement of capital have been made applicable to the departments (Article 227), but are not applicable to the Overseas Territories unless an extensive interpretation of the right of establishment provisions incorporates them. The same is true of the provision\textsuperscript{150} envisaging non-discriminatory treatment of nationals of other Member States in matters of financial participation in national companies. The provisions of the European Investment Bank, designed to help finance private investments, are applicable only to the European territories of the Member States and therefore exclude both the departments and the Overseas Territories. Exceptions are possible but require unanimous agreement of the Member States represented on the Bank’s Board of Governors.\textsuperscript{151} Some use-
ful suggestions have already been made as to how this situation may be remedied.\textsuperscript{152} One category of suggestions concerns possible changes in territorial legislation and practice. Among them one, for instance, calls for abolition of discrimination against foreign majority interests by the substitution of a system of guarantees to be given by the companies to local authorities insuring to all a local supply of raw materials.\textsuperscript{153} Along the same lines it has been suggested that International Charter Companies should be created, that is, companies constituted according to multilateral international conventions between the metropolitan country and third countries.\textsuperscript{154} Another category of suggestions aims at changes in the Treaty and its policy of association. These suggestions are directed mainly at an expansion of the functions of the European Investment Bank (for instance, by eliminating the territorial limitation), and at the creation of a European Finance Company for investments in the Overseas Territories.\textsuperscript{155} Yet another category of suggestions goes beyond the investment needs of the territories under examination here. For example, it has been suggested that the Community investigate the possibilities of establishing a financial assistance program for underdeveloped areas bordering on the associated territories in order to prevent assistance given the associated territories from resulting in undesirable political and psychological reactions in those areas.\textsuperscript{156} All of these proposals emanate from the same important realization that only intelligent, generous and widely ranging assistance to the underdeveloped areas can create a true partnership.

While any of these proposals would be a step in the right direction, the problem is actually much larger. The availability of investment funds—by itself a problem\textsuperscript{157}—is of little value if unaccompanied by adequate provisions removing discrimination against foreign majority interests for example.

An additional problem is posed by the variations in risk insur-

\textsuperscript{152} Cf. also Resolution of the European Assembly of Nov. 27, 1959, para. 8, [1959] J.O. 1267/59 at 1268/59.

\textsuperscript{153} De Lattre, op. cit. supra note 8, 70 and 91 ff.

\textsuperscript{154} Ibid.

\textsuperscript{155} These proposals were made by the Belgian Committee of the European League for Economic Cooperation. They were reported by Press Bulletin \textit{EUROPE}, No. 409, item 2396, May 14, 1959.

\textsuperscript{156} Wirsing, supra note 135 at 234.

\textsuperscript{157} Frisch indicates in \textit{Soci\'et\'e d'\'Etudes et de Documentation \'Economiques, Industrielles et Sociales}, No. 683 (1957) that German industrialists are interested in principle in investing in Africa, but lack the necessary capital. The high level of German investment is achieved primarily by self-financing, leaving little for outside (\textit{e.g.} African) projects.
ance of export financing. Illustratively, a German exporter is required by government regulation to assume 30 percent of the risk in cases of economically conditioned losses and 20 percent of politically conditioned losses. The latter category includes the stoppage of foreign currency transfers imposed by the debtor country. In contrast, the risk assumed for losses caused by inability to convert currencies or by restrictions on the transfer of capital is only 5 percent for Dutch exporters, 10 percent for French, and 15 percent for Belgian and Italian exporters. The effect of these variations—and the inadequacy of the insurance in some respects—is that capital goods necessitating long-term financing may not be readily available for underdeveloped areas and that Belgian, German, and Italian exporters are at a considerable competitive disadvantage compared with other suppliers of the underdeveloped countries. As the association of the territories becomes a reality, such problems will become more pressing.

IV. EFFECTS AND PROBLEMS OF THE ASSOCIATION

No discussion of the territories can ignore at least three of the major problems which association with the E.E.C. creates. The first of these results from the fact that so many of the territories have, or will have, attained independence since the Treaty was signed in March 1957. In a somewhat larger setting, the relationship of the territories to the other territories in the proposed Free Trade Area deserves mention. Finally, the objections raised by third countries, mainly the South American and Asian producers of tropical fruit, must be considered.

