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COVER NOTE

from: Secretary-General of the European Commission,
signed by Mr Jordi AYET PUIGARNAU, Director

date of receipt: 3 July 2006

to: Mr Javier SOLANA, Secretary-General/High Representative

Subject: Communication from the Commission to the Council and to the
Representatives of the Governments of the Member States meeting
within the Council to give orientation to the Commission for the revision
of the Agreement on Trade, Development and Cooperation between the
European Community and its Member States, of the one part, and the
Republic of South Africa, of the other part

Delegations will find attached Commission document COM(2006) 348 final.

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COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 28.6.2006
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**COMMUNICATION FROM THE COMMISSION TO THE COUNCIL AND TO THE
REPRESENTATIVES OF THE GOVERNMENTS OF THE MEMBER STATES
MEETING WITHIN THE COUNCIL**

**to give orientation to the Commission for the revision of the Agreement on Trade,
Development and Cooperation between the European Community and its Member
States, of the one part, and the Republic of South Africa, of the other part**

EXPLANATORY MEMORANDUM

The Trade, Development and Cooperation Agreement between the European Community and its Member States, of the one part, and the Republic of South Africa, of the other part (TDCA) was signed in October 1999 and has applied provisionally and partially from 1 January 2000. After ratification by all parties, the Agreement entered fully into force on 1 May 2004.

Article 103 of the TDCA calls for a review within five years of its entry into force in order to address the possible implications of other arrangements which may affect the Agreement. The “other arrangements” which the authors of the Agreement had in mind include undoubtedly the Cotonou Agreement, which itself has been revised. Article 18 of the TDCA calls for further steps in the process of trade liberalisation and for a review of the trade provisions, in particular of the customs duties applicable to products in the “waiting lists” of the TDCA, i.e. products for which limited or no trade liberalisation is laid down in the Agreement. Article 30 calls for an extension of the scope of the Agreement to liberalisation of trade in services.

Article 97(3) provides that the Cooperation Council shall have the power to take decisions in respect of all matters covered by the TDCA and Article 106(1) gives to the Cooperation Council the power to decide on amendments put forward by any Party. This provision should be used for the proposed revision.

In the course of 2004 the Commission, the Member States and the Republic of South Africa conducted a review of the TDCA, focusing primarily, but not exclusively, on those sections of the Agreement that were provisionally being applied. This review led to the adoption by the Cooperation Council on 23 November 2004 of “Joint Conclusions” setting out broad guidelines for a revision of the TDCA. The Joint Conclusions call *inter alia* for the political dialogue between the parties to “include exchanges of views on more recent political issues such as Weapons of Mass Destruction, Counter-terrorism and the International Criminal Court”, and recommend that “reciprocal trade liberalisation be continued and possibly accelerated, taking into account the sensitivities on both sides, the regional dimension and the time schedule for the ongoing negotiations concerning the Economic Partnership Agreement in Southern Africa”.

On the basis of these Joint Conclusions, Commission staff and the representatives of the Member States in the Council ACP Working Group have further discussed and refined the scope and purpose of a revision of the TDCA.

The overall assessment Commission staff have made of these recommendations in terms of amendments to the TDCA is that a major overhaul of the agreement is not required. However, the Agreement needs to be updated to reflect the new political and security provisions of the revised Cotonou Agreement, further trade liberalisation, cooperation in trade-related areas, strengthening the environmental dimension, and updated wording for some of the articles on economic and other areas of cooperation.

After having negotiated with South African authorities, the Commission will propose to the Council a more finalised text in the form of a decision of the Cooperation Council in accordance with Article 300(2), second subparagraph, of the EC Treaty.

The Commission therefore proposes that the Council issue the appended orientations for the revision of the TDCA.

PROPOSED ORIENTATIONS FOR THE REVISION OF THE TDCA

1. INTRODUCTION

The Trade, Development and Cooperation Agreement between the European Community and its Member States, of the one part, and the Republic of South Africa, of the other part (TDCA) was signed in October 1999 and has applied provisionally and partially from 1 January 2000. After ratification by all parties, the Agreement entered fully into force on 1 May 2004.

Article 103 of the TDCA calls for a review within five years of its entry into force in order to address the possible implications of other arrangements which may affect the Agreement. The other arrangements which the authors of the Agreement had in mind include undoubtedly the Cotonou Agreement, which itself has been revised.

Article 18 of the TDCA calls for further steps in the process of trade liberalisation and for a review of the trade provisions, in particular of the customs duties applicable to products in the “waiting lists” of the TDCA, i.e. products for which limited or no trade liberalisation is laid down in the Agreement. Article 30(4) states that the objective of ‘further liberalisation of trade in services’ shall be subject to a first examination by the Cooperation Council at the latest five years after the entry into force of the Agreement.

The review of the TDCA which the Commission, the Member States and the Republic of South Africa conducted during 2004 led to the adoption by the Cooperation Council on 23 November 2004 of “Joint Conclusions” setting out broad guidelines for a revision of the TDCA.

