

The Lisbon Treaty and Commonwealth Developing Countries: Implications for ACP-EU trade and trade negotiations

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The Lisbon Treaty which came into force on 1 December 2009 alters institutional arrangements and the distribution of responsibilities within the European Union. Despite being an internal EU change it is certain to produce external effects. Although neither the scale nor precise nature of these effects can yet be predicted clearly, this issue of Commonwealth Trade Hot Topics offers a preliminary guide to the potential areas of change and an assessment of how these might impact upon Commonwealth developing countries in general (including least developed countries and small vulnerable economies) and on members of the ACP group in particular.

Less a turning point than a staging post

The Lisbon Treaty is the latest in a line of agreements (from Maastricht to Nice via Amsterdam) that modify the basis of the EU's trade policy process. Addressing aspects of the Nice Treaty that created a degree of confusion and uncertainty it:

- changes the Union-level institutions responsible for external relations;
- creates a European External Action Service (EEAS);
- changes responsibilities for policy on trade and investment; and
- gives new powers to the European Parliament.

The broad thrust is to enhance the responsibilities and powers of the Union institutions relative to those of the European member states and to redistribute influence between the former. The Common Commercial Policy, for example, has been extended explicitly to apply with a few exceptions to trade in services, protection of intellectual property rights and foreign direct investment. Consequently, trade agreements covering areas of exclusive EU competence will now be adopted by a qualified majority (and not unanimous) vote within the Foreign Affairs Council of the EU and will no longer have to be ratified by member state national parliaments.

It is easy to exaggerate the potential impact of such change since Lisbon will not end the long established practice of European policy being created through political compromise between the different Union and national institutions – the 'habit of consensus'. But

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practice *will* evolve over time, and the trade-related effects on Commonwealth countries will not occur only from changes to formal trade policy.

Among the kaleidoscope of possibilities there are four key areas of change that appear particularly likely to occur and would have a direct impact on Commonwealth developing countries. These are the possible politicisation of development policy, the loss of a clear ACP identity, the increased influence of the European Parliament in a wide range of trade-related policy areas, and the shift of investment policy to the Union level.

Blurring development and foreign policy

The new institutions may blur development with other foreign policy goals. There are two new Union-level figures with responsibilities for external relations: the High Representative for Foreign Affairs and Security Policy and Vice President of the European Commission (Baroness Catherine Ashton); and the President of the European Council (Herman van Rompuy). There will be some shifting of responsibilities between them and the four Commissioners who have traditionally been responsible for relations with developing countries: the Development Commissioner (Andris Piebalgs), the Enlargement and European Neighbourhood Policy Commissioner (Štefan Füle), the Commissioner for International Cooperation Crisis Response and Humanitarian Aid (Kristalina Georgieva), and the Trade Commissioner (Karel De Gucht).

In addition to sharing pre-existing responsibilities with the established actors, these two new figures are expected to bring to bear on European external policy a wider range of issues with the result that diplomatic, defence, development cooperation and trade instruments may be used more consistently in a politically directed fashion to achieve EU foreign relations objectives. There may be a parallel politicization at the developing country level where the new EU Delegations will be empowered to represent the Union in the full range of its competencies, with a bolstering of EU Ambassador's role in political dialogue.

One positive change for Commonwealth developing countries is that Lisbon identifies as the '*primary objective*' of development co-operation '*the reduction and, in the long term, the eradication of poverty*'. This is a stronger emphasis than under previous policy in which three other aims were mentioned on equal footing. It could be used by Commonwealth states to offset any increased politicization of relations.

ACP affected first

Whatever the eventual balance between poverty reduction and other EU goals, ACP states will be affected by the reshuffling of responsibilities in ways that are more certain and predictable than many of the other Lisbon effects. The change of most immediate importance is the creation of the EEAS. Although its exact scope, character and responsibilities are still under being developed, the ACP will lose their separate identity. The EEAS will have geographical desks covering all countries and regions of the world. It will be supplanted as a distinctive grouping by regional subdivisions (such as EU-Africa, EU-Latin America).

This comes on top of the removal from Lisbon of two key references to the ACP and their aid funding mechanism. The Maastricht Treaty referred explicitly to 'the ACP', establishing the intergovernmental nature of EU-ACP relations. In parallel, the Maastricht also provided that

the European Development Fund should be financed outside the EC budget. Both references have been dropped in Lisbon.

This could lead to more direct competition between the ACP and other potential recipients of EU 'development' spending at the same time as the edges of 'development' may become blurred into foreign and security policy objectives. The creation of the EEAS, for example, may result in aid programming and policy reflecting more the approach developed by DG Relex (prioritizing conflict and peace issues in country-level strategies) rather than the more poverty-focussed approach of DG Development under the Cotonou Partnership Agreement.

Negotiations between the High Representative, the Council, the Commission and the Parliament in June 2010 produced an agreed wording to key documents that recognised the 'responsibility' of the Development and Humanitarian Commissioners for aid instruments even though proposals for any change will be submitted jointly with the EEAS. If, despite this, there is a change in practice the result could be that European aid becomes led less by traditional development priorities and more by the wider interests of the EU.

