

trade hot topics

EU Proposal to End Preferences of 18 African and Pacific States: An Assessment

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Background

To the surprise of those countries in Africa and the Pacific that had been enjoying Duty Free Quota Free (DFQF) access to Europe while still negotiating EPAs, the European Commission on 30 September 2011 adopted a proposal recommending to the EU Council of Ministers an end to their DFQF access by 1 January 2014. The Caribbean is the only ACP region to have concluded an Economic Partnership Agreement with the EU by the deadline of 1 January 2008, but negotiations with the other regions had been ongoing. Since the Cotonou (formerly Lomé) market access provisions would have automatically lapsed on 1 January 2008, the EU Council adopted Regulation (EC) No 1528/2007 permitting those countries to continue to enjoy DFQF access. The European Commission came up with the convenient device of placing them on a list of countries that had 'concluded negotiations' on their respective Agreements (even if this was not the case in reality). Contentious issues remained and active negotiations have been going on. The device was in essence a ruse, put together, to shield the preferential market access provided by the EC to those countries from challenge in the World Trade Organization (WTO).

This issue of the *Commonwealth Trade Hot Topics* provides an assessment of the proposed regulation which the European Commission adopted on 30 September 2011.

The European Commission's 30 September proposal

The European Commission's proposed regulation seeks to modify the basis on which ACP countries whose governments have initialled but not yet signed or ratified an EPA may be withdrawn from Annex 1 of the December 2007 regulation. Specifically, it seeks to withdraw 18 ACP countries from the list of beneficiaries of preferences under Regulation 1528/2007, with immediate effect, with the loss of DFQF access taking effect from January 2014. It further proposes that powers be delegated to the European Commission to reinstate countries to the list of beneficiaries, if the Commission is satisfied with the progress made in signing, ratifying and, according to the Commission's proposal, implementing the initialled interim EPAs (IEPAs).

This represents a significant shift compared to the original regulation. The proposed regulation exerts pressure on the governments of countries

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concerned to sign and ratify their EPA within the specified timeframe (before 1 January 2014), regardless of whether the contentious provisions have been resolved. The alternative would be the de facto loss of DFQF access and reversion to either standard GSP (generalised system of preferences) market access conditions or even, in two cases, MFN (most favoured nation) treatment.

Given that the September 2011 Commission proposal for a regulation makes no reference to the processes of negotiations which have been ongoing since 2008 and the progress made in these negotiations, there are concerns that the proposal further shifts the balance of power in an already asymmetrical process of negotiations in favour of the EU. This could potentially leave the governments of the affected ACP countries with a difficult choice:

- (a) the loss of DFQF access to the EU market, to the detriment of established exporters; or
- (b) signing of a trade agreement which includes certain unacceptable provisions that limit the space for domestic economic policy-making, to the detriment of emerging economic sectors and relationships.

It should be stressed that the proposed regulation is still a proposal which needs to be discussed and approved by the EU Council and the European Parliament before it can take legal effect. It is not known when this will occur.

Some additional immediate effects

The Commission's proposal had a number of immediate effects. Within days, reports were emerging from trade missions from affected countries of enquiries from EU importers over the long-term prospects for the maintenance of duty free access. This matter is therefore having an immediate impact on commercial relations between EU importers and exporters in the affected ACP countries.

More serious are the possible effects on investment flows into the worst affected sectors, all of which are agro-food sectors. In affected sugar exporting countries such as Swaziland, investment in the development of further processing capacity only took place following the confirmation that DFQF access would form a central part of EU-ACP economic partnership agreements. Prior to this date such investment had been concentrated in neighbouring least developed countries (LDCs), which already enjoyed unrestricted DFQF access

under the European Union's 'Everything But Arms' (EBA) initiative.

Similarly in the horticulture sector prior to the confirmation of DFQF access under EPAs, new investment had tended to flow into neighbouring LDCs with similar agro-ecological potential for year-round supply, rather than established non-LDC exporters such as Kenya. Against this background, the September 2011 EC announcement could well impact on investment flows into affected sectors in the affected countries in the coming 26 months and beyond.

The further area of impact relates to the complications generated within regional based negotiating processes from measures which selectively punish only certain states—for example, in the SADC EPA context, where only Botswana, Namibia and Swaziland are potentially affected, and the EAC context where only Kenya is potentially affected. This could serve to generate tensions within regional configurations engaged in ongoing EPA negotiations. This would further complicate intra-regional negotiations, particularly in regions where there are inconsistencies between existing bilateral IEPA commitments and evolving regional trade policy frameworks (e.g. the Ghana—EU IEPA and the May 2011 agreement to create a fifth tariff band within the ECOWAS CET, mainly affecting agro-food products).