2. PURPOSE OF THE PROPOSED REVISION

The Trade, Development and Cooperation Agreement is still by and large a good basis for cooperation between the signatory parties. In the past six years none of the parties have shown any intention of making fundamental changes to the text.

As implied in Articles 18, 30 and 103 of the Agreement, the purpose of the revision should be to examine possible further trade liberalisation and to bring the TDCA in line with recent international commitments, including the Revised Cotonou Agreement, the International Criminal Court and the global fight against terrorism. The revision is also an opportunity to strengthen the environmental dimension of the Agreement, including the environmental impact resulting from enhanced trade in goods, and to update the language in some of the provisions.

3. ISSUES INVOLVED

In the light of the above, the Commission has identified the following issues to be considered for amendment:

- In the Preamble, an explicit reference to the Millennium Development Goals needs to be included.
- In Title I, with regard to the political dimension, the Agreement should be brought into line with the Council provisions concerning the inclusion in international agreements of references to the fight against terrorism, the International Criminal Court, non-proliferation of weapons of mass destruction and other international commitments.
- In Title II on trade, and its annexes, further trade liberalisation must be considered in line with Article 18. In addition, the resolution of outstanding trade issues requires minor changes.
- In Title III, on trade-related issues, rules of origin, trade in services and cooperation and mutual administrative assistance in customs matters need to be considered.
- In Title IV on economic cooperation, updated wording must be considered for cooperation in the fields of energy, transport, agriculture and sanitary and phyto-sanitary matters.
- In Title V on development cooperation, some provisions concerning implementation need to be brought in line with the new Financial Regulation of the Commission.
- In Title VI concerning cooperation in other areas, updated or new wording must be considered for cultural cooperation, for cooperation on matters relating to justice, freedom and security and the fight against drugs, money laundering and organised crime. In addition, a provision on cooperation in the field of migration needs to be added.
- In Title VIII, the dispute settlement system should be improved in so far as trade and trade-related issues are concerned, in order to increase its effectiveness.

3.1. Millennium Development Goals

Objective of the proposed change

To affirm the partners' commitment to these goals and ensure coherence with the preamble of the revised Cotonou Agreement.

Proposed amendments

Add a recital on the Millennium Development Goals.

Relevant provisions: Preamble.

3.2. Security issues

Objective of the proposed change

To ensure coherence with the political commitments expressed by the EU on the fight against terrorism (Seville Presidency Conclusions, 21-22 June 2002), cooperation in countering the proliferation of weapons of mass destruction (Council Conclusions of 17 November 2003) and support to the International Criminal Court (Common Position 2003/444/CFSP of 16 June 2003 and Thessaloniki Presidency Conclusions, 19-20 June 2003). Bring the TDCA in line with the revised Cotonou Agreement.

Proposed amendments

- a legally binding commitment to cooperating in countering the proliferation of weapons of mass destruction taking into account the EU policy paper concerning the non-proliferation clause in EU relations with third countries;
- a legally binding commitment to the fight against terrorism;
- reference in the preamble to the “joint commitment of EU and ACP partners to international justice and the fight against impunity” and to the Rome Statute of the International Criminal Court, which entered into force on 1 July 2002 and a legally binding commitment to cooperating in this field;
- a legally binding commitment to cooperate in the prevention of mercenary activities.

Relevant provisions: Preamble; new provisions to be included in Title I.

3.3. Political dialogue

Objective of the proposed change

Bring the provisions of Articles 3 (non-execution) and 4 (political dialogue) into line with the revised Cotonou Agreement.

Proposed amendments

In Article 3(4), include a commitment to exhaustive political dialogue as described in Article 4, prior to taking “appropriate measures”. Bring Article 4 more into line with the revised text of Article 8 of the Cotonou Agreement.

Relevant provisions: Articles 3 and 4.

3.4. Further trade liberalisation

Objective of the proposed change

Include new provisions for further reciprocal trade liberalisation or acceleration of existing liberalisation schedules in the areas of goods (customs duties applicable to products included in the ‘waiting lists’), taking into account the provisions negotiated

under EC-SADC EPA negotiations and the sensitivities on both sides. Ensure coherence of these provisions with those negotiated under EC-SADC EPA negotiations.

Background / Problem to be solved

Both sides have exchanged comprehensive papers on their respective levels of ambition with respect to trade provisions to be revised. These are of two kinds:

- the first aims at improving the TDCA in areas where commitments already exist (mainly trade in goods). This would also be an opportunity to make some necessary technical adjustments to the Annexes.
- the second aims at extending the scope of the TDCA to areas which are currently not or partially covered by the Agreement and could include WTO-plus commitments in several new regulatory areas.

Proposed amendments

Further liberalisation of the trade in goods (review of excluded products and acceleration of existing liberalisation schedules contained in Articles 11 to 15 and 17, plus the relevant Annexes). New legally binding commitments concerning the review of the safeguard clause (Articles 16 and 24-26).

