How to Ensure Development Friendly Economic Partnership Agreements - Lessons Across Regions

Services – Investment – Other Trade Dimensions
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Services – Investment – Other Trade Dimensions
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<td>Association Agreement</td>
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<tr>
<td>ACP</td>
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<td>Instituto Nacional das Comunicações de Moçambique</td>
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<td>INDOTEL</td>
<td>Instituto Dominicano de las Telecomunicaciones</td>
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<td>Maximum Residue Level</td>
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<td>NGO</td>
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<td>National Notification Authority</td>
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<td>Pacific Islands Forum</td>
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<td>REC</td>
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<td>RI</td>
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<td>SDR</td>
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<td>SDT</td>
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Introduction
Foreword

Economic Partnership Agreements (EPAs) provide an important opportunity for deeper regional integration, broader trade with the European Union and enhanced economic and social development in the African, Caribbean and Pacific (ACP) countries. They provide the opportunity only – but they should be carefully designed, implemented and monitored, to ensure that they contribute to the overarching goal of development. The European Commission and the Member States of the European Union have offered generous support for accompanying measures for EPA implementation as part of the joint EU Aid for Trade Strategy adopted in October 2007. This support in itself – however large it may be – will not avoid all risks of EPAs if not carefully targeted at the relevant areas of trade and economic policies of the ACP Countries and Regions.

When the WTO waiver, granting the EU the right to extend unilateral preferences for ACP exports otherwise inconsistent with WTO law, expired at the end of 2007 the EU and the ACP countries shouldered the task of negotiating EPAs as their new trading framework, in conformity with WTO rules. By that time, it had become widely accepted that the unilateral trade preferences had not been very successful in the first place: They had not generated a significant increase of ACP exports to the EU, nor had they led to a more diversified export base. Increased competitiveness, higher export diversification and larger regional markets are, however, prerequisites for sustainable economic growth. Such growth will only transform into sustainable social development if supported by a complex set of complementary policy areas. EPA negotiations, for their part, offer the chance to unleash trade potential in areas such as services exports and at the same time trigger policy reforms, thereby giving new impetus to trade, regional integration and development.

The German Federal Ministry for Economic Cooperation and Development (BMZ) attaches great importance to the conclusion of development-friendly comprehensive EPAs. Trade and development objectives and approaches need to be combined in the EPAs in a coherent manner. Besides further liberalising trade in goods, EPAs offer the possibility to negotiate rules on trade in services, market access for investment, intellectual property rights, competition and public procurement – the so-called Cotonou topics. The relevant chapters will prioritise regional liberalisation and harmonisation within the ACP regions over market access considerations between the EU and the ACP Countries. And they should prepare the ground for a favourable business and investment climate and for deeper regional integration.
We therefore welcome the publication of the studies in this volume and hope that a wide audience of experts, negotiators, and development practitioners in the ACP regions and in Europe will access them and draw on them in their important decision making. Based on a thorough legal, institutional, and economic assessment, the authors explore the link between the rules negotiated under comprehensive EPAs and their development potential. And they provide fresh ideas into how we can best ensure that EPAs assist ACP countries in reaping the gains of regional integration and trade.

Birgit Hofmann and Eckhard Volkmann, Division of Globalisation, Trade and Investment, German Federal Ministry for Economic Cooperation and Development
Cotonou issues in Economic Partnership Agreements and their development potential

by Regine Qualmann and Silke Trumm

Negotiations on Economic Partnership Agreements (EPA) of the European Commission and the African, Caribbean and Pacific (ACP) group of countries have been ongoing since 2002, and they have attracted much attention from the development community. Much of the actual negotiation procedures and of the drafting of legal texts has, however, been confined to the negotiators themselves and a small group of technical advisers and legal experts. Exchange of information and of negotiation experience between the groups or even with the wider audience of development practitioners has been very limited. Moreover, the sometimes heated debates focused mainly on the issue of reciprocal liberalisation of trade in goods and much less on the other chapters on trade in services and other trade-related aspects that have come to be known as the Cotonou issues.¹

The Caribbean EPA was signed on 15 October 2008 by the EU and the Caribbean Forum of ACP States (CARIFORUM)², and preparations for its implementation are now underway. It is a comprehensive agreement which reaches far beyond other trade agreements negotiated so far between developed and developing countries and covers among others trade in goods and services, market access for foreign direct investment, innovation and intellectual property rights, government procurement and competition policy.³ African regions and the Pacific ACP group currently continue negotiations, with a view to signing regional EPAs with the European Community and its member states in the course of 2009.⁴ Interim agreements which have been initialled by the Commission and a number of African and two Pacific states in late 2007 cover mainly trade in goods and primarily served to safeguard uninterrupted trade and preferential market access to the European Union.

Apart from still having to agree on a number of ‘contentious issues’ in the interim agreements⁵, the main question is now whether and how to move beyond trade in goods in the final EPAs, and to maintain regional coherence at the same time. The European Commission has made clear that she wishes to agree on comprehensive regional EPAs with the other groups, similar to the one signed with CARIFORUM. Moving beyond trade in goods to the inclusion of services and further trade related aspects in the EPA negotiations has, however, sparked much controversy over their
potential merits and risks, including in the Caribbean. While the pace and scope of reciprocal tariff dismantling for trade in goods under EPAs has also been disputed, the basic argument for liberalisation there was rather straightforward. Elements of reciprocity had to be introduced to trade relations between the EU and its former colonies to align the formerly unilateral preferences with the WTO principle of non-discrimination.6

WTO compatibility, however, is not the argument for the inclusion of wider aspects of trade in services and other issues in the EPAs. The reasons put forward by the EU for ‘comprehensive’ EPAs were to build the new trade relationship on a broader and more solid basis of trade rules and regulations than can be achieved through tariff reductions alone. The EC argues that additional chapters containing regulations for trade and investment would contribute to strengthening the enabling environment for trade and make ACP regions more attractive for investors. Together with fostering regional integration this would contribute to achieving the ultimate objective of development and poverty alleviation. For the Commission, the inclusion of Cotonou Issues hence became one of the corner stones of the ‘development dimension’ of EPAs.

The ACP countries pointed out that for them, while agreeable to the general point that trade liberalisation is only a necessary though not a sufficient condition to generate development outcomes of EPAs, a much higher priority was on agreeing on firm commitments for appropriate financial assistance for the implementation of the EPAs. In their view the development dimension of EPAs was necessarily connected to the compensation of revenue loss, support for adjustment measures and for overcoming supply-side constraints. These needs were not only felt to be of more immediate concern than negotiating further trade related aspects under EPAs; doubts were also raised whether ACP countries and regions were actually ready and in a position to negotiate issues such as services trade or competition policy under EPAs.

Indeed, many ACP countries lack respective policies and regulations at national level, and much less do the EPA regions have comprehensive bodies of regional provisions in this regard. Given that their capacities were already stretched with the goods negotiations, most African ACP countries and regions opted for at least back-loading these issues in the negotiations while some outrightly objected to their inclusion in the EPAs. Even the CARIFORUM-EU EPA, despite being praised by many, has received criticism of being overly ambitious and potentially curbing the decision making powers of Caribbean member states. Still, the Caribbean negotia-
tors were able to cover new ground and arguably achieved far-reaching concessions from the European Commission especially in the area of trade in services. Moreover, a number of commitments were made in the chapter on development cooperation on technical and financial support to build the necessary capacities in the respective areas.

Against this background, it appears useful to consider in more depth the questions of development potential connected in particular with the Cotonou Issues in the EPAs. To this end, BMZ and GTZ have commissioned a series of analyses into the issues covered by the CARIFORUM EPA which go beyond the trade in goods debate. The fields addressed cover trade in services, investment, competition and public procurement, innovation and intellectual property rights, as well as social and environmental issues. An additional analysis was commissioned to reflect from a cross-cutting perspective the negotiation strategies and experience in pursuing defensive and offensive interests in the various chapters as perceived by the Caribbean negotiators.

The objective of the analysis presented in this reader was two-fold. First, the studies assess the developmental impact of the Cotonou issues as stated in the CARIFORUM EPA text. Thereby they contribute to filling a gap in current analyses, paying special attention to the development dimension as contained in the chapters on Cotonou issues. Aspects explored were among others the potential benefits of ‘locking-in’ of policies as against losing policy space due to the inclusion of binding provisions in the agreements. Moreover, the authors looked into the possible implications of any ‘WTO-plus’ or ‘GATS-plus’ provisions in the respective chapters. Finally, all were asked to assess the likely impact – positive, negative or none – of the agreement on deepening regional integration within CARIFORUM, i.e. between Caribbean countries and sub-regions.

Moving beyond the Caribbean, the second objective of the analyses was to draw on the experience of the CARIFORUM EPA negotiations and make it available to the other ACP regions that are still negotiating. In addition to the thorough analysis provided, experts from Southern and East African regions were asked to analyse the outcome of the Caribbean experience from their own perspective, and explore potential benefits and risks against this background for ongoing negotiations in the respective African EPAs. These studies are equally included in the present reader and together the analyses provide for very structured and insightful reading on the current state of play in EPA negotiations.
The reader is intended for an audience directly involved with the negotiations or with EPA implementation and monitoring of its implications. Trade and development experts and practitioners alike will find it useful reading as the authors very clearly address the issue of the development dimension of EPAs, draw conclusions and provide policy options. On a companion CD ROM, we have collected in addition to the papers included in the reader, a number of complementary texts on further technical and legal aspects of EPAs as well as a comprehensive analysis of the regional dimension which EPAs should build on and foster. The views stated are naturally those of the authors and should not be attributed to either BMZ or GTZ. We would like to thank all the authors involved in this undertaking and hope that our joint endeavour will contribute in a constructive way to the discussion.

Endnotes

1 This name is to distinguish the list of issues which include trade in services, intellectual property and social and labour standards among others from the so-called Singapore issues of WTO negotiations which cover investment, procurement, competition and trade facilitation only.

2 CARIFORUM comprises the CARICOM States and the Dominican Republic. The agreement had already been initialled by the parties in December 2007.

3 For more information see the EC’s Fact Sheet on the CARIFORUM EPA found at http://trade.ec.europa.eu/doclib/html/141029.htm.

4 All fact sheets and information on interim agreements to be found on the EC’s trade pages under http://ec.europa.eu/trade/issues/bilateral/regions/acp/pr270109_en.htm.

5 See the analysis in S. Bilal and D. Lui “Contentious issues in the interim EPAs - Potential flexibility in the negotiations”, ECDPM Discussion Paper No. 89, Maastricht, March 2009

6 Other developing countries were increasingly challenging the old Lomé preferences, and a waiver of the WTO expired in 2007, thereby pressuring the EC and ACP to realign their trade relations with WTO rules. See S. Bilal et al. The new EPAs: comparative analysis of their content and the challenges for 2008, ECDPM Policy Management Report 14, joint publication with ODI.
Part I: Services
Economic Partnership Agreements with ACP Countries – the Trade in Services Agenda: Criteria for a Development Friendly EPA Chapter on Trade in Services

Silke Trumm
Preface

The German Federal Ministry of Economic Cooperation and Development has commissioned GTZ (German Technical Cooperation Implementation Agency), program trade, to discuss criteria for a development friendly design of a chapter on services liberalisation. The goal of the paper therefore is above all to provide a comprehensive overview of the development issues in negotiating trade in services within an EPA and contains proposals for political prioritisation and positioning in the negotiation process. The study therefore contains the personal opinion of the author and not of the German Federal Ministry of Economic Cooperation and Development.

Due to its limited scope the study does not discuss all the relevant topics and questions in detail, but instead builds and relies upon diverse literature and information instruments. The list of literature lists some of the more in-depths literature, but does not try to be exhaustive.

The status of negotiation on trade in services within the different ACP negotiation groups which is not discussed here due to its permanently rapid changes instead can be found on the Website of ECDPM (European Centre for Development Policy Management (http://www.acp-eu-trade.org/index.php?loc=tni/).

1. Introduction

The ACP countries have been benefiting from unilateral non reciprocal trade preferences offered by the European Communities since 1964, through the treaties of Jaundé I and II, Lomé I – IV and through the actual legal basis of the Treaty of Cotonou (effective from 2000 – 2007). As the EC unilateral preferences for the ACP countries are not compatible with the GATT, the EC had negotiated a waiver within the WTO system to temporarily heal the breach of WTO law, but which is running out at the end of 2007.

The EU therefore is negotiating Economic Partnership Agreements with regional groups of ACP countries in order to replace the unilateral trade preferences by WTO conform development friendly reciprocal trade and cooperation agreements. Besides traditional liberalisation schemes like trade in goods, other so called trade-related topics are discussed and negotiated, among others liberalisation in trade in services1.
2. Background

2.1 Trade in services in the ACP countries

Services and its trade in the economies of the ACP countries

The services export capacity of the ACP is diverse across countries, sectors and modes of delivery. In the analysis on the performance of ACP services trade Te Velde\(^2\) finds the following:

- The average share of services in GDP is 50 percent for the ACP but varies widely across countries; the share of services in total exports ranges from over 75 percent for a number of Caribbean countries (typically high because of tourism) to under five percent for several African countries.
- Despite strong growth in the value of ACP exports of services (US$8 billion in 1980 to US$20.8 billion in 2000), the world share of the ACP dropped from 2.4 percent in 1980 to 1.5 percent in 2000.
- In 2000, the largest eight exporters of services in the ACP group accounted for more than half of total ACP services exports. These include the Dominican Republic, Bahamas, Jamaica, Mauritius, Barbados, Kenya, Zimbabwe and Nigeria. For the ACP group of countries the largest export sector is travel, which accounts for more than half of all ACP services exports, followed by transport, business services and government services.
- Almost three-quarters of recorded African ACP exports of services have gone to the EU\(^3\). Seven percent of extra-EU trade in services is with the ACP. Exports of services account for one-third of all ACP exports of goods and services to the EU.

ACP services export opportunities

Services exports offer export opportunities to ACP countries mostly in Modes 1, 2 and 4. Foreign direct investment in the services sector from ACP countries (Mode 3) is negligible. Due to technical improvements in telecommunications and information networks mode 1 services delivery has increased in importance for the ACP. Mode 2 is the main mode of ACP supply of services because of preponderance of the tourism sector. Export in the leisure tourism sector to European customers features few barriers from the EU, whereas the export of health tourism services leaves more room for further liberalisation.
Mode 4 is the services sector or highest export interest for the ACP: compared with the EU, the ACP countries have a comparable advantage in labour owing to relative labour abundance, low prices, but the comparative advantage of ACP countries lies particularly in lower skilled services suppliers.

2.2 Regulation on trade in services in other free trade and economic integration agreements

WTO rules and regulations on trade in services: GATS
The GATS agreement is the multilateral agreement on trade in services in the framework of the WTO. Trade in services is liberalised progressively and stepwise in the three disciplines: market access (Art. XVI GATS), national treatment (Art. XVII GATS) and domestic regulation (Art. VI GATS). The GATS works with a positive list approach: Specific liberalisation commitments have to be listed in country schedules which are part of the agreement. All sectors and modes not specifically mentioned in the list are not liberalised.

EU free trade agreements: Chapters on trade in services
The comparison of FTAs concluded by the EU with third countries reveals a general trend towards liberalising trade in services. The services chapters of these agreements follow the legal framework set by Art. V: 1 GATS.

The Euro-Mediterranean Agreements (Euro-Med Agreements)
The Euro-Med Agreements are being negotiated and concluded in the so called Barcelona-Process, which had started in 1995, with the objective of a single Euro-Mediterranean Free Trade Area in 2010. Until then all members of the process negotiate and conclude bilateral free trade agreements, among each other and with the EU. The Euro-Med agreements are limited in their provisions on services liberalisation, e.g. in terms of both liberalisation and cooperation in the trade in services. Contents also differ depending on the WTO membership of the trade partners. Most agreements (Israel, Jordan, Morocco, and Tunisia) just reaffirm the relevant commitments under the GATS and provide for a possible widening of the liberalisation of trade in services within a certain time period.

The EU-South Africa TDCA
The Trade, Development and Cooperation Agreement (TDCA) between the EU and South Africa has been fully in force since May 2004. The TDCA does not imply direct liberalisation obligations in itself, but addresses the issue of the possible
future additional liberalisation of trade in services. The parties only stress the need for observance of the GATS, including as well their respective commitments to the GATS Protocols on basic telecommunications and on financial services. Future services trade liberalisation in the framework of the TDCA is contained in the pledged effort to extend the scope of the TDCA, but without establishing a time frame for further liberalisation.

The regulations on economic cooperation between the EU and South Africa are quite remarkable, as they are more detailed than in the MED agreements and try to benefit both parties as well as southern Africa in general. Concerning services sectors, the TDCA explicitly mentions economic cooperation, including promotion, development and training, in information and communication technology, postal services, energy, mining, transport, tourism, as well as promotion of trade in services, including the exchange of information on and improving the rules, laws, regulations and monitoring systems in banking, insurance and other financial services.

The EU-Mexico Global Agreement
In the area of trade in the EU-Mexico Agreement has set itself the objective to create a bilateral framework for the preferential, progressive and reciprocal liberalisation of trade in goods and services. The chapter on trade in services was decided upon by a joint EU-Mexico Council in a decision from 2001.

The EU-Mexico Agreement utilises the GATS definitions and systematic, but exempts audiovisual services, air services and maritime cabotage from its coverage. After a stand-still phase during which discriminatory measures were forbidden, EU and Mexico are negotiating since March 2004 schedules of commitments, but haven’t reached an agreement yet. According to the Council’s Decision each party is allowed to regulate the supply of services as long as these regulations do not discriminate against the services or services suppliers of the other party. Concerning mutual recognition the Decision demands from the Parties to establish the necessary steps for the negotiations of agreements providing for the mutual recognition of requirements, qualifications, licenses and other regulations for professional admission of services suppliers not later than three years.

The EU-Chile Association Agreement
The EU-Chile Association Agreement has been provisionally in effect since 1 February 2003. Besides covering political dialogue and cooperation issues, its trade chapter stands out as relatively far-reaching among the EU regional agreements.
The EU-Chile AA adopts the principles of the GATS, including its definitions, market access and national treatment. The schedules of each party’s specific market access commitments are set out in an annex, which covers all the main sectors and their specific reservations by both parties. The EU-Chile AA includes a commitment to further the liberalisation of services within three years of its entry into force, and entrusts the Association Committee to regularly review the implementation of the services provisions and to suggest recommendations to the Association Council meeting at ministerial level. Especially remarkable is the appeal to seek additional liberalisation of the movement of natural persons (mode 4) and explicitly to consider broadening the current definition of natural persons as set out in the EU-Chile AA. Another noteworthy element of the EU-Chile AA is the regulation on the recognition of each party’s education and licences, including the possibility to eliminate citizenship or residency requirements. The mutual recognition of requirements, certifications and other regulations shall initially be considered by the relevant authorities in each country and region, with a final decision to be taken by the Association Committee within a reasonable amount of time.

Like the earlier FTAs, the Association Agreement includes provisions on economic cooperation in several service sectors, as well as a time frame for a review in order to facilitate progress toward further liberalisation. However, it differs from the earlier FTAs by being more complex and by an ongoing process within the Association Committee.

2.3 Defining and monitoring development friendly aspects of an EPA chapter on trade in services

Development aspects of an agreement on trade in services

Exports of services by modes of delivery 1, 2 and 4 offer opportunities for additional jobs (and thus ease labour market tensions), revenues and – depending on distribution- more income for the employees. Export growth may lead to further growth in the national economy as further supply and subcontracting will be demanded. In addition, positive development effects may occur –depending on the working conditions and business climate- through gained expertise and working experience. Yet, export of services may also lead to brain drain: in services sectors of vital development interests such as health and education, but also services suppliers with special expertise are needed urgently in the national market as well, but more and better jobs or living standards lure them away.
Market access and liberalisation (imports as well as inward FDI) in all sectors and modes of delivery can in general imply better and cheaper supply, employment growth, technology and know-how transfer on the one side, as well as crowding out, lower income and loss of jobs on the other side. In the short run, liberalisation and open markets will imply higher competition. Yet, in the long run, this higher competition should lead to a higher competitiveness also of the local sector. Adjustment costs in the DCs should be softened by transition periods and stepwise liberalisation. But liberalisation and market access can only lead to positive development effects, if other preconditions are in place, such as a good business and investment climate (including inter alia a functioning protection of free competition, prohibition of monopolies and ban on cartels), linkages to the local economy and efficient private sector development institutions and business associations.

Yet, the effects of services liberalisation on poverty reduction can be quite diverse, depending on the character of the services sector, the development status and competitiveness of the DC:

A special case are those services sectors of basic supply character which have direct impacts on poverty reduction such as water and sewage services, health services, energy services and education services: In these sectors regional coverage, a minimum quality standard and affordable prices are a vital and immediate precondition for poverty reduction. Whether privatisation and liberalisation of these basic services sectors or whether a public or a private, but national supply system are more apt to reach these development goals depend on the concrete situation in the DC, its economic and social development, its geographic dimension and characteristics, the location and liquidity of consumers, relevant national services suppliers as well as the whole business and investment climate. Regulation of these services, independent and efficient implementation and monitoring institutions and processes are deemed to be necessary prerequisites for a development friendly privatisation and liberalisation in these sectors. But the choice how to regulate and how to guarantee affordable and area-wide services supply with the necessary minimum standards is broad and therefore difficult. As there is no “golden solution”, DCs should keep this choice and the possibility to learn from their own experiences and best practices. They therefore should also keep the possibility to change and ameliorate their system how basic services are supplied or promoted in order to reach their development goals. Consequently, locking in of specific regulation models for basic services should be considered carefully under due consideration of sufficient policy space.
Some services sectors have direct impact on other economic sectors and the competitiveness of the local economy: financial services, all business-related services such as legal services, business advisory services, accountancy services, telecommunication and IT services, fall into this category. High quality and low costs of these services lead to a higher competitiveness of the local economy and can involve higher employment and income. On the one hand, imports can entail this higher quality and lower prices and strengthen the competitiveness of the local businesses. Area-wide supply at affordable prices can even set important incentives for economic development in remote and poor areas\textsuperscript{21}. As in the case of financial services, imports might even be necessary for economic development in the whole economy, if the national supply is insufficient. But on the other hand, local services suppliers might get crowded out, employment and income in these services sectors might decrease. In the long run, opening the markets in these sectors is considered to be development friendly. Yet, depending on the economic and social development of the DC, transition periods, stepwise liberalisation or even emergency safeguard measures (to react to not expected dangerous imports), should help to cushion adjustment costs.

**Defining criteria for a development friendly design of an EPA services chapter**

A development friendly design of an EPA services chapter will focus on an agreement text which opens the path for liberalisation in sectors of export interest to the ACPs. The EPA chapter on services should leave enough policy space to the ACP countries to reach development goals as well as to adapt this approach according to experience, to best practices and to new developments in international trade, in technology and research. It should allow for an efficient regional economic integration among the ACPs which should be broader and deeper than the economic integration with the EU. In sectors of basic supply character there should be no obligation to privatise. Regulation and systems for area-wide supply at a sufficient quality level and affordable prices shall be in place before the liberalisation starts. Yet, the way and the system how this regulation and this basic supply are ensured shall not be determined in the agreement. In order to reach this development friendly design, the ACP should make full use of Special and Differential Treatment (S&DT), which should not only entail asymmetric sectoral commitments, but also exceptions for DCs and LDCs to general rules.
Limits to this approach

Apparently, such a short study cannot differentiate between the services sectors, between different ACP countries and not even between the different ACP negotiating regions. As reliable and updated information and data on exports, imports, FDI and competitiveness of the different services sectors in the ACP countries are difficult or even impossible to obtain, no general remarks and assumptions on specific services sectors can be made.

Implications of trade policies and trade agreements in the services sector on development indicators are not easy and reliable to trace and therefore also difficult to predict. Often these implications are indirect and depend also on other factors as the often mentioned business and investment climate and linkages between FDI and the local businesses. Direct impacts on development indicators arise through social standards, labour rights, but also through higher employment rates and better remuneration. Liberalisation in trade in services might lead to crowding out of local suppliers, thus endangering jobs for the short term. Direct impacts of services liberalisation, e.g. through FDI, on development indicators may also accrue just through area-wide better quality supply of basic services or professional services, thus strengthening overall supply and economic competitiveness for the long term. Therefore development interests might be found on both sides of a pro and contra services liberalisation argument.

The suggested criteria therefore try to help to design and formulate a services chapter in the EPAs which

- Achieves outcomes in sectors and modes of supply of export interests to the ACPs and sufficient room for learning processes within the ACPs,
- sets conditions for the regional integration among ACPs to go deeper and broader than with the EU, and
- ACP obligations are avoided that are not a necessary prerequisite for services liberalisation ("GATS+") and which need more time for formulation of policies and negotiation.
3. Trade in services in the Economic Partnership Agreements: Negotiation agenda

The Economic Partnership Agreements between the EU and the ACP have to be guided by other legal commitments these partners have already taken, e.g. in the multilateral framework of the WTO, the regulations of their bilateral Cotonou Agreement as well as negotiation steps already taken such as in the first phase of the supra-regional EPA negotiations.

3.1 Framework set by WTO agreements

The existing unilateral trade preferences of the EU for imports from the ACP countries are not in conformity with the WTO agreements and therefore are based on a waiver which had to be negotiated expensively from the other WTO members. One of the main goals of the EPA negotiations therefore is to replace the existing unilateral trade scheme with a bi-regional agreement that offers the ACP comparable preferences on the one hand and goes in conformity with WTO rules on the other hand.

Regional economic integration in services trade liberalisation not demanded by WTO system

Economic integration is allowed by the WTO system as far as it corresponds to the preconditions set out in Art. XXIV GATT and V GATS. These two regulations contain exceptions to the Most Favoured Nation Clause as one of the core principles of the WTO system. The exception for economic integration for trade in goods by the means of free-trade areas and customs unions is regulated in Art. XXIV GATT. In the GATS, economic integration on trade in services is regulated in Art. V.

There is no general rule on economic integration in the WTO agreement itself or other WTO agreements that demands that a minimum regional economic integration includes services liberalisation as well. Such a precondition can also be found neither in Art. XXIV GATT nor in V GATS. Therefore the EPAs need not include a chapter on regional trade or liberalisation in trade in services in order to be in conformity with the WTO system.
**Economic integration, Art. V GATS**

Art. V lays down the prerequisites for WTO compliant economic integration in trade in services and therefore has to be observed by a WTO compliant EPA chapter on services.

Art. V GATS postulates that  
- such an agreement shall have substantial coverage (Art. V: 1: a GATS): A footnote explains that this condition is understood in terms of number of sectors, volume of trade affected and modes of supply. To meet this condition, specific modes of supply (as e.g. mode 4) cannot be a priori excluded from the agreement. Despite these clarifications in the GATS itself the exact definitions of substantial coverage of volume of trade and other prerequisites are still open and therefore discussed. Due to the special character of the WTO law, text interpretations mingle with negotiation tactics and the probability that other WTO members will resort to the dispute settlement in order to verify the WTO compatibility of the future EPA services commitments.
- substantially all discriminations concerning national treatment (Art. XVII GATS) have to be eliminated and new ones will be prohibited (see Art. V: 1: b GATS).
- for developing countries flexibilities shall be provided concerning Art. V: 1 GATS, esp. sub-paragraph b (Art. V: 3: a GATS): Therefore this regulation allows more exceptions concerning national treatment to be kept by ACP countries concerning EU. As well a lower sectoral coverage on ACP side can be justified.
- bilateral or multilateral agreements on trade in services under Art. V GATS shall not raise the overall level of barriers to trade in services within and outside of the coverage of this agreement (Art. V: 4 GATS). In case prevailing commitments are withdrawn or modified, the country lists have to be modified in the procedure of Art. XXI GATS (see Art. V: 5 GATS).

### 3.2 Agenda and framework set by the Cotonou Agreement

The EU preference scheme for ACP countries was started in 1964 with the Yaoundé I Agreement, was continued by Yaoundé II, broadened and deepened by Lomé I to IV Agreements up to the Cotonou Agreement in 2000. In this long row, the EPAs are at the same time implementing the Cotonou Agreement as well as
replacing them, as the Cotonou Agreement will run out in February 2020\textsuperscript{23}. EPA negotiations thus have to take into regard the decisions and requirements set by the Cotonou Agreement on different topics.

Trade in services is mainly dealt with in chapter 4, Art. 41 of the Cotonou Agreement. Regulations which are more than mere declarations of intent and which have relevance for the EPA negotiations are laid down in paragraphs 4 and 5 of Art. 41. The EU acknowledges that EPA negotiations should only encompass the liberalisation of trade in services (in accordance with the provisions of the GATS concerning developing countries) after the ACP countries have acquired some experience in applying the MFN treatment under the GATS (Art. 41:4 Cotonou Agreement). In Art. 41:2 of the Cotonou Agreement, the EU and the ACP countries reaffirm their respective commitments under the GATS and underline the need for special and differential treatment to ACP suppliers of services. In Art 41:5 Cotonou Agreement the EU promises to support the ACP States efforts to strengthen the ACP capacity in the supply of services, with a view to enhancing competitiveness and thereby increasing the value and the volume of their trade in goods and services.

Art. 42 Cotonou Agreement concerns services in the maritime transport sector. It acknowledges the importance of cost-effective and efficient maritime transport services in a safe and clean marine environment as the main mode of transportation facilitating international trade. The parties to the Cotonou Agreement therefore promise to promote the liberalisation of maritime transport and to apply the principle of unrestricted access to the international maritime transport market on a non-discriminatory and commercial basis. According to Art 42:3 of the Cotonou Agreement, the most-favoured nation clause shall apply to ships owned by or operated by a national from another Party as well as registered in another Party. In Art. 42:4 the EU is asked to offer Technical Assistance and Capacity Building to the ACP countries in order to develop and promote cost-effective and efficient maritime transport services with a view to increasing the participation of ACP operators in international shipping services.

Besides general remarks on information and communication technologies and the information society, Art. 43 of the Cotonou Agreement contains an invitation to join the plurilateral protocol on Basic Telecommunications attached to the GATS, the promise to engage in future negotiations, as well as the intent to offer measures and to start cooperation with a view to low-cost wireless networks and adaptation to new technologies in the ACP countries.
Art. 23 of the Cotonou Agreement directs (technical and financial) cooperation efforts to the development of some of those services sectors which are of importance for businesses and the economic development as a whole, such as financial services, business related services, technological, scientific, research and economic infrastructure services (e.g. transport, telecommunication systems, communication services).

In Art. 24 of the Cotonou Agreement points to the importance of the tourism sector for the economic development and export of services. Several cooperation proposals are mentioned which should help the ACP countries to develop the necessary framework and obtain competitive tourism sectors.

3.2 Agenda set by the negotiation framework of the EU Council

The EU council has set a negotiation framework for the EU to negotiate EPA agreements with the ACP countries. Besides general remarks and repetitions on WTO conformity and accordance with the development status of the ACP countries the EU Council document contains a stand-still clause (no new or additional discriminations after the negotiations have started), affirmation of the asymmetric liberalisation according to the development status of the ACP countries, and the assurance among ACP countries to treat each other at least as favourable as the EU.

4. Recommendations for the development friendly design of a trade in services chapter in EPAs

4.1 Horizontal questions

Optional integration of a services chapter

The integration of a chapter on the liberalisation of trade in services between the different ACP regional groups on the one hand and the EU on the other hand is not mandatory, neither by WTO law nor by effective agreements between EU and ACP. The ACP countries and the EU therefore are free to agree whether they want to integrate a chapter on services liberalisation into the EPAs. Once they have decided to agree to bind market access commitments, Art. V GATS, the most favourite nation treatment and national treatment rules have to be observed.

Asymmetric liberalisation

The formulation “progressive reciprocal liberalisation” is e.g. used in the Non-Paper of the EU on illustrative lists of provisions in Chapter I, first article. Progressive
liberalisation implies transition periods that could in principle be granted only to one party. Reciprocity conveys commitments by both sides, but does not define in detail the balance between the commitments of each partner.

The asymmetric liberalisation, already postulated in the Cotonou Agreement, means that the EU has to grant the ACP countries broader and deeper market access and national treatment in services sectors and modes than the other way round. Only the average of EU and ACP commitments has to reach the substantial coverage demanded by Art. V: 1: a GATS. This is stressed by the flexibilities to be provided to DCs concerning Art. V: 1 GATS according to Art. V: 3: a GATS.

“Traditional System” of the GATS instead of a “hybrid system” of the EU

The GATS system for services trade liberalisation shall not be assessed here conclusively, but it should be stated that the GATS system with the four modes and the liberalisation factors market access, national treatment and domestic regulation serve as a kind of (reference) model for many existing services trade agreements and ongoing negotiations. Definitions and legal structures are complex and difficult to handle, but DCs and also the ACPs have gathered experience and expertise in how to work with the GATS definitions and its legal structure. Therefore it is easier for ACP governments, private sector and civil society to understand the consequences of a services trade chapter and horizontal as well as sectoral commitments that are formulated in definitions and a legal structure following the GATS system. New definitions and a new legal structure complicate the process and bind scarce negotiation capacities in the ACP countries.

The EU has suggested a new “hybrid system” for trade in services liberalisation as a model chapter for its bilateral and bi-regional trade negotiations. In this new “hybrid system” the EU wants to define a new set of modes and tries to integrate:

- establishment rights in the sense of market access obligations, not only in services sectors (as in mode 3 GATS), but also in other –production- sectors,
- in mode 4 according to the GATS, definitions on categories of services suppliers with specific liberalisation rules, which were discussed in the framework of WTO, but which the DCs, the EU and other WTO members did not reach an agreement on, and
- regulation obligations for specific services sectors once services sectors are committed.
The advantages and disadvantages of the new EU system shall not be discussed in detail here. But the main disadvantage is already mentioned above: ACP trade in services experts and negotiators have not gathered any experience and expertise in this new hybrid system. Understanding and negotiating in this new system will bind too many capacities. Besides, the “hybrid” system of the EU contains many details and hinders a clear understanding of the negotiation process and the different offers. Especially in mode 4, the new “hybrid” system of the EU can even imply a narrower scope and coverage than the GATS and thus allow less market access in the export interests of the ACP. Additionally, the EU “hybrid system” forces the parties to determine and decide on many topics which otherwise would be left for the commitment schedules or even could be left outside the agreement at all.

For these reasons, definitions and a legal structure according to the GATS system is deemed to be more development friendly than the new EU “hybrid system”.

Positive list approach instead of negative list approach

The GATS uses the positive list approach for the listing of specific liberalisation commitments in the country schedules: only those liberalisation steps explicitly defined in the schedules are liberalised. In contrast, the negative list approach (used e.g. in the US Central American Free Trade Agreement) lists only the sectors not covered by liberalisation: all sectors not defined in the agreement are therefore liberalised and open to foreign suppliers.

The positive list approach offers advantages from the point of view of development policy: Firstly, in the positive list approach the liberalisation of specific services sectors stays a rather knowing decision. In contrast, the negative list approach leads to unconscious liberalisation of services sectors that were simply not considered and – if not explicitly regulated otherwise- to liberalisation of new services sectors (created by future technical developments or economic needs). Secondly, both approaches can offer advantages and disadvantages concerning transparency and facility of inspection, depending of the length and the detailedness of the schedules. Positive lists offer a more cautious approach; negative lists suggest a more liberalistic proceeding.

As in the all-ACP phase 1 of EPA negotiations the ACP countries and the EU agreed on the positive list approach for the EPA chapters on trade in services25, the positive list approach should be stuck to, anyway.
Services of basic supply character
As described above, “services of basic supply character” can be characterised by their direct implication on development indicators: their area-wide, affordable supply at a minimum quality standard is crucial for minimal living standards and poverty reduction. Relevant services sectors are especially water and sewage services, health services, energy services, and education services. Developing country governments as well as NGOs in industrialised as well as in developing countries are very concerned about privatisation and trade in services of public interest. Because of the important role for development, ACP governments shall keep their policy space on how to offer this basic supply and how to ensure the area-wide, affordable supply at a minimum quality standard for poor people or remote areas. From a development perspective it therefore might be advisable for the ACP countries not to offer commitments in services sectors of basic supply character in order to keep the choice to ameliorate and thus change the supply system. Decisions on privatisation, market access and other liberalisation steps should not be bound internationally and can be taken (and changed) unilaterally. To reach this policy space, basic supply services could explicitly be taken out of the coverage of the services chapter of the EPAs.

The right sequencing in basic supply services sectors should be observed: first effective regulation, only afterwards legal binding of liberalisation. In case the ACP countries choose to commit themselves in basic supply services the liberalisation commitments should not become effective before an efficient regulatory system, the necessary institutions and procedures are in place. This goal could be reached, for example, by offering concrete liberalisation steps after a transition period of sufficient length for the ACP country to install a functioning regulatory system with the necessary institutions and procedures as well as for the relevant technical cooperation and capacity building projects to assist in this process.

Services supplied in the exercise of governmental authority
In the GATS, Art. I: 3 b and c, those services are exempted from the GATS coverage that are “supplied in the exercise of governmental authority”, whereas this is defined as “supplied neither on a commercial basis, nor in competition with one or more service suppliers”. This regulation or at least a comparable solution should be integrated into an EPA chapter on services: Services supplied in the exercise of governmental authority always have a strong connection with public interests, public
tasks or strong security interests. In these sectors the ACP government should be free to decide on public or private delivery of the services. Negotiation pressure in these sectors should be avoided. A development perspective would suggest an exemption for publicly supplied services from the scope of the agreement therefore.

Besides, it could be stressed in the EPA chapter on services that privatisation shall not be a possible obligation committed to in the framework of an EPA agreement.

Access to the employment market
The demarcation line between services export via mode 4 and access to foreign employment markets is very thin.

Mode 4, as defined in the GATS, is certainly part of border-crossing of natural persons for occupational reasons. Mode 4 is limited to natural persons working in the services sector and not in the production or agricultural sectors. Besides, Mode 4 postulates that the stay remains temporary and that the services supplier’s nationality is different from the services consumer’s. The line between access to the labour market and Mode 4 thus depends on the underlying business contract. If the foreign services supplier has got a labour contract with an entity in the recipient country, this will be defined as labour migration. If the foreign services supplier has got a labour contract with an entity from another country or works as a foreign independent professional on the basis of an assignment, this falls under the definition of trade in services, mode 4. The demarcation line is very thin: simply the founding of a temporary employment agency with branches in both countries would be needed to change temporary access to the labour market for ACP services suppliers into services export via mode 4.

Not regarding discussions on the exact scope of GATS mode 4, an EPA agreement may always contain “GATS+” regulations and liberalisation steps that might even exceed the coverage and liberalisation steps of the GATS itself.

Yet, like many other industrialized countries, the EU is very reluctant in this point: not only the governments in the EU member states, but also important parts of the civil society oppose services trade on a more than temporary basis or even access to the employment market. Therefore the ACP countries should carefully try to find solutions which are viable for both sides. Solutions should take into account:

- the vivid interest of the ACP countries not to loose their work force (“brain drain”), but to invite the services suppliers with additional expertise and experience to offer these in their region of origin (“brain gain”)

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the reluctance of the industrialized countries to open up their employment markets: sector specific solutions could on a bilateral basis be negotiated among governments, business associations and trade unions,

- the interest of the industrialized countries to avoid illegal immigration: an efficient regulation and control system of the entry and exit of services suppliers has to be provided for,

- and competences of EU member states, especially concerning immigration, labour markets and employment policies; The EU Commission is not allowed to negotiate for the EU member states in these fields.

Even if the EU does not open up its employment market at the moment, the ACP countries should try to keep the scope and coverage of the EPA services chapter open, maybe for later negotiation rounds.

In this context, other EU initiatives in the field of temporary labour migration such as already existing bilateral agreements of specific EU member states on circular labour migration\textsuperscript{28} should be taken into account. Besides, the EU ministers of internal affairs and justice are discussing opportunities for circular or seasonal regular labour migration opportunities for African countries in order to cope with the problematic migration situations between Africa and the EU\textsuperscript{29}.

**Most Favoured Nation Clause (MFN)**

The MFN Clause is one of the basic legal tools in free trade agreements: Each party to a free trade agreement shall grant to all other parties a treatment not less favourable than granted to third countries that are not party to the free trade agreement. The MFN customarily can apply to past as well as future free trade agreements with third parties as soon as and as long as they are valid and effective.

The EPA chapter on services trade therefore will probably contain a provision on MFN that each party shall accord to services and services suppliers of the other party a treatment no less favourable than it accords to like services and services suppliers of any third country.

**MFN exemption for economic integration agreements with the ACP negotiating group**

In order to ensure that the regional integration among the regional ACP negotiating group goes further than the integration with the EU an exemption from such a MFN clause for the economic integration agreements with the other members of this specific ACP negotiating group is crucial.
In the Non-Paper of the EU on illustrative lists of provisions the EU suggests a final provision (chapter VII, first article, EU Draft Cariforum ACP) that the ACP of the regional group may and shall grant among them a more favourable treatment concerning market access than to the EU. The EU also suggests an exemption from the MFN clauses in the services chapter itself: the more favourable treatment among the specific ACP regional group shall not have to be extended to the EU.

**MFN exemption for economic integration agreements with other ACP negotiating groups**

Yet, regional integration should not only be promoted inside the regional ACP negotiating groups, but also within the ACPs as a whole. This is especially true for the African ACPs which are direct neighbours and vivid or future economic partners. As for some African ACP (e.g. Tanzania) the allocation to a specific negotiation group was difficult to agree upon, fostering regional integration among all ACPs (or at least among all African ACPs) could be a viable solution. Besides, the EPAs should always leave enough space for future regional integration among all ACPs.

Therefore, in order to open the path for a better integration among all ACP countries such an exemption to the MFN clause should also be made for economic integration agreements with other regional ACP groups (or the ACP countries as a whole).

**National treatment**

National treatment is a principle customarily used in free trade agreements. The parties to the agreement promise that, in those sectors they have undertaken liberalisation commitments, they will accord to services and service suppliers of any other party, in respect of all measures affecting the supply of services, treatment no less favourable than that they accord to their own like services and service suppliers.

As a general principle the National Treatment principle is an important tool for trade liberalisation in services. Yet, in order to follow some development interests ACP countries should be left several possibilities to privilege their own services suppliers or services or even certain groups among those.

** Preferential treatment to local or regional services suppliers**

In order to strengthen supply capacities, e.g. build up specific important services sectors or “nascent services sectors”, governments of ACP countries should have the legal opportunity to offer special measures and privileges only to their national services suppliers or services. To this end, exemptions to the national treatment principle should be included into an EPA services chapter.
As far as privileges for services suppliers from the specific ACP region or the other ACP regions are needed for regional integration among the ACP countries, a comparable exemption to the national treatment principle should be foreseen also for services suppliers from other ACP countries.

**Measures to promote disadvantaged groups**

Measures to promote the achievement of equality or to protect or advance persons disadvantaged by long-term historic discrimination (e.g. privileges for local indigenous people, anti-Apartheid measures) shall be possible and not get into conflict with national treatment obligations of the ACPs. A respective exemption to the national treatment clause should be incorporated into an EPA services chapter.

**Policy space for development**

It is the immanent goal of international, multilateral or bilateral trade agreements to limit the host governments’ power to regulate and set conditions to foreign services and services suppliers. Therefore there is a general consensus that policy space should be restricted. The discussion focuses on the questions how much policy space should be left and whether developing countries should get more possibilities to protect and foster their businesses than the industrialized countries, which had used these tools before to develop their actual economic force. Policy space should leave enough space to obtain important development goals, such as, among others:

- human rights, social and labour rights
- environment protection, and
- external and public security.

ACP services suppliers are not as competitive as EU providers, ACP economies and exports need diversification and higher competitiveness, and ACP countries will need relatively more time and more capacities in order to develop respective policies and learn from experience. Sufficient policy space therefore should be granted to ACP countries, e.g. through Special and Differential Treatment (such as special transition periods for DCs), provision of sufficient policy space in the rules on domestic regulation, subsidies, etc. as well as development cooperation support in this regard (introduced below).

**Domestic regulation**

Domestic regulations are significant means of exercising influence or control over services trade. In the GATS, governments are requested to regulate services reasonably, objectively and impartially. Administrative decisions that affect a service,
should always be possible to be challenged and reviewed by an impartial review-
ing body. GATS commitments to liberalize do not affect governments’ right to set levels of quality, safety, or price, or to introduce regulations to pursue any other policy objective. In the ongoing Doha Development Round, in a Working Party on Domestic Regulations, WTO members discuss disciplines relating to technical standards, licensing and qualification requirements.

Regulation comparable to GATS, Art. VI
In order to strengthen good governance in the ACP countries it would be recom-
mend introducing into EPA services chapters a regulation comparable to Art. VI, GATS. Such a regulation offers basic principles of the rule of law (like prohibition of arbitrariness, impartial review of government decisions), but leaves enough space for development orientated government decisions and learning processes.

Destination country principle
Like in the GATS system and in most international services trade agreements, the recipient country principle should prevail: services that are provided in another country have to be supplied in a manner and with standards in conformity with the law of the recipient (or destination or target) country. This is a prevailing prin-
ciple, but shall explicitly be mentioned here, as the EU in its internal market integration for services has mixed the recipient country principle with the country of origin principle.

No necessity test
Necessity tests are to be found in several WTO agreements and in general require that measures which restrict trade do not go beyond what is necessary to achieve the WTO member states policy objective. GATS Art. VI: 4, contains necessity language, the legal status of which is unclear, and asks the WTO member states to negotiate on disciplines in this regard.

In the Working Group on Domestic Regulation WTO members therefore also discussed the inclusion of a so called necessity test into the rules on domestic regu-
lation: domestic regulations should be no more burdensome to trade than necessary to reach the legitimate goal of the domestic regulation. While some DCs proposed not to impose the necessity test on domestic regulation for regulatory purposes and national policy objectives, others asked to exempt all LDCs from the obligation, and the ACP group suggested to doing away with the necessity test entirely.
As DCs will have big difficulties to find straight away the best domestic regulation that reaches their national policy goals and, at the same time, does not impose unnecessary burdens on international services trade, a strict necessity test should not be integrated into EPA services chapters. Including the necessity test as a non-binding principle might offer a useful guideline.

**Subsidies**

As mentioned already above, DCs should have the right to promote local businesses to build supply capacities or specific groups to reach their policy goals. In order to diversify the economies and the export structures ACP economic policies might want to include building up specific important services sectors or “nascent services sectors”. National treatment thus should not cover subsidies: ACP subsidies and privileges should only be offered to national services suppliers or services and not to EU services suppliers. Yet, among ACP countries, even national treatment among ACP services suppliers and services could be a topic, following the example set by the internal market integration of the EU.

Apart from national treatment, the ACPs could be encouraged to integrate rules on transparency and rules-based procedures for subsidies into the EPAs. In order to set a framework for reasonable and non-distorting subsidies, the EU de-minimis regulation for SME subsidies could serve as a best practice.

Above all, rules on reduction of subsidies are a natural topic for regional integration agreements or international agreements, as subsidies mostly affect and distort competition world-wide and not in a recipient country specific way. Only export subsidies can be applied according to the destination of the export and therefore be negotiated in the framework of bilateral or regional trade agreements.

**Government procurement**

In Art. XIII GATS, procurement by governmental agencies is defined as the purchase of services for governmental purposes and not with a view to commercial resale or with a view to use in the supply of services for commercial sale. Such government procurement is exempted from the liberalisation rules in Art. II, XVI and XVII GATS. Multilateral negotiations on government procurement in services under the GATS have started, but have not come to a conclusion yet.

Considering development aspects of rules on government procurement on services in the EPAs, the following aspects have to be taken into account:
On the one hand, liberalisation of government procurement helps to spend govern-
ment funds more efficiently and more transparently. Especially the opportunity to
include regulations on transparency and rules based procurement procedures per-
mits to fight corruption and the waste of public funds.

On the other hand public procurement rules might include the liberalisation of
government procurement markets and open up this market for foreign services sup-
pliers, thus weakening the competitive position of the local suppliers.

A development friendly solution for services procurement would include regula-
tions on transparency and rule based procurement procedures in the EPA chapters
on trade in services. Concerning liberalisation of government procurement in serv-
ces the following differentiation is advisable: The ACP countries should be encour-
aged to open the procurement markets among themselves, creating a vital interest
in the transparency and rule based procurement procedures and thus helping to
monitor them. It even could be considered to open the market for EU services sup-
pliers. In this case, one could think about an asymmetric element in the procure-
ment procedures, to allow the government to prefer a local supplier or a supplier
from other ACP countries in case they are not significantly more expensive or the
quality of their offer is not momentously lower.

**Recognition of professional qualifications**

DCs often cannot fully take advantage of services trade opportunities because of
barriers to market entry that their exporters face like the necessary recognition of
professional qualifications. Admission of foreign professional credentials can be
approached through harmonization or through mutual recognition. Besides, co-
operation, alignment and reciprocal monitoring of regulators, professional associa-
tions, institutions for vocational training would facilitate these processes and offer
multifaceted opportunities for TA/CB, e.g. through harmonizing and adapting of
trainings, respective curricula and qualifying exams.

**Harmonization**

Harmonization of the prerequisites for professionalism encompasses the application
of comparable vocational trainings, equivalent curricula and syllabi at vocational
training institutions and universities, similar professional credentials (similar also
in nature and scope of the activities covered), as well as harmonized public tasks
concerning the prerequisites for professionalism, such as registration, licensing,
monitoring and disciplining procedures. Breadth, diversity and sensitivity of topics
covered convey that agreements on harmonization probably will lead to a lengthy negotiating process and a comprehensive and slow implementation phase, which should integrate a number of different stakeholders.

Once they are established, harmonized systems of professional credentials are the easiest and most transparent to implement. Depending on the already existing national systems of professional credentials and vocational training institutions, harmonization could be a reasonable goal for regional integration among ACP countries. Alignment with EU systems (e.g. curricula), and in a second step even harmonization, could strengthen ACP services exports to the EU, especially in mode 4.

**Mutual recognition**

On a lower integration level, mutual recognition of professional credentials, mainly through the conclusion of mutual recognition agreements (MRAs), offers another way to accept foreign services suppliers and profit from market access opportunities in trade in services. MRAs can be negotiated and concluded between governments as well as between the respective national professional associations, depending on the national system of vocational training.

As recognition of professional credentials is a crucial prerequisite for services export, esp. via mode 4, ACP countries should try to agree on MRAs, concerning as many partner countries and as many professions as possible. As far as MRAs are concluded between government authorities, EPAs chapter on services could contain a direct obligation to start the procedures for mutual recognition of diplomas in a minimum number of sectors with a set deadline. As far as MRAs have to be concluded between professional associations and thus private players which cannot be directly obliged by the EPAs, the text might only comprise a general demand to facilitate the harmonization and recognition of professional credentials between the EU and the ACP. Here the EU-Chile Association Agreement could be taken as a best practice: This AA requests the relevant authorities in each country and region to consider the mutual recognition of requirements, certifications and other regulations in a first phase, with a final decision to be taken by the Association Committee within a reasonable amount of time.

In this field, quite a number of measures can be brought up to help the ACPs accrue the benefits of services trade liberalisation. ACP and EU professional bodies and associations responsible for licensing or for certification of services could work together in the form of technical cooperation and capacity building. Additionally, EU profes-
sional bodies could offer to arrange licensing and certification procedures in the ACP region for ACP services suppliers who would like to export services to the EU.

The recognition of professional credentials could also be facilitated in a very concrete manner by setting up one-stop shops in ACP countries comparable to the EUROPASS initiative which brings together into a single framework several existing tools for the transparency of diplomas, certificates and competences in order to help EU citizens to better communicate and present their qualifications and skills throughout Europe. Another opportunity might be to open up the EUROPASS initiative for ACP country members as well as to offer assistance to create a comparable initiative in the ACP countries.

Transparency, disclosure of confidential information and enquiry points
Transparency on regulations on services is of high importance for local services as well as for foreign services suppliers. With the relevant information at hand services suppliers can take the necessary business related decisions like investment, employment, market orientation as well as services and capacity development.

Through the GATS, Art. III: 4:2, the ACP countries who are already member of the WTO, are obliged to install enquiry points. DCs are allowed to install these services enquiry points later than the foreseen two years in special cases, Art. III: 4:4 GATS. As the obligation already exists in many cases, ACP countries should not be obliged through the EPAs to build up other contact points besides the enquiry points suggested in the GATS. Yet, those ACP countries who are not member of the WTO or who have not installed an enquiry point up to now, should be encouraged and supported building up such services enquiry points. Possible and recommendable is the offer of financial and technical assistance for the installation as well as capacity building for the efficient functioning of such a GATS enquiry point.

Social standards and labour rights
Social standards and labour rights are up to now not an integral part of WTO agreements. They have been integrated into some bilateral preference schemes (US and EU), but DCs have up to now been reluctant to include social standards and labour rights into international trade regimes as they fear hidden protectionist purposes.

Yet, from a development perspective, the observance of core labour rights and social standards are of utmost importance for reaching the MDGs. Looking at it from an economic development perspective, core labour rights and social standards are crucial factors for participation of the poor, minimum living standards and better
distribution effects (and thus for pro-poor-growth). The internationally supported decent work agenda with its four pillars social standards, productive employment, social dialogue and social protection, aiming at better coherence between trade, social and development policies, could serve as guiding principle or reference for integrating social standards and labour rights into the EPAs.

Besides questions to be tackled in a general social chapter (e.g. adherence to the ILO core labour rights and implementation in national law), in a chapter on trade in services social standards and labour rights should be integrated with a view to those services suppliers who travel to another country in order to offer their services.

EU and ACP countries should guarantee that all services providers who stay in the respective partner countries in order to provide services will be protected by minimum social standards and by the ILO core labour rights. To this end, foreign services providers should get the right to apply to the national justice system to be protected accordingly. In order to use these rights, ACP services suppliers, offering their services in the EU via mode 4, should be informed in depth about their rights and the relevant interest groups. With the cooperation of European trade unions, respective information packages on the effective social standards and labour rights could be offered to ACP services suppliers when entering the EU. Focal Points for social standards and labour rights for foreign workers could be installed to offer information to the services suppliers and monitoring to the policy makers.

When services providers offer their services in another country, often they are obliged to contribute into the national social security system and other insurance schemes. The EU and the ACP should cooperate with a view to guarantee that the services providers will get the right to benefit from these social and other insurance systems and the benefits can be transferred to the sending countries in the ACPs.

**Brain gain instead of brain drain**

An eminent and crucial question of services trade liberalisation and development implications concerns the danger of “brain drain” and the opportunity of “brain gain” or “brain circulation” through services exports, mainly via mode 4. Certainly, services exports via mode 4 offer tremendous development benefits through job opportunities (thus also expertise and professional experience), income and the remittances sent home. In some DCs remittances even reach 30% of the GDP. But migration might impede development, in case services suppliers going abroad are entrepreneurial, have high expertise in development relevant professions and
thus could also be very well needed in the countries of origin, yet more and better job offers lure them away. Another problematic complex connected with services trade via mode 4 originates from the abundance of low-skilled labour in many DCs. On the one hand, an increase in services exports via mode 4 could thus ease labour market pressures in sending countries. On the other hand, low-skilled services offers to the EU could deteriorate the labour market situation in EU member states for low-skilled labour even further and therefore is politically difficult to realise.

Brain drain versus brain gain is typically discussed in the context of migration of labour, but is also relevant for services trade, modes 1 and 4.

The goal to reach brain gain instead of brain drain can only be tackled by various policies and measures both in the sending as in the recipient countries.

In services sectors with direct impact on development, such as health and education services, the sufficient supply of well trained personnel is of utmost importance to offer basic standards to the whole population. This holds true for DCs as well as for industrialized countries. Therefore all governments should take good care that vocational training opportunities are sufficient in quality and number of training positions in order to supply the number of professionals needed, taking into account the possibility of export of services.

Another option to attract a sufficient number of nationals to jobs in professions important for development, is to make these jobs more attractive through better payment and working conditions, in DCs as well as in industrialized countries.

Additionally to these approaches, the EU discusses in its strategy on health workers in DCs\textsuperscript{36} to develop a code of conduct not to actively recruit health workers from DCs where a serious shortage of health workers is detected.

In case ACP services suppliers decide to offer their services to EU consumers via mode 4 and return after the end of the assignment, the ACP countries can profit from the “brain circulation” through the additional expertise, working experience and business contacts. In order to really benefit from this “brain gain” DC governments together with the governments of the recipient countries should provide incentives for the services suppliers to return and offer their services in the country of origin. Measures should comprise also assistance and information for reintegration of the services suppliers as well as monitoring and control of the return process in order to avoid overstaying. Besides, policies on social rights of the services suppliers
and transferability of insurance claims should also be taken due account of37.

In an EPA chapter on services EU and ACP countries could agree on cooperation on incentives, monitoring mechanisms and control of the return of the services suppliers to the sending countries. In services sectors of crucial importance for development (health, education) the EU and the ACP countries could try to develop a mechanism how to prioritize the needs for these services in the ACP countries before recruiting services suppliers for export to the EU in this sector. Such a mechanism should constitute a code of conduct which takes into account the supply situation in the sending countries, instead of market access restrictions like economic needs test that take into account the labour market and demand side in the recipient country. The latter has to be inscribed in the schedules describing the liberalisation commitments whereas the former do not have to be included in the schedules.

4.2 Special and Differential Treatment (S&DT)

Transition periods

S&DT for ACP countries in an EPCA chapter on services trade should also include transition periods. ACP countries will need transition periods concerning their obligations on market access or national treatment for EU services providers, in order to accomplish regional integration among ACP countries first. Transition periods can also be necessary in services sectors with basic supply needs. As the right sequencing is essential for development goals in these sectors, regulations, institutions and monitoring systems have to be in place before liberalisation and market access become effective. Transition periods would offer to the ACP countries the opportunity to install all necessary regulation steps on the one side, but the fixed end date would create at the same time the need to accomplish these tasks in due time.

Besides these two cases, transition periods might help the ACP countries to commit slowly to market opening in those services sectors they are still reluctant to open to foreign suppliers and ACP services suppliers shall get the chance to adapt step by step to foreign competition.

Transition periods in the services context might follow the model of Annex D on Trade Facilitation in the July Package (Geneva, 2004)38. There it is agreed, that the extent and the timing of entering into commitments shall be related to the implementation capacities of developing and least-developed Members. Especially investments in infrastructure projects shall depend on available means. LDCs could
only be required to undertake commitments to the extent consistent with their individual development, financial and trade needs or their administrative and institutional capabilities.

**Emergency Safeguard Measures (ESM)**

In the negotiations in the framework of the GATS the DCs have strongly promoted the idea of emergency safeguards in the GATS, but negotiations have not come to a conclusion. The goal of such an ESM is to provide a mechanism to mitigate any negative effect arising from the implementation of the services sector.

Critics reproach the proposal for an ESM of not matching the special requirements of services trade. Especially for mode 3, trade through investment, it would be difficult to find an ESM that suits the vested interests of investors already actively involved. Additionally, adversaries to ESM insist, that GATS (or the sector and country specific approach in many other agreements on trade in services) is flexible in such a high degree that developing countries can commit themselves to specific liberalisation steps in their interest.

But for multiple reasons DCs have difficulties in reliably assessing the consequences of services trade liberalisation on their economies and societies. Hence, they actually are hesitating to commit themselves to opening their services markets. Emergency Safeguards therefore would help the ACPs to liberalise more audaciously, but allow them to take the necessary measures in case the trade liberalisation causes serious damage to the economy and/ or society.

All four modes should be covered by the ESM, in order to be an efficient tool. An ESM would have to be construed in a way that protects vested interests of foreign services providers, esp. foreign investors. E.g. an ESM for mode 3 could allow changing the conditions for future FDI, but having no consequences for already existing investments. Preconditions such as the definition of injury or damage to economy and/ or society have to be well defined and all conditions should be a possible subject of a dispute settlement.

**Review and modification of ACP commitments**

**Review of EPA chapter on services for ACP countries**

The EPAs should contain a regulation for a regular review concerning the development impacts on ACP economies and societies (esp. employment in the services sector, crowding-out of local services suppliers by foreign offers, sustainability, en-
environment, poverty reduction). Such a review should be introduced in a horizontal regulation and a broader review process on all EPA topics and should encompass development relevant impacts of the services trade chapter and commitments.

Such a review should be connected with concrete consequences, in order to guarantee the effectiveness of this instrument and to obtain positive development impacts of the EPAs. Possible consequences of such a review could be the renegotiation of the schedules and agreement text with a view to the development interests of the ACP countries.

**Modification of schedules**

As the positive list approach probably will probably be decided on, the services trade chapters in the EPAs could contain a regulation on the procedure and preconditions for the modifications of the schedules which should apply to all parties to the EPAs. In order to offer more development oriented policy space to ACP countries this regulation could allot easier preconditions for the modifications of schedules for the ACP side than for the modification by the EU. At least, when negotiating and defining the compensatory adjustments the partner countries should take due account of the development status and the economic and social situation in the modifying ACP country.

In case the EPAs offer other possibilities to retrospectively change the schedules like through a general regular review process on services commitments or through a mechanism for emergency safeguard measures in the services trade, the modification of schedules might not be such an urgent topic.

However, any instrument for modification of commitments should offer a prudential balance between the interest to withdraw commitments the economies and societies suffer from and the goal of a free trade agreement that creates predictability and open markets under transparent conditions. The decision should therefore be shared by EU and ACP representatives alike and maybe even be joined by a third independent party.

**4.3 Further rounds of services negotiations**

Another possibility to adapt the commitments on services trade liberalisation to future developments should be offered by further negotiation rounds. This process could also open the opportunity to deepen the preference margins for the ACP that might decrease through other bilateral and regional trade agreements of the EU as
well as new GATS commitments once the negotiations inside the WTO have successfully been finished.

4.4 Regional ACP integration

Regional integration of the ACP regional negotiating groups is one of the main goals of the EPAs. In this context the regional economic integration of all ACP negotiating groups should also play a crucial role, as –at least in Sub-Sahara Africa– the ACP groups are direct neighbours and some allocations of specific ACP countries are still disputed or at least not easy to decide upon. Interesting administrative and economic synergies can be made not only in regional integration inside ACP negotiating groups, but also among them. Yet, in case of limited capacities and time constraints, priority should certainly be laid on the integration inside the ACP negotiation groups. In an EPA services chapter, regional integration should be paid attention to in the following aspects.

Market access and Most Favoured Nation Clause

Reciprocal market access should always go much further among the ACP countries than market access in the ACP countries for EU services. Here again, this holds true for ACPs in the same negotiating group, but also for all ACPs.

Horizontal and sectoral commitments among ACP countries therefore should be at least the same but preferably be broader and deeper than the commitments of the ACP countries towards the EC. This should cover in particular developmentally important service sectors like transport services, financial services and mode 4. An adequate legal instrument for this could be a MFN clause only for the ACP countries among each other in the sense that all ACP services suppliers or services should be treated not less favourable than services from any other country, including the EU.

Such a preference in market access should be secured via an exemption to a possible MFN clause for the EU (see above).

National treatment

Among ACP countries national treatment for services suppliers should be granted generously. Treating foreign ACP services suppliers just the same as national services suppliers will reduce transaction costs and administration processes and will provide transparency. For the levels of integration that can be reached the EU internal market could be taken as a good practice where national treatment is a basic rule.
Public procurement
As already discussed above, good governance aspects recommend ACP countries to agree among themselves and with the EU on disciplines and a rules-based process for public procurement in order to foster efficiency, finance allocation and transparency as well as to fight corruption.

Opening the procurement markets through regional integration among ACP services suppliers could offer the advantage of competition and thus better and more efficient offers without involving the danger of having the procurement market overrun by EU services suppliers. Market access for ACP services suppliers could also help to raise interest in the observance of the rules-based procurement procedures and transparency and thus help fight corruption.

Subsidies
For their regional integration ACP countries might wish to develop disciplines on the prerequisites of subsidies, on transparency and on the administration and review processes. National treatment concerning subsidies could be considered as granting of subsidies to foreign ACP services suppliers (see the EU internal market as a possible good example) would help align the investment conditions and thus deepen the integration. But taking into account the overwhelming burden of negotiation and implementation of other more important topics, this might not be regarded as a priority.

Joint regional activities
Important synergies for the ACP governments, administration and the businesses can be reached, when the ACP regions try to create joint institutions and necessary infrastructure as well as implement joint activities for services promotion, export, vocational training and necessary regulations and standards. As quite a number of these activities will afford a relevant amount of finances and capacities, joint efforts might help to meet the needs better and quicker. Additionally, joint infrastructure and harmonized rules and standards will also extend the market and make it more interesting for foreign investors and economic partners.

Common services infrastructure
This is certainly the case, when the services infrastructure is also addressed jointly by the ACP regions or when a common services infrastructure is built up together. Therefore ACP countries should strive to plan and build up joint infrastructure necessary for competitive services providers from their region, esp. cross-border
infrastructure. This could concern traffic infrastructure like roads, canals, airports and other ports. Other important infrastructure facilities are telecommunication networks, internet infrastructure (e.g. copper wires, fibre-optic cables or with wireless connections).

Vocational training
The ACP should also consider jointly establishing and maintaining institutions for vocational training, universities and other institutions preparing for professionalism in the services sectors. For specific services qualifications, training institutions could be built up in one ACP country only, offering training positions for students from the whole ACP negotiating group or even all ACPs.

Besides, cooperation or even harmonization of curricula, professional credentials and certification is recommended to facilitate the services export among ACP countries.

Promotion and export of services
Joint regional activities and institutions might be interesting and worthwhile for the promotion and export of services. ACP countries should strive to find synergies when offering information, assistance and promotion to their local and regional services providers. This could even include common institutions for economic and export promotion for the services providers (e.g. certainly also for producers).

Regulation and standards
Joint activities and institutions might prove to be very rewarding in the field of technical regulation and standards: In order to create synergies and to facilitate regional economic integration ACP countries should aim at developing joint technical standards and regulations for their ACP negotiation region.

As far as the regulation, licensing and professional requirements systems are not yet developed nationally, a joint effort and common institutions will be easier and more efficient to build up the necessary expertise and capacities to create the new and effective system. Already existing standards and regulations, especially those already developed by international (standards) organisations or EU standards should be taken as prototype or guideline in order to offer internationally comparable services and to facilitate trade. In this case, TA and CB could be offered by the EU as well as cooperation with relevant EU institutions in order to allow harmonization with the EU system as far as this is appropriate.
As far as the national systems for regulation, licensing and professional requirements are already in place, the ACP should be encouraged to create joint processes or even common institutions for the harmonization or mutual recognition of technical standards, licenses and professional requirements.

**4.5 Commitments of the ACP countries**

Commitments shall cover all modes of supply and substantial coverage of services sectors and modes (Art. V: 1: a GATS), but -according to GATS, Art. V: 3: a- for DCs flexibilities shall and can be provided. Therefore the commitment schedules by the ACP countries could contain significantly more exceptions concerning national treatment and a lower sectoral and modal coverage than the EU commitments.

As explained above, horizontal and sectoral interests of the different ACP groups and countries differentiated by modes cannot be explained and assessed in this paper due to the lack of reliable data and to the scope of the study. But some general assumptions can be made.

**Offensive export interests**

The ACPs have export interests in mode 1, 2 and 4, but concerning mode 3 ACP entrepreneurs probably do not have the financing to make relevant use of establishment access to the EU. Therefore ACP interests in mode 3 concern import rather than export of services.

ACP export interests are expressed most often for mode 4. The categories of services providers of export interest to ACP (due to the lack of FDI and mode 3 respectively) are independent professionals and contractual services suppliers.

Mode 4 delivery is seriously hindered by the current EU trade regime in the form of economic-needs tests and diploma and nationality requirements, as well as outright restrictions on movement of less skilled workers or short-term workers for ACP companies. Concerning mode 4, the ACP countries should at least try to reach more openness in the EU markets for contractual services suppliers and independent professionals.

Professional requirements and credentials should be harmonised and at least be mutually accepted. According to their export interests in mode 4 the ACP should try to soften the requirement of university degrees: other professional schools, vo-
cational training of several years as well as a longer professional experience could be accepted as equivalent. In a number of sectors it will be interesting for the ACP to extend the length of stay permitted in mode 4 for the different services supplier categories. Another promising idea could be to negotiate work force agreements with the EU or specific EU member states like the German “Werkvertragsarbeitnehmerverträge” which allow entry on the basis of quotas which are renegotiated every year according to the actual employment situation.40

Defensive import interests
The ACP countries themselves have to define the services sectors they want to protect. It is recommended to compare these defensive interests with the need for a sufficient supply, e.g. as an input into other business sectors or for social goals. Besides, services trade protection should always send a signal to ACP governments to ask for technical assistance and capacity building for governments, sector related administration and business associations to strengthen the competitiveness of the national (or regional) services suppliers in this sector.

Offensive import interests
The ACPs should consider where they have interests to import services. On the one hand, imports via mode 1, 3 and 4 might be of interest in order to fill gaps in the national economy or supply system. Sectors that are named very often in this context are financial services, business related services, and as well telecommunication services and services for basic supply character. Services import via mode 3 as well as “classic” imports via mode 4 may probably also bring along technology and know-how transfer.

Basic consumption interests as a restriction to exports
On the other hand, consumption needs and basic supply might in some sectors oppose to export of services. Esp. in the health services the ACPs should check their national needs and supply capacities to avoid brain drain through services exports. In this regard, it is important not only to have mode 4 in mind, but also mode 1 services supplies: doctors and nurses working in call centres giving advice to patients in industrialized countries are as little available for the national health system as the doctors and nurses working abroad.

Regulatory interests
As explained before, commitments in sectors, where regulation and efficient institutions play an important role for development and therefore have to be in place
before trade liberalisation should be only made under the condition that these are already in place. This should be connected with a process for TA/CB and FA as well as a monitoring process jointly governed by the EC and the ACP side.

**LDC commitments**
According to Art. IV: 3 GATS, LDCs shall take less liberalisation commitments concerning Art. XVI and XVII GATS than DCs. For the EPA services chapter this conveys a possible differentiation between the ACP which are DCs and those which are LDCs. LDC could try to not open a bigger number of sensible services sectors, but should not forget to consider their import interests for affordable and good quality services as well as possible technology and know-how transfer linked here-with in these fields.

