Briefing Note

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Legal constraints on the EU's ability to withdraw EPA preferences under Regulation 1528/2007

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Introduction

On 30 September 2011 the European Commission launched its latest salvo in the negotiations of economic partnership agreements (EPAs). As reported in these pages, it issued a proposal to withdraw 18 African, Caribbean and Pacific (ACP) countries from the list of beneficiaries of preferences under Regulation 1528/2007 as of 1 January 2014.[1]

These 18 ACP countries have been benefiting from Regulation 1528/2007 since 1 January 2008. The Regulation was intended to continue the unilateral duty free quota free market access granted to ACP countries under the Cotonou Agreement for countries that had initialled or signed interim or full Economic Partnership Agreements, pending the full implementation of these agreements as WTO consistent free trade agreements.

The Regulation foresaw that these agreements might not be ratified within a 'reasonable period of time'. Should that occur, and should the entry into force of these agreements be 'unduly delayed' as a result, the EU reserved the right to remove beneficiary countries from the list (Article 2(3)(b)). The Commission's proposal seeks to implement this right.

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[1] Commission Proposal to amend Annex I to Council Regulation (EC) No 1528/2007 COM(2011) 598 final. The 18 countries are Botswana, Burundi, Cameroon, Comoros, Cote d'Ivoire, Fiji, Ghana, Haiti, Kenya, Lesotho, Mozambique, Namibia, Rwanda, Swaziland, Tanzania, Uganda, Zambia, and Zimbabwe.

Formal problems with the Commission's proposal

There are various problems with the Commission's proposal. For a start, Article 2(3)(b) of the Regulation only permits the European Union (EU) to withdraw market access once there has been a failure to ratify within a reasonable period of time. It does not permit withdrawal just because 'steps' have not been taken to ratify, which is the reason given in the Commission's proposal. Formally, this means that the proposal lacks a clear legal basis.

Even if one equated the proposal's concept of 'taking steps to ratify' with the Regulation's standard of 'failure to ratify within a reasonable period of time', it is questionable whether, in each individual case, this will have occurred by 1 January 2014, and, furthermore, that if it has, there will be an 'undue delay' in the entry into force of the respective agreement. Both conditions must be satisfied.

Furthermore, the Commission's proposal must explain why this is the case for each affected ACP country. So far, it simply lists the dates the agreements were initialled alongside a claim that there has been no progress in ratification to date. This does not conform to Article 296 of the Treaty on the Functioning of the European Union (TFEU), which requires all EU legal acts state the reasons on which they are based. This does not mean that reasons must always be given in full. But at least when a Regulation states that conditions must be fulfilled before the EU can take further action, it must be clear that those conditions are in fact fulfilled.

The Commission's proposal and the law of treaties

The Commission's proposal also suffers from a more serious problem. Regulation 1528/2007 constitutes a unilateral provisional application of the respective EPAs by the EU. This means that it is subject to the Vienna Convention on the Law of Treaties (VCLT), which imposes conditions on the termination of provisional application. These conditions have not been satisfied.

Provisional application

Article 25 of the Vienna Convention on the Law of Treaties recognizes that treaties may be 'provisionally applied' by the parties[2] before they enter into force. It can take time for treaties to be ratified according to domestic constitutional procedures, and provisional application is a useful means of ensuring that treaties can be implemented while that process continues.

The mechanism of provisional application has to balance two competing interests. On the one hand, it has to provide sufficient legal security so that the other party can rely upon the provisions being provisionally applied. On the other, because the treaty is not yet in force, it is also necessary to allow for the termination of provisional application with relative ease. Article 25 of the Vienna Convention seeks to strike this balance.

It does so by limiting the right of a party that provisionally applying a treaty to terminate that provisional application. Article 25(2) lists three ways in which this can be done: by agreement between the parties; according to the treaty itself; and if the party seeking to terminate notifies the other party or parties that does not intend to become a party to the treaty by completing all outstanding formal requirements, such as ratification. Where these conditions are not satisfied, the provisions of the treaty being provisionally applied are treated as applicable to that party: a series of arbitrations has held the Energy Charter Treaty to be binding on Russia, Georgia, Gibraltar and Bulgaria on this basis. The claims in the arbitration against Russia alone were worth US$100 billion.[3]

[2] Technically, a negotiating or signatory party only becomes a 'party' to a treaty once it is in force.
[3] www.encharter.org/index.php?id=213&L=0#Yukos

Regulation 1528/2007 as provisional application of initialled Economic Partnership Agreements

There can be little doubt that Regulation 1528/2007 meets the description of an act of provisional application to which Article 25 of the Vienna Convention applies. The Regulation itself is called 'Council Regulation … *applying the arrangements* for products originating in certain states which are part of the African, Caribbean and Pacific (ACP) Group of States *provided for in agreements establishing, or leading to the establishment of, Economic Partnership Agreements*' (emphasis added). And its Recital 4 also refers to provisions in the EPAs authorising the parties, unilaterally, to 'apply' the agreement.