European Parliament is central

The European Parliament is central not only to the determination of aid focus (since it must approve the EEAS architecture) but also in the areas of trade and trade-related policy. This centrality derives less from the European Parliament's formal *power* and more from its enhanced *influence*. It has no new powers on the formal preparation of trade negotiating mandates, and no new active formal role either in the process of negotiations or in the monitoring of implementation of the agreements. But the scope which the Parliament has for exercising influence over the negotiating process has been enhanced because it can now withhold assent to agreements negotiated if they are not consistent with Parliamentary positions. Whilst this is a 'nuclear option' (since Parliament can only reject a draft agreement outright) that is unlikely to be exercised in practice, the requirement that Parliamentary approval must be obtained is bound to have an influence on the whole course of negotiations. This is especially likely since there is a parallel enhanced right of the Parliament to be kept informed.

Given the long-established 'habit of consensus' in policymaking by the EU institutions, no sharp changes in practice are certain though chance occurrences determined by 'events' cannot be ruled out. Much will depend on how skilfully individual parliamentarians are able to exploit the opportunities and on the nature of the issues which they choose to take up.

Given this, the impact on Commonwealth countries of the Parliament's enhanced role may well be the consequence of Parliamentary opinion outside the realm of 'trade policy' narrowly defined. The Lisbon Treaty makes the European Parliament a stronger lawmaker by bringing within the "co-decision" procedure, under which Parliament has equal rights with the Council, over 40 new fields that lie outside 'core' trade policy but often have potential trade-related effects.

Of clear potential ACP importance, for example, is that members of the European Parliament (MEPs) are now on an equal legislative footing with the Council regarding EU policy on agriculture and on fisheries. MEPs may also acquire more influence on the scope and application of food safety and SPS control measures, the development of EU agricultural product quality standards, and the elaboration of labelling requirements. Given the strong

role of consumer opinion (possibly encouraged by the agricultural lobby) in driving ever higher formal and private sector standards, the more central involvement of Parliamentarians in standard setting could result in an even more rapid escalation.

Investment treaties must be re-examined

Following the implementation of Lisbon Commonwealth developing countries must re-examine any Bilateral Investment Treaties (BITs) with a European state. This is because the new rules on foreign direct investment have transferred with immediate effect powers from the Member States to the Union.

Investment policy, broadly defined, will remain a 'mixed' rather than an exclusively Union responsibility since the Union institutions probably do not have authority for negotiation and enforcement in respect of portfolio investments or investment in the form of intellectual property rights. But the continued validity of the large number of the BITs negotiated by the member states in the past is now questionable. The EU may introduce rules that 'grandfather' such bilateral accords. If it does not there is a danger that the issue could be raised at a later date if a company takes action in the courts to challenge the Commonwealth country's domestic law or regulation on the grounds that, whilst in conformity with the BIT, they no longer have binding force. Rather than act defensively, Commonwealth developing countries that have BITs with one or more European states could take the opportunity to assess their conformity of the provisions with Community law and seek to renegotiate in any case in which the country considers that provisions more clearly consistent with EU law would be more favourable. As with many aspects of Lisbon nothing is certain and in that sense there is a great deal at play.

A call to action

Adverse effects from the Lisbon Treaty are not inevitable. The internal changes that the EU has agreed to make should be seen by Commonwealth developing countries as a spur to action to advance their interests. A priority is to establish a good working relationship with key MEPs. This is likely to be required sooner rather than later for those Commonwealth countries that are not parties to an Economic Partnership Agreement (EPA) or other free trade agreement (FTA) with the EU.

Establishing an effective dialogue with the European Parliament to ensure that Commonwealth voices are heard poses a significant challenge. It should include (but go well beyond) using *fora* such as the EU-ACP Parliamentary Assembly and the regional assemblies that will be created. It requires early and sustained engagement with the European Parliament, organised in association with friendly MEPs (who need to be identified in advance), communicating clear and well documented messages articulated in ways designed to appeal to a wide cross section of political and national opinion. It also requires an understanding of both the avenues for intervention (parliamentary questions, committee meetings, plenary sessions, informal contacts) and the limits of Parliamentary influence within the trade negotiation and trade implementation process.

The EU's Generalised System of Preferences (GSP), which will expire in December 2010 and is currently being renewed, will be an early litmus test for the success of Commonwealth developing countries in communicating their interests to Parliament. States that have not signed an interim or full EPA (or other FTA) are most directly in the firing line since their

access to the EU market is determined by the GSP. This includes all least developed countries and ACP states outside EPAs as well as South and South East Asian Commonwealth developing countries that are eligible only for the standard GSP.

The GSP has been renewed many times in the past, but this time may be different. The increased likelihood of development and other European foreign policy objectives being fused is happening at the same time as the Commission has indicated it will pursue a more 'assertive trade diplomacy' to ensure its exporters are not disadvantaged compared to their American and Asian competitors. India and South Africa are named explicitly in the Commission's first report to the Council and Parliament on market access.

Initial statements by both the Commission and the European Parliament on the renewal of the GSP tend to emphasise a desire to increase political, social, labour and environmental conditionality and, in some cases, hint at scaling back benefits from countries with which the EU wishes to negotiate an FTA (in order to increase the pressure on them to accede). Any move in this direction would be problematic, of course, for those states that have opted out of the EPAs in the belief that they could safeguard their export interests without altering their import policy in undesired ways through the Everything But Arms and standard GSP regimes.

Most countries in a formal trade agreement with the EU are partly protected from any 'Lisbon effect' since the accords establish their own set of joint consultative and decision-making institutions within which any policy change must be discussed and agreed. This applies to all the (I)EPAs except that of the Pacific and to the South Africa Trade Development and Co-operation Agreement. Nonetheless, even these countries could be vulnerable in practice given the substantial need of many for aid for trade.