This differentiation would not harm the goal of regional integration too much. Commitments in services trade liberalisation are always listed in country schedules, explaining for every sector and every mode the specific liberalisation commitment (or none). Even the EU member states still have diverging commitments listed in their GATS schedules.

**4.6 Commitments of the European Union**
Like the ACP countries, the EU should bind horizontal and sectoral liberalisation commitments in all modes of supply and with substantial coverage of services sectors. According to the Cotonou Agreement, the EU should consider liberalisation in the sectors and modes of particular interest for development and poverty reduction in the ACP. Following the principles of special and differential treatment and asymmetric liberalisation, the EU should engage in deeper and broader commitments than the ACP.

**Offensive export interests**
The EU has declared not to have any offensive interests in the services negotiations with the ACP countries. Up to now, the EU has not tabled any horizontal or sectoral requests, but has offered to formulate proposals for liberalisation steps by the ACP in case specific ACP regional negotiation groups think this is useful for the process.

**Defensive import interests**
The ACP countries all have named mode 4, exported by contractual services suppliers and independent professionals, often on a low skills basis as their main export interest. As the employment markets in the EU generally are under stress and as
unemployment rates in the EU are highest among the less qualified, the EU is not willing to open up their services market in this segment.

The EU has to include mode 4 into its liberalisation scheme, but it could easily focus its liberalisation in mode 4 to FDI related temporary stay and high qualified personnel. Thus, the EU would open its services market in accordance with Art. V GATS, but not in accordance with the export interests of the ACPs\textsuperscript{41}.

As EU reluctance to liberalise in mode 4 is mostly due to employment market constraints and feared illegal immigration, the ACP countries should try to connect their mode 4 requests with initiatives in this regard. Mode 4 liberalisation requests therefore should take into account negotiations on control of entry and exit of the services suppliers and solutions how to proceed if ACP services providers overstay. Looking at the tight EU employment market, it might be a viable solution to negotiate every year a quota with each relevant EU member states governments and their relevant civil society (business associations and trade unions) on how many ACP services providers in which sector may travel to which EU member state to offer their services. This might convey some amount of administrative expense, but some EU member states already have put similar quotas in practice with other countries.

4.7 Development cooperation

Role of development cooperation in an EPA services chapter

Development cooperation will probably not form a main part of the EPA chapter on services itself, but EPA chapters on services trade liberalisation could contain a general statement in which both parties acknowledge the importance of development cooperation for the implementation of the chapter.

Below, I want to suggest some fields of cooperation where development cooperation will be useful or even necessary for obtaining development friendly results of services trade liberalisation in the framework of the EPs. However, an agreement on concrete development cooperation measures between ACPs on the one side and the EU or EU member states on the other side should be reached upon well considered appraisal of the needs and the most efficient mechanisms to answer these.

Fields for development cooperation

Development cooperation should consider the following approaches for technical and financial assistance as well as capacity development:
Part I: Services

- Technical assistance and capacity building on national and regional services policies, services export strategies and liberalisation strategies; this should be offered to government and administration officials as well as to business administration and chambers, also in order to assist strengthening a vivid public private dialogue.

- Consultancy and capacity building for pro poor and development friendly policies and implementation of regulation, supervision, quality maintenance, affordable pricing and sustainable area-wide supply of services with basic supply character (health, educational, energy, water, waste related services)

- Support to build up and maintain local services supplies in services sectors with basic supply character

- Technical and financial support to build up the capacities and competitiveness of the services sector in general in the ACP countries, esp. the LDCs; this should be offered to government and administration officials as well as to business administration and chambers in order to help building up and strengthening local or regional support structures.

- Capacity building and institution building for meso institutions and enterprise associations and chambers in order to take advantage of new export opportunities.

- Consultancy and capacity building for implementation of EPA and other international trade agreements.

- Sustainable, efficient and market oriented vocational training offers for services, corresponding to EU professional credentials

- Setting up one-stop shops in ACP countries for the recognition of professional credentials

- Licensing and certification system for ACP services providers, accepted by EU members for import via mode 4.

- Technical and financial support and capacity building for the efficient functioning of GATS enquiry points (Art. III:4 GATS)

- TA/CB for regional integration concerning trade in services, esp. on
  - efficient economic integration agreements and initiatives among the ACP countries (and different ACP regional groups),
  - implementation and
  - joint regional activities.
5. Conclusions

First of all, ACP countries should take advantage of the development opportunities offered through regional integration in the services sectors. Creating a bigger market and maybe even common institutions, regulations and infrastructure will enable ACP countries to benefit from synergies in the services sectors, strengthen the regional services sectors and become more competitive.

Regarding the negotiations on economic integration with the EU, it can be concluded that positive development implications of the services negotiations in the EPAs will certainly depend on the market access opportunities granted by the EU according to the export interests of the different ACP negotiation groups.

But ACP countries should also consider their strategic import interests in trade in services, as better quality and prices of services imported from the EU might ameliorate the supply of basic services and implicate strengthening the international competitiveness of ACP businesses.

Of high development relevance are basic supply services: commitments on market access and domestic regulation should either not be made or take into due account the necessity of basic supply in good quality, with affordable prices and for the whole population.

Yet, commitments in market access, national treatment and domestic regulation should be taken into a due balance with the need for regulation and sufficient policy space. Concerning regulation, the relevant institutions and mechanisms should already be in place when liberalisation commitments towards the EU get effective.

Special and differential treatment shall ensure that liberalisation steps taken by ACP countries can be easily implemented by ACP institutions and that ACP economies and societies can easily adapt to and benefit from the stronger competition. The EPA services chapter should provide for effective monitoring of the development implications of the trade liberalisation and offer pragmatic instruments to adapt the EPAs according to the development needs of the ACP countries.
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Endnotes

1. Dvvvue to its limited scope the study does not discuss all the relevant topics and questions in detail, but instead builds and relies upon diverse literature and information instruments. The list of literature lists some of the more in-depths literature, but does not try to be exhaustive. The status of negotiation on trade in services within the different ACP negotiation groups which is not discussed here due to its permanently rapid changes instead can be found on the Website of ECDPM (European Centre for Development Policy Management (http://www.acp-eu-trade.org/index.php?loc=tni/).

2. Taken from Te Velde, TNI May 2004, p. 5.

3. In the whole study „EU“ is used as the relevant actor on the European side as this political term is more common. In legal terms the relevant actor for trade negotiations is the EC (European Communities).


5. Ullrich, ECDPM InBrief 6C, p. 2.

6. Ullrich, ECDPM InBrief 6C, p. 3.


9. Algeria, Lebanon and the Palestine Authority are not WTO members yet.

10. Ullrich, ECDPM InBrief 6C, p. 3-4.


15. Ullrich, ECDPM InBrief 6C, p. 6-7.


17. Mode 3, outward FDI, constitutes rather an auxiliary mode of export as the outward FDI may lead to services sales, but only through the other modes of delivery.

18. More in detail on brain gain versus brain drain in chapter III.1.m.

19. This might imply subsidies for consumers, political pricing, price steps for poor and remote areas or subsidies for the supply system and the infrastructure etc.

20. As above.


22. See Art. 95.1 of the Cotonou Agreement.

23. See e.g. for the Cariforum EPA http://www.bilaterals.org/article.php3?id_article=6217.


25. The German definition „Daseinsvorsorge“, which is thought of here, is not easily translated into English.

26. See also below, in chapter IV.1.m.

27. In Germany e.g. the “Werkvertragsarbeitnehmerverträge” with mostly east and
middle European countries, see Jahresgutachten 2004 des Sachverständigenrates für Zuwanderung und Integration, p. 66.


31 Rules on subsidies need not be services specific, but could be formulated in general, apply to trade in goods and rights as well and be integrated into the horizontal regulations of the EPAs.


34 Mode 4 is the mode associated most often with „brain drain“. But brain drain can also happen through mode 1, when e.g. in the health sector doctors and nurses prefer working for call centres for medical services instead of the national health system. Mode 2, often in connection with mode 3, can lead to health personnel working in hospitals and sanatoriums for health tourists instead of in the less well paid national health system.


36 See e.g. the EU Strategy for Action on the Crisis in Human Resources for Health in Developing Countries http://europa.eu/scadplus/leg/en/lvb/r12550.htm.

37 See chapter IV.1.l.


39 See negotiations in the WTO Working Group on GATS Rules, esp. according to GATS, Art. X.

40 For specific sectors where the EU still could offer the ACP countries liberalisation in the interest of the ACP countries please check Te Velde, TNI May 2004, p. 5.

41 See also Te Velde, TNI May 2004, p. 5.
Analysis of Economic Partnership Agreements: Trade in Services Case Study of the CARIFORUM-EU Agreement

Allyson Francis, Heidi Ullrich
1. Introduction

CARIFORUM and the EU Commission agreed a comprehensive Economic Partnership Agreement\(^1\) (EPA) on behalf of the 27 Member States of the EU and the 15 Signatory States of CARIFORUM\(^2\) on 16 December 2007. Among the six negotiating regions of the African Caribbean and Pacific (ACP) countries, the CARIFORUM-EU EPA is the only comprehensive agreement that has been concluded to date. While there is no legal obligation for ACP negotiating groups to include a chapter on trade in services and investment to be WTO-compliant, given the comprehensive nature of the CARIFORUM-EU Title on Investment, Services and E-commerce, this analysis aims to identify and assess the potential developmental impacts for the CARIFORUM region as well as other ACP regions. In particular, this study analyses the developmental aspects specifically related to economic and social growth, including the degree of liberalisation in trade in services, scope of sectoral and modal commitments, regulatory requirements, the extent to which the Agreement is compatible at the multilateral level of the General Agreement on Trade in Services (GATS) as well as with current and future regional integration and potential impacts on CARIFORUM regional integration.

With respect to trade in services, Title II of the Agreement sets out provisions on Investment, Trade in Services and E-commerce within seven chapters while Annex 4 contains the CARIFORUM and EU schedules of commitments.\(^3\) Haiti and the Bahamas, currently excluded from the chapters on investment and services, are to submit their schedules within six months from the signing of the Agreement (Art. 63). Market access, national treatment and most-favoured nation treatment are covered in chapters on commercial presence (Mode 3) and cross-border supply of services (Modes 1 and 2).\(^4\) Commitments covering the temporary presence of natural persons for business purpose (Mode 4) applying to key personnel, graduate trainees, business services sellers, contractual services suppliers, independent professionals, and short term visitors for business purposes are set out in Chapter 4 while a Protocol on Cultural Cooperation that incorporates the provisions within the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expression aims to facilitate the entry and temporary stay of artists and cultural professionals not covered within Title II. Chapter 5 establishes extensive regulatory disciplines for tourism services as well as for telecommunications, financial services, computer services, courier services, and international maritime transport. Significantly weaker language on regulatory issues related to e-commerce is
included in Chapter 6 with Parties only agreeing to ‘maintain a dialogue’ (Art. 120). Cooperation priorities specific to services and investment are set out in Chapter 7 including improving the ability of Signatory CARIFORUM States to meet EU regulations and standards; increasing the export capacity of their service suppliers; the establishment of CARIFORUM regulatory regimes for specific services sectors at both the regional and national levels, and creating mechanisms for promoting investment and joint ventures between EC and CARIFORUM Signatory States’ service suppliers (Art. 121). (See Annex 1 for the key elements of Title II.)

In addition to trade in services and investment, the CARIFORUM-EU EPA also covers trade in goods; current payments and capital movements; such trade-related issues as competition, intellectual property, environment and social aspects; as well as outlining dispute settlement procedures and establishing institutional bodies to oversee its implementation. Additionally, the Agreement includes a Trade Partnership for Sustainable Development that recognizes the importance of sustainable development and regional integration; the need for monitoring the operation of the Agreement; and highlights priorities for cooperation including technical assistance and capacity building.

2. CARIFORUM-EU EPA: Toward good practice in pro-development provisions

Socio-economic development is of primary importance within the EPAs. The Cotonou Partnership Agreement (CPA), which forms the basis for the EPAs, grants ACP countries ‘due regard for their political choices and developmental priorities, thereby promoting their sustainable development and contributing to poverty eradication’. As a means to assess the degree to which the provisions on investment and trade in services within the CARIFORUM-EU EPA may be considered pro-development, where amendments to provisions may be needed, and which elements should be included among all ACP regions to ensure sustainable development and enhance regional integration, this analysis is informed by criteria developed by the Deutsche Gesellschaft für Technische Zusammenarbeit (GTZ), including, in general, that the EPA:

- Achieves outcomes in sectors and modes of supply of export interest to the ACP countries and provides sufficient space for learning processes within the ACP countries,
Establishes conditions for regional integration among ACP countries allowing for deeper and broader integration than between the ACP and EU, and avoids GATS-plus obligations for ACP countries.6

2.1 Horizontal elements

Progressive and asymmetric liberalisation
The Parties explicitly acknowledge that the objectives of regional integration, sustainable development and the gradual integration of the CARIFORUM States into the global economy require ‘progressive, reciprocal and asymmetric liberalisation’ of trade in services and investment (Art. 60:1). Progressive liberalisation is built-in to the Agreement with further negotiations on trade in services and investment to begin within five years of the entry into force of the EPA (Art. 62). At the same time, effective review and monitoring mechanisms are necessary to assess the implementation of the existing EPA as well as the need for progressive liberalisation. Although the CARIFORUM-EU EPA includes some general provisions for monitoring7 and specific provisions within Title II for review of progress in investment8 and mutual recognition9, a development-motivated monitoring process based on development benchmarks and indicators should be incorporated within all EPAs.10

Asymmetric liberalisation, provided for in GATS Art. 5:3(a) granting greater flexibility for developing countries in economic integration agreements with developed countries, is evident in the CARIFORUM-EU EPA. While the developed countries of the EU commit to liberalise 94 percent of services sectors11, the CARIFORUM developing countries, divided into more developed countries (MDCs) and less developed countries (LDCs)12, open 75 percent and 65 percent of their services sectors respectively. One exception is the Dominican Republic that has committed to open 90 percent of its services sectors. Given the strength of the CARIFORUM services sectors in contribution to GDP and percentage of total exports, the relatively narrow asymmetry in liberalisation within the CARIFORUM-EU EPA will likely still result in opportunities for development among the CARIFORUM States. However, in the case of ACP negotiating groups consisting primarily of Least Developed Countries (LDCs) with low levels of services infrastructure, greater asymmetric liberalisation (i.e., minimal liberalisation by LDCs) accompanied by sufficient attention to sequencing to allow appropriate regulatory and competitive environments to be in place may provide greater developmental prospects.
Market access in sectors and modes of interest to developing countries

A key mechanism to increase the ability of ACP States to engage fully in world trade is through the liberalisation of market access in sectors and modes of supply of export interest to them. In general, the EC has opened services sectors in which the CARIFORUM States are competitive or are searching for investment to develop service supply capacity thus resulting in the potential for pro-development development. The sectors that the EC has opened include Business services, Communications (including telecommunications), Construction, Distribution, Environmental services, financial services and Recreational services (including the key sub-sector of Entertainment services included for the first time in an EU trade agreement). Of particular developmental value for CARIFORUM are the EU’s market access commitments in Tourism, including travel agencies and tour guides, and Entertainment services, including artists, dancers and musical bands, given CARIFORUM’s competitiveness in these sectors. Notably, the extent of market access that the EC is granting in Entertainment services is the most significant it has offered in a trade agreement to date13. Services sectors supplied by the government, including energy, public health and water as well as social security and pensions are not covered in the EPA.

The EC’s commitments are made across all four modes of supply. The EC’s level of commitments in cross-border supply (Mode 1) is somewhat limited given the increasing ability to provide services via telecommunications. However, there are significant limitations on the temporary movement of natural persons (Mode 4), in particular contractual services suppliers and independent professionals, thus reducing the developmental impacts. Although the EC has granted market access for CARIFORUM contractual services suppliers in 29 sub-sectors as well as 11 sub-sectors for independent professionals, conditions include time-limitations of 6 months, considerable requirements for academic and professional qualifications, and economic needs tests that can be prohibitively costly for developing and LDC countries (see Annex 1 for more details). Thus, despite the substantial scope of market access opening in Mode 4, the actual developmental impact will likely be relatively limited given the burdensome requirements placed on the service providers. Given the interests of developing countries in improving developed country market access commitments in Mode 4, CARIFORUM and other EPA negotiating groups may consider urging the incorporation of less restrictive limitations in Mode 4 market access commitments in future negotiations.
CARIFORUM Signatory States have agreed to liberalise the following services sectors in all four modes of supply: Business services (accounting, architecture, engineering, etc.) and Other Business services (advertising, management consultancy, etc.), Computer and Related services, Communications (courier services, telecommunications), Construction, Distribution, Education, Environmental services, Financial services, Health, Tourism, Transport and Recreational services. With respect to modes of supply, CARIFORUM Signatory States were relatively generous with commitments in Modes 1 and 2 and Mode 3, although commitments undertaken by individual CARIFORUM States vary somewhat due to domestic and sub-regional sensitivities. Joint ventures, predominantly for Professional services, are frequently required in several states. Of particular developmental benefit for many developing countries are the detailed requirements such as used by Belize for joint ventures as well as transfer of knowledge and technology in such sectors as accounting, architectural and engineering services. Requirements for economic needs tests are less frequently required in several sectors, including Professional services and Computer services. Several CARIFORUM States, particularly Antigua and Barbuda, Belize, request transitions periods that allow time for States to learn and adapt to liberalisation and St. Vincent and the Grenadines, in such sectors as Professional services, Computer services and Education services.

**Most-favoured nation treatment and national treatment**

CARIFORUM and the EC grant the other the key trading principles of most-favoured nation (MFN) and national treatment (NT). The Parties agree to grant the other no less favourable treatment than given to any other major trading partner. A useful exception for purposes of regional integration is granted to Parties or CARIFORUM Signatory States that form a regional internal market, as this will allow deeper integration. However, to allow for future economic integration between all ACP negotiating groups, ‘regional’ could be replaced with ‘preferential’.

National Treatment is granted to EC and CARIFORUM States subject to specific conditions set out in their individual schedules. CARIFORUM States have the right to reserve NT for subsidies and grants with Belize and Jamaica noting citizenship requirements for some health and education-related sectors.

**Regional integration**

Language supporting the further regional integration of the CARIFORUM Region is present in several articles of Title III. In setting out the title’s objective, scope and coverage, the Parties recognise that progressive, reciprocal and asymmetric
liberalisation in investment and trade in services will facilitate regional integra-
tion (Art. 60). Notably, Article 64 entitled ‘Regional CARIFORUM integration’
recognises that progressive liberalisation and the establishment of appropriate
regulatory frameworks will facilitate the deepening of the CARIFORUM integra-
tion process. However, there is a lack of language encouraging integration among
other ACP regions. Such language is of particular relevance for regions in which
several ACP negotiating groups exist. Section 5 provides further details pertaining
to CARIFORUM regional integration.

**Labour and environmental standards**

Labour standards, although removed from being negotiated at the multilateral level
within the WTO Doha Round, are increasingly going beyond the GATS by being
incorporated within regional trade agreements. The CARIFORUM-EU EPA man-
dates that investors from both Parties act in accordance with core labour standards.
While such GATS-plus requirements can contribute to pro-development growth,
there are also concerns among some developing and least developed countries that
these provisions may mask protectionist intentions by developed countries. To pro-
vide assurances of good intent, in addition to labour standards in Mode 3, devel-
oped countries could add provisions on labour rights covering Mode 4.

Environmental obligations and standards, although similarly controversial within
the current WTO Doha round as labour standards, are also incorporated within
the CARIFORUM-EU EPA within the chapter on commercial presence as well as
under provisions related to tourism services. Such environmental provisions can
serve as important factors in achieving sustainable development objectives, but
need to be well-managed including sequenced implementation and adequate tech-
nical assistance.

**2.2 Sectoral elements**

The CARIFORUM-EU EPA establishes regulatory disciplines in sectors of im-
portance to both Parties, particularly Tourism and Telecommunications, but also
including Financial services, Computer services, Courier services, and International
Maritime Transport. Notably, the Agreement also includes language on mutual
recognition that will impact all sectors.
**Mutual recognition**

To facilitate the ability of services providers in the EC and CARIFORUM states to fully benefit from trading opportunities involving the recognition of qualification, licenses and professional experiences, negotiations to develop recommendations on mutual recognition are to take place between EU and CARIFORUM professional bodies within three years of the EPA going into effect. Mutually agreed recommendations are to be firstly submitted to the newly established Trade and Development Committee to ensure they are consistent with the Agreement followed by negotiations between the competent EU and CARIFORUM authorities. The Trade and Development Committee is to review progress toward mutual recognition agreements every two years. Provisions on mutual recognition are more suitable for agreements between developed and developing countries than harmonisation requirements given the often political and cultural sensitivities that are involved in the latter case. Additionally, agreeing to develop mutual recognition procedures rather than harmonisation allows space for regional integration within CARIFORUM. However, mutual recognition provisions within EPAs would likely have broader impact if there were similar procedures established for all ACP regions based on the best practices of the Parties involved as well as time-frames for the development of recommendations and negotiation of mutual recognition agreements.

**Tourism services**

As in many ACP regions, tourism and travel-related services are of primary importance to CARIFORUM contributing sixty percent of its services exports to the EU. Both parties have made considerable sectoral commitments as well as agreed a number of regulatory disciplines in tourism. The EC has agreed to open its markets for travel agencies and tour operator services as well as tourist guide services. CARIFORUM has made commitments in hotels and restaurants, marina services and spa services. The regulatory framework for tourism services as established by the EPA include the facilitation of access of technology by the CARIFORUM States, increased participation of small and medium-sized enterprises within the tourism sector, cooperation toward the development of mutual recognition mechanisms, and ensuring that tourism activities are in compliance with environmental standards and contribute to sustainable development. The Parties established priorities for development cooperation and technical assistance and agreed to establish modalities for dialogues with relevant stakeholders for purposes of information exchange. The current regulatory provisions offer CARIFORUM’s tourism sector opportunities for growth and development, however, in future negotiations the
CARIFORUM States could stress the need to upgrade current language from requiring Parties to only ‘endeavour to facilitate’ to more affirmative language signalling greater commitment as well as the establishment of indicators and mechanisms as appropriate.

**Telecommunications services**

Telecommunications services provide significant developmental benefits including increasing access to markets, education and health services. The regulatory disciplines in the CARIFORUM-EU EPA reflect the GATS Telecommunications Reference Paper (TRP) in that it includes provisions on establishing principles covering competitive safeguards, interconnection, independent regulatory authorities and allocation and use of scarce resources. In a few notable instances, the provisions go further than the TRP such as in the case of if a license to provide telecommunications services is unduly denied, the applicant has recourse before a body of appeal, the requirement that the Parties will ensure confidentiality of telecommunications and related traffic data, new rules for resolving disputes and expanded language on universal services obligations (USO). For example, similar to existing provisions in the EU, the Parties retain the right to define the kind of USO they wish to apply, with national regulatory authorities able to determine whether a mechanism (e.g., a Universal Access Fund) is necessary to ensure that the telecommunications services suppliers designated as the universal service provider are adequately compensated. Such Funds generally are flexible, transparent and can lead to lower costs. ACP countries that choose to establish UA Funds may consider emphasizing the need for access to both basic telecommunication services as well as value-added services, such as access to the Internet given technological advances in this sector.16

**Financial services**

Financial services comprise activities involving insurance and insurance-related services and banking and other financial services. Although broadly following the GATS Annex on Financial Services and the Understanding on Commitments in Financial Services,17 the CARIFORUM-EU EPA is slightly GATS-plus in this sector as it adds deeper provisions covering new financial services, allowing Parties to provide financial services that are ‘new’ to the other Party and data processing, permitting the transference of information either electronically or other form for purposes of data processing. The EPA also includes a provision on effective and transparent regulation, although this principle is not binding upon the Parties. In addition to the GATS and EPA commitments on financial services liberalisation
made by CARIFORUM, the Members of CARICOM are also obligated to imple-
ment the CARICOM Financial Services Agreement.

The liberalisation of financial services can provide such developmental benefits as
improved efficiency and stability of domestic banking systems as well as increased
access to foreign capital and modern financial services technology.\(^{18}\) However, as
noted in detail in section 3.1, financial services liberalisation in CARIFORUM will
also require significant training, policy making and funds.

### 2.3 Development cooperation

Given that enabling the CARIFORUM States to play a full part in world trade is
the primary objective of EU-ACP economic and trade cooperation, the Parties rec-
ognized the need for CARIFORUM States to have access to technical cooperation
and assistance. The CARIFORUM-EU EPA contains both general\(^{19}\) and issue spe-
cific provisions on development cooperation. With respect to services, Chapter 7 is
dedicated to development cooperation, albeit consisting of only one article. In Art.
121.2 the Parties agree to cooperate in such pro-development activities as meet-
ing regulations and standards; improving export capacity of CARIFORUM States;
facilitating dialogue between EC and CARIFORUM services suppliers; address-
ing quality standards; implementing regulatory regimes; and establishing mecha-
nisms for the promotion of investment and joint ventures. Additionally, Chapter
5, Article 117 recognizes the need for specific cooperation in the tourism services
sector including modernizing the national accounting systems of CARIFORUM
States in order to introduce Tourism Satellite Accounts, capacity building activities
in environmental management of tourism sites and the initiation of tourism ex-
change programmes for training purposes.

Nonetheless, the language on cooperation represents a missed opportunity for effec-
tive development assistance due to lack of clear financial commitments, deadlines
for the achievement of activities\(^{20}\), and country-specific technical assistance and
capacity building needs analysis. CARIFORUM States and other ACP regions
would benefit significantly from urging the incorporation of detailed development
cooperation commitments as well designing activities that promote effective design
and implementation of regulatory systems, institution-building, monitoring the
implementation of the EPAs, and multi-stakeholder participation.
3. Impact on CARIFORUM regulatory policies

The focus of this section is primarily on the provisions relating to telecommunication, financial and tourism services. The countries that are addressed are Barbados, Dominica, Grenada, Jamaica, St. Lucia and St. Vincent and the Grenadines. These countries were chosen in order to ensure representation of issues from both the LDCs and MDCs of CARICOM.

3.1 Telecommunication services

As indicated above the regulatory disciplines on telecommunications services reflect the GATS Telecommunications Reference Paper. All the mentioned Member States have established national regulatory commissions and implemented legislation addressing the disciplines provided for in this section.21

3.2 Financial services

The provisions on Financial services go beyond the GATS by adding provisions on new financial services,22 and data processing. As it pertains to new financial services, while the provision grants the Parties the right to determine the juridical form for the provision of these services, it states that Parties shall permit such suppliers to provide this service under its domestic law and in like circumstances to its own financial service suppliers. This therefore removes the flexibility to provide preferences for indigenous providers of new financial services. According to the Revised Treaty of Chaguaramas Establishing the Caribbean Community Including the CARICOM Single Market and Economy, the Member States of CARICOM are required to remove restrictions on banking, insurance and other financial services,23 and on movement of capital and current transactions.24 In addition Member States of CARICOM are also required to implement measures to facilitate establishment, provision of services and the movement of capital.25 As stated in a document on the implementation of the EPA, prepared for the Inter-Sessional Meeting of the Conference of Heads of Governments of CARICOM,26 to meet the provisions on financial services, Member States will have to put into practice the CARICOM Financial Services Agreement (CFSA)27 and adopt appropriate policies. Doing so will require additional regional consultations, training of regulators and stakeholders, the amending of present legislation and the drafting of required legislation. The document estimated that this will cost CARIFORUM approximately 2 million Euros.28
3.3 Tourism services

Tourism services, like cultural services, are extremely important to CARIFORUM economies and therefore were an important part of the negotiations for the region. In the development of the regulations on this sector, many stakeholders in the industry including the Caribbean Tourism Organization (CTO) and the Caribbean Hotel Association (CHA) provided input. The section on Tourism establishes disciplines on the prevention of anticompetitive practices, particularly as it relates to tourism distribution networks. In addition it also provides for the facilitation of access to technology and the participation of small and medium sized enterprises in the sector. There are also provisions to support CARIFORUM participation in programmes on the sustainable development of tourism and compliance with environmental and quality standards. The section also provides for cooperation on mutual recognition of requirements and the development of the sector through cooperation and technical assistance. In order to implement this section CARIFORUM Member States will be required to continue consultations between the regional tourism organizations and the public sector policy makers toward the development of harmonized policies, reform or establish new institutions to address the issues and develop the required legislation. It is estimated that this cost CARIFORUM over 4 million euro to implement.

3.4 Mutual recognition

Article 85 on Mutual Recognition is another notable aspect of Chapter 5 as the Region is of the view that it is sufficiently organized in some of the professional services disciplines, notably accounting, architecture, engineering and tourism, and can also organize the other professions to actively trade with the EC. Regarding the development of Mutual Recognition Agreements (MRAs), while there are associations in most CARIFORUM Member States, the national accreditation bodies within CARICOM are not operational in all states. Chaitoo (2008) notes that there are professional associations in various fields, but the traditional professions have been quite restrictive at the national level, therefore there is a need for convergence of national regulations and mutual recognition of qualifications. The CARICOM Secretariat, together with the CARICOM Legislative Drafting Facility (CLDF), has prepared Draft Model Professionals Services Bills to facilitate the development of a harmonized system within CARICOM. The Bill provides the basis for the practice of professions within Member States by introducing a regulatory framework and administrative body to implement the provisions.
The development of MRAs will require coordination at the national and regional level, particularly to ensure that the required legislative framework is put in place for the different professional bodies and also for the joint development of recommendations to put forward to the joint committee. At the national level where there are not the required professional bodies, they will have to be established, to better participate in the regional initiative.

A study prepared by Dykon Developments noted that there was neither a harmonised regime for temporary entry under Mode 4 within CARICOM nor in CARIFORUM. It is therefore necessary for CARIFORUM Member States to amend their legislation and develop the required institutions to provide for the temporary entry of natural persons between themselves and the Member States of the EC. While the draft model bills will be used, CARIFORUM Member States will need to develop the necessary administrative bodies. In order to implement the commitments undertaken in the mutual recognition provisions, CARIFORUM will need to develop or designate a unit to participate in the Joint Committee meetings. In addition it will also be necessary for CARIFORUM to specify which institutions will coordinate with the professional bodies towards the negotiation of the MRAs. Highlighting the numerous capacity constraints that exist, the estimated minimum cost to implement the EPA provisions on Trade in Services and address the capacity constraints will be Euro15.6million.

The commitments on regulatory policies in Title II, Chapter 5 are not fully reflective of the existing regulatory policies and institutions in CARIFORUM. The regulatory policies that currently exist in CARIFORUM in many instances differ by industry and country. Therefore, for the implementation of the EPA, Signatory CARIFORUM States will be required to enhance its capacity through the reform of legislation or institutions. As the CARICOM Member States progress towards the full implementation of the CARICOM Single Market and Economy (CSME), it is expected that there will be harmonisation of the laws and administrative procedures in Member States. Therefore, the implementation of commitments undertaken should reflect the intended regulatory framework of CARICOM.

As stated above, it can be seen that the commitments on regulatory policies in Title II, Chapter 5 do not correspond entirely to the existing regulatory policies and institutions within CARIFORUM. With the exception of the section on tourism services, which introduces new disciplines, most of the other requirements have to be addressed under the establishment of the CSME. This also re-emphasises the
earlier statement that the EPA will serve as a catalyst for the CARICOM region to put required policies into place. While this can be interpreted as a positive aspect of the Agreement, it can also be stated that the Region will now be pushed at a pace that it is not fully in a position to undertake. It will therefore be critical that the development cooperation and technical assistance provided for in the Agreement is made available in a timely and adequate manner.

4. Comparison of WTO and EPA commitments: GATS vs. GATS-plus

EPAs must be WTO-compatible. In the case of trade in services the EPAs need to be GATS-compliant with GATS Article 5 that establishes the relationship between the services commitments made at the multilateral level of the WTO and those made within regional trade agreements (RTAs), including the EPAs. Although, as mentioned above, there is no legal obligation for the EPAs to include comprehensive chapters on trade in services, if trade in services are included, EPAs must include substantial sectoral coverage in terms of sectors, modes of supply and overall volume of trade, as well as providing for the absence of elimination of substantially all discrimination (Art. 5.1). While WTO rules require the EPAs to include greater reciprocity between the EU and ACP countries, both the GATS and the CPA grant flexibility to developing countries in terms of coverage of market access liberalisation.37

In scheduling the commitments in trade in services within the EU-CARIFORUM EPA, a primary objective of the Caribbean Regional Negotiating Machinery (CRNM) was to establish preferential access to the EU in services sectors not scheduled by the EC or not fully committed within the GATS so as not to fall under WTO MFN.38 At the same time, the CRNM took into account such issues as sensitive sectors within individual CARIFORUM States, sectors in which investment was need to spur growth, and sectors with offensive interests.39 As established in the CPA, the EC was to approach liberalisation through building on the *acquis* and seek to improve existing market access for ACP countries.40 Thus, GATS-plus liberalisation in the EPA is consistent with the objectives of the Parties.

In order to assess the degree to which the EPA has resulted in GATS-plus liberalisation in trade in services, the following section reviews the degree of liberalisation by both the EU Member States and CARIFORUM Signatory States within the
EPA as compared to their commitments within the GATS and their current offers\textsuperscript{41} within the ongoing Doha Round negotiations. The discussion focuses on the coverage and speed of liberalisation within financial services, telecommunications services and tourism services.

4.1 Financial services

CARIFORUM signatory states
The financial services sector has a high level of convergence among the CARIFORUM States with all States having made GATS commitments/offers except Belize. Within the Doha Round, Suriname, Trinidad and Tobago and St. Vincent and the Grenadines have made a total of five initial offers, all of which are in the sub-sector of All Insurance Related services. This sector has the greatest number of existing GATS commitments with 44, of which 23 are under insurance and insurance-related services and 21 are scheduled under the sub-sector of banking and other financial services. The States with the highest number of commitments/offers include the Dominican Republic (10), Haiti (9), Jamaica (8), Guyana (5), and St. Vincent and the Grenadines and Trinidad and Tobago each with 3.

Within the EPA, all CARIFORUM States that have submitted their schedules made commitments in financial services for a total of 83 commitments nearly double their collective GATS commitments/offers. Although this points to a high level of convergence among CARIFORUM States, there is noticeable variation between the number of commitments made ranging from the most commitments made by the Dominican Republic (16) to Belize and Surname with one commitment each. There is a general trend among the CARICOM LDCs to have fewer commitments than the MDCs. However, Belize, an LDC, that has no GATS commitments/offers in financial services, made a commitment in the sub-sector of actuarial services. Regarding future liberalisation, only Dominica noted limitations with all but one of its commitments in Mode 3 unbound until 2018. Given the growing importance of Financial services to both CARIFORUM and the EU, the GATS-plus commitments within the EPA are not unexpected.

EU member states
EC commitments in financial services within the GATS are based on the Fifth Protocol to the GATS that went into force in 1999 following post-Uruguay Round negotiations. Although the sector is substantially open in terms of market access, given the national sensitivity of the financial services sector several sub-sectors are
unbound for Mode 1, while a number of Member States list reservations. The EC’s revised services offer within the Doha GATS negotiations includes expanded market access commitments, including in the more recently acceded Member States, as greater commitments in Mode 3 that will allow foreign financial institutions to provide insurance and banking services through a branch or subsidiary.

As within the GATS, the EC’s EPA commitments in financial services reflect the sensitivity of the sector. For example, under Insurance Services, 21 Member States have reserved the right to apply market access limitations (i.e., unbound) in direct insurance services in Mode 1 and Mode 2. A similar number of EC Member States have retained discretion to apply market access limitations in insurance intermediation services (20 Member States under Mode 1 and 24 Member States under Mode 2). At the same time, under the sub-sector of banking and other financial services, Mode 1 remains unbound for 20 Member States with the exception of financial information and financial data processing and for advisory and other auxiliary services. Where Member States did make commitments in these sub-sectors, many listed reservations. With respect to commercial presence (Mode 3), a number of Member States also note reservations, including various requirements pertaining to residency, nationality and incorporation in both investment and banking services that could impose barriers to CARIFORUM financial service providers wishing to invest in the EU. In Mode 4, while key professionals and graduate trainees are granted greater access, reservations in the insurance sub-sector are noted by Austria, Estonia, Spain, Italy, and Finland while in the banking sub-sector Belgium, Finland, Italy, Lithuania, and Poland list reservations. The EC made no commitments in Mode 4 for the categories of Independent Professionals and Contractual Service Suppliers.

4.2 Telecommunication services

CARIFORUM signatory states

Similar to financial services, the communications sector, of which telecommunications services is the primary sub-sector, has a high level of convergence among CARIFORUM States with all states except Haiti having made either GATS commitments or offers.42 As a group, the CARIFORUM States have made 18 conditional offers in telecommunications services with St. Vincent and the Grenadines and St. Lucia submitting the highest number of initial conditional offers due primarily to autonomous liberalisation. Other CARIFORUM States with a large number
of commitments/offers in telecommunications include Trinidad and Tobago (37), Barbados (34), Antigua and Barbuda, Dominica and Grenada (32), and Jamaica and Suriname (29). Several countries, particularly Antigua and Barbuda, Barbados, Jamaica, and Trinidad and Tobago, have noted time-related restrictions in certain sub-sectors such as voice telephone services and telegraph services.

The commitments made by the CARIFORUM States within the EPA reflect the high level of convergence among the States within the GATS. All states that have submitted their schedules to date made significant numbers of commitments including St. Kitts and Nevis (27), and Barbados, Grenada, and Jamaica (24 each). The majority of restrictions and limitations in market access noted in GATS commitments/offers are carried over into the EPA, including notably in Mode 3 for both voice telephone services and mobile services (both terrestrial and satellite based).

**EC member states**

The EC has a significant number of GATS commitments in telecommunications services. Its revised offer in the Doha negotiations includes commitments in the sub-sector of all services consisting of the transmission and reception of signals by any electromagnetic means, excluding broadcasting removes most market access and national treatment limitations.

The EC has opened the sector of telecommunications services to a greater degree in the EPA than in the WTO. The sub-sector of all services consisting of the transmission and reception of signals by any electromagnetic means, except broadcasting has no restrictions in Mode 1, Mode 2 or Mode 3 except for a note that Member States retain the right to maintain public participation in certain telecommunication operators. Under the sub-sector of satellite broadcast transmission services, there is a note applying to all EC Member States that service suppliers may be subject to obligations to safeguard general interest objectives related to the conveyance of content through their network in order to comply with the EU regulatory framework for electronic communications, while Belgium is unbound for this sub-sector.

**4.3 Tourism services**

**CARIFORUM signatory states**

The number of CARIFORUM states that have submitted GATS commitments/offers in tourism services ranks slightly lower than in financial services and telecommunications with a total of 12 countries. Six initial offers have been made in this sector,
all by Trinidad and Tobago, bringing the total of number of commitments/offers to 29. The States with the greatest number of commitments/offers include Trinidad and Tobago (9), Dominican Republic (4), and St. Lucia (3), and Antigua and Barbuda, Guyana, Jamaica, Suriname all with 2. The sub-sectors with the most number of commitments/offers are Hotels and Restaurants including catering (8), Travel agencies and Tour operators (7), and Hotel Development and Hotel Management each with 4.

CARIFORUM was somewhat GATS-plus in the scope of its tourism services commitments. The thirteen states that have to date submitted their schedules made a total of 52 commitments in tourism services. As at the multilateral level, Trinidad and Tobago (9) made the most commitments. Belize and Barbados who have no GATS commitments/offers in Tourism services made 6 and 3 commitments respectively in the EPA. This variance in the number of commitments reflects the particular sensitivities of individual CARIFORUM States and the process of regional economic integration. Notably for the first time, 11 States made commitments in Spa services, while the number of States making commitments in Marina services expanded dramatically from one in the GATS compared to 12 within the EPA.

EC member states

The EC has been limited in its commitments and offers in tourism services within the GATS, specifically in Mode 4 despite this being a sector of particular interest among developing countries. Under Mode 1, Cyprus, Malta, Poland and the Slovak Republic have listed restrictions under the sub-sector of Travel Agencies and Tour Operator Services. EC commitments and offers under Mode 4 are the most restrictive, particularly under the sub-sector of Tourist Guide Services that is nearly completely closed.

The EC’s EPA commitments in Mode 1 of tourism services are greater in scope than their offers within the Doha Round. Under the sub-sector of hotels and restaurants (including catering), the Member States have opened catering services in Mode 1 to a greater extent than hotels and restaurants. Similarly, the sub-sector of Travel Agencies and Tour Operator services is GATS-plus for Mode 1 as all EC Member States with the exception of Bulgaria and Hungary, have opened the sector, while within the GATS there are reservations from four countries. There are no reservations under Mode 2 for the sub-sectors of Hotel, Restaurants and Catering, Travel Agencies and Tour Operator services and Tourist Guide services. Mode 3 in Tourism Services is quite open in the EU. Under Hotels, Restaurants and Catering only Bulgaria, requiring incorporation, and Italy, requiring economic needs tests,
note limitations. Under Travel Agencies and Tour Operator services, only Bulgaria and Portugal list reservations. No Member State lists reservations for Tourist Guide Services.

EC commitments covering Mode 4 are considerably GATS-plus in most categories. Key Personnel and Graduate Trainees are liberalized significantly with the exception of Tourist Guide Services in which 11 Member States have listed nationality requirements. Contractual service suppliers working in tourism services are also granted greater access to the EU market, although several Member States require economic needs tests under the sub-sectors of Travel Agencies and Tour Operator Services and Tourist Guide Services. Notably there are no commitments on Independent Professionals within the sector.

5. CARIFORUM regional integration and potential impacts of the CARIFORUM-EU EPA

5.1 CARIFORUM regional integration

There are two distinct levels of market openings in CARIFORUM: 1) the intra-CARICOM market opening towards establishment of the CSME; and 2) the CARICOM – Dominican Republic market openness envisaged under the Free Trade Agreement.43

CSME integration

Under the CSME of great importance is Protocol II, which amended Chapter V of the Treaty establishing the Caribbean Community. Protocol II entered into force, provisionally in July 1998. The basic objective of this Protocol is to complete the creation of the Single Market by adding free movement of services, the unrestricted movement of capital, the free movement of selected categories of skills and the right of CARICOM nationals to set up business in any CARICOM country (the right of establishment). The key principles underpinning the CSME are: the equal rights and treatment for all persons of Member States in the Market; Nondiscrimination (Article 7) and Most Favoured Nation Treatment (Article 8).

Among the key elements for the establishment of the CSME is the Removal of Discriminatory Restrictions to Provision of Services.44 CARICOM allows consideration for its Less Developed Country (LDC) Members. This consideration for the LDCs was one of the underpinning factors of the negotiations where
CARIFORUM ensured that the liberalisation of services was asymmetrical, commensurate with the level of development of Caribbean states, their services sector and their capacity to adjust to the liberalisation process.

The programmes for the removal of restrictions on the right of establishment, provision of services and the movement of capital, as approved by the Conference of Heads of Government at its 13th Inter Sessional Meeting, requires the immediate removal of restrictions not on the programme and between 2003–2005 for those listed (4 phases, immediate, short, medium & long term). In the case of provision of services, the Revised Treaty allows for unrestricted provision of services by Members within the region by the four modes of trade in services.

Legislative and administrative actions are still required in the Region to complete the process and the Member States of CARICOM are continuing to take the necessary actions, to ensure the fulfilment of their obligations for the full implementation of the CSME. Under this regime Member States are obligated to permit establishment in all areas, not to introduce new restrictions and remove all being restrictions. Therefore on the full implementation of the CSME there will be greater market openness and commitments for trade in services among the CARICOM Member States, which do not have to be given to the EC Party.45

**CARICOM – Dominican Republic integration**

As pertains to the liberalisation of trade in services between CARICOM and the Dominican Republic, under the CARICOM - Dominican Republic Agreement the objectives include the progressive liberalisation of trade in services46 and the establishment of a framework for the liberalisation of trade in services among the Parties consistent with the GATS.47 The negotiations on this built-in agenda commenced in early 2007 resulting in a draft schedule of offers for some CARICOM Member States. However, the negotiations have to date not been concluded.

The provisions addressing market access and national treatment48 in the commitments state that the Parties49 shall accord to each other treatment no less favourable than that provided for in the commitments. Therefore while there is agreement for the establishment of a framework on services between CARICOM and the Dominican Republic, a schedule of commitments has not yet been agreed upon. Therefore based on the draft initial schedule of offers developed by some CARICOM Member States, it can be stated that Thus, the commitments made under the CARIFORUM-EU EPA surpass the level of market openness
and commitments that exists between the CARICOM Member states and the Dominican Republic. Based on the fact that these offers have not been presented to the Dominican Republic for their consideration it can also be stated that the CARIFORUM-EU EPA commitments sets the platform for the negotiation of the CARICOM-Dominican Republic Services schedules.

It is due to this fact that some have also expressed concern that the implementation of CSME (which is still in progress) will not be determined by shared objectives expressed in the CARICOM Development Vision but by the need to fulfil commitments made under the CARIFORUM-EU EPA.  

5.2 Potential impact of the CARIFORUM-EU EPA on Caribbean regional integration

The CARIFORUM-EU EPA is likely to have many positive effects on regional integration. The objective, scope and coverage of Title II states that the Parties in reaffirming their commitments under the WTO Agreements and with a view to facilitating the regional integration lay down the necessary arrangements for progressive, reciprocal and asymmetrical liberalisation of investment and trade in services and for cooperation on e-commerce (Art. 60). This is underscored by Article 64, which states:

1. The Parties recognize that economic integration among CARIFORUM States, through the progressive removal of remaining barriers and the provision of appropriate regulatory frameworks for trade in services and investment will contribute to the deepening of their regional integration process and the realization of the objectives of this Agreement.

2. The Parties further recognize that the principles set in Chapter 5 of this Title to support the progressive liberalization of investment and trade in services between the Parties provide a useful framework for the further liberalization of investment and trade in services between CARIFORUM States in the context of their regional integration.  

The provisions on market access commitments and key personnel and graduate trainees in the Title also state the limitations that the Parties shall not maintain or adopt either on the basis of a regional subdivision or on the basis of its entire territory, unless specified. In addition, as it pertains to development cooperation for Tourism services, the Parties agree to facilitate support in areas including develop-
ment of programmes to achieve and ensure equivalency between national/regional and international standards for sustainable tourism.

Within the provisions addressing market access and national treatment it is also stated that as regards the commitments the Parties shall accord to each other treatment no less favourable that that provided for in the commitments. Thus it is expected that CARICOM states, in fulfilling this requirement must extend equal treatment to the Dominican Republic through the agreement between CARICOM and the Dominican Republic. These requirements can therefore serve to hasten the regional economic integration process between CARICOM Members States and the Dominican Republic towards the development of a clearer intra-regional regime for services wherein there is harmonisation and recognition of policies.

As stated above it can be seen that based on the obligations pertaining to market access and key personnel and graduate trainees, CARICOM States will only be able to place limitations as specified therein but will have to make provisions to allow for the implementation of those obligations. At the same time, taking into consideration the level of commitments under taken by the Dominican Republic will also result in CARICOM Member States having access to many services sectors within the Dominican Republic, particularly that of distribution services which is of great importance to CARICOM States.

Additionally, in order to facilitate the development of the tourism sector the CARIFORUM States will be required to develop programmes to achieve and ensure equivalency between national/regional and international standards for sustainable tourism. This will require a greater level of government and institutional cooperation in the development of the required projects.

Based on the obligations mentioned above, this level of cooperation will not only be required for the development of projects in the tourism sector, but also for meeting the other obligations, particularly the development of a schedule of commitments between CARICOM and the Dominican Republic.

Another positive externality that could have desirable effects on the regional integration of CARIFORUM lies within the realm of information sharing. CARICOM members have already committed to a significant degree of cooperation through the exchange of data via the Revised Treaty of Chaguaramas included in Article 42; (Coordination of Foreign Policies and Exchange of Information), Article 170, chapter 3, part (c); Article 67, chapter 4 part (e) the lattermost of which obliges members to
“make arrangements for the exchange of information with respect to development and implementation of standards and technical regulations among parties to this treaty”.56

The CARIFORUM-EU EPA likewise not only facilitates regional collaboration and integration, but the exchange of information regarding technical regulations, standards and measures taken to conform within the terms of the treaty. Such an exchange, one might posit, advances the promotion of best practices and provides a platform for the harmonization of policies. The EPA therefore provides for and requires a level of cooperation and collaboration between CARICOM member states and the Dominican Republic that did not exist prior to the initialling of the EPA.

6. Negotiating the EPA: Lessons learnt

For the Signatory CARIFORUM States there are several lessons learnt from the negotiating process in trade in services.57 In addressing this issue the underlying objectives and principles of CARIFORUM in this negotiating process must first be stated. These included the attainment of economic development that is socially and environmentally sustainable; adjustment of Caribbean economies in a manner and at a pace conducive to overall socio-economic development; support for and the building of the regional integration process; the equal promotion of the development objectives of the countries of the region, consistent with their development strategies; the inclusion of a variety of forms of special and differential treatment, not limited to longer transitional periods and technical assistance; and flexibility to allow individual countries to calibrate the pattern and schedules of implementation.

In the process of the negotiations an important overarching consideration was the understanding of the Region’s development objectives and where the negotiations on services can assist in this process. In this regard where development plans were not available it was important to determine and fully understand the various policy objectives established or being established at the national level that could then be translated into language in the text or in the development of the schedule of commitments.

The CRNM recommended to the Signatory CARIFORUM States that in developing their schedule of commitments they should first identify sectors requiring investment and development support that would benefit from market liberalisation under Mode 3. Secondly, sectors in which States had offensive market access interests should be placed in their requests to the EC. Thirdly, States were encouraged to identify sensitive sectors for exclusion from liberalisation commitments. Finally,
States selected sectors that could be utilized to exercise flexibility in the negotiating process. It was also recognized that the Region had specific interest in obtaining market access particularly through Mode 4, and market access for professional services, tourism services and cultural practitioners. It was seen in the negotiations the focus on CARIFORUM’s interests went, or some may say was directed, mainly to Tourism and Entertainment Services and other critical issues in their requests to the EC, including removal of limitations of establishment requirements and movement of natural persons in such sectors as Professional services and Construction services were not fully addressed. Therefore, an important lesson for CARIFORUM in the further liberalisation of the EC offers and a factor that the other ACP Regions should take into consideration, is that in negotiations they must insist on addressing the sectors of interest identified in any requests developed. This will ensure that focus is not lost on all the areas of interest where liberalization is required, thus allowing greater certainty that the most may be achieved in the negotiations.

It is also important to note that unlike the EC, most Signatory CARIFORUM States do not have the necessary regulatory frameworks in place. It was therefore crucial that CARIFORUM States take this into consideration in their scheduling. In some instances States placed future liberalisation in sectors to allow for the development of appropriate regulation in their scheduling. Where future liberalisation was not scheduled, the States considered that regulatory frameworks could be created on a parallel track, particularly making use of development cooperation. It was therefore necessary to have a sound understanding of the scope and content of existing regulations and, where necessary, seek clarification before making commitments.

Another key factor was the lack of disaggregated statistical data on the services sectors in the region to facilitate the development of the schedules. Also as stated above, in some cases development plans were not available, therefore in formulating the development cooperation requirements for the sectors and scheduling of commitments it was important to conduct national consultations with stakeholders (public sector, private sector and non-governmental organizations) to determine their technical assistance needs and obtain greater clarification of the market situation for the sectors. It was also critical that where possible consultations needed to be conducted at each juncture of the negotiations as legal texts and schedules of commitments were changed, there must be national understanding and awareness of all the processes to ensure that they are reflective of the interests and development objectives of the Parties.
As pertains to the legal text, it was imperative that particular attention be given to language proposed. If a legal counsel was not present at the negotiating table, no agreement was made prior to clarification being sought.

CARIFORUM’s insistence on the use of the GATS format for scheduling was to the advantage of the States, as it was a structure that they understood and with limited capacity could address. However, the fact that EC presented their schedule in a newly developed format made it difficult to cross reference what was actually scheduled. In addition, the EC omitted several listings which they were of the view were not necessary, but resulted in a level of ambiguity that had to be addressed. It was therefore necessary to seek clarification at several junctures in the negotiating process. Thus, parties to the negotiation must ensure that policies underlying their positions are presented in writing within a reasonable time.

In terms of where GATS-plus commitments were scheduled, the GATS schedules set the basis for the Signatory States’ negotiations. The States then added their offers under the Doha Round, which they had agreed upon utilising the CRNM recommendations mentioned above to improve on their schedule of commitments. In addition to CRNM’s recommendations, as the negotiations progressed, particularly as it relates to telecommunication services, CARIFORUM scheduled commitments reflective of their *de facto* liberalisation. While it was agreed that there will be asymmetrical liberalization of services wherein the LDCs of CARICOM\(^58\) will commit at least 65 percent of their services sectors and the MDCs\(^59\) at least 75 percent, the level of commitments was at the discretion of the Signatory CARIFORUM States.\(^60\)

Given the time limitations imposed by the negotiating deadline, the Signatory CARIFORUM states were unable to have the necessary degree of consultations. It was therefore recommended that, where necessary, sectors be scheduled with limitations including future liberalisation to allow for their development, particularly the establishment of appropriate regulations.

The EC made GATS-plus commitments primarily in Mode 3 and Mode 4. In addition there was commitment from the EC for a higher level of cooperation for the development of CARIFORUM services industries, including cooperation through the Cultural Protocol\(^61\), which takes account of audiovisual services, the development of the tourism sector\(^62\) and facilitating the development of MRAs for professionals including in tourism services\(^63\).
Based on the negotiations, the Signatory CARIFORUM States liberalised significantly more services sectors than what was liberalised under the GATS, including offers presented under the Doha negotiations. In the case of the Dominican Republic, at least all sectors liberalised under the DR-CAFTA Agreement were liberalised as well under the CARIFORUM-EU EPA. For the CARICOM Member States there was a substantial increase in the number of sectors liberalized. For example, based on the calculations for the percentage of sectoral coverage used by CARIFORUM, the increases are: Antigua & Barbuda from 27 percent to 65 percent; Barbados from 25 percent to 75 percent; Belize from 15 percent to 65 percent; Grenada from 23 percent to 69 percent; Guyana from 19 percent to 82 percent; Jamaica from 39 percent to 75 percent; St. Kitts & Nevis from 5 percent to 65 percent; St. Lucia from 19 percent to 65 percent; St. Vincent & the Grenadines from 24 percent to 65 percent; Suriname from 15 percent to 75 percent; and Trinidad & Tobago from 40 percent to 75 percent. This significant increase in sectors liberalized was as a result of agreement by the Parties to the negotiations that this level of sectoral coverage should be able to pass the scrutiny of the WTO for meeting the requirements of GATS Article 5 for substantial sectoral coverage.

With the exception of Communication, Construction & Related Engineering, Financial and Tourism & Travel Related services, there was substantial liberalisation by the Signatory CARIFORUM States resulting in significant Regional impact. As noted in Section 3, in addition to the scheduling of services activities there are also important impacts resulting from the regulatory commitments made under Chapter 5.

Due to the provisions on Mutual Recognition requiring the start of negotiations for the development of recommendations within three years of entry into force of the Agreement (Article 85:3), one may be tempted to argue that professional services, particularly accounting, architecture, engineering and tourism, will be most affected as they will have to make several adjustments to fulfil the requirements. However, these specific sectors were selected for the development of MRAs as they are the most organized and competitive with the EU.
As indicated above, the Signatory CARIFORUM States made substantial commitments in several areas. Therefore in addressing the impacts it will be necessary to look at the issues in a horizontal manner, as all the industries liberalised will have to make required adjustments.

In the initial stages of the negotiations, for the scheduling of sectors the Signatory CARIFORUM States took into consideration such factors as services activities in which there is a need for investment and development; activities in which they can schedule to exercise flexibility in meeting the sectoral coverage agreed and sensitive sectors. However, there are several issues that they must also take into account.

Most services providers within CARIFORUM are not organised in terms of having the required regulatory framework and standards for operation in a global environment. During the national consultations that took place during the negotiation process, it was recognised that in order to fulfil their obligations, services providers would need to adjust in several areas. These include the ability to:

- Promote, facilitate and finance access to and the development, transfer and distribution of sound technology and corresponding training,
- Enhance their research and development capacity to improve their efficiency in the supply of services, competitiveness and also to access regional and international research and development programmes,
- Provide support to firms through training of required skills and modernisation of their operation to ensure sustainable development,
- Develop the national and regional services industries associations which would allow for greater dissemination of support, rather than to individual applicants and creating the necessary management unit to assist with implementation of programmes which will allow for greater participation of sectors in policy development as capacity develops, and
- Access to information on the EU market, including market access requirements, the regulatory framework in place in each Member States for the provision of the service; tender and sourcing information; and business-to-business portals for EU services to allow for match making services between EU and CARIFORUM services firms.

As a result of the prevailing circumstances at the governmental and industry level and the level of commitments made by the Signatory CARIFORUM States, it will be necessary to conduct more in depth national and regional consultations to deter-
mine their strengths, weaknesses, opportunities and threats (SWOT). Regarding the market access obtained in the negotiations, the industries will also have to address issues such as consumer demands, the regulatory regimes that exists, and which markets they will begin to contest. In order to do so it will be critical that the industries consider issues such as their level of competitiveness, existing product quality and standards, and their human resource and technological capabilities.

In order to implement the agreement and for the industries to develop the required level of competitiveness to operate more effectively at the regional level and benefit from market opportunities in the EU, the development and harmonisation of policies and regulatory frameworks will be required. In addition, existing institutions will need strengthening and new institutions will need to be developed.

The EPA incorporates these issues through the provisions on cooperation. These provisions include both financial and non-financial technical assistance and address the ability of the Signatory CARIFORUM States to maximize the expected benefits of the Agreement. As noted in section 2.3, the priority areas for cooperation are set out in Article 8, while the specific requirements for the development of the services sector are outlined in Article 121.

Whereas these cooperation provisions are useful for the development of the services sectors in the Signatory CARIFORUM States, based on the fact that most industries are not sufficiently developed to meet the obligations in the Agreement, as recommended by CRNM, it would have been more useful for the CARIFORUM States to schedule limitations such as future liberalisation of commitments in most sectors, particularly those added at the later stages of the negotiations to meet the agreed sectoral coverage. This strategy would have allowed for the sectors, while utilising the cooperation provisions, to develop the required environment to effectively participate in the regional and global environment. It can therefore be seen that consultations towards greater understanding of the scope of commitments and requirement is necessary at every juncture of the negotiating process.

8. Recommendations

Given the above analysis of the CARIFORUM-EU EPA, the following recommendations are offered:

Existence of an enabling environment – The analysis of the CARIFORUM-EU EPA showed the need for ACP countries still negotiating final EPAs to conduct
thorough analyses of economic, regulatory and institutional conditions prior to negotiating a services agreement to ensure the existence of an appropriate enabling environment. As in the case of the CARIFORUM countries, a services agreement will likely result in the need for existing institutions to be strengthened and new institutions to be developed as well as the implementation of regulations.

**Clear and transparent negotiating process** – All parties to a negotiation need to fully understand the scope and impact of the provisions and commitments being agreed as well as the process. In the case of the CARIFORUM EPA, CARIFORUM negotiators were hindered in scheduling commitments in trade in services by the lack of disaggregated statistical data on the services sectors in their region. With regard to the process, CARIFORUM negotiators insisted on using the format of the GATS as they were familiar with the structure. However, the EC presented their schedule in a newly developed format that made it difficult to cross reference what was actually scheduled. At the same time, the EC omitted several listings that they did not consider necessary, resulting in the need for CARIFORUM negotiators to seek clarification at several junctures in the negotiating process. Thus, parties to a negotiation must ensure that policies underlying their positions are presented in writing within a reasonable time. Additionally, to ensure full transparency, multi-stakeholder consultations should occur at every stage of the negotiating process.

**Incorporation of sequencing and transition periods to allow for learning** - Appropriate sequencing of liberalisation should be taken into consideration to allow for the appropriate regulatory and competitive environments to be developed. As in the case of several CARIFORUM members, ACP negotiators should also request adequate transition periods and incorporate future liberalisation into their commitments to grant their member states sufficient time to learn and adapt to liberalisation.

**GATS-plus liberalisation only as appropriate** – In the CARIFORUM-EU EPA, GATS-plus liberalisation in selected sectors was consistent with the objectives of both Parties. However, ACP negotiating groups considering negotiating a chapter on investment and services should schedule GATS-plus commitments in sectors only after careful identification and analysis of sectors in which investment is required to increase service supply capacity and sectors in which they have offensive interests.

**EU should grant greater market access in sectors and modes of supply of export interest to ACP countries** – Within the CARIFORUM-EU EPA, the EC has
for the most part opened services sectors in which the CARIFORUM States are competitive, including Tourism and Entertainment services, or are searching for investment to develop service supply capacity. However, under Mode 4, the mode of supply of greatest interest to many ACP regions, the EC has placed significant 34 limitations, specifically for contractual services suppliers and independent professionals. Therefore, CARIFORUM and other EPA negotiating groups should consider urging the incorporation of less restrictive limitations in Mode 4 market access commitments in future negotiations.

EPAs should be supportive of regional integration – Many believe that the CARIFORUM-EU EPA will likely facilitate Caribbean regional collaboration, integration and exchange of information. However, others have cautioned that the on-going implementation of CSME will not be determined more by the need to fulfill CARIFORUM-EU commitments than by shared objectives expressed in the CARICOM Development Vision. A critical factor for future regional integration was the recognition by all Parties that given the varied state of development among CARIFORUM countries, provisions for progressive, reciprocal and asymmetrical liberalisation of investment and trade in services were necessary. ACP regions considering negotiating a chapter on investment and services should insist on similar such provisions.

Adequate and timely development cooperation and technical assistance – It is estimated that the minimum cost to implement the CARIFORUM-EU EPA Chapter on Investment and Services will be Euro 15.6 million. While the CARIFORUM-EU EPA contains both general and issue specific provisions on development cooperation, the language on cooperation represents a missed opportunity for effective development assistance given the lack of clear financial commitments, deadlines for the achievement of activities, and country-specific technical assistance and capacity building needs analysis. CARIFORUM States and other ACP regions would benefit significantly from urging the incorporation of detailed development cooperation commitments as well designing activities that promote effective design and implementation of regulatory systems, institution-building, monitoring the implementation of the EPAs, and multi-stakeholder participation. Given the capacity constraints of other ACP regions, targeted development assistance and technical assistance will be crucial to successfully implementing agreements on trade in services

Incorporation of development-motivated review and monitoring mechanisms
– As a means to assess the extent to which the services provisions and commitments
promote sustainable development, the CARIFORUM-EU EPA and other final EPAs should incorporate effective review and monitoring mechanisms based on development benchmarks and indicators.

Endnotes

1 The complete text of the Economic Partnership Agreement Between the CARIFORUM States and the European Community and its Member States, including annexes and protocols, is available at: http://www.acp-eu-trade.org/index.php?loc=epa/.

2 CARIFORUM consists of the 14 member states of CARICOM, Antigua and Barbuda, Barbados, Belize, Dominica, Grenada, Guyana, Jamaica, Stint Christopher and Nevis, Saint Lucia, Saint Vincent and the Grenadines, Suriname, and Trinidad and Tobago, plus the Dominican Republic.

3 The CARIFORUM-EU EPA follows the positive list approach in which only the sectors listed in the country schedules are liberalised as opposed to the negative list approach in which all sectors are liberalised except for those explicitly listed. Given the often-limited negotiating capacity among developing countries, the positive list approach offers potentially greater developmental benefits.

4 The CARIFORUM-EU EPA combines cross-border supply of services, (i.e., the supply of a services from the territory of a Party into the territory of the other Party), or Mode 1. with consumption abroad (i.e., the supply of a service in the territory of a Party to the service consumer of the other Party) or Mode 2 (Art. 75:2).


7 Article 5 of the Trade Partnership for Sustainable Development mandates that the Parties are to continuously monitor the operation of the EPA but establishes no developmental benchmarks as guides.

8 Parties are to review the legal framework, environment and flow of investments within three years of entry into force of the Agreement (Art. 74).

9 The CARIFORUM-EC Trade and Development Committee are to review progress in mutual recognition every two years. (Art. 86).

10 For additional information on the monitoring of EPAs, see studies prepared by ICTSD-APRODEV: http://www.aprodev.net/trade/Files/A EPAs and Sustainable Development FINAL.pdf and ECDPM: http://www.ecdpm.org/Web_ECDPM/Web/Content/Download.nsf/0/89E6AC93AFB8B6E0C125741300333B70/$FILE/ECDPM 03-08 On the Importance of Monitoring an EPA_short paper_FINAL.pdf.

11 Based on the WTO’s Services Sectoral Classification List (W/120) available at: http://www.wto.org/english/tratop_e/tratop_e/serv_e/serv_e.htm.

12 The Treaty of Chaguaramas divides the CARICOM countries into more developed countries (MDCs) and less developed countries (LDCs) based on their developmental and economic levels. The MDCs consist of: the Bahamas, Barbados, Guyana, Jamaica, Suriname, and Trinidad and Tobago. The LDCs are: Antigua and Barbuda, Belize,
Dominica, Grenada, Haiti, Montserrat (not a Party to the EU-CARIFORUM EPA), St. Kitts and Nevis, Saint Lucia and St. Vincent and the Grenadines. Haiti is the only UN-designated least developed country (LDC) within CARIFORUM. For more information, see the CRNM Note on Differentiation in CARIFORUM-EC EPA. Available at: http://www.crnm.org/documents/ACP_EU_EPA/epa_agreement/Differentiation_in_the_EPA.pdf.


Major trading partner is defined as either a country contributing more than 1 percent of world merchandise exports per year or a regional trade group whose share of world merchandise exports exceeds 1.5 percent per year.


Similar provisions on new financial services and data processing are included in the WTO Understanding on Commitments in Financial Services that is annexed to the GATS Agreement. However, WTO members were able to choose whether to inscribe the provisions of the Understanding in their services schedules.


Article 103 of Title II, Investment, Trade in Services and E-Commerce states that “new financial service’ means a service of a financial nature, including services related to existing and new products or the manner in which a product is delivered, that is not supplied by any financial service supplier in the territory of the EC Party or the Signatory CARIFORUM States but which is supplied in the territory of the other Party.


Article 40.

Article 44.


For the purpose of this section, tourism distribution networks means tour operators and other tourism wholesalers (both out-bound and in-bound), computer reservation systems and global distribution systems (whether or not connected to airlines or provided through the internet), travel agencies and other distributors of tourism services.

Ibid. Implementation matrix. Tourism Services.

Chaitoo, Ramesh, Movement of Professionals and Mutual Recognition Issues in the Caribbean Community. 2008. ‘There are Caribbean professional associations in the fields of engineering, doctors, nurses, legal, accountancy, architecture and management consulting.

To date Draft Model Professionals Bills have been developed by the CARICOM Secretariat and the CARICOM Legislative Drafting Facility in the areas of Medical, Nursing and Midwifery, Dental, Pharmacy, Veterinary, Allied Health, Medical Laboratory professions, Engineering, Architecture, Accountancy, Consulting and building contracting.

Dykon Developments. Study on Temporary Entry (Mode 4) Regimes in CARIFORUM and Selected EU States. 2006.

Presently the Shridath Ramphal Centre of the University of the West Indies in collaboration with the OAS, the Barbados Coalition of Services Industries and the Trinidad & Tobago Coalition of Services Industries have initiated this process by conducting several focus groups meeting with Accounts, Engineers, Architects and Tourism officials.

The Agreement should therefore serve as a catalyst for the Region to put its policies in place in order to benefit fully from the market access and any other potential gained from the negotiations.

See GATS Article 5.3 and CPA Title 2, Chapter 2, Article 37:7.


Ibid. Pp. 4.


During the course of the ongoing Doha Round negotiations, the EU has submitted both initial and revised services offers while all CARIFORUM States, with the exception of Antigua and Barbuda, Belize and Haiti, have submitted initial services offers. The Bahamas currently has Observer status at the WTO.


Agreement Establishing the Free Trade Area Between the Caribbean Community and the Dominican Republic.


Footnote 11 of Article 70 (2) states that the EC agreements, the CSME and the CARICOM – Dominican Republic Free Trade Agreement falls in their entirety under the stated exception.

Ibid. Article II.

Ibid. Article I Annex II.

Ibid, Articles 67, 68, 76 and 77.

EC Party and the signatory CARIFORUM States.

Economic Partnership Agreement Between the CARIFORUM States and the European Community and its Member States. 2007.

Ibid. Article 67 and 76.

Articles 67, 68, 76 and 77.


With reference to the Revised Treaty of Chaguaramas of the Caribbean Community, Article 42 puts measures in place to exchange information related to Foreign Exchange Policies while Article 170 encourages member states to share information pertaining to anti-competitive business conduct.


Article 67, (4), (e), Revised Treaty of Chaguaramas of the Caribbean Community.

For an excellent analysis of CARIFORUM negotiating strategies in investment, competition policy, government procurement, and intellectual property, see the GTZ study by Audel Cunningham entitled “The CARIFORUM States and the Economic Partnership Negotiations: A glance at the negotiating strategies and negotiating outcomes.” 2008.

The LDCs of CARICOM are the OECS Member States (Antigua and Barbuda, Dominica, Grenada, Montserrat, St Kitts and Nevis, St Lucia, and St. Vincent and the Grenadines) and Belize and Haiti.

The MDCs in this regards are Barbados, Dominican Republic, Jamaica, Suriname and Trinidad and Tobago.

In order to achieve this level of convergence Signatory CARIFORUM States utilized the flexibility in scheduling of services to place specific limitations that will be reflective of their ability to fulfill their obligations under the Agreement.

Protocol III on Cultural Cooperation.

Title II Investment, trade in Services and E.-Commerce. Section 7 Tourism Services. Article117.

Ibid. Article 85.

The liberalization of this sector reflected the \textit{de facto} liberalization that had taken place in the Member States, wherein competition has been introduced through the implementation of the required regulatory framework.

There was very limited liberalization in this sector as it is deemed sensitive particularly due to the level of development of the sector in CARIFORUM.