The impact of the loss of DFQF access

Of the 18 ACP countries named in the EC 30 September proposal, nine are least developed countries and hence would continue to benefit from DFQF access under the EU's EBA scheme. Seven however would revert to standard GSP treatment (Cameroon, Fiji, Ghana, Ivory Coast, Kenya, Zimbabwe and Swaziland), while two (Namibia and Botswana) under the EC's new proposed GSP scheme, would revert back to MFN treatment (see Box 1). The exports from these countries of sugar, beef, bananas, fisheries and horticulture products would, to varying degrees, be affected.

It should be stressed from the outset that no ACP country whose government initialled an EPA and benefits from regulation 1528/2007 will lose its DFQF access if the initialled EPA is signed, ratified and implementation commences before 1 January 2014. However, of the nine non-LDCs likely to face DFQF loss, the most at stake, in terms of the percentage of trade affected, would be the sugar exporting countries of Fiji and Swaziland, with 97.4

Box 1: The 18 ACP states to be affected by the proposed EC regulation

Countries whose governments have initialled but not signed an (I)EPA	Countries whose governments have signed but not taken steps to ratify their (I)EPA
East African Community Customs Union	ESA EPA Configuration
- Burundi (LDC)	- Zimbabwe
- Kenya	SADC EPA Configuration
- Rwanda (LDC)	- Botswana
- Tanzania (LDC)	- Lesotho (LDC)
- Uganda (LDC)	- Swaziland
Other ESA Configuration	- Mozambique (LDC)
- Comoros (LDC)	Central Africa EPA Configuration
- Zambia (LDC)	- Cameroon
SADC EPA Configuration	West Africa EPA Configuration
- Namibia	- Côte d'Ivoire
West Africa EPA Configuration	Pacific Configuration
- Ghana	- Fiji
	Caribbean Configuration
	- Haiti (LDC)

Source: Extracted from 'Proposal for a regulation of the European Parliament and of the Council amending Annex I to Council Regulation (EC) No 1528/2007 as regards the exclusion of a number of countries from the list of regions or states which have concluded negotiations', COM (2011) 598 final, 30.9.2011. <http://www.ipex.eu/IPEXL-WEB/dossier/dossier.do?code=COD&year=2011&number=0260>

per cent and 96.3 per cent of their total exports to the EU at risk (see Table 1). The duties imposed would be of such a level (€339/tonne) that they would effectively close the EU market to exports of sugar from the affected countries (see Table 2), unless access could be secured to the temporary duty free quotas being opened for all third country suppliers. However, even if this were achieved the volume of exports would be likely to fall dramatically. The commercial effects would vary depending on the relative level of EU sugar prices

and the prices obtainable on alternative markets. In the face of world market sugar prices higher than EU sugar prices, Swaziland and Zimbabwe may well be able to secure equally profitable markets elsewhere. However, were world market prices to fall below EU prices, income losses would occur. For Swaziland and Zimbabwe the greatest impact is likely to be on investment flows in value added processing — that is, moving beyond the export of raw sugar to the export of refined and quality differentiated sugar and sugar based products.

Table 1: Overview of the impact of a reimposition of duties

Country	EU imports ('000 €)	Dutiable imports ('000 €)	% imports dutiable (%)	Preferences under Reg. 1528/2007 (%)	Preference value of duties ('000 €)
Botswana	370,707	35,639	9.6%	81.7%	29,111
Cameroon	1,741,473	333,724	19.2%	14.9%	49,858
Fiji	92,402	89,986	97.4%	75.3%	67,782
Ghana	1,087,880	376,548	34.6%	10.3%	38,654
Ivory Coast	3,051,022	1,029,512	33.7%	10.3%	105,662
Kenya	1,075,563	751,792	69.9%	5.8%	43,804
Namibia	585,765	298,663	51.0%	19.5%	58,156
Swaziland	130,656	125,764	96.3%	52.0%	65,427
Zimbabwe	234,992	167,459	71.3%	30.1%	50,365

Source: 'Proposal for a regulation of the European Parliament and of the Council amending Annex I to Council Regulation (EC) No 1528/2007 as regards the exclusion of a number of countries from the list of regions or states which have concluded negotiations', COM (2011) 598 final, 30.9.2011. <http://www.ipex.eu/IPEXL-WEB/dossier/dossier.do?code=COD&year=2011&number=0260>