Relevant provisions: Title II and Annexes I to VII, in particular Articles 11-15 and 17, as well as Articles 16 and 24-26.

3.5. Trade-related issues

Objective of the proposed change

Include new binding commitments and enhanced cooperation in trade-related areas. Ensure coherence of these provisions with those negotiated under EC-SADC EPA negotiations.

Background / Problem to be solved

These commitments will be an incentive for rules based market access within the region. They will ensure additional transparency and predictability for operators and enforceability of rules in the region and consolidate development.

Proposed amendments

Include binding commitments in areas such as services (Articles 29-30), investment (Articles 32-34), and new commitments on Government procurement (Article 45).

Enhanced cooperation and possibly additional commitments will also concern areas such as intellectual property (Article 46), competition (Articles 35-39), standardisation and conformity assessment and customs (Articles 47-48). Concerning rules of origin (Article 28 and Protocol 1), revision of some product-specific rules of origin concerning a limited number of tariff headings may be required.

Relevant provisions: Title III and Protocol 1.

3.6. Dispute settlement on trade and trade-related issues

Objective of the proposed change

Bring the dispute settlement system in line with more recent EC practice, in order to increase its effectiveness.

Background/Problem to be solved

The dispute settlement provisions of the TDCA represented a step forward at the time of their negotiation, but they fall short of the standards achieved in more recent agreements. Under the current system, possibilities for procedural blockages remain and important aspects of compliance are not regulated.

Proposed amendments

Further develop the rules on dispute settlement, in so far as trade and trade-related issues are concerned, through a Protocol to the TDCA which would set out in detail the principles and procedures to settle disputes.

Relevant provisions: Article 104.

3.7. Provisions on economic cooperation

Objective of the proposed change

Bring the wording of certain provisions in line with current thinking and EC policy.

Background/ Problem to be solved

The TDCA was negotiated in the late 1990s. On some of the issues EC policy and general thinking have further developed. Many of the proposed changes are minor or technical and would not normally require an amendment to the Agreement. But since amendments are needed in other sections, this is an opportunity to update some provisions. A more substantial change is proposed concerning sanitary and phyto-sanitary issues, which have turned out to be an important impediment to trade and therefore require enhanced cooperation.

Proposed amendments

The proposed amendments concerns sanitary and phyto-sanitary matters, energy, mining, transport, postal cooperation and tourism. Article 61 deals with sanitary and phyto-sanitary matters and with cooperation on Agriculture. The proposal is to split Article 61 into two, with stronger environmental language for Article 61 and with Article 61A dealing specifically with cooperation in sanitary and phyto-sanitary matters. Concerning transport it is proposed to split Article 59, with Article 59A dealing specifically with cooperation on maritime transport. Article 55 on “Information Society – Telecommunications and information technology” should be updated to take into account *inter alia* the evolution of technologies, the findings of the World Summit on Information Society and the interconnection of the EC and South Africa research networks. Less important changes concern enhanced cooperation on energy, in particular in promoting energy efficiency policy and

technologies as well as clean coal technologies, postal cooperation, mining and tourism. In addition the environmental impact of many of these provisions needs to be addressed.

Relevant provisions: Articles 56 to 61.

3.8. Development cooperation

Objective of the proposed change

Some provisions concerning implementation need to be brought into line with the new Financial Regulation of the Council and with the proposed regulation for development cooperation¹ or the equivalent legislative instrument, once it is adopted.

Background / problem to be solved

The TDCA contains certain provisions on implementation of development cooperation that have been superseded by the Community Financial Regulation. De facto they are not applied. There is a case for adjusting these provisions, as the general financial regulation applies across the board.

Proposed amendments

Review those provisions that have been superseded by the Financial Regulation.

Relevant provisions: Title V.

3.9. Cooperation in other areas

Objective of the proposed change

Bring the wording of certain provisions into line with current thinking and EU policy. Strengthen the provisions on such issues as justice, freedom and security, money laundering, drugs and migration.

Background / problem to be solved

The TDCA was negotiated in the late 1990s. On some of the issues EC policy and general thinking has further developed. The provision on cultural cooperation could be updated in the light of multilateral commitments. The fight against drugs and money laundering are dealt with in a single article, reflecting the thinking of that time. As the two issues are now considered linked but quite separate, the provision could best be split into two distinct articles with updated wording that should also include terrorism financing. New provisions must be added on combating organised crime and counter-terrorism and on cooperation in the field of migration. Stronger and updated wording needs to be adopted for the provisions on the environment. Revised possibilities for enhanced cooperation could be considered on the environment, social issues, information, press and audiovisual media, data protection and health.

¹ COM(2004) 629.

Proposed amendments

Include a reference in Article 85 to the UNESCO Convention on the protection and promotion of the diversity of cultural expressions, particularly with a view to its ratification and implementation. Split Article 90 into two, with Article 90A dealing with money laundering. Add new provisions on the above subject. Update the wording of Articles 84, 86 to 89, 91 and 92.

Relevant provisions: Title VI, Articles 84 to 92.