There was limited liberalization in this sector as it was deemed sensitive. The liberalization generally reflected \textit{de facto} position in the sectors, or were areas in which the States were of the view that investment was needed.

With the exception of Marina services and Spa services, new services activities added, in which there was liberalization by ten of the thirteen Signatory CARIFORUM States in either activity, only Barbados and Belize had not scheduled Hotels & Restaurants under the GATS. As it pertains to the Travel Agencies and Tour Operators services and Tourist Guide Services there were very limited liberalization under the GATS and no additional liberalization under the CARIFORUM-EU EPA, as these activities are considered very sensitive for the Signatory CARIFORUM States.

The Shridath Ramphal Centre of the University of the West Indies, Cave Hill has initiated this process by conducting several focus groups meetings in Barbados and Trinidad and Tobago, with the assistance of their Coalition of Services Industries to address the implications of the initial CARIFORUM – EU EPA. As a result of these focus groups meeting a Services Symposium was held in Barbados to obtain a more regional understanding of the
issue facing the Accounting, Architectural, Engineering, Tourism and Cultural industries. Information on this activity can be obtained at: http://www.shridathramphalcentre.org.

CARICOM Secretariat. Implementation of the CARIFORUM – EU Economic Partnership Agreement, January 2008. It is estimated that this will cost approximately 15.6 million Euros.

These provisions can be found in Articles 7 & 8, Part I on Trade Partnership for Sustainable Development. Also Article 117, specifically addressing Tourism services, and Article 121 covering all services sectors.
Cutting the Regulatory Edge? Services Regulation Disciplines in the CARIFORUM-EU Economic Partnership Agreement

Hannes Schloemann, Christian Pitschas
1. Introduction

The far-reaching coverage of trade in services, investment and e-commerce in the Economic Partnership Agreement between the European Community and the CARIFORUM states (“the CARIFORUM EPA”, or “CEPA”) is one of the distinctive features of that agreement. The interim, or “stepping-stone” EPAs between the EC and other ACP regions do not contain comparable provisions – they essentially remain “goods-only” while negotiations on other issues, including services and investment, continue.

The inclusion of services and investment in the CEPA is not only remarkable for the mutual market access provided by the Parties, but – perhaps equally so – for the treatment of certain regulatory aspects. Title II on “Investment, Trade in Services and E-Commerce” contains an entire Chapter 5 on the “Regulatory Framework.” This chapter features both general disciplines on the regulation of services and several blocks of specific provisions on various regulatory issues, namely for postal/courier, telecommunications, financial, maritime and tourism services. The depth and breadth of these disciplines – that means: legal obligations on the Parties to regulate, or not regulate, services in certain ways – is still comparatively unusual for international agreements, but is arguably part of a global trend. The CEPA is certainly the avant-garde of a trend the European Commission aims to set for the EC’s bilateral trade agreements – the first agreement concluded that reflects the Commission’s new “template” for services and investment agreements.

Should this trend be welcomed? This paper takes a somewhat detailed look at the “Regulatory Framework” chapter with a focus on two aspects that may shed some light on this issue. First, how do the regulatory provisions relate to corresponding WTO rules, in particular the GATS – to what extent are they ”WTO plus” commitments? Second, are they desirable or undesirable from a development policy perspective? In particular: Do they raise administrative issues that may pose significant challenges to the CARIFORUM states’ (and possibly other ACP states’) capacities to implement?

After a brief reminder of the nature of domestic regulation in services and the basic WTO parameters in play (Section 2), the following analysis considers the provisions of Chapter 5, the “Regulatory Framework” chapter one by one (Section 3), in search of answers to these questions which may provide a piece of the puzzle when approaching the (much) bigger question: Is this agreement good for development?
Our limited focus on the “Regulatory Framework” chapter, of course, leaves aside other aspects of the CEPA’s Title II that may have a (much) more significant impact on development, most notably the various market access commitments made by the EC and CARIFORUM sides. Out of these, the EC’s “mode 4” commitments, including for cultural professionals and entertainers, fashion models and others, stand out as an arguably unique pro-development achievement of the CARIFORUM negotiators. We only mention in passing the Protocol on Cultural Cooperation, which will hopefully assist CARIFORUM cultural industries and professionals in no small measure in reaping the benefits of enhanced cooperation.

2. Domestic regulation in services and the WTO – A mini-primer

2.1 What is domestic regulation in services?

The term domestic regulation in the context of trade in services (and similarly in trade in goods) refers to all administrative and regulatory measures that happen on the domestic market level, i.e., “behind the border,” as opposed to measures that directly affect the very access to the market, for instance the right of foreigners to provide a certain service. Domestic regulation measures typically apply to both foreign and domestic services and providers alike. Typical elements of domestic regulation are qualification requirements and procedures, licensing requirements and procedures, and technical standards.

A special subset of domestic regulation could be seen in so-called “pro-competitive” regulatory activities. This captures the functions of regulators, in particular in network industries such as telecoms, energy or postal/courier services, where rules are enforced to secure fair competition among market players.

Trade agreements address – and attempt to discipline – domestic regulation measures because they may, in fact, have a significant effect on the possibility of foreign services and providers to succeed in that market.

2.2 WTO law on domestic regulation in a nutshell

WTO law currently maintains relatively few, and mostly quite general, standards for the domestic regulation of services. Article VI of the GATS, the main provision on domestic regulation, provides for instance that where Members have undertaken
specific market access commitments in services their regulations affecting trade in those services must be administered in a reasonable, objective and impartial manner. It demands, again generally, that some review of relevant administrative decisions through independent tribunals or procedures must be guaranteed. And it gives applicants for licenses the right to be informed about progress in their application. Against this thin set of rules, however, Article VI:4 of the GATS establishes a mandate for negotiations on further – more detailed and powerful – disciplines. This forms an important background for our evaluation of the CEPA, because the corresponding negotiations in the WTO’s Working Party on Domestic Regulation (WPDR) are in fact at an advanced stage. As text-based negotiations are well under way, it seems fair to expect that general disciplines will emerge sooner rather than later. Meanwhile, the guiding principles of the negotiating mandate apply on a provisional basis where Members have made specific commitments.7 These guiding principles7 provide that qualification requirements and procedures, technical standards and licensing requirements should be

- based on objective and transparent criteria, such as competence to supply the service;
- not more burdensome than necessary to ensure the quality of the service; and
- in the case of licensing procedures, not in themselves a restriction on the supply of the service.

However, this obligation to apply these guiding principles on a provisional basis is rather weak and largely irrelevant in practice. This is because regulatory measures by WTO Members are only caught if they go beyond what could be expected at the time the GATS was concluded. This leaves all then existing regulation, and new regulation replacing it with similar effect, out. On top of that a claimant would have to prove that the violation of the principles “nullifies and impairs” the specific commitments made by the Member – usually a tough task. The provisional application rule acts thus as a mere, and rather weak, standstill obligation.

Apart from Article VI, a few other elements of WTO law provide further disciplines on domestic regulation. Article VII of the GATS provides a general framework for mutual recognition agreements (MRAs) on professional qualifications, allowing countries to conclude them (which may otherwise raise issues under the most-favoured nation (MFN) principle) but requiring them to give other Members the “adequate opportunity” to participate in such agreements or negotiate similar
ones – provided they meet the standards. The same applies to unilateral recognition, where other Members must be given the chance to prove that their professional qualifications, too, should be recognized.

A few sector-specific instruments complete the picture. Around half of all WTO Members (including many, but not all CARIFORUM states) have subscribed to the so-called “Reference Paper on Basic Telecommunications” (the “Reference Paper”), which lays down a set of rules aiming to foster pro-competitive regulation in that sector. The GATS’ Annex on Financial Services, which applies to all Members, provides for some rules for the regulation of financial services – its most important element, the so-called “prudential carve-out”, however, is in fact an enhanced right for financial regulators to act on prudential grounds, hence not primarily an additional discipline. Further elements of regulatory disciplines can be found in the “Understanding on Commitments in Financial Services,” and optional set of rules to which some WTO Members (none of them a CARIFORUM State) have subscribed. Finally, Members have developed a set of quite detailed disciplines on domestic regulation for accountancy services under the above-mentioned mandate in Article VI:4 of the GATS. These “Accountancy Disciplines”, however, are not yet legally applicable.

Initiatives have been mounted as part of the Market Access negotiations in the Doha Development Agenda (DDA) negotiations to develop further disciplines in the form of additional reference papers similar to the Telecoms Reference Paper, for instance in postal, courier and express delivery services. These attempts, however, have not found the echo their proponents had hoped for and appear unlikely to find their way into the DDA’s results.

Apart from the – optional – sector-specific rules in telecoms and financial services, thus, WTO disciplines on the regulation of services are rather limited. However, developments are under way to expand and deepen them.

3. The CEPA “Regulatory Framework”

3.1 The general provisions

Overview
The “provisions of general application” – Section 1 of CEPA’s Chapter 5 – address three issues, namely the mutual recognition of qualifications, transparency and
some aspects of procedures. They correspond, with some variation, to their respective GATS counterparts.

The section, however, does not address some of the more pertinent principles contained in Article VI:4 of the GATS, the mandate to negotiate new disciplines. These principles, although only on a weak footing, do apply provisionally to all GATS Parties. In that sense the CEPA appears to be even “GATS minus.”

**Mutual Recognition (Article 85)**

The recognition of professional qualifications is the key to a meaningful market access. A professional will hardly benefit from the general right to exercise her profession in another country if that country does not recognize her qualifications. One way of addressing this issue is to conclude mutual recognition agreements, or MRAs. Article 85 foresees a process of several stages towards the establishment of MRAs between EPA Parties on “requirements, qualifications, licenses and other regulations,” in particular (but not limited to) professional services, some of the stages even of “soft” obligatory character. The process, despite the apparent “softness” of its mechanisms, is designed to generate significant legal pressure towards the conclusion of MRAs. The GATS does not foresee any obligation to conclude such MRAs; its Article VII merely provides for the possibility of MRAs, subject to certain conditions. This provision goes thus beyond WTO obligations.

This is true because although the obligations contained in Article 85 are primarily “soft,” they may lead to a dynamic which results in “hard” obligations. The EPA Parties generally undertake to “encourage” their respective professional bodies – meaning: professional self-organizing bodies, such as bar associations and engineers’ guilds – to work together towards developing *recommendations* for mutual recognition (Para. 2). This general rule is without a timeline. However, for four priority sub-sectors, namely accounting, architecture, engineering and tourism, a timeframe of three years is set to start negotiations. While this sends a signal to hasten the efforts, the obligation on EPA Party governments remains one to “encourage” (Para. 3). The treaty obligation in a strict sense thus remains soft.

If and to the extent that recommendations are developed by the two sides’ professional bodies, they will be reviewed by the CARIFORUM-EC Trade and Development Committee for consistency with the EPA. Provided the Committee finds them to be in conformity with the EPA, however, the Parties are then under an obligation (“shall”) to negotiate an MRA. While the Parties’ governments thus
retain some control over the process through the Committee, its limited mandate (only review for consistency with the EPA) restricts that control. In other words: Once recommendations have been developed by the professional bodies, a semi-automatic process begins that may lead to the obligation to conclude – and implement – an MRA.

The administrative burden of this obligation on the EPA governments is arguably limited. Recognition is unlikely to increase the effort needed in the regulation of the respective sector – if at all recognition, once agreed, should lead to a reduction of such efforts for the authorities, as the regulation of foreign service providers becomes easier (because their admission to practice is then a mere formality). That said, it appears that accreditation bodies are not necessarily fully operational in all CARIFORUM states, so some work there remains. Further, the governments will be called upon to provide for legislative frameworks, where not yet in place – a task facilitated by various Draft Model Professional Services Bills prepared by the CARICOM Secretariat in cooperation with the CARICOM Legislative Drafting Facility. Finally, the governments will, of course, have the task of participating in the Trade and Development Committee’s meetings – which, for purposes of vetting MRAs, will require the use of experts.

The actual work, in fact, will however be shouldered by the respective professional bodies, which are the ones to actually engage and negotiate with each other. To the extent that their administrative capabilities are limited, they arguably have the option not to act on the “encouragement” – and thereby avoid the burden altogether. This applies even in the four priority sub-sectors, despite the timeline, which therefore remains hortative in nature. The bodies thus retain, in theory at least, the ability to control the administrative burden falling upon them.

That said, a simple refusal to engage appears rather unrealistic, and the pressure of the bodies’ respective governments’ “encouragement” (as well as their own desire to negotiate an MRA) may be significant. In practice, therefore, the challenge for the CARIFORUM professional bodies in particular may be rather significant. Transitional timeframes would in any case only be relevant for those privileged sub-sectors, as the obligation to “encourage” regarding other sectors (Para. 2) does not carry any timeline. Given the “soft” nature of the obligation, however, phase-in periods would appear to add little.
Another question is whether and to what extent the effects of MRAs, especially in the privileged sub-sectors, are desirable, since they may lead to more effective market access in these sub-sectors. This, however, is a question that would be more appropriately addressed in the context of market access negotiations and commitments. Once a commitment is made, the (non-)recognition of professional qualifications, licenses etc. should ideally not act as a second, hidden “line of defence” in any case. MRAs thus remain, as a matter of conceptual principle, desirable, as they (eventually) alleviate burdens from service providers, national regulators and/or their professional bodies (win-win).

An investment in MRAs will thus usually be a worthwhile exercise – for CARI-FORUM professionals who wish to use new market access opportunity in the EU they will operate as a significant facilitator.

**Transparency (Article 86)**

This provision requires the provision of information to other CEPA Parties and the establishment and operation of enquiry points. It mirrors virtually verbatim GATS Article III:4, with the logical variation that the transparency obligation concerns laws and agreements that pertain to or affect this EPA rather than the GATS. Rather curiously, however, the provision does not single out services and investment issues, and hence appears to cover measures relating to all parts of the EPA (“this Agreement”). This may be a drafting error – the provision’s context and position in the middle of the Services and Investment Title and the parallelism to GATS would suggest that it was indeed meant to relate to measures pertaining to aspects relating to services, investment and e-commerce only.

Even if read with that limitation, two relevant differences exist with regard to the GATS counterpart, however, namely with regard to the beneficiaries of the enquiry points (private Parties instead of governments only) and the added coverage of measures related to investors and investments in non-services sectors.

GATS Article III:4 requires enquiry points to provide information “to other Members,” whereas Para. 1 of this provision provides that they respond “to investors and service suppliers of the other Party.” This corresponds to TRIPS Article 10.1, which foresees the same function (to respond to “interested parties in other Members”; i.e., private parties) for TBT enquiry points, in contrast to SPS enquiry points, which like GATS enquiry points only have to respond to other Members (i.e., their governments).
It is obvious that from a market perspective an enquiry point is significantly more useful if it is open to those directly concerned, namely the investors and service providers, rather than only their governments. However, from the perspective of the administering government being directly exposed to requests from private parties may add some burden in terms of quantity and costs. To the extent that the EPA Parties already operate GATS enquiry points (which should be the case in all WTO Members), however, the impact would appear overall negligible, as far as services are concerned.

The same is not true, however, with respect to investors and investments in sectors other than services. These are obviously not yet covered by GATS Article III. The enquiry points would thus have to cover all investment-related measures, too. This is significant in principle, but most likely less so in practice, as most countries already maintain investment-related public relations mechanisms. However, to the extent that an EPA Party does not yet maintain such a mechanism, the obligation may indeed lead to a non-negligible burden.

It would thus arguably have been sensible to provide for a transitional period of, e.g., two years, in parallel to that given to initially to WTO Members in GATS Article III:4. That said, however, a functional information mechanism for potential and current foreign investors would appear to be in the immediate interest of any country, developing and developed. The early investment in the establishment and operation of an enquiry point would thus, in principle, seem to be a very good one indeed.

**Procedures (Article 87)**

This provision follows *verbatim* GATS Article IV:3 and 2. The only difference, again, is that the obligations would now cover also investment in non-services sectors.

The obligations themselves, as in GATS, arguably represent a common-sense minimum of good governance and are thus unlikely to represent a significant “burden” for CARIFORUM states.

**Conclusions**

The “provisions of general application” are arguably unremarkable, because they essentially follow in the footsteps of the corresponding GATS provisions, namely Articles VI and VII.

In fact, taken as a whole they do not even fill those footsteps, because they leave out some of the main principles found in Article VI of the GATS. The principles (pro-
visionally applicable under GATS, even if with shackles) that measures should be based on objective and transparent criteria, should be not more burdensome than necessary to ensure quality and should not in themselves operate as restrictions on the supply of a service are not reflected. Similarly, the section does not mention the basic principle, reflected in GATS Article VI:1 and many other services agreements, that measures should be administered in a reasonable, objective and impartial manner. Given the otherwise far-reaching ambition reflected in this Chapter, this Title and the CEPA in general, this may appear a bit surprising. Commentators have even called it a missed opportunity to advance the cause of regulatory disciplines in services agreements generally.\(^{13}\)

That said, the chapter still does contain some limited “GATS plus” obligations. In particular, it establishes a certain automatism regarding the development of mutual recognition agreements on services regulation that may lead to an obligation to actually conclude such agreements. The GATS allows and encourages, but does not “nudge” WTO Members to conclude such agreements. That said, however, MRAs will be an important vehicle for interested CARIFORUM professionals to make use of market access opportunities in the EU.

The EPA’s transparency obligations go beyond existing GATS obligations in that EPA enquiry points, unlike GATS enquiry points, will have to cater also to private parties, not only to governments. Transparency as well as general good governance principles for procedures will apply not only to services but also non-service sector investments and investors.

The resulting administrative burdens on ACP governments and administrations appear overall rather limited, except for the CARIFORUM professional bodies that are called upon to negotiate mutual recognition parameters – and, where applicable, the CARIFORUM legislators that need to provide a framework for such recognition.

### 3.2 Computer services

Section 2 of Chapter 5 consists of only one Article (Article 88). Despite its position in this Chapter entitled “Regulatory Framework,” however, the provision in fact does not contain any regulatory disciplines; it merely addresses the interpretation of specific commitments in computer and related services.
3.3 Courier (and postal?) services

Overview
Section 3 of Chapter 5 provides for a series of disciplines for pro-competitive regulation in the courier (and postal) services sector. This is remarkable because no specific regulatory disciplines in this sub-sector currently exist in the WTO context. The entire Section, thus, is “WTO plus”.

The approach mirrors that of the Telecoms Reference Paper, but is less comprehensive. The chapter’s provisions on the prevention of anti-competitive practices, universal service, licenses and the independence of regulatory bodies, however, reflect significant obligations for the Parties’ regulators.

Scope and definitions (Article 89)
Article 89 determines, first, the scope of the section on courier services and, second, defines two key concepts for this services sub-sector, namely the concepts of “universal service” and “individual license”. It is worth pausing to consider these “technicalities,” as they provide important insights into the operation of this Section.

Article 89 (1) provides that the regulatory principles set out in Section 3 explicitly apply to “courier” services. Postal services, by contrast, are not mentioned. This is noteworthy because under the WTO Services Sectoral Classification List, courier and postal services form a common single sub-sector of the sector “communication services”. The WTO list refers to the UN’s CPC\(^{14}\) classification, which defines both courier and postal services essentially as “pick-up, transport and delivery services” relating to letters, parcels and packages.\(^{15}\) However, courier services are further defined as being supplied by service suppliers “other than … the national postal administration”. Thus, the difference between courier and postal services, as defined by the CPC, is not in the nature of the service but in the nature of the service suppliers as postal services may only be supplied by the “national postal administration”. Given this context – much discussed in negotiations at the WTO and elsewhere – it would seem at first sight that postal services were not meant to be covered by this Section at all, given that only courier services are mentioned here. However, it would seem that the drafters of the CARIFORUM EPA have decided to deviate from traditional practice here. This follows from Article 89 (2), which defines universal service as the permanent provision of a postal service. It may be inferred that the section, in fact, aims to cover both courier and postal services.
The first of the legal definitions set forth by Article 89 (2), as just mentioned, relates to the concept of “universal service”. In debates at the WTO and elsewhere that concept is discussed primarily in relation to the liberalization of postal services, as erstwhile monopolies of many national postal administrations are eroding. Because courier services – if one follows the CPC distinction – are supplied by service suppliers other than the national postal administration, the universal service concept is usually not discussed with respect to courier services. It is thus not surprising that Article 89 (2) defines universal service in relation to “postal service” but not in relation to courier services – except that Section 3, as discussed, explicitly (only) relates to courier services.

The definition of universal service here is similar to that in the Convention of the Universal Postal Union (UPU). There, universal service is defined as the “permanent provision of a postal service of specified quality at all points in the territory of a Party at affordable prices for all users”. The UPU definition (which does not formally apply here, but offers useful orientation) lists the elements that make a postal service “universal” (within the territory of the Party in question), namely: (a) the postal service concerned must be supplied on a permanent basis; (b) the geographical reach of the postal service concerned is unlimited; (c) the number of the service consumers that may benefit form the postal service concerned is unlimited; (d) the postal service concerned must meet certain criteria regarding its quality; and (e) the prices charged for the postal service in question have to be “affordable”. These elements are general in nature and need further concretization by the CEPA Parties. This is addressed by CEPA Article 91 on “universal service” (see below).

The second definition under Article 89 (2) concerns individual licenses. Pursuant to this provision, an individual license is “an authorization, granted to an individual supplier by a regulatory authority, which is required before supplying a given service”. This definition highlights that the Parties may require an authorization for the supply of certain services, namely those linked to the universal service concept. Remarkably, Article 92 – see below – provides that such licenses may only be required for services within the scope of the universal service (meaning: services that are, or compete directly with, universal services).

**Prevention of anti-competitive practices in the courier sector (Article 90)**

Article 90 addresses the regulation of the market behaviour of certain service suppliers, namely those suppliers who “have the ability to affect materially the terms of participation (having regard to price and supply) in the relevant market for courier
services as a result of use of their position in the market”. The service suppliers targeted by this provision are those who have a “dominant position” in the relevant market for the courier (possibly including postal) service in question. As the provision refers to suppliers “who, alone or together” have a dominant position in the relevant market, the provision covers both monopolistic and oligopolistic suppliers.

Yet the fact that some suppliers may enjoy a monopoly or an oligopoly is not at issue, in and of itself. Rather, Article 90 (only) seeks to ensure that such suppliers are prevented by national regulators “from engaging in or continuing anti-competitive practices”. However, the provision does not spell out which market behaviour may constitute anti-competitive practices. This is less remarkable than it may seem, due to the immediate context, namely Article 97 of the CEPA (Section 4 on telecommunication services, see below) and its model, the WTO Telecoms Reference Paper. Both list the following practices in the telecoms sector as being anti-competitive: (a) cross-subsidization; (b) using information obtained from competitors with anti-competitive results; and (c) not making available to other services suppliers on a timely basis technical information about essential facilities and commercially relevant information which are necessary for them to provide services. While practice (c) may be less relevant in the market for courier/postal services, practices (a) and (b) are clearly relevant. While, of course, the CEPA rules on telecoms and the WTO Telecoms Reference Paper do not apply directly or by automatic analogy here, it seems safe to assume that at least these two practices (or behaviour akin to them) fall under Article 90.

National regulators must prevent these anti-competitive practices by service suppliers through “appropriate measures.” They are to be taken in accordance with the provisions of the CEPA’s chapter on competition.” This reference is potentially confusing. The competition chapter does not set out any (specific) measures against anti-competitive practices. It only requires the Parties to “have laws in force addressing restrictions on competition within their jurisdiction, and the bodies referred to in Article 1.1”, within five years of the coming into force of the EPA. The competition bodies of the CARIFORUM States, referred to in Article 1 (1) of the competition chapter, are the CARICOM Competition Commission and the Dominican Competition Authority. Thus, it would appear that Article 90, in fact, contemplates that measures against anti-competitive practices by service suppliers in the market for courier (and possibly postal) services should be taken
by the aforementioned competition bodies, in line with the relevant competition laws (once they have entered into force). Yet it must be noted that Article 93 also refers to regulatory bodies (see below). It would thus seem that the CARIFORUM Parties are free to choose their preferred institutional setup, and that the regulatory bodies referred to in Article 93 are those bodies that are responsible for taking measures against anti-competitive practices of courier (and possibly postal) service suppliers, whether or not they are the aforementioned (general) competition bodies. In the same vein, it would seem natural that such measures do not have to be based on general competition laws but could equally be based on specific rules regarding the regulation of the market for courier (and possibly postal) services.

**Universal service (Article 91)**

Article 91 relates to the universal service concept. The ability of governments to effectively secure universal service in essential services is, obviously, a very important principle of modern administration. This is true in particular in developing country markets where unsupervised market players may be even more tempted than in richer markets to leave parts of the population aside and concentrate on profitable areas and customers. This provision thus recognizes the need for universal service, and hence the obligations for service suppliers that may go with it. But it also operates to discipline regulators when they impose such obligations.

It is recalled that the concept in this Section only applies to postal services (but not to courier services), according to the legal definition of “universal service” in Article 89. Article 91 complements this legal definition, which is based on a number of somewhat general criteria. The first sentence of Article 91 grants any Party “the right to define the kind of universal service obligation it wishes to maintain”. This means two things: First, any CEPA Party is entitled to decide which specific postal service is to be supplied as a “universal” service. Put differently, a Party may decide that no postal service is supplied as “universal” service or, conversely, that all, or only some, postal services are to be supplied as “universal” services.

Second, once a CEPA Party decides that a, some, or all postal services are to be supplied as “universal” service, Article 91, second sentence, imposes certain conditions on that Party as regards the administration of the specific universal service obligations imposed on providers, such as the permanent provision of a postal service of specified quality at all points within the territory [of the Party] at affordable rates.¹⁹
Article 91 provides that these obligations have to be “administered in a transparent, non-discriminatory and competitively neutral manner” and must “not [be] more burdensome than necessary for the kind of universal service defined by the Party” (the “necessity-test”). In a nutshell, this discipline on regulators seeks to ensure that the imposition of a universal service obligation on the suppliers of such a service is not used as a pretext for favouring certain (domestic) service supplier(s) over others, i.e. is not applied in manner that accords to the incumbent a competitive advantage. The conditions imposed on the supplier must be limited to what is strictly necessary to achieve the elements that make up the universal service.

It is worth noting that as the said conditions concern the “administration” of the obligations pertaining to universal services, they also apply to the actual granting of licenses required for the supply of such services (see immediately below on Article 92).

**Individual licenses (Article 92)**

Article 92 on individual licenses also relates to the universal service concept, as an individual license “may only be required for services which are within the scope of the universal service.” In other words, no individual licenses may be required for postal/courier services that do not fall within the realm of the “universal” services. This is significant – normal courier/postal services that are not operating within that realm must thus be allowed without requiring a special license.

To the extent that an individual license is required for the supply of a “universal” service, certain criteria regarding such a license must “be made publicly available,” namely: (a) all the licensing criteria and the period of time normally required to reach a decision concerning an application for a license; and (b) the terms and conditions of individual licenses. The criteria set forth in Article 92 (2) thus underpin the conditions stipulated by Article 91 regarding the administration of the universal service obligations.

The third paragraph of Article 92 addresses the rights of service suppliers whose applications for individual licenses were rejected: transparency and appeal. When a license application is rejected “the reasons for the denial of an individual license shall be made known to the applicant upon request.” Moreover, each Party is under an obligation to establish “an appeal procedure through an independent body.” Thus, an unsuccessful applicant has to have the opportunity to request a review of the decision to deny its application for an individual license. The procedure govern-
ing the review by the independent body must be “transparent, non-discriminatory, and based on objective criteria.”

**Independence of the regulatory bodies (Article 93)**

While Articles 91 and 92 are concerned with the rules governing the administration of the obligations pertaining to universal service, Article 93 relates to the regulatory bodies competent for administering these obligations as well as the courier and postal services sub-sector in general. The provision may seem to suggest that such (specialized, sectoral) “regulatory bodies” ought to be set up, although the provision stops short of expressly requiring the setting up of such bodies. (As discussed, Article 90 in fact appears to suggest that the general competition bodies, as contemplated in the competition chapter, may operate as the postal/courier regulators.)

In any case, however, the body regulating this sector is to be “legally separate from, and not accountable to, any supplier of courier services”. Hence, the regulatory body must be independent, both in legal and factual terms, from any given supplier, in particular the (domestic) incumbent – the national postal provider. Moreover, and in line with this wide notion of independence, the “decisions and procedures used by the regulatory body” are to be “impartial with respect to all market participants”. Thus, the regulatory body must not discriminate against any supplier of courier and postal services in favour of any other courier or postal service supplier, in particular the (domestic) incumbent.

**Conclusions**

This section provides for Reference Paper-type disciplines in the courier – and the postal – services sub-sector. No specific regulatory disciplines in this sub-sector currently exist in the WTO context. Proposals for establishing a Reference Paper for postal and courier services were made in the DDA negotiations, notably by the EC, but so far received a rather cool response by other WTO Members. At this point in time, it appears very unlikely that a Reference Paper for the postal and courier services sub-sector will be agreed by a critical number of WTO members.

Against this backdrop, agreeing on such regulatory disciplines in an EPA means a clear and effective “GATS plus” commitment for all EPA Parties. The disciplines set out in Section 3 are identical to those contained in the proposal for a Reference Paper regarding postal and courier services, made in 2005 by the EC and its Member States in the DDA negotiations. The scope of these disciplines is somewhat unclear, however, because Section 3 is supposed to cover only courier services.
However, the disciplines on universal service and individual licenses, which are key elements of this section, relate to postal service. Arguably, thus, the section plainly covers both courier and postal services.

Of particular relevance are the requirement for EPA Parties to take appropriate measures against anti-competitive practices, the need to have an independent regulatory body in place as well as a review procedure through an independent body in case applications for individual licenses are denied. These measures entail a significant administrative and institutional responsibility, including potentially non-trivial costs. (That said, of course, more transparent procedures, better competition and hence better services may well justify the efforts.)

### 3.4 Telecommunications services

**Overview**

Section 4 of the “Regulatory Framework” Chapter 5 addresses the regulation of telecommunication services.

The section obviously builds on, and emulates, the elements of the WTO Telecoms Reference Paper (hereinafter “RP”), but at times goes beyond RP obligations. In most cases, however, these “RP Plus” provisions are more or less mere elaborations of RP principles.

Like its model, the section covers a broad range of aspects relevant for a functioning system of pro-competitive regulation in this important sector. It addresses the independence of the regulator, the licensing of telecoms operators, the pro-active prevention of anti-competitive practices by monopolists and oligopolists, the interconnection between grids and operators, the fair allocation of frequencies, telephone numbers and other scarce resources, the regulation of universal service, the confidentiality of telecommunication data and the settlement of disputes between telecoms suppliers - a rather comprehensive web of obligations.

The majority of CARIFORUM members have accepted the RP as part of the specific commitments under the GATS, and hence are likely to be reasonably well prepared for any challenges this chapter poses. But some CARIFORUM members have not subscribed to the RP, and may thus find it more challenging to comply with this chapter. That said, all (except possibly one, namely Guyana) have largely functional telecommunications laws and regulators in place, and should thus be generally prepared as well.
Definitions and scope (Article 94)
The definitions in Para. 1 of Article 94 correspond to normal GATS / Telecoms Reference Paper definitions, with the exception of that of a “Regulatory Authority”, which is an autonomous definition. No relevant regulatory challenges appear to arise from this provision.

The same is true for Para. 2 on the scope, which (like the RP) provides for the coverage of basic (non-value-added) telecommunications services.

Regulatory authority (Article 95)
This provision with its four paragraphs goes beyond, but arguably primarily elaborates on, Section 5 of the Telecoms RP, which is much shorter and reads in its entirety as follows:

“The regulatory body is separate from, and not accountable to, any supplier of basic telecommunications services. The decisions of and the procedures used by regulators shall be impartial with respect to all market participants.”

Para. 1 of Article 95 appears to reinforce the RP requirement of “separate from, and not accountable to” through the alternative phrase “legally separate and functionally independent,” which is arguably more specific and imposes stricter obligations, because it does not leave Parties the choice to achieve effective separation without separating the functions legally. In essence, however, this option would appear to be of minor relevance, as it is hard to imagine effective separation and non-accountability without legal separation and functional independence of the regulator from any operator in the market. For practical purposes, thus, Para. 1 seems to function as a clarification rather than an additional “RP Plus” obligation.

Para. 2 of this provision contains two additional specific obligations which the RP does not spell out, namely the need to sufficiently empower the regulatory authority and to make its function and powers transparent for the market. However, while these are technically “RP Plus,” the demands appear to reflect simple common sense regarding the status and operation of a regulatory authority, once one is established. The resulting additional obligations thus appear rather negligible.

The same applies to Para. 3, which spells out the obvious, namely that the regulatory authority should be and act impartial(ly).
More remarkable is Para. 4. It reinforces the general right to appeal contained in GATS Article VI:2 in three ways: (1.) the independence of the appeals body from the Parties, including the regulatory authority; (2.) the requirement for that body (unless it is judicial in nature) to provide written reasons for its decision; and (3.) the requirement to provide for independent and impartial judicial review of the appellate decision itself. Depending on the actual regulatory status quo in individual CARIFORUM members to date, these obligations may for some of them entail non-negligible institutional and administrative burdens, especially for small Parties with limited administrative capacities.

**Authorization to provide telecommunications services (Article 96)**

This provision appears to impose rather significant disciplines on licensing requirements and activities. It goes well beyond its counterpart in the RP (Section 4), which only provides for the public availability of licensing criteria, but otherwise leaves licensing (in particular the requirement as such) largely to the discretion of the Members.

Para. 1 provides that the provision of telecoms services “shall, as much as possible be authorized following mere notification,” i.e., automatically. It thus puts the burden of proof on the Party (or its regulatory authority) to demonstrate that non-automatic licensing for a particular telecoms activist is necessary, as it is otherwise obliged to authorize following mere notification. Para. 2 enumerates two aspects with respect to which licensing is expressly authorized, namely frequencies and numbers. It would appear that beyond these only major concerns such as security and data safety may effectively justify non-automatic licensing under Para. 1. While this in principle constitutes a non-trivial restriction (discipline) on EPA Parties, it does not as such impose administrative burdens, and hence does not raise issues of feasibility.

Para. 3 (a) reiterates RP requirements regarding the administration of licensing. Interestingly, however, it leaves out the requirement to make the terms and conditions of individual licenses publicly available (RP Section 4.b).

Para. 3 (b) clarifies that the reasons for a denial decision must be given in writing, while the RP only demands that they are given in the first place. The difference in administrative practice appears to be negligible, as subjecting regulators concerned with major issues such as the licensing of telecoms to the need to provide written reasons for their decisions appears to be an imperative of basic good governance, and as such is likely to be part of administrative practice (if not law) of most
CARIFORUM states in any case. However, some of the smaller states may prove the exception to the rule. As written reasons do increase the vulnerability of a decision upon appeal, the effect may be non-negligible on some smaller administrations.

Para. 3 (c), oddly, merely mirrors Article 95 (4) in requiring the availability of an appeal against the denial of licenses, and hence appears redundant.

Para. 3 (d), remarkable, limits the license fees to the administrative costs. This would appear to operate as a significant limitation on EPA Parties to generate revenue through telecoms licensing. Since no exception for the auctioning (or other sale) of licenses is provided for (unlike in the draft Disciplines on Domestic Regulation currently under discussion in the WTO), this appears as a rather excessive limitation on EPA Parties, especially those with yet-to-be liberalized market segments (or unused/unallocated licenses), e.g. in 3G (or even 2G) mobile telephony. It would have been sensible to either leave out the paragraph in its entirety (this would allow for revenue generating licensing generally) or at least add an exception for the non-discriminatory, competitive sale (especially auctioning) of scarce frequencies (or rather: related licenses). It should be noted that several EU Member states (not least Germany) have generated enormous revenues through telecoms licensing in 3G mobile telephony. It would seem unfair to deny others the same opportunity (even if the economic wisdom of excessive licensing fees generated by auctions may be questionable).

Competitive safeguards on major suppliers (Article 36)
This provision, which requires the pro-active prevention of major anti-competitive practices by dominant providers (especially incumbent ex-monopolists, but also oligopolies), mirrors largely literally Section 1 of the RP, with minimal editorial rearrangements. No additional obligations arise thus for EPA Parties that have subscribed to the RP. For others the obligation – which entails the need to supervise major suppliers, i.e. powerful companies, rather narrowly – could prove to be rather significant.

Interconnection (Article 98)
Perhaps the single most important element of a functioning telecoms market is the secure possibility (right) of telecoms provider to interconnect with, i.e., link their networks to, other providers’ networks. Without this guarantee especially smaller providers will not be able to satisfy their customers (as they cannot guarantee that they can reach other subscribers), and hence will not be able to compete. It is thus
in principle welcome that this provision clarifies and improves the RP provisions on interconnection – possibly, not least, in view of lessons drawn from the Mexico-Telecoms (Telmex) case decided by a WTO Panel in 2004.24

While paragraphs 3-6 of Article 98 provision mirror largely literally Section 2.2-2.5 of the RP, the remainder of the provision goes beyond its model.

Para. 1 establishes the additional right of every telecoms provider to negotiate interconnection with every other provider, effectively excluding gatekeeper rights for designated providers (usually the universal service providers). This requirement, however, logically does not add any administrative burden on the government/regulatory authority.

Para. 2 requires Parties to secure the confidentiality, and restrictive use, of business information exchanged between telecoms operators as part of interconnection negotiations. The obligation already exists under the RP for major suppliers (Section 1.2 (b) of the RP). The extension to others appears as a necessary reflex of Para. 1. Notwithstanding that conclusion, it does add another specific obligation for regulatory authorities, which, however, would appear rather manageable for those EPA Parties that have subscribed to the RP, given that they already maintain that control for major suppliers.

For EPA Parties that have not subscribed to the RP so far and have not implemented its principles in practice this provision may pose significant challenges, in particular in the short run.

**Scarce resources (Article 99)**

The provision, requiring fair procedures for the allocation of scarce resources such as numbers and frequencies among providers, reproduces verbatim Section 6 of the RP. Even for EPA Parties that have not subscribed to the RP the burden would appear to be rather minor.

**Universal service (Article 100)**

As in postal and courier services, the possibility to provide for universal service obligations for telecoms providers is an important tool to secure access to these essential services for all citizens. Article 100 allows for, but also disciplines, the imposition of such obligations.
Paragraphs 1 and 2 of the provision reproduce literally Section 3 of the RP. Para. 3, however, adds the right of all providers to be eligible for universal service. This reflects the fact that the obligation also potentially entails significant economic advantages, even in the absence of monopoly rents, namely economies of scale short of (prohibited) cross-subsidization. This right of operators thus entails an obligation on the regulator to entertain the options and make impartial choices. While the decision is likely to be economically important and hence potentially contentious, the actual administrative and institutional burden on the regulator to administer this decision would appear to be acceptable.

Para. 3 further requires Parties to consider suitable compensation mechanisms for universal service obligations, limiting them to what is necessary to offset actual burdens incurred by the operator. Importantly, the choice of mechanism (direct compensation or sharing mechanisms involving the other operators) is left to the individual Party. However, the need to administer such compensation mechanisms may represent a non-trivial challenge, not least for small administrations. Given that it is a necessary reflex of the operation of universal service obligations, as exclusivity of certain services is not an option to the extent that market access is committed, the burden appears unavoidable.

While the issue does not appear to have raised concerns regarding administrative burdens in the CARIFORUM context, this may be different in other EPA arenas. It may be worth considering a transitional period postponing the right for non-incumbents to be eligible for universal service provision, and hence allowing Parties to maintain the status quo (likely involving a previously or currently state-owned operator providing universal service) for a while, to provide relief in case of need.

Confidentiality of information (Article 101)
Article 101 imposes the obligation on Parties to ensure (through regulation) the confidentiality of telecommunications and traffic data as processed by operators, excluding non-public telecoms operations such as intra-corporate communications (see GATS Annex on Telecommunications for guidance).

Neither the GATS (incl. Annexes) nor the RP contain such an obligation. The GATS Annex on Telecommunications, however, in Section 5 d) provides for a right for Members to ensure such confidentiality, provided the measures do not operate as a disguised restriction on trade. The obligation to do so in this provision may, again, pose challenges for some regulators in EPA Parties, notwithstanding the de-
sirability of the result. Interestingly, this provision, while requiring Parties to secure confidentiality, limits this to cases that do not restrict trade in services (not only telecommunication services). Since many data protection measures may do exactly that, the scope of the obligation may be effectively limited.

An interesting interpretative question arises if and when an EPA Party chooses to exercise its rights under the GATS Annex, raising undisguised (open, visible and purposeful) barriers to trade in the process. Would Article 101 of the CEPA prohibit such measures? The answer, however, would appear to be no, as the phrase “without restricting trade in services” seems to only operate only as a limitation on the obligation to secure confidentiality in Article 101 itself, not as a separate limitation on a Party’s right to provide for further-reaching data protection if it so chooses. However, it may be worth ensuring that all EPA Parties are fully aware of this issue to avoid misunderstandings; a clarification of the issue in future EPAs may be desirable to avoid misunderstandings.

**Disputes between suppliers (Article 102)**

Article 102, which does not find a correspondence in the RP, requires the telecoms regulator to intervene, when requested, as an arbitrator in disputes between telecoms suppliers if rights and obligations rooted in this Chapter of the CEAP are concerned. Oddly, it duplicates the right of providers engaged in a dispute on interconnection to have the matter resolved by the regulatory authority (Article 98 (4)).

The provision adds a function to the regulator’s portfolio and as such represents an administrative burden. However, given the general need to “sufficiently empower” the regulator to effectively regulate the sector (Article 95 (2), see above), establishing it as a judge of first resort for disputes among operators appears as a rather obvious consequence. The additional burden can thus be seen as rather negligible.

Para. 2, finally, provides for the cooperation of concerned Parties’ regulators in case of disputes concerning cross-border supply of services. This rather general and unspecified obligation holds the potential for some degree of outside interference, but does not add significant administrative burdens as such.

**Conclusions**

Section 4 on telecommunication services emulates its model, the WTO Telecoms Reference Paper, but at times goes beyond RP obligations. In most cases, however, these “RP Plus” provisions are more or less mere elaborations of RP principles.
For the majority of CARIFORUM Parties that have subscribed to the RP, the additional burden appears moderate. For those that haven’t the requirements, individually and as a bundle, may pose challenges. That said, as indicated, all of these (with the possible exception of Guyana) appear to have generally functional telecommunications laws and regulators in place, and should thus be generally prepared as well.

Significant departures from the standards established by the RP include a far-reaching right of (ultimately judicial) appeal against regulatory decisions (Article 95), limitations on licensing including the capping of licensing fees at the level of costs, which would preclude the profitable auctioning of licenses (Article 57), the obligation to establish compensation mechanisms for universal service provision (Article 100), the obligation to ensure the confidentiality of telecommunications and traffic data (Article 101) and the obligation to settle disputes between providers (Article 102). The resulting administrative burdens (for RP subscribers), however, appear generally acceptable, with the possible exception of very small administrations.

3.5 Financial services

Overview

Section 5 of the CEPA’s regulatory chapter addresses the regulation of financial services. Its significance derives not least from the considerable number of specific commitments that CARIFORUM states have undertaken in this sector – 83 in total, compared to 44 existing GATS commitments and offers made in the DDA negotiations.

The Section’s provisions derive their inspiration almost entirely from the GATS’ “Annex on Financial Services” (the “Annex”) and the “Understanding on Commitments in Financial Services” (the “Understanding”). The difference matters, as the Annex is a part of the GATS and hence mandatory WTO law, while the Understanding only applies to (mostly developed) WTO Members who have chosen to undertake their specific commitments on financial services in line with the approach adopted by the Understanding. Importantly, no CARIFORUM state has done so, therefore all obligatory elements derived from the Understanding represent “WTO plus” commitments.

Apart from detailed definitions, in particular of financial services (a crucial element of any agreement on financial services), the provisions of this Section include in particular a “prudential carve-out” (a far-reaching authorization for regulators to take
exceptional measures for prudential reasons), principles of transparency, the principle of automatic inclusion of new financial services, an obligation to permit the processing and transfer of financial data and specific exceptions for public entities.

**Scope and definitions (Article 103)**

According to Article 103 (1), Section 5 sets out the principles of the regulatory framework for “all financial services liberalized pursuant to Chapters II, III and IV of this Title”, i.e. only for those financial services where the EPA Parties have undertaken commitments on market access and national treatment.

Article 103 (2) lit. a) – c) contain legal definitions of: (a) financial service, (b) financial service supplier, and (c) public entity. These definitions are identical to the corresponding definitions the Annex, which, as indicated, is an “integral part” of the GATS, according to Article XXIX of the Agreement.

Article 103 (2) lit. d) further contains a legal definition of “new financial service” which does not figure in the Annex. By contrast, it corresponds literally to the legal definition of a “new financial service” in the Understanding, which, as discussed, does not constitute an integral part of the GATS, however.

**Prudential carve-out (Article 104)**

The prudential carve-out in Article 104 (1), which allows financial regulators to take prudential measures to protect customers such as investors, depositors or policy holders as well as measures to ensure the integrity and stability of a country's financial system, corresponds literally to its counterpart in the Annex. The non-disclosure rule in Article 104 (2), which ensures that authorities are not required to disclose confidential information or information relating to the affairs and accounts of individual customers, is identical to the non-disclosure rule in paragraph 2. b) of the Annex.

The provision thus simply mirrors existing GATS obligations, or rather: rights. Its role here is simply to ensure that these rights also apply in the CEPA context. No additional obligations arise.

**Effective and transparent regulation (Article 105)**

By contrast, the regulatory principles laid down in Article 105 do constitute in large part a “WTO plus” approach, mitigated, however, by the soft “best endeavour” nature of the obligations.

Article 105 (1) seeks to increase the transparency of the (legislative) process by which a Party adopts new measures of “general application.” In this respect, there is
a clear link to Article III:1 of the GATS which requires WTO Members to publish promptly “all relevant measures of general application which pertain to or affect the operation” of the GATS. However, Article 105 (1) differs from Article III:1 of the GATS in that it covers measures “that the Party proposes to adopt”, as opposed to measures already adopted (emphasis added). Such measures should be provided “in advance to all interested persons” in order to allow an opportunity for such persons “to comment on the measures” being proposed – a so-called “prior comment” commitment. While undoubtedly a useful tool for maintaining a reasonable and transparent regulatory practice, this type of commitment is feared by small and/or weak administrations because it may open the door somewhat prematurely to powerful foreign providers that may steamroll the regulator more easily during the drafting stage than later when a regulatory measure has already been adopted. Like other developing country groupings in the WTO the group of Small, Vulnerable Economies (SVEs), which includes virtually all CARIFORUM states, has therefore consistently resisted a general “prior comment” obligation in the deliberations of the WTO Working Party on Domestic Regulation (WPDR).

Possibly as a result of the CARIFORUM states maintaining this position also in the EPA negotiations, Article 105 (1) does not legally oblige the Parties to follow this approach. Rather, it states that each Party “shall endeavour”, i.e. use its best efforts, to do so. (A similar compromise, in fact, appears to emerge in the WPDR.28)

Article 105 (2), third sub-paragraph, relates to “internationally agreed standards for regulation and supervision in the financial services sector”. Parties are asked to use their best endeavours to facilitate their implementation and application. The exact meaning of “internationally agreed standards,” however, is less than clear. A previous draft of the CEPA provided that these were standards “under agreements to which they are parties.” This phrase would have excluded, for example, OECD standards, which are viewed with suspicion by Caribbean countries that feel targeted by OECD measures on tax policy, money laundering etc. While it is not a necessary conclusion that the disappearance of that phrase means that such plurilateral standards have now found their way back into the EPA, the vagueness does not seem to work in favour of the CARIFORUM states. That said, the mere “best endeavour” nature of the obligation should provide sufficient insulation against such unwanted standards.

The first and second sub-paragraphs of Article 105 (2) deal with “applications relating to the supply of financial services”. These two provisions are mandatory.
According to the first sub-paragraph, each Party has to make available to interested persons “its requirements for completing applications relating to the supply of financial services”. Financial service suppliers are thus entitled to be informed of all of the requirements applying to the supply of financial services within the territory of a given Party. This is to enhance the transparency of the financial services sector. The second sub-paragraph requires the Parties to inform an applicant of the status of its application (this obligation corresponds to Article VI:3, second sentence, of the GATS). Moreover, the Parties have to “notify the applicant without undue delay” if they require additional information on its application. This obligation serves the goal of making the application process as fast as possible.

**New financial services (Article 106)**

Article 106 addresses the treatment of new financial services, i.e. services not yet captured by existing definitions and schedules – a rather important issue given the fast pace of innovation in financial product design. The issue is not dealt with in the Annex, but appears in the Understanding.

Article 106 foresees that new financial services provided by suppliers from the other Party should be permitted if the same or similar services are permitted when supplied by domestic providers “in like circumstances.” The first sentence of Article 106 is somewhat similar to paragraph 7 of the Understanding. The two provisions mainly differ in that paragraph 7 of the Understanding only applies to new financial services that are offered by financial service suppliers which have a commercial presence (mode 3) in the territory of the WTO Member where the services are to be supplied. By contrast, Article 106, first sentence, is not restricted to new financial services supplied in mode 3. Rather, the latter provision applies to new financial services supplied in any mode of supply, provided the service in question is “similar to those services that the Party permits its own financial service suppliers to provide under its domestic law in like circumstances”.

This general right of foreign suppliers to provide the new service, however, can still be subjected to regulatory conditions. Article 106, second sentence, entitles the Parties to determine “the juridical form through which the service may be provided.” Thus, a Party may effectively require foreign financial service suppliers to establish a commercial presence in its territory in order to be able to supply the new financial service.

Further, Article 106, third sentence, entitles the Parties to “require authorization” for the provision of a new financial service. In such a case, a decision by the competent
authority (regulatory body) on an application for authorization is to be made “within a reasonable time” (this requirement corresponds to Article VI:3, first sentence, of the GATS). An authorization may only be refused “for prudential reasons.” The discretion enjoyed by the regulatory body is thus somewhat limited, but the notion “prudential reasons” still leaves a wide margin of discretion to the regulatory body.

The CEPA’s approach to new financial services is thus distinctly liberal, but not novel. It corresponds not only to that reflected in the Understanding, but also mirrors corresponding concepts in NAFTA.29

**Data processing (Article 107)**

The provision on data processing has its counterpart in paragraph 8 of the Understanding, and hence is – for CARIFORUM States – “GATS plus.” It contains two corresponding elements. First, Parties must allow for the cross-border transfer of financial data if that is required in the ordinary course of business of a financial service provider. Second, however, the Parties on the other hand undertake the obligation to take sufficiently effective measures (“adequate safeguards”) to ensure the protection of data, in particular personal data. While the first element will cater to those CARIFORUM States that excel in financial services, the second may pose some legislative and regulatory challenges. Given the values at stake, however, this would appear as a normal cost to be borne to obtain the benefit.

In its logic the right of financial service suppliers to transfer information into and out of a Party’s territory for data processing is somewhat reminiscent of the general obligation of WTO Members that have made specific market access commitments in mode 1 to permit the cross-border movement of capital, provided that is an essential part of the service itself.30

**Specific exceptions (Article 108)**

The “specific exceptions” listed in Article 108, relating to certain specific financial services of a public nature, are identical to the “exceptions” listed in paragraph 1. b) of the Annex. The difference between Article 47 and paragraph 1. b) of the Annex is a purely formal one: paragraph 1. b) of the Annex provides that the financial services concerned are deemed to be “supplied in the exercise of governmental authority” in the sense of Article I:3(b) of the GATS. According to this provision, such services do not come under the scope of the GATS (and hence the Annex).

There is one material difference, though, between Article 108 and the Annex as regards the financial services concerned. According to paragraph 1. c) of the
Annex, the financial services comprised by paragraph 1. b) (ii) [services relating to a statutory system of social security or public retirement plans] and (ii) [activities conducted by a public entity for the account or with the guarantee or using the financial resources of the Government] are not considered to be supplied in the exercise of governmental authority if a WTO Member allows such services to be conducted by its financial service suppliers “in competition with a public entity or a financial service supplier”. By contrast, this exception from the exception is more limited under Article 108: Only its first paragraph, relating to services forming part of a public retirement plan or a statutory system of social security, mentions the possibility that such services may be supplied in competition with public entities or private institutions. In such a case, the services in question are not exempted from the regulatory principles set out in Section 5.

Conclusions

Most of the regulatory principles in this section are identical, or correspond, to the principles in the “Annex on Financial Services” (Annex) or the “Understanding on Commitments in Financial Services” (Understanding). Furthermore, some of the principles are similar to those set out in Article VI:3 of the GATS. As the Annex is an integral part of the GATS, the regulatory principles of this section that are identical, or correspond, to those in the Annex do not constitute a “WTO plus” approach.

The same cannot be said, however, with respect to the regulatory principles that are identical, or correspond, to those in the Understanding. This is because the Understanding is not an integral part of the GATS. It is only applicable to those WTO Members that subscribed their specific commitments on financial services in line with the Understanding. None of the CARIFORUM States chose to do so. Therefore, the regulatory principles mirroring those of the Understanding represent a “WTO plus” approach for the CARIFORUM States. This applies in particular to the provisions on new financial services (Article 106) and financial data processing (Article 107).

Equally “WTO plus,” of course, are those principles that are entirely new, i.e. that do not appear in either the Annex or the Understanding. This is the case for most of the principles relating to an “effective and transparent regulation”. It must be noted, though, that the latter principles are couched in the form of “best endeavour” commitments and hence are not strictly mandatory for the Parties.
All in all it would not appear that the regulatory principles which constitute a “WTO plus” approach are overly burdensome. In particular, they do not require the establishment of new (regulatory) bodies. The implementation of such principles may, however, require more resources in terms of additional personnel for the regulatory bodies charged with the implementation of such principles as well as appropriate training of the (new) staff. To this end, technical assistance and capacity building may be required so as to enable the regulatory bodies of the Parties concerned to effectively fulfil their functions to the benefit of a stable financial service sector.

In fact, for CARICOM members (i.e., CARIFORUM Members minus the Dominican Republic) it appears that it will generally be sufficient to implement already existing commitments under the CARICOM Financial Services Agreement. However, doing so will in fact require further work and resources.31

### 3.6 International maritime transport services

Section 6 on international maritime transport services consists of just one, but rather long, Article broadly entitled Scope, definitions and principles. The provision aims primarily at clarifying the extent of market access commitments in maritime services by providing (partly extensive) definitions.

Importantly, it further establishes in principle unrestricted market access “in view of the existing levels of liberalization between the Parties” (Article 109 (3) lit. a).

It further provides for National Treatment and MFN, in particular regarding access to port and other facilities and services (Article 109 (3) lit b) and (6)). Beyond non-discrimination, Article 109 (6) further specifies that access to a number of enumerated services must be on “reasonable (...) terms and conditions,” excluding thereby in particular excessive fees and grossly sub-standard services. Cargo-sharing arrangements are henceforth prohibited, existing ones are to be phased out (Article 109 (4) (a)).

A general clause (Article 109.4 (b)) imposes on the Parties the requirement to abstain from (if need be: abolish existing) measures that discriminate or act as a disguised restriction on trade in international maritime services.

The administrative regulatory burdens resulting from this Section, if any, appear rather limited, given not least the quoted existing level of liberalization. It appears
to act largely as a reconfirmation/elaboration of existing policies rather than a new, additional set of obligations. Specific difficulties for CARIFORUM Parties are not apparent.

3.7 Tourism services

Overview
Section 7 contains significant regulatory disciplines with respect to tourism services (Article 110 speaks of “principles of the regulatory framework for all tourism services”). The GATS does not contain any sector-specific disciplines in tourism. The section as a whole thus constitutes “GATS plus.”

The treatment of tourism, not surprisingly, has attracted considerable attention. This is not only because of the importance of the sector for Caribbean economies, but also due to some innovative elements in the CEPA’s approach to the matter. Perhaps most prominent is the obligation (de facto primarily on the EC) to prevent anti-competitive practices by their tourism service suppliers abroad (i.e., in the Caribbean). This is of high importance for the CARIFORUM States where powerful, often vertically integrated European providers exert significant anti-competitive pressures.

Other provisions address access to technology, SMEs, mutual recognition, sustainable development, environmental and quality standards, cooperation/technical assistance and the exchange of information.

It is worth noting that while the other sectoral mechanisms – in financial, telecoms, postal/courier and maritime transport services – are originally based on standard EC proposals, the agreement on a regulatory framework for tourism came about at the targeted insistence of the CARIFORUM side, reflecting the region’s significant interests in the sector. These interests include the defensive interest to control the negative impact of anti-competitive structures maintained in particular by foreign (EU) tourism networks as well offensive interests for Caribbean tourism companies and professionals to effectively access the European market.

Prevention of anticompetitive practices (Article 111)
This provision, perhaps the most innovative in the Chapter, requires the Parties to maintain or introduce a pro-active competition policy in the area of tourism services. It specifically demands controls on “tourism distribution networks,” such as agencies, tour operators, tourism wholesalers and reservation systems (see definition
in footnote 24). Anti-competitive practices, in particular the abuse of a dominant position, are to be prevented.

These requirements in their entirety are “GATS plus.” The GATS does not contain any such requirements, general or sector-specific for tourism, beyond the general disciplines on monopolies and exclusive service providers in GATS Article VIII.

The requirements are significant. They demand significant administrative (and implicitly institutional) arrangements. While most CARIFORUM states already maintain an active tourism policy, which may or may not include some supervision of strong players and anti-competitive practices, and some maintain general competition policies, the challenges should not be underestimated.

That said, the main focus of this provision is in fact on the EC and its tourism operators. It is in view of their (often vertically integrated) structures, market power and behaviour in the Caribbean markets that the CARIFORUM States have actively pushed for these disciplines. It may indeed be hoped that by enlisting the European Commission’s formidable powers in competition policy for this challenge the Caribbean markets could gain respite from sometimes suffocating structures – something the local governments could not easily do on their own.

**Access to technology (Article 112), small and medium-sized enterprises (Article 113), increasing the impact of tourism on sustainable development (Article 115)**

Article 112, a hortative “best endeavour” provision, asks the Parties to facilitate the commercial transfer of technology to CARIFORUM States. This rather harmless provision aims to serve exclusively CARIFORUM interests and does not entail relevant regulatory obligations for them. The same applies to Article 113, which asks the Parties to use their best endeavours to facilitate the participation of SMEs in tourism, and Article 115, which commits them to encourage (read: finance) the participation of CARIFORUM providers in programmes supporting the sustainable development of tourism.

The value of these provisions may appear rather questionable, given their weakness and vagueness, but should probably not be underestimated. They may provide the basis for policies and budgetary outlays, and hence prove eventually valuable.
**Mutual recognition (Article 114)**
This provision reconfirms the obligations under Article 85 (see above), with specific emphasis on tourism requirements, qualifications and licenses, but without additional “hard” obligations. However, this provision will lend some political weight to future specific demands towards mutual recognition, for example of qualifications of tourism professionals. It corresponds to CARIFORUM demands made in the course of the negotiations.

**Environmental and quality standards (Article 116)**
This provision contains a relatively “hard” (“shall”) but, as far as results are concerned, effectively “soft” (“shall encourage compliance”) obligation on the Parties to work towards the observation of unspecified environmental and quality standards in tourism. The second sentence, asking for support of CARIFORUM states’ participation in international standard setting activities, suggests that these include standards developed by – again unspecified – international organizations.

An earlier CARIFORUM proposal would have put the compliance obligation only on the EU Member States, not on the CARIFORUM Parties. It can thus be assumed that the latter considered this obligation to be non-negligible, presumably more so for CARIFORUM’s tourism service providers than its administrations. Since the effective obligations on those providers remains rather vague (they are to be “encouraged”) as long as their governments act with restraint, the EPA obligation as such appears manageable from the perspective of the CARIFORUM Parties.

**Development cooperation and technical assistance (Article 117)**
This provision envisages cooperation (read: technical assistance) programmes for a number of specified purposes. It does not contain regulatory disciplines.

**Exchange of information and consultation (Article 118)**
Article 118, finally, contains “soft” obligations to exchange information among the Parties and invite stakeholders to these dialogues, if agreed. No such obligation exists under GATS. The administrative burden, if any, appears very limited.

**Conclusions**
While many of its provisions are “best endeavour” commitments to advance worthwhile causes such as technology transfer and the participation of SMEs in the sector, Section 7 does contain a few significant regulatory disciplines with respect to tourism services. The GATS does not contain any sector-specific disciplines in tourism. The section as a whole thus constitutes “GATS plus.”
The provisions appear to be geared primarily towards CARIFORUM interests. A key obligation is the requirement for Parties to maintain an active sectoral competition policy in the area of tourism, focused on the prevention of anti-competitive practices and abuse of dominance in particular by “tourism networks,” including – that is the point – in the respective other Party’s market. This obligation is significant and could entail important new administrative and institutional burdens for countries that do not yet maintain such a policy. The primary target of this provision, however, are the EC and its powerful, often vertically integrated tourism operators and networks. They are the ones that this provision, by enlisting the European Commission, aims to control. It is for this reason that the CARIFORUM states actively demanded the inclusion of such disciplines in this Chapter.

A further “soft” obligation to uphold (“encourage compliance with”) environmental and quality standards in tourism may entail the need for new administrative and institutional measures. The impact of this obligation, however, appears to be of moderate significance. A provision on MRAs reiterates the soft obligations contained in Article 24.

The remainder of this section, as indicated, concerns “best endeavour” obligations targeted towards support for developing country interests (access to technology, SMEs) as well as technical assistance and cooperation.

4. Concluding remarks

Chapter 5 does not contain strong general disciplines on the regulation of services, except for mutual recognition agreements (MRAs). While even there the obligations in a strict legal sense remain soft, the procedure involving professional bodies from both sides entails a certain automatism, once the ball gets rolling, towards the adoption of MRAs.

More significant are the sector-specific disciplines. These contain partly non-trivial “GATS plus” regulatory obligations on EPA Parties, which will demand additional administrative, regulatory and legislative efforts. The extent of the additional challenge depends in part on individual Parties’ existing specific commitments under GATS, including in particular the Telecoms Reference Paper, and the status of implementation. The same applies to regional frameworks such as the CARICOM Financial Services Agreement. For those countries that have already implemented it the CEPA provisions on financial services do not require much additional effort.
Far-reaching new regulatory commitments not underpinned by any existing GATS commitments arise in particular in the courier/postal and tourism services, where the CEPA Parties undertake to pursue significant sectoral competition policies and corresponding regulatory activities, resulting in the need for institutional arrangements.

In financial services, most of the regulatory principles conform to those set out in the Annex on Financial services and the Understanding on Commitments in Financial Services. As none of the CARIFORUM States made commitments in line with the said Understanding, the principles corresponding to the Understanding go beyond the current commitments of these States under the GATS.

With respect to telecoms, the Chapter in part goes beyond the Reference Paper. In most instances (with some notable exceptions), however, the requirements appear to be elaborations of Reference Paper disciplines rather than entirely new obligations.

Is the CARIFORUM EPA good for development? This paper obviously cannot answer this question. However, what can be stated is that the “Regulatory Framework” established by the provisions of Chapter 5 will, on the one hand, pose a number of regulatory and legislative challenges, impose some administrative burdens and trigger corresponding costs. These costs – for CARIFORUM members – have been estimated to amount to EUR 15.6 million in total. If correct, this number would appear rather trivial compared to the possible positive economic impact of functioning regulatory systems, in particular the pro-competitive mechanisms foreseen in telecoms, postal/courier and, most of all, tourism services.

On the other hand, some of the agreed regulatory mechanisms should cater directly to important CARIFORUM interests, most prominently in the area of tourism. In addition to the specific rules in Section 7 on tourism services, the built-in agenda to work towards mutual recognition agreements, as stated, should work to benefit those Caribbean professionals whose interests in exporting their services to Europe have driven their negotiators’ rather remarkable efforts in securing some market access in “mode 4.” Remarkably, the four priority sectors where negotiations on mutual recognition are to be initiated within three years include tourism – an unusual choice given that tourism professionals usually do not get the same recognition as the classical liberal professions. It reflects CARIFORUM negotiators’ successful insistence on priority treatment for this crucial sector.
The insistence on access for Caribbean professionals to EC markets may – apart from tourism – be most relevant in the area of cultural and entertainment services, a sector not separately represented in the Chapter analysed here, because it has found a more prominent place in the CEPA’s rather unique “Protocol III on Cultural Relations.” There, the specific access gained for CARIFORUM cultural professionals to the EC market is further buttressed by additional facilitation measures, including “soft” market access (explicit support in going through normal channels) for those cultural professionals not directly benefiting from agreed market access – a unique construction that aims at underpinning the far-reaching cultural cooperation envisaged.

Quite apart from the concrete effects discussed, one may further speculate that the most significant benefits of Chapter 5 may actually lie in the overall efficiency gains inherent in the good governance embodied in the regulatory disciplines. This, however, remains obviously speculative at this point.

Overall, thus, the developmental balance with respect to the regulatory framework appears to be positive. The burdens appear manageable, and the benefits could be significant. It remains to be seen, of course, whether the assumptions made here – and by the CARIFORUM negotiators – survive their meeting with reality.
References


Endnotes

1 CARIFORUM consists of the members of CARICOM plus the Dominican Republic.
2 The right of service suppliers and investors from one party to sell and provide services, or make investments, in (or into) the respective other party’s market.
3 This new template has been introduced by the European Commission over the past few years in all of its recent negotiations on agreements on trade in services, such as in the EuroMed („Barcelona Process“) negotiations on services and investments with its Mediterranean partner countries, as well as bilaterals with Asian and Latin American Countries, and, of course, EPAs. Its features include, among other things, an alignment of “mode 3“ commercial presence in services and investment in other areas (such as manufacturing), a merger of GATS “modes 1” and “2” under the heading of cross-border supply, separate treatment of audio-visual services and, as reflected upon in this paper, significant regulatory disciplines in particular in courier/postal, telecoms and financial services.
4 Several commitments made by the EC in “mode 4” for cultural professionals in particular are a “first” in the Community's negotiating history. See Caribbean Negotiating Machinery, Getting to Know the EPA: Provisions on Services and Investment, 8 February 2008, page 7 (available online at www.crnm.org, last visited on 7 September 2008).
5 Under the GATS domestic regulation measures that discriminate against or among foreign services or service suppliers are addressed as National Treatment or Most-Favoured Nation principle violations under Articles XVII or II, respectively, not under the disciplines on domestic regulation.
6 Contained in Article VI:5 of the GATS.
7 See GATS Article VI:4.
8 GATS Article VI:5.
9 See Section 3.4.1 and footnote xxi.
10 Section 2 (a) of the Annex on Financial Services.
11 Allyson Francis and Heidi Ullrich, EPA Negotiations on Trade in Services: Analysis of the CARIFORUM-EU EPA, Part I in the present reader, p. 70.
12 Francis and Ullrich, Part 1 in the present reader, at p. 70-72.
14 The UN’s Provisional “Central Product Classification”, to which the WTO list and many Members’ schedules of specific commitments refer.
15 CPC numbers 7511 (postal) and 7512 (courier).
16 Note that the EC proposal for a Reference Paper for postal and courier services (TN/S/W/26 of 17 January 2005) stated that the examples of anti-competitive practices listed by the Telecoms Reference Paper were not included in the EC proposal “as further analysis of the anti-competitive practices specific to the postal and courier sector appears necessary” (ibid., page 4).
17 Chapter 1 of Title IV of the CEPA.
18 Article 3 (1) of the competition chapter.
19 See CEPA Article 89, discussed above.
20 This underpins the objective, sought by Article 91, of a transparent administration.
This applies to Guyana, Haiti, St. Kitts & Nevis, St. Lucia, St. Vincent and the Grenadines, as well as the non-WTO Members Bahamas and Montserrat (the latter is not a party to the EPA).


St. Kitts & Nevis, St. Lucia and St. Vincent & the Grenadines are members of ECTEL, the Eastern Caribbean Telecommunications Regulatory Authority (www.ectel.int).

Sauvé and Ward, *supra* note xiii, at II.4.3 (b) see this connection. See *Mexico – Measures Affecting Telecommunication Services*, Report of the Panel, dated 2 April 2004, WT/DS204/R.

See note xxii.

Francis and Ullrich, Part 1 in the present reader, at p. 73-75.

Paragraph 2. a) of the Annex on Financial Services. The CEAP leaves out the second sentence of this provision, without apparent consequences.


See Article 1407 (1) of the North American Free Trade Agreement (NAFTA).

See footnote 8 to Article XVI:1 of the GATS.

S. 139, 31: Francis and Ullrich, Part 1 in the present reader, at p. 69. They refer to a paper prepared for CARICOM Heads of Government in January 2008 which puts the cost of implementation of the financial services obligations for CARIFORUM states at EUR 2 million.


Francis and Ullrich, Part 1 in the present reader, at p. 72.
Analysis of the Economic Partnership Agreement Process: Trade in Services Negotiations in the SADC-EU EPA

Nkululeko Khumalo
1. Introduction

After several years of negotiations with the EC a number of African, Caribbean and Pacific (ACP) countries initialled interim Economic Partnership Agreement texts (IEPAs) at the end 2007. The talks are carried out in terms of the Cotonou Agreement which seeks to replace non-reciprocal export preferences which ACP countries have been receiving from the EC with reciprocal free trade arrangements negotiated at the regional level from January 2008 onwards in order to align the parties’ trade regime with WTO rules.

The IEPAs are a stop gap measure meant to prevent trade disruptions while negotiations on fully-fledged EPAs continue. The second stage of negotiations which will include services, investment, competition and government procurement is expected to lead to the conclusion of fully-fledged EPAs.

Where services trade liberalisation is concerned, only the CARIFORUM countries have negotiated a comprehensive liberalisation framework. It is of critical importance that the provisions of the EPA text and their implications be properly understood since there is a distinct possibility that the EC may seek to secure similar commitments from other ACP groups.

Accordingly, and based on the analysis of the CARIFORUM text, this paper seeks to provide policy options for the ongoing EPA negotiations between the EC and the SADC EPA group. The main question to be addressed is what are the economic opportunities and threats for the SADC EPA group and individual countries in negotiating EPAs on trade in services and how can this be taken up in the ongoing negotiations.