A. FUTURE ASSOCIATION OF INDEPENDENT COUNTRIES

The following countries must be mentioned under this heading, all of which give rise to substantially the same problem: (1) the African trusteeship territories which have gained independence, for example, Togo (which on April 27, 1960, became the Republic of Togoland) and Italian Somaliland (since July 1, 1960, a part of the Republic of Somalia); (2) Guinea, originally covered by the provisions relating to French West Africa, but which has now be-

come independent. Although some maintain that Guinea continues to be covered by the Treaty, it seems probable that a new association would have to be negotiated; (3) the Republic of the Congo (formerly the Belgian Congo) which became independent on July 1, 1960; (4) the three republics of the Union of Central African Republics and the four of the Council of the Entente plus Gabon and Mauritania all of which are, or soon will be, independent; (5) independent countries like Tunisia, which were invited by "Declarations of Intention" to associate with the E.E.C.

Having become sovereign nations, the countries of the first four groups indicated above will probably no longer be bound by the Treaty. No provision in the Treaty envisions the situation of these countries, and the Member States are not in agreement as to the attitude to be adopted. The Community is inclined to follow a pragmatic approach and to maintain the status quo ante until a new regime of association can be elaborated. On the other hand, none of the Territories have apparently rejected the principle of association, while several have clearly and publicly indicated favorable positions. Where it will be necessary to negotiate or renegotiate an association, obvious problems arise. For instance, to what extent are the provisions of the Development Fund to apply, and to what extent does the inclusion of the products of these independent countries necessitate a re-examination of E.E.C. internal policy, for instance agricultural policy, and of E.E.C. external policy, for instance the common external tariff? More importantly, to what extent does the association of independent areas necessitate a change in the institutional structure of the E.E.C.? This point was raised as early as 1957 in the Belgian Parliament. The type and extent of these institutional changes will depend on the form of association. An association—for instance a free trade area between the E.E.C. and these areas—may be characterized by no institutional changes in the E.E.C.; any problems could be handled on an international inter-institutional level. On the other hand, if the association takes

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161 Speech by Mr. Scheyven, Chambre des Représentants, Annales, Session of Nov. 14, 1957, 7.
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the form of adhesion ¹⁶² to the E.E.C. Treaty some changes may be necessary. It would seem that representatives from these areas would have to be seated in the European Parliamentary Assembly (no longer being members of the contingent of the metropolitan country) ¹⁶³ and would have to participate in the work of the executive bodies of the Community. The latter would involve, for instance, a difficult re-examination of all provisions relating to weighted voting.

B. PROBLEMS IN CONNECTION WITH THE PROPOSED FREE TRADE AREA

The foregoing problems would, of course, be multiplied if the E.E.C. should become a part of a larger free trade area. Such an arrangement would presumably increase agricultural competition, due to the inclusion of European countries like Denmark and of overseas areas such as the British possessions in Africa. For instance, it is reported that under the present scheme of association of the Overseas Territories there exists a certain equilibrium in the production and consumption of coffee in the E.E.C.; in the case of a free trade area there may be an excess of 100,000 tons. With respect to cocoa, a deficit of 65,000 tons exists presently within the E.E.C., but a free trade area may bring an excess of 70,000 tons. ¹⁶⁴

Other difficulties lie in the area of investments and French trade. It is doubtful for instance, that the countries of a free trade area would be able (in the case of Switzerland because of its neutrality) or willing (in the case of the United Kingdom, because of her own overseas commitments) to participate in the financing of the development of the E.E.C. Overseas Territories to the extent that increased competition would require. Yet, if they do not, some doubt that France could commit herself to accept the burdens of a free

¹⁶² The difference is mainly one of associating such an area under art. 238 or allowing it to adhere in a form analogous to art. 237. The latter provides only for adhesion by any European State. Yet, the extension of the Treaty to Algeria and the overseas departments of France, by art. 227 of the Treaty, is one case where the territorial principle is not followed. Institutional changes due to adhesion would thus become probable if any of the departments should gain independence but desire to maintain their present status in relation to the E.E.C.