Table 2: Products and countries affected by a reimposition of duties under the EU proposal

CN code	Product description	Maximum changes in tariff levels	Affected countries
Very High Tariff Jumps			
17011110	Raw cane sugar for refining	€339/1,000kg	Swaziland, Fiji, Kenya, Zimbabwe
17011190	Raw cane sugar	€419/1,000kg	Swaziland, Fiji, Kenya, Zimbabwe
02013000	Fresh and chilled bovine meat, boneless...	12.8% + €3,034/1,000kg	Namibia, Botswana
08030019	Bananas fresh	€176/1,000kg	Ivory Coast, Cameroon, Ghana
24012010	Partly/wholly stemmed flue cured Virginia tobacco...	14.9% max €240/1,000kg	Zimbabwe
Large Tariff Jumps			
16041418	Prepared and preserved tuna and skipjack	20.50%	Ivory Coast, Ghana
16041411	Tuna prepared and preserved in vegetable oil	20.5%	Ivory Coast, Ghana
03026966	Fresh and chilled cape hake...	15.0%	Namibia
03037811	Frozen cape hake...	11.5%	Namibia
03037981	Frozen monkfish	15.0%	Namibia
Moderate Tariff Jumps			
20055900	Unshelled beans prepared and preserved	+15.7%	Kenya
20082079	Pineapples prepared and preserved...	+15.7%	Kenya, Swaziland
20082090	Pineapples prepared and preserved...	+14.9%	Kenya, Swaziland
20083090	Citrus fruit prepared and preserved...	14.9%	Swaziland
20094930	Pineapple juice...	+11.7%	Kenya
08051020	Sweet oranges	+12.8%	Swaziland, Zimbabwe
20082071	Grapefruit segments, preserved and prepared...	+10.6%	Swaziland
07081000	Fresh and chilled peas...shelled or unshelled	+10.1%	Kenya, Zimbabwe
07082000	Fresh or chilled beans...shelled or unshelled	+10.1%	Kenya

Source: Extracted from 'The Costs to the ACP of Exporting to the EU under the GSP', ODI, Final Report, March 2007.

Fiji would be likely to face difficulties in adjusting its export patterns, both in the sugar sector and from the loss of 'global sourcing' concessions secured for canned tuna under the IEPA. A high percentage of Kenyan exports (69.9%) would be subject to the reimposition of duties under an alternative trade regime (mainly horticulture, floriculture, and inland fisheries exports), but at a relatively moderate average level of additional duties. The greatest impact in the horticulture and floriculture sector is likely to be on future investment flows.

Under the alternative trade regime, Zimbabwe would face the reimposition of duties on over 70 per cent of its exports to the EU with moderate to high average levels of additional tariffs being imposed. The sugar sector would be worst affected. Moderate levels of additional duties are likely to be imposed on Zimbabwe's horticulture and floriculture exports,

with this likely to hinder the economic rehabilitation of these important export sectors.

A high percentage of Namibia's total exports to the EU would be subject to additional duties (51%) with, on average, moderate average levels of additional tariffs being imposed. However, this average disguises very different sector effects. The additional duties levied on beef exports under the MFN regime are high and this would probably result in the de facto commercial closure of the EU market to Namibian beef exports. Namibian fisheries exports, while facing moderate levels of additional duties, are likely to be less severely affected than the beef sector given Namibian exporters are currently operating largely in a sellers' market. In the short term some export earnings losses are likely to occur, but these could well be recouped in the medium to long term as new alternative

Table 3: EU tariff rates in the cocoa sector

Products	GSP rate
Cocoa beans	0
Cocoa paste	6.1%
Cocoa butter	4.2%
Cocoa powder	2.8%
Cocoa powder containing 5-65% sugar	2.8% + €25.2/100kg
Cocoa powder containing 65-80% sugar	4.5% + €31.4/100kg
Cocoa powder containing more than 80% sugar	4.5% + €41.9/100kg
Chocolate in slab	4.8% + EA MAX 18.7 I ADSZ

Source: EU Help Desk.

markets are developed. In the case of Namibia's expanding grape export sector the reimposition of MFN duties would be likely to result in some earnings losses, but are unlikely to lead to a major contraction of the sector although this could serve to halt further investment in the sector.