2. Legal provisions on services trade liberalisation

Chapter Summary

In the SADC-EC IEPA the parties commit themselves to stick to their respective rights and obligations under GATS.

In addition they agree to: negotiate progressive liberalisation with substantial sectoral coverage within a period of three years following the conclusion of the full EPA; no introduction of new and more discriminatory measures to third parties as specified in Article V.1.b (ii) GATS, for all services sectors; and to have a liber-
alisation schedule for one service sector for each participating SADC EPA State by 31 December 2008.

The EC Party agreed to support capacity building aimed at strengthening the regulatory framework of the participating SADC EPA States.

The timelines are unrealistic and the obligations are somewhat vague but what seems important for the EC is that the agreement ties SADC EPA countries to a specific liberalisation framework.

This chapter examines the provisions of the provisions of the interim Economic Partnership Agreement (IEPAs) between the European Community (EC) and SADC countries with regards to services trade liberalisation. It provides an overview of what the IEPA provides for with respect to a services chapter and what timeframes have been agreed.

In terms of Article 67 of the IEPA which deals with the second stage of negotiations towards a full EPA only Botswana, Lesotho, Mozambique and Swaziland will participate from the SADC group. South Africa made it clear from the onset that it will not countenance an agreement that includes services trade liberalisation and disciplines on new generation issues like investment. Namibia initialled the IEPA in protest because of certain provisions dealing with goods trade that they were not happy with and like South Africa refused to take part in the second phase of negotiations.

The SADC IEPA text contains the following obligations and timeframes regarding negotiations on trade in services:

- Parties reaffirm their respective rights and obligations under GATS.
- By 31 December 2008 the Parties will complete negotiations on services liberalisation, on the basis of the following:
  a) liberalisation schedule for one service sector for each participating SADC EPA State;
  b) no introduction of new and more discriminatory measures to third parties as specified in Article V.1.b(ii) GATS, for all services sectors;
  c) agreement to negotiate progressive liberalisation with substantial sectoral coverage within a period of three years following the conclusion of the full EPA.
- The EC Party agreed to support capacity building aimed at strengthening the regulatory framework of the participating SADC EPA States.
The Parties will define the specific cooperation objectives, principles and procedures that will accompany trade liberalisation by the time of laying down the necessary arrangements for the liberalisation of trade in services.

The IEPA text is somewhat vague making it difficult to understand fully what exactly the parties have committed to. It is unclear for example what the statement ‘By 31 December 2008 the Parties will complete negotiations on services liberalisation…’ actually means. Does it mean that they would have secured a services liberalisation schedule for SADC EPA states or they would have completed negotiations on the modalities? It also does not say anything about the nature of the corresponding liberalisation commitment from the EC. It is also unclear when the 3 year period for substantial liberalisation begins – is at the time of initiallling the IEPA or after 31 December 2008?

A source close to the talks claims that this text was never negotiated but was simply introduced by the EC in November 2007. Participating SADC EPA negotiators are reportedly as clueless and had to try to seek clarification from the EC at a meeting held in Brussels in May 2008.

**Are the timelines realistic?**
Meeting the deadline for liberalizing one service sector is unlikely considering that such talks have not yet started and we are fast approaching mid-2008. Moreover the country level processes and technicalities of determining what sector to liberalise and to what extent are likely to take a long time. The three year period for a full agreement is unrealistic too considering the breadth of the services sector.

It seems that the motivation behind setting such tight timelines is to ensure that SADC EPA countries begin the process of negotiation on these issues. For the EC, what may be important at this stage is simply setting the agreement framework which will have far-reaching impacts even in the WTO. This is because once these countries make GATS plus commitments under the EPA it would not make sense to hold back at the multilateral level. This would render them EC ‘allies’ in the GATS negotiations. SADC EPA should take cognizance of the fact that there is no WTO requirement to negotiate services in the EPA therefore they should not allow themselves to be pressured to make commitments before properly identifying their needs, challenges and regional priorities.
3. Flexibilities on scope and level of liberalisation

Chapter Summary

The provisions of the IEPA are not detailed and informative enough on the flexibilities that shall be available to SADC EPA countries that negotiate a services liberalisation chapter.

However it is significant that the parties commit to respect each other’s rights and obligations under GATS. This is because the GATS provisions especially Article XIX and Article V do allow for a lot of flexibility and for an outcome that should promote the interest of SADC EPA states provided the negotiators make maximum use of them.

These talks also provide an opportunity to test the provisions of Article IV of GATS on measures that can be taken to increase the participation of developing countries in world trade. The SADC EPA countries should take the initiative and seek ways in which these provisions that favour them can be operationalized.

In addition the provisions of the Cotonou Partnership Agreement are very important in providing proper context to the talks and they also provide specific obligations like observing the principle of Special and Differential Treatment.

This chapter seeks to give a sense of how much issue and region-specific flexibility regarding scope and level of liberalisation is provided by the IEPA provisions on trade in services. Other applicable legal instruments like the GATS and the Cotonou Partnership Agreement will also be extensively examined.

At this stage nothing substantive has been agreed upon except for timeframes. However in Article 67 I (a) 1 the SADC EPA countries and the EC reaffirm their respective rights and obligations under the GATS’ which means that the negotiating methodology and scope shall be within the parameters of what GATS provides for. Therefore it is expected that the negotiations shall respect and reflect the rights of SADC EPA countries enshrined in several GATS articles.

GATS Article Article XIX provides that the process of liberalization shall take place with due respect for national policy objectives and the level of development of individual Members, both overall and in individual sectors. In particular it provides that developing countries especially least developing countries shall have the flexibility to:
- open fewer sectors,
- liberalize fewer types of transactions,
- progressively extend market access in line with their development situation and,
- attach market access conditions aimed at achieving the objectives referred to in Article IV when making access to their markets available to foreign service suppliers.

Further Article V which deals with economic integration provides for more flexible requirements governing regional trade agreements where developing countries are parties, in accordance with the level of development of the countries concerned, both overall and in individual sectors and subsectors.

In addition since the development of ACP’s services supply capacity has been forcefully used by the EC as a reason for services in the EPA, the provisions of GATS Article IV should be used by the SADC EPA countries in support of this stated objective., GATS Article IV outlines measures that can be taken to increase the participation of developing countries in world trade. Such measures include:

- the strengthening of their domestic services capacity and its efficiency and competitiveness, inter alia through access to technology on a commercial basis;
- the improvement of their access to distribution channels and information networks;
- and the liberalization of market access in sectors and modes of supply of export interest to them.

Moreover apart from GATS the provisions of the Cotonou Partnership Agreement (CPA) should also provide guidance in respect of the scope and nature of services trade liberalisation between the EC and the ACP. Chapter 4 of the CPA provides the enabling provisions for the EC-ACP negotiations on liberalisation of trade in services. In Article 41.2 the parties’ reaffirm their GATS commitments and specifically call for an outcome that provides for Special and Differential Treatment for ACP suppliers of services’. Further in terms of Art.41.4 the parties agree to extend “their partnership to encompass the liberalisation of services in accordance with the provisions of GATS and particularly those relating to the participation of developing countries in liberalisation agreements.”
In Article 41.5 the EC assumes an obligation to support the ACP states’ efforts to strengthen their capacity in the supply of services. This clause promises to pay particular attention to the enhancement of the competitiveness of ACP services related to; labour; business; distribution; finance; tourism; culture; and construction and related engineering services. In Article 43, the ACP and the EU undertake to promote the liberalisation of maritime transport and to cooperate on information and communication technologies and Information Society i.e. creation of complementarities and harmonization of communication systems.

In conclusion it is clear from the discussion above that while the provisions of the IEPA are not detailed and informative enough on the flexibilities that shall be available to SADC EPA countries it commits to respect their rights and obligations under GATS. In addition the provisions of the CPA are very important in providing proper context to the talks and they also provide specific obligations like observing the principle of Special and Differential Treatment. Therefore the legal texts examined above especially GATS do allow for a lot of flexibility and for an outcome that should promote the interest of SADC EPA states provided the negotiators make maximum use of them. In fact these talks should be an opportunity to test the provisions of Article IV of GATS on measures that can be taken to increase the participation of developing countries in world trade. The SADC EPA countries should take the initiative and seek ways in which these provisions that favour their cause can be operationalzed.

4. SADC EPA group’s defensive and offensive interests

Chapter Summary

Among other things, participating SADC EPA countries would like to use the EPA to:

- Attract investment from the EC; enhance competition in order to reap efficiency and supply capacity gains and boost the business environment and benefit consumers.
- Obtain regulatory capacity building in order to maximize the benefits of liberalisation.
- Gain market access to the EC in Mode 4 (independent professionals not linked to commercial presence and semi-skilled and unskilled labour).
This chapter investigates what the SADC EPA country’s interest is in the services negotiations. Accordingly it looks at both the defensive interest (what they seek to protect) and their offensive interest (what they seek to obtain). This is deduced from the individual countries’ positions as expressed through the nature of commitments they undertook in the IEPA as well as the provisions of the CPA and their current GATS commitments.

Namibia signed the IEPA under protest due to pressure to preserve preferential access for its key exports like beef and some agricultural products and made it clear that they initialled the IEPA on the condition that certain contentious issues are resolved in the second stage of the negotiations. Like South Africa they are generally opposed to the inclusion of services and trade-related issues in the EPA. Namibia is therefore unlikely to participate in the services negotiations except maybe as a way to secure regulatory capacity building and technical assistance.

Botswana is interested in the services liberalisation under the EPAs which they see as an opportunity for introducing more competition into their market especially in the core infrastructure services areas like financial services, communications and transport. The main aim seems to be ensuring access to affordable quality services from efficient EC services companies. There is no strong drive to secure EC market access for Botswana services suppliers though there is some interest to have mutual recognition agreements to allow qualified people to provide their services in other countries. However before access will be given, an effective competition policy and legislation must be in place coupled with an enabling legislative environment for the service providers.

Lesotho demonstrated its willingness to negotiate services in the EPA and together with Botswana felt South Africa wanted to impose its agenda which they saw as an attempt to prevent the EC companies from investing in the region. Lesotho would like to secure access to the EC market for its health (nurses in particular) and construction services providers. In the UR Lesotho made far-reaching commitments without understanding what they were doing due to lack of technical capacity. In some cases the domestic laws have not been aligned with the WTO schedule. They tried to reverse some of these commitments but were told they have to go through a process of compensating trade partners hence they backed-off.

In line with broader reforms in the economy as a whole Mozambique has in recent years undertaken substantial autonomous or unilateral liberalisation of its services
sectors. The main aim is to enhance competitiveness with a view to curbing the high costs of essential services. However, regulatory reform needs strengthening in order to discipline anti-competitive practices. It seems Mozambique’s interest in the EPA lies in both allowing market access providing they attach conditions that would ensure supply capacity development in the domestic services sector i.e. technology transfer; and regulatory capacity building.

On its part Swaziland seems keen to introduce competition through the liberalisation of the services sectors in the EPA; and to obtain assistance to strengthen supply capacity and regulatory capacity. Like most developing countries their offensive interest is to secure EC market access in Mode 4.

Finally, the SADC EPA group’s interest in the services negotiation can therefore be summarized as follows:

- Wish to liberalize core infrastructure services with a view to attracting investment from the EC; enhanced competition in order to reap efficiency and supply capacity gains and boost the business environment and benefit the consumers. The SADC private sector generally has only limited interest in accessing the EC market in the services sector and is not interested in keeping the latter’s companies out. The SADC services sectors need strengthening in order to compete with foreign investment and to take advantage of new market opportunities that may be opened up in the EU.

- The prospect of gaining regulatory capacity building through the EPA is one of the motivations for engaging in the negotiations. Regulatory capacity is very weak in the participating SADC countries and almost if not all of them do not have competition legislation and competition bodies. Lack of effective regulation is generally regarded as a constraint to realizing the benefits of liberalization and has been used to support a gradualist approach to liberalizing trade in services. This is an area where SADC countries have a clear offensive interest and could link any liberalisation concession they offer to the commitment the EC has made in the IEPA to support regulatory capacity. Article 67 1 (b) of the IEPA lays down a clear undertaking from the EC to support capacity building aimed at strengthening the regulatory framework of the participating SADC EPA States.

- SADC EPA countries generally have an export interest in Mode 4 (independent professionals not linked to commercial presence and semi-skilled
and unskilled labour). The EPA should aim at promoting export capacities in the SADC countries. The EC is expected to implement certain measures such as granting of concessional licensing fees for professionals; and to include competence based criteria such as demonstrated experience besides formal requirements (especially in the hospitality and care industries) should be considered. The EPA should also provide for mutual recognition agreements to ensure that skilled people from SADC can have their qualifications recognized in the EC. Mode 4 liberalisation is most likely to be agreed upon in a bilateral or regional FTA than under GATS. This is mainly because such agreements are based on effective cooperation between countries of origin and destination. In effect countries of origin also do their part to ensure that their citizens return home (if the agreement provides only for temporary movement) after a specified period and the destination countries use such guarantees to suppress anti-immigration fears and concerns in their constituencies. Therefore success in securing market access will be possible if the SADC states undertake to screen, select and facilitate repatriation in the unskilled category while the EC undertakes to ensure temporariness of the migration of skilled personnel to prevent brain drain. In addition the EPA should have binding provisions to allow business persons to travel freely between SADC and the EC.

- The EPA is good opportunity to try and operationally the provisions of GATS Article IV on increasing the participation of developing countries in world trade. In addition the EPA agreement should reflect the levels of development of the individual SADC EPA countries.

In conclusion, the conditions for negotiating the EPA from a SADC perspective should include: a firm commitment from the EC for development assistance to the SADC countries in the services sector; strong commitment to support the development of adequate SADC competition legislation, competition institutions and industry specific regulation and institutions; appropriate sequencing – both between the development assistance and strengthening of the SADC service sectors and the negotiation of liberalisation commitments; and should use the more flexible positive list approach.
Chapter Summary
All SADC EPA countries are members of the WTO and are involved in the current round of GATS negotiations.

Owing to unilateral reforms, the level of GATS commitments made by SADC countries do not reflect the actual extent of liberalisation in these economies.

Regionally, all SADC EPA countries are part of the 14 Member SADC body and most of them are also members of other regional integration bodies.

SADC is the most advanced when it comes to efforts at liberalizing trade in services. SADC countries aim to liberalise their service sectors among themselves in order to deepen their economic integration, and to have co-coordinated positions vis-à-vis third parties, and to improve their participation and influence at the multilateral level. In line with this objective these countries have recently decided to have a separate Protocol on Trade in Services which is now at a draft stage.

SADC countries have also undertaken integration efforts that have a positive effect in facilitating both trade in services and goods across the region through various Protocols and memoranda of understanding that contain provisions that foster both the liberalization of services sectors and the harmonization of regulatory regimes.

Though some progress has been made in regulatory harmonization in many cases cooperation has not yet resulted in actual trade liberalization of services at a regional level.

EPA talks should therefore build on the liberalisation that has been achieved unilaterally; liberalization under regional instruments particularly the trade capacity development mechanisms; and multilateral liberalisation under GATS.

There is a risk that the EPA would disrupt the regional integration process depending on the calibre of its services chapter that would be agreed upon.

5.1 General country level processes
At country level, it is worth noting that all SADC EPA countries are members of the WTO and are involved in the current round of GATS negotiations. These
countries made services liberalisation commitments of varying breadth and depth. Lesotho tops the list with commitments in 10 out of 12 sectors while Mozambique is the least with a commitment on only one sector (see Table 1 below).

Table 1: GATS commitments of participating SADC EPA countries

<table>
<thead>
<tr>
<th>Country</th>
<th>1</th>
<th>2</th>
<th>3</th>
<th>4</th>
<th>5</th>
<th>6</th>
<th>7</th>
<th>8</th>
<th>9</th>
<th>10</th>
<th>11</th>
<th>12</th>
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<tr>
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<td>x</td>
<td>x</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>x</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>3</td>
</tr>
<tr>
<td>Lesotho</td>
<td>x</td>
<td>x</td>
<td>x</td>
<td>x</td>
<td>x</td>
<td>x</td>
<td>x</td>
<td>x</td>
<td>x</td>
<td></td>
<td></td>
<td></td>
<td>10</td>
</tr>
<tr>
<td>Mozambique</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>x</td>
<td></td>
<td></td>
<td></td>
<td></td>
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<td>1</td>
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<tr>
<td>Swaziland</td>
<td>x</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>x</td>
<td>x</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>3</td>
</tr>
</tbody>
</table>

Note on Schedules: 1) business services, 2) communication services, 3) construction and related engineering services, 4) distributional services, 5) educational services, 6) environmental services, 7) financial services, 8) health-related and social services, 9) travel-related services, 10) recreational, cultural and sporting services, 11) transport services, and 12) other services.

Source: IMANI Report3.

It should however be noted that the level of GATS commitments made by SADC countries generally do not give the full picture of the actual state of liberalization in their services sectors. Most of these countries’ services sectors underwent significant reforms in the 1990s through the IMF, World Bank program as well as unilateral reforms especially in the financial services sector4. Most of these reforms were unilateral and have not been committed under GATS. Yet there are still barriers to trade in some services sectors in SADC5.

The experiences of some small economies like Lesotho where there has been virtually no increase in foreign direct investment in the services sectors despite more liberal policies suggest that supply capacity building should be a crucial element of the eventual EPA deal.

5.2 Regional level processes

At a regional level, all SADC EPA countries are part of the 14 Member SADC body and are involved in its integration agenda6. Of the 4 SADC EPA states participating in the EPA services liberalisation only Mozambique belongs to only one regional economic integration community (REC). Botswana, Lesotho and Swaziland also belong to the Southern African Customs Union (SACU)7; while Swaziland also belongs to the Common Market of Eastern and Southern Africa (COMESA)8. Below we examine what specific RECs (to which SADC EPA states are members)
have done or intend to do with regards to intra-regional liberalisation of trade in services. We give more detail on the SADC agenda since it is the one that has progressed further on services trade liberalisation than any other REC discussed below.

**SACU**
The new SACU Agreement does not cover the liberalization of trade in services. However, SACU member states have engaged on services trade liberalizing activities through implementation of a range of SADC Protocols.

**COMESA**
A COMESA-wide services trade liberalisation program is currently being prepared though some COMESA countries have embarked on certain services liberalisation programs among themselves. These initiatives include programs aimed at the liberalisation of air transport markets and the free movement of persons. Regarding the former, COMESA introduced regulations aimed at liberalizing the air transport services in accordance with the COMESA vision of attaining full economic integration in May 1999. As part of these regulations COMESA introduced an air transport services liberalisation plan whose first phase (1999-2001) has already resulted in increased flight frequency between city pairs and other benefits like reduced fares to passengers due to heightened competition. As far as the latter is concerned COMESA now has a Protocol on Free Movement of Persons which Kenya, Rwanda and Zimbabwe have already signed.

**SADC**
The SADC Treaty provides for co-operation in various areas and for the conclusion of protocols on co-operation and memoranda of understanding in each area. It is the Protocols that spell out the agreement by member states on how to proceed in the implementation of certain agreed strategies for regional integration. They define the areas, objectives, broad strategies and timeframes of sectoral co-operation and integration and often specify the necessary steps required to implement such strategies. During the past decade more than two thirds of all SADC Protocols have entered into force and most provisions of the regional integration policy are under implementation, at least partially.

Where timeframes for economic integration are concerned the Regional Indicative Strategic Development Programme envisages the creation of a Free Trade Area by 2008, a Customs Union by 2010, a Common Market by 2015, and a Monetary Union by 2016.
SADC’s regional integration agenda covers more than just trade, but the Trade Protocol, signed in August 1996, seems to be currently driving the integration process. The Trade Protocol entered into force on 25 January 2000, when eleven of the thirteen members ratified it. Its objectives are to further liberalise intra-regional trade in goods and services; ensure efficient production; contribute towards the improvement of the climate for domestic, cross-border and foreign investment; and enhance economic development, diversification and industrialisation of the region. In practical terms it aims to have 85% of all intra-SADC trade at zero tariffs by 2008 and the remaining 15% to be liberalized by 2012.

SADC countries wish to liberalise their service sectors among themselves in order to deepen their economic integration, and to have co-coordinated positions vis-à-vis third parties, thereby improving participation and influence at the multilateral level.

In SADC, the enabling provision to liberalise trade in services is contained in the Trade Protocol. While the major focus of the protocol is the liberalization of trade in goods, Article 23 underlines the importance of trade in services for overall economic development and encourages Member countries to adopt policies and implement measures with a view to liberalizing their services sectors within the region.

In pursuit of this mandate SADC countries have recently decided to have a separate Protocol on Trade in Services which is now at a draft stage. The draft Protocol sets out the framework for the liberalization of trade in services between SADC members and will serve as a basis for negotiations. Starting with six key services sectors (construction, communication, transport, energy, tourism and financial), the envisaged liberalization process seeks to eventually cover substantially all sectors and modes of supply. The aim is to reach a stage where each member state will treat the services emanating from other members, and the suppliers of such services, in the same way as its own services suppliers, and the services they supply. In terms of this plan substantial liberalization of intra-regional trade in services is to be achieved no later than 2015.

However, notwithstanding the fact that the draft Protocol on Trade in Services is still under negotiation, SADC countries have undertaken integration efforts that have a positive effect in facilitating both trade in services and goods across the region. Indeed, various Protocols and memoranda of understanding that contain provisions that foster both the liberalization of services sectors and the harmonization of regulatory regimes have been concluded and are at various stages of implementation.
Generally, regional cooperation has focused on developing the sectors concerned by pooling together resources and developing important regional services infrastructure and strengthening the institutional framework with actual trade liberalization being incidental to this process and not its goal. However in some cases both development cooperation and trade in services have been achieved.

Notable achievements in sectors that are the key to deeper regional integration include the following:

In **transport services** – cooperation has led to the construction of highways such as the Trans-Kalahari and Trans-Caprivi as well as Development Corridors such as the Maputo, Beira, Limpopo, Mtwara, Nacala and Lobito Corridors which enhance the development and trade potential of the region and have resulted in increased flow of goods and services within the region. Much still needs to be done though. SADC countries must step up their efforts to improve transport services in all sub-sectors. They must focus on improving the efficacy of transport corridors, and enhancing the participation of the private sector by dismantling monopolies in air travel, ports, and rail transport.

In **energy services** - It is important to note that trade in energy services (electricity) is already taking place in the region through the Southern African Power Pool, which was established to expand electricity trade and to reduce energy costs. The Protocol on Energy in particular seems to combine cooperation in development of the energy sectors and the creation of a conducive climate for intra-regional trade in services. To enhance these efforts the region should increase the pace of restructuring loss-making state-owned power utilities. In addition, SADC countries should ensure that pricing systems are cost-reflective, in order to attract private investments and extend access to electricity to all consumers.

In **telecommunication services** - Much progress has been made in ensuring telecommunications infrastructure network connectivity and implementation of the agreed regulatory framework as part of the Protocol on Transport Communications and Meteorology. SADC countries should give more attention to liberalising this sector, particularly strengthening the regulatory framework once privatisation has taken place in order to prevent large companies from abusing their monopoly positions and blocking benefits from reaching the consumers.

In **financial services** - these sectors in SADC countries are generally open. The Protocol on Finance and Investment (once ratified and implemented) would clearly
be an important complement to the Trade Protocol and the Protocol on Trade in Services. Already, there has been substantial liberalization of the banking, finance and capital markets as well as investment services in SADC unilaterally and through a number of agreements and memoranda of understanding. Further liberalisation must be preceded by macroeconomic stabilisation, and must be accompanied by a strong regulatory regime. Such liberalisation should also be used to lock in reforms.

In tourism services - Perhaps owing to wider awareness of its importance and a strong desire to attract more FDI, the tourism sector in the region has generally been more open than other services sectors. SADC should maximise its international competitiveness as a tourist destination by abolishing remaining restrictions that relate mainly to immigration policies and visa issues. Specific attention must be given to promoting the intra-SADC movement of visitors. The current proposals to create a universal-visa system to help facilitate intra-regional travel through the easing or removal of travel and visa restrictions; as well as the harmonization of immigration procedures and movement of international tourists in the region in order to increase the market share and revenue of the region in world tourism should be implemented soon.

Further broader liberalisation of trade in services in the above mentioned sectors must be complemented by freer temporary movement of natural person’s services providers. The free movement of people within SADC must be enhanced. Accordingly, member states should ratify the recently signed Protocol on the Facilitation of the Movement of Persons in order to increase business mobility, create greater trade opportunities, and achieve economic growth.

The removal of impediments to the movement of persons is also to be addressed in some provisions of the Protocol on Education & Training and the Protocol on Health. In particular, Article 28 of the Health Protocol which deals with referral systems or cooperation in tertiary care services calls upon member states to, *inter alia*, progressively build capacity in their countries to provide appropriate high quality specialised care through the exchange and attachment of specialists in the region; and the sharing of information on centres of excellence in the region. The issue of exchange and attachment of health specialists clearly relates to liberalization of movement of natural persons service providers and at regional level the Protocol on the Facilitation of Movement of Persons constitutes the legal framework.
Further, one of the key interventions being addressed in the Education Implementation Plan is the development of a SADC Qualifications Framework that is aimed at promoting comparability of qualifications of the educational systems of all SADC member states. This is important for both facilitating mobility of students and academic staff especially to our higher institutions of learning and subsequently for enhancing labour mobility and clearly relates to the Protocol on Facilitation of Movement of Persons.

While some progress has been made particularly in regulatory harmonization in many cases cooperation has not yet resulted in actual trade liberalization of services at a regional level. A number of challenges remain. In particular, the slow ratification and implementation of Protocols is a serious concern. In addition, for most of those instruments those have been ratified by the majority of member states and are in force the means to ensure their actual implementation are very weak. Being “indicative in nature” even the RISDP does not seem to address this problem. Therefore a stronger implementation mechanism is required.

Moreover, it must be noted that provisions that have a bearing on liberalization of trade in services are scattered over a plethora of protocols and MOUs to the extent that though some progress has been achieved, it is difficult to get a comprehensive understanding of what is going on. There are also overlaps from one instrument to another which further complicate the situation. There is clearly a need for a consolidation process whereby all services trade liberalizing provisions are located within a single instrument which in this case should be the Protocol on Trade in Services. The level of liberalization or openness of each economy that has been reached under the protocols and unilateral liberalisation would then be reflected in that country’s schedule of commitments.

The EPA talks will therefore build on the liberalisation that has been achieved unilaterally; liberalization under regional instruments particularly the trade capacity development mechanisms; and multilateral liberalisation under GATS.

In terms of approaches to trade negotiations intra-SADC services liberalisation should ideally run ahead of or in parallel with liberalisation to the EU, building on the basis of unilateral reforms already conducted or in the pipeline. From a negotiating and regional integration perspective there is clearly a need for the regional agenda to get up to speed in order to keep up with the EPA negotiations and should ideally provide for more liberalisation at a faster pace than the one regional
country will offer to the EC and should also be ahead of the GATS negotiations. This is critical otherwise the regional agenda runs the risk of being overtaken by events and becoming irrelevant. Timely intra-regional services liberalization would enable these countries to have coordinated positions vis-à-vis third parties and gain clout at the multilateral level.

On the other hand, from an economic perspective regional liberalization only will not bring substantial economic gains given the weak capacities of member states, excepting South Africa, to supply most services. This suggests that any external opening should ideally be conducted on an MFN basis, locked in through the GATS. Within this spaces could be found, for example regional procurement preferences, to privilege the regional agenda.

Regardless, the negotiating challenge is that only 4 out of 14 SADC countries will negotiate with the EC though others will also negotiate under the East and Southern Africa group and other EPA groups. Unless these groupings offer the same or similar commitments to the EC, (which is unlikely since each negotiating outcome will reflect the specific dynamics of the particular group) the SADC process would be severely undermined.

The SADC regional services liberalisation process is likely to stall as the participating SADC EPA states and the EC focus on the EPA considering the tight timeframes they have set in the IEPA. More importantly, the SADC process has been funded by the EC and implemented through the United Nations Conference on Trade and Development (UNCTAD). The funding cycle has come to an end and the EC has reportedly indicated that it will devote its resources to the EPA only in future. Some SADC countries are now reportedly failing to send delegates to the SADC Trade Negotiations Forum due to resource constraints. It is therefore difficult to see how this agenda can progress sufficiently to inform EPA positions. What is likely to happen is for SADC countries to simply take on board what has been offered to the EC under EPA and then use it as a benchmark for making commitments to one another.

On the SADC EPA, as indicated earlier on, Namibia may join the services negotiations but it is very unlikely that South Africa will do so. South Africa’s position on services and other regulatory issues is consistent with its general unwillingness to offer more in bilateral and regional FTAs than what it is prepared to do in the WTO. This approach has been followed in all its bilateral and regional FTAs with
developed countries notably the Trade Development and Cooperation Agreement with the EC and the EFTA-SACU Agreement. Both agreements simply provide non-binding cooperation provisions on trade in services. The South African negotiators feel strongly against including services in the EPA and even feel let down by their regional partners. This issue is a very delicate one and has caused a lot of frictions among SACU member states.

At best, South Africa may simply decide to sign on the goods-only part of the EPA in order to preserve SACU unity. Since services are outside the ambit of the SACU agreement this would be sufficient to preserve SACU or they could simply give the go-ahead to BLNS members who wish to sign the agreement and not do so themselves. However, South Africa is likely to extract a concession from its SACU partners to extend any market opening commitments in services offered to the EU to South Africa. It is not clear how much emphasis the EU will place on negotiating services with SACU minus South Africa given that the major market will not be present. Nonetheless, we anticipate that the EU will be keen to use any leverage it can find in order to increase pressure on South Africa to come on board at some point in the future.

In conclusion, it is very clear that the EPA negotiations continue to pose serious challenges not just to regional integration processes but to the very existence of some regional bodies. A lot of effort and resources are required to enable SADC countries to navigate a least-destructive way out of this quagmire.

6. Sectoral implications of EU-CARIFORUM-like provisions

**Chapter Summary**

In telecommunications, tourism and financial (banking) services the potential implications of a CARIFORUM-like EPA chapter on services would necessarily differ from country to country depending on the stage of reform in the country, yet it is possible to give a general overview.

All 4 SADC countries analysed in this chapter are actively engaged in reforming their services sectors primarily as means to assure the supply of quality and affordable services in the domestic market and to attract FDI.
In telecommunications, the EU-CARIFORUM EPA provisions reflect the GATS Telecommunications Reference Paper (TRP) but in some cases the provisions go beyond TRP obligations. SADC EPA countries may, provided appropriate transition times and regulatory capacity building is provided, manage to commit to TRP-type provisions but would all have difficulties going beyond that.

These countries are at different stages of reform and it would be appropriate for them to undertake commitments that reflect these differences.

In financial services SADC EPA countries could commit to the level of liberalisation they have undertaken unilaterally, seek compensation for it and link any additional market access to provision of regulatory capacity building and the creation and or strengthening of competition bodies.

In tourism the CARIFORUM text provides for principles of the regulatory framework for all tourism services liberalised. The GATS does not contain any sector-specific disciplines in tourism, therefore this whole section constitutes “GATS Plus.”

The tourism sector is generally more open than other services sectors. Yet the growth of tourism in southern Africa is also inhibited by constraints in tourist-originating countries or export markets. This is an area where the CARIFORUM EPA seems to have made a marked improvement to GATS. SADC EPA countries should accept these regulatory provisions that are aimed at the prevention of anti-competitive practices and abuse of dominance in particular by tourism networks. However they would require a lot of capacities building to establish strong competition bodies that are able to discipline strong tourism players and cooperation with the EU would be crucial. Therefore the regulatory burden in this case seems to be acceptable provided assistance is offered.

Generally the challenge for the SADC EPA countries would be how to establish their specific needs in the framework of the GATS Article IV, and the CPA leading to transfer of technology and capacity building.

This chapter focuses on regulatory issues concerning three services sectors: telecommunications, tourism and financial (banking) services based on the provisions of the CARIFORUM EPA chapter on services. In particular it seeks to answer the question of what the impact would be on the SADC EPA countries if the EU were to successfully use the CARICOM as the template and manage to get the same or roughly similar commitments from them.
6.1 Telecommunications

In the EU-CARIFORUM EPA the regulatory provisions reflect the GATS Telecommunications Reference Paper (TRP) establishing principles covering competitive safeguards, interconnection, independent regulatory authorities, allocation and use of scare resources, and universal services obligations (USO). In some cases however the EU-CARIFORUM EPA provisions go beyond TRP obligations. Notable TRP plus measures include a far-reaching right of appeal against a regulatory decision, limitations on licensing including the capping of licensing fees at the level of costs, which would preclude the profitable auctioning of licenses (Article 96), the obligation to establish compensation mechanisms for universal service provision (Article 100), the obligation to ensure the confidentiality of telecommunications and traffic data (Article 101) and the obligation to settle disputes between providers (Article 102).

What implications will a commitment mirroring the Telecommunications Reference Paper have on SADC EPA countries? In the proceeding paragraphs we look at the general state of liberalisation and the regulatory framework in telecommunications sector per country with a view to giving recommendations on how they should approach the EPA with the EC.

Telecommunication services are among the backbone infrastructure services that play a profound role in determining the economic performance and trade competitiveness of any country. Chapter 10 of the SADC Protocol on Transport, Communications and Meteorology provides for regional co-operation in telecommunications, and outlines regional policy and regulatory frameworks in this sector. Regional reforms are meant to ensure the provision of reliable, effective, and affordable telecommunications services. Co-operation is seen as a vehicle for achieving regional universal services; access to advanced information services; enhanced regional and global interconnectivity; and high-quality and efficient services to meet the diverse needs of the region. To strengthen the regional co-operation processes, associations for both regulators and operators - the Southern Africa Telecommunications Administrations (SATA) and Communications Regulators Associations of Southern Africa (CRASA)\textsuperscript{14} – have been formed.

Owing to both unilateral and regional measures, significant progress is being made in this sector. The number of telephone operators in SADC countries is increasing, internet connectivity is growing, and institutions are being revamped to create
competitive markets. For example, Botswana, Lesotho, and Mozambique all have independent telecommunications regulatory bodies. Although privatisation is progressing steadily, full private sector participation remains limited, while the process of enabling other fixed service operators to establish is slow. Lesotho is still the only country that has completely privatised its telecommunications subsector. Further as Table 2 below indicates Lesotho is the only SADC EPA country that made GATS commitments in the telecommunications sector.

Table 2: Telecommunication services commitments by SADC EPA countries in GATS

<table>
<thead>
<tr>
<th>Country</th>
<th>Telecommunication services commitment</th>
<th>Market access limitations</th>
<th>National treatment limitations</th>
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<tbody>
<tr>
<td>Botswana</td>
<td>No commitment</td>
<td>-</td>
<td>-</td>
</tr>
<tr>
<td>Lesotho</td>
<td>V</td>
<td>1-N; 2-U; 3-N; 4-H</td>
<td>1-N; 2-U; 3-N; 4-H</td>
</tr>
<tr>
<td>Mozambique</td>
<td>No commitment</td>
<td>-</td>
<td>-</td>
</tr>
<tr>
<td>Swaziland</td>
<td>No commitment</td>
<td>-</td>
<td>-</td>
</tr>
</tbody>
</table>

*B=Basic telecommunications; V=Value-added telecommunications; U=Unbound; H= Unbound except as indicated in the horizontal section; N=Bound with no restrictions; R= Bound with restrictions; 1=Cross-border supply; 2=Consumption abroad; 3=Commercial presence Source: Adapted from Hansohm et al.

In 1999 Lesotho’s telecommunications policy addressed domestic liberalization, led to part privatization of fixed line operator (LTC: 70% sold to private consortium) and establishment of the Lesotho Telecommunications Authority (2000). Prior to this one mobile operator (Vodacom) had exclusive rights. LTC licensed a second mobile operator (Econet Lesotho – subsidiary of Telkom Lesotho). Vodacom is the dominant player with 70-80% market share. Telkom Lesotho was given exclusivity rights (5 year period 2001-6 (extended to February 2007) on basic voice, local and international, basic data, and leased lines entailing roll-out obligations. Since then further liberalization has ensued, and Vodacom Lesotho has applied for permission to establish an international gateway - to add to Telkom Lesotho’s international gateway. ISPs will also be allowed to source international bandwidth from abroad. But no licenses have yet been granted. Further, in 2005 the National Information and Communication Technology Policy which introduced a regulatory framework
for electronic commerce into Lesotho’s legal system was adopted. Lesotho did not participate in the WTO extended telecommunications services negotiations and therefore did not commit to the GATS TRP. Yet the reforms they have undertaken closely follow the provisions of the TRP. However committing to TRP-plus provisions as in the EU-CARIFORUM EPA could pose serious administrative challenges to Lesotho. Simply matching all the requirements of the TRP should be considered more than sufficient for a country of Lesotho’s economic size at this stage.

In Botswana the telecommunications market was liberalized in 1996 following the adoption of the Telecommunications Policy of 1995 and enactment of the Telecommunications Act (Act No. 15 of 1996), which ended Botswana Telecommunication Corporation’s (BTCS) monopoly in some segments of the market and established an independent regulator, the Botswana Telecommunications Authority (BTA). The BTA is meant inter alia to ensure competition and inter-connection to the public network. Liberalisation has so far occurred in the mobile telephones sector, data communications, payphones, sale of telecommunications equipment, and Internet services. At present Botswana’s telecommunications sector is composed of one fixed line service provider (BTC), two mobile service providers, Mascom (Portuguese) and Orange (French), and about 12 internet service providers (ISPs)\(^{15}\). Market entry is regulated by BTA.

Competition in the cellular phone industry is dominated by two international firms, Mascom and Orange, who compete for the bulk of the local market share. Voice-Over-Internet Protocol (VOIP) is currently not allowed (except over private networks). Universal licenses are apparently in the process of being granted for all licensed telecommunications corporations, opening the cell phone market to parastatal BTC. Botswana did not make GATS commitments in telecommunications. She also did not participate in the WTO extended telecommunications services negotiations and therefore did not commit to the GATS TRP. Yet the reforms they have undertaken closely follow the provisions of the TRP\(^{16}\). So even making commitments similar to what Lesotho has made would represent a huge reform step. Therefore committing to TRP-type provisions may be a problem and would have to be cushioned by reasonable transition periods as well as capacity building assistance. Committing to TRP-plus provisions (mentioned above) as in the EU-CARIFORUM EPA may not be appropriate for Botswana at this stage.

In Swaziland communications are dominated by the Swaziland Post and Telecommunications Cooperation (SPTC) which is currently the sole provider of fixed-line
telephone services. In the mobile telephones sector MTN is monopoly services provider and SPTC is one of its major share holders. The government of Swaziland gave MTN a 10-year monopoly that ends in 2008.

Swaziland did not participate in the WTO extended telecommunications services negotiations and therefore did not commit to the GATS TRP. In fact, as the table above indicates, Swaziland made no GATS commitments at all. Current reforms in the telecommunications sector are minimal. Therefore, even making basic liberalisation commitments similar to what Lesotho has made would represent a significant reform step in terms of giving away policy space. Making concessions on TRP-type provisions may be acceptable if tied to a reasonable transition period and capacity building assistance. Committing to TRP-plus provisions (mentioned above) as in the EU- CARIFORUM EPA may pose a huge administrative burden and may not be appropriate for Swaziland at this stage.

In Mozambique the telecommunication sector has undergone significant reform as part of the liberalisation process. Since the passing of law 22/92 of 31 December 1992, the government began a strategy that actively encourages private sector participation in the production and delivery of goods and services. In 2004 a new telecommunication law (8/2004 of July 21\(^{st}\)) was introduced to regulate this sector. Taking into the objectives defined by the previous laws regarding the liberalisation process, it encourages the harmonization of telecom activities with international rules and practices\(^{17}\). In terms of its Article 3 the new telecommunications law has the following objectives: promotion of the availability of high quality telecommunications services; promotion of private investment in the telecommunications sector; promotion of fair competition and consumer protection; and increased telecommunication access and advanced information services nation-wide.

The Regulation of the telecommunications and information sector is the responsibility of Instituto Nacional das Comunicacoes de Mocambique (INCM). In 2001 INCM which was established in 1992 (Decree n. 22/92 of 10 of September) as public entity was converted to an independent regulatory authority for the post and telecommunications services under the supervision of the Minister of Transport and Communications. This gives more autonomy to INCM and redefines its responsibilities and activities, establishing that the INCM can contract directly with its partners and other parties without a specific authorization of the Minister of Transport and Communications and its responsibility is to regulate specific activities related to telecommunications. The operation of the telecommunicati-
Tions infrastructure is the responsibility of network operators and service providers. Telecommunicações De Mozambique (TDM), as a government company, has a special responsibility as a public telecommunications operator and carries a mandate to provide universal service.

TDM, the only fixed line operator, is obliged by law to keep the public telecommunications network open to all users. It must provide access to the public transmission network to all telecommunications service providers on an equal and non-discriminatory basis, in respect of access, quality and pricing. It can provide complementary or value-added services in competition with other operators and service providers but it is prevented by law from taking unfair advantage of its dominant position of public operator18.

The telecommunications sector reforms in the last few years include the creation of a local mobile company (Mcel), a former wholly State owned company, and the awarding of an operating license for a foreign mobile company, Vodacom.

The telecommunication sector is of great interest to the EC, as evidenced by the fact that it has already made a request to Mozambique under the GATS negotiations. Mozambique is clearly taking a liberalisation path and a lot has already happened as discussed above. Mozambique seems and is advised to prioritise the development of an appropriate regulatory framework, before making liberalisation to the EC with regards to the EPA. The INCM is both a result and an important actor in the process of development of a regulatory framework. Mozambique could find it useful to demand and secure binding commitments from the EC to develop an appropriate regulatory framework and the necessary institutional capacities to run it as a quid pro quo for market access.

Mozambique did not participate in the WTO extended telecommunications services negotiations and therefore did not commit to the GATS TRP. Yet it is clear that the reforms they have undertaken closely follow the provisions of the TRP. However, considering that Mozambique made no GATS commitments at all, simply agreeing to TRP-like provisions may be a big concession for them (as they may wish to reserve policy space). Such a commitment would need to be accompanied by a generous transition period and regulatory capacity building assistance. Committing to TRP-plus provisions (mentioned above) as in the EU-CARIFORUM EPA may not be appropriate for Mozambique at this stage.
Finally, it is clear that all SADC EPA countries have embarked on significant reforms in the telecommunications sector and could benefit from regulatory capacity development assistance; appropriate transition times; special and differential treatment (especially for LDCs Lesotho and Mozambique; and Swaziland which lags behind in reform); and if compensation for liberalisation is offered may find it easier to commit to provisions similar to those in the GATS TRP under the EPA. It must be emphasized that these countries are at different stages of reform and it would be appropriate for them to undertake commitments that reflect these differences. For instance Swaziland should not be expected to commit to the same level as Botswana and may in fact need a longer transition period and probably more adjustment and capacity building assistance. In this light committing to TRP plus provisions may be a jump too far for all SADC EPA countries.

6.2 Financial services

The provisions on financial services to a certain extent go beyond the GATS by adding provisions on new financial services; and data processing. Further the regulatory principles on effective and transparent regulation (Article 105) constitute mostly a “WTO Plus” approach but are not mandatory for the Parties in this respect. The measures governing new financial services (Article 106) slightly differ with those of paragraph 7 of the WTO Understanding on Commitments in Financial Services but do not necessarily impose huge burdens on a country provided such country committed to the Understanding. Similarly provisions on data processing mirror the Understanding.

What implications will a deal similar or closely related to the EU-CARIFORUM EPA provisions on financial services have on SADC EPA countries? In the proceeding paragraphs we look at the general state of liberalisation and the regulatory framework in the financial services sector per country with a view to giving recommendations on how they should approach the EPA with the EC.

Financial services encompass banking services, insurance, and the securities market. According to Hansohm et al, the potential benefits to a country from trade liberalisation in this sector may be greater than those of liberalisation in any other services sector. The financial infrastructure in any country or region is central to creating an enabling environment for economic growth.
The financial sectors of SADC member states differ significantly. Although they are less sophisticated, and much smaller, the financial systems of Lesotho and Swaziland closely resemble that of SA.

Mozambique has a history of state intervention in its financial sectors (it adopted socialist economic policies for a period after independence from colonial rule). Reforms have led to the development of new products and services, though banking services are still limited to short-term, trade-related finance.

Botswana has made considerable progress in reforming and developing its financial sector. It has introduced foreign exchange bureaus and foreign accounts, and abolished exchange controls. Botswana did not participate in the WTO extended financial services negotiations.

Swaziland’s banking system is currently dominated by South Africa’s Ned Bank, Standard Bank, First National Bank and the Parastatal- Swaziland Development and Savings Bank. In addition, the Swaziland Building Society provides long term mortgage lending to all income groups, operating only on title deed land properties. Banks are required to apply for and obtain a license from the central bank of Swaziland. Swaziland is currently in process of introducing reforms in the banking sector aimed at creating conditions more consistent with good international practice and opens the market to competition in certain areas.

When it comes to liberalisation at a multilateral level, only Lesotho, and Mozambique (only banking) made commitments under GATS. As table 3 shows, both countries have made commitments in banking (represented by B in the table), while only Lesotho has made commitments in insurance (represented by A in the table).
Table 3: Financial services commitments by SADC EPA Countries in GATS

<table>
<thead>
<tr>
<th>Country</th>
<th>Financial services commitment</th>
<th>Market access limitations</th>
<th>National treatment limitations</th>
</tr>
</thead>
<tbody>
<tr>
<td>Botswana</td>
<td>No commitment</td>
<td>-</td>
<td>-</td>
</tr>
<tr>
<td>Lesotho</td>
<td>AB</td>
<td>A:1-U;2-N;3-R;4-H</td>
<td>A:1-U;2-N;3-N;4-H</td>
</tr>
<tr>
<td></td>
<td></td>
<td>B:1-U;2-U;3-R;4-H</td>
<td>B:1-U;2-U;3-N;4-H</td>
</tr>
<tr>
<td>Mozambique</td>
<td>B</td>
<td>1-N;2-N;3-R;4-H</td>
<td>1-N;2-N;3-N;4-N</td>
</tr>
<tr>
<td>Swaziland</td>
<td>No commitment</td>
<td>-</td>
<td>-</td>
</tr>
</tbody>
</table>

Notes: A = commitment in insurance; B = commitment in banking; U = unbound; H = unbound except as indicated in the horizontal section; N = bound with no restrictions; R = bound with restrictions. Modes of supply: 1 = Cross-border; 2 = consumption abroad; 3 = commercial presence; 4 = presence of natural persons. Source: Adapted from Hansohm et al.

Mozambique currently has only made GATS commitments under Banking and other Financial Services. There are no restrictions on national treatment but modes 3 and 4 under market access do contain restrictions. The mode 3 restriction is not onerous and only requires that foreign banks abide by domestic regulation. Mode 4 requires a work permit for foreigners. Lesotho’s GATS commitments in financial services are mostly unbound and contain some requirements which are not at all onerous.

However, the GATS commitments by SADC countries do not adequately reflect the actual state of liberalisation of their financial services sectors. Most of these countries’ services sectors were significantly reformed in the 1990s under IMF and World Bank programmes as well as unilaterally. Most of these reforms have in fact been unilateral, and have not been introduced under GATS. Those SADC countries that have not yet done so should introduce these reforms in exchange for market access in other areas where they have export interests.

Yet there are still barriers to trade in the financial services sector. These usually take the form of legislation and other measures inhibiting services trade such as the state ownership of banks and insurance companies, determination of interest rates, and administration of credit, as well as foreign exchange controls. Other legal and organisational issues that should be addressed include the need for a clear separation of commercial and central banking functions; the lack of clear definition of the
role and degree of independence of central banks; and the need to curtail the fiscal functions of central banks to allow them to focus on their monetary roles.22

In the EPA however SADC countries could commit to the level of liberalisation they have undertaken unilaterally, seek compensation for it and link any additional market access to provision of regulatory capacity building and the creation and or strengthening of competition bodies. This is a very sensitive sector, and liberalisation measures should be well-timed, well-sequenced, and ideally undertaken when certain preconditions have been met. These include the stabilisation of the macroeconomics and fiscal deficits (to avoid shocks and banking crises); balance sheet restructuring and the recapitalisation of banks where necessary; and the improvement of regulatory oversight (to avoid risky behaviour by banks responding to competitive pressure). The SADC EPA countries should request the EC to support them in order to meet the macro-economic stabilization targets of the SADC Protocol on Finance and Investment.

Indeed, if financial services are to be made more efficient, competition must be effectively regulated. A lack of robust regulation could undermine reform, and may only benefit oligopolistic financial institutions. This trend has been -- and is still partly -- evident in SA, where banks have been accused of fixing prices, resulting in high costs for consumers (high ATM charges and handling fees, and so on).

6.3 Tourism

CARIFORUM has made commitments in hotels and restaurants, marina services and spa services. Article 110 provides for principles of the regulatory framework for all tourism services liberalised. The GATS does not contain any sector-specific disciplines in tourism, therefore this whole section constitutes “GATS Plus.” The parties undertake to maintain an active sectoral competition policy in the area of tourism, focused on the prevention of anti-competitive practices and abuse of dominance in particular by “tourism networks” (Article 111). Tourism distribution networks in this case means tour operators and other tourism wholesalers (both out-bound and in-bound), computer reservation systems and global distribution systems (whether or not connected to airlines or provided through the Internet), travel agencies and other distributors of tourism services. This obligation is significant and may entail important new administrative and institutional burdens for countries that do not yet maintain such a policy. The CARIFORUM states may have supported the inclusion of such regulatory disciplines considering that many developing countries
have an interest in disciplining anti-competitive practices in tourist originating countries.

What implications will a deal similar or closely related to the EU-CARIFORUM EPA provisions on tourism have on SADC EPA countries? In the proceeding paragraphs we look at the general state of liberalisation and the regulatory framework in tourism sector per country with a view to giving recommendations on how they should approach the EPA with the EC.

Tourism is potentially the biggest foreign currency earner in the region. Services falling under this sector include hotels and restaurants, travel agencies, and tour operator and tourist guide services. In SADC there are vast export opportunities in tourism which remain largely unexploited. Due to its labour-intensive nature, this sector could also play a very important role in job creation and human and social development.

There is a strong drive to develop tourism in the region. Regional co-operation initiatives are underpinned by the need to avoid unnecessary and expensive duplication, and achieve economies of scale through the joint development of infrastructure, facilities and services; joint marketing efforts; the pooling of scarce resources for research and development; and education and training.

A Protocol on the Development of Tourism was signed in 1998, and came into force on 26 November 2002. It is aimed at enhancing the region’s competitiveness vis-à-vis other destinations by creating a favourable investment climate for tourism, improving standards of safety and security for tourists, and facilitating intra-regional travel by removing travel and visa restrictions and harmonising immigration policies. The Regional Tourism Organisation of Southern Africa (RETOSA) has been created to boost marketing and promotional activities in this sector.

Perhaps owing to a wider awareness of its importance, and a strong desire to attract more FDI, the tourism sector is generally more open than other services sectors. Consistent with the general trend towards liberalisation in tourism, all SADC EPA countries (except for Mozambique, which has made no commitments at all) made considerable GATS commitments in this sector (see Table 4 below). Yet a number of barriers still remain. They include regulations limiting the market access of natural persons and commercial enterprises.
Table 4: Tourism services commitments by SADC EPA Countries in GATS

<table>
<thead>
<tr>
<th>Country</th>
<th>Tourism services commitment</th>
<th>Market access limitations</th>
<th>National treatment limitations</th>
</tr>
</thead>
<tbody>
<tr>
<td>Botswana</td>
<td>AB</td>
<td>A:1-N; 2-R; 3-R; 4-H</td>
<td>A:1-N; 2-U; 3-R; 4-H</td>
</tr>
<tr>
<td></td>
<td></td>
<td>B:1-N; 2-N; 3-R; 4-H</td>
<td>B:1-R; 2-N; 3-N; 4-H</td>
</tr>
<tr>
<td>Lesotho</td>
<td>ABC</td>
<td>A:1-U; 2-N; 3-H; 4-H</td>
<td>A:1-U; 2-N; 3-H; 4-H</td>
</tr>
<tr>
<td></td>
<td></td>
<td>B:1-U; 2-N; 3-U; 4-H</td>
<td>B:1-U; 2-U; 3-U; 4-H</td>
</tr>
<tr>
<td></td>
<td></td>
<td>C:1-U; 2-N; 3-N; 4-H</td>
<td>C:1-U; 2-N; 3-N; 4-H</td>
</tr>
<tr>
<td>Mozambique</td>
<td>No commitment</td>
<td>-</td>
<td>-</td>
</tr>
<tr>
<td>Swaziland</td>
<td>A</td>
<td>1-U; 2-N; 3-R; 4-H</td>
<td>1-N; 2-N; 3-N; 4-N</td>
</tr>
</tbody>
</table>

A=Hotels & restaurants; B=Travel and tour operators; C=Tourist guide services; D=other services; U=Unbound; H=Unbound except as indicated in the horizontal section; N=Bound with no restrictions; R=Bound with restriction; NC=No commitment; Modes of Supply: 1=Cross border supply, 2=Consumption abroad, 3=Commercial presence, 4=Presence of natural persons.

Source: Adapted from Hansohm et al.

In Botswana for example, while the sector as a whole is generally liberal tour operators are required to apply for licenses to the Director of Tourism. The terms of the license are such that tour operators are encouraged to enter into joint venture arrangements with locals in order to provide citizens with a means of increasing their participation in the industry. These are clearly development conditions that Botswana is advised to maintain in the EPA and are justified under GATS.

Mozambique’s tourism policy and legislation indicates a strong interest in broader liberalisation in this sector. It has already liberalised or has shown interest to liberalise the following sub-sectors but without any specific commitment in GATS:

- market access to hotels, restaurant and beverage (including catering) sub sectors are liberalised except camping activity where only local investors are allowed to invest. Foreign investors are allowed to make partnership (joint venture) with local investors in the camping owned by local investors but a limitation of not more than 49.9 percent of the investment is set;
- partnerships between local and foreign investors are encouraged in the lodging services in the parks and reserves;
- in the tour and travel agencies there is no limitation in foreign investment but a commercial presence (mode 3) is obligatory.
Mozambique will have to simply commit the current liberalisation achieved and should ideally maintain such development provisions like requirements for joint ventures under the EPA.

The growth of tourism in southern Africa is also inhibited by constraints in tourist-originating countries or export markets. For example, the absence of SADC tourist suppliers in travel-originating distribution centres and a lack of access to the Global Distribution System (GDS) and Computer Reservation Systems (CRS) have been identified as significant barriers.²⁴

This is an area where the CARIFORUM EPA seems to have made a marked improvement to GATS. SADC EPA countries should accept the regulatory provisions of Article 111 that are aimed at the prevention of anti-competitive practices and abuse of dominance in particular by tourism networks. However they would require a lot of capacities building to establish strong competition bodies that are able to discipline strong tourism players and cooperation with the EU would be crucial. Therefore the regulatory burden in this case seems to be acceptable provided assistance is offered.

Finally, the challenge for the SADC EPA countries would be how to establish their specific needs in the framework of the GATS Article IV, and the CPA leading to transfer of technology and capacity building. In some core infrastructure services developing country suppliers are able to maximize their capacity building when engaging in joint ventures and partnerships with foreign firms in the delivery of the service. Yet the requirement to establish joint ventures (though allowable under certain conditions in Article XVI of GATS) is considered a limitation on trade liberalisation and the EC is likely to request elimination or relaxation of such measures. SADC EPA countries should not act out of pressure and should only remove such development motivated measures when it is clear they are not serving their intended purposes in some sectors i.e. making it difficult to attract investment. Where they decide to remove some of these measures they should request generous transition periods and trade development capacity to strengthen domestic services suppliers.

7. Conclusion

It is clear from the foregoing discussion that a lot of clarity as to the actual import of provisions of the IEPA on trade in services is still required. Though it is not yet
very clear what level of flexibilities are provided to SADC EPA countries, guidance can also be found from relevant provisions of GATS as well as the CPA – the eventual agreement is expected and should reflect and promote their rights provided therein.

It is also clear that the timeframes set in the IEPA text are over-ambitious and SADC countries should not allow themselves to be pressured to make commitments before fully understanding the implications thereof. They should be able to identify their specific interests which largely lie in trade and regulatory capacity building and ensure the outcomes are in line with their objectives - after all the EC has maintained that EPAs represent a development opportunity for ACP countries. Therefore, commitments made by SADC EPA should ideally be firmly tied and be conditional on the EC Party making good on its commitment to support capacity building and their compliance should measureable and monitored. The trade facilitation negotiations in the Doha Round, whereby commitments are linked to delivery of capacity building support and dispute settlement is tied to such delivery, could be a useful model to explore in this respect.

SADC EPA countries should also look at how the EPA could be used as an opportunity to operationalise the provisions of Article IV of GATS on measures (i.e. improving their access to distribution channels and information networks; and the liberalization of market access in sectors and modes of supply of export interest to them) that can be taken to increase the participation of developing countries in world trade. In addition, these countries should seek an outcome that at most promotes regional integration in SADC or at least does not cause massive disruptions.

With regards to core infrastructure services and other important sectors like tourism, it is clear that all SADC countries are on a reform path though at various stages. Where liberalisation has occurred but has not been bound at GATS these countries may wish to offer it to the EC in exchange for other commitments. This is important because though a country may have done autonomous liberalisation binding it limits their policy space and they may not be able to reverse it (which may be required in some cases). It would be in the SADC countries interest to tread carefully and be able to make liberalisation that is fully informed by domestic priorities like attracting FDI and ensuring competitiveness while at the same time being able to attach development related conditions like joint ventures with locals in some sectors and subsectors and promoting domestic shareholding where this is necessary.
Endnotes

1. Especially the controversial most favoured nation (MFN) clause which enjoins those countries signing the EPA to extend to the EU any trade concession that they grant in future to a third party as long such third party is a developed country or has one percent share of world merchandise exports.

2. There are no competition bodies in Botswana, Lesotho, and Swaziland.


4. Botswana is a typical example, since despite limited barriers remaining after it removed exchange controls; it still has not committed these reforms in GATS.


6. SADC comprises Angola, Botswana, Democratic Republic of Congo, Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, South Africa, Swaziland, Tanzania, Zambia and Zimbabwe.

7. SACU comprises Botswana, Lesotho, Namibia, Swaziland, and South Africa.

8. COMESA comprises Burundi, Comoros, Democratic Republic of Congo, Djibouti, Egypt, Eritrea, Ethiopia, Kenya, Libya, Madagascar, Malawi, Mauritius, Rwanda, Seychelles, Sudan, Swaziland, Uganda, Zambia and Zimbabwe.


11. The RISDP seeks to provide strategic direction with respect to SADC programmes, projects and activities. It aligns the strategic objectives and priorities with the policies and strategies to be pursued towards achieving those goals over a period of fifteen years.


14. Used to be known as the Telecommunications Regulators Associations of Southern Africa (TRASA) and has been renamed to accommodate the fact that it now includes broadcasting regulatory authorities.


16. This does not mean that they have reached a stage where they are TRP compliant, what it means is that they are on a reform path and they are making reforms that reflect what is in the TRP. To what extent they have reformed along the TRP lines maybe a subject of specific detailed research paper.


19. The Understanding is only applicable to those WTO Members that subscribed their specific commitments on financial services in line with the Understanding.

21 Botswana is a typical example; limited barriers have remained after its removal of exchange controls, and it has not made a commitment to remove them under GATS. Rweyemamu, op. cit.
22 Angola, Zambia, Malawi and the DRC have not yet acceded to the protocol, thereby delaying the harmonisation process. Hansohm D et al, op. cit.
Part II: Investment
Investment Provisions and Commitments in the CARIFORUM-EU Economic Partnership Agreement and in Interim Agreements between other ACP Regions and the EU

Investment Provisions and Commitments

Thomas J. Westcott
1. Introduction

Part I of this study analyses the investment provisions of the CARIFORUM-EU Economic Partnership Agreement (EPA). The text was initialled in December 2007 and signature is due to take place in June 2008. It is yet to be determined when the Agreement will enter into force. Part II looks at the treatment of investment issues in four interim EPAs concluded by the EU with: the East African Community, the Eastern and Southern African States, the Southern African Development Community, and Ghana.1

Investment provisions in the CARIFORUM-EU EPA are examined in the context of the negotiating constraint the EU faces under its organisational structure with the division of ‘competence’ between Member States and the representative organ. FDI is not yet within the scope of the EC’s – the EU’s executive branch - Common Commercial Policy, despite the inclusion of other trade-related issues such as intellectual property.2 The EC currently has non-exclusive competency over investment. This constraint means the EC applies a trade construct to the negotiation of investment issues. Attempts to overcome this in the draft European Constitution were partly successful, though the Constitution was never adopted.3 The Reform Treaty (Treaty of Lisbon), signed in late 2007 but not yet ratified, brings FDI under the EU’s Common Commercial Policy, but then adds that legal competencies over FDI are unaffected. This has created confusion and leaves open the question of who holds competency to negotiate international investment agreements (IIAs) – the EC or Member States.4

Currently, EU Member States negotiate their own bilateral investment treaties (BITs). The EC participated in WTO investment discussions with the approval of all Member Countries until the Singapore issues were sidelined after the 2003 Cancun Conference. And economic integration agreements such as EPAs remain limited to including investment provisions concerning liberalisation and market access. The important issue of investment protection is regarded as outside the EC’s competence and so remains the domain of Member States’ BITs. Also, it leaves the EU open to only negotiate on a limited type of investment: commercial presence. Member States negotiate BITs to cover both FDI and other forms of investment and assets. Another consequence is that EU Member States still have to approve the final version of investment provisions included in the EPA.
2. The CARIFORUM-EU EPA

2.1 Explanation and analysis of investment provisions

How development friendly are the EPAs investment provisions?

Title II Chapters 1 (General Provisions) and 2 (Commercial Presence) contain provisions on investment that form the basis of Part I of this study. Title II Chapter 2 covers certain types of investment in services sectors and non-services sectors. Investments covered by Title II are referred to as “commercial presence”.\(^5\) For ease of reference, the terms investment and commercial presence are used interchangeably here in connection with Title II of the EPA.

In assessing the outcome of investment negotiations in the CARIFORUM-EU EPA, this report examines, *inter alia*, how the provisions aid development. Development friendliness is a concept that requires some elaboration. Investment treaties seek to achieve one or more of the following objectives: investment promotion, protection, and liberalisation. All three objectives have pro-development implications. It is also the case that in pursuing these objectives, investment provisions may prove less effective in meeting development goals. That is, they may not adequately balance the interests of host governments and their right to regulate for development with the interests of foreign investors. A host government’s commitments under investment treaties may sometimes conflict with its pursuit of more direct development goals.

Most IIAs (BITs and investment provisions in economic integration agreements) only address development issues indirectly by granting investment protection and liberalising investment rules. Relatively few investment treaties contain provisions that directly promote investment, though most make some reference to promotion and have the indirect objective of promoting investment.

The EPAs coverage of investment centres on the core ‘treatment’ elements of national treatment (NT) and most favoured nation (MFN) treatment,\(^6\) and a key liberalising provision, market access.\(^7\)

The EPA makes limited use of investment protection provisions; Title III includes a guarantee that host governments will not restrict the free movement of capital relating to investments made under Title II (including the commercial presence chapter).\(^8\) The EPA does not seek to guarantee investors protection against expropriation
of their investments without fair compensation, a guarantee commonly used in IIAs (see below in relation to CARICOM FTAs). Nor does it include dispute settlement and the means for investors to take claims for breach of treaty to international arbitration.\footnote{9}

Investment \textit{promotion} is commonly the focus of development policy. Whilst promotion is an important, but indirect, outcome of the provisions in Chapters 1 and 2, it is covered directly in Chapter 7, Article 60. Recommendations for future negotiations (discussed at 1.1.2 below) include options for more effective investment promotion in investment treaties.

Title II Chapters 1 (General Provisions) and 2 (Commercial Presence) contain provisions on investment that form the basis of Part I of this study. Title II Chapter 2 covers certain types of investment in services sectors and non-services sectors. Investments covered by Title II are referred to as “commercial presence”.\footnote{10} For ease of reference, the terms investment and commercial presence are used interchangeably here in connection with Title II of the EPA.

In assessing the outcome of investment negotiations in the CARIFORUM-EU EPA, this report examines, \textit{inter alia}, how the provisions aid development.

Development friendliness is a concept that requires some elaboration. Investment treaties seek to achieve one or more of the following objectives: investment promotion, protection, and liberalisation. All three objectives have pro-development implications. It is also the case that in pursuing these objectives, investment provisions may prove less effective in meeting development goals. That is, they may not adequately balance the interests of host governments and their right to regulate for development with the interests of foreign investors. A host government’s commitments under investment treaties may sometimes conflict with its pursuit of more direct development goals.

Most IIAs (BITs and investment provisions in economic integration agreements) only address development issues indirectly by granting investment protection and liberalising investment rules. Relatively few investment treaties contain provisions that directly promote investment, though most make some reference to promotion and have the indirect objective of promoting investment.

The EPAs coverage of investment centres on the core ‘treatment’ elements of national treatment (NT) and most favoured nation (MFN) treatment,\footnote{11} and a key liberalising provision, market access.\footnote{12}
The EPA makes limited use of investment protection provisions; Title III includes a guarantee that host governments will not restrict the free movement of capital relating to investments made under Title II (including the commercial presence chapter). The EPA does not seek to guarantee investors protection against expropriation of their investments without fair compensation, a guarantee commonly used in IIAs (see below in relation to CARICOM FTAs). Nor does it include dispute settlement and the means for investors to take claims for breach of treaty to international arbitration.

Investment *promotion* is commonly the focus of development policy. Whilst promotion is an important, but indirect, outcome of the provisions in Chapters 1 and 2, it is covered directly in Chapter 7, Article 60. Recommendations for future negotiations (discussed at 1.1.2 below) include options for more effective investment promotion in investment treaties.

**CARIFORUM’s approach to investment negotiations**

CARIFORUM countries are heavily dependent on inward investment flows to sustain their economies. Investment promotion has been pursued through a number of bilateral investments treaties between various CARIFORUM states and third states, including member states of the European Union. Tourism oriented investment accounts for the major portion of investment flows into the CARIFORUM region thereby giving rise to the need to seek different types of investment flows compatible with the broad based development strategies of CARIFORUM states.

**Approach to the investment negotiations:**

CARIFORUM sought a comprehensive investment agreement with the EC in the EPA for a number of reasons including:

(i) the need to achieve greater predictability and transparency in investment flows into the region and greater security for investors and their investments (investor protection);

(ii) the need to establish rules supportive of more favourable market access rights; and

(iii) the need to achieve a broad based investment regime conducive to the technological development and social transformation (for example, greater employment) of CARIFORUM States.
Negotiating challenges and strategies:
CARIFORUM’s principal negotiating objective was to secure, as far as possible, a comprehensive investment framework establishing rules for both market access and investment protection. Ideally CARIFORUM States hoped to use an EPA framework as a “one stop shop” in its investment relationship with the Member States of the European Union. On commencing negotiations, it quickly became evident that the EU’s ongoing limited competency on investment would prove an obstacle to achieving this.

In light of the need to scale back its ambition on the scope of the investment chapter, CARIFORUM’s negotiating strategy centred around securing agreement on rules that would facilitate greater investment flows and best lead to a pro-development outcome. The notion of a pro-development outcome has two dimensions:

(i) the establishment of rules that would be conducive to investment flows in those areas of greatest economic importance to CARIFORUM states; and

(ii) the reservation of the most sensitive areas of investment activity so as to ensure the maintenance of an effective policy space for CARIFORUM Governments conducive to national development. Accordingly, CARIFORUM has excluded sensitive areas such as the provision of public services and the provision of utilities from EPA investment liberalization.

Source:

Commitments for the signatory CARIFORUM states on treatment and market access must strike a balance to maximize development needs. The EPA addresses development concerns by placing limitations on the extent of liberalisation and protection offered to EU investors. It does this through narrowing the wording of provisions in Titles II and III, and the use of reservations, exceptions, transitional arrangements, and consultation mechanisms established under the Agreement. By limiting the treaty’s coverage of investment to commercial presence, an important narrowing is assured. The constitution, acquisition or maintenance of a business, professional establishment or branch for the purpose of economic activity is a much more limited concept than commonly used asset-based definitions of investment that cover portfolio investments and a range of other assets such as intellectual property. Consequently, the EPAs investment provisions only apply to certain types of investment. This was driven by the EU’s lack of competence to negotiate on all
types of investment. Given CARIFORUM was a demander on many investment issues (see box) they might have preferred a broader definition that would have meant national treatment and MFN applied to more types of foreign investment. Other ACP regions should bare this in mind in their negotiations with the EU.

Scheduling commitments and setting out reservations allows development needs to be addressed. The phasing in of commitments for less developed economies is a development friendly technique the EPA uses for The Bahamas and Haiti.\textsuperscript{17} And non-conforming measures existing at the time of signature but not set out in the CARIFORUM Party’s schedule may be added to the schedule within two years of the date of entry into force of the EPA. This leniency is of considerable benefit to developing countries and allows them to gradually adjust to the treaty commitments. A commitment to further negotiations and future liberalisation is another development friendly way of reducing the immediate impact of treaty commitments.\textsuperscript{18}

The EPA is proactive in seeking to balance public and private interests. UNCTAD has noted that “(a)n alternative approach to balancing private and public interests, which to date has not been prominently explored in [investment treaties], would be to establish investor responsibilities directly… rather than only leaving the host country with the right to impose them through its domestic laws.”\textsuperscript{19} Article 11 (Behaviour of Investors) goes some way to achieving this by requiring Parties to legislate to prevent things such as corruption in investment processes. However, Article 11 stops short of imposing a direct requirement on investors.

**Recommendations for other regional EPA negotiations**

In the current negotiating environment where the EU is limited in what it can negotiate on, the approach taken by CARIFORUM-EU negotiators can be commended for other ACP regions. It includes core international investment principles - NT, MFN treatment and market access\textsuperscript{20} - defined and limited to address needs in a region that includes economies at different stages of development. A narrow definition of investment required by the EU will also be required in their negotiations with other ACP regions.