¹⁶⁴ Representative Raingeard, Assemblée Parlementaire Européenne, Compte rendu sténographique provisoire, June 25, 1958, 9 (2d part), 162-163.
trade area in addition to those which her territories create.\textsuperscript{165} Finally, as M. Diori, former overseas representative in the European Parliamentary Assembly, pointed out, any compromise with respect to the above problems has to give first priority to the political significance of the association of the E.E.C. territories. The Six have a political responsibility to support the economic, social, and political development of Africa and to further cooperation between Europe and Africa. This responsibility should not be ignored, however difficult it renders any mutually satisfactory solution to the free trade area problem.\textsuperscript{166}

C. The Objections of Third Countries

Serious objections to the association of the territories were raised by Latin American and Asian countries, all of which are to a large extent suppliers of primary products and therefore most directly affected by the preference extended to the territories by the E.E.C. Objections were also raised by Britain and Portugal because of the disadvantageous position in which exports from their African territories have been placed.\textsuperscript{167} Latin America exported 35.3 percent of its total coffee exports to Europe in 1954–1955.\textsuperscript{168} A study of the United Nations Economic Commission for Latin America indicates gradual gains of African products in the E.E.C. market and comparable Latin American losses. The impact of the E.E.C. Treaty may accelerate this trend with a resulting weakening of international prices for Latin American commodities due to the characteristic inelasticity of demand for foodstuffs and tropical products, with a corresponding adverse effect on Latin American terms of trade.\textsuperscript{169} The most recent report of the United Nations Economic Commission for Asia and the Far East shows the possible effect of the Treaty on those regions. Thus, Indonesia exports 43 percent of its total coffee exports to the Six; and 44 percent of the total tea exports of the Far East go to the Community. The Far East would also be affected with regard to its sugar, tobacco, and vegetable oil exports.

\textsuperscript{165} Ibid. 161, 164.
\textsuperscript{166} Ibid. 158
\textsuperscript{169} Ibid. 23.
Japan would be affected with regard to her exports of woolen, cotton, and rayon fabrics, medicines, and timber, and, in addition, would face stiffer competition in third markets.\textsuperscript{170}

These effects were analyzed by a recent G.A.T.T. study.\textsuperscript{171} It pointed out that the external tariff of the E.E.C. on tropical products—while it has the effect of a protective tariff in regard to the products of the associated territories—is, by nature, a revenue tariff since no tropical products are produced within the E.E.C. The result of the removal of these tariffs vis-à-vis the associated countries has a trade-diverting effect, it is argued, since it cannot displace high-cost production within the E.E.C. It is further argued that the trade-diverting effect of the association, that is, the diversion of trade away from traditional sources of supply to the associated territories, could only be countered by an increase in total imports from the outside, which would occur if imports from the associated territories increased to such an extent that they offset the displacement of imports from traditional sources.

The Six have consistently adopted the latter thesis to show that the association will not be trade-diverting, and have argued beyond this that the former suppliers will indeed benefit from an increase in demand.\textsuperscript{172} They foresee, for instance with regard to fats and vegetable oils, that imports from the associated countries will lower Community prices. Yet, since the per capita consumption of these products is far below that of the United States, increased demand for these products may be expected with an increased standard of living both in the Community and in the producing territories. For purposes of an examination of trade effects the exportable surplus, rather than total production, is therefore one criterion, and changing—especially increasing—patterns of consumption are another.\textsuperscript{173} Finally, there is room for considerable doubt that the production of the Overseas Territories will increase appreciably as a result of the association and thus displace traditional imports. The solution of problems of soil erosion, irrigation, transport and labor will require years, perhaps decades before the exportable surplus can threaten to displace traditional sources of supply.\textsuperscript{174} Thus, the posi-

\textsuperscript{173} U.N., \textit{supra} note 170 at 43.
tion of the Six in the G.A.T.T. negotiations is that the association will not prejudice traditional imports and that, in fact, it may be expected that third countries will, beyond this, also benefit from an appreciable share of the increase in demand in the E.E.C.

However, while they disclaim any of the disadvantageous effects asserted by third countries, the Six have already taken steps and issued policy statements which are intended to ensure that third countries will not suffer the feared adverse effects. To prevent short-term effects, the Six extended part of their first 10 percent tariff reduction (of January 1, 1959) to their O.E.E.C. and G.A.T.T. partners, as well as to those countries which enjoy most-favored-nation treatment. In formulating long-term policy, the Six are also obligated by the Treaty to take into account the interests of third countries, and the Treaty enables the Community to negotiate trade agreements. In the meantime, the E.E.C. Council has already declared its willingness to work within G.A.T.T. towards a general lowering of trade barriers.

176 Arts. 18, 110, 111(5).
177 Art. 113.