It will no doubt be objected that the agreements themselves distinguish between mutual 'provisional application' and unilateral 'application' and, that Article 25 only applies to the former.

The difference is illustrated by Article 243 of the CARIFORUM EPA, which is typical.[4] Paragraph 3 refers to mutual 'provisional application':

> Pending entry into force of the Agreement, the European Community and the Signatory CARIFORUM States shall agree to provisionally apply the Agreement, in full or in part. This may be effected by provisional application pursuant to the laws of a signatory or by ratification of the Agreement. …

And paragraph 4 refers to unilateral 'application':

> Notwithstanding paragraph 3, the European Community and Signatory CARIFORUM States may take steps to apply the Agreement, before provisional application, to the extent feasible.

It is on the basis of provisions on the model of this paragraph 4 that, by its own terms, Regulation 1528/2007 purports to 'apply' the respective agreements.

However, the Vienna Convention draws no distinction between unilateral 'application' and mutual 'provisional application'. Article 25(1) simply states:

> 1. A treaty or a part of a treaty is applied provisionally pending its entry into force if:
>
> (a) the treaty itself so provides; or
> (b) the negotiating States have in some other manner so agreed.

In this case, the parties have indeed so agreed, by establishing a mechanism by which one of the parties can unilaterally apply the agreement in whole or in part, 'to the extent feasible'.

One might object further that there is a principle of reciprocity that requires provisional application to be mutual. But there is no principle of reciprocity in the relevant provisions of the Vienna Convention. Second, unilateral 'application' under the initialled agreements is not a true 'unilateral act'. It is an act foreseen, and previously agreed, in the agreements themselves. But even if it were a unilateral act, this would make no difference. It is quite possible under international law for states (and international organizations) to bind themselves by means of unilateral acts. The International Law Commission has for some years been engaged in a significant study on just this topic.[5]

The possibility of unilateral provisional application of treaties is also supported by doctrine and practice. Sir Ian Sinclair, in his classic work *The Vienna Convention on the Law of Treaties*, recognizes that 'there are other instances where some only of the negotiating States may agree to apply the treaty or part of it

[4] Article 243(3) and (4) 'apply', as per Article 24(4) VCLT. There is significant academic debate on what the legal force is of this 'application'; the most convincing theory is that there is a collateral agreement to this effect (which may be unwritten): see Anneliese Quast, *The Binding Force and Legal Nature of Provisionally Applied Treaties*, PhD thesis (University of London: 2010), at 190.

[5] See ILC, Analytical Guide, Unilateral Acts of States, at http://untreaty.un.org/ilc/guide/9_9.htm .

provisionally pending its entry into force.'[6] An example is the 2003 social security agreement between the Netherlands and Romania, which provides that 'The Netherlands shall apply Article 4 of this Agreement provisionally from the first day of the second month following the date of signature.'[7]

Another objection might relate to terminology. It does not matter that the EPA Regulation (like the EPAs themselves) uses the term 'application' rather than 'provisional application'. The Vienna Convention does not require any wording at all; it just refers to the act of provisionally applying a treaty. And here, too, there is practice. The 1949 Air Transport Agreement between Czechoslovakia and Finland provided that its provisions 'shall be applied from the date of signature', and the 1947 Air Transport Agreement between Chile and the US provided that '[b]oth contracting parties shall undertake to make effective the provisions of this agreement, within their respective administrative powers, from the date on which it is signed.'[8]

Finally, it might be objected that it is not possible to 'provisionally apply' an agreement that has only been initialled, as opposed to one that is signed. But this is not the case. Article 24(4) of the Vienna Convention states (with emphasis) that:

> The provisions of a treaty regulating the authentication of its text, the establishment of the consent of States to be bound by the treaty, the manner or date of its entry into force, reservations, the functions of the depositary *and other matters arising necessarily before the entry into force of the treaty apply from the time of the adoption of its text*.