Coverage of the pre-establishment phase combined with an annex containing a schedule of commitments is to be commended for other ACP negotiations as a means of defining the extent of commitments. The positive list approach used in the CARIFORUM-EU EPA is arguably more appropriate for developing countries.
since it allows for a “bottoms-up” approach to protection and liberalisation with selection of sectors and sub-sectors to be subject to investment provisions. The GATS-style schedule adopted by signatory CARIFORUM states requires making commitments on MFN, NT or market access in a particular sector. A country thereby agrees to adhere to the principles defined by the agreement, subject to limitations listed in the schedule. “When making a commitment a government therefore binds the specified level of market access and national treatment and undertakes not to impose any new measures that would restrict entry into the market or the operation of the [commercial presence]. Specific commitments thus have an effect similar to a tariff binding — they are a guarantee to economic operators in other countries that the conditions of entry and operation in the market will not be changed to their disadvantage.”

However, the implications are unclear where the full GATS approach to scheduling is not used. Capacity constraints were no doubt complicit in preventing CARIFORUM negotiators from providing greater detail of non-conforming measures and guaranteeing all non-conforming measures were included in the schedule. Details of relevant legislation ensure greater transparency and certainty in binding the specified level of access. For example, it is uncertain whether Grenada can increase fees for non-nationals without breaching its market access commitment:

**Fishing: Grenada:** The Legislation prescribes differential fees for non-nationals to obtain a license to engage in fishing activities.

If other ACP regions elect to use a positive list, it is recommended that more information is included in the schedule explaining exactly how the schedule will operate. A substantial capacity building initiative is recommended to assist with the preparation of EPA schedules in other regions. It is also worth noting that the use of reservations that retain the right to adopt or maintain measures in the future is a significant tool for retaining flexibility where this is perceived as necessary for development. The CARIFORUM schedule uses this extensively (see section 1.2).

If feasible in light of the EU’s competence to negotiate on investment, it is recommended several additional principles be considered for the remaining ACP negotiations: the prohibition of expropriation without just compensation, and the guarantees of fair and equitable treatment and full protection and security. These are well-established investment principles that do not obstruct development objectives but are central tenets of investment protection and amongst the basic investment
guarantees. Signatory CARIFORUM states have agreed to these provisions in other IIAs (see sections 1.2 and 1.4) and numerous African countries already have some experience with these issues, though clearly require technical assistance in these areas. However, care should be taken to use legal formulations that have emerged in recent years to address concerns about a broad reading of indirect expropriation and fair and equitable treatment.22

It is further recommended that if the EU receives an expanded negotiating mandate and additional investment principles are included in the remaining ACP EPAs, then negotiators consider including alternative dispute resolution methods such as mediation and conciliation. International investment arbitration is extensively used in IIAs but its benefits (strengthening the rule of law and providing greater certainty for investors) are sometimes outweighed by disadvantages for developing countries. For example, arbitration can be costly and may damage host government relations with the investor concerned.

A number of other issues less commonly addressed in investment agreements and which set a more proactive development agenda should also be considered to ensure remaining ACP negotiations are development friendly and enhance regional integration. These include provisions: requiring transparency and the exchange of investment-related information; fostering linkages between foreign investors and domestic companies; promoting capacity building and technical assistance; encouraging the transfer of technology; and requiring joint investment promotion activities.23 Some of these issues are covered in the CARIFORUM-EU EPA, but not in the detail required to set a proactive development agenda (admittedly, this is always a negotiated outcome). Cooperation is covered in Chapter 7 of Title II, but there is little detail on how Parties can cooperate on investment promotion:

> Establishing mechanisms for promoting investment and joint ventures between service suppliers of the EC Party and of the Signatory CARIFORUM States, and enhancing the capacities of investment promotion agencies in Signatory CARIFORUM States.24

In conclusion, there are potential additional advantages from making greater use of investment promotion provisions and explicitly linking these to a country or region’s strategic investment policies. Promotion provisions are most effective where they commit a contracting party to take positive steps to encourage investment. These can be harnessed to target specific sectors.25 It is also necessary to consider
what impact on investment flows investment treaty provisions have. It seems from the literature that investment provisions are likely to play a greater role in the development of some countries than in others.26 A full assessment of the impact on other ACP regions is beyond the scope of this study.

2.2 CARIFORUM commitments on investment: a comparison between the EPA outcome and other intra-regional investment treaties

Commitments on investment in the CARIFORUM-EU EPA

As mentioned above, the three main commitments on investment set out in Chapter 2 are market access, NT and MFN treatment. Market access is a trade concept whose links with international investment law are usually limited to trade in services through commercial presence (so-called mode 3). It plays a larger role in the EPA due to the EU’s limited competence to negotiate on investment. Commitments in Chapter 2 relate to commercial presence, a subset of foreign direct investment.

The EPA also includes a commitment in Article 11 for states to regulate the behaviour of investors to prevent corruption, ensure investors act in accordance with ILO core labour standards and do not circumvent international environmental and labour obligations, and liaise with local communities on natural resource projects.

Liberalisation of investment in signatory CARIFORUM states

Article 6 Market Access, guarantees commercial presences and investors from the EU access no less favourable than that set out in the CARIFORUM Party’s schedule of commitments on investment (commercial presence).

Market access is assured in Article 6.2 by introducing limitations to the types of measures CARIFORUM states can use to regulate commercial presences and investors. Liberalisation of existing regulatory regimes is achieved by requiring all signatory CARIFORUM states to – where applicable - remove measures currently in place, and commit not to introduce measures in the future, that operate as:

a) limitations on the number of commercial presences whether in the form of numerical quotas, monopolies, exclusive rights or other commercial presence requirements such as economic needs tests;

b) limitations on the total value of transactions or assets in the form of numerical quotas or the requirement of an economic needs test;
c) limitations on the total number of operations or on the total quantity of output expressed in terms of designated numerical units in the form of quotas or the requirement of an economic needs test.

d) limitations on the participation of foreign capital in terms of maximum percentage limit on foreign shareholding or the total value of individual or aggregate foreign investment; and

e) measures which restrict or require specific types of establishment (subsidiary, branch, representative office) or joint ventures through which an investor of the other Party may perform an economic activity.

However, these limitations do not apply to all sectors and laws. Scope is reduced in two ways: first, Article 5 sets out a list of sensitive sectors that are carved out from the scope of Chapter 2, and second, Article 6.2 liberalisation is confined to selected sectors set out by signatory CARIFORUM states in its schedule and excludes laws and regulations (measures) specified therein. The relevant schedule is Annex 4.V List of Commitments on Investment (Commercial Presence) in Economic Activities other than Services Sectors. Commercial presence in services sectors (mode 3) falls within the scope of Chapter 2, but unusually, sectoral coverage and non-conforming measures are set out in the separate services schedule.

Signatory CARIFORUM states have adopted a GATS-style schedule for investment in non-services sectors. The schedule sets out those sectors, including all sub-sectors, for which the market access and NT commitments apply. The sectors include: agriculture, hunting and forestry; fishing; mining and quarrying; manufacturing; production, transmission and distribution of electricity, gas, steam and hot water. Critically, the schedule also sets out reservations for measures that do not conform to the Article 6.2 market access liberalisation commitment or the Article 7 national treatment commitment.

Reservations are also made for sub-sectors or activities where there is currently no limitation on foreign investment, but where a CARIFORUM state seeks flexibility for possible future regulation of foreign investment in a manner inconsistent with its market access and national treatment obligations. These reservations are usually formulated in the signatory CARIFORUM state’s schedule as “[Country X] reserves the right to adopt or maintain any measures relating to…”. The schedule contains 29 reservations taken out by individual signatory states for adopting possible future measures and three further reservations taken out by all 13 CARIFORUM states for adopting possible future measures.
Liberalisation through binding existing foreign investment regimes

The EPA contains no indication of what measures currently in place in CARIFORUM states are to be removed for CARIFORUM states to comply with this liberalisation. The Caribbean Regional Negotiation Machinery (CRNM) has indicated there will be very little need for legislative change to give effect to these commitments.\(^3\) Some states may amend laws or regulations in their fishing sector to comply with Article 6.2. No details of these changes are discernable from the EPA or its schedules. Liberalisation will therefore principally be achieved through the ‘binding’ of existing regulatory practice and the resulting limitations placed on future ‘tightening’ of the regulation of commercial presences. That is, parties to the EPA commit to maintaining the current level of openness and procedural ease for the establishment of commercial presences. As noted above, binding of the existing regulatory landscape is limited by open reservations taken out by some CARIFORUM states.

Scope

Chapter 2 applies to both the pre and post-establishment phases of investment. The chapter therefore commits parties to provide NT or MFN treatment to the setting up a commercial presence, including everything from the approval processes through to the operations phase of a commercial presence. Article 1 defines commercial presence to include the “constitution” and “acquisition” of a juridical person.

Transparency

Transparency is also critical to notions of liberalisation and is often cited as a liberalising effect of IIAs. The transparent articulation of exceptions to treaty commitments on investment, including referencing the particular measures (law or regulation), allows investors to make more informed decisions and thereby amounts to a more liberal and open investment environment. The signatory CARIFORUM states’ schedule provides limited transparency because little information is provided on non-conforming measures. No doubt negotiators were wary of this and had in mind that transparency would be improved considerably as part of the mechanism for ongoing discussions and future negotiations established under Article 13 (Review).

Most favoured nation treatment

CARIFORUM states need not automatically pass on the same treatment to EU investors that they provide to foreign investors from small developing and least developed countries. MFN treatment is offered to EU investors under Article 9.1
with exceptions to its application set out in paragraphs that follow. In principle, EU investors and their commercial presences are guaranteed:

*Treatment no less favourable than the most favourable [Signatory CARIFORUM states] may accord to like commercial presences and investors of any major trading economy with whom they conclude an economic integration agreement after the signature of this Agreement.*

Three exceptions to MFN treatment are worthy of note. First, the MFN obligation only requires that CARIFORUM states provide EU investors treatment no less favourable than they provide to investors from a “major trading economy” under an economic integration agreement. “Major trading economy” is defined to include “any industrialised country, or any country accounting for a share of world merchandise exports above one percent”. The reciprocal EU commitment for CARIFORUM investors is greater and requires providing treatment no less favourable than that accorded to investors or commercial presences in the EU of *any third country*. ³¹

Second, Article 9.2 further limits the application of the MFN rule by exempting any treatment of commercial presences within the CARICOM Single Market and Economy and the internal market created by the CARICOM-Dominican Republic FTA. ³² Whereas the “major trading economy” limitation applies for treatment by signatory CARIFORUM states to their trading partners, this means CARIFORUM states need not treat EU investors as favourably as investors from other CARIFORUM states.

A third limitation set out in Article 9.5 covers the negotiation of future free trade agreements (FTAs). Where a signatory CARIFORUM state enters an FTA with a third party including more favourable treatment accorded to such third party, the signatory CARIFORUM states and the EU will enter into consultations to decide whether the signatory CARIFORUM state can deny the EU the more favourable treatment.

To summarise, the three cases where MFN treatment need not be extended to EU investors provides CARIFORUM states with considerable flexibility in formulating investment policy. In fact, it reduces the MFN commitment to almost zero.

**Other commitments on investment**

As mentioned above, Title II contains no investment protection provisions. However, Title III does include a guarantee of the right to freely transfer funds relating to an investment:
Part II: Investment

Article 2 Capital movements

1. With regard to transactions on the capital account of balance of payments, the Signatory CARIFORUM States and the EC Party undertake to impose no restrictions on the free movement of capital relating to direct investments made in accordance with the laws of the host country and investments established in accordance with the provisions of Title II of this Agreement, and the liquidation and repatriation of these capitals and of any profit stemming therefrom.

2. The Parties shall consult each other with a view to facilitating the movement of capital between them in order to promote the objectives of this Agreement.

Note that the right to free transfers is also subject to a balance of payments exception in Part VI, Article 8.35

Investment promotion commitments are also not addressed in the Commercial Presence chapter, but are part of Title II Chapter 7:

Article 60 Cooperation

…2. Subject to the provisions of Article 7 of this Agreement, the Parties agree to cooperate, including by providing support for technical assistance, training and capacity building in, inter alia, the following areas:

…

f. Establishing mechanisms for promoting investment and joint ventures between service suppliers of the EC Party and of the Signatory CARIFORUM States, and enhancing the capacities of investment promotion agencies in Signatory CARIFORUM States.

This is a very general undertaking containing no explicit obligations.

In conclusion, commitments faced by signatory CARIFORUM states require no change in current policy (with the possible, unconfirmed, exception of the fishing industry in several countries). First, market access and NT obligations are reportedly in line with the existing treatment of EU investors. Second, what liberalisation there is comes from binding existing laws, noting that many activities within these sectors are unbound. And third, MFN treatment imposes negligible requirements on the current and future regulation of EU-sourced commercial presences.
Commitments relating to treatment of investors from other CARIFORUM states

This section examines the treatment of intra-CARIFORUM foreign investment flows through an analysis of treaty commitments in three key regional instruments: the Revised Treaty of Chaguaramas Establishing the Caribbean Community Including the CARICOM Single Market and Economy, the CARICOM - Dominican Republic Free Trade Agreement, and the CARICOM - Costa Rica Free Trade Agreement.34

Revised Treaty of Chaguaramas establishing the Caribbean Community including the CARICOM Single Market and Economy (2001)

The Revised Treaty, though not yet fully implemented, includes provisions dealing with investment and the establishment of investments in several places. The main effect of these provisions is to prohibit Member States imposing new restrictions on the ability of investors from other Member States to establish and operate economic enterprises:

Article 32 Prohibition of New Restrictions on the Right of Establishment

1. The Member States shall not introduce in their territories any new restrictions relating to the right of establishment of nationals of other Member States save as otherwise provided in this Treaty.

2. The Member States shall notify COTED of existing restrictions on the right of establishment in respect of nationals of other Member States.

3. The right of establishment within the meaning of this Chapter shall include the right to:
   a) engage in any non-wage-earning activities of a commercial, industrial, agricultural, professional or artisanal nature;
   b) create and manage economic enterprises referred to in paragraph 5(b) of this Article.

…

It also proposes the removal of existing restrictions on the right of establishment:

Article 33 Removal of Restrictions on the Right of Establishment

1. Subject to the provisions of Article 221 and Article 222, the Member States shall remove restrictions on the right of establishment of nationals of a Member State in the territory of another Member State.
2. The removal of restrictions on the right of establishment mentioned in paragraph 1 of this Article shall also apply to restrictions on the setting up of agencies, branches or subsidiaries by nationals of a Member State in the territory of another Member State.

3. Subject to the approval of the Conference, COTED, in consultation with COHSOD and COFAP, shall, within one year from the entry into force of this Treaty, establish a programme providing for the removal of restrictions on the right of establishment of nationals of a Member State in the territory of another Member State.

There is a similar prohibition and process of removal of restrictions on the movement of capital payments. Investment issues particular to disadvantaged countries in the CARICOM community are addressed in Articles 147 and 149 of the Revised Treaty.

These commitments in the Revised Treaty will be brought into effect through development under the Revised Treaty of a CARICOM community investment policy:

**ARTICLE 68 Community Investment Policy**

**COTED in collaboration with COFAP and COHSOD shall establish a Community Investment Policy which shall include sound national macroeconomic policies, a harmonised system of investment incentives, stable industrial relations, appropriate financial institutions and arrangements, supportive legal and social infrastructure and modernisation of the role of public authorities.**

The policy is to be implemented through the CARICOM Investment Code (CIC). This is still under negotiation. The original proposal had been for a CARICOM Agreement on Investment to govern intra-regional investment relations, with an Investment Code used to address third country investment. The CIC is now being negotiated as the sole agreement governing both intra and extra-regional investments in the CARICOM Single Market.

A draft CIC text (dated August 2007) is being used as the basis of ongoing consultations, however schedules containing reservations have not yet been prepared. The final coverage of the Code and the extent to which it may liberalise, protect and promote investment flows between CARICOM member states remains to be seen, however the draft text includes a comprehensive set of core investment protection
provisions: national treatment, most favoured nation treatment, fair and equitable treatment, performance requirements, appointment of senior management and board of directors, transfer of funds, expropriation and compensation, compensation for losses (from war and civil unrest), sectoral reservations, general exceptions, and transparency. It also proposes a number of provisions addressing national and regional investment promotion, the exchange of information between CARICOM member states and a mechanism for resolving disputes between investors and a member state. Full implementation of the CARICOM Revised Treaty through introduction of the CIC would result in an investment framework for Caribbean countries much broader and more comprehensive than envisaged by the EU EPA. Central to this conclusion is the adoption in the draft CIC of a broad asset-based definition of investment. Finally, as indicated in discussion of the CARIFORUM-EU EPAs MFN provision, the treatment of intra-CARICOM investment would not automatically be extended to EU investors.

**CARICOM-Dominican Republic Free Trade Agreement (signed 22 Aug. 1998)**
The CARICOM-DR FTA entered into force on 1 December 2001 for Barbados, Jamaica, and Trinidad and Tobago, 5 February 2002 for the Dominican Republic, 6 October 2004 for Guyana, and August 2005 for Surinam. Other CARICOM members have not completed implementation of the FTA. The free trade area established by Article I paragraph 1(i) is therefore presumed not to apply in its entirety. That is, the FTA provisions relating to investment would not apply to all CARICOM countries. The other complicating fact is that to date, non-conforming measures negotiations for investment have not taken place, so there are no reservations schedules in place. Similarly there are not yet schedules with services market access commitments. With only the disciplines in place in the investment and services chapters, the FTA is not properly implemented and it seems safe to conclude, investors are not accorded the protections set out in the provisions.

Notwithstanding questions regarding its operability, the FTA’s investment provisions differ in scope and objectives to the CARIFORUM-EU EPA. The FTA doesn’t pursue liberalisation through a market access provision. Its focus is investment protection implemented by way of a side agreement in Annex III on the reciprocal promotion and protection of investment (in effect, a BIT concluded for a group of countries). These provisions stipulate the admission of investments in accordance with each country’s laws. The agreement includes: NT, MFN treatment with an exception for regional economic integration agreements, fair and equitable
treatment, transparency, compensation for losses, expropriation, and free transfers. These rights for investors and investment flows between CARICOM countries are far more extensive than rights accorded EU investors under the EPA.

Trade in services covering mode 3 is included in a separate Annex II agreement. There, Article XII (Market Access) refers to an attachment setting out commitments, but these have not yet been implemented.\textsuperscript{45}

**CARICOM – Costa Rica FTA (signed 9 March 2004)**

The FTA entered into force between Costa Rica and Trinidad and Tobago on 15 November 2005, Costa Rica and Guyana on 30 April 2006, and Costa Rica and Barbados on 1 August 2006. Again, it is important to recognize that obligations regarding the treatment of investors and their investments in this treaty only apply between these ratifying parties, so the treaty does not govern investment flows between Costa Rica and all CARICOM countries.

Chapter X of the treaty contains investment provisions similar to those in the Dominican Republic FTA. Leaving aside the incomplete implementation of the CAIRCOM-DR FTA, the Costa Rican FTA extends greater protection to investors and their investments. Both FTAs differ in scope and in objectives to the EPA commercial presence chapter. The FTA with Costa Rica includes: coverage of post establishment investment, fair and equitable treatment, and full protection and security, NT, MFN, expropriation and compensation, compensation for losses arising from war and civil disturbance, and free transfers. Unlike the other treaties examined in this study, the FTA with Costa Rica also provides investors additional protection through the option to access international arbitration to settle disputes with host governments.

These rights and protections are available for investors from either Party who have made investments in accordance with the legislation of the host government (i.e. post establishment). The structure and nature of the commitments in this agreement are established in part through the definition of *investor* and *investment*. The two FTAs analysed and the CIC contain broadly similar definitions of an investor covering natural persons and legal persons constituted under the laws of a treaty party that carry on business in that country. The CARICOM–Costa Rica FTA adopts a similar broad definition of investment to that used in the Dominican Republic FTA and the CIC. Investment includes “any kind of asset, defined in accordance with the laws of the host country, which the investor of one Party invests
in the territory of the other Party in accordance with the latter’s laws and regulations”. It then sets out an open list of examples. This approach is in contrast to the more restricted “commercial presence” definition adopted in the CARIFORUM – EU EPA to comply with the EU’s limited competence in the field of investment.

As a consequence of these definitions in the CARICOM-Costa Rica FTA, the NT and MFN apply to a larger range of investors and types of investment. The NT and MFN disciplines are also more extensive and offer greater protection to investors because they contain fewer direct exceptions or limitations to their application. Finally, because the FTA with Costa Rica covers only post establishment investments, the chapter doesn’t include schedules of commitments determining the scope of NT, MFN or market access, nor is there any framework for including these at a later stage. NT and MFN require treating a given foreign investor the same as nationals and other foreign investors once their investment is made. The absence of schedules also means CARICOM has not bound its regulatory framework and is not prevented from introducing “less liberal” laws. By comparison, the EPA does not require signatory CARIFORUM states to offer EU investors the same protections as they offer Costa Rican investors, and whilst the CARIFORUM schedule binds its regulatory framework in a number of sectors, it has been shown that they have retained considerable flexibility to introduce new laws in many of the covered sub-sectors.

**Conclusion**

Full implementation of the CARICOM Revised Treaty through introduction of the CIC would result in a broader and more comprehensive investment framework for Caribbean countries than has been introduced through the CARIFORUM-EU EPA. These intra-CARICOM rules would include the gradual removal by home countries of restrictions on the right of establishment for intra-regional investors, and would also offer them a full complement of investment protection guarantees. The EPA with the EU does not remove restrictions on the right of establishment, nor does its scope include investment protection provisions. EU investors are provided with a guarantee of the current level of openness in those sectors specified in the schedule (except in the 32 cases where sectors are listed but future regulatory flexibility is preserved). This does not make it easier for the EU to invest, but it does offer greater certainty about the applicable laws in specified sectors.

CARICOM host countries that are also members of the CARIFORUM grouping would not be required to extend to EU investors the same treatment they provide investors from CARICOM home countries if and when the CARICOM rules are
finalized. The MFN treatment provision in the EPA is quite limited. It does not require CARIFORUM states to automatically pass on the same treatment to EU investors that these states offer to foreign investors from small developing and least developed countries.

The CARICOM-Dominican Republic FTA and the CARICOM-Costa Rica FTA do not address the right of establishment, though it was flagged as an issue for future negotiation in the Dominican Republic agreement. The EPAs binding of certain existing laws on establishment for EU investors therefore represents something not currently available to parties of these FTAs. But this only locks in current practice in certain sectors for the treatment of EU investors. It is unlikely existing regulations would be changed and made more restrictive for investors from the region. On the other hand, both FTAs include investment protection provisions for investors within the two FTA areas. If the FTAs are fully implemented this will provide regional investors protection through a number of international investment principles (e.g. fair and equitable treatment, protection against expropriation, compensation for losses, free transfers, etc.) not offered in the EU EPA.

2.3 CARIFORUM states’ commitments to EU member states in bilateral investment treaties

This section examines investment commitments made by individual CARIFORUM states to individual EU Member States. There are no economic integration agreements between individual CARIFORUM states and the EC or individual EU Member States, however a considerable number of BITs have been negotiated and are operational. Five BITs are examined here representing a diversity of CARIFORUM countries and levels of development.

BITs differ from the EPA in their objectives, scope and coverage. BITs are almost universally treaties that cover only the post establishment phase of investment. They confer rights to investors regarding treatment by host governments of a wide range of types of investment after they have been established in the host country. In contrast, the EPA commercial presence chapter includes amongst its core provisions a commitment to market access for a narrow set of investments in accordance with conditions set out in the EPAs provisions and schedules. CARIFORUM states have not offered investors from EU Member States preferential or liberalised access in these BITs. BITs nevertheless confer on investors rights under international law and therefore generate a greater degree of confidence in the host country environment.
once an investment is established. A host government that offers a binding treaty commitment consistent with its domestic law is generally recognized as having agreed to more liberal treatment of the foreign investor.

**Barbados – Germany BIT**

The Barbados-Germany BIT, in force since 1 May 2002, is quite different in its objectives and coverage to the CARICOM-EU EPA. The BIT seeks to ensure greater protection of investments rather than liberalising entry of investment into Barbados. It applies a broad and open-ended definition of investment: “every kind of asset” including moveable and immovable property, shares, claims to money, intellectual property rights and business concessions. Investments between the parties are to be admitted in accordance with domestic laws, but once an investment is established the host government provides investors and their investments with NT and MFN treatment, except where more favourable treatment to third parties is extended through membership of a customs union, common market or free trade area.

Parties also guarantee they will accord investors and their investments fair and equitable treatment, full protection and security, compensation for losses arising from war or civil unrest, and will not expropriate an investment directly or indirectly without prompt, adequate and effective compensation. These are well-established principles in international investment law, though their meaning and the treatment demanded of host governments to meet these standards is dependent on the treaty wording and individual facts. These issues are the subject of considerable international arbitration. The EU was restricted from including these issues in negotiating the CARIFORUM-EU EPA.

The BIT also guarantees investors the right to freely transfer payments in connection with an investment. This right is offered in the EPA (see question 1, above), though the BIT wording offers investors greater protection by requiring that transfers are allowed “without delay” and by establishing which official exchange is to be applied.47

The BIT is in force for an initial period of ten years and continues thereafter unless terminated by either party with twelve months’ notice. Investments made prior to the treaty’s termination are subject to the treaty provisions for a further twenty years after the BIT is terminated.48

**Belize – Netherlands**

The Agreement on Encouragement and Reciprocal Protection of Investments between Belize and the Netherlands entered into force on 1 October 2004. Like
other BITs considered here, it contains no market access commitments but aims to protect and (indirectly) promote a broad range of investments once they have been established in the host country. The treaty adopts a standard asset-based definition of investment and defines investors as including legal persons not constituted under the law of a party, but controlled directly or indirectly by a national or legal person of a party. Belize and the Netherlands agreed to the same treatment provisions included in the Barbados-Germany agreement. Article 3 (5) seemingly ensures that any CARIFORUM-EU EPA provision that offers investors more favourable treatment would prevail over the BIT:

_If the provisions of law of either Contracting Party or obligations under international law existing at present or established hereafter between the Contracting Parties in addition to the present Agreement contain a regulation, whether general or specific, entitling investments by nationals of the other Contracting Party to a treatment more favourable than is provided for by the present Agreement, such regulation shall, to the extent that it is more favourable, prevail over the present Agreement._

This should be interpreted to include the EPA concluded by the EU and CARIFORUM body as containing international law obligations “between the Contracting Parties”.

The Belize-Netherlands BIT applies for 15 years, and thereafter is extended for periods of ten years. It can be terminated with six months notice prior to the conclusion of a ten-year period.49

**Dominican Republic - Spain**

The Agreement on the Reciprocal Protection and Promotion of Investments between the Dominican Republic and Spain entered into force 7 October 1996. It operated for an initial period of five years and since then has been automatically renewed every two years. Parties can terminate with six months notice before the date of expiry, though the substantive provisions would continue to apply to investments made before termination for a period of five years.50

The treaty’s provisions and scope are very similar to those described above. Still, there are slight differences between these BITs that affect the scope. For example, ‘investor’ is defined to include natural persons with nationality of one of the parties and legal persons organised under the law of a contracting party and with a registered address in the territory of the same contracting party.51 The Belize-Netherlands
BIT, on the other hand, also applies to legal persons not constituted under the laws of a contracting party but controlled directly or indirectly by nationals or legal persons of a contracting party. And in the Barbados-Germany BIT, Germany does not require companies claiming to be investors in Germany to have legal personality.

Haiti - United Kingdom
An Agreement for the Promotion and Protection of Investments entered into force between the UK and Haiti on 27 March 1995, ten years after it was negotiated. The BIT operated for an initial period of ten years and thereafter continues in force until either of the parties gives 12 months notice of termination. The provisions continue to apply to investments made whilst the treaty was in force for a further ten years.

This BIT contains better protection in relation to compensating investors for losses arising from war, armed conflict or civil unrest. It includes a requirement for restitution or compensation where the loss results from requisitioning of property by forces or authorities, or destruction of property not caused by in combat and not “required by the necessity of the situation”. It also sets out in more detail the requirements for compensation in the event of justifiable expropriation. It must reflect the:

market value of the investment expropriated immediately before the expropriation or impending expropriation became public knowledge, and shall include interest at a normal commercial rate until the date of payment, shall be made without delay, effectively realizable and be freely transferable.

Jamaica - Germany
The Treaty Concerning the Reciprocal Encouragement and Protection of Investments between Jamaica and Germany entered into force on 29 May 1996. The BIT operates for 15 years and will terminate then if either party provides 12 months notice. The treaty will otherwise continue indefinitely and can be terminated at any time with 12 months notice. The scope and application of the treaty is consistent with those addressed above.

Conclusion
Individual CARIFORUM states and individual EU member countries have negotiated numerous BITs, however these are quite different in scope and objectives when compared to the EPAs Chapter 2 on Commercial Presence: BITs seek to protect and promote investors and their investments once they have been made, whilst the
EPA provisions are designed to liberalise the process of establishing an investment. It should be noted (see Box) that CARIFORUM countries had hoped to negotiate a comprehensive investment chapter with the EU that would supersede BITs concluded by individual countries of the two regions. The EU’s limited competence on investment was an obstacle to achieving this. Notwithstanding, BITs can coexist with the EPA and offer greater certainty for investors.

2.4. New institutions, regulations and administrative procedures concerning investment

This section assesses whether new institutions, regulations or administrative procedures are required to implement the Commercial Presence Chapter. This is to be distinguished from the issue of whether signatory CARIFORUM states need to introduce or amend domestic legislation to conform to their treaty commitments (this was addressed to the extent possible with available information in section 1.1.

The Commercial Presence Chapter contains no requirements for new institutions or procedures; however, the General Provisions Chapter (Chapter 1) requires several further steps and future action. The first is the preparation of the schedules for The Bahamas and Haiti. Article 3 bis requires incorporation of these schedules no later than six months after signature of the EPA. Interestingly, these commitments are to be compatible with relevant requirements under the GATS. It’s unclear what GATS requirements would dictate these countries’ schedules for non-services sectors.

The second requirement is the Article 3 obligation to undertake “future liberalisation”. This commits parties to commencing further negotiations on investment no later than five years from the date of entry into force of the EPA with the aim of adding to the overall commitments of issues covered in Title II. Note that on a strict reading, this would not require additional commitments under the Commercial Presence Chapter, if additional commitments were made in, say the chapter on Cross Border Supply of Services. Although the requirement for future negotiations is not an ongoing burden or administrative procedure, it will require future action by signatory CARIFORUM states. If the EU’s competence issues relating to investment negotiations are resolved by this time and the EU can address international investment more fully, recommencing negotiations under Article 3 could be a large undertaking for Caribbean countries. This could well impose further costs on CARIFORUM countries. At the same time, indications are the CARIFORUM region would welcome the inclusion of investment protection pro-
visions in the EPA. These two issues – incorporating schedules for disadvantaged countries, and committing to future negotiations – are likely to be important issues in other ACP region negotiations. They confer future obligations, but are important development features of EPAs that allow gradual adjustment.

At the broader, treaty-wide level, Part V of the EPA establishes four institutional bodies that will supervise implementation, facilitate dialogue and cooperation between the parties, and assist stakeholders to participate in the implementation process. These bodies play a key role in implementing the treaty’s development dimension and in implementing and monitoring the Commercial Presence Chapter. They are: the Joint CARIFORUM-EC Council, the CARIFORUM-EC Trade and Development Committee, the CARIFORUM-EC Parliamentary Committee, and the CARIFORUM-EC Consultative Committee. There is no expected ongoing function in relation to investment carried out by the treaty’s institutional bodies.

2.5 Impact of the CARIFORUM-EU EPA on regional integration for investment

This section considers whether the EPAs investment commitments will impact the broader integration process underway in CARIFORUM states. This integration process is driven by the Revised Treaty (see section 1.2.2.1). The integration process and consequences for the regulation of foreign investment between Caribbean states were discussed in section 1.2. Formulation of a Community investment policy, the CARICOM Investment Code, is well advanced, but preparing schedules of commitments and reservations is still an undecided issue. Implementing the CARIFORUM-EU Commercial Presence Chapter will be introduced into this policy environment.

Title II and CARIFORUM’s commercial presence schedule specifically acknowledge regional integration. First, Article 1 states Title II’s objectives as:

[…] reaffirming [the Parties] commitments under the WTO Agreement and with a view to facilitate the regional integration and sustainable development of the Signatory CARIFORUM States and their smooth and gradual integration in the world economy […]

Second, Article 3 ter Regional CARIFORUM Integration draws attention to the progressive removal of, inter alia, investment barriers as a means of achieving greater regional integration, but confers no obligations on parties:
1. The Parties recognize that economic integration among CARIFORUM States, through the progressive removal of remaining barriers and the provision of appropriate regulatory frameworks for trade in services and investment will contribute to the deepening of their regional integration process and the realization of the objectives of this Agreement.

2. The Parties further recognize that the principles set in Chapter V of this Title to support the progressive liberalisation of investment and trade in services between the Parties provide a useful framework for the further liberalisation of investment and trade in services between CARIFORUM States in the context of their regional integration.

Here, paragraph 2 reinforces the regional integration process. It refers to Title II Chapter V which sets out core elements of a regulatory framework required for the progressive liberalisation of investment. For example, a system committed to the principles of transparency, procedural fairness, and the right of review of administrative decisions. However, Title II, Chapter V of the EPA does not create obligations for the regional integration of CARIFORUM states. Rather, it says only that parties recognize the role of transparency, procedural fairness, and the right of review.

And third, the CARIFORUM schedule on commercial presence also clearly separates the EPA undertakings from “the rights and obligations of the signatory CARIFORUM states arising from obligations under the Revised Treaty of Chaguaramas…, or the CARICOM-Dominican Republic Free Trade Agreement.”

It can be concluded from these references and the effect of the EPA investment provisions discussed in earlier sections, that the investment provisions are unlikely to disrupt regional integration and may provide additional momentum to the process. The EPA does not of itself make it easier for EU investors to enter Caribbean markets, thereby minimizing the most direct impact of increased capital flows crowding out intra-regional flows. Moreover, the investment provisions do not provide preferential access to EU investors over regional investors. The market access and NT commitments provide greater certainty that investment laws in signatory CARIFORUM states will remain consistent in certain sectors. This reduces the chance that investors will be adversely affected by changes to the law.
A positive effect of the Commercial Presence Chapter on regional integration is derived from preparation of the EPA commercial presence schedule. This experience improves the capacity of government officials in the region responsible for identifying sectors to be covered by investment provisions and documenting exceptions to market access and NT. Whilst this improved capacity and expertise should not be overstated - the task is likely to have been the work of a small number of officials - it nevertheless should make preparation of the CIC schedules easier, despite the draft CIC’s additional inclusion of investment protection provisions.

Finally, it is possible the EPA will be implemented before the CIC is concluded and before the CARICOM-Dominican Republic FTA is fully operational. Those CARIFORUM host countries that have committed to binding their laws in certain sectors for EU investors under the EPA may not be required to extend this commitment through an MFN obligation to investors claiming no less favourable treatment under these other agreements. The MFN provision in the CIC is not finalized and does not yet apply. The CARICOM-Dominican Republic FTA has only entered into force in some countries and though there is an MFN provision, the MFN obligation contains an exemption for treatment offered to investors under an existing or future trade agreement. Further study could be undertaken to ascertain whether investors from the Caribbean region already benefit from a binding commitment such as that accorded EU investors in certain sectors bound by CARIFORUM in its schedule.

3. Interim ACP-EU EPAs

3.1 Coverage of investment in the interim EPA agreements and timelines for completion of negotiations

Part II of the study builds on an analysis of investment in the CARIFORUM-EU EPA with a view to developing an understanding of the task ahead for other ACP regions and their policy options on investment. Questions 1 and 2 establish the current position and set out details of how investment is addressed in four interim EPA agreements. In each interim agreement, conclusion of investment negotiations is integrated into a final single outcome and will be part of a comprehensive EPA.

Limitations the EC has on negotiating on investment because of the uncertainty of where competence on this issue rests is equally relevant in analysis of interim EPAs and the ongoing negotiating process in other ACP regions. The possibility that this
uncertainty over competency may be resolved whilst ACP EPA negotiations continue presents a particular challenge for these regions. As mentioned in the introduction, for the meantime, it seems the prospective ratification of the Lisbon Treaty will not resolve this issue.

**East African Community**

The Agreement Establishing a Framework for an Economic Partnership between the East African Community Partner States and the European Community and its Member States (the EAC-EU framework EPA) was concluded on 27 November 2007. The final EAC-EU EPA is to be concluded by 31 July 2009.62

There is no commitment in the framework agreement for an EPA to contain a chapter on commercial presence; however there is a requirement set out in Article 37, the Rendezvous Clause that Parties build on “progress made in the negotiation of a comprehensive EPA text”. This provision, which comprises Chapter V of the Agreement, sets out areas where the parties will continue negotiations and includes trade in services and investment and private sector development.63 The Agreement also includes several other references to investment. The preamble notes the importance of increased investment flows:

*Cognizant that substantial investment are required to uplift the standards of living of the EAC Partner States.*

And Article 2 notes as an objectives of an EAC-EU EPA:

*Establishing and implementing an effective, predictable and transparent regional regulatory framework for trade and investment in the EAC Partner States, thus supporting the conditions for increasing investment, and private sector initiative [and to]*

*reinforce, broaden and deepen cooperation in all areas relevant to trade and investment.*

Article 52 makes the only reference in the Agreement to investment promotion and cooperation:

*[..] the Parties shall endeavour to facilitate co-operation in all areas covered by this Agreement as well as facilitate trade and goods and services, promote investments and encourage transport and communication links [*]
Originally part of the Eastern and Southern Africa grouping that had been negotiating with the EU since 2004, the EAC decided in October 2007 to conclude its own separate EAC agreement. The decision reflects the fact that the EAC has operated as a Customs Union since 1 January 2005.

The EAC has more than 18 months from concluding its interim agreement in which to complete negotiations. Some reports suggest negotiations on the comprehensive EPA are only just beginning. It is unclear whether resumption of discussions signals the start of negotiations on substantive investment provisions, or whether talks were held earlier before the EAC broke away from the ESA-EU negotiations. The ESA-EU EPA joint roadmap established in February 2004 set out an indicative timetable for three phases of negotiations: setting of priorities (March-August 2004), substantive negotiations (September 2004-December 2005), and continuation and finalization of negotiations (January 2006-December 2007). Irrespective of this, the EAC-EU framework EPA commits parties to the aforementioned timetable of 31 July 2009.

If there has been no discussion yet of substantive provisions, July 2009 could pose a challenging target for EAC states. It will be particularly important to leave sufficient time to negotiate and develop the schedules. This is true for negotiations in all ACP regions.

**Eastern and Southern African States**
The Interim Agreement Establishing a Framework for an Economic Partnership Agreement between Eastern and Southern African States and the European Community and its Member States (the interim ESA-EU EPA) includes references to investment issues in several chapters. Chapter IV, Title II Private Sector Development, commits parties to a number of investment promotion goals in Article 40:

\[\ldots\] a) Create an environment for sustainable and equitable economic development of ESA through investment, including Foreign Direct Investment (green field or portfolio), technology transfer, capacity building and institutional support from the EC Party;

b) Provide deeper cooperation with institutions and intermediary organizations dealing with investment promotion in the EC Party, including the CDE and ESA through, inter alia, business dialogue, cooperation and partnership;
c) Support through appropriate instruments, the promotion and encouragement of investment in the ESA region including establishing a framework for funding and assistance to support economic development programmes in ESA;

d) Strengthen and build the capacity of private development institutions such as investment promotion agencies, chambers of commerce, associations and indigenous development organisations in individual ESA States and the region as a whole so as to enable the emergence of dynamic and vibrant private sector; and

e) Develop a legal interim framework that promotes investment by both Parties, with a view to promoting and protecting investment and work towards harmonised and simplified procedures and administrative practices.

Note that the EU was not restricted in setting out investment promotion objectives relating to a broader concept of investment that includes portfolio investment.

Investment negotiations are covered in Chapter V Areas of Future Negotiation. The same Rendezvous clause as used in the EAC interim agreement commits parties to concluding a “full and comprehensive” EPA covering trade in services (assumed to include investment in services sectors), and investment and private sector development. The interim Agreement also looks to promote investment in a number of areas of private sector development: micro-enterprises and SMEs, mining and minerals, and energy.

An ESA-EU EPA must be concluded by 31 December 2008. If the ESA negotiations have not yet started discussing the substantive content of an investment chapter, concluding discussions in time will be difficult. With talks having started in 2004, there should be a good basis for moving ahead with treaty text. Model text along the lines used in the CARIFORUM-EU EPA can usefully be used as the basis of discussions. Given the limited number of investment issues to be included in the EPA (i.e. no investment protection provisions other than a commitment to free transfers, and a narrow establishment-based definition of commercial presence), most time should be spent on market access and preparing ESA schedules. Based on the CARIFORUM outcome, indications are that binding existing investment regulations and identifying sub-sectors where future regulatory flexibility is to be preserved will be the main task for Eastern and Southern African countries.
Southern African Development Community

The Interim Economic Partnership Agreement between the SADC EPA States and the European Community and its Member States (the interim SADC-EU EPA) was initialled on 23 November, 2007. Article 1 includes amongst the objectives of the EPA “(s)upporting the conditions for increasing investment and private sector initiative…”. The agreement establishes a timetable for future negotiations on investment, but only for a subset of countries within the SADC grouping. Title IV, Article 67 Second Stage of Negotiations states:

The Parties agree to continue negotiations in 2008 to extend the scope of the present Agreement. For the purpose of this Title, the SADC EPA States will be constituted of Botswana, Lesotho, Mozambique and Swaziland. The remaining SADC EPA States may join the process of negotiation on a similar basis. To this end, they will notify in writing the EC Party and the other SADC EPA States.

Article 67 also commits the Parties to negotiating an Investment Chapter no later than 31 December 2008. It stipulates that negotiations take into account relevant provisions of the SADC Protocol on Finance and Investment and that the EU provide adequate technical assistance to facilitate negotiations and implementation of the Investment Chapter.

Ghana

The West African region did not reach agreement on concluding an interim EPA with the EU. However, Ghana and the Ivory Coast concluded individual agreements. Here we examine the Agreement Establishing a Stepping Stone Economic Partnership Agreement between Ghana and the EC and its Member States (the interim Ghana-EU EPA).

Article 44 in Title IV (Services, Investment and Trade Related Rules) requires that Parties cooperate to conclude a “global Economic Partnership Agreement between the whole West African Region and the EC” including investment and trade in services. Parties are required to take all necessary measures to endeavour to conclude an EPA between West African countries and the EC and its Member States before the end of 2008. This creates a very limited obligation since other countries in the West African Region are not party to the interim agreement and are therefore not bound to take “all necessary measures” to finalise the EPA. Article 44 does not entertain the possibility of concluding a Ghana-EU EPA.
Article 74 (Outermost regions of the European Community) paragraph 1 refers to investment promotion:

 [...] the Parties shall endeavour to facilitate co-operation in all areas covered by this Agreement as well as facilitate trade and goods and services, promote investments and encourage transport and communication links between the outermost regions and Ghana.

The West Africa - EU joint roadmap was adopted in March 2004. In the first phase of negotiations, from 2004 until October 2006, one of the five negotiating technical groups looked at services and investment. In October 2006, the West African region decided to proceed to the second phase of negotiations focusing on the text of the agreement. According to the report of the meeting of chief negotiators in February 2007, it was agreed to begin the next phase of negotiations immediately, namely drafting the EPA legal text and negotiating market access offers. It is unclear what progress on drafting investment provisions was made during 2007. Negotiations on investment and the entire EPA will not be concluded in 2008 if the West African grouping is unable to quickly come together and support the principles outlined in the interim agreements of Ghana and the Ivory Coast.

3.2 Extent of liberalisation and implications

The four interim EPAs analysed contain no requirements regarding the nature or extent of investment liberalisation commitments to be included in final EPAs. For example, the interim EAC-EU EPA only requires that parties conclude a comprehensive agreement and continue negotiations on investment and private sector development in pursuit of this aim. And the interim ESA-EU EPA requires negotiating a full and comprehensive agreement including investment that builds on the Cotonou Agreement and takes account of progress made in EPA negotiations to date.

The Cotonou Agreement, the founding treaty governing the trade and investment relationship between the EU and ACP regions, also contains no guidance on the nature or level of investment liberalisation to be undertaken. Rather, it focuses on the two other objectives of investment treaties: investment protection (Article 78) and investment promotion (Article 75). These objectives are commonly addressed through BITs negotiated by EU Member States, so it is curious that these issues are taken up under the competence of the European Community. Articles 75 and 78
both include a caveat that taking action to promote and protect investment must be “within the scope of their respective competencies”. We are left to assume negotiators of the Cotonou Agreement hoped the EU might have resolved the question of investment competency sooner. Instead, the CARIFORUM-EU text is light on protection and promotion provisions, but takes up the issue of investment liberalisation, not directly mentioned in the Cotonou Agreement in the context of non-services sectors. As it has eventuated, further liberalisation of CARIFORUM investment laws through the EPA is moderate and is primarily achieved by binding the existing investment framework, rather than amending and lowering CARIFORUM states’ domestic investment laws.

Finally, the Cotonou Agreement’s provisions on services include mode 3 commercial presence, and Article 41.4 does identify liberalisation of services as a goal for the EPAs:

_The Parties further agree on the objective of extending under the economic partnership agreements, and after they have acquired some experience in applying the Most Favoured Nation (MFN) treatment under GATS, their partnership to encompass the liberalisation of services in accordance with the provisions of GATS and particularly those relating to the participation of developing countries in liberalisation agreements._

Two markers to this requirement are set out: that such action need only be taken after Parties have acquired some experience in applying MFN treatment under GATS, and that liberalisation is to be in accordance with those GATS provisions relating to developing country services liberalisation. This wording provides negotiators in the ACP regions with significant flexibility in determining the level of liberalisation of investment in services they agree to.

**Endnotes**

1 Ghana and Cote d’Ivoire are members of the West African region. Both concluded individual interim agreements with the EU in the absence of a consensus position for a region-wide interim agreement.


3 See proposed Article III-217.

4 Vis-Dunbar, *supra*, footnote 2.

5 Article 4.

6 Articles 7 and 9 respectively.

7 Article 6.
Title III Current Payments and Capital Movements, Article 2 Capital Movements.

Article 5, footnote 7.

Article 4.

Articles 7 and 9 respectively.

Article 6.

Title III Current Payments and Capital Movements, Article 2 Capital Movements.

Article 5, footnote 7.

The latter is covered in Part V Institutional Provisions.

Article 4.

Article 3 bis.

Article 3.


Market access is frequently only applied to trade in services, rather than all foreign direct investment flows.


On fair and equitable treatment see T. J. Westcott, ‘Recent Practice on Fair and Equitable Treatment’, the Journal of World Investment and Trade, Volume 8, Number 3, June 2007.


Article 60, paragraph 2(f).

UNCTAD, supra, footnote 18.


This revised version was provided by CRNM on 28 March 2008.

Note that the schedule does not mention that non-conforming measures listed are reservations against the provisions on market access or national treatment. However, Article 8 (List of Commitments) states: “and, by means of reservations, the market access and national treatment limitations applicable to commercial presences and investors of the other Party in those sectors are set out in lists of commitments…”

For example, “Forestry and Logging: DMA, VCT: The State reserves the right to adopt or maintain measures on investment in this sector.”

Email to the author from CRNM, 4 April 2008.

Set out in the preceding paragraph of Article 9.1

This type of exception to MFN is known as the Regional Economic Integration Organisation (REIO) exception.

“…Where any Signatory CARIFORUM States or the EC Party is in serious balance of payments and external financial difficulties, or under threat thereof, it may adopt or maintain restrictive measures with regard to trade in goods, services and establishment. […]” (Part VI, Article 8.1)

The CARIFORUM grouping comprises 15 countries. The Caribbean Community
(CARICOM) originally established in 1973, is made up of 14 countries. The Dominican Republic is a member of CARIFORUM but not CARICOM, Montserrat is a member of CARICOM but not CARIFORUM, and Haiti is a member of CARIFORUM but not CARICOM.


Article 147 Promotion of Investment, and Article 149 Article 149 Measures Relating to the Right of Establishment.


Ibid.

Ibid.

http://www.sice.oas.org

CRNM, supra, footnote 31.

If the disciplines were assumed to apply to all investors and investments, existing non-conforming measures would be in breach of the treaty.

“Article VII- Investment: The Parties agree to promote and facilitate investments within the Free Trade Area through the provisions contained in the Agreement on Reciprocal Promotion and Protection of Investments that appears as Annex III.”

Article II states that further negotiations on admission and promotion are to take place after entry into force. These haven’t taken place yet.

In the protocol implementing the FTA, Article V indicated market access negotiations for services were to commence in 2000 and were to conclude by the indicative date of 30 June 2001.

The model BITs of several countries, most notably Canada and the United States, have been revised in recent years to include the pre-establishment phase and incorporate schedules.

Articles 5 and 7.

Article 13.

Article 14.

Article 12.

There is no requirement that the company undertake economic activity as was required, for example, under the CARICOM-Costa Rica FTA.

Article 1.

Article 1.

Article 4.

Article 5.

See the CRNM Fact-Fiction series: <http://www.crnm.org/epa_fact_fiction3.htm>

CRNM, supra, footnote 31.

Title II, Articles 25 and 26. Other provisions in Chapter V relate primarily to services sectors.

Paragraph 4, Annex 4.V

See section 1.2.2.2, above.

Annex III, Article III.3, CARICOM-Dominican Republic FTA.

Article 3.2

Article 37 d) and e)ii.

Article 53.

Article 5.2 states: The Parties undertake to complete negotiations with a view to concluding a comprehensive EPA, no later than 31 December 2008, including on subject matter listed in paragraphs b) and c) according to the Agree Joint Road Map adopted by the Parties on 7 February 2004.

Article 67 II.a)

Details of the SADC Protocol were not identified during research for this study.

Article 67 II.b)

http://ec.europa.eu/trade/issues/bilateral/regions/acp/regneg_en.htm

Article 37, Agreement Establishing a Framework for an Economic Partnership Agreement between the EAC and EU.

Article 53, Interim Agreement Establishing a Framework for an Economic Partnership Agreement between the ESA and EU.

Article 78 Investment Protection:

1. The ACP States and the Community and its Member States, within the scope of their respective competencies, affirm the need to promote and protect either Party’s investments on their respective territories, and in this context affirm the importance of concluding, in their mutual interest, investment promotion and protection agreements which could also provide the basis for insurance and guarantee schemes.

2. In order to encourage European investment in development projects of special importance to, and promoted by the ACP States, the Community and the Member States, on the one hand and the ACP States on the other, may also conclude agreements relating to specific projects of mutual interest where the Community and European enterprises contribute towards their financing.

3. The Parties also agree to introduce, within the economic partnership agreements, and while respecting the respective competencies of the Community and its Member States, general principles on protection and promotion of investments, which will endorse the best results agreed in the competent international fora or bilaterally.

Article 75 Investment promotion: The ACP States, the Community and its Member States, within the scope of their respective competencies, recognising the importance of private investment in the promotion of their development cooperation and acknowledging the need to take steps to promote such investment, shall: […] (b) take measures and actions which help to create and maintain a predictable and secure investment climate as well as enter into negotiations on agreements which will improve such climate; […]

On implementation of Article 78 and investment protection provisions, see also Annex II Chapter V Investment Protection Agreements, Article 15.
Analysis of the Economic Partnership Agreement Process: Investment Negotiations in the EAC-EU EPA

Francis Mangeni

The framework Economic Partnership Agreement initialled by the five East African Community Countries¹ and the European Commission on 27 November 2007 provides for continuation of negotiations in, among other areas, investment.² This case study on the East African Community (EAC) builds on the results of an analysis of the CARIFORUM-EU EPA text in order to arrive at conclusions and policy options for the ongoing EPA negotiations between EAC and EU relating to foreign direct investment and commercial presence.³
1. Economic integration in the East African Community

Attraction of sustainable foreign direct investment to supplement local investment is already a key development strategy of EAC, and in this regard, EPA negotiations may offer another opportunity to explore additional mechanisms consistent with the ongoing regional integration processes. Economic and political integration through building a strong community is the overarching strategy that the people of East Africa are pursuing in this regard, as a response to limited market size that doesn’t provide the economies of scale for large-scale investment, faced by the individual partner states in a rapidly globalising and competitive world. As limited market size and opportunities limit the prospects for generation of local and foreign direct investment, enhanced access to the EU market under the EPA can constitute a significant incentive for investment into the EAC region, for investment from any source, including local and non-EU investment, which specifically seeks to utilise such improved access to the EU market.

Therefore the Treaty establishing the EAC sets the objectives of the community to be “to develop policies and programmes aimed at widening and deepening cooperation among the Partner States in political, economic, social and cultural fields, research and technology, defence, security and legal and judicial affairs, for their mutual benefit”. The broad stages of the gradual and deeper integration of the East African Community, in order to build a sizeable economic space to support the generation of investment, are the formation of a customs union (formed on 1 January 2005), a common market (to be formed on 1 January 2010), a monetary union (to be formed by 2012), and political federation (proposed shortly thereafter). Negotiations for the common market have commenced in earnest, on the basis of a draft for the protocol, commissioned by the secretariat; the negotiations are to be completed by June 2009. According to the Treaty and the draft protocol, the common market will be characterised by free movement of goods, services, labour, and capital; and recognition of the right of establishment and residence. These traditional four freedoms and the right of establishment would mean the establishment of a large single market that would be attractive to investment into the EAC region.

The mission of the East African Community has been formulated as follows: “to widen and deepen economic, political, social and cultural integration in order to improve the quality of life of the people of East Africa through increased competi-
tiveness, value added production, trade and investment”. This is in pursuit of the vision of: “a prosperous, competitive, secure and politically united East Africa”. From this mission and vision, development is a fundamental goal of the community. The elements of achieving this goal include the promotion of “competitiveness, value addition, trade and investment”.

The community operates on the basis of periodic development strategies; the current one being the EAC Development Strategy of 2006 to 2010, succeeding the development strategy of 2001 to 2005, which succeeded the first strategy of 1997 to 2000. In the area of trade and investment, a key achievement of the second strategy was the successful negotiation and launch of the customs union on 1 January 2005; and a key element of the 2006-2010 strategy will be the completion of negotiations and the launching of the common market on 1 January 2010. The development strategies cover all the key priorities of the community. The action matrix of the 2006-2010 strategy covers 30 areas, including those related to investment, such as infrastructure, macroeconomic convergence, capital markets, development of competitive supply capacities, science and technology, human resource development, health, education, environment and natural resources, urban development and housing. For instance, improvement of infrastructure, macroeconomic stability, health and education, assists in generation of investment. Key location advantages that investors value highly include, among others, good infrastructure, availability of local skilled labour supported by appropriate education and training, and economic and political stability. In addition, resource-seeking investment will be drawn to the abundant natural resources in the region.

Against this background, the continuing EPA negotiations should fully take the ongoing regional integration processes into account, and promote the rapid achievement of the objectives of the East African Community, as clearly articulated in the constitutive treaty, the vision and mission, the programme for the common market, and the development strategy. EPA negotiations, including in the area of investment, should primarily aim to support the ongoing integration process. In practical terms, this requires that important development and trade partners, such as the EU, give due priority to supporting the consolidation of the customs union, the successful launching and operation of the common market in all the key areas including services and investment, infrastructure building, training, and political and economic stability. While such support may be expected to take the form of development cooperation, specific EPA provisions could assist through recognising
and supporting the integration process, and giving the consolidation of the EAC common market due priority as a main objective to be served by any liberalisation under the EPA.

2. Approaches to international investment rules

A vigorous debate has raged for years on the best approach to international rules on investment. This debate will continue to inform the key issues arising in investment negotiations and may provide draft instruments that could be sources of legal text in formulating investment rules, including in the context of EPAs.

The early 1970s saw the adoption of UN resolutions on the rights and duties of states, and on sovereignty over natural resources, but these were only soft law and their credibility was undermined by the refusal of major western countries to support them. In 1982 negotiations within the UN Commission on Trans-national Corporations started on a Code on Regulation of Trans-national Corporations. The negotiations produced a draft code containing two major sections: one on obligations of the corporations and the other on their rights and corresponding government obligations. The draft was not adopted and the exercise was abandoned after about 10 years; mainly due to the refusal of developed countries to accept the proposed regulation and obligations on trans-national corporations.

Under the Uruguay Round negotiations under GATT 1947, which ended in April 1994, developed countries had demanded introduction of investment and other related rules. The Uruguay Round negotiations resulted in the General Agreement on Trade in Services, covering investment in the services sectors, and the Agreement on Trade-Related Aspects of Intellectual Property Rights, protecting intellectual property. Only a limited short agreement was concluded on investment rules, namely, the Agreement on Trade Related Investment Measures. The other outcome was an effective dispute settlement and enforcement system, which underpinned all the WTO agreements. Investor protection as well as market access and national treatment outside the services sectors are not covered by the WTO agreements and also not by the ongoing WTO negotiations. Also, the 1990s saw a fresh attempt, this time within the framework of the OECD, to elaborate a Multilateral Agreement on Investment. The draft agreement aimed to give pre and post establishment rights to multinational corporations, and has been the template for subsequent attempts at international investment rules. However, the negotiations collapsed and work on the draft was stopped.
At the same time, at the WTO Singapore Ministerial Conference of 1996, developed countries strongly brought up the matter of the new issues of investment, competition, public procurement, trade facilitation and labour. On labour, the ministerial conference agreed that this issue should be addressed by the International Labour Organisation and not the WTO. Working groups were established on investment, competition, public procurement and trade facilitation to undertake a study process. On 31 July 2004, the WTO General Council finally agreed to remove the issues of investment, competition and government procurement from WTO negotiations, with active leadership of the European Commission following the failed WTO ministerial conference at Cancun the previous year. This was the time when EPA negotiations with the regions were getting off the ground; the EC wasted no time in raising these very issues as key priorities in the EPA negotiations.

This quite long history of largely unsuccessful attempts to negotiate binding international investment rules should be rather alarming and ground for caution and careful analysis before any rules are agreed in the EPA negotiations. The attempts provide a wealth of experience on negotiating international investment rules that can be built upon. Major offensive interests of developed countries like the EU, are now fairly well known, and major defensive and offensive interests of developing countries, such as the EAC countries, are also fairly well known.

There have been three camps in the EU:

- the offensive investors (i.e. seeking liberalization essentially for EU investors to the same degree as competing US/Canadian investors);
- those, who rejected negotiations of all trade related issues altogether, either for defensive EU reasons or for the sake of not overtaxing ACP implementation capacity; and
- those who wanted trade related issues negotiated essentially for the sake of regional integration; i.e. regulation of the TRIs, including liberalization within the ACP-regions (depending on status of development) where possible.

The international political economy has been changing, from the era of the new international economic order of the 1970s, which provided the backdrop for UN resolutions on the rights and duties and states and sovereignty over natural resources as well as to initiating work on regulation of trans-national corporations; to the triumph of economic liberalism and the Washington consensus of the 1980s and
early 1990s, giving the conditions for abandoning work on regulation of trans-national corporations and initiating negotiations on comprehensive international investment agreements covering pre and post establishment rights for investors; to the globalisation-discontent among governments and opinion leaders, and to the civil society movements, that characterise current trade and investment negotiations.

The political economy of our times, with the development impetus once again, the identification and listing in the MDGs of key challenges facing the world, the international attention on Africa to assist its rapid social economic development: these factors provide suitable conditions for addressing this issue of international investment rules, albeit in the limited framework of the EPAs.

3. Development concerns in international investment negotiations

A starting point is that opponents of international investment rules don’t oppose initiatives to attract FDI and to generate local investment, as the positive role of FDI in social economic development is widely accepted. Rather, they have key concerns they want taken on board, particularly the right of governments to regulate FDI in the best interests of the country including future populations.

A catalogue of concerns could include the following:

- While FDI is important, it can have serious adverse effects. Sustainable development is better based on generation of domestic savings and local investment, to which FDI can be an important supplement.
- FDI volatility can cause financial crises and set back important development gains. Footloose and speculative investment can contribute to major financial crises due to sudden and unexpected outflows. Regulation by government and monitoring by regional and international financial institutions is necessary as well as appropriate safeguards on current and capital account liberalisation.
- Negative financial and trade effects of FDI should be carefully managed, particularly the resource outflows that result in lost capital to host countries through repatriation of returns and importation of intermediate and capital goods, which can also cause balance of payments problems.
- Addressing these effects requires strong export performance by FDI and that the growth of domestic investment should exceed FDI; as well as joint
ventures, concentration of FDI in export industries, increasing use of local resources, macroeconomic and political stability in host countries.

- Environmental and natural resource costs, as well as concerns of inequitable growth, should be addressed through more transparency, accountability, and corporate social responsibility on the part of investors and through stronger regulation to assist ensure sustainable development and the protection of the long-term best interests of present and future generations.

- Appropriate exceptions should be in place, including restricted sub-sectors and industries that are not open to FDI; regulation of mergers and acquisitions and a dominant position; controls on equity participation; protection or promotion of SMEs, infant industries and important domestic industries; and balance of payments measures.

- The regulation provisions and obligations set out in the draft UN Code on Trans-national Corporations should be taken into account, rather than an approach that gives investors rights without duties and obligations to ensure the best interests of all stakeholders particularly the local communities and future generations. Obligations on investors should include respect for national laws and compliance with economic goals as well as the development and social-cultural objectives of host countries, transfer of technology and environment protection, respecting human rights, abstaining from corruption as well as anti-competitive practices and transfer pricing, and abiding by applicable disclosure requirements.\(^\text{12}\)

- To enhance development prospects, appropriate transition periods should be included for phasing in the liberalisation process, capacity building programmes to strengthen regulatory and investment promotion institutions should be built in, and speedy and flexible dispute settlement particularly mediation and conciliation rather than litigation and arbitration.

- Language used in the legal text should be carefully scrutinised to have precise rights and obligations that increase prospects for the contribution of investment to sustainable development, and in order to avoid unnecessary disputes. Some African regional economic communities have already elaborated regional investment regimes that attempt a balanced approach to attraction of FDI.
4. The African Union and the Singapore issues

In their Cairo Declaration of 9 June 2005, African Union Trade Ministers agreed that negotiation of rules on the Singapore issues should be kept out of the EPA negotiations except trade facilitation.\(^\text{13}\) This issue came up again when they met the following year on 14 April 2006 in Nairobi. In their Nairobi Declaration on EPAs, they re-affirmed their Cairo position but went further to agree that the African regional economic communities may adopt regional frameworks and instruments on the Singapore issues, including investment, within the context of the regional and continental integration processes.\(^\text{14}\)

This meant that the regional economic communities could adopt instruments such as the SADC Finance and Investment Protocol or the COMESA Agreement on a Common Investment Area. Regional investment instruments are core pillars of regional common markets. The EAC common market will need investment rules, in the form of rules on recognition of the right of establishment and residence, and on free movement of capital, services, labour as well as goods; which will assist to promote the EAC as a common investment destination.

In the context of the long history of opposition to investment rules, the African Common Position of elaborating regional investment regimes in the framework of the broader integration process of creating African common markets should be welcome. EPA negotiations could assist this approach by strengthening the regional regimes through development cooperation and attraction into the African regions, such as the EAC, of FDI that seeks to benefit from the regional common markets and the global export markets created by the EPAs and other initiatives. This would mean that due preference be given to establishment of commercial presence in the EAC region in a manner that generates adequate multiplier effects within the region.

5. Investment rules under the Cotonou Agreement

The Cotonou Agreement was concluded on 23 June 2000, in the heat of the WTO debate on whether or not to negotiate investment rules. The Seattle ministerial conference had just collapsed the previous year in 1999. While the EU advocated for the adoption of investment rules in the WTO, ACP countries together with other developing countries opposed this. The Cotonou Agreement provisions reflect this state of flux, as well as the negotiating mandates on EPA negotiations. What was
agreed was that the negotiations on international investment rules in EPAs would simply endorse and follow the outcome at the multilateral level. In addition, the Cotonou Agreement established important investment facilities, which ACP countries have continued to seek implementation of.

Regarding endorsement of the multilateral outcome, it may be considered remarkable that after the Singapore issues, except for trade facilitation, were dropped out of the WTO negotiations by the General Council Decision of 1 August 2004, this outcome was not endorsed in the EPA negotiations; rather, the European Commission has continued to insist on negotiating these issues in the EPAs. The EPA Negotiating Directives to the EC of 12 June 2002, which include reference to Article 78 that deals with investment, clearly state that:

*EPAs will reconfirm the respective commitments undertaken in the framework of the Cotonou Agreement [Articles 45 to 51 and 78 of the Cotonou Agreement], in particular with regard to competition policy, protection of intellectual property rights, standardisation and certification, sanitary and phytosanitary measures, trade and environment, trade and labour standards, consumer policy and protection of consumer health. These provisions will be reviewed in the light of the results of the forthcoming multilateral trade negotiations.*

Specifically on investment, the Directives state that:

*In accordance with the objective of “reducing and eventually eradicating poverty consistent with the objective of sustainable development” (and with regard to articles 1, 29, 75 to 78, and to Annex II of the Cotonou Agreement) the parties agree to establish, while respecting the respective competencies of the Community and its Member States, a regulatory framework which shall enhance and stimulate mutually beneficial sustainable investment between them. This framework will be based on principles of non-discrimination, openness, transparency and stability and on general principles of protection, which will endorse the best results agreed in the competent international forum or bilaterally.*

As is well known, however, ACP countries have not maintained a common approach to negotiation of investment rules. The ACP common position has been that the EC should not press regions that are unwilling to negotiate investment issues, but regions willing to negotiate these issues may go ahead. It is this position
that the EU General Affairs and External Relations Council has also adopted. The conclusions of 15 May 2007 state that:

*The Council recognizes the various levels of development and integration within the six EPA regions, recalls the ACP countries’ rights to regulate services and investment and supports, a flexible and phased approach in trade-related areas. In this context, the Council emphasizes that the EU shall not pursue any particular market access interests.*

To this end, then, the CARIFORUM group went ahead and negotiated investment rules with the EC, resulting in the chapter on investment.

In Africa, the SADC group agreed in the interim EPA to go ahead and negotiate a chapter on investment drawing on the SADC Finance and Investment Protocol. Other regions, including the EAC, have also stated that they can negotiate investment rules. Negotiation of rules may contravene the Common African Position against negotiating rules on the Singapore issues, unless the negotiations are limited to development cooperation in two important ways; first by supporting the regional investment frameworks or instruments, which contain regional rules; and secondly by supporting the development of the private sector at the national level through technical and financial cooperation.

At the Dialogue between ACP Ministers and EU Development Ministers held on 13 March 2007 in Bonn, hosted by Germany as EU President, the Ghanaian Minister, speaking on behalf of ACP countries, recommended the following approach to investment:

- Adoption of regional investment codes
- Reduction of transaction costs, such as for company registration
- Building strong infrastructure
- Supporting macro economic stability, including through debt relief
- Promoting full market access to EU markets, including through removing non-tariff barriers
- Strengthening ACP institutions such as the Centre for Development of Enterprises
- Expanding the mandate of the European Investment Bank to extend credit facilities to SMEs.
6. Implementation and adjustment needs and costs

Key needs of EAC countries in the area of investment include the following:

- Audit of all EAC applicable laws, regulations and policies in order to ascertain the effect of the national treatment non-discrimination obligations and rights, and the revisions and amendments that would need to be undertaken in order to comply with EPA rules
- Audit of all BITs and other related agreements to ascertain the legal and institutional relation between EPA investment rules and BITs, particularly the implications of the MFN clauses if extended to BITs
- Audit of all EPAs entered by the other 5 ACP regions and of the WTO outcomes for comparison and contrast in order to better appreciate the global context for implementation of the agreements, and in order to periodically review the EPA rules to make improvements
- Capacity building for negotiators and implementers of the agreement, particularly to strengthen the capacity to utilise the development flexibility in the rules and to promote compliance with the main obligations imposed on host countries
- Strengthening the legal and institutional capacity and readiness to redress any breach of the rules
- Building of requisite modern physical and social infrastructure in order to remove or reduce high production costs, inaccessibility, and the bad image associated with infrastructure bottlenecks
- Establishment and strengthening of national and regional investment regulatory and promotion authorities that can effectively assist in FDI inflows
- Support for the enhancement of the international competitiveness of the regional and national economies and particular industries so that products can be produced and offered for sale at competitive prices, and so that the products can be of good quality that meets applicable health and technical standards, and can be produced in sustainable quantities that meet growing demand
- Supporting small and medium size enterprises, which constitute the backbone of manufacturing industries in EAC countries, through programmes that address their specific constraints such as those relating to access to credit, market information, and exportation and retailing facilities
- Modernisation of commercial laws and regulations through enactment of new laws and amendment of existing ones, as appropriate, as well as establishment and strengthening of judicial mechanisms for protection of property and speedy resolution of disputes
- Promotion of technology and skills transfer and sharing, through effective mechanisms such as active information and dissemination programmes, licensing, training, attachments, partnerships, and strengthening and modernisation of EAC engineering and technology institutions
- Accumulation of business, management and legal skills in order to address capacity constraints in the private sector and in government relating to successful running of investments and utilisation of available flexibility in agreements as well as successful enforcement of rights and obligations in dispute settlement

It is well to recall that the interim ESA-EU EPA has an extensive chapter on development in which provisions on investment and private sector development are included as areas of cooperation. The agreement of the EC negotiators to these provisions in the ESA-EU EPA provides a strong starting point for negotiating them in the EAC-EU EPA as areas of cooperation, and giving this approach and these areas appropriate prioritisation over investment rules. It should therefore remain an important offensive interest of EAC countries to prioritise development cooperation in the area of investment over investment rules.

At the conclusion of the negotiations, there might be unfinished business or even a built-in programme for continuation of certain areas of the negotiations. In that case, there would be needs for due completion of the negotiations, such as preparation of any outstanding schedules of commitments.