Of the Southern African countries which would be affected by reversion to an alternative trade regime, Botswana would see the lowest percentage of its total exports affected. However, this would be concentrated in the beef sector with the duties imposed effectively closing the EU market to commercially viable exports. Ivory Coast, Ghana and Cameroon would face increased duties on 33.7 per cent, 34.6 per cent and 19.2 per cent of their total exports to the EU respectively, with average additional duties of 10.3 per cent, 10.3 per cent and 14.9 per cent respectively. The worst affected sector would be banana exports, with the reimposition of duties occurring in the context of the extension of new EU tariff preferences to a range of Latin American banana exporters. This is serving to increase competition on EU banana markets and already undermines the already uncompetitive position of African banana exporters.

With increased competition in canned tuna markets, difficulties could be faced in passing on tariff increases to consumers, with the competitiveness of Ivorian and Ghanaian canned tuna exports being undermined. Reversion to GSP treatment could also hold back efforts to move up the cocoa value chain, given the tariff escalation which is a feature of the cocoa sector (Table 3).

A consequence of the regulation for the ongoing negotiations is that the opportunity to adequately negotiate contentious outstanding issues could be

lost. The contentious issues in the ongoing EPA negotiations relate in part to specific texts in the initialled agreements and in part to a range of unresolved issues, which could not be dealt with prior to the December 2007 deadline. These issues can be divided into four main categories: (i) provisions related to the use of traditional trade policy tools; (ii) provisions related to relations with third countries; (iii) rules of origin; and (iv) EPA related development assistance support. Negotiations around these issues have thus become complicated, with ACP negotiators often unaware of wider European Commission concerns, while EU negotiators are unaware of the local and regional context within which such policy tools are being used by the ACP governments concerned.

Legal considerations related to the EC proposal

From a legal perspective, an initial review of the Commission's proposed regulation suggests a number of difficulties. For example, the proposal to withdraw the 18 ACP countries from Annex I is based on their 'failure to take steps to ratify' the respective Agreements. This is not a relevant question under Regulation 1528/2007, which permits withdrawal only if there is a failure to ratify 'within a reasonable period of time' such that there is an 'undue delay' in the entry into force of the respective agreement. As a result, it is questionable whether the proposed regulation would be based on proper reasons, as required by Article 296 of the Treaty on the Functioning of the European Union. Nor, for that matter is it clear that the relevant conditions would be satisfied even if there are no steps towards ratification by 1 January 2014. It took five years for the EU—Israel Association Agreement to be ratified by all EU Member States.

The Commission's proposal also suffers from a more serious problem. Regulation 1528/2007 amounts to a provisional application of the respective EPAs by the EU. This means that the regulation is subject to Article 25 of the Vienna Convention on the Law of Treaties (VCLT), which restricts the grounds on which the EU is permitted to terminate its provisional application of the EPAs.

It might be questioned whether Regulation 1528/2007 is an act of provisional application to which Article 25 of the VCLT applies. The EU will no doubt draw attention to the fact that the respective Agreements distinguish between mutual 'provisional application' and a voluntary 'application'. Regulation 1528/2007 is undoubtedly an example of the latter. However, this distinction is unknown to the Vienna Convention. For these purposes, it does not matter that the provisional application is triggered by one of the parties acting voluntarily, or that it is not called 'provisional application', or that something else is termed 'provisional application'.

In the interests of legal security, Article 25(1) of the VCLT limits the right of a party to terminate its provisional application of a treaty to three situations: (a) by agreement between the parties; (b) according to the treaty itself; and (c) if the party seeking to terminate notifies the other party or parties that it does not intend to become a party to the treaty by completing all outstanding formal requirements, such as ratification.

Clearly the affected ACP governments do not agree to the termination of the provisional application of the DFQF access provisions of the initialled interim-EPAs. Equally, the respective treaties say nothing about termination of provisional application. This means that the default rule in Article 25(2) VCLT applies, and the EU can only withdraw its provisional application of the respective agreements if it notifies its intention not to become a party to these agreements.

If the above analysis is correct, the European Union has (perhaps unwittingly) restricted its scope of action, since its actions in provisionally applying the DFQF access provisions of the IEPAs invoked the disciplines of the VCLT, notably Article 25(2). In this context the only way that the EU can terminate Regulation 1528/2007 with respect to any given beneficiary country is by notifying that country that it does not intend to become a party to the respective EPA. What it cannot do is remove beneficiaries from Annex I of the regulation as the

Commission is proposing to do — not, at least, without violating article 25(2) of the Vienna Convention on the Law of Treaties.