Under Article 9 of the Vienna Convention, a text is adopted 'by the consent of all the States participating in its drawing up'. This is signified by the act of initialling of a treaty text. The Vienna Convention expressly foresees that an 'initialled' treaty text can be provisionally applied.

One is tempted to suppose that the EU failed to see the international law dimension of provisional application because of its domestic procedures. Article 218(5) TFEU states:

> The Council, on a proposal by the negotiator, shall adopt a decision authorising the signing of the agreement and, if necessary, its provisional application before entry into force.

Signature might be a condition of provisional application under the TFEU.[9] But it is not a condition under international law – and that is what governs the EPAs.

In sum, everything points to Regulation 1528/2007 as a provisional application of the respective interim and full EPAs. 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'. But if this is true, then when can the EU's provisional application of the agreements be terminated?

Termination of provisional application

Article 25(2) VCLT deals with the termination of provisional application. As mentioned above, it seeks to balance the interest of the party provisionally applying being able to withdraw provisional application for good reasons with the interest of the other party in having a degree of legal security while it continues the process of ratification. The provision states as follows:

> **Article 25 VCLT (Provisional application)**
>
> 2. Unless the treaty otherwise provides or the negotiating States have otherwise agreed, the provisional application of a treaty or a part of a treaty with respect to a State shall be terminated if that State notifies the other States between which the treaty is being applied provisionally of its intention not to become a party to the treaty.

[6] Ian Sinclair, *The Vienna Convention on the Law of Treaties*, 2nd ed (Manchester: Manchester University Press, 1984) at 46. See also Andrew Mitchie, *The Provisional Application of Treaties with Special Reference to Arms Control, Disarmament and Non-Proliferation Instruments*, LLM thesis (University of South Africa 2004), at 63.

[7] This example is in Andrew Mitchie, ibid.

[8] These examples are found in Hans Blix and Jirina Emerson, *The Treaty Maker's Handbook* (Oceanea: Dobbs Ferry, NY, 1973), at 85.

[9] The act of signature usually marks the 'authentication' of a text in all official languages: Article 10 VCLT.

Given that the negotiating states have not agreed to the EU's termination of its provisional application of the treaty, the question is whether the treaty 'otherwise provides' that the EU may terminate its application of the respective treaties. If not, the EU will be able to terminate this application *but only if it notifies the other parties of its intention not to become a party to the treaty*.

Termination of provisional application according to the agreements

If one looks at the wording of the actual agreements, one sees two main formulations (recital 4 of Regulation 1528/2007 is inaccurate in only referring to one of these formulations). The Cote d'Ivoire EPA states:

> Notwithstanding paragraph 4, the EC Party and Cô te d'Ivoire may apply the agreement, in whole or in part, before its provisional application, to the extent that this is possible under their national legislation.

The other agreements, which is to say the CARIFORUM Agreement, the Pacific Agreement, the East African Community (EAC) Agreement, the Eastern and Southern Africa (ESA) Agreement, and the Southern Africa Development Community (SADC) Agreement simply say 'to the extent that this is feasible', or (in the case of Central Africa, 'to the extent that this is possible'), without continuing with the phrase 'under their national legislation'.

It would be strange if these paragraphs were to be interpreted differently. Their essence is that there is a possibility for either party to provisionally apply the treaty. The references to 'the extent [to] which this is feasible', 'possible' or 'possible under their national legislation' clearly refers in each case to domestic constraints on provisional application. This is because some constitutional systems do not permit provisional application without parliamentary approval; and some do not permit it at all.

In short, 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 the respective ACP countries that it does not intend to become a party to these agreements.[10] This has not yet been done.

Conclusions

If the above analysis is correct, the EU has (perhaps unintentionally) restricted its scope of action. It has been argued here that Regulation 1528/2007 is an act of provisional application of the respective interim and full EPAs, and as a result falls under the discipline of Article 25(2) of the Vienna Convention. Because of the drafting of the provisional application clauses in these agreements, it seems, further, that 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.

[10] There is an apparent gap in Article 25(2) in relation to treaties which are provisionally applied by a party that has not only signed but also pending entry into force. It does not seem to make sense that in such a case termination of provisional application is only possible by notifying an intention not to become a party to a treaty when that intention has already been expressed. But nor does it make sense to apply the provisions in the treaty on termination. There may be no such provisions, nor any that may be implied (Article 56(1) VCLT) with the potential result that provisional application would be permanent. No obvious solution presents itself.

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