Though not necessarily indicated in the agreement, there is usually need for institutional reforms when new agreements are to be effectively implemented and complied with. New institutions need to be set up or existing ones strengthened with new divisions and additional staff. At the regional level, the EAC secretariat would also need to beef up the relevant departments in order to effectively service the new items of investment under the EPA. Technical and financial assistance could be helpful in such cases.
7. Defensive interests

The EAC countries all have active FDI promotion and attraction programmes. To this end, they have domestic investment laws offering attractive incentives, and identifying priority investment areas. They have established investment authorities and centres for facilitating the entry, establishment and operation of investment. Accounts are that these measures have resulted in increasing inflows of FDI and generated local investment. EAC countries have important defensive interests in this regard, particularly to maintain the momentum of openness, FDI inflows and local investment generation. Under the existing domestic frameworks, governments have maintained policy space for formulation and implementation of development and public policy programmes. This policy space should be reasonably protected to permit appropriate governmental measures. For instance, at the Singapore Ministerial Conference of December 2005, WTO members agreed that least developed countries may for given periods of time introduce trade-related investment measures otherwise inconsistent with the TRIMs Agreement. Such measures may include those in the illustrative list attached to the TRIMS Agreement. Other methods include those agreed in the CARIFORUM-EU EPA, such exclusions and exceptions of sectors or sub-sectors, conditions to the limitations that are otherwise prohibited; in effect resulting in rules that reflect existing levels of liberalisation, the binding achieved being a major concession.

According to the EAC common market draft protocol on the basis of which negotiations are proceeding, the right of establishment should be recognised for nationals of the partner states as well as companies incorporated under the laws of the partner states and having their office and place of business within a partner state. The right of residence for undertaking economic activities is also to be recognised for nationals from other partner states. Under free movement of capital, the partner states are to liberalise their current and capital accounts, and discrimination based on place of investment of capital is to be prohibited. These are important proposals that should be carefully explored, so that a single market can be established among EAC countries when the common market is launched. In the EPA negotiations, in accordance with these proposals if adopted, and in order to preserve and strengthen the common market, companies registered in an EAC country should benefit from these provisions, particularly if investment is defined to limit it to foreign direct investment and establishment of commercial investment, and exclude speculative investment. Also, through appropriate exceptions, the treatment accorded to EAC
investors, whether of local or foreign, need not be automatically extended to EU-based investors; and this can be achieved through a relevant exception, as has been done in the CARIFORUM-EU EPA.

Again at the regional level, under COMESA, negotiations for the Agreement on the COMESA Common Investment Area have been finalised. This agreement is relevant because four of the five EAC countries are COMESA members, and creation of the common investment area is in practice likely to benefit all the EAC countries. The agreement contains development objectives; investor obligations though these are limited to compliance with domestic measures; investor rights of market access, fair and equitable and non-discriminatory treatment; protection of assets; and dispute settlement mechanisms. The agreement applies to “COMESA investors” defined to be natural or juridical persons of a member state; juridical persons owned or controlled by non-nationals qualify as COMESA investors if they maintain “substantial business activity” in the member state where the initial investment was made. The EPA negotiations should recognise and support these provisions. Also, as with the EAC, an appropriate exception in the EPA can be to the effect that EU-based investors, who are not COMESA investors, will not automatically benefit from the COMESA investment agreement, drawing on a similar exception in the CARIFORUM-EU EPA.

Various international and other soft law instruments have together contributed to awareness of the need for foreign investors to be good corporate citizens having corporate social responsibility. These include the UN Global Compact and the initiative on transparency in extractive industries, as well as the OECD guidelines on multinational enterprises. Globalisation has sensitised consumers to production processes, human rights, environmental protection and the rule of law, which have together contributed to the importance of a good corporate image for multinational enterprises. EPA negotiations should recognise and support such instruments.

Surveys of recent trends in investment have made important findings. A key finding has been that south-south investment flows are on the increase. In Africa, including EAC countries, investment flows from South Africa and Nigeria, and from China, India and Brazil have increased much faster than the growth in FDI inflows from traditional sources. The recent UNIDO survey of investment in Africa found that:

*There is a new generation of growing, high quality, value creating investors from the South with diverse qualities. Some have regional markets in*
mind, some are from within the region, and others are from outside the region but are not subsidiaries of large TNCs. This group could contain the seeds of a new generation of investors that begins to transform the approach of the region to leveraging FDI for development.  

The survey found that these investors considered the following factors to be important, in the following order of ranking:

1. Economic stability
2. Political stability
3. Physical security
4. Local market
5. Skilled labour

Investors from the new sources, tend to contribute significantly to achievement of important public policy objectives, such as generation of employment opportunities though their rates of pay remain lower than the rates given by enterprises from developed countries. At the continental level, partnerships with the emerging powers of Brazil, China, and India are under active exploration and summits have been held with each of the three countries separately, which have produced action plans on cooperation including in the area of investment. The EU has proposed a tripartite arrangement, in order to be part of the dialogue between Africa and China. New sources of FDI, particularly from the rapidly growing economies of China and India should be actively promoted. EPA negotiations should not hinder these new sources but should encourage them, perhaps as other donor sources to supplement resources and capital inflows from Europe.

8. Offensive interests

Like most countries, EAC countries have the primary offensive interest of attracting appropriate FDI that will support rapid social economic development. Initiatives to attract FDI take various forms. At the national level, they include publicity of location advantages and promotion of a good image for the country. They include participation in trade fairs and business forums, and offensive missions by government officials at the highest political level to important countries that could be sources of FDI. They entail also establishment of investment liaison offices in countries that are potential sources of FDI. These initiatives are replicated at the regional level in the EAC, which is internationally marketed as a common investment area. In EPA negotiations, a primary offensive interest will be to attract EU investors into
the EAC countries. EPA provisions on investment should therefore adopt a broad approach that goes beyond rules, to mechanisms for promotion of a good image for the EAC countries as attractive investment destinations. EPAs could support investment promotion initiatives undertaken by EAC countries through the investment promotion agencies. On the EU side, the member states will also be signatories and parties to the EPA, and in this regard could undertake measures within their competence to encourage enterprises based in their territories to undertake investment in EAC countries.\textsuperscript{28}

8.1 Substantive rules

In terms of the rules themselves, EAC countries should be expected to pursue the following offensive interests:

- Use of a positive-list or list-in approach on the basis of the WTO GATS model, as agreed by the EU in the CARIFORUM-EU EPA and as required in the Cotonou Agreement; the NAFTA agreement adopts a negative-list approach in order to attain the widest possible liberalisation, but this approach is not provided for in the Cotonou Agreement or in the negotiating mandates, nor even in the WTO proposals that have now been abandoned

- A narrow rather than expansive definition of “investment” in order to assist clarity of scope and obligations and to cover only genuine investment; wider definitions can lead to overly volatile and speculative investments, with adverse consequences for social economic stability in host countries

- Definition of “investment” to require substantial business activity in the EAC region, with some modification for EAC investors into Europe to reflect the fact of the small size of EAC investors, in order to avoid fraudulent shells also qualifying as investments; without the requirement, brief case companies can be paraded as investors, which can get important concessions and long term contracts which if breached could have adverse consequences, for instance, contracts for provision of utilities such as energy and water

- Refusal of the MFN clause requiring extension to the EU of the better treatment extended to other countries; preference instead could be made for limiting the MFN clause to major economies, but if this approach is taken, there should be an additional clause requiring the EU to always match the better treatment offered to the EAC countries by any major economy and appropriate exceptions
Clear definition of “like circumstances” in order to clarify the scope and meaning of the MFN treatment and national treatment obligations

Appropriate limitations on national treatment in sectors liberalised, in order to preserve or enhance the role of government regulation for achievement of important public policy objectives such as support for SMEs; and insistence on allowing a reasonable degree of performance requirements in order to promote linkages into the economy and generate multiplier benefits, in accordance with the exceptions agreed at the Hong Kong Ministerial Conference

Restriction of a fair and equitable treatment obligation to the customary international law standard for protection of aliens; so that the obligation is not expansively interpreted to require better treatment for foreigners and to stretch the scarce resources of EAC governments

Imposition of clear and appropriate obligations on investors in order to assist them be good corporate citizens and promote a good international image, which should be good also for the region

Provisions on security and general exceptions, as well as specific exceptions for balance of payments difficulties and promotion of infant industries and preserving the right of government to regulate investment for achievement of important development and public policy objectives in accordance with national and regional laws and programmes

Ensuring simple and flexible dispute settlement procedures; the arbitration procedures under the CARIFORUM-EU EPA could be improved upon by, for instance, requiring open public hearing, publication of dissenting opinions, expanding the range of expertise for arbitrators, and establishing a dispute settlement resource or facility to assist EAC countries effectively enforce their rights or defend themselves

Attracting long-term and sustainable investments, rather than footloose or even speculative investors, which assists in retention and accumulation of national and regional investible capital stocks, promoting social economic development

Through WTO-consistent measures and where practicable, the right to prioritise and direct FDI into key growth sectors and industries, such as the pharmaceutical, agro-processing and extractive industries as well as energy, livestock, edible oil, foods and beverages, leather, dairy products, packaging, iron and steel, metal and metal products, building and construction, and storage
Taking a common approach to attracting FDI, and avoiding a race to the bottom in competing for FDI by generous incentives given by individual partner states under their investment laws

Helpful drafting language for these offensive interests can be found in some bilateral investment agreements but particularly, for the EAC, in the draft for the Agreement on the COMESA Common Investment Area as well as the ESA-EU EPA chapter on development. The SADC-EU EPA chapter on development also provides useful drafting language on development cooperation.

8.2 Lessons from the CARIFORUM-EU EPA

It can be expected that EU negotiators will seek to secure from the other regions at least the same deal as contained in the investment chapter of the CARIFORUM-EU EPA. The analysis this paper builds on has pointed out the development flexibility in that chapter and made recommendations for improvements the other regions the other regions could seek. In addition, it is recommended that the EAC countries should ensure that shortcomings of that chapter are not included in the investment chapter that the EAC region may finally agree to.

Whereas the EPA provisions would only constitute a binding of current liberalisation levels, the provisions respond to the EU feeling that their BITs and trade agreements have in the past not been as ambitious as those that competitors such as USA and Canada have entered. The EPA provisions therefore aim to actually go beyond current levels of liberalisation under BITs and domestic laws and policies, particularly by restricting performance requirements and requiring commitments in key areas of interest to EU investors, including natural resources. The EPAs initiate the automatic extension of the best available treatment accorded to major economies in future, to EU investors. In terms of achieving a balanced outcome then, this means that the EAC countries should agree to an investment chapter if it equally addresses their priorities and concerns, particularly in supporting the integration process in accordance, for instance, with the 2006-2010 development strategy and the common market programme; and if it will equally address concerns all along expressed by developing countries in negotiating groups and coalitions that EAC countries belong to, as set out earlier.

To support regional integration, the EPA provisions should not only stop at references to regional integration, but should systematically aim to attract FDI into the
EAC region in line with the priorities of the region. Establishment of commercial presence in the region should therefore be encouraged by making it relatively more attractive than investment not based in the region; for instance, through the definition of investment, appropriate conditions attached to liberalisation commitments, transition periods that prioritise the consolidation of the regional common market over EPA liberalisation rules\textsuperscript{35}; and the targeting and profiling of investment that seeks to consolidate the regional market through infrastructure and interconnectivity, and that seeks to benefit from the regional market and from the enhanced access to EU market operating out of the EAC region. It should be recalled that, under GATS, and indeed in accordance with the Cotonou agreement, these are WTO-compatible measures if attached as conditions to any liberalisation commitments to be agreed.

The EPA rights and obligations would not reduce or affect those under BITs entered by EU member states. However, the BITs have the MFN clause requiring the best treatment to be accorded to investors from the EU member states (and EAC countries). This would mean that EU investors can invoke the MFN clause in the BITs to demand the best treatment under the EPA investment chapter including on pre-establishment rights. Such a demand could be made in order to use the BIT enforcement mechanism, particularly the investor-state dispute arbitration before private parties under the BIT provisions. Given that recent arbitral awards have been huge and the arbitration process costly, in many cases way out of the means of the justice departments of some developing countries, this issue requires attention. There could therefore be provisions in the EPA clearly prohibiting the parties and investors from invoking the EPA provisions for dispute resolution under other forums outside those established by the EPA, and clearly conferring on the EPA dispute resolution mechanism exclusive jurisdiction.

The MFN obligation in the EPA can be given an expansive interpretation by EU investors and arbitral panels, as has recently been the case in various arbitral awards. Such an interpretation could require according to the EU all the rights included in trade and investment agreements with the USA and Canada, and other countries, that include, for instance, state-investor arbitration before private parties and post-establishment protection rights for investors, not directly included in the EPA investment chapter. Therefore, it should be clearly stated that the MFN obligation applies only to pre-establishment rights, and cannot be extended to the post-establishment phase or to any BIT in place. This is particularly important because the
EPA provisions would preserve existing BITs, which constitute separate important regimes.

The right of the government to regulate FDI should be explicitly recognised in the objectives on investment. The objectives of regulation could include, among others, the advancement of human, cultural, social, economic, health, and environmental welfare for present and future generations; attainment of the MDGs; attainment of critical levels of resource inflows in accordance with recommendations of the G8 Gleneagles summit and the Monterrey Consensus on Development Financing; and implementation of the regional integration programmes.

Clear exceptions should be included, for instance, a specific balance of payments safeguard to the provisions requiring liberalisation of the capital and the current accounts, and for adverse developments such as financial crises. There could also be specific exceptions for measures for eradication of rural poverty, for rural modernisation and for universal access to basic services.

8.3 Lessons from partnerships with emerging powers

Key lessons can be drawn from the approaches proposed under the partnerships with the emerging powers, which can be adapted and included in the EAC-EU partnership. At the Africa-Latin America summit held in Abuja in Nigeria, the two sides adopted the Abuja Action Plan on 30 November 2006, which contains the following commitments by the two sides:

27. To improve the dialogue between the public and private sectors of both regions to facilitate and strengthen South-South Cooperation. This will imply the strengthening of representative institutions of civil society and private sector representative institutions in both regions and their Diaspora, through capacity building and the setting up of common institutions such as the Africa-South America Business Association, and to consider the proposal for the establishment of an Africa-South America Bank and support the establishment of the African Investment Bank.

28. To hold regular trade and investment policy dialogues aimed at identifying possible guidelines for macro-economic, monetary and fiscal policies. …

31. To develop databases on trade and investment opportunities and requirements in the two regions.
At the Africa-China Summit, held in Beijing in China, the two sides adopted the Beijing Action Plan 2007-2009, which includes the following commitment on the part of China:

*The Chinese Government places great importance on and agrees to take active measures to facilitate investment expansion in Africa. It will continue to encourage and support well-established and reputable Chinese companies in making investment or operating in industries in Africa which will contribute to local technological progress, employment and sustainable socio-economic development. The Chinese government agreed to study and take practical steps to boost investment cooperation between businesses of the two sides.*

### 8.4 Investment in natural resources

Investment in and development of natural resources is a key priority of EAC countries. There could be merit in giving these sectors special attention, especially given that CARIFORUM countries made commitments liberalising some of these sectors. The 2007 Big Table\(^3\), held on 1 February, adopted recommendations on natural resources in Africa, including the following:

- G-8 countries should endorse the Extractive Industries Transparency Initiative (EITI) and African countries should be encouraged to adhere to and implement the principles
- The mandate and scope of EITI should be expanded beyond the oil and gas sectors and revenue transparency to include other natural resources, upstream and downstream issues, and environmental stewardship
- The African Union Commission, African Development Bank and Economic Commission for Africa should initiate a programme to assist elaborate Africa codes and standards for natural resources exploitation
- The African Development Bank should establish a grant facility to help Africa’s emerging oil and other natural resource producers in contract negotiations
- The Economic Commission for Africa should establish a peer-learning group on natural resources management
- African countries should undertake a better profiling of emerging global players such as China and India and engage them
African countries should build or strengthen partnerships and coalitions at national, regional and international levels with a view to improving information sharing and dialogue, coordination and collaboration …

EAC countries can draw on some of these recommendations for their partnership with the EU in investment in natural resource sectors.

9. Conclusion

This case study on the EAC has raised various issues. Of particular importance have been the following: how to address the ongoing integration process in the region, particularly the formation of the common market by the year 2010 where there will be free movement of capital, labour, services, goods and the right of establishment will be recognised; and how to address the pertinent issues raised in previous attempts to negotiate international investment rules. The study has then proceeded to make recommendations on how these issues could be addressed in EPA negotiations on investment, through the defensive and offensive interests the EAC could pursue and seek the cooperation of the EC partner. Reference has been made to approaches being taken in new partnerships that Africa is exploring. Careful attention will need to be given to supporting the regional investment framework as elaborated under the common market, and to strengthening the private sector in the EAC partner states.

Endnotes

1 Burundi, Kenya, Rwanda, Tanzania, and Uganda.
2 Article 37.
3 That is: Thomas J Westcott, Investment Provisions and Commitments in the CARIFORUM-EU EPA and interim Agreement between other ACP Regions and the EU. Part II in the present reader.
4 Article 5.1.
5 The draft protocol has not been published and availed to the public, but copies can be requested from the secretariat. Please see www.eac.int for information on the EAC.
6 Article 104.
7 The UN finally adopted the Convention on Biological Diversity at the 1992 Rio Conference.
8 The GATS provides for the possibility of commitments to allow foreign direct investment to establish a commercial presence in a member country.
9 The TRIMs Agreement has 9 Articles and prohibits measures that contravene the national treatment obligation (such as requirement to use domestic inputs) and the prohibition of quantitative restrictions (such as measures restricting importation of inputs).
10 EU main interests, among others, are market access for EU investors at least on terms
comparable to those their competitors have particularly the US and Canada and, through rules such as the MFN clause and future negotiations, to lock in their position of advantage should new agreements be entered with advanced developing countries and other developed countries.

The main interests of EAC and other countries are to attract suitable FDI that will assist the achievement of key social economic development objectives, particularly equitable and sustainable development, eradication of poverty and promotion of rural modernisation through channelling investment into important and strategic sectors and industries.

If it is felt appropriate to include such obligations on investors, the draft code can provide useful drafting language.

11 Para 14 of the declaration states: “On the issues of investment policy, competition policy and government procurement, we re-iterate the concerns we have raised at the World Trade Organisation, leading to their being removed from the Doha Work Programme. We reaffirm that these issues be kept outside the ambit of Economic Partnership Agreements. We stress the importance of maintaining consistency in our negotiating objectives and positions in the various fora. We appeal to regional groupings, that in dealing with these issues, they ensure the coherence of our negotiating objectives and positions adopted in various fora. We specify that regional instruments can be developed for the sole mutual benefit of member states of regional groupings.”

12 As pointed out, there have been camps within the EU, constituting different motivations for negotiating investment issues in EPA negotiations – to achieve equivalent protection for EU investors as enjoyed by US and Canadian investors, or to promote regional integration in ACP regions.

13 This was adopted at the ACP Council meeting in Papua New Guinea, Port Moresby, of 1 June 2006. Please see www.acp.int.

14 For instance, under the COMESA Common Investment Area Agreement, COMESA investors are defined to include foreign investors with substantial business activity in the region and registered in the region; these are also entitled to the non-discrimination rights provided for.

15 Statement of the Ghanaian Minister, unpublished.

16 Annex F (item 84) to the WTO Hong Kong Ministerial Declaration, 18 December 2005.

17 Please see part 5.

18 The agreement is expected to be signed at the next COMESA summit, originally planned for May 2008 but postponed sine die due, among other reasons, to political problems in Zimbabwe.

19 UNIDO, Africa Foreign Investment Survey, 2005; p.130; please see www.unido.org.

20 Among other sources, the African Union web site (www.africa-union.org) has good updates on developments in relations between Africa and the emerging powers.

21 Priority sectors include infrastructure, agro-processing, natural resources and pharmaceuticals.

22 Article 66.2 of the TRIPS Agreement requires developed countries to take measures to encourage their enterprises to assist in technology transfer and the building of a sound technological base in least developed countries.
Large-scale and long-term investors regularly seek support from governments or international development institutions in undertaking investment projects. Provision for due consideration of such initiatives can be handy when the occasion arises.

Copies of these agreements can be sought from the secretariats of COMESA (www.comesa.int) and SADC (www.sadc.int). Other websites also provide useful information on EPAs, such as www.ecdpm.org and www.acp-eu-trade.org.

Thomas J Westcott, op cit.

Please see also: Gus Van Harten, Investment Provisions in EPAs, Osgoode Hall Law School, York University, March 2008.

For LDCs, this commitment could amount to forfeiting their right under Annex F of the WTO Hong Kong Ministerial Declaration to maintain or introduce new performance requirements until the year 2020 subject to extension.

In this regard, the ESA group’s position is that investment should be a matter for development cooperation where the EU assists in the establishment and consolidation of the COMESA investment area in accordance with the draft Agreement.

The Big Table is an informal forum of development institutions, experts and opinion leaders regularly convened by the Economic Commission for Africa to discuss key challenges facing Africa.
Part III:
Other Trade Dimensions
Innovation and Intellectual Property in the CARIFORUM-EU Economic Partnership Agreement: Lessons for other ACP Regions

Sisule F. Musungu
1. Introduction

In December 2007, the European Community (EC) and its Member States concluded an Economic Partnership Agreement (EPA) with the 15 CARIFROUM States covering trade in goods and a wide range of other trade and related disciplines. In particular, in addition to trade in goods and provisions on general matters and dispute settlement, the EPA also covered issues related to investment, trade in services, e-commerce, current payment and capital movement as well as other trade related issues including competition policy, innovation and intellectual property (IP), public procurement, environment, social aspects and the protection of personal data. The EPA was negotiated under the framework of the Cotonou Agreement concluded between the EC and its Member States and the African, Caribbean and Pacific (ACP) Group. The broad based CARIFORUM-EU EPA is notable because it was the only comprehensive EPA concluded by the deadline of 31 December 2007. Other regions of the ACP and/or countries only signed interim EPAs with limited subject coverage.

The failure to conclude comprehensive EPAs with the vast majority of ACP countries and the criticisms that have been levelled at the CARIFORUM-EU EPA relate, in part, to the inclusion of the so-called trade related issues as well as investment and trade in services. In particular, the inclusion of IP provisions in EPAs has received wide criticism in ACP countries as well as within Europe. In this context, the conclusion of the CARIFORUM-EU EPA raises a number of questions not just for the CARIFORUM countries but also for other ACP countries. These include:

- To what extent do the provisions of the EPA in respect of trade related issues, trade in services, investment etc., extent the obligations assumed by ACP countries under the World Trade Organization (WTO) agreements?
- What are the socio-economic and development impacts (real or potential) of the EPA on CARIFORUM countries particularly with respect to the trade related issues and other trade matters such as trade in services, investment and e-commerce?
- Can the CARIFORUM-EU EPA be used as template for the EPA negotiations with other ACP regions on these issues?
- What lessons can the other ACP regions (Africa and the Pacific) learn from the provisions of the CARIFORUM-EU EPA?
It is in the context of these questions that this study on the innovation and IP Chapter of the CARIFORUM-EU EPA has been commissioned by GTZ.

The study therefore seeks to analyse: if, and in which ways the obligations assumed by CARIFORUM countries under this Chapter extent the obligations assumed by these countries under the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) in a manner that compromises the ability of these countries to address their development needs, a situation commonly referred to as TRIPS-plus. It also analyses the potential impact of the these obligations and other provisions in the Chapter on the economic and social development prospects of CARIFORUM States and regional integration, particularly with respect to innovation for development, access to medicines, food security and biological diversity; the cost and implications of implementing the said obligations and other provisions including relevant regional mechanisms; and the lessons learnt for other ACP regions including replicability of the CARIFORUM-EU EPA provisions in these other regions.

The study is divided into six main sections. Following this introductory section, the background section addresses two foundational issues. First, a brief analysis of Article 46 of the Cotonou Agreement, on the protection of IP rights, is provided. Secondly, the section provides the international innovation and IP context and parameters for assessing the development implications of IP as the backdrop to the issues that arise for ACP countries in EPAs. Section three, which forms the bulk of the study, then, turns to a development analysis of the Innovation and IP Chapter of the CARIFORUM-EU EPA followed, in section four, by a brief overview of other provisions in the EPA that may have implications for innovation, access to knowledge and technological learning in the CARIFORUM States. Section five then turns to examining the lessons that can be learnt by other ACP regions before offering some final remarks in section six.

2. Background

The centrality of knowledge in determining success in trade, industrial and economic growth as well as in meeting the various national and regional development objectives is today widely accepted. The challenge that the global community faces is how to transform the power of knowledge into real outcomes, especially for people in developing countries. With growing public debate on knowledge governance, international institutions are struggling to cope with the challenges of technological
transformations and the competing ideas about how the knowledge society should be governed. This is because while new technologies may empower some actors, they may equally threaten others.

The control or ownership of the means for the production and distribution of knowledge has therefore become an important economic, political and social issue. Various actors, including nation states, are therefore trying to protect their interests by seeking to shape the policies of various institutions charged with governing/coordinating international relations between states in this area. As systems of appropriation and allocation of rights over knowledge, IP rights, ranging from patents, to copyright and related rights through to trademarks, have a major impact on production (innovation), distribution and access to knowledge.

As a corollary, the institutions that provide the forums for international discussions and rule-making on IP, for example, the World Intellectual Property Organization (WIPO), WTO, or the agreements containing such rules such as CARIFORUM-EU EPA have and/or are acquiring tremendous influence over the lives of people at all levels of society. The decisions in these forums, and the rules in such agreements, have particularly important implications for the poor and vulnerable people within countries.

2.1 IP in EPAs: Interpretation and implementation of Article 46 of the Cotonou Agreement

The provisions related to IP in EPAs are taken to have their basis in Article 46 of the Cotonou Agreement. In the EPA negotiations with various ACP regions, the EC has argued that the only way to give effect to Article 46 is to ensure that the EPA includes “both substantive IP rules, including on enforcement, and co-operation aspects.” A careful reading of Article 46, however, suggests that the EC’s interpretation and suggested implementation methodology is questionable, if not flawed.

Article 46 of the Cotonou Agreement has five paragraphs which cover, the objectives of the Parties and their understandings regarding IP protection in the Cotonou framework. Article 46.1 of the Agreement contains the overall aspirations and aims of the Parties which are stated to be “the need to ensure adequate and effective level of protection of intellectual, industrial and commercial rights, and other rights covered by TRIPS including protection of geographical indications, in line with international standards with a view to reducing distortions and impedi-
ments in bilateral trade” provided that the positions of the Parties in multilateral negotiations are not “prejudiced”.

To fulfil the requirements of Article 46.1 both Parties have to take some measures aimed at ensuring adequate and effective level of protection of IP rights in line with international standards. Most of the ACP countries and the EC have already agreed on the mechanism for ensuring adequate and effective protection of IP, with a view to reducing distortions and impediments to trade, should be. The mechanism is the TRIPS Agreement. This means that as long as ACP countries fulfil their obligations under TRIPS, any further substantive provisions are not required by the Cotonou Agreement. This interpretation of Article 46.1 is supported by the provisions of Article 46.2 which states that the Parties underline the importance of adherence to the TRIPS Agreement. Consequently, the EC’s assertion that the only way to give effect to Article 46 of the Cotonou Agreement is to include in the EPA both substantive provisions, including on enforcement, and cooperation aspects is incorrect.9

In the context of Article 46.1, the only matter that needs to be addressed relates to what the non-WTO ACP countries such as some of the Pacific countries are expected to do to give effect to Article 46 of the Cotonou Agreement. Since these countries have not committed to the TRIPS Agreement they do not have any common basis with the EC to determine what the appropriate mechanism to do this is. At the basic level, it could be argued that since some of the ACP countries have already recognised the TRIPS Agreement as a framework for ensuring adequate and effective level of IP protection, it makes sense for the other ACP countries to do the same. Joining the WTO, is however, not dependent on the wishes of these countries. Unilateral implementation of the TRIPS Agreement would, on the other hand, deny these countries the other benefits that come with WTO membership. In this context, in order to implement Article 46.1 of the Cotonou Agreement, the ACP countries which are not WTO members need only to undertake to work towards WTO membership.

ACP countries also agreed, under Article 46.3 of the Cotonou Agreement to accede to all relevant international conventions on IP as referred to in Part I of the TRIPS Agreement, in line with their level of development. Part I of the TRIPS Agreement refers to four conventions on IP, namely: The Paris Convention (1967); The Berne Convention (1971); The Rome Convention on the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (1961); and The Treaty on Intellectual Property in Respect of Integrated Circuits (1989) otherwise known
as the Washington Treaty. The membership of ACP countries in these four WIPO conventions is not universal. However, it should be noted that the ACP countries that are developing country Members of the WTO are already required to implement the bulk of the provisions of the four conventions. Further, least developed countries (LDCs) will be required to implement these provisions once the LDCs transition period under Article 66.1 of the TRIPS Agreement runs out. The ACP countries that are in the process of accession to the WTO will also have to implement the bulk of the conventions’ provisions once they join the WTO.

The question is therefore whether LDCs or ACP developing countries that are in the process of accession should implement the rest of the provisions of the four agreements. In context of the requirement that accession to the WIPO conventions be in line with the level of development of countries, there must be some evidence that there are provisions not required to be implemented by the TRIPS Agreement that are of particular developmental benefit for these countries. This would also be applicable with respect to the ACP countries which are neither LDCs or accession countries.

Finally, Article 46.4 of the Cotonou Agreement provides that under the EPA, the Parties may consider the conclusion of agreements aimed at protecting trademarks and geographical indications for products of particular interest to either Party. While it is well known that the EC has an interest in the protection of a large range of geographical indications, ACP countries would need to consider what products are of particular interest and whether legal commitments to the EC would, on balance, provide particular benefits. The implementation of Article 46.4 as is clear, however, does not imply automatic inclusion of substantive or other provisions on trademarks and geographical indications in the EPA.

In light of the above analysis, it is clear that Article 46 of the Cotonou Agreement does not require substantive IP rules, including on enforcement, and co-operation aspects to be given effect. Article 46 of the Cotonou Agreement can be given effect if:

- There are provisions in the EPA addressing whether and how those ACP countries that are not WTO Members would implement the TRIPS Standards;
- Provisions are included on how and when these countries would accede to the conventions mentioned in Part III of TRIPS in cases where such accession is in line with their levels of development; and
Consideration is given to whether it is necessary and beneficial for the ACP countries to conclude agreements for protecting trademarks and geographical indications.

In sum, ACP countries should only consider the inclusion of additional substantive provisions on IP and innovation in EPAs if there is reason to believe that such additional rules would bring socio-economic and technological development. The costs of adjustment and eventual implementations of the obligations must be reasonable and be offset by the benefits. This reality is particularly important when one considers the current international context on IP and related matters.

2.2 Innovation and IP: The international context

The last two decades or so have witnessed unprecedented progress in the development and application of science and technology with new innovations offering vast possibilities for addressing the challenges of hunger and food security, epidemic and other diseases, environmental challenges as well as human development generally. IP rights have been seen by some as having been central to this rapid growth in innovation particularly in sectors such as pharmaceuticals. To some, however, claims for IP rights have, in some cases, impeded more rapid progress and in other cases impacted negatively on the access to goods and services not only for the poor but also for well to do as in the case of access to medicines. The recent expansion of IP rights through the TRIPS Agreement and the inclusion of further obligations for developing countries in EPAs as well as in free trade agreements (FTAs) have therefore rightly led to a vigorous debate on the relationship between IP and innovation as well as the impact of IP rules on access to essential knowledge goods and services.

The relationship between IP and innovation therefore remains uncertain and controversial. This is particularly the case in developing countries where the current IP regimes are of a relatively recent history. The reason, as Fink and Maskus argue, is that “Although the existing economic literature on IPRs provides some useful guidance to policymakers in developing countries, there is still a lot we do not know”11. Proof of a correlation between strong IP rights and foreign direct investment, for example, remains elusive12. While the controversy regarding the relationship between IP and innovation and the impact of IP on access to essential goods and services is not new, international processes to address specific challenges have, in recent years, been driven by a certain sense of urgency due to concerns such as on HIV/AIDS as well as the rapidly changing business environment, thanks to major
technological transformations related to growth of the internet and information and communication technologies (ICTs).

Consequently, the last few years have seen a number of milestones in the efforts to address these challenges. These include: the Doha Declaration on the TRIPS Agreement and Public Health in 2001; the report of the UK Commission on Intellectual Property Rights (Commission on IPRs) in 2002; the creation of the World Health Organization (WHO) Commission on Intellectual Property Rights, Innovation and Public Health (CIPIH) in 2003 and thereafter the Intergovernmental Working Group on Public Health, Innovation and Intellectual Property (IGWG) to develop a strategy and plan of action on essential health research in 2005; and, finally, the adoption of a development agenda for WIPO in 2007.

In addition, in a number of areas, such as software development, we have witnessed important business and industry sectors as well as major research agencies coming around to support more open and democratic innovation processes and wider access coupled with recognition of the differences in the innovation systems between developed and developing countries. There is also evidence of a better appreciation of the development-related concerns in IP among developed country governments and policy makers. Such evidence include, for example, the bipartisan deal in the United States Congress on better rules in free trade agreements relating to data exclusivity and patent term extensions and the United States Government Accountability Office (GAO) Report on IP and the Doha Declaration.

It is therefore fair to conclude that an analysis of innovation and IP today must take place in a significantly different international context than that which existed at the time of the adoption of the TRIPS Agreement in 1994. In the new context, there is more reason for: caution in linking IP and innovation; seeking evidence justifying the need for expansion of IP rights; and demanding impact assessments on the effect of IP standards and rules on creativity and access to essential goods and services. It is this international context which should also provide the backdrop for the analysis of IP and innovation provisions in EPAs.

In sum, the analysis of innovation and IP in EPAs, and in any other bilateral or multilateral agreement, should be based on a number of development-related considerations. These include the following:

- The implementation of the TRIPS Agreement raises many issues and challenges for developing countries and LDCs, ranging from difficulties
in discerning the impact of the various categories of the IP rights covered under the Agreement on the development of various sectors through administrative and financial challenges especially with respect to enforcement.22

- The TRIPS Agreement is premised on the idea, stated in Article 1.1, that each WTO Member would determine the appropriate method of implementing the provisions of the Agreement within their own legal system and practice”. This means that a bilateral agreement which interprets and/or clarifies the TRIPS Agreement’s provisions may preclude parties from looking for a different interpretation domestically or from benefiting from a favourable interpretation by the WTO Dispute Settlement panels in the future.

- The ultimate objective of the ACP countries as a group of developing countries and LDCs should be, on an evidence and impact-based view, to use IP rights for development while at the same time eliminating or minimising the costs not only of integration into the international IP system but also of living with the IP rules over the longer-term.

- There are significant factual differences between the EC and the ACP countries in terms of their needs relating to IP, their levels of development and their national priorities which have to be taken into account in determining the objectives and elements of an IP and innovation section of an EPA. An emerging global consensus in this regard was most recently expressed in the WIPO Development Agenda.23

- Unlike at the time of the TRIPS negotiations, there is now significant literature and emerging evidence on the pros and cons of IP for development, the impact or lack of it in different sectors including health, agriculture, software etc. and on other factors of development such as inward investment. There is also better historical literature and evidence regarding the development paths of many of the OECD countries including recent entrants like South Korea.24 Further, as already noted, there is a better understanding and continuing work on innovation systems in developing countries and the relevant factors including the role of IP rights. Finally, there is some emerging evidence about the impact of the TRIPS Agreement itself although there are no major specific empirical studies.25 This means that the ACP countries are now in a much better position to make judgements about which rules have the potential to bring benefits and those
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that, on average, are likely to have negative impacts. This body of literature and evidence also provides a stronger basis for the citizens of ACP countries to hold their governments accountable for signing on IP provisions in EPAs.

- The international IP system is changing and dynamic. Account should therefore be taken of these changes which affect old assumption about the system and its efficacy as an incentive for innovation.

It is on the basis of these six considerations that we now turn to analyse the relevant innovation and IP Chapter of the CARIFORUM-EU EPA. The analysis below will therefore be interposed with cross-references to these considerations to illustrate the development issues that arise.

Box 1: Innovation and intellectual property: The pre- EPA regime in the CARIFORUM states

By Audel Cunningham

Within the CARIFORUM geographic space, intellectual property protection is achieved by a basket of national laws. There is neither a CARIFORUM nor a CARICOM wide regime. With the exception of the Bahamas, all CARIFORUM States are WTO members and therefore have an obligation to implement the TRIPS agreement. This notwithstanding, owing to appreciable capacity constraints, many CARIFORUM States are yet to implement TRIPS compliant legislative regimes. The overall lack of implementation of the TRIPS obligations is however by no means reflective of inadequate recognition on the part of the CARIFORUM States of the tangible benefits that can be gained from the encouragement, exploitation, commercialization and protection of intellectual property works. Rather, CARIFORUM States have always displayed a heightened sense of appreciation of the importance of intellectual property in their respective development strategies.

3. Development analysis of the innovation and IP chapter in the CARIFORUM-EU EPA

The CARIFORUM-EU EPA contains a detailed Chapter on Innovation and IP running to 20 pages. The Chapter includes provisions on: context; objectives; innovation; and IP including enforcement and cooperation. The sub-sections that follow provide an analysis of each of these components in the context of the interpretation
of Article 46, the international innovation and IP context and the development-related considerations for analysing IP agreements discussed in section 2 above.

3.1 Context

The Innovation and IP Chapter of the CARIFORUM-EU EPA in Article 1, titled Context, recognises that fostering innovation and creativity improves competitiveness and is a crucial element in efforts to achieve sustainable development and in trade. The parties also recognise in Article 1.2 that, as part of the context, IP protection plays a key role in fostering innovation, creativity and competitiveness. For this reason, the EPA commits the Parties to work towards increased levels of protection of IP appropriate to their levels of development. The acknowledgement that the level of development should determine the appropriateness of increasing the levels of protection of IP also matches with the international context on innovation and IP as discussed in section 2.2 above. It would, however, have been important to recognise as part of the context in the EPA three other elements.

First, as recognised in the TRIPS Agreement IP rights can also be used in an abusive manner resulting in restraints on legitimate trade and restriction of competition with attendant effects on innovation, creativity and transfer of technology. Second, simple reference to the levels of development as a determinant of appropriateness for ratcheting-up IP standards is not enough. The reason is that in cases where explicit elaboration of what this means is lacking, there is a general assumption that increased levels of IP protection automatically results in innovation and creativity. It is therefore important to be explicit regarding the need for flexibility within the rules and standards and the need to balance the costs and benefits of protection as provided for in the WIPO Development Agenda. In other words, it is important that the principles that are taking shape under the emerging international consensus on the meaning of the development dimension in IP should guide the elaboration of the EPAs.

Finally, it is important to recognise that in certain cases and circumstances, such as in the case of essential health research and development (R&D) for medicines relating to diseases that disproportionately affect developing countries, alternative incentives and funding mechanisms are needed. In such cases, it is accepted that IP protection, and in particular, increased level of protection and enforcement are unlikely to generate the required innovation, creativity and competitiveness.
3.2 Objectives of the innovation and IP chapter

Overall, the stated objectives of the Innovation and IP Chapter of the CARIFORUM-EU EPA are commendable. There is useful focus on promoting innovation including collaborative innovation and R&D, competitiveness, transfer and dissemination of technology and know-how. The most important missing objective relates to availability and access to the products of innovation in various sectors. As has been starkly demonstrated in the case of TRIPS and public health, innovation and creativity without access is not relevant for development. Access is in fact an important component of innovation since innovators require easy and reasonable access to existing knowledge in order to innovate and be creative. Inclusion of an access component of innovation and the possible impact of IP rights on availability and access to essential goods and services would have left no doubt regarding the centrality of development in the interpretation and implementation of the Chapter provisions.

3.3 The innovation section of the EPA

The CARIFORUM-EU EPA scored a first for including an explicit innovation section within the IP Chapter. Previous FTAs and EPAs have mostly focused on IP issues with only a cursory mention, if any, of innovation, creativity and competitiveness. The recognition in what is essentially a trade agreement, of the importance of cooperation with respect to competitiveness and innovation; science and technology, information society and ICTs as well as on eco-innovation and renewable energy is therefore a laudable step in the right direction.

The areas and forms of cooperation identified in Articles 5 through to Article 8 of the innovation section of the Chapter are, overall, fairly comprehensive and ambitious. Unfortunately, however, the section suffers from a number of important shortcomings with the result that the extent to which the provisions on innovation in the IP Chapter of the EPA will support the development of CARIFORUM States through innovation and competitiveness remain largely uncertain.

The most prominent of these shortcomings is the failure to translate the laudable aspirations to promote innovation and competitiveness, science and technology, information society, ICTs, eco-innovations and renewable energy into operational language and specific obligations particularly on the part of the EC. All the proposed measures are limited to best endeavour cooperation activities.
In order to truly promote development-oriented innovation and competitiveness, including in the area of eco-innovation and renewable energy, technological development and to use of ICTs to foster creativity, specific mechanisms and measures would be required including IP specific measures. For example, achieving the stated goals would require some specific measures relating to the research and experimental exception under patent law, measures related to patent pools for essential technologies and provisions addressing limitations and exceptions for teaching and educational purposes. To promote innovation, creativity and competitiveness in development relevant areas, such as health, would also require addressing the issues contained in the draft WHO Strategy and Plan of Action for essential health R&D.

Another shortcoming is the failure to address questions related to access to essential innovations by the general populations as well as the research community.

### 3.4 The IP section of the EPA

The provisions on IP cover a range of issues and various categories of IP; from patents to copyright and related rights through to utility models. In particular, the section addresses: the nature and scope of IP obligations under the EPA; the treatment of LDCs; transfer of technology; copyright and related rights; trademarks and geographical indications; industrial designs; patents; utility models; plant variety protection (PVP); genetic resources and traditional knowledge; and IP enforcement. Such a detailed and comprehensive section on IP is of special interest because, as already noted, there is no obligation under Article 46 of the Cotonou Agreement to include detailed substantive provisions on IP in EPAs. The principal question underlying the analysis in this section is therefore the following: *Will CARIFORUM States benefit from enhanced social and economic development, especially in the vital sectors of their economies, by virtue of implementing additional obligations on IP under the EPA?*

In order to answer this question, we turn now to a brief analysis of the IP section of the CARIFORUM-EU EPA.

**Nature and scope of IP obligations in the EPA**

Article 1 of the IP section of the CARIFORUM-EU EPA expresses the intention of the Parties and defines the nature and scope of the IP obligations under the Agreement. The intention of the Parties to the EPA is expressed to be ensuring an adequate and effective implementation of international IP treaties to which the two
sides are parties and the TRIPS Agreement, subject to the principles of Article 8 of TRIPS and the development needs of the CARIFORUM countries. The measures to ensure the adequate and effective protection of IP are also expected to provide a balance of rights and obligations between right-holders and users and allow the parties to protect public health and nutrition. In line with the TRIPS Agreement, each Party is also free to determine the appropriate method of implementing the provisions of the section within their own legal systems and practice, and may, implement more extensive provisions in their national law than that is required under the EPA.

The provisions on the nature and scope of obligations of the EPA do not raise particular TRIPS-plus problems. The main concern with these provisions relates to the apparent narrowing of the scope of Article 7 of the TRIPS Agreement. While the principles set out in Article 8 of the TRIPS Agreement are made directly applicable to the section, the same is not the case with respect to Article 7 of TRIPS. Only some phrases from Article 7 are included. Presumably, direct reference to Article 7 of the TRIPS Agreement was omitted since the EPA already has specified objectives for the Innovation and IP Chapter. While this makes sense, the challenge as noted, is that the objectives of the EPA with respect to innovation and IP omit important access principles. Without clearly stated access principles in the objectives of the Chapter or under the obligations provisions, it is unlikely that the specific operational provisions would be interpreted in an access friendly manner without a direct reference to Article 7 of the TRIPS Agreement.

**Treatment of LDCs and transition periods**

Article 2 of the IP section sets rules with respect to the treatment of LDCs including the special transition period applicable to these countries. The general transition period for the implementation of the EPA is set out in Article 1.4 of the section.

Under Article 2, LDCs are not expected to implement the IP provisions of the EPA until 1 January 2021 subject to two caveats. First, the end of the transition periods under the TRIPS Agreement would also automatically operate to end the transition under the EPA with respect to the implementation of TRIPS specific provisions. In the second place, the CARIFORUM-EC Trade and Development Committee (hereinafter TDC) has the powers, taking into account the relevant decisions of the Council for TRIPS at the WTO, to alter the date of implementation for LDCs in CARIFORUM. These powers are akin to the powers vested in the Council for TRIPS under Article 66.1 with two important differences.
To start with, the Council for TRIPS only has powers to extent the transition period. The wording of the EPA, however, suggests that the TDC can accelerate the implementation of the obligations under the section for LDCs. In the second place, while under the TRIPS Agreement a duly motivated request should automatically lead to an extension, this is not the case under the EPA. The net effect of these differences is that while the treatment of LDCs under the EPA appears reasonable, there are important differences with how LDCs are treated under the TRIPS Agreement which opens the possibility of political manipulation.

With respect to the general transition period, the requirement is that CARIFORUM developing countries will be required to implement the provisions of the section by 1 January 2014 at the latest. However, unlike the treatment of developing countries under Article 65 of the TRIPS Agreement, the EPA introduces an interesting innovation modelled on the approach to the LDCs’ transition provision under the TRIPS Agreement. This innovation may bring potential advantages to developing countries in the region. In particular, Article 1.4 of the IP section of the EPA provides that the TDC can alter, that is, extent the transition period for developing countries under the EPA beyond 1 January 2014 based on the development priorities and levels of development of CARIFORUM developing countries. This power of the TDC is particularly important since, as noted, the field of IP is rapidly changing and what is assumed to be a good provision for development today might not be by 2014.

**Transfer of technology**

Transfer of technology is addressed in Article 4 of the IP section of the Innovation and IP Chapter of the CARIFORUM-EU EPA. The provisions under the Article, which address issues related to exchange of views and information on practices and policies affecting transfer of technology, measures to prevent or control licensing practices and conditions, the abuse of IP rights, information asymmetries and promoting the use of incentives to support transfer of technology, offer important improvements on the TRIPS regime. While more could be done, three particular improvements are worth mentioning.

First, the EC undertakes an obligation to exchange views and information with CARIFORUM countries on practices and policies affecting transfer of technology. There is no similar commitment under the TRIPS Agreement. Secondly, in addition to addressing licensing practices and conditions and abuse of IP by right-holders in a manner that affects international transfer of technology, the Article also
addresses itself to the question of information asymmetries between technology holders in developed countries (the EC States) and recipients in developing countries (the CARIFORUM countries). Although specific rules on how to address the issue are not included in the EPA, the recognition of the problem in the treaty provides an opportunity to move towards concrete action in the future. Finally, unlike under the TRIPS Agreement where incentives are only required to be provided to enterprises and institutions to transfer technology to LDCs, the provisions in the EPA also cover incentives for technology transfer to CARIFORUM developing countries. This is an important improvement since developing countries have for some time now sought to improve the WTO regime in this direction.31

Copyright and related rights provisions
The provisions on copyright and related rights (Article 5 of the IP section) cover three main obligations and requirements. The first obligation requires adherence to the WIPO Copyright Treaty -WCT (1996) and the WIPO Performances and Phonograms Treaty - WPPT (1996), commonly referred to as the Internet treaties.32 Here, there is a mandatory obligation to adhere to these treaties subject only to the transition arrangements in the EPA with respect to IP provisions. The second obligation relates to the protection of performers, producers of phonograms and broadcasting organizations. On this subject, the EPA requires that CARIFORUM countries endeavour to accede to the Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (1961) – commonly referred to as the Rome Convention.33 Finally, the provisions in Article 5.2 address the subject of collective management of IP rights with the main focus being on collecting societies.

Only three out of the 15 CARIFORUM countries are Contracting Parties to the WCT and WPPT –the Dominican Republic, Jamaica and Saint Lucia. Recognising that adherence to WCT and WPPT is not required under Article 46 of the Cotonou Agreement, compliance with these two treaties by the other CARIFORUM countries must therefore be based on some other justification, which in the context of the general approach to the EPA would be development benefits.

The WCT and WPPT were adopted to address protection of copyright and related rights in the digital environment. On the one hand, WCT provides protection to authors of literary and artistic works, computer programmes and compilations of data. On the other hand, WPPT provides protection to performers and producers of phonograms. In addition to the basic rights granted by the treaties, they also
require the Parties to address circumvention of technological protection measures (TPMs) used by right holders and digital rights information.\textsuperscript{34} According to WIPO, adherence to the treaties has advantages including securing international protection of national right holders, promotion of electronic commerce, contribution to national economy, encouragement of investment and the protection of local creativity and folklore.\textsuperscript{35}

These claimed advantages are, however, not based on empirical evidence. Indeed on questions such as encouragement of investment, studies and field work such as that by Maskus and Fink show that claims of causal relationship between IP rights and inward investment are difficult to justify in many cases\textsuperscript{36}. Okediji in her analysis of the two treaties also points to the challenges that they pose for public access to digital information for various purposes including education, research, and culture.\textsuperscript{37} In light of the low internet access and penetration rates in most CARIFORUM countries, the benefits of the treaties are not particularly evident. TPMs also pose special problems.\textsuperscript{38} Consequently, the mandatory requirement that CARIFORUM States adhere to the Internet treaties is clearly TRIPS-plus.

Five of the 15 CARIFORUM countries are Parties to the Rome Convention namely, Barbados, Dominica, the Dominican Republic, Jamaica and Saint Lucia. Ten other CARIFORUM countries are not yet parties to this treaty. In the context of Article 46 of the Cotonou Agreement, ACP countries including the ten CARIFORUM States currently not parties to the Rome Convention had committed to offer protection to performers, producers of phonograms and broadcasting organisations in accordance with the TRIPS Agreement. In particular, by virtue of Article 46.3 these countries were required to consider acceding to the Rome Convention. The requirement under Article 5 is therefore generally in line with the provision of the Cotonou Agreement. It is important to remember, however, that the commitment under the Cotonou Agreement to endeavour to adhere to the Rome Convention by ACP countries is conditioned upon the development imperatives in these countries. Accession should therefore be pegged on the existence of empirical evidence.

**Trademarks**

CARIFORUM countries agreed to a set of substantive provisions with respect to trademarks in the EPAs. Article 6.1 of the IP Chapter requires, among others, that trademark registration authorities provide a reasoned opinion in writing with respect to rejection of a trademark application and that there is a possibility for applicants to contest decisions to refuse their applications as well as the possibility
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to object to registration of trademarks after publication of applications. The Article also requires the public provision of information on applications and registrations. Articles 6.2 to 6.4 require the EPA Parties to endeavour to apply the WIPO Joint Recommendation relating to Well-Known trademarks, internet use and trademark licenses respectively. Article 6.5 then requires CARIFORUM countries to endeavour to accede to the Protocol to the Madrid Agreement Concerning the Registration of Marks (1989)39 and the revised Trademark Law Treaty (2006) – commonly referred to as the Singapore Treaty on the Law of Trademarks40. Finally, Article 6.6 provides for exceptions to the rights conferred by a trademark

Save for the costs of implementation, the procedural requirements under Article 6.1 are generally accepted principles with regard to administrative decisions. Equally, the application of the Joint recommendations on the well-known trademarks, internet use of trademarks and trademark licenses may be reasonable. In the latter case it is particularly important that the EC dropped its earlier attempt to convert these soft law norms into treaty provisions for CARIFORUM countries. Adherence to the Madrid Protocol and the Singapore Treaty, subject to a consideration of the benefits and costs including the costs of administration, can also be considered a reasonable approach to the issue for the CARIFORUM countries. In sum, the treatment of trademarks in the EPA does not appear raise major TRIPS-plus problems.

Geographical indications

The inclusion of substantive provisions on geographical indications into EPAs is subject, under Article 46 of the Cotonou Agreement, to a development test. However, it is well known that the protection of geographical indications is one of the issues on which the EC has pushed the hardest not just in the EPAs but also at the WTO and in its other bilateral dealings. The EC has an elaborate and well-defined system for granting geographical indications and it is obvious that its enterprises would benefit significantly from extended protection.41 The result is that the CARIFORUM-EU EPA contains fairly detailed provisions on the protection of geographical indications which cover the scope of protection, the rights to be granted to holders and the relationship with trademarks, among other issues.

Properly calibrated, the protection of geographical indications can bring benefits to a country’s economy and uplift living standards.42 Some of the possible benefits of protection could include maintaining the reputation of products, securing premium prices for products, ensuring greater returns to local producers, offering niche marketing opportunities and may serve as a tool for protecting traditional knowl-
edge. On the other hand, for developing countries and LDCs, in particular, protection could also have significant disadvantages and challenges such as imposing restrictions on local producers from renaming, labelling, remarketing or rebranding. Protection also raises the spectre of legal challenges and in foreign markets could be used as a trade barrier. More importantly, there are significant costs in administering the protection system.

In the specific case of CARIFORUM countries, as would be the case in other ACP regions, only an empirical study can help make a determination of whether the advantages outweigh the disadvantages and *vice-versa*. Such a study was not undertaken. Also, the EPA anticipates these countries identifying the products of interest in future as opposed to doing this before adopting the standards. Once the products are identified further negotiations would follow with the EC. In this regard, the adoption of detailed rules on the protection of geographical indications beyond the requirements of TRIPS before CARIFORUM countries had fully identified their products of interest was a mistake.

**Industrial designs**

The CARIFORUM-EU EPA contains substantial provisions on industrial designs reflecting the deep harmonisation in the EC. This is the opposite of TRIPS which contains only two articles on Industrial designs. The EC’s design system is based on the Directive on the Legal Protection of Designs. While the Article 8 of the IP section of the EPA, which contains the relevant provisions on industrial designs, builds on the TRIPS Agreement, it has a number of important additional obligations. Among these are: the requirement for CARIFORUM countries to endeavour to accede to the Geneva Act of the Hague Agreement for the International Registration of Industrial Designs (1999); the provisions defining the criteria for protection; the requirement to offer protection for unregistered designs; and subject to a request by the right holder and payment of fees, the requirement to offer a term of protection of up to 25 years. The TRIPS Agreement only requires protection for 10 years.

All these new obligations entail substantial administrative burden for the CARIFORUM States while the benefits to them cannot be empirically demonstrated. It is particularly problematic for the EC to impose its design system on CARIFORUM countries when their internal markets are significantly different. The implication is that CARIFORUM countries have forfeited their right under Article 1 of the TRIPS Agreement to determine the appropriate method of implementing the TRIPS provisions on industrial designs.
Patents

The CARIFORUM-EU EPA has very limited provisions on patents reflecting the sensitivity of the EC to the heavy criticism that has been levelled at the Commission and the United States for seeking to impose additional obligation on developing countries regarding patents especially in the area of pharmaceuticals and test data protection. The provisions on patents in the EPA impose on CARIFORUM countries only two main obligations: One mandatory and, the other, a best endeavour obligation. The mandatory obligation requires CARIFORUM countries, which are not yet members, to accede to the Patent Cooperation Treaty (PCT) - 1970 as modified in 1984 and the Budapest Treaty on the International Recognition of the Deposit of Micro-organisms for the Purposes of the Patent Procedure (1977 as amended in 1980). The best endeavour obligation relates to the requirement that CARIFORUM countries endeavour to accede to the Patent Law Treaty (2000).

The only other provision concerning CARIFORUM countries under the Article on patents – Article 9 of the IP section – relates to recognition of the importance of the Doha Declaration on the TRIPS Agreement and Public Health and subsequent implementation decisions. In this context, the Parties agreed to take measures to accede to the Protocol done in Geneva on 6 December 2005 amending the TRIPS Agreement. The requirement to take such measures already applies to all WTO Members.

The mandatory requirement to accede to the PCT and the Budapest Treaty are obviously TRIPS-plus requirements. To the extent that the PCT and the Budapest Treaty are meant to support easier acquisitions of patents including by inventors in developing countries such treaties may bring some benefits to these countries. However, there are still important costs attached to participation. An important consideration is therefore the overall cost associated with implementing the IP section of the EPA when one considers specific costs associated with acceding to these two treaties. While appreciating that there is significant technical assistance provided by WIPO in implementing these treaties, the overall costs of administration will still be significant. This is particularly the case when one considers, for example, trends in patent filings. According to the 2007 WIPO Patent Report, PCT national phase entries for the CARIFORUM countries for 2005 that are parties to the PCT was dismal with the highest number being 262 recorded in Barbados. Most of the grants of patents are to foreigners.

The treatment of public health in the Chapter is consistent with the EC’s pledge that it will not impose TRIPS-plus requirements on ACP countries with respect to
patents in the pharmaceutical area. The exclusion of matters related to test data protection as well as restrictions related to compulsory licenses, parallel imports, and the early working exception from the EPA is an important positive step.

In essence, it can be concluded that the IP section of the CARIFORUM-EU EPA does not contain TRIPS-plus requirements with respect to public health and access to medicines. The only question then is whether there could be other matters of interest to CARIFORUM countries that could have been addressed under the article on patents. There is one such issue.

CARIFORUM countries appear to have agreed to address IP issues in the EPA, in part, on the understanding that the same Chapter would address important issues related to innovation. The result would be a balanced outcome. As already noted, however, the provisions on innovation in the EPA are insufficient to bring real long-term benefits to these countries. In the area of health, a real beneficial contribution of the EPA could have been fashioning mechanisms to implement and support the implementation of the outcomes of the process to develop a WHO Strategy and Plan of Action on essential health R&D. At the very least, a provision similar to Article 12.6 of the IP section of the EPA requiring the Parties to revisit the EPA upon the conclusion of the IGWG discussions at the WHO could have been usefully incorporated in the EPA.

Utility models
The EPA makes provision, under Article 10 of the IP section, for the protection of utility models. In particular, the article addresses the requirements for protection, the term of protection, and the relationship between utility models and patents. Although utility model protection is not a subject directly covered by the TRIPS Agreement, there is widespread recognition that protection for such models provides far more opportunities than the patent system when one considers the innovation environment in developing countries and LDCs.53 Indeed, many developing countries and LDCs have a certain level of protection for utility models. Consequently, the recognition of the importance of utility models for innovation in developing countries and the inclusion of norms in the EPA is a beneficial step for the CARIFORUM countries.

The main shortcoming in the provisions on utility models under the EPA is the permissive nature of the obligation imposed particularly on the EC. Under Article 10.1, first, the EC may, but is not obliged, to offer protection for utility models
from CARIFORUM countries. Secondly, even where protection is contemplated, the products or processes that can benefit from protection would be those determined by the EC to be appropriate. With such a permissive provision, it is not entirely clear how much benefit CARIFORUM inventors can benefit from protection in the EC. Some minimum mandatory requirements for protection of CARIFORUM utility models in the EC would have offered better potential for CARIFORUM enterprises and individual inventors.

**Plant Variety Protection (PVP)**

The provision on PVP in the EPA is very brief. Article 11 of the IP section, which addresses the protection of PVP, deals only with the question of exceptions for farmers and accession to the 1991 Act of the International Convention for the Protection of New Varieties of Plants (UPOV-1991).54

The general obligation with respect to PVP under the EPA is compliance with Article 27.3(b) of TRIPS.55 The EPA, however, also recognises the right of the CARIFORUM countries to provide for exceptions to the exclusive rights granted to plant breeders for the purposes of allowing farmers to save, use and exchange protected farm-saved seed or propagating material. Of course, the recognition of the farmers privilege here should be understood to have been done to ensure that there is no doubt regarding the right to provide such exceptions but should not mean that CARIFORUM countries have renounced the right to provide for other exceptions to exclusive rights under PVP regimes.

The main challenge on PVP in the EPA relates to the accession to UPOV 1991.56 Although the obligation that was finally accepted by CARIFORUM countries on PVP is milder than the original demand by the EC that CARIFORUM countries mandatorily accede to UPOV 1991, it still raises TRIPS-plus problems.

The TRIPS Agreement requires countries to protect plant varieties by patents or to develop their own *sui generis* system subject only to the requirement that the protection afforded is “effective”. The requirement to join UPOV 1991, which is known to be much more restrictive than earlier Acts, goes beyond what is necessary to meet the TRIPS obligations. There is also the problem that the benefits of PVP in developing countries and LDCs such as the CARIFORUM countries are far from proven. A study by Louwaars et al57 has shed some light on what is happening in developing countries with respect to PVP. The study, which was aimed at describing and evaluating the initial experience with strengthened IP rights for
developing country agriculture focuses on five case studies on China, Colombia, India, Kenya and Uganda. Though the study concludes that it is too early to make any general conclusions about the impact of PVP in developing countries, it finds, among other things, that overall, there is inconclusive evidence as to the effects of PVP both in developed and developing countries.\(^{58}\)

That said, one could argue that there is no under the EPA obligation to join UPOV 1991, only a requirement to consider joining. Considering the power equation between the EC and CARIFORUM countries the mandatory obligation to consider joining essentially reverses the burden of proof. Instead of EC having to show that UPOV 1991 is the most suitable method of implementing PVP under Article 27.3(b) of the TRIPS Agreement, the burden shifts to CARIFORUM countries to prove that they have considered joining and have made a decision that UPOV 1991 is not the most suitable method of implementing the TRIPS obligation.

**Genetic resources and traditional knowledge**

CARIFORUM countries, like many other developing countries and LDCs, have specific interests in the protection of genetic resources and traditional knowledge. In this regard, there are a range of international negotiations and discussions on these issues, notably those taking place at the WTO, in the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC) at WIPO\(^{59}\) and in the Convention on Biological Diversity (CBD) in which these countries are seeking specific outcomes. Though the outcomes of all the three processes remain uncertain, it is obvious that they provided the context in which the relevant EPA provisions were negotiated.

In the final text of the CARIFORUM-EU EPA, Article 12 of the IP section addresses a number of issues related to the protection of genetic resources and traditional knowledge. Although there are important positive words in the text, there is, however, no major achievement for the CARIFORUM countries. Other than the commitment by the EC to encourage the preservation and promotion of genetic resources and traditional knowledge, to implement the CBD and the patent provisions of the EPA in a mutually supportive way, and to exchange information regarding international negotiations, only a mild step is taken towards the objective sought by CARIFORUM countries in the international processes.

This step is related to the question of disclosure of genetic resources and associated traditional knowledge used in inventions. The EC acknowledges that each Party to
the EPA may introduce such requirements. The concern is that there is no obligation on the EC Party to establish a mandatory system. This concern is partly addressed by the commitment of the Parties to revisit the provision under the Article following the conclusion of the negotiations in WIPO, WTO and the CBD. Going by the current pace of negotiations, however, the revisiting might be a long way coming.

Overall, therefore, the treatment of genetic resources and traditional knowledge in the CARIFORUM-EU EPA adds little value and offer no major development benefit to CARIFORUM countries.

**Enforcement provisions**

The provisions on enforcement in the TRIPS Agreement as well as in EPAs, such as the CARIFORUM-EU one, have direct practical effects on the impact of IP rights at the national level. The manner in which the provisions are written, interpreted and applied determines how much power the IP right-holders enjoy; and the extent to which flexibilities in the agreements can be used. The result is that enforcement provisions have a direct bearing on the competitive relations among firms in the economy, on consumer interests and on innovation generally. This means that TRIPS-plus enforcement provisions can have even more significant negative consequences for developing countries than TRIPS-plus provisions on the substantive subject matter.

Next to geographical indications, enforcement is the other major offensive interest of the EC in its bilateral dealings on IP issues. This is illustrated by the fact that despite the detailed enforcement provisions in the TRIPS Agreement, five pages of detailed rules, drawn from the EC enforcement regime, are added into the EPA with CARIFORUM countries. The provisions, set out in sub-section 3 of the IP section of the EPA, cover a range of issues including: general obligations; entitled applicants; evidence; measures for preserving evidence; right of information; provisional and precautionary measures; corrective measures; injunctions; alternative measures; damages; legal costs; publication of judicial decisions; and border measures. The focus on enforcement by the EC reflects its *Strategy for the Enforcement of Intellectual Property Rights in Third Countries*, which makes it clear that the EU would revisit its approach to IP in bilateral agreements with a view to *inter alia* strengthening enforcement clauses.

The campaign and greater focus on IP enforcement by the EC in EPAs as well as the United States in the context of FTAs and Special 301 Report are predictable
reactions in a dynamic global economy. The WTO TRIPS framework, as well as the FTAs and EPAs, are all built around a static view of comparative advantage. The implication is that each country will seek rules that lock in its comparative advantage in perpetuity. Where countries feel that their trading partners, while retaining their comparative advantage, say in agriculture or commodities, but are also gaining advantage in other sectors, in this case higher technology goods and services, one defensive strategy is to ratchet-up enforcement of the lock-in rules or to create new rules to maintain the lock-in. This is essentially what the EC and the United States are seeking to do through the additional enforcement obligations in EPAs and FTAs.

Taken together, the provisions on enforcement in the CARIFORUM-EU EPA entail a significant ratcheting up of IP enforcement in CARIFORUM countries. There are, as a result, major TRIPS-plus implications. In addition to the significant administrative and financial burden to be imposed on these countries, these TRIPS-plus provisions are likely to result in a range of specific problems and challenges for these countries. The range and types of problems attendant to the EC approach to enforcement of IP in EPAs generally, and with respect to specific enforcement issues covered under the CARIFORUM EPA have been extensively discussed by this author elsewhere and it is therefore not necessary to repeat this here. It suffices here to say that in addition to the obvious TRIPS-plus implications of the obligations, the introduction of such extensive provisions on enforcement into the EPA also runs directly counter to the EC stated position in its strategy on enforcement in third countries that the strategy is not ‘intended to impose unilateral solutions or to propose a one-size-fits-all approach in promoting IP enforcement’.

3.5 Regional aspects in the Innovation and IP Chapter of the EPA

There are many regional aspects to innovation and IP policies. Regional cooperation can therefore bring important benefits. In particular, innovation and IP policy can be helped by regional cooperation if countries leverage regional opportunities to use TRIPS and other flexibilities in IP instruments. Regional cooperation can also provide important cost and efficiency benefits with respect to the administration of IP systems. Examples of such regional cooperation include the European Patent Office (EPO), the African Regional Intellectual Property Organization (ARIPO) and the African Intellectual Property Organization (OAPI).
Articles 3 of both section 1 and section 2 of the Chapter address regional integration aspects of innovation and IP. The explicit recognition of the regional aspects of innovation and IP policies in the EPA is an important forward looking step. So is the commitment by CARIFORUM countries to foster regional action on innovation and certain aspects of IP. There are, however, two specific problems with the commitments with respect to regional integration and IP as framed in Article 3 of the IP sub-section.

The first problem relates to the commitment for further harmonisation and regional enforcement. The second, and more important problem, is the undertaking to move towards the creation of regional IP rights. Regional cooperation should not be taken to be synonymous with harmonisation. As already noted, there is an international acceptance that one-size-does-not-fit-all even between developing countries. Consequently, while cooperation can bring benefits, overzealous harmonisation, especially in the area of enforcement, may be dangerous. The undertaking by the EC and CARIFORUM countries “to move towards a harmonised level of intellectual property protection across their respective regions” should therefore be viewed with extreme caution.

The commitment to create regional IP rights, as noted, is even more problematic. What exactly is envisaged as regional IP rights? The principle of territoriality that underpins the international IP system is a crucial rule with important implications on state sovereignty and policy space. While there are cases where the principle may be usefully relaxed, such as in cases where a region adopts the same approach to flexibilities like parallel trade, a wholesale commitment to regional rights raises many unanswered questions. This is particularly the case when it is not clear what moving towards the creation of such right will entail. Clarity on the exact intentions here coupled by the evidence of need should therefore be an important aspect of implementation.

3.6 Cooperation (capacity building and technical assistance) on innovation and IP

Sub-section 4 of the IP section of the EPA contains provisions related to financial and technical cooperation. Developing countries and LDCs always need such cooperation in order to meet their commitments in bilateral or international instruments. In the emerging international innovation and IP context, such cooperation is now understood to include a greater focus on helping developing countries use
flexibilities in IP instruments including EPAs as well as the use of flanking policies such as competition law. Seen in this context, the section on cooperation on IP and Innovation in the EPA leaves a lot to be desired.

The cooperation activities anticipated under Article 27 of the IP section will mainly focus on supporting the implementation of obligations of CARIFORUM countries, including preparing laws for this purpose, but not necessarily the use of flexibilities. The support would also focus on efforts aimed at regional harmonisation and enforcement activities including support for trade associations to develop codes of conduct on enforcement along the lines of Article 17 of IPRED. This approach falls far short of the principles and parameters that have been internationally agreed to guide IP technical assistance, under the auspices of the Development Agenda.

The cooperation sub-section is framed to promote an uncritical implementation of the EPA IP obligations with little attention being paid to the innovation provisions as well as issues around flexibilities and abuse of rights. For example, the development agenda principles and guidelines require a focus on capacity to address anti-competitive behaviour by right holders, institutional capacity in IP offices to promote a fair balance between rights and the public interest, and assistance to developing countries and LDCs to better understand and use TRIPS flexibilities. None of these pro-development aspects of IP technical assistance and capacity building have been captured in the provisions on cooperation in the EPA.

3.7 Implementation costs

The establishment of the administrative and enforcement framework for IP entails a range of one-time as well as recurrent costs. There are also direct costs incurred by IP agencies as well as indirect costs incurred as a result of implementing enforcement requirements in the Judiciary, the police, customs etc. Very little empirical work has been done to determine the cost of implementing the TRIPS Agreement for developing countries and LDCs leave alone the additional obligations imposed through FTAs and EPAs. This is partly because, as Leesti and Pengelly argue, it is difficult to generalise the cost of implementing international IP obligations such as those imposed by TRIPS on developing countries for various reasons.

Apart from the costs incurred by government administrations, it is also important to remember that there are important costs incurred by business and other sectors in terms of adjusting practices, training etc. While charges on applications and other services provided by IP offices offer important cost recovery channels for gov-
ernment expenditure, which might brings profits to the IP office, the costs in the business and other sectors are not always accounted for.