Conclusions

Against this background, there would appear to be a case for the EU Council and European Parliament to call on the European Commission to review its 30 September proposal for the amendment of regulation 1528/2007 to reflect:

- (a) the ongoing nature of negotiations on the limited number of contentious provisions contained in the initialled IEPAs;
- (b) the unaddressed nature of important supplementary areas of negotiations, such as those on the rules of origin to be applied under the EPAs so as to promote the structural transformation of the basis of the integration of ACP economies into the global economy;
- (c) the diverse and complex regional realities in which the governments of countries potentially subject to withdrawal from the benefits of Regulation 1528/2007 find themselves, given the central importance of regional economic integration to overcoming the development challenges faced;
- (d) the increasingly complex global economic context within which ACP—EU trade relations need to evolve;
- (e) the relevant obligations incumbent upon the European Union under the VCLT, arising from the provisional application of the DFQF provisions of the initialled EPAs; and
- (f) the need for a mutual review process at ministerial level, to identify and address outstanding issues holding back the final conclusion of the various EPA negotiating processes.

International Trade & Regional Co-operation Section at the Commonwealth Secretariat

This Trade Hot Topic is brought out by the International Trade and Regional Co-operation (ITRC) Section of the Economic Affairs Division (EAD) of the Commonwealth Secretariat, which is the main intergovernmental agency of the Commonwealth — an association of 54 independent states, comprising large and small, developed and developing, landlocked and island economies — facilitating consultation and co-operation among member governments and countries in the common interest of their peoples and in the promotion of international consensus-building.

ITRC is entrusted with the responsibilities of undertaking policy-oriented research and analysis on trade and development issues and providing informed inputs into the related discourses involving Commonwealth members. The ITRC approach is to scan the trade and development landscape for areas where orthodox approaches are ineffective or where there are public policy failures or gaps, and to seek heterodox approaches to address those. Its work plan is flexible to enable quick response to emerging issues in the international trading environment that impact particularly on two highly vulnerable Commonwealth constituencies — least developed countries (LDCs) and small states.

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ITRC undertakes activities principally in three broad areas:

- It supports Commonwealth developing members in their negotiation of multilateral and regional trade agreements that promote development friendly outcomes, notably their economic growth through expanded trade.
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- It contributes to the processes involving the multilateral and bilateral trade regimes that advance the more beneficial participation of Commonwealth developing country members, particularly small states and LDCs.

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ITRC's most recent activities focus on assisting member states in the WTO Doha Round and the Economic Partnership Agreement (EPA) negotiations involving the African, Caribbean and Pacific countries (ACP) the European Union (EU), undertaking analytical research on a range of trade policy and development issues, and supporting workshops/dialogues for facilitating consensus-building on issues of Commonwealth members' interest, exchange of ideas, and disseminating results from informed analysis.

Selected Recent Meetings/Workshops supported by ITRC

20-21 October 2011: Commonwealth Investment Experts Group Meeting for the African region held in Kampala, Uganda

26-27 September 2011: Workshop on Elements of a Pro-Development Doha Round Result held in Hampshire, UK

19-21 September 2011: Panel Discussion on "The Doha Round and Multilateralism: Stakes for LDC's and SVE's" at the WTO Public Forum held in Geneva, Switzerland

18 July 2011: ACP/COMSEC/OIF/UNEP Joint Meeting on Environment, Climate Change and Trade held in Brussels, Belgium

07 July 2011: Brainstorming Session on "Negotiating Better" for Trade Negotiators from Small States held in London, UK

29 June - 01 July 2011: Regional Consultative Meeting on Procurement Development in the Pacific held in Brisbane, Australia

22-24 June 2011: ACP High Level Meeting in Preparation for the 3rd Global Review on Aid for Trade held in Geneva, Switzerland

13-14 June 2011: Meeting on Climate Change Mitigation and Safeguarding the Trading Interests of Small States and LDCs held in Hampshire, UK

9-13 May 2011: Meeting and Symposium on LDC development events at the UN LDC IV Conference held in Istanbul, Turkey

5-6 May 2011: Trade Policy Seminar for Commonwealth Parliamentarians (Southern Africa) held in Livingstone, Zambia

6-8 April 2011: Roundtable on Competition Law and Policy held in, Boston, USA

28-29 March 2011: OECD workshop on Aid for Trade held in Paris, France



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