The Leesti and Pengelly study included figures for one CARIFORUM country – Jamaica, which could provide some sense of the implementation costs one is looking at with respect to EPA obligations. In the study, it is reported that in the financial year 1999/2000 Jamaica's expenditure on IP administration was USD 283,752 while revenues for the same period was USD 161,693. That means that the tax payers in Jamaica had to spend USD 122,059 in direct costs for IP administration excluding indirect costs and the costs to businesses and other entities. Although during the initial period of implementation some of these costs may be borne through technical assistance and capacity building projects provided by WIPO, the EC and/or other providers, the recurrent costs are likely to be picked up, in the longer-term by the tax payers in CARIFORUM countries.

It is therefore obvious that although it is difficult to be definitive about the cost of implementing the IP provisions of the EPA, the costs are likely to be substantial. This is because:

- **CARIFORUM countries have assumed new onerous obligations especially in the areas of geographical indications and trademarks, industrial designs and enforcement. The costs associated with enforcement activities, in particular, may be the highest though the most difficult to estimate.**

- **CARIFORUM countries have undertaken to accede to or consider acceding to nine (9) WIPO treaties all of which would come with additional costs for establishing administrative and enforcement systems.**

It should also not be forgotten that at the same time, some of the CARIFORUM countries have to implement FTAs with the United States which have even more onerous and costly obligations.
4. Other EPA provisions with implications for development-oriented innovation and IP policies in the CARIFORUM countries

In order to understand the full implications of the innovation and IP provisions in the CARIFORUM-EU EPA, it is important to appreciate that there are a range of other EPA provisions which might exacerbate or obviate the negative impacts of the IP provisions. While it is beyond the scope of this study to discuss each of these other relevant provisions in detail, this section briefly explores the various provisions that might have implications for development-relevant innovation, access to knowledge and technological learning in the CARIFORUM countries. The provisions include those related to: investment; the regulatory aspects of e-commerce, especially matters related to the liability of intermediary service providers; competition policy; dispute settlement; and the general exceptions clause.

4.1 Investment provisions

There are only limited provisions on investment in the EPA. However, under Article 3 of Chapter 1 of Title II (Investment, Trade in Services and E-Commerce) CARIFORUM countries have agreed to enter into further negotiations on investment no later than five years from the date when the EPA enters into force. In these negotiations, CARIFORUM countries will have to consider the implications of the rules they agree to for IP protection and enforcement, if the definition of investment includes IP.

Broadly speaking, standalone investment agreements or investment provisions in agreements such as EPAs can have significant impact on efforts to promote the public interest in IP policies. For example, where IP disputes are not excluded from the dispute settlement mechanisms under investment agreements or provisions, government measures to utilise flexibilities in IP agreements may be open to challenge. In this regard, Correa points out that the areas of particular concern relate to the government powers to grant compulsory licenses as well as measures to implement a mandatory disclosure requirement with respect to genetic resources and associated traditional knowledge.
4.2 Regulatory aspects of e-commerce

Chapter 6, made up of two articles (Article 58 and 59), of Title II of the EPA addresses the question of e-commerce. In the main, beyond some general objectives and principles no substantive provisions are promulgated with respect to e-commerce. Only the areas, and form of cooperation, are spelt out.73

In the context of IP protection and the public interest, one area of cooperation that raises concern is the question of liability of intermediary service providers. The exchange of information on legislation and implementation, which would include the development of jurisprudence, is likely to have an upward harmonisation force on CARIFORUM countries whose laws in this area are less advanced.74 In the specific case of IP, the question of the secondary liability of internet service providers (ISPs) for copyright and trademark infringement is of particular concern. In the various enforcement initiatives driven by the United States Trade Representative (USTR), the EC and a range of right-holder groups there are efforts to impose higher standards of liability on ISPs for IP infringement which would make it extremely difficult and costly for ISP to operate. This would have negative effects on efforts to narrow and/or close the digital divide in CARIFORUM countries.

4.3 Competition policy

Competitiveness is singled out as an important part of the Innovation and IP Chapter of the CARIFORUM-EU EPA. There is also a specific reference to Article 8 of the TRIPS Agreement which provides that appropriate measures may be needed to prevent the abuse of IP by right holders or the resort to practices which unreasonably restrain trade or adversely affect the international transfer of technology. In the TRIPS framework, anti-competitive licensing practices have been identified as one key problem area.75

A number of studies and reports in the last few years have amply demonstrated the importance of developing countries using competition policy tools to address the negative impact of the TRIPS and TRIPS-plus obligations.76 In a recent study, Correa makes a number of recommendations for developing countries to ensure that the implementation of TRIPS and other IP obligations is done in a pro-competitive manner.77

Competition is addressed in Chapter 1 of Title IV (Trade Related Issues) of the CARIFORUM-EU EPA. Under the Chapter, CARIFORUM countries agree,
among other steps, to ensure that within five years of the coming into force of the EPA they have laws in force addressing restrictions on competition within their jurisdictions. Though the implementation of competition policy may raise important challenges for developing countries, which explains the resistance to address this issue in the WTO framework, the process to develop these laws in the CARIFORUM countries should be taken as an opportunity in the area of IP. In particular, in formulating such laws, CARIFORUM countries should proactively address the IP-related competition issues along the lines recommended by Correa.  

4.4 Dispute settlement

Part III of the CARIFORUM-EU EPA contains detailed rules in dispute settlement. The system is compulsory for the parties to the EPA and applies to all disputes including IP related disputes. Theoretically, such a system, to which all parties have equal access and in which decisions are made on the basis of rules rather than on the basis of economic power, empowers developing countries and smaller economies like CARIFORUM countries by placing them on ‘an equal footing’ with the EC. However, as the experience with the WTO Dispute Settlement has shown, developing countries face significant challenges participating in such a system. The result is that instead of putting the parties on the same footing, the dispute settlement mechanisms in the EPA essentially provide the EC with another lever over the IP policy of CARIFORUM countries. How the EC uses the dispute settlement system may have important implications on the way CARIFORUM countries utilise flexibilities contained in the TRIPS Agreement and in the EPA.

4.5 General exceptions clause

Part IV of the EPA provides for general exceptions under the Agreement which would also apply to the IP section. Article 1 of this Part, in particular, provides that as long as a measure does not constitute a means of arbitrary or unjustifiable discrimination or disguised restrictions to trade in goods, services or establishment, nothing in the EPA prevents the Parties from taking measures, among others, to: protect security, public morals or public order; protect human, animal or plant life or health; and curiously, that are necessary to secure compliance with laws and regulations including those related to protection of IP rights.

Since there is no equivalent to Articles 13, 17, 24 and 30 of the TRIPS Agreement, which address exceptions and limitations to copyrights, trademarks, geographical indications and patents respectively, the general exception clause in the EPA is of
particular interest. Measures related to the protection of security, public morals and order as well as life and health can be used by CARIFORUM countries to address some of the negative impacts of IP.

Depending on the interpretation of this clause, the elevation of IP laws and regulations to the level of general exception could, however, have a chilling effect on the use of IP flexibilities under the EPA. It is conceivable that the EC could argue that provisions on flexibilities in the EPA or elsewhere could not be used by CARIFORUM countries to justify non-action on certain IP-related matters. One can clearly foresee such a situation with respect to the approach to enforcement laws and regulations.

**Box 2: Innovation and intellectual property: CARIFORUM negotiating strategies**

*By Audel Cunningham*

Unlike as was the case with the other trade related issues on the EPA negotiating agenda, CARIFORUM had strong offensive interests in the area of innovation and intellectual property. Securing pro-development obligations in the area of Innovation was seen as a means of assisting the transition of the CARIFORUM states into strong technology based economies and therefore one of the areas of the EPA most obviously capable of providing significant benefits for the CARIFORUM States.

The main CARIFORUM negotiating strategy in this area therefore consisted of precisely identifying the various elements of CARIFORUM’s offensive interests in this area and tying the attainment of these elements to a willingness to grant concessions in those areas in which the EC had offensive interests such as greater protection for geographic indications. CARIFORUM’S negotiating guidelines identified its main offensive interests in this area as being:

1. Achieving an agreement that facilitated the development within CARIFORUM of competitive technologies,
2. Attaining an agreement conducive to the protection of CARIFORUM indigenous knowledge,
3. Obtaining development support to facilitate the development and exploitation of intellectual property resources by CARIFORUM private sector entities.
As is the case with all the Trade Related Issues negotiations, CARIFORUM employed in the area of innovation and intellectual property, the strategy of tying the assumption of new commitments to the provision by the EC of development support and the agreement upon appropriate transition periods. In this regard, it is to be noted that the least developed CARIFORUM States are not obliged to implement the obligation of sub-sections 2 and 3 of Section 2 of the Chapter until 2021.

Arguably, TRIPS plus obligations have been entered into in the Chapter, most obviously in the rules providing for (1) the treatment of infringing imports and (2) stronger protection for geographical indicators other than wines and spirits. These obligations however accord with aspects of CARIFORUM’s development strategies such as the use of intellectual property protection to spur development of national creative industries and the protection of specific high value products.

CARIFORUM was also able to make successful use of the general strategy of rejecting any agreement which was not a pro-development one, which in this particular case, was to be manifested not just in the provision of development co-operation etc, but which allowed CARIFORUM to benefit from the development oriented programmes available to the less developed parts of the community such as the Community Framework Programmes and programmes specifically available to the French outermost regions.

5. IP in the CARIFORUM-EU EPA: Lessons for the African and Pacific regions

Controversy and debate over the suitability of IP provisions in EPAs is likely to continue unabated as the negotiations to finalise EPAs in Africa and the Pacific evolve. Various reasons account for this. First, as argued in the background section of this study, the Cotonou Agreement does not mandate the inclusion of substantive provisions on IP in EPAs. This means that the inclusion of such provisions should be conditioned upon the demonstration of clear development benefits taking into account the changing international innovation and IP context. Second, as the analysis of the various sets of innovation and IP provisions in the CARIFORUM-EU EPA in section 3 reveal, there are substantial problems with a number of these provisions coupled with a potentially huge implementation bill for CARIFORUM countries. Third, although certain provisions on innovation and IP in the EPA have potential to lead to positive developmental impacts, further work will be
required in areas such as geographical indications to determine the real benefits to CARIFORUM countries. Finally, flanking policies which could help address some of the negative consequences of enhanced IP protection, for example, competition policies remain underdeveloped in the ACP regions.

The underlying question in this continuing debate and controversy is therefore the following: Should African and Pacific countries\(^8\) negotiate substantive provisions on IP, including enforcement, in the EPAs and if so, can the CARIFORUM text on innovation and IP be used as a template? The three sub-sections that follow focus on the positive aspects of the innovation and IP provisions in the EPA as well as the problems areas and issues that could be additionally addressed in future EPAs.

### 5.1 Positive aspects of CARIFORUM-EU innovation and IP chapter

There are a number of positive aspects in the Innovation and IP Chapter of the CARIFORUM-EU EPA which could provide a basis for positive rules on this subject in the other ACP regions. Based on the analysis in section 3 of this study these can be summarised into the following 12 aspects:

1. The recognition that fostering innovation and creativity improves competitiveness and, as such, measures in this direction are a crucial element to achieve sustainable development.
2. The acknowledgement that the level of development should determine the appropriateness of increasing the levels of IP protection.
3. The inclusion in the EPA of specific objectives focusing on promoting innovation, including collaborative innovation and R&D, competitiveness, transfer and dissemination of technology and know-how.
4. The inclusion of an explicit innovation section in the EPA.
5. The adherence to the TRIPS Agreements standard on the nature and scope of IP obligations and the direct application of the principles contained in Article 8 of TRIPS to the EPAs IP provisions.
6. Generally, fair treatment of LDCs and the grant of powers to the TDC to extent the transition periods not just for LDCs but also for developing CARIFORUM countries.
7. The explicit recognition of the problem of information asymmetries in transfer of technology dealings.
(h) The inclusion of an obligation for the EC and its Member States to provide incentives to enterprises and institutions in their territories to transfer technology not just to LDCs, as required under Article 66.2 of the TRIPS Agreement, but also to developing countries.

(i) The exclusion of substantive provisions on patents particularly with respect to pharmaceuticals and agro-chemicals.

(j) The recognition of the importance of utility models for CARIFORUM countries and the inclusion of substantive provisions on the same in the EPA.

(k) The explicit recognition by the EC and its Member States of the right of CARIFORUM countries to establish mandatory disclosure requirements with respect to genetic resources and traditional knowledge used in inventions for which patent are applied for in their territories.

(l) The commitment to revisit the question of the protection of genetic resources and traditional knowledge upon the conclusion of the various international negotiations on the issues in the WTO, WIPO and the CBD.

5.2 Problem areas in the innovation and IP chapter in CARIFORUM EPA

The analysis in section 3, however, also demonstrates that there are significant problem areas and half measures on innovation and IP in the CARIFORUM-EU EPA. These range from the failure to translate certain stated objectives into operational provisions through to TRIPS-plus problems in a number of areas. In particular, the problem areas can be summarised into the following 17:

(a) In the context and objectives of the Chapter, there are important gaps with respect to access and the use of IP flexibilities which is echoed in the substantive provisions. The failure to spell out specific objectives in this area, coupled with the fact that there is no direct incorporation of the provisions of Article 7 of the TRIPS Agreement, may comprise pro-development interpretations of the Chapter’s provisions.

(b) The laudable aspirations to promote innovation and competitiveness, science and technology, ICTs, eco-innovations and renewable energy are likely to result into little development benefits due to the failure to translate these aspirations into operational language and specific obligations on the EC. The inclusion of these provisions in the EPA may not therefore offer much more than the traditional science and technology cooperation agreements that have often remained paper promises.
(c) Because of ambiguous language, there is a danger of political manipulation of the TDC’s power with respect to the use of the transition period for LDCs. Unlike in the TRIPS Agreement where the powers of the Council for TRIPS under Article 66.1 are limited to extending the transition, the language in the EPA leaves open the possibility of the TDC accelerating the implementation of the EPA by LDCs. In the case of Africa, where the majority of countries in the ACP are LDCs, such a provision would raise significant problems.

(d) Though there are notable improvements in the treatment of technology transfer in the EPA, more could have been done to translate, for example, the recognition of the problem of information asymmetries into specific measures to redress it.

(e) The mandatory requirement for CARIFORUM countries to accede to the WIPO Internet treaties is TRIPS-plus. There is no evidence of specific development benefits that would offset the costs of accession and implementation of these treaties in CARIFORUM countries.

(f) Without further empirical evidence, the onerous obligations assumed by CARIFORUM countries with respect to the protection of geographical indications, have the potential to result into higher costs to these countries than the benefits they would derive from the system.

(g) The range of new obligations relating to the protection of industrial designs entail substantial administrative burden for CARIFORUM countries. The benefits of the system, however, are at best uncertain.

(h) The mandatory obligation on CARIFORUM countries to accede to the PCT and the Budapest Treaty entail important TRIPS-plus obligations. In particular, although these may have benefits for CARIFORUM inventors, the overall costs of implementation may not be justified for these countries at this time.

(i) The laudable step to include utility model protection in the EPA is tempered by the failure to include any firm obligations on the EC to protect utility models from CARIFORUM individuals and firms in the territories of the EC Member States.

(j) The obligation on CARIFORUM countries to consider acceding to UPOV 1991 raises particular problems. This approach shifts the burden of proof from the EC to CARIFORUM countries in that they would have to demonstrate that they have considered and made a reasoned decision not to accede to the Act.
(k) The provisions related to genetic resources and traditional knowledge still fall far short of the stated intention of CARIFORUM countries in this area.

(l) The introduction of a broad range of new IP enforcement obligations on CARIFORUM countries under the EPA raise many TRIPS-plus problems and impose a significant administrative and financial burden on these countries. This runs directly counter to the EC’s stated position that it would not seek to propose a one-size-fits-all approach on enforcement in its dealings with third countries.

(m) The commitment by CARIFORUM countries to further harmonisation and regional enforcement of IP introduces a dangerous precedent. Similarly, the commitment to move towards the creation of regional IP rights raises specific challenges and problems.

(n) Technical assistance and capacity building (cooperation) on IP is framed to promote an uncritical implementation of the EPAs IP provisions with little attention being paid to the question of use flexibilities. This approach falls short of the principles and parameters on technical assistance and capacity building agreed to by both the EC’s Member States and CARIFORUM countries under the WIPO Development Agenda.

(o) Although it is difficult to definitively determine the costs for implementing the IP obligations under the EPA, the costs for CARIFORUM countries are likely to be substantial considering the obligations that these countries have assumed with respect to trademark, geographical indications, industrial designs and enforcement as well as the undertaking to accede or consider acceding to nine (9) WIPO treaties. These costs will be in addition to the costs of implementing the TRIPS Agreement, and for some CARIFORUM countries, such as the Dominican Republic, the costs of implementing IP provisions in recently concluded FTAs.

(p) IP problems may also arise with respect to the implementation or further negotiations related to provisions on investment and regulatory aspects of e-commerce in the EPA.

(q) As explained in section 4.4 above, the elevation of IP laws and regulations to the level of general exception could have a chilling effect on the use of IP flexibilities under the EPA.
5.3 Possible additional pro-development aspects that could be considered in future EPAs

It is clear, from juxtaposing the positive aspects of the IP-related provisions in the EPA against the problem areas that, on balance, the inclusion of substantive provisions on IP in the EPA are likely to result in negative consequences for the CARIFORUM countries. The lesson for the African and Pacific countries is that they should approach the question of additional IP obligations with extreme caution.

However, if these African and Pacific countries determine that it is of interest to include such provisions a two pronged approach is suggested. First, these countries will need to specifically address themselves to the various issues flagged as problems areas above. Secondly, they could also consider including in the EPA a number of additional pro-development issues that were left out of the CARIFORUM-EU EPA. There are five such issues that could be considered. These are: inclusion of obligations relating to the elements of the WHO global strategy and plan of action on essential health R&D; more specific provisions on competition and IP; limitations and exceptions particularly in the area of copyright; obligations related to access to knowledge; and impact assessment. A brief word on each of these issues follows.

Essential health R&D

The global health community, through the World Health Assembly (WHA), has recognised that in addition to the effective use of flexibilities in IP instruments, there is need to develop further funding and incentive mechanisms to support essential health R&D. As already noted, in the IGWG processes, WHO Member States have agreed that a workable strategy would need to address at least eight elements including: prioritising R&D needs; promotion of R&D; building and improving innovative capacity; promoting transfer of technology; management of IP; improving delivery and access; ensuring sustainable financing; and monitoring progress. Building on this work in the WHO, the IP section of EPAs could include specific obligations, especially on the part of the EC, in these areas. At the very least, ACP countries should seek to get a commitment from the EC to negotiate specific measures under the EPA on these elements following the finalisation of the WHO strategy and plan of action.

Mitigating the abuse of IP rights through competition policy

The efforts to improve the use of competition policy tools to address the abuse of IP rights or practices that restrain trade and transfer of technology could be further
enhanced by adopting special rules in the EPAs on IP and competition. Building on the WIPO Development Agenda, EPAs could be used to promote measures to address abuse of rights or anti-competitive practices. These measures could include obligations on the EC to provide technical and financial assistance to ACP countries to develop their capacities to use competition tools as well as to undertake studies in this area.

**Limitations and exceptions to copyright**

There is a growing international consensus on the need to establish regional and global standards to secure mandatory minimum limitations and exceptions in the area of copyright to support educational and research needs as well as to meet the needs of disadvantage groups such as the visually impaired. In a recent seminal study, for example, Hugenholtz and Okediji make a convincing case that “[T]he task of developing a global approach to limitations and exceptions is one of the major challenges facing the international copyright system today.”\(^{83}\) Instead of, or in addition to considering issues related to the WIPO Internet treaties, ACP countries could benefit by taking advantage of the EPAs to contribute to the efforts to develop such a global approach to limitations and exceptions. Such an approach to limitations and exceptions would bring significant benefits to these countries as demonstrated in the Hugenholtz and Okediji study and other previous studies.

**Access to knowledge**

The debate on integrating development and the public interest into IP has, in recent years, led to increased focus on the measures that may be required to improve access to knowledge, especially in developing countries. This increased focus on access to knowledge has not only spawned a global movement but also led to the development of specific treaty and other proposals for action. Such proposals have, for example, been made under the auspices of the WIPO Development Agenda. Indeed, the proposals in WIPO have received wide support among the ACP countries. As WIPO considers the range of mechanisms that may be used to support enhanced access to knowledge in developing countries and LDCs, EPAs could also be used as a platform to develop such mechanisms at bilateral and regional levels.

Provisions on access to knowledge in EPAs could aim to address at least two concerns.\(^{84}\) These are the concerns relating to: (a) investments in human capital particularly education and health; and (b) innovation models that maximise the participation of developing countries in the processes of innovation while minimising the social cost of accumulating knowledge. In this regard, addressing access to
knowledge could be one way of making provisions such as those in the CARIFOR- 
RUM EPA on innovation operational.

Assessment of the impact of IP on development

The observation by Fink and Maskus that there is a lot we do not know about the 
impacts of IP in developing countries resonates with many of the arguments that 
developing countries and other stakeholders have been making in a range of global 
and regional fora. As a result, recent years have seen increasing calls for impact as-
sessments on the effect of IP protection on a range of sectors. For example, under 
the WIPO Development Agenda, WIPO Member States have agreed to strengthen 
the organisation’s capacity to undertake objective impact assessments and, at the re-
quest of Member States, to undertake studies to identify the possible links between 
IP and development. Calls for impact assessment on IP have also come from a 
number of UN human rights bodies.

In line with these developments at WIPO and in the human rights field, there is a 
strong case to condition any IP provisions in the EPAs between the EC and ACP 
countries to specific period impact assessments. Indeed, such practice would be 
consistent with the EC’s practice to undertaken such impact studies on its direc-
tives including in the field of IP.

6. Final remarks

There is no requirement under the Cotonou Agreement to include any substantive 
provisions on IP in EPAs. The analysis in this study goes a long way in demonstrat-
ing that while ACP regions or countries may decide to assume such substantive 
obligations under the EPA, there are significant challenges and problems that they 
will face in implementing these obligations. The debate on whether IP should be 
included in EPAs is therefore consistent with the reality. This reality is also reflected 
in the international innovation and IP context, a context that is significantly differ-
ent from what obtained at the time of adopting the TRIPS Agreement.

The overall conclusion of this study is therefore that African and Pacific countries, 
learning from the example of the CARIFORUM EPA, should approach proposals 
for additional obligations on IP issues in their regions with utmost caution. Even 
in cases where the issues addressed have the potential of development benefits, the 
overall obligations assumed may be too onerous for these countries. This is the case, 
for example, with respect to the provisions on enforcement and on the protection
of geographical indications. If IP provisions are to be included in these other agreements, these countries would have to make efforts to enhance the positive aspects of the relevant provisions by addressing the problem areas identified in section 5.2 of this study and consider the inclusion of the additional elements highlighted in section 5.3.

References


Hugenholtz, B. / R. Okediji (2008): Conceiving an International Instrument on Limitations and Exceptions to Copyright – Final Report, Institute for Information Law, University of Amsterdam and University of Minnesota Law School


Musungu, S. (2006): Fostering Research in Developing Countries: Key IPR Issues for Development-related Research, A study commissioned by the International Development Research Centre, mimeo

Musungu, S. (2005): Rethinking Innovation, Development and Intellectual Property in the UN: WIPO and Beyond, TRIPS Issues Papers 5, QIAP, Ottawa


Musungu, S., Villanueva, S. / R. Blasetti (2004): Utilising TRIPS Flexibilities for Public Health Protection through South-South Regional Frameworks, South Centre, Geneva


Endnotes

1. The 15 CARIFORUM States are: Antigua and Barbuda, The Bahamas, Barbados, Belize, The Commonwealth of Dominica, The Dominican Republic, Grenada, Guyana, Haiti, Jamaica, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, Suriname and Trinidad and Tobago.


5. The full official text of the TRIPS Agreement which is Annex 1C to the Agreement Establishing the WTO can be found in WTO (1999).

6. TRIPS-plus is a concept which refers to the adoption of multilateral, plurilateral, regional, bilateral and/or national IP rules and practices which have the effect of reducing the ability of developing countries to protect the public interest. In particular, TRIPS-plus standards include any new standards which would limit the ability of these countries: to promote technological innovation and to facilitate the transfer and dissemination of technology; to take necessary measures to protect public health, nutrition and to promote the public interest in sectors of vital importance to their socio-economic and technological development; or, to take appropriate measures to prevent the abuse of IP by right holders or the resort by right holders to practices which unreasonably restrain trade or adversely affect the international transfer of technology. Definition adapted from Musungu and Dutfeld (2003).


8. The fifth paragraph, Article 46.5, however, only contains a definition of IP.


10. For the membership of various WIPO conventions see the WIPO website at http://www.wipo.int/treaties/en/.


13. The Declaration together with other related decisions and processes in the WTO are available on the WTO website at http://www.wto.org/english/tratop_e/trips_e/public_health_e.htm (last accessed on 3 April 2008).


15. For the final report of the Commission see CIPIH (2006).
The resolution, documents and other information relating to the working group are available on the WHO website at http://www.who.int/phi/en/ (last accessed on 4 April 2008).

See the WIPO website at http://www.wipo.int/ip-development/en/agenda/ (last accessed on 1 April 2008).

For example, the principal theme of the Davos Annual Meetings of the World Economic Forum in 2008 was “The power of collaborative innovation”. Information is available at http://www.weforum.org/en/events/ArchivEd Events/ AnnualMeeting2008/ index.htm (last accessed on 4 April 2008). With respect to innovation in developing countries, the OECD and the EC have recognised that innovation in these countries has particular characteristics different from what obtains in developed countries. The differences arise because of the different socio-economic and institutional structures of developing countries. In general, innovation systems in developing countries are characterised by: dissemination mechanisms and minor or incremental inventions; few resources devoted to innovation activities system-wide; small markets leading to important market failures and other externalities which present high barriers to innovation; micro and or small firms and high levels of instability; informality so that the great creativity invested in solving day to day problems do not lead to systemic application; unusual economic and innovation environments; and reduced innovation decision-making powers due to the structure of multinational corporations and international manufacturing and service networks. In analysing the impact of IP rights as incentive mechanisms for innovation and diffusion of knowledge in developing countries including with respect to biotechnology, these special features need to be taken into account. For detailed discussion see OECD and European Commission (2005).


GAO (2007).

These considerations build on the analytical framework first elaborated by the author in the study on the EC Non-Paper on objectives and elements for an IP chapter in the EC-Pacific EPA, supra note 9.

Enforcement provisions make up about 30% of the provisions of the TRIPS Agreement. Recommendation 15 of the WIPO Development Agenda, supra note 17, provides inter alia that norm-setting activities (in this case negotiation of IP provisions in EPAs) should take into account the different levels of development of the countries involved and consider the balance between the costs and benefits of such rules.

See e.g., Chang (2002) as well as Dutfield and Suthersanen (2005).

See e.g., the literature available on http://www.iprsonline.org (last visited on 4.4.2008).

For a discussion on the changing dynamics and possible future scenarios especially in the area of patents, see European Patent Office (2007).


For a discussion on how measures in these areas are important for fostering innovation and creativity as well as competitiveness see e.g., Commission on IPRs (2002); CIPIH (2006); and Musungu (2006).
In the WHO IGWG process, WHO Member States, which includes both the EC Member States and the CARIFORUM States, have agreed on eight key elements including on specific measures to: prioritise R&D needs; promote R&D; build and improve innovative capacity; promote transfer of technology; management of IP; improve delivery and access; ensure sustainable financing; and monitor and report on progress. The draft strategy and plan of action and other relevant documents in this process are available on the WHO website at http://www.who.int/phi/documents/en/ (last accessed on 1 April 2008).

For additional insights on the issues addressed in the IP section see also Santa-Cruz (2007). The Commentary in that paper addresses the EC Non-Paper on scope of IP in the then proposed EC-CARIFORUM EPA which was the precursor to the adopted Chapter. Though the final text of the EPA has some changes the analysis in the paper is still relevant since a large part of the EPA provisions aim to achieve the goals stated in the Non-Paper.

See the list of Implementation issues in the WTO. Document Job(01)/152/Rev.1. The text of the treaties and the current membership can be found on the WIPO website at http://www.wipo.int/treaties/en/ (last accessed on 1 April 2008).

Information regarding the Rome Convention can be found on the WIPO website, id.

For an analysis of these treaties from a development perspective see e.g., Okediji (2004). See the paper prepared by the International Bureau of WIPO titled “Advantages of Adherence to the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT)” available at http://www.wipo.int/export/sites/www/copyright/es/activities/wct_wppt/pdf/advantages_wct_wppt.pdf (last accessed on 4 April 2008).

Fink and Maskus (2005).


For a summarised explanation of what some of the problems TPMs may be, see e.g., Hinze, G. at http://www.cptech.org/ip/ftaa/hinze11182003.pdf (last accessed 1.4. 2008).

Among the CARIFORUM countries only Antigua and Barbuda is a party to the Madrid Protocol. The Singapore treaty is not yet in force. The Dominican Republic and Haiti have signed the treaty.


Indeed, some ACP countries such as those in the OAPI region already have detailed rules on geographical indications. See Annex VI of the Revised Bangui Agreement. The text of the Agreement is available at http://www.oapi.wipo.net/doc/en/bangui_agreement.pdf (last accessed on 5 May 2008).

Part III: Other Trade Dimensions

44 For a detailed discussion of the socio-economics of geographical indications see e.g., Ragnekar (2004). Also see Vivas, D. / C. Spennemann, The Evolving Regime for Geographical Indications in WTO and in Free Trade Agreements, in Correa and Yusuf, eds. (2008).

45 Section 4 of Part II of TRIPS, which deals with industrial designs, contains only Articles 25 and 26 with a total of five short paragraphs. Out of the over 12,000 words making up the TRIPS Agreement, only 232 are dedicated to industrial designs. For a discussion of these provisions including an examination of the limited treatment of industrial designs in the TRIPS Agreement see e.g., Phillips, J. Industrial Designs and TRIPS, in Correa and Yusuf (2008) pp.215 – 226.


47 The text of the Act and other information on the Hague Agreement is available at http://www.wipo.int/treaties/en/registration/hague/ (last accessed on 2 April 2008). Among the CARIFORUM countries only Belize and Suriname are parties to the Hague Agreement.

48 For analysis, see Phillips, Supra note 45.

49 For a discussion of some of the problems with the EC and United States policies on patents in EPAs and FTAs particularly in the area of pharmaceuticals see e.g., Musungu and Oh (2006).

50 The texts and information on both treaties can be found at http://www.wipo.int/treaties/en/ The majority – ten – of the CARIFORUM countries are parties to the PCT. The exceptions are The Bahamas, Guyana, Haiti, Jamaica and Suriname. The Budapest treaty has much less traction in the region. Only two CARIFORUM countries are parties – Dominican Republic and Trinidad and Tobago.

51 The text and other information about the treaty including the contracting parties can be found at http://www.wipo.int/treaties/en/ip/plt/ (last accessed on 2 April 2008). Only Haiti is party to the PLT.


53 For a detailed discussion on utility models and their importance as well as potential to support innovation in developing countries see e.g., Suthersanen (2006).

54 For information regarding UPOV 1991, the earlier Acts as well as general information about UPOV as an organisation see its website at http://www.upov.int/index_en.html (last visited on 2 April 2008).

55 Article 27.3(b) provides that “Members shall provide for the protection of plant varieties either by patents or by an effective sui generis system or by any combination thereof”.

56 While the EC is a Member of UPOV and has implemented PVP through Council Regulation (EC) No 2100/94 of 27 July 1994 on Community Plant Variety Rights, only two of the CARIFORUM countries are UPOV members – Dominican Republic and Trinidad and Tobago.


60 In the WTO many of the CARIFORUM countries have aligned themselves with the proposal to amend the TRIPS Agreement to provide that: “Where the subject matter of a patent application concerns, is derived from or developed with biological resources and/or associated traditional knowledge, Members shall require applicants to disclose the country providing the resources and/or associated traditional knowledge, from whom
in the providing country they were obtained, and, as known after reasonable inquiry, the country of origin. Members shall also require that applicants provide information including evidence of compliance with the applicable legal requirements in the providing country for prior informed consent for access and fair and equitable benefit-sharing arising from the commercial or other utilization of such resources and/or associated traditional knowledge.” (See paragraph 2 of WTO document IP/C/W/474).


“Special 301” is the part of United States Trade Act that requires the United States Trade Representative (USTR) to identify countries that deny adequate protection for IP or that deny fair and equitable market access for US persons who rely on IP. Under the process, countries that have what the United States considers the most egregious acts, policies, or practices, or whose acts, policies, or practices have the greatest adverse impact (actual or potential) on relevant United States products and are not engaged in good faith negotiations to address these problems, must be identified as “priority foreign countries.” If so identified, such country could face bilateral trade sanctions if changes are not made that address United States concerns. The USTR has also created a “Priority Watch List” and “Watch List” under Special 301 provisions. Placing a country on the Priority Watch List or Watch List indicates that, according to the United States, particular problems exist in that country with respect to IP protection or enforcement or market access for persons relying on IP.


62 “Special 301” is the part of United States Trade Act that requires the United States Trade Representative (USTR) to identify countries that deny adequate protection for IP or that deny fair and equitable market access for US persons who rely on IP. Under the process, countries that have what the United States considers the most egregious acts, policies, or practices, or whose acts, policies, or practices have the greatest adverse impact (actual or potential) on relevant United States products and are not engaged in good faith negotiations to address these problems, must be identified as “priority foreign countries.” If so identified, such country could face bilateral trade sanctions if changes are not made that address United States concerns. The USTR has also created a “Priority Watch List” and “Watch List” under Special 301 provisions. Placing a country on the Priority Watch List or Watch List indicates that, according to the United States, particular problems exist in that country with respect to IP protection or enforcement or market access for persons relying on IP.


64 For a detailed discussion of how regional cooperation can help in an area such as public health see e.g., Musungu, Villanueva and Blasetti (2004).


66 For details of the parameters to guide pro-development technical assistance and capacity building on IP see Recommendations 1 through to 14 of the WIPO Development Agenda, supra note 17.


69 Id.

70 The Dominican Republic is one such country which is party to the DR-CAFTA FTA with the United States. Basic information on the DR-CAFTA FTA is at http://www.ustr.gov/Trade_Agreements/Bilateral/CAFTA/Section_Index.html (last accessed on 4 April 2008).
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71 For a discussion, see generally Biadgleng (2006). Also see Correa (2004).

72 Id.

73 The areas of cooperation identified include: recognition of electronic signatures; liability of intermediary service providers with respect to storage and transmission of information; the treatment of unsolicited electronic commercial communications; consumer protection; and any other issues relevant to the development of e-commerce. In terms of the nature of cooperation, it is envisaged that this could take the form of exchange of information on the Parties' respective legislations and the implementation of such legislation.


75 See Article 40 of the TRIPS Agreement. For additional discussion of the treatment of anti-competitive practices under TRIPS see e.g., Roffe, P. / C. Spennemann “Control of Anti-competitive Practices in Contractual Licenses under the TRIPS Agreement” in Correa and Yusuf, eds. (2008), pp.293 – 330.

76 See e.g., Commission on IPRs (2002); Federal Trade Commission (2003); UNCTAD and ICTSD (2005); and Drexl, Josef. in Barton et al (2007).

77 Correa (2007). In the study, Correa recommends consideration of a number of issues including inter alia the use of competition policy to control abuse of IP rights, use of competition policy in matters related to market entry such as with respect to pharmaceutical and agrochemical market approvals, consideration of anti-competitive behaviour such as refusal to deal as a basis for the issue of compulsory licenses, use of competition policy to address patent thicket problems, and measures to avoid the grant of frivolous and low quality patents.

78 Correa (2007).

79 This argument is made, for example on the WTO website at http://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c11s1p1_c.htm (last accessed on 4 May 2008).

80 For a detailed discussion of these challenges and problems see e.g., Mosoti (2007).

81 It should be noted that in an earlier paper regarding IP provisions in the EC-Pacific EPA, this study's author recommended that considering the TRIPS-plus implications of many of the elements suggested by the EC in the Non-Paper on the objectives and possible elements of an IP section, the challenges that would face non-WTO Pacific countries to even adhere to the TRIPS Agreement, and the general level of development in these countries, Pacific countries should not agree to the inclusion of an IP section in the EC-Pacific EPA.

82 This is the essence of WHA Resolution WHA59.24, supra note 27.


84 Drahos (2005).

85 Fink and Maskus (2005).

86 See the recommendations under Cluster D on Assessment, Evaluation and Impact Studies, supra note 17.

87 See e.g., European Commission (2005).

Kamala Dawar, Simon J. Evenett
1. Introduction

The negotiation of Economic Partnership Agreements (EPAs) between the European Union (EU) and some of the world’s smallest and most vulnerable countries, many of which were former colonies of European states, has been both protracted and a source of considerable controversy within and outside Europe. This has had adverse consequences for broader EU external relations policy. These considerations added further impetus to concluding these negotiations, which were necessary once a World Trade Organization (WTO) waiver expired concerning the EU’s extant preferential trading arrangements with the African, Caribbean, and Pacific nations (ACP). Notwithstanding this, the EPAs are claimed to represent an important element in the EU’s trade and development policies. As such they can be seen as a manifestation of Europe’s collective desire to promote living standards in poorer countries and to facilitate their integration into the world trading system as well as into their respective regional economies.

An important milestone was reached on 16 December 2007 when the European Commission (EC) initialled an EPA with 15 Caribbean economies, the so-called CARIFORUM group. Naturally governments, civil society, business, and other interested parties are keen to assess both the contents as well as the likely effects of the CARIFORUM-EU EPA. This paper characterises and assesses the government (public) procurement and competition law-related provisions of the CARIFORUM-EU EPA. In so doing, it seeks to contribute to the debate over the relative merits of this regional trade agreement (RTA), at least with respect to these two particular government policies. To this end, the paper identifies some policy options for those EPA negotiations between the EC and other ACP countries that have yet to reach a similar milestone.

Given the conditions of competition within a developing economy and the budgetary pressures faced by many governments, central and sub-national, in many poorer countries it should not be surprising that competition and public procurement policies can have important consequences for the availability and prices of goods and services in poorer countries. What has been contentious, however, not only in the context of the EPA negotiations but RTA negotiations more generally as well as in deliberations at the WTO, is whether trade agreements should include provisions on certain behind-the-border matters such as government procurement policies and competition law. The debate of particular interest to this paper is whether...
provisions on these policies in trade agreements could contribute to the development of poorer countries.

This paper is organised into two major substantive sections: one relating to government procurement policies and the other to competition law. These sections are followed by concluding remarks. Each substantive section proceeds from the general to the specific. That is, first, each section summarises the policy findings of the available research on the potential developmental consequences and experience with the class of RTA provisions in question. Next, the relevant provisions of the CARIFORUM-EU EPA are discussed in some detail and compared to similar provisions in other recent RTAs. An assessment of the CARIFORUM-EU EPA provisions follows, including consideration of the possible impact on regional integration of certain markets within the Caribbean region. Finally, policy options for the other ongoing EPA negotiations are described.

During the course of the analysis for this paper, interviews and opinions of relevant experts and civil society actors were sought. The substantive comments and criticisms gleaned from this dialogue have been addressed in the revisions of this paper. The authors would like to particularly thank Robert Anderson (WTO Counsellor), Dr Taimoon Stewart (UWI), Jan Wimaladhama (DFID Caribbean) for their input and interest, although the final paper reflects the views of the authors alone.

2. The public procurement provisions of the CARIFORUM EPA

As noted in the introduction, the contents of this section proceeds from the general to the specific. First, what is known about the development impact of government procurement provisions in trade agreements, including regional trade agreements, is discussed. Then a legal analysis of the procurement-related provisions of the CARIFORUM EPA is presented. Finally, some observations on the specific impact of these provisions, including on the potential for further integrating economies in the Caribbean region, are discussed.

2.1 Development implications of the government procurement provisions in trade agreements

The price and quality of state purchases can have significant implications for the poor in developing countries. When few firms compete for state contracts the
prices paid by public bodies tend to be higher than they need to be and—with fixed budgetary allocations—the quantity of goods bought is reduced. This argument applies to medicines and school books as well as to large scale projects such as hospital and school construction. Worse, when government procurement practices are distorted by corruption even fewer resources end up reaching end-users and the poor suffer. Designing a state procurement system in which potential suppliers have the confidence to bid (because they don’t expect corruption or idiosyncratic discrimination), where value-for-money, safety, and environmental state objectives are met, and where national populations receive the public services they need is an important developmental priority. The question arises as to how to accomplish these goals and what constructive role EPAs and other RTAs might play.

The history of national reform efforts in public purchasing is, for the most part, a sad one. Vested interests—commercial, bureaucratic, and political—often conspire to doom the implementation of reform measures or to prevent them being put forward in the first place (Hunja 2003). External interventions by the World Bank and International Monetary Fund—often in the form of conditionality for loans received—do not have an impressive track record either. Initiatives need to be identified that fundamentally alter the long term balance of interests within a country in favour of public procurement reform. Sometimes scandals relating to state purchasing provide the impetus for reform, but the frequency of these scandals cannot be counted on to improve matters. Another option is to use trade agreements, which draw in a wider range of interested parties than those typically associated with a public procurement process, to shift the incentives away from closed, corrupt procurement systems to open, transparent, and competitive alternatives. In this regard it is noteworthy that there is a plurilateral WTO agreement on government procurement but its membership is principally limited to industrialised countries. A United Nations (UN) accord on procurement matters (lodged at United Nations Commission on International Trade Law -- UNCITRAL) is a soft-law alternative, but its non-binding nature probably limits its impact. What can be accomplished in principle in EPAs and RTAs?

Turning to the effects of potential procurement provisions in RTAs it is appropriate to distinguish between those provisions that seek to limit discrimination against foreign bidders and those that seek to improve the transparency of national procurement regimes. The former include measures to limit the de jure or de facto bans on foreign bidding, measures to limit the use of price preferences (which in-
fl ate the magnitude of foreign bids before they are compared with the bids of domestic firms), and measures that make it harder or more costly for foreign bidders to meet any requirements for suppliers (such as health and safety requirements) to qualify to bid or to bid in the first place. Indeed, the last point suggests that certain procurement regulations may at first glance look innocent or even noble, but their effects could be to substantially discriminate against foreign firms.

Research findings concerning the development impact of provisions that limit discrimination in procurement markets tend to focus more on arguments made from first economic principles and less on statistical studies of their impact. Moreover, the evidence that is available tends to relate to the experience of industrialised countries (see Bourgeois, Dawar, and Evenett 2007). When it comes to first principles, an important finding is that bans on procurement discrimination will only lead to greater imports from foreign suppliers under a narrow set of circumstances. Only when the domestic industry is completely dependent on the government as the buyer of the goods that it produces for the domestic market, and the price paid by the government exceeds the price paid by domestic private customers to import the same product, will the elimination of procurement discrimination against foreign firms result in greater imports (Baldwin 1970, Baldwin and Richardson 1972). This longstanding research finding was first demonstrated for government purchases in competitive markets and has been validated in many other market structures since.4

When governments buy goods through procurement auctions, the removal or reduction of procurement discrimination can have different effects. Simulations of procurement auctions have shown that less discrimination against foreign bidders (perhaps in the form of lower price preferences or allowing more foreign firms to bid in the first place) reduce both the probability that any domestic firm wins the state contract in question and the profit margin should they do so. Interestingly, foreign bidders tend to respond to lower price preferences by raising their prices and profit margins and, when there are a small number of domestic and foreign bidders in total, total procurement costs paid by the government fall only a little (Evenett and Deltas 1997). Other simulations have shown that the biggest falls in state procurement costs occur when the total number of domestic and foreign bidders rises from a very small number (two or three) to five or more bidders (Deltas and Evenett 1997, McAfee and McMillan 1990). These findings suggest that procurement provisions in EPAs and RTAs which induce more foreign bidders are
likely to generate the greatest improvements in value-for-money for governments and enable them to spread their budgets further across their needy populations.

The research findings on improving the transparency of state procurement processes are interesting (for a summary see Evenett and Hoekman 2005). Greater clarity in the terms and conditions for applying for state procurement contracts attracts larger numbers of both domestic and foreign firms to bid. Small and medium sized enterprises, which governments often seek to promote in both developing and industrialised countries, appear to be particularly responsive to increases in procurement-related transparency. The overall impact, then, is to tend to reduce the average size of firms bidding for state contract. The impact on imports however, is mixed, precisely because more domestic firms bid for state contracts too and some will win them. This casts doubt on any presumption that transparency-improving provisions in EPAs necessarily increase imports and are a back door way to improving market access to developing country markets.

According to experts on corruption improvements in transparency which have the effect of discouraging extra-legal payments to state officials also result in a shift in state spending away from highly differentiated products such as aircraft (where cross-product price comparisons are more difficult and where corruption can flourish) towards more homogenous goods (where it is more evident when the state is overpaying for a good). Overall, transparency improvements tend to have a variety of effects, many of which are of direct benefit to developing countries. Any discussion of the impact of transparency provisions would be incomplete, however, without an acknowledgement of the resource costs that are often associated with publishing changes in procurement practices and publishing statistics on procurement decisions. Moreover, the benefits of greater transparency to potential bidders for state contracts are probably maximised when additional steps are taken to ensure due process and to challenge the decisions of procuring entities. The latter too can involve expense and expertise. A balanced perspective is needed here as the benefits of transparency, due process, and rights of appeal are enjoyed by potential domestic bidders for state contracts, not just foreign firms. To the extent that more of the former are encouraged to bid for state contracts then the procurement cost reductions that follow may defray all or part of any additional administrative costs. Plus, it should be remembered that these additional costs are typically spread across a country’s entire state procurement system and the cost per state purchase may
well be very low. These arguments apply with as much force to developing and least developed countries as they do to other jurisdictions.

Scholarly research on the effects of public procurement policies does (indirectly at least) speak to another matter that is often liberally used in discussions on trade agreements and development, namely “policy space.” There appears to be no accepted definition of this latter term (which in and of itself should be a warning to careful policy analysts). However, in the context of government procurement policies some have associated “policy space” with the use of “preferential procurement for development or infant industry strategies” (Woolcock 2008b, page 15).

As a matter of economic theory, there are indeed some circumstances under which preferential procurement policies can expand the output (but not necessarily the profits) of domestic industry (see the summary tables in Evenett and Hoekman 2005). However, what is remarkable is that we could find no empirical evidence in those papers critical of the inclusion of public procurement provisions in the EPAs (such as Woolcock 2008a, b). Surely, if such policy space were so crucial to development prospects then with all the money spent by developmental organisations, NGOs, and aid ministries on commissioning work on the EPAs then someone would have found evidence that preferential procurement policies met the following three criteria: (i) effectively attained stated development goals (over the longer term and, therefore, not temporarily), (ii) delivered benefits in excess to society of any costs (such as higher prices paid by government buyers and therefore fewer goods and services, such as medicines and school textbooks, available to the poor), and (iii) that these policies were indispensible, that is, there is no other government measure that could attain the same development goals at lower societal cost? Only then would it be possible to start making an evidence-based case for excluding preferential procurement policies from EPAs. Even if at some future point in time the available research enables such a case to be made, it would not necessarily imply that measures to improve the transparency of procurement processes should be excluded from trade agreements too. Given the paucity of evidence supporting the use of preferential procurement policies in developing countries--and certainly the failure to meet the three criteria articulated above--decision-makers in developing economies should be under no illusion that the concept of “policy space” as it relates to public procurement policies has no sound foundation in empirical research on their countries.
2.2 Legal analysis of the CARIFORUM-EPA provisions relating to public procurement

Introduction

This section analyses the structure and content of the legal provisions of the CARIFORUM EPA relating to government / public procurement. It provides a textual analysis of the legal obligations regulating public procurement and, where possible, provides a comparative assessment of equivalent provisions with different other trade agreements including the WTO Government Procurement Agreement (GPA). The GPA is a plurilateral agreement, meaning that not all Members of the WTO are bound by it.

Table 1 below provides an overview of the main elements that can be identified within the rubric of public procurement regulation, although clearly not all of these elements are negotiated within a trade agreement. The following analysis divides these relevant legal provisions into two main categories depending on whether they are seeking to reduce discrimination against foreign suppliers or whether the provisions seek to set standards among the parties to the agreement. The latter includes the right to regulate at the domestic level; any exceptions and measures concerned with regulating potential conflicts with obligations arising from other international agreements; and provisions providing for cooperation between parties. Provisions can vary, of course, in the degree to which they actually bind signatories.

To assess the strength or ‘bite’ of the obligation, an examination is also made of the dispute settlement mechanism(s) provided by the agreement to underpin the relevant provisions, including identifying any remedies it may provide to an aggrieved Party. This should identify whether the provisions governing the Dispute Settlement Mechanism (DSM) are closer to what John Jackson has termed the ‘power-oriented’ or ‘diplomatic’ approach or to the ‘rule-oriented’ approach (Jackson 2000). The former includes, for example, mediation and consensus based conflict resolution, while the latter implies binding decisions based on non-negotiable legal obligations, such as in the GATT/WTO System. A binding DSM offers greater legal certainty and clarity than the more diplomatic routes. It is not possible for stronger parties to a dispute to disregard the outcome or to refuse to enter into dispute resolution when a weaker party is the complainant. However, if a weaker party has a poor record of implementing its trade obligations, it may prefer a less binding DSM on the grounds that it may be able to use diplomacy to gain greater concessions in implementation.
An overview of the CARIFORUM EPA chapter on public procurement

The CARIFORUM Economic Partnership Agreement was initialled between the CARIFORUM States and the European Community and its Member States. The Public Procurement provisions fall under Chapter 3 of Title IV covering Trade Related Issues. The chapter begins by recognising the importance of transparent competitive tendering for economic development; with due regard being given to the special situation of the economies of the CARIFORUM States. With further reference to Table 1 above, The CARIFORUM Public Procurement chapter includes articles concerning the following matters: Definitions; Scope; Transparency; Methods of Procurement; Selective Tendering; Rules of Origin; Technical Specifications; Qualification of Suppliers; Negotiations; Opening of Tenders /Awarding Contracts; Information on Contract Awards; Time Limits; Bid Challenges; Implementation Periods; Review Clauses; and Cooperation. The following sub-sections examine the most important legal issues arising from the provisions in this chapter.

Legal textual analysis of public procurement provisions

The agreement’s preambles and objectives
This sub-section identifies whether the subject matter under analysis is explicitly related to the overall trade obligations of the EPA parties or not. The preamble does not contain any binding obligations upon the Parties; the statements are not intended to be operative provisions in the sense of creating specific rights or obligations. Rather a preamble is designed to establish a definitive record of the intention or purpose of the Parties in entering into the agreement, which can inform or ‘colour’ the interpretation of a treaty provision.

Article 31 of the Vienna Convention on the Law of Treaties (VCLT) provides that the preamble forms part of the treaty text and, as such, part of the terms and ‘context’ of the treaty for purposes of interpretation. The Appellate Body of the WTO has also emphasised on several occasions that Article 31 VCLT is a fundamental reference point for WTO dispute settlement. The preamble of the CARIFORUM EPA (or any other treaty) may therefore be used as a source of interpretative guidance by government officials and judges in the process of implementation and dispute settlement.

The preamble to the overall CARIFORUM EPA does not contain any statement referring to public procurement. This is the case for many RTAs. In one study of public procurement provisions in 27 RTAs, none referred in its preamble to public procurement.
procurement explicitly (Bourgeois, Dawar, and Evenett 2007). However, some broad statements could be understood as implicitly covering public procurement.

In the CARIFORUM EPA as noted above, Article 165 of the Public Procurement chapter states that the general objective of the procurement chapter is as follows:

**CARIFORUM EPA Article 165: General Objective**

The Parties recognize the importance of transparent competitive tendering for economic development with due regard being given to the special situation of the economies of the CARIFORUM States.

This objective is narrow not only because it is the sole objective, but also because it merely ‘recognises’ the importance of this issue and does not set out any further prescriptive objective. Moreover, while it does explicitly mention the ‘special situation’ of the CARIFORUM states, nowhere is this phrase defined within the treaty.

**The scope of obligations for government procurement**

The scope of the subject matter of value to this analysis includes the types of rights and obligations to be covered by the agreement and whether these rights will be based on national or international standards. The scope of the CARIFORUM EPA public procurement provisions are set out in Article 167 of the CARIFORUM EPA and can be said to be relatively narrow.

The CARIFORUM EPA does not contain explicitly substantive provisions on how the eligibility for public procurement is determined. They only obligate the parties to ensure that the procurement of their procuring entities takes place in a transparent manner according to the procedural provisions of the CARIFORUM EPA Article 168.

**CARIFORUM EPA, Article 168: Transparency of Government Procurement**

1. Subject to Article 180(4), each Party or Signatory CARIFORUM State shall promptly publish any law, regulation, judicial decision and administrative ruling of general application, and procedures, regarding procurement covered by this Chapter, as well as individual procurement opportunities, in the appropriate publications referred to in Annex 7 including officially designated electronic media. Each Party or Signatory CARIFORUM State shall promptly publish in the same manner all modifications to such measures, and shall within a reasonable time inform each other of any such modifications.
2. The Parties and the Signatory CARIFORUM States shall ensure that their procuring entities provide for effective dissemination of the tendering opportunities generated by the relevant government processes, providing eligible suppliers with all the information required to take part in such procurement. Each Party shall set up and maintain an appropriate on-line facility to further the effective dissemination of tendering opportunities.

(a) Tender documentation provided to suppliers shall contain all information necessary to permit them to submit responsive tenders.

(b) Where entities do not offer free direct access to the entire tender documents and any supporting documents by electronic means, entities shall make promptly available the tender documentation at the request of any eligible supplier of the Parties.

3. For each procurement covered by this Chapter, procuring entities shall, save as otherwise provided, publish in advance a notice of intended procurement. Each notice shall be accessible during the entire time period established for tendering for the relevant procurement.

4. The information in each notice of intended procurement shall include at least the following:
   (a) name, address, fax number, electronic address (where available) of the procuring entity and, if different, the address where all documents relating to the procurement may be obtained;

   (b) the tendering procedure chosen and the form of the contract;

   (c) a description of the intended procurement, as well as essential contract requirements to be fulfilled;

   (d) any conditions that suppliers must fulfil to participate in the procurement;

   (e) time-limits for submission of tenders and, where applicable, any time limits for the submission of requests for participation in the procurement.

   (f) all criteria to be used for the award of the contract; and

   (g) if possible, terms of payment and other terms.
5. Procuring entities are encouraged to publish as early as possible in each fiscal year a notice regarding their future procurement plans. The notice should include the subject-matter of the procurement and the planned date of the publication of the notice of intended procurement.

6. Procuring entities operating in the utilities may use such a notice regarding their future procurement plans as a notice of intended procurement provided that it includes as much of the information set out in paragraph 4 as available and a statement that suppliers should express their interest in the procurement to the entity.

The eligibility criteria for participating in a government tender is not regulated within this chapter. Article 169 aims to ensure that this decision making capacity remains with the state. These provisions only obligate parties to ensure that their policies are made transparent.

**CARIFORUM EPA, Article 169: Methods of Procurement**

1. Without prejudice to the method of government procurement used in respect of any specific procurement, procuring entities shall ensure that such methods are specified in the notice of intended procurement or tender documents.

2. The Parties or the Signatory CARIFORUM States shall ensure that their laws and regulations clearly prescribe the conditions under which procuring entities may utilise limited tendering procedures. Procuring entities shall not utilise such methods for the purpose of restricting participation in the procurement process in a non-transparent manner…

Even though the EPA public procurement provisions do not obligate CARIFORUM parties to open their procurement markets to another CARIFORUM or EC party, there is nothing to prevent their national laws stipulating that their public procurement policies are based on non-discrimination and national treatment. This is in contrast to the basis of the WTO’s GPA, which the EC has signed up to. The GPA embodies guarantees of national treatment and non-discrimination for the goods, services, and suppliers of those governments that are party to the Agreement and with respect to procurement of covered goods, services, and construction services set out in each Party’s schedules. Moreover, during the negotiations to
revise the coverage of the GPA, the EC advocated a significant expansion of other Parties’ coverage and reduction of exclusions and derogations embodied in their schedules (Anderson 2007).

While this EPAs public procurement provisions do not prevent the Caribbean Community and Common Market (CARICOM) countries from discriminating between the nationality of suppliers, signatories are encouraged to apply non-discrimination principles in state purchases through the use of the word ‘endeavour’ in Article 167.1:

**CARIFORUM EPA, Article 167.1: Supporting the Creation of Regional Procurement Markets**

1. The Parties recognize the economic importance of establishing competitive regional procurement markets.

2. (a) With respect to any measure regarding covered procurement, each Signatory CARIFORUM State, including its procuring entities, shall endeavour not to treat a supplier established in any CARIFORUM State less favourably than another locally established supplier. 
   
   (b) With respect to any measure regarding covered procurement, the EC Party and the Signatory CARIFORUM States, including their procuring entities:
   
   (i) shall endeavour not to discriminate against a supplier established in either Party on the basis that the goods or services offered by that supplier for a particular procurement are goods or services of either Party;
   
   (ii) shall not treat a locally established supplier less favourably than another locally established supplier on the basis of degree of foreign affiliation to or ownership by operators or nationals of any Signatory CARIFORUM State or of the EC Party.

3. Subject to paragraph 4 below, each Party, including its procuring entities, shall with respect to any measure regarding covered procurement, accord to the goods and services of the other Party and to suppliers of the other Party offering the goods or services of any Party, treatment no less favourable than the treatment the Party, including its procuring entities, accords to domestic goods, services and suppliers.
4. The Parties shall not be required to provide the treatment envisaged in paragraph 3 unless a decision by the Joint CARIFORUM-EU Council to this effect is taken. That decision may specify to which procurements by each Party the treatment envisaged in paragraph 3 would apply, and under which conditions.

Article 167.1.1 recognises that, while these countries have different developmental needs and abilities, the Caribbean countries are anyway moving towards the establishment of the CARICOM Single Market and Economy (CSME) Public Procurement regime as well as including a public procurement protocol within the CARICOM-Dominican Republic (CARICOM-DR) Free Trade Agreement. The Caribbean Regional Negotiating Machinery (CRNM) has stated that the public procurement thresholds that were finally agreed upon in the CARIFORUM EPA are not only the highest in existing bilateral trade agreements but are also limited in covering Central Government procurement only, which is less than the EC’s coverage.

Nevertheless, the EPA does commit signatories to avoiding discrimination against one form of foreign supplier in public procurement procedures and allows for further steps to be taken against discriminatory practices. With respect to the former, the use of the language ‘shall not treat’ in Article 167.1.2.ii is significant. This amounts to an obligation not to discriminate against foreign companies that have a commercial presence in a CARIFORUM State and as such qualify as a domestic company for public procurement bids. Furthermore, Articles 167.1.3 and 167.1.4 can be seen as a ‘built in agenda’ to implement national treatment in state purchases at some point in the future, should the parties to this EPA agree to do so.

In Article 168 covering transparency of public procurement each Party is obligated through the use of the word ‘shall’ to promptly publish and effectively disseminate in a timely manner, any relevant law, information, decision or modification regarding procurement in explicitly listed publications. Again, these transparency requirements do not affect the method of public procurement policy followed at a national level.

Indeed, as noted above, Article 169 obligates the parties only to ensure that their laws and regulations clearly set out the conditions for limited tendering procedures that procuring entities may follow with the overall objective of preventing parties from using restricting procurement eligibility in a non-transparent manner; this is absolutely ‘without prejudice’ to their chosen method of public procurement.
Individual CARIFORUM parties may have highly selective eligibility criteria for public contracts bids - as long as these limited tendering procedures are made publicly known under the conditions set out in Article 171 of the EPA. These conditions are the same as those negotiated for the CSME public procurement regime and are informed by international standards and best practices. This is necessarily so, for if either the EPA or CSME conditions for limited tendering were either more stringent or more flexible than the other, it could undermine the relevant provisions of both agreements.

The exceptions to these obligations are broad, especially when compared with the WTO GPA:

### CARIFORUM EPA, Article 167.3: Exceptions

1. Nothing in this Chapter shall be construed as preventing a Signatory CARIFORUM State or the EC Party from imposing or enforcing measures relating to goods or services of persons with disabilities, philanthropic institutions, or prison labour.

2. This Chapter does not apply to:
   
   (a) the acquisition or rental of land, existing buildings, or other immovable property or the rights thereon;
   
   (b) non-contractual agreements or any form of assistance that a Party or Signatory CARIFORUM State provides, including cooperative agreements, grants, loans, equity infusions, guarantees, and fiscal incentives;
   
   (c) the procurement or acquisition of fiscal agency or depositary services, liquidation and management services for regulated financial institutions, or services related to the sale, redemption and distribution of public debt, including loans and government bonds, notes and other securities;
   
   (d) the acquisition, development, production or co-production of programme material intended for broadcasting by broadcasters and contracts for broadcasting time;
   
   (e) arbitration and conciliation services;
   
   (f) public employment contracts;
   
   (g) research and development services; (ii)
   
   (h) the procurement of agricultural products made in furtherance of agricultural support programmes and human feeding programmes, including food aid;
(i) intra-governmental procurement;

(j) procurement conducted:

(i) for the direct purpose of providing international assistance, including development aid;

(ii) under the particular procedure or condition of an international agreement relating to the stationing of troops or relating to the joint implementation of a project by a Party or Signatory CARIFORUM State with a non-Party;

(iii) in support of military forces located outside the territory of the Party or Signatory CARIFORUM State;

(iv) under the particular procedure or condition of an international organisation, or funded by international grants, loans, or other assistance where the applicable procedure or condition would be inconsistent with this Chapter.

**WTO GPA, Article III: Exceptions to the Agreement**

1. Nothing in this Agreement shall be construed to prevent any Party from taking any action or not disclosing any information that it considers necessary for the protection of its essential security interests relating to the procurement of arms, ammunition, or war materials, or to procurement indispensable for national security or for national defence purposes.

2. Subject to the requirement that such measures are not applied in a manner that would constitute a means of arbitrary or unjustifiable discrimination between Parties where the same conditions prevail or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent any Party from imposing or enforcing measures:

   (a) necessary to protect public morals, order, or safety;
   
   (b) necessary to protect human, animal or plant life or health;
   
   (c) necessary to protect intellectual property; or
   
   (d) relating to goods or services of persons with disabilities, philanthropic institutions, or prison labour.

More generally, the WTO GPA plurilateral agreement’s core principles go further than the CARIFORUM EPA to include both transparency and non-discrimination. The national treatment provision obligate each party to provide to goods, services,
and suppliers of any GPA party treatment ‘no less favourable’ than the treatment provided to domestic goods, services, and suppliers. To ensure proper access to procurement, the GPA lays down a series of detailed rules on tendering procedures, documentation and technical specifications, deadlines for the preparation, submission and receipt of tenders, and rules on post-contract information and publication. Like the CARIFORUM EPA, the GPA obligations apply only to procurements by entities which are listed in Annexes, of goods and of all services which are also listed in Annexes (following the ‘positive list’ system) and in relation to contracts which exceed certain monetary thresholds. Each party to the GPA is allowed to set, modify or rectify the coverage of the agreement on its own, provided it follows due process.

For reference, the appendix to this paper lists the entities that parties to the CARIFORUM EPA have agreed shall be covered by the procurement chapter. Although the budgets and responsibilities of ministries across the CARIFORUM countries certainly differ, the diversity of state purchasers covered by the EPAs procurement chapter is striking. The EC has included in its covered entities the same public purchasing bodies that it maintains obligations on under the WTO GPA.

A comparative study of the public procurement provisions in 27 RTAs indicated that certain agreements exclude de plano certain sectors (e.g. the EU-Chile RTA and the European Free Trade Agreement (EFTA) States-Chile RTA both exclude, among others, financial services) or certain contracts (e.g. Dominican Republic-Central American countries-United States (US); US-Bahrain; US-Jordan; US-Morocco; US-Oman; US-Peru; US-Singapore RTAs). Moreover, the New Zealand-Singapore RTA refers to schedules of commitments only for services but is intended to apply across the board to public procurement of goods (Bourgeois, Dawar, and Evenett 2007).

**Institutions and agencies**

Part V of the CARIFORUM-EU EPA establishes four institutions, of which the highest body - the Joint CARIFORUM-EU Council - and the CARIFORUM-EU Trade and Development Committee are relevant to the implementation of the public procurement chapter. The Joint CARIFORUM EC Council meets at Ministerial level with the mandate of supervising the implementation of the EPA and is vested with normative powers in that it may take decisions concerning any aspect of the agreement which will be binding on the Parties. The CARIFORUM –EU Trade and Development Committee is also responsible for supervising the implementa-
tion of the Agreement. It has specific responsibilities including the supervision of the implementation and application of the Agreement, to undertake action to avoid disputes, and to resolve disputes that may arise regarding the interpretation or application of the Agreement, and also, to monitor the implementation of the cooperation provisions laid down in the Agreement.

The CARIFORUM EPA is not unusual in omitting the creation of public procurement specific institutional machinery. The RTAs between EFTA States and Chile; EFTA States and Mexico; Korea and Singapore; US and Australia; US and Bahrain; US and Morocco; US and Oman; US and Peru; US and Singapore; EC and Chile do not create such bodies either. In a comparative study of 27 recent RTAs, a wide variety of formulas in relation to institutional cooperation were identified among parties to the RTAs (Bourgeois, Dawar, and Evenett 2007). In some RTAs the parties did not intend to assume significant commitments in relation to public procurement. A good example can be found in the RTA between Thailand and Australia which merely expresses the parties’ will to establish a working group with a view to making recommendation to the RTA Joint Commission on the scope of subsequent bilateral negotiations on public procurement. At the other end of the spectrum, the US-Chile RTA, for instance, establishes a “Committee on Procurement”, which is in charge of addressing matters related to the implementation of the public procurement commitments assumed by the parties.

Consistent with the apparent emphasis on preserving Member State “policy space” in setting out public procurement eligibility criteria, it is perhaps not surprising that the CARIFORUM EPA provisions do not obligate the parties to create regional or national institutions or agencies to implement the chapter. However, per Article 181 the CARIFORUM-EU Trade and Development Committee are obligated to review the operation of this Chapter every three years. Again, this allows for a built-in agenda to arise and for new procurement provisions of mutual interest to the parties to be negotiated.

**CARIFORUM EPA. Article 181 Review Clause**

The CARIFORUM-EU Trade and Development Committee will review the operation of this Chapter every three years, including with regard to any modifications of coverage, and may make appropriate recommendations to the Joint CARIFORUM-EU Council to that effect, as appropriate. In carrying out this task, the CARIFORUM-EU Trade and Development Committee may, without
prejudice to Article 182, also make appropriate recommendations regarding the Parties’ further cooperation in the procurement field and the implementation of this Chapter.

The Dispute Settlement Mechanism (DSM)
The CARIFORUM EPA public procurement provisions set out procedures covering bid challenges in Article 179. Here the parties are obligated to provide transparent, timely, impartial, and effective procedures enabling affected suppliers to challenge domestic measures in the context of covered procurement. Importantly, the measures to be taken to correct breaches in the accord are not specified in Article 179. Nor is the amount of compensation available to aggrieved parties specified. As will become clear, compared to other RTAs, these are significant omissions.

CARIFORUM EPA, Article 179: Bid Challenges

1. The Parties and the Signatory CARIFORUM States shall provide transparent, timely, impartial and effective procedures enabling suppliers to challenge domestic measures implementing this Chapter in the context of procurements in which they have, or have had, a legitimate commercial interest. To this effect, each Party or Signatory CARIFORUM State shall establish, identify or designate at least one impartial administrative or judicial authority that is independent of its procuring entities to receive and review a challenge by a supplier arising in the context of covered procurement.

2. Each supplier shall be allowed a sufficient period of time to prepare and submit a challenge as from the time when the basis of the challenge become known or reasonably should have become known to the supplier. This paragraph does not preclude Parties or Signatory CARIFORUM States from requiring complainants to lodge their complaints within a reasonable period of time provided that duration of that period is made known in advance.

3. Procuring entities shall ensure their ability to respond to requests for a review by maintaining a reasonable record of each procurement covered under this Chapter.

4. Challenge procedures shall provide for effective rapid interim measures to correct breaches of the domestic measures implementing this Chapter.
As a point of reference, a comparative study of relevant RTA provisions identified widespread use of bid challenge systems to allow suppliers taking part in a tender to challenge contracts, which they consider having been awarded in breach of procurement rules (Bourgeois, Dawar, and Evenett 2007). The degree of sophistication of these systems varied although most provided for a degree of detail in their rules more or less equivalent to the WTO GPA. Probably the most comprehensive provision in this regard is Article 125 of the Economic Partnership Agreement between Japan and Mexico, which is reproduced directly below.

**Japan – Mexico RTA, Article 125**

1. In the event of a complaint by a supplier that there has been a breach of this Chapter in the context of a government procurement, each Party shall encourage the supplier to seek resolution of its complaint in consultation with the procuring entity. In such instances the procuring entity shall accord impartial and timely consideration to any such complaint, in a manner that is not prejudicial to obtaining corrective measures under the challenge system.

2. Each Party shall provide non-discriminatory, timely, transparent and effective procedures enabling suppliers to challenge alleged breaches of this Chapter arising in the context of government procurements in which they have, or have had, an interest.

3. Each Party shall provide its challenge procedures in writing and make them generally available.

4. Each Party shall ensure that documentation relating to all aspects of the process concerning government procurements covered by this Chapter shall be retained for 3 years.

5. The interested supplier may be required to initiate a challenge procedure and notify the procuring entity within specified time-limits from the time when the basis of the complaint is known or reasonably should have been known, but in no case within a period of less than 10 days.

6. A Party may require that a challenge procedure be initiated only after the notice of procurement has been published or, where a notice is not published, after tender documentation has been made available. Where a Party
imposes such a requirement, the 10 day period described in paragraph 5 above shall begin no earlier than the date that the notice is published or the tender documentation is made available.

7. Challenges shall be heard by an impartial and independent reviewing authority with no interest in the outcome of the government procurement and the members of which are secure from external influence during the term of appointment. A reviewing authority which is not a court shall either be subject to judicial review or shall have procedures which provide that:

(a) participants can be heard before an opinion is given or a decision is reached;
(b) participants can be represented and accompanied;
(c) participants shall have access to all proceedings;
(d) proceedings can take place in public;
(e) opinions or decisions are given in writing with a statement describing the basis for the opinions or decisions;
(f) witnesses can be presented; and
(g) documents are disclosed to the reviewing authority.

8. Challenge procedures shall provide for:

(a) rapid interim measures to correct breaches of this Chapter and to preserve commercial opportunities. Such action may result in suspension of the procurement process. However, procedures may provide that overriding adverse consequences for the interests concerned, including the public interest, may be taken into account in deciding whether such measures should be applied. In such circumstances, just cause for not acting shall be provided in writing;
(b) an assessment and a possibility for a decision on the justification of the challenge; and
(c) where appropriate, correction of the breach of this Chapter or compensation for the loss or damages suffered, which may be limited to costs for tender preparation or protest.

9. With a view to the preservation of the commercial and other interests involved, the challenge procedure shall normally be completed in a timely fashion.
While the CARIFORUM EPA bid challenging procedures are narrower than the Japan-Mexico RTA, the former are open to private parties that have participated in bidding for a state contract and have some grievance or matter they wish to raise. Bidders for state contracts, therefore, do not as a first resort have to go to their respective governments to initiate formal dispute settlement procedures.

In a comparative study of procurement provisions in recent RTAs nearly all the agreements examined contain dispute settlement provisions for disagreement arising between the two contracting parties (Bourgeois, Dawar, and Evenett 2007). Very few RTAs provide for specific dispute settlement systems for discord arising between parties in relation to public procurement. Specific dispute settlement systems for public procurement are foreseen in Chapter 9 of the EFTA States-Korea RTA, Chapter 15 of the Economic Partnership Agreement between Japan and Mexico, and Chapter 16 of the Singapore-Australia Free Trade Agreement. Only five of the 27 RTAs avoided mention of any public procurement-related provisions, although a further four confined their public procurement provisions to institutional matters. The US agreements signed under the Bush Administration have included an extensive range of public procurement provisions, strongly suggestive of a greater level of ambition on the part of US trade policymakers.

The general (that is, not government procurement chapter-specific) CARIFORUM EPA dispute settlement mechanism (DSM) includes consultation, mediation, and dispute settlement panel procedures to ensure that disputing parties try to resolve their conflicts in consultation without the need to establish an arbitration panel. In areas where the capacity to accept collective obligations currently exists or has been contemplated, the CARIFORUM States have agreed to accept collective obligations. In areas where there is no existing or planned regional competence the CARIFORUM states are individually responsible for implementing the provisions of the agreement at the national level. Further, if a CARIFORUM State fails to comply with the obligations of the EPA, the EC is entitled to retaliate, but only against the non-compliant CARIFORUM State.

Assessment of the interim EPA public procurement provisions
Table 1 compares the provisions that have been included in five Interim EPAs that have currently initialled by the EU and the Pacific; Central African Republic; East African Community; SADC; ESA; alongside the EC-South Africa 2001 TDCA.
As Table 1 indicates, the Interim EPA initialled by the CAR is the most detailed to date. The text sets out the date for concluding future negotiations on public procurement, which is 1/1/2009. While the ESA and EAC texts contain 'rendezvous clauses' for negotiating government procurement provisions, no date has been set. None of the other interim EPAs reference government procurement, except within the National Treatment and / or Security Exceptions. Here all the texts include government procurement under both or only the latter provision.

The implications of this is that only the ESA, EAC and CAR EPA negotiations need include government procurement in any eventual EPA agreement. Of these, only the CAR text sets out the potential scope of the EPA government procurement chapter. Article 59 states that negotiations will include transparency and non-discriminatory rules and procedures, the coverage of the provisions, conflict resolution and technical assistance. The negotiations will first look at the application of these rules in the context of regional integration before and only after a jointly pre-determined transition period, will these rules be applied on a bilateral level. The distinct and special needs of the African signatories will be taken into account during the negotiations and if necessary through specific implementation periods and the adoption of transitional compensatory measures.

**Chapitre 4 Marchés publics: Article 59 Poursuite des négociations dans le domaine des marchés publics**

1. Les parties reconnaissent que des règles transparentes et concurrentielles d’appel d’offre contribuent au développement économique. Elles conviennent donc de négocier l’ouverture progressive et mutuelle de leurs marchés publics tout en reconnaissant leurs différences de développement, dans les conditions définies au paragraphe 3 de cet Article.

2. Pour atteindre cet objectif, les parties concluront avant le 01/01/2009 des négociations sur une série d’engagements éventuels sur les marchés publics qui concerneront notamment les points suivants:

   (a) règles transparentes et non discriminatoires, procédures et principes à appliquer ;

   (b) listes des produits couverts ainsi que seuils appliqués ;

   (c) procédures efficaces de contestation ;
(d) mesures pour soutenir les capacités de mise en œuvre de ces engagements, y inclus l’utilisation des opportunités offertes par les technologies de l’information.

3. Les négociations seront basées sur une approche en deux étapes, visant d’abord à appliquer les règles dans le contexte de l’intégration régionale en Afrique centrale et, après une période de transition déterminée conjointement, appliquer les règles au niveau bilatéral.

4. Au cours des négociations, la partie CE prendra en compte les besoins en développement, financiers et commerciaux des États signataires de l’Afrique centrale, ce qui pourra se traduire par les mesures suivantes dans l’intérêt du traitement spécial et différencié :

(a) Si nécessaire, périodes de mise en œuvre appropriées pour mettre les mesures gouvernementales de marché public en conformité avec toute obligation procédurale spécifique.

(b) Adoption ou maintien de mesures transitionnelles telles que des programmes de prix préférentiels ou compensation, en accord avec un calendrier d’élimination.

The CAR Interim Agreement can usefully be compared to the SADC provision covering both competition and public procurement policies. For the former, while special and differential treatment in the form of transitional periods and compensatory mechanisms are built into any future agenda, it still has the explicit long term objective of introducing transparent and non-discriminatory rules for public procurement. The SADC provision merely states that the EC party will cooperate in building adequate capacity before any negotiations take place.

SADC Title III: Competition and Government Procurement

1. The EC Party agrees to cooperate with a view to strengthening regional capacity in these areas. Negotiations will only be envisaged once adequate regional capacity has been built.

The EC-SA TDCA is a cooperation provision to ensure transparent, fair and equitable rules in public procurement. However beyond a requirement for a periodic review of progress in this cooperation, there is little detailed or explicit scope to this obligation which implies the parties must rely primarily on capacity building and consultation.
EC-SA TDCA: Article 45 Government Procurement

1. The Parties agree to cooperate to ensure that access to the Parties’ procurement contracts is governed by a system which is fair, equitable and transparent.

2. The Cooperation Council shall periodically review the progress made in this matter.

Table 1: Comparing interim EPA public procurement provisions and the EU-SA TDCA

<table>
<thead>
<tr>
<th>Interim EPA</th>
<th>Public Procurement Exceptions</th>
<th>Public Procurement Provisions</th>
<th>Future negotiations</th>
</tr>
</thead>
<tbody>
<tr>
<td>Pacific</td>
<td>National Treatment – internal tax and regulation (Article 23.5)</td>
<td>None</td>
<td>No reference</td>
</tr>
<tr>
<td>EAC</td>
<td>Security Exception (Article 41)</td>
<td>None</td>
<td>Rendezvous Clause (Article 37)</td>
</tr>
<tr>
<td>SADC</td>
<td>National Treatment – internal tax and regulation (Article 18)</td>
<td>None</td>
<td>No reference</td>
</tr>
<tr>
<td></td>
<td>Security Exception (Article 91)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>ESA</td>
<td>National Treatment – internal tax and regulation (Article 18)</td>
<td>None</td>
<td>Rendezvous Clause (Article 53)</td>
</tr>
<tr>
<td></td>
<td>Security Exception (Article 57)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>CAR</td>
<td>National Treatment – internal tax and regulation (Article 23)</td>
<td>Public Procurement Chapter</td>
<td>Establishing foundations for negotiation and implementation (Article 3(e))</td>
</tr>
<tr>
<td></td>
<td>Security Exception (Article 90)</td>
<td></td>
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<tr>
<td>Mimeo:</td>
<td></td>
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<td></td>
</tr>
<tr>
<td>EU-SA TDCA</td>
<td>No explicit reference</td>
<td>Cooperation and Review (Article 45)</td>
<td>n/a</td>
</tr>
</tbody>
</table>

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In conclusion, then, the CARIFORUM EPA contains procurement provisions that are greater in scope and coverage than the interim EPAs and the EU-SA TDCA. This in an of itself is a remarkable situation given that, as demonstrated in earlier sub-sections, the CARIFORUM EPAs procurement provisions fall short of the procurement provisions contained in other FTAs that have both industrialised and developing countries as signatories.

2.3 Assessment of the CARIFORUM public procurement provisions

General assessment
If the objective of CARIFORUM negotiators was to avoid using this EPA to structure a comprehensive reform of their national procurement systems then, arguably, they have succeeded. Stronger and more far-reaching provisions could have laid the groundwork for greater competition for state contracts, more variety and choice for state purchasers and better value for money. Softer public procurement provisions may harbour corrupt and clientelistic domestic procurement practices which are not in the interests of sustainable development or poverty alleviation. In short, the public procurement provisions of this EPA represent a missed opportunity.

As Cunningham (2008) indicates the EC and CARIFORUM negotiators have managed to conclude one of the few agreements on public procurement provisions that at present excludes market access commitments. The domestic “policy space” of the individual CARIFORUM members has been reserved with regard to public procurement—though to what constructive and legitimate end is not clear. Moreover, this EPA only rids national procurement systems of one type of discrimination— that relating to discrimination against the subsidiaries of foreign firms established in a party to the agreement. Overall, then, this EPA will do little to open public procurement to foreign firms, especially when compared to other RTAs signed by developing countries.

Box 1: A glance at negotiating strategies and negotiating outcomes:
Public procurement

By Audel Cunningham, Legal Advisor CRNM

1. The Pre-EPA government procurement regime in CARIFORUM
Government procurement within the CARIFORUM states occurs on the basis of a basket of national laws and policies and in the absence of a central regional
framework. With reference to the CARICOM States, the Revised Treaty of Chaguaramas provides for the negotiation of a protocol on government procurement as part of the regime of the Caribbean Single Market and Economy (CSME). The Caricom –Dominican Free Trade Agreement also has a built in agenda on government procurement, providing for the Parties thereto, to negotiate a Protocol on Government Procurement upon the full implementation / completion of the CSME regime.

2. Negotiating challenges
The major challenge in the negotiations arose from a combination of the negotiating configuration and the absence of any existing regional framework in that no commitments could be negotiated which could have the potential to pre-determine the content of the future regional regimes. At the same time, the recognition of these challenges served to give appropriate orientation to the requisite mandates, namely that the negotiations were to be confined to “Transparency in Government Procurement “ only and that no market access commitments in favour of the EC were to be granted.

3. Negotiating strategies
The EC was the demander of government procurement rules for several reasons, namely:

(i) The existence of EC offensive interests in securing access at some levels to CARIFORUM public procurement markets,

(ii) EC insistence upon CARIFORUM’s assumption of government procurement commitments extendable to each other as a means of further facilitating the creation of regional procurement markets (regional integration).

With the exception of development cooperation, CARIFORUM had no offensive interests in this area but rather had important defensive interests, namely to resist EC demands for market access so as to preserve existing policy space and not undermine or pre-determine the content of the regional frameworks to be established.

CARIFORUM’s strategies in the government procurement negotiations were oriented by the mandate to limit the scope of the negotiations to transparency in government procurement only and not to offer market access to the EC. CARIFORUM’s negotiation strategies also centred on the need to ensure that as far as possible, no commitments that would be applicable intra-CARIFORUM would
be accepted, as this could have the potential to pre-determine the content of the regional regimes to be established in the future.

The deployment of this strategy involved a clear insistence on the use of best endeavour type language with reference to provisions that otherwise could have had the result of creating binding intra-CARIFORUM commitments. A clear example of this is seen in Article 167 (2) (a) creating a best endeavour obligation on the part of the CARIFORUM States to offer national treatment to each other’s economic operators.

Negotiation strategies were further defined by the need to have a pro-development outcome and in this regard, negotiators exhibited a willingness to consider certain provisions provided they were tied to the provision of significant transition periods and the build up of CARIFORUM capacity. Article 180 (1) therefore allows the CARIFORUM States a period of two years within which to implement the obligations of the Chapter.

The CARIFORUM EPA does contain transparency-related obligations. Article 169 of the CARIFORUM EPA only obligates the parties to ensure that their laws and regulations relating to public procurement contracts are set out in a transparent manner ‘without prejudice’ to their chosen method of public procurement. Individual CARIFORUM parties may have highly selective eligibility criteria for government contracts bids - as long as these limited tendering procedures are made publicly known under the conditions set out in Article 171 of the EPA.

As regards positive commitments, Article 169 on Transparency should serve to improve national processes in terms of good governance, permitting a greater level of scrutiny and ultimately the establishment of value for money objectives. Article 182 of the CARIFORUM EPA on cooperation obligates the parties to cooperate in achieving the objectives of the provisions. The parties agree to exchange information on best regulatory practices and set up mechanisms to facilitate compliance with the obligations of this Chapter.

A development-related asymmetry has been built into the DSM, which provides some special and differential treatment for the CARIFORUM states. While Article 214 (3) obligates the EC to exercise ‘due restraint’ in seeking trade-related compensation from CARIFORUM States or in seeking to impose appropriate measures against a CARIFORUM state who has not complied with a determination of the Arbitration panel, there is no corresponding ‘due restraint’ obligation placed on the
CARIFORUM States. Whether this is more of a political statement than legal provision is unclear.

The CARIFORUM EPA sets out the negotiated implementation period in Article 180. This normally gives CARIFORUM states two years from the agreement’s ratification to bring their measures into conformity with any specific procedural obligations arising from the Chapter. An extension can be granted by the CARIFORUM-EC Trade and Development Committee, should the implementation period be insufficient. Certain CARIFORUM States are granted a five year implementation period, particularly with regard to publication and on-line information dissemination. The limited procurement provisions of this EPA, therefore, are not being immediately “foisted” on the CARIFORUM states. Correspondingly, the benefits of greater transparency will not be enjoyed immediately either.

**Consideration of whether the EU CARIFORUM provisions are likely to foster or hamper regional integration among the non-EU partners to the Agreement**

By pre-empting the possibility of different CARIFORUM member states concluding separate bilateral or sub-regional agreements with the EC, the CARIFORUM EPA preserves the option of developing region-wide responses to state purchasing matters in the Caribbean. Moreover, within the obligations of the EPA Article 4 on Regional Integration explicitly recognises the importance of regional integration as an integral element to their partnership and a powerful instrument to achieve the objectives of this Agreement. It goes on to acknowledge:

- the importance of regional integration among the CARIFORUM States as a mechanism for enabling these States to achieve greater economic opportunities, enhanced political stability and to foster their effective integration into the world economy.

- the efforts of the CARIFORUM States to foster regional and sub-regional integration amongst themselves through the existing regional treaties.8

While Article 4 also states that the pace and content of regional integration is a matter to be determined exclusively by the CARIFORUM States in the exercise of their sovereignty and given their current and future political ambitions, this does not compromise the commitments undertaken in the EPA. This cannot be considered to be a loophole because the rest of Article 4 states that the EPA:
‘builds upon and aims at deepening regional integration and undertake to cooperate to further develop it, taking into account the Parties’ levels of development, needs, geographical realities and sustainable development strategies, as well as the priorities that the CARIFORUM States have set for themselves and the obligations enshrined in the existing regional integration agreements’

The introduction of transparency obligations should remove unnecessary barriers to the procurement market without aiming to harmonise CARIFORUM Member’s public procurement policies. At present, suppliers may decide to shop for CARIFORUM Member’s with more open public procurement eligibility criteria in order to receive the most favourable treatment in bidding for state contracts.

The use of ‘best endeavour’ language with regard to non-discrimination in public procurement is as strong as the provisions concerning regional public procurement measures get in the CARIFORUM EPA. Again, this does not establish a regional public procurement regime beyond transparency requirements. However, to the extent that the CSME public procurement regime is in the process of being established, it will complement any regional trends in public procurement policy being encouraged by the CARIFORUM EPA.

Another key impact that the EPA commitments will have on the CSME regime is in the provision of cooperation and assistance to facilitate the development and implementation of the CSME regime and to improve national processes so that they comply with the CSME regime. The EPA transition periods of up to five years mean than the CSME regime should in principle have already been established within that timeframe.

The only regional mechanism established by the agreement is the creation of an on-line regional facility to disseminate tendering information and opportunities. It has been noted by the CRNM that these cooperation provisions in Article 182 (reproduced below) have already given rise to an approved document detailing the needs to be addressed in the CARIFORUM Member States at the regional, sub-regional, and national levels in order to comply with the EPA commitments. Capacity building activities that have been identified at national and regional levels include a financing proposal for approximately US$10M in support of undertaking the identified activities.
CARIFORUM EPA, Article 182: Cooperation

1. The Parties recognize the importance of cooperating in order to facilitate implementation of commitments and to achieve the objectives of this Chapter.

2. Subject to the provisions of Article 7, the Parties agree to cooperate, including by facilitating support and establishing appropriate contact points, in the following areas:

   (a) Exchange of experience and information about best practices and regulatory frameworks;

   (b) Establishment and maintenance of appropriate systems and mechanisms to facilitate compliance with the obligations of this Chapter; and

   (c) Creation of an on-line facility at the regional level for the effective dissemination of information on tendering opportunities, so as to facilitate the awareness of all companies about procurement processes.

2.4 Policy options for government procurement provisions in the EPAs with the ACP countries that have yet to conclude the full set of negotiations

Given the adverse development-related consequences of poor public procurement regimes, the question facing policymakers is not whether there is a case for improving state purchasing practices but what initiatives are to be taken to do so and whether trade agreements can play a useful role in this regard. If a developing country already has a solid domestic programme to strengthen public procurement practices in place, which has demonstrated results and is very likely to continue to do so, then perhaps another initiative is not needed. The reality, however, is that most developing countries have not implemented reform programmes that have brought their public procurement procedures up to best practice and the option of taking advantage of the negotiation of an EPA to advance procurement reform should be given serious consideration. Policymakers in developing countries should focus on the development consequences of successful procurement reform and ignore the mercantilist instincts that plague the thinking of many trade negotiators and NGOs. This is one of those circumstances where trade agreements can be fruitfully used to improve national institutions, providing an impetus to do so that has often been lacking to date and, if done correctly, permanently increasing the cost of lob-
bying for favouritism and non-transparency. If the opportunity to improve public procurement practices through an EPA negotiation is missed, policymakers should ask how long their citizens will have to suffer before another promising opportunity for procurement reform materialises.

Policymakers in developing countries whose treasuries are strapped for cash should also recognise the benefits of getting better value for money out of tight procurement budgets. Research has demonstrated that increasing the number of bidders for government contracts (the nationality of which is unimportant) is what drives down average prices paid per unit. Moreover, measures to improve both transparency and access to national procurement markets will increase the number of bidders for state contracts. Domestic small and medium sized enterprises appear to be particularly responsive to improvements in the transparency of national procurement regimes. With these considerations in mind, policymakers in developing countries are recommended to adopt a full suite of transparency and non-discrimination provisions in future EPA negotiations. What this effectively means for the latter is going further than the public procurement provisions in the CARIFORUM EPA, certainly up to and beyond the procurement provisions contained in the other RTAs referred to in section 2.2.3. and in the other relevant examples given in the procurement section of Bourgeois, Dawar, and Evenett (2007). Unfortunately, the treatment of public procurement in the interim EPAs and in the EC-SA TDCA is so embryonic that incremental improvements over the provisions contained in this provision would not be appropriate. A serious attempt to promote and support public procurement reform through trade agreements requires a more comprehensive approach, the principal elements of which are the reduction of favouritism (de jure and de facto preferences), improvements in the transparency of public procurement processes, and effective rights of redress for private sector participants and state parties.

EPAs and RTAs in general are sufficiently flexible instruments of state-to-state cooperation that favouritism could be reduced and ultimately eliminated in stages over time. Should there be concerns about the capacity of local enterprises to withstand competition from European firms for state contracts, then future EPAs could in the first instance eliminate non-discrimination against the developing country signatories to an EPA. Complemented with measures to enhance notification of procurement contracts in the developing country signatories, this would facilitate the creation of a regional procurement market among the poorer EPA signatories. Measures to open up that market to European competition could then follow some
years later. While this two-step process for enhancing the variety of suppliers available to procuring bodies in EPA nations would allow local firms time to improve their product offerings and productivity, it should be remembered that the savings enjoyed by state purchasers increase as the number of bidders rises—so the full benefits of procurement reform would only be felt after the second step was implemented. Cushioning local firms comes at a cost to state purchasers in developing countries and to the end users of public services, namely, citizens; this reality cannot be avoided.9

Proper attention should be given to strengthening national capacities in state purchasing with a combination of technical assistance and implementation periods. Indeed, one option may be to complement the greater willingness by an EPA signatory to take on procurement-related obligations with more technical assistance from European nations. In this manner developing countries that take on more obligations would signal to development partners and the private sector the priority they attach to such reforms.

The use of review mechanisms in EPAs should be encouraged so as to increase the probability that procurement provisions are implemented properly and on time and, should the need arise, be progressively strengthened over time. Regional integration can be an ongoing process and the signing of an EPA need not represent the culmination of the signatories’ efforts in these regards. Reviews should not be confined to compliance matters and to the collection of procurement-related statistics. The extent and usefulness of technical assistance and other measures to strengthen procurement-related capacities should be also evaluated. Moreover, evidence of any difficulties experienced in supplying EU state procurement markets by the firms from the developing country signatories to an EPA should be collected, the difficulties analysed, and if necessary, corrective measures proposed. The latter measures possibly include recommendations for reforms to procurement practices in Europe and aid for trade to the relevant exporters in developing countries.
3. The provisions of the CARIFORUM EPA relating to competition law

Like its predecessor, the contents of this section proceeds from the general to the specific.

3.1 Development implications of competition law-related provisions in RTAs

In order to understand the potential contribution of this EPAs competition provisions it is important to set the discussion in its appropriate developmental context. Market forces—which can sometimes be distorted by anti-competitive practices of private and state firms—determine the prices at which goods are sold to customers and the quantity of goods available. Affordability and access of goods and services - some of which are essential items for the poor - are, therefore, directly affected by market forces and measures like competition law that seek to deter and punish anti-competitive acts.

Although many of the proponents of competition law stress its effects on economic efficiency, resource allocation, and sometimes productivity and economic growth10, in fact competition law can have important distributive implications with direct consequences for the poor in developing countries. These are not just theoretical conjectures as the studies compiled and led by Stewart (2003) identified many anti-competitive practices that have harmed the populations and economies of the Caribbean region.

While it is important to recognise that the proper and effective application of competition law is not the only government measure that can promote inter-firm rivalry (trade reforms, foreign direct investment reform, price deregulation, and lowering the costs and time necessary to set up businesses are others), competition law is typically the only government measure that directly targets certain corporate practices which are thought to harm customers. Those practices include hard-core cartels (for which there are almost no legitimate defences for), restrictive agreements between manufacturers and distributors and between suppliers and manufacturers, mergers or acquisitions that unduly restrict competition, predatory pricing (that seeks to drive rival firms out of markets) and abuses of a dominant position by a firm or group of firms. In many jurisdictions, in particular in developing countries,
without competition law these anti-competitive practices would go unchecked. Indeed, much of the impetus for enacting and strengthening competition laws in developing countries in the first place was to ensure that opening up to foreign competition, domestic deregulation, and privatisation of former state owned enterprises results in more inter-firm rivalry that benefits customers rather than less. Competition law, then, has been seen by many as a necessary accompaniment to other economic reform measures. That is, competition law is seen as a way of helping ensure that the benefits of economic reform are not entirely captured by small cliques of incumbent firms.

Of course, developing countries can enact and strengthen competition laws on their own, and some have. The question arises as to whether competition provisions in regional trade agreements, like the EPA between CARIFORUM and the EC, can contribute in this regard. To be frank, there is more evidence on the form of these competition provisions (and therefore on what they might achieve) than on what their actual impact has been (see Bourgeois, Dawar, and Evenett section 6). This is not surprising given that it is only in the past ten years that many RTAs began including provisions to promote competition, competition law enactment and enforcement, limit state subsidies which distort the competitive playing field, and international cooperation on competition law-related matters (such as enforcement cases, technical assistance, and sharing of best practices).

Holmes, Müller, Papadopoulos, and Sydorak (2005), OECD (2006), Anderson and Evenett (2006), and very recently Teh (2008) describe, provide taxonomies of, and qualitatively assess the competition provisions of RTAs. In addition to careful overviews of the contents of competition chapters in RTAs, competition principles have also been entrenched in other chapters of RTAs, notably, those relating to government procurement, intellectual property rights, government monopolies and enterprises, and certain service sectors (typically where access to infrastructure is a critical bottleneck to competition, such as telecommunications). What is interesting about the latter provisions is that they demonstrate how competition principles and the goal of contestable markets can be seen to have priority over the mercantilist and market-opening objectives of RTAs (Anderson and Evenett 2006, Teh 2008). To those trade negotiators and policymakers aware of and open to these options, RTAs can be a useful vehicle to promote competition. Neither RTAs nor EPAs are inherently entirely mercantilist.
Anderson and Evenett (2006) also point out that the negotiation of a RTA can afford an opportunity for parties to strengthen their competition laws and their enforcement agencies, even though commitments to take these steps may not necessarily be written into the agreement. It is said that Costa Rica took tangible steps to strengthen its enforcement agency Comisión para Promover la Competencia (CO-PROCOM) after its RTA with Canada came into force. Policymakers in developing countries that seek to promote competition then might see the negotiation of an EPA as an opportunity to strengthen their national institutional capacity, whether through their own resources or with technical assistance.

Turning to the quantifiable effects of competition provisions in RTAs, there is evidence that particular provisions influence the amount of foreign direct investment (FDI) entering a developing country. Although much discussion of foreign direct investment focuses on the setting up of new facilities (the so-called greenfield FDI), it should not be forgotten that much FDI is in fact in the form of cross-border mergers and acquisitions. The latter can play a useful role in developing and industrialised countries alike by keeping managers on their toes and helping finance the upgrading and expansion of firms.

Using a large sample of data (covering 116 countries over the years 1989-2004) Anderson and Evenett (2006) found that the total value of inward cross-border mergers and acquisitions was increased in countries that had signed on to transparency provisions in the competition chapters of RTAs. For a country with an existing merger review law, the most conservative estimate of the impact of signing a transparency provision was to raise the value of inward mergers and acquisitions by 43 percent. Moreover, a country with a merger review law in place that subsequently signed provisions on transparency, on measures against anti-competitive practices, on non-discrimination, and on due process was estimated to see an increase of inward mergers and acquisitions by 19 percent (again this is the most conservative estimate).

It is important to emphasise that the amount of evidence available to guide policy-making varies across the topics that are relevant here. The qualitative evidence that anti-competitive practices are not uncommon in developing countries—including in the Caribbean—is strong as is the evidence that stronger inter-firm rivalry depresses the prices customers pay (including the poor), induces productivity spurts and product and process innovations by firm. We also know more about the rich variety of competition-related provisions that can be implemented in RTAs. As to
the effects of those provisions, we know less. However, what quantitative evidence is available suggests that packages of those provisions can foster the integration of developing countries into the world economy through the vehicle of corporate consolidation. Measures to enhance the transparency of competition law and enforcement regimes appear to bolster foreign direct investment of this sort the most.11

3.2 Legal analysis of the CARIFORUM-EPA provisions relating to competition law

Introduction

This section analyses the structure and content of the legal provisions of the CARIFORUM EPA relating to competition policies. The section provides a textual analysis of the legal obligations regulating competition and where possible provides a comparative assessment of equivalent provisions within different regional trade agreements. Although competition was one of the WTO’s Singapore Issues, as yet there is still no binding multilateral framework on competition law and policy.

The competition provisions of the CARIFORUM EPA fall under Chapter 1 of Title IV on Trade Related Issues. The competition chapter covers the following matters: Definitions (Article 125), Principles (Article 126), Implementation (Article 127), Exchange of information and enforcement cooperation (Article 128), Public enterprises and enterprises entrusted with special or exclusive rights including designated monopolies (Article 129), and Cooperation (Article 130).

Some RTAs do not contain any competition commitments at all.12 This may be because one or more of the parties to the agreement do not have domestic competition rules in place and cooperation between competition agencies is therefore a moot point. Even though this is the case for some of the CARIFORUM Members, their EPA still contains competition provisions. To date, Jamaica, St. Vincent and the Grenadines, Barbados, Guyana and Trinidad and Tobago have passed legislation, while Suriname has completed its legislation and is in the process of enacting it. St. Vincent and the Grenadines, Guyana, and Trinidad and Tobago have yet to enact their legislation. Jamaica and Barbados are the only two States to have established Fair Trading Commissions. The countries of the Organisation of Eastern Caribbean States are still in the process of establishing a sub-regional competition authority that will enforce harmonised competition legislation. Belize is also receiving technical assistance to complete the drafting of its competition legislation.
Part III: Other Trade Dimensions

EU bilateral agreements usually provide substantive commitments in the field of competition. For example, the agreements with Chile and Mexico include provisions that recognise the parties’ respective competition authorities. Several of the Euro-Mediterranean Association Agreements include obligations to introduce competition legislation similar to that of the EU. While the EU-South Africa TCDA includes such substantive provisions defining anticompetitive practices, the treaty provisions, particularly those relating to implementation, information exchange and technical assistance, also reflect the development needs of South Africa and the possibility for anti-competitive practices to be allowed under certain conditions, most obviously relating to black empowerment programmes. Article 35 definition reads as follows:

a) agreements and concerted practices between firms in horizontal relationships, decisions by associations of firms, and agreements between firms in vertical relationships, which have the effect of substantially preventing or lessening competition in the territory of the Community or of South Africa, unless the firms can demonstrate that the anticompetitive effects are outweighed by pro-competitive ones;

b) abuse by one or more firms of market power in the territory of the Community or of South Africa as a whole or in a substantial part thereof.

The implementation period of three years reflects the nascent stage of competition policy in South Africa at the time of the negotiations. Thus this obligation is supported by a provision obligating the EU to provide appropriate expertise to South Africa.

<table>
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<tr>
<th>EU-SA TDCA: Article 39 Technical Assistance</th>
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<tr>
<td>The Community shall provide South Africa with technical assistance in the re-structuring of its competition law and policy, which may include among others:</td>
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<tr>
<td>(a) the exchange of experts;</td>
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<tr>
<td>(b) organisation of seminars;</td>
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<td>(c) training activities.</td>
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These EU RTAs can be contrasted with those competition provisions negotiated by the US and Canada. These are limited to cooperation on competition matters without commitments to implement substantive competition rules.
The CARIFORUM EPA does not contain any substantive commitments. At the regional level, in 2001 the Caribbean Community (CARICOM) including the CARICOM Single Market and Economy (CSME) was established through the Revised Treaty of Chaguaramas. CARICOM’s competition policy was developed with the aim of ensuring that the benefits expected from the CSME are not be frustrated by anti-competitive business conduct that could restrict or distort competition in the Member States and within the region. Given the existence of nascent or non-existent competition regimes, the commonality of the challenges faced is thought to reinforce the need for regional cooperation in respect of competition policy.

The following sections assess the competition provisions of the CARIFORUM EPA, using the same approach as the last section’s legal analysis of this EPAs public procurement provisions. Where relevant, there is also an examination of the relevant provisions of the competition regime established by the Revised Treaty of Chaguaramas.

**Box 2: A glance at negotiating strategies and negotiating outcomes:**

**Competition policy**

*By Audel Cunningham, Legal Advisor CRNM*

**1. Pre-EPA structure of competition policy within the CARIFORUM states**

There is a weak competition policy ethos within the CARIFORUM States. Antitrust rules are classically seen as being unnecessary or unwelcome given the small size of CARIFORUM firms and CARIFORUM markets and the predominant ownership structure existing in many states, which sees the few dominant firms being controlled by leading families.

Only four CARIFORUM States currently have legislation implementing a competition policy regime (Jamaica, Barbados, Trinidad and Tobago and the Dominican Republic) but of this number, only two, Jamaica and Barbados, have established the necessary rule enforcement bodies specified in the legislations. Within the CARICOM arrangement, Chapter 8 of the Revised Treaty of Chaguaramas contains rules on competition policy and mandates the establishment of a Community Competition Commission to address cases of cross border anti-competitive conduct. This body was only recently commissioned into operation after the conclusion of the EPA negotiations. The Revised Treaty also mandates that CARICOM States must implement harmonized national competition policy legislation based upon the treaty provisions, so as to ensure the attainment of an effective competition policy regime in all the member states of the Community. Notwith-
standing the existence of this obligation, as has been observed, there exists to this moment a failure or inability on the part of the majority of the CARICOM States to fulfil the stated obligation.

2. Negotiating challenges
Given the existing obligation on CARICOM member states to enact competition policy legislation, as well as the fact that the Dominican Republic had embarked on the process of legislating competition policy rules, CARIFORUM’s acceptance of substantive rules addressing competition policy were never in issue. In this regard, the CARIFORUM mandate on this subject prescribed an acceptance of the competition policy rules, provided that the EPA provisions did not surpass the content of the existing regional or national regimes.

Negotiating challenges however arose principally from the negotiating configuration coupled with the varying layers of integration within CARIFORUM. The Dominican Republic is not a part of the CARICOM arrangement and is therefore not a party to the obligation to enact harmonized competition policy legislation nor is it subject to the jurisdiction of the CARICOM Competition Commission. At the time of the negotiations, the Bahamas and Haiti though members of CARICOM, were not parties to the trade regime establishing the Caribbean Single Market and Economy (CSME) and like the Dominican Republic were also not participants in the CARICOM competition policy regime.

The challenges posed by the different layers of integration became manifest in the negotiations on the enforcement cooperation provisions (Article 128) when CARIFORUM became faced with EC reluctance to cooperate with all the various existing or contemplated competition enforcement agencies of the CARIFORUM States. CARIFORUM considered it essential to have strong provisions obliging the EC to cooperate in competition policy enforcement with the CARIFORUM Competition agencies so to ensure effective rule enforcement and faced with the EC reluctance to cooperate with more than a limited number of agencies, had to accept agreement for cooperation with only the CARICOM Competition Commission and the Competition Authority of the Dominican Republic. This means that until the Bahamas accedes to CARICOM’s CSME regime, proper administrative arrangements will have to be put in place to ensure coordination in competition policy enforcement between the Competition Authority of the Bahamas when established, and the CARICOM Competition Commission.
3. Negotiating strategies

CARIFORUM was able to successfully negotiate a pro-development Competition Policy Chapter in the EPA, primarily as a result of the utilization of clearly defined strategies. Chief among such strategies was a clear identification of defensive or offensive interests.

Given the pre-EPA movement towards developing competition policy regimes in the region, CARIFORUM had no offensive interests in this area save and except in the area of development support and enforcement cooperation. Development support under this Chapter of the EPA was seen as not just necessary to enable the CARIFORUM states to assume (for many States) novel obligations, but as being supportive of the attempts by CARIFORUM states to fulfil their obligations under pre-existing treaty arrangements. This aspect of development support was therefore seen as being critical to the fostering of regional integration and the establishment of a strong regional regulatory regime and was enabled by the stated objective of the EPA to foster regional integration.

The CARIFORUM wish list consisted primarily of the provision of development financial and other development support for:

(i) the design and drafting of appropriate competition policy legislation  
(ii) the training of CARIFORUM officials involved in the enforcement of competition policy at all levels  
(iii) making operational, the administrative bodies required to oversee competition policy legislation.

A second employed strategy justifiable under the rubric of a “pro-development EPA” was CARIFORUM’s insistence upon tying the assumption of the proposed obligations to suitably long transition periods. To a great extent, this demand was necessitated not just by the exiting realities of the capacity constraints of the CARIFORUM States, but also by the orientation of the agreement as a region to region one, with the consequence that all states were expected to act in tandem in the fulfilment of the prescribed obligations.

Finally, although not having been a demander of Competition Policy, CARIFORUM’s negotiating strategy involved it being the first side to table draft text in this area so as to exercise some measure of control over the manner in which EC counter proposals evolved.
The CARIFORUM EPA preamble does not contain any direct statements regarding the promotion of competition, nor do many other RTAs. Of those RTAs that do, some refer to competition policy in one statement together with other issues. However, within the competition chapter itself, Article 126 of the CARIFORUM EPA sets out the principles of the chapter and explicitly acknowledges the need to tackle anti-competitive behaviour conducted by firms:

**The CARIFORUM EPA. Article 126 Principles**

The Parties recognise the importance of free and undistorted competition in their trade relations. The Parties acknowledge that anti-competitive business practices have the potential to distort the proper functioning of markets and generally undermine the benefits of trade liberalization. They therefore agree that the following practices restricting competition are incompatible with the proper functioning of this Agreement, in so far as they may affect trade between the Parties:

(a) agreements and concerted practices between undertakings, which have the object or effect of preventing or substantially lessening competition in the territory of the EC Party or of the CARIFORUM States as a whole or in a substantial part thereof;

(b) abuse by one or more undertakings of market power in the territory of the EC Party or of the CARIFORUM States as a whole or in a substantial part thereof.

Other RTAs also include separate statements concerning competition policy that may in certain cases appear in the operative part of the agreement, as the following example attests:

**US-Singapore FTA. Article 12.1**

Recognizing that the conduct subject to this Chapter has the potential to restrict bilateral trade and investment, the Parties believe prosecuting such conduct, implementing economically sound competition policies, and engaging in cooperation will help secure the benefits of this Agreement.

It is noteworthy that Article 126 of the CARIFORUM EPA refers to the potential for anti-competitive practices to undermine the trade enhancing objectives of the RTAs, rather than anti-competitive practices per se. This suggests that an anti-competitive practice that in no way affects international commerce between the signato-
ries would fall outside any of the competition-related obligations of this EPA. However, it is difficult to discern just how limiting the requirement of a trade-related effect is, especially when it is recalled that anti-competitive practices affecting the supply of inputs (not just parts, components, and energy but also transportation and distribution services) can indirectly affect trade and investment flows between signatories. Still, the requirement of trade-related impact is there and can be found in many other RTAs too (Bourgeois, Dawar, and Evenett, 2007).

Comparative textual analysis of competition provisions

The scope of obligations
The CARIFORUM EPA contains competition-related commitments in two main areas: a) in the enactment and enforcement of competition law and b) in enhancing cooperation between the agencies responsible for the enforcement of competition laws (so-called competition agencies). The competition chapter of this EPA incorporates by reference for the EC Party, Articles 81, 82 and 86 of the Treaty establishing the European Community, and their implementing regulations or amendments and for the CARIFORUM States, Chapter 8 of the Revised Treaty of Chaguaramas of 5 July 2001, national competition legislation complying with the Revised Treaty of Chaguaramas and the national competition legislation of The Bahamas and the Dominican Republic. The provisions for Chapter 8 are examined in section 3.3.3. below.

Article 127 of the CARIFORUM EPA effectively obligates the CARIFORUM states to enact and implement competition legislation within five years of the entry into force of the EPA. Steps to promote cooperation between national competition agencies are encouraged under Article 128 and would be reviewed subsequently.

CARIFORUM EPA. Article 127 Implementation

1. The Parties and the Signatory CARIFORUM States shall ensure that within five years of the entry into force of this Agreement they have laws in force addressing restrictions on competition within their jurisdiction, and have established the bodies referred to in Article 125 (1).
2. Upon entry into force of the laws and the establishment of the bodies referred to in paragraph 1, the Parties shall give effect to the provisions of Article 128. The Parties also agree to review the operation of this Chapter after a confidence-building period between their Competition Authorities of six years following the coming into operation of Article 128.
Another scope-related consideration relates to public enterprises and those enterprises given specific responsibilities by government. The disciplines of the competition chapter relate to public sector firms unless excluded under Article 129. Article 129.2 provides for specific circumstances under which the disciplines of the competition chapter are not binding on a CARIFORUM EPA signatory. This particular article implies that enterprises pursuing a social mandate, for example, would not necessarily be subject to the principles of the competition chapter. Article 129.4 recognises that some state monopolies may effectively discriminate against EC firms and that such discrimination is to be phased out within five years of this EPA agreement coming into force.

**CARIFORUM EPA. Article 129 Public enterprises and enterprises entrusted with special or exclusive rights including designated monopolies**

1. Nothing in this Agreement prevents a Party or a Signatory CARIFORUM State from designating or maintaining public or private monopolies according to their respective laws.

2. With regard to public enterprises and enterprises to which special or exclusive rights have been granted, the Parties and the Signatory CARIFORUM States shall ensure that, following the date of the entry into force of this Agreement, there is neither enacted nor maintained any measure distorting trade in goods or services between the Parties to an extent contrary to the Parties interest, and that such enterprises shall be subject to the rules of competition in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them.

3. By derogation from paragraph 2, the Parties agree that where public enterprises in the Signatory CARIFORUM States are subject to specific sectoral rules as mandated by their respective regulatory frameworks, such public enterprises shall not be bound or governed by the provisions of this Article.

4. The Parties and the Signatory CARIFORUM States shall progressively adjust, without prejudice to their obligations under the WTO Agreement, any State monopolies of a commercial nature or character, so as to ensure that, by the end of the fifth year following the entry into force of this Agreement, no discrimination regarding the conditions under which goods and services are sold or purchased exists between goods and services origi-
nating in the EC Party and those originating in the CARIFORUM States or between nationals of the Member States of the European Union and those of the CARIFORUM States, unless such discrimination is inherent in the existence of the monopoly in question.

5. The CARIFORUM-EU Trade and Development Committee shall be informed about the enactment of sectoral rules provided for in paragraph 3 and the measures adopted to implement paragraph 4.

Comparing the CARIFORUM EPA scope to other recently-signed RTAs
In a recent comparative study of the competition provisions of 27 recent RTAs, there were practically no commitments on substantive rules on competition law (Bourgeois, Dawar, and Evenett 2007). In some the parties simply agree that there should be no competitive advantages to state-owned businesses17. Notably, there were no provisions setting out competition rules that must apply to anti-competitive conduct that affects trade between the parties. Nor were there provisions obligating one party to introduce its domestic system a competition regime similar to that of the other party, unlike a number of EC RTAs. This has been attributed to the priority of ensuring that laws and their enforcement are non-discriminatory, rather than promoting the convergence of the substantive provisions of competition laws.18

Procedural provisions
Once the CARIFORUM parties have implemented their domestic competition regimes, the CARIFORUM EPA ‘enables’ Members’ Competition Authorities to inform each other of their willingness to co-operate with respect to enforcement activity and ‘may’ exchange information. The exchange of information is commonly a sensitive area because one party wants to be able to request information from the other party and there is the possibility that non-public information may be used in criminal investigations.

CARIFORUM EPA, Article 128: Exchange of Information and Enforcement Cooperation

1. Each Competition Authority may inform the other Competition Authorities of its willingness to co-operate with respect to enforcement activity. This cooperation shall not prevent the Parties or the Signatory CARIFORUM States from taking autonomous decisions.
2. With a view to facilitating the effective application of their respective competition laws, the Competition Authorities may exchange non-confidential information. All exchange of information shall be subject to the standards of confidentiality applicable in each Party and the Signatory CARIFORUM States.

3. Any Competition Authority may inform the other Competition Authorities of any information it possesses which indicates that anticompetitive business practices falling within the scope of this Chapter are taking place in the other Party’s territory. The Competition Authority of each Party shall decide upon the form of the exchange of information in accordance with its best practices. Each Competition Authority may also inform the other Competition Authorities of any enforcement proceeding being carried out by it in the following instances:

(i) The activity being investigated takes place wholly or substantially within the jurisdiction of any of the other Competition Authorities;

(ii) The remedy likely to be imposed would require the prohibition of conduct in the territory of the other Party or Signatory CARIFORUM States;

(iii) The activity being investigated involves conduct believed to have been required, encouraged or approved by the other Party or Signatory CARIFORUM States.

The CARIFORUM EPA provisions are both narrower in scope and less far-reaching than the EC-Chile RTA, for example, which includes provisions on exchanging information, improving transparency and information exchange subject to standards of confidentiality.

**EC-Chile RTA, Article 177**

1. With a view to facilitating the effective application of their respective competition laws, the competition authorities may exchange non-confidential information.

2. For the purposes of improving transparency, and without prejudice to the rules and standards of confidentiality applicable in each Party, the Parties hereby undertake to exchange information on regulatory sanctions and
remedies applied in the cases that, according to the competition authority concerned, are significantly affecting important interests of the other Party and to provide the grounds on which those actions were taken, when requested by the competition authority of the other Party.

3. [relating to state aid].

4. All exchanges of information shall be subject to the standards of confidentiality applicable in each Party. Confidential information whose dissemination is expressly prohibited or which, if disseminated, could adversely affect the interest of the Parties, shall not be provided without express consent of the source of information.

5. Each competition authority shall maintain the confidentiality of any information provided to it in confidence by the other competition authority, and oppose any application for disclosure of such information by a third Party that is not authorized by the competition authority that supplied the information.

6. In particular, where the laws of a Party so provide, confidential information may be provided to their respective courts of justice, subject to maintaining its confidentiality to the respective courts.

Article 128.3.(i)-(iii) on notification is also a comparatively ‘soft’ cooperation provision because there is no compulsion for the parties to implement these measures, particularly when compared to the Canada-Costa Rica RTA provisions on notification. Here a non-exhaustive list sets out enforcement actions that will normally require notification, such as those involving anti-competitive activities carried out in whole or in part in the territory of the other party and may be significant for that party.

**Canada-Costa-Rica RTA. Article XI.3**

3. For the purpose of this Chapter, enforcement actions that may affect important interests of the other Party and therefore will ordinarily require notification include those that:
   (a) are relevant to enforcement actions of the other Party;
   (b) involve anti-competitive activities, other than mergers and acquisitions, carried out in the whole or in part in the territory of the other Party and that may be significant for that other Party;
c) involve mergers and acquisitions in which one or more of the enterprises involved in the transaction, or an enterprise controlling one or more of the enterprises to the transaction, is incorporated or organized under the laws of the other Party […];
d) involved remedies that expressly require or prohibit conduct in the territory of the other Party or are otherwise directed at conduct in that territory; or
e) involve the seeking of information located in the territory of the other Party, whether by personal visit by officials of a Party or otherwise, except with respect to telephone contacts with a person in the territory of the other Party where that person is not subject to enforcement action and the contact seeking only a response on a voluntary basis.
f) Notifications will ordinarily be given as soon as the competition authority of the Party becomes aware that the notifiable circumstances pursuant to paragraphs 2 and 3 are present.

Cooperation through technical assistance is covered in Article 130 of the CARIFORUM EPA. Here the Parties agree to cooperate in the efficient functioning of the CARIFORUM Competition Authorities:

**CARIFORUM EPA, Article 130: Cooperation**

1. The Parties agree on the importance of technical assistance and capacity-building to facilitate the implementation of the commitments and achieve the objectives of this Chapter and in particular to ensure effective and sound competition policies and rule enforcement, especially during the confidence-building period referred to in Article 3.

2. Subject to the provisions of Article 7 the Parties agree to cooperate, including by facilitating support, in the following areas:

(a) the efficient functioning of the CARIFORUM Competition Authorities;
(b) assistance in drafting guidelines, manuals and, where necessary, legislation;
(c) the provision of independent experts; and
(d) the provision of training for key personnel involved in the implementation of and enforcement of competition policy.
These commitments are not unusual features of RTAs. Some also contain commitments relating to two or more procedural rules, such as notification, consultation, exchange of information, and even coordination of enforcement. However, the strength varies from the softer ‘may’ to the stronger and binding language negotiated in the EU Chile agreement, for example:

**EU-Chile FTA. Article 172(3)**

The Parties agree to cooperate and coordinate among themselves for the implementation of competition laws. The cooperation includes notification, consultation, exchange of non-confidential information and technical assistance.

Like most other RTAs, the CARIFORUM-EU EPA exempts the provisions in the competition chapter of the agreement from the dispute settlement procedures created by that agreement.

**The 2001 Revised Treaty of Chaguaramas and its relationship to the CARIFORUM EPA**

As noted above, the Caribbean Community (CARICOM) including the CARICOM Single Market and Economy (CSME) was established in 2001 by the Revised Treaty of Chaguaramas (RTC). The latter includes provisions on regulating competition within CARICOM.

**Competition Policy**

The rules governing competition policy within CARICOM are provided for in Chapter 8 of the Revised Treaty of Chaguaramas. Member States the Caribbean Single Market and Economy (CSME) are obliged to implement the provisions of Chapter 8 which establishes a Community Competition Commission (CCC) with jurisdiction over all cases of cross border anti-competitive conduct.

The CCC was recently established in Suriname in January 2008 and its main responsibilities within the CARICOM Single Market and Economy (CSME) include:

- To apply the rules of competition
- To promote and protect competition
- To co-ordinate the implementation of Competition Policy,
- To monitor anti-competitive business conduct
To promote the establishment of national Competition Institutions and harmonisation of Competition Law

To advise the Council for Trade and Economic Development on Competition and Consumer Protection policies

Article 30(b) places obligations on all CSME member states to enact competition policy legislation and establish competition enforcement bodies. At the time of writing, the majority of the CSME States have still not enacted the necessary national legislative frameworks. Haiti for example has not yet embarked on establishing competition policy. Jamaica and Barbados, on the other hand, have enacted competition policy legislation and have established enforcement bodies, St. Vincent and the Grenadines never promulgated their competition law, while Trinidad and Tobago enacted competition policy legislation but are still in the process of establishing. The Commonwealth of the Bahamas and the Dominican Republic, who are signatories of the CARIFORUM EPA but not the CSME, are currently in the process of enacting competition policy legislation. Nevertheless, once the Organisation of Eastern Caribbean States Sub-regional Competition Authority is established, Antigua and Barbuda, St. Kitts and Nevis, Dominica, St. Lucia, St. Vincent and the Grenadines, Monserrat and Grenada will automatically be in compliance with Article 30(b).

Revised Treaty Of Chaguaramas

Article 30(b) Implementation of Community Competition Policy

1. In order to achieve the objectives of the Community Competition Policy,

   (a) the Community shall:
       (i) subject to the Treaty, establish appropriate norms and institutional arrangements to prohibit and penalise anti-competitive business conduct;
       (ii) establish and maintain information systems to enable enterprises and consumers to be kept informed about the operation of markets within the CSME;
   
   (b) Member States shall:
       (i) take the necessary legislative measures to ensure consistency and compliance with the rules of competition and provide penalties for anti-competitive business conduct;
(ii) provide for the dissemination of relevant information to facilitate consumer choice;
(iii) establish and maintain institutional arrangements and administrative procedures to enforce competition laws;
(iv) take effective measures to ensure access by nationals of other Member States to competent enforcement authorities including the courts on an equitable, transparent and non-discriminatory basis.

2. A Member State shall establish and maintain a national competition authority for the purpose of facilitating the implementation of the rules of competition.

3. A Member State shall require its national competition authority to:
   (a) co-operate with the Commission in achieving compliance with the rules of competition;
   (b) investigate any allegations of anti-competitive business conduct being allegations referred to the authority by the Commission or another Member State.
   (c) cooperate with other national competition authorities in the detection and prevention of anti-competitive business conduct, and the exchange of information relating to such conduct.

4. Nothing in this Article shall be construed as requiring a Member State to disclose confidential information, the disclosure of which would be prejudicial to the public interest or to the legitimate commercial interests of enterprises, public or private. Confidential or proprietary information disclosed in the course of an investigation shall be treated on the same basis as that on which it was provided.

5. Within 24 months of the entry into force of this Protocol, Member States shall notify the COTED [Council for Trade and Economic Development] of existing legislation, agreements and administrative practices inconsistent with the provisions of this Protocol. Within 36 months of entry into force of this Protocol, the COTED shall establish a programme providing for the termination of such legislation, agreements and administrative practices.

To summarise, Chapter 8 provisions requires Member States to cooperate in the determination of competition legislation and to ‘take the necessary legislative
measures to ensure consistency and compliance with the rules of competition and provide penalties for anti-competitive business conduct.’19 They also provide for cooperation between national authorities in Member States and the Community Competition Commission (CCC), in achieving compliance with the rules of competition. However, it is the responsibility of the CCC to cooperate with the national authorities, provide support and facilitate information exchange and expertise.20

Co-operation between the national competition authorities in the different Member States is binding to the extent that every Member State ‘shall require’ its national competition authority to co-operate with other national competition authorities in the detection and prevention of anti-competitive business conduct, and the exchange of information relating to such conduct.21. However, once more it must be remembered that within CARIFORUM countries, several competition regimes are still either nascent or non-existent.

The Scope of the Treaty
The substantive obligations of the competition provisions are provided for in Part III: Rules of Competition and include:

- Article 30(i) Prohibition of Anti-Competitive Business Conduct
- Article 30(j) Determination of Dominant Position
- Article 30(k) Abuse of a Dominant Position
- Article 30(l) Negative Clearance Rulings
- Article 30(m) De Minimis Rule
- Article 30(n) Powers of COTED Respecting Community Competition Policy Rules
- Article 30(o) Exemptions

Dispute settlement mechanism in respect of competition policy
In addition to monitoring and investigating the anticompetitive practices of enterprises operating in the CSME, the CCC settles disputes related to competition policy and parties are obligated to comply promptly with the judgement of the CCC. Each party is responsible for the fees and expenses of conciliation and arbitration. Individuals and firms are permitted to have cross-border competition dis-
Disputes addressed by the Regional Competition Agency, appeals to the Court against any decision of the Regional Commission will have to be taken by a member-state.

The parties also have recourse to the dispute settlement mechanisms set out in Chapter 9 of the Treaty, but only if the dispute concerns the interpretation and application of the Treaty. The dispute settlement mechanism under Chapter 9 of the Treaty only permits States to be parties to the disputes; businesses and consumers do not have standing unless an individual or company has standing to appear, with leave of the Caribbean Court of Justice (CCJ), as parties in proceedings in certain set circumstances:

- when the CCJ has decided that a benefit or right conferred by the revised Treaty on a Member State is designed to directly benefit these persons
- where these persons have established that they have been prejudiced in the enjoyment of this right or benefit
- where the Member State which should have brought a claim on behalf of a person or company has declined or omitted to do so, or has expressly consented to allow the persons concerned to bring the claims instead of the Member State entitled to do so;
- where the CCJ has decided to allow the person to pursue the claim in the interest of justice.
- Since its establishment the CCJ has not made any decisions involving disputes between two Member States.

The CCC acts as a regional Commission to deal with cross-border matters. However, given that the bulk of member-states might be unable to set up competition authorities, the CCC is also expected to operate as a domestic Commission for such states as are unable to establish domestic agencies. The CARICOM competition legislation therefore has dual application: to take the necessary legislative measures to ensure consistency and compliance with the rules of competition and to provide penalties for anti-competitive business conduct, while taking effective measures to ensure access by nationals of other member states to competent enforcement authorities, including the courts, on an equitable, transparent and non-discriminatory basis.
Assessment of the interim EPA competition provisions

Table 2 summarises the competition law and policy-related provisions of the Interim EPAs. As this Table makes clear, the CAR Interim Agreement contains the most extensive such provisions. In what follows those provisions are compared with those contained in the EU-SADC TADC.

Table 2: Comparing interim EPA competition provisions and the EU-SA TDCA

<table>
<thead>
<tr>
<th>Interim EPA</th>
<th>Competition objectives</th>
<th>Competition provisions</th>
<th>Future negotiations</th>
</tr>
</thead>
<tbody>
<tr>
<td>Pacific</td>
<td>No reference</td>
<td>None</td>
<td>No reference</td>
</tr>
<tr>
<td>EAC</td>
<td>No reference</td>
<td>None</td>
<td>Rendezvous Clause (Article 37)</td>
</tr>
<tr>
<td>SADC</td>
<td>Supporting conditions for competitiveness (Article 1(e))</td>
<td>None</td>
<td>No reference</td>
</tr>
<tr>
<td>ESA</td>
<td>No reference</td>
<td>None</td>
<td>Rendezvous Clause (Article 53)</td>
</tr>
<tr>
<td>CAR</td>
<td>Establishing foundations for negotiation and implementation (Article 3(e))</td>
<td>Chapter</td>
<td>Conclude negotiations: 1/1/2009</td>
</tr>
<tr>
<td>Mimeo:</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>EU-SA TDCA</td>
<td>n/a</td>
<td>Substantive provisions; Special and Differential Treatment (Article 35-40)</td>
<td>n/a</td>
</tr>
</tbody>
</table>

The CAR Interim Agreement contains competition provisions setting out the need to negotiate competition policy within the EPA, including rules to prohibit anticompetitive practices which significantly affect trade. As with the CAR public procurement provisions, two stages are envisaged for the negotiations, firstly the application of rules in the context of Central African regional integration; only then can the negotiation of the application of rules at the bilateral level begin. This clearly preserves policy space at the national level, while the regional expertise is being built. The date agreed to for concluding the negotiations is the same as for the public procurement negotiations – 1/1/2009. The ESA and EAC Interim agreement sets out the same rendezvous clause for competition negotiations as for public
procurement, without a date for concluding negotiations. SADC and the Pacific do not made any reference to negotiating competition within a future EPA.

CAR Interim EPA Chapitre 2 Concurrence

Article 57 Poursuite des négociations dans le domaine de la concurrence

1. Les parties reconnaissent l’importance de la concurrence libre et sans distorsion dans leurs relations commerciales, et le fait que certaines pratiques anticoncurrentielles peuvent restreindre le commerce entre les parties et ainsi gêner l’accomplissement des objectifs de cet accord.

2. Les parties acceptent donc de s’engager dans les négociations d’un chapitre dans le domaine de la concurrence dans l’APE, qui comprendra notamment les éléments suivants:

   (a) pratiques anticoncurrentielles qui sont considérées incompatibles avec le fonctionnement approprié de cet accord, dans la mesure où elles peuvent toucher le commerce entre les parties;

   (b) dispositions sur la mise en œuvre efficace des politiques et règles de concurrence et des politiques au niveau régional en Afrique centrale qui encadrent les pratiques anticoncurrentielles identifiées conformément au paragraphe 2 (a);

   (c) dispositions sur l’assistance technique par les experts indépendants pour assurer la réalisation des objectifs du chapitre et de l’application efficace des politiques de concurrence au niveau régional en Afrique centrale.

3. Les négociations seront basées sur une approche en deux étapes, visant d’abord à appliquer les règles dans le contexte de l’intégration régionale en Afrique centrale et, après une période de transition déterminée conjointement, appliquer les règles au niveau bilatéral.

4. Les négociations sur le chapitre de concurrence seront conclues avant le 01/01/2009.

The provisions regulating competition in the EC-SA TDCA are very strong compared to the Interim EPAs. There is, however, an implementation period of three years for the parties to implement appropriate competition laws to address anti-competitive practices that substantially lessen competition unless there is a stronger
pro-competitive rationale for these practices. In addition in the TDCA, there are provisions covering comity, information exchange and detailed obligations for the EC to provide technical assistance to South Africa.

EC-SA TDCA Competition Policy

Article 35 Definition

The following are incompatible with the proper functioning of this Agreement, in so far as they may affect trade between the Community and South Africa:

(a) agreements and concerted practices between firms in horizontal relationships, decisions by associations of firms, and agreements between firms in vertical relationships, which have the effect of substantially preventing or lessening competition in the territory of the Community or of South Africa, unless the firms can demonstrate that the anti-competitive effects are outweighed by pro-competitive ones;

(b) abuse by one or more firms of market power in the territory of the Community or of South Africa as a whole or in a substantial part thereof.

Article 36 Implementation

If, at the entry into force of this Agreement, either Party has not yet adopted the necessary laws and regulations for the implementation of Article 35, in their jurisdictions it shall do so within a period of three years.

Article 37 Appropriate measures

If the Community or South Africa considers that a particular practice in its domestic market is incompatible with the terms of Article 35, and:

(a) is not adequately dealt with under the implementing rules referred to in Article 36, or

(b) in the absence of such rules, and if such practice causes or threatens to cause serious prejudice to the interests of the other Party or material injury to its domestic industry, including its services industry, the Party concerned may take appropriate measures consistent with its own laws, after consultation within the Cooperation Council, or after 30 working days following referral for such consultation. The appropriate measures to be taken shall respect the powers of the Competition Authority concerned.
Article 38 Comity

1. The Parties agree that, whenever the Commission or the South African Competition Authority has reason to believe that anti-competitive practices, defined under Article 35, are taking place within the territory of the other authority and are substantially affecting important interests of the Parties, it may request the other Party’s competition authority to take appropriate remedial action in terms of that authority’s rules governing competition.

2. Such a request shall not prejudice any action under the requesting authority’s competition laws that may be deemed necessary and shall not in any way encumber the addressed authority’s decision-making powers or its independence.

3. Without prejudice to its respective functions, rights, obligations or independence, the competition authority so addressed shall consider and give careful attention to the views expressed and documentation provided by the requesting authority and, in particular, pay heed to the nature of the anti-competitive activities in question, the firm or firms involved, and the alleged harmful effect on the important interests of the aggrieved Party.

4. When the Commission or the Competition Authority of South Africa decides to conduct an investigation or intends to take any action that may have important implications for the interests of the other Party, the Parties must consult, at the request of either Party and both shall endeavour to find a mutually acceptable solution in the light of their respective important interests, giving due regard to each other’s laws, sovereignty, the independence of the respective competition authorities and to considerations of comity.

Article 39 Technical assistance

The Community shall provide South Africa with technical assistance in the restructuring of its competition law and policy, which may include among others:

(a) the exchange of experts;

(b) organisation of seminars;

(c) training activities.
In sum, then, the CARIFORUM EPA contains many of the same types of competition law-related provision as the EC-SA TADC. Arguably, the formers’ scopes are wider as they include provisions on public enterprises and monopolies. Moreover, developments over time in the Caribbean region may provide the basis upon which cooperation with European partners may develop further—but it should be recalled that those developments may well occur without independently of the CARIFORUM EPA.

3.3 Assessment of the CARIFORUM competition provisions

General assessment

By stipulating the enactment and enforcement of competition laws in the Caribbean region, this EPA reinforces an important element of the appropriate regulation of firms in developing countries. Moreover, these provisions are not too prescriptive in specifying which agency will implement competition law, allowing for regional and sub-regional enforcement agencies to be developed where appropriate and where limited resources dictate. The provisions of the CARIFORUM EPA are no more onerous for the CARIFORUM Members than the obligations set out in the Revised Treaty of Charaguaramas and taken on by Caribbean countries before this EPA negotiation was initialled.

While affirmation of the importance of competition law and its enforcement is valuable, no one should be in any doubt that it is the sustained commitment of national governments to fund and to support their competition agencies that leads to the effective deterrence and punishment of anti-competitive practices, both national and international. The CARIFORUM EPA provides signatory governments with an opportunity to demonstrate or renew their commitment to promoting rivalry between firms so as to lower prices, increase choice, and stimulate productivity growth and innovation.

Under this EPA the implementation period for enacting competition legislation is five years. Following this, the parties should implement the cooperation provisions.
While cooperation agreements as the exchange of information and consultations may be viewed by some as a burden on limited resources, the language negotiated in the EPA provisions are limited to ‘may’ rather than ‘shall’. This indicates a non-binding obligation and shows some appreciation of the circumstances of the poorer signatories. Even so, it should be remembered that the benefits of agency-to-agency cooperation require financial and political commitment from government to enable their competition agencies to build the trust of other agencies and to participate effectively in international fora.

There are no specific development provisions set out in the Competition Chapter, although Article 130 on Cooperation agrees on the importance of technical assistance and capacity building in promoting competitive markets.

**Consideration of whether the EU CARIFORUM provisions are likely to foster or hamper regional integration among thenon-EU partners to the agreement**

As noted in the analysis on public procurement, the CARIFORUM EPA is a regional agreement which explicitly recognises in Article 4 the importance of regional integration as an integral element in enhancing the economic development of the CARIFORUM states.

The EPA requirements also incorporate by reference (in Article 125.3(a)) the competition chapter of the Revised Treaty of Charaguaramas, which additionally aims to foster regional integration. This is because at the regional level there are ongoing CARIFORUM initiatives aimed at ensuring that all CSME states comply with their competition law-related treaty obligations. These initiatives include the CARICOM Competition Policy Task Force entrusted with the responsibility of facilitating the establishment of the Community Competition Authority and a CARICOM Legislative Drafting Facility charged with preparing draft competition policy legislation for member state adoption. It would seem, then, that the CARIFORUM EPA is compatible with current measures to promote regional and sub-regional approaches to the enforcement of competition law in the Caribbean region.

However, to the extent that the Bahamas and the Dominican Republic are not parties to the CSME arrangement, these Members are not brought under the same provisions of the Revised Treaty of Charaguaramas. Furthermore, given the slow to non-existent progress some CARIFORUM members are making in implementing their national competition regimes, there is little coherence between the competi-
tion policies of these states. This necessarily limits the effectiveness of the regional initiatives such as the Competition Policy Task Force.

3.4 Policy options for competition law provisions in the EPAs with the ACP countries that have yet to conclude the full set of negotiations

Before discussing policy options in detail, it is worth recalling that existing research has shown that the ACP countries too are affected by anti-competitive practices, which are private and public, domestic and international.22 If anything, some research has shown that international cartels target jurisdictions with weak enforcement regimes. In which case, countries need to develop--individually or in cooperation with others--enforcement regimes for competition law that effectively deter or punish anti-competitive practices. Trade agreements, including EPAs, can play a useful contribution in this regard by entrenching a commitment to enact and enforce competition laws, banning state-promoted anti-competitive practices, encouraging cooperation between competition agencies (by raising the cost of non-cooperation), and promoting technical assistance. National policymakers in ACP countries should ask themselves what serious alternatives they have to promoting competition law in their jurisdictions to the EPAs and why the poor in their countries should continue to have their interests sacrificed to those of incumbent firms with market power.

There are many policy options of varying degrees of ambition for the inclusion of competition provisions in the EPAs that still need to be negotiated. The competition provisions in the CARIFORUM EPA could provide the base-line upon which further disciplines could be added in the following areas. First, disciplines could be included in the EPAs that explicitly ban trade-related anti-competitive practices, such as state-created or state-promoted export cartels. Signatories could also affirm that the cartelisation by their own firms of another party’s markets is unacceptable and that cooperation between enforcement agencies to investigate such cartels is a priority. The development of EPA-wide leniency programmes, the national equivalent of which has proved to be very effective in prosecuting cartels, could also be prioritised.

Second, that the exemptions to national competition law should be reviewed as part of the EPA negotiation and that, should any exemptions be retained, national mechanisms be established that review periodically those exemptions to assess whether they are still necessary or could be replaced by some other public policy measure that sought to attain the same goal at lower societal cost. More gener-
ally, the EPA negotiation could entrench and reinforce the rights and capacity of competition agencies to promote competition, inter-firm rivalry, and the adoption of less distortive state competition. Such advocacy is probably best undertaken by competition agencies that are independent of governments and EPA provisions stipulating such independence could be considered.

Third, while it is difficult to mandate cooperation between competition agencies, the costs of non-cooperation in enforcement cases should be increased. A competition agency that refuses to assist another agency from an EPA signatory in an enforcement matter should be required to state their reasons for doing so in a specific period of time. Moreover, those reasons should be circulated to all EPA signatories and discussed in a committee made up of competition enforcement officials and other government officials. A minority of members of this committee may seek further information from the non-cooperating agency and the latter and its government would be required to respond within a specified period of time. Only in exceptional circumstances would it be acceptable for non-cooperation on the grounds of a reluctance to share confidential business information. Those exceptional circumstances would not extend to enforcement actions against cartels; it being perverse to require that competition agencies cannot share the very confidential information that cartel members typically share amongst themselves to sustain their illicit acts.

Fourth, the provision of technical assistance by competent European agencies and experts to poorer EPA signatories could be specified and review mechanisms established to evaluate existing programmes and to identify better practices.

4. Concluding remarks

The purpose of this paper has been to assess the government procurement-related and competition law-related provisions of the CARIFORUM EPA that was initialled in December 2007. Existing research on these provisions, including research on similar provisions found in recent RTAs, was used to shed light on alternative policy options and to identify the linkages between these policies and the development of ACP nations. It is hoped that the audience for this paper is not confined to those interested in evaluating the CARIFORUM EPA, but also to those negotiating the EPAs that still have to be concluded.

Promoting value-for-money and choice in public purchasing and deterring and punishing anti-competitive corporate acts both have important societal payoffs, in
developing and richer countries alike. This paper reviews the evidence and arguments concerning the efficacy of public procurement reform and promoting competition in developing countries and argues that both are worthy objectives of state policymaking. No provisions in the CARIFORUM EPA were found to undermine these pro-developmental objectives. If anything, our concern is that the relevant CARIFORUM EPA provisions do not go far enough and, by implication, that the level of ambition sought by developing countries and the EC in future EPA negotiations should be higher.

Central to the case for more ambitious provisions in the areas of public procurement and competition law and policy is the recognition that trade agreements--like the EPAs--can be used for non-mercantilist purposes. Trade agreements can be used to define and entrench policies and principles that affect the conditions of competition in markets and effectively distribute the benefits of open borders more widely. Moreover, trade agreements can be used to bolster domestic state institutions, such as the agency responsible for enforcing competition law. An emphasis on zero-sum thinking and market access may have blinded some observers to the constructive approaches possible through Economic Partnership Agreements.

With respect to public procurement practices, this paper recommends that future EPAs include a full suite of public procurement provisions and are not confined to improving the transparency of public procurement practices. As noted in section 2, steps to increase the number of bidders for state contracts can proceed in stages, with the first stage being to create regional procurement markets among the non-EC signatories of EPAs. Exceptions to procurement provisions should be limited, defined with specific public policy purposes in mind, and reviewed regularly for effectiveness. The users of public services, which are typically the most vulnerable in developing countries, cannot afford to be indirectly subsidising inefficient domestic firms.

With respect to competition provisions in the EPAs, measures to enact and enforce anti-competitive practices should be complemented by provisions in the following four areas: state-promoted anti-competitive practices, exemptions to national competition law and competition advocacy, raising the cost of non-cooperation in enforcement matters by competition agencies, and technical assistance and capacity building. Adoption of such provisions would demonstrate how a trade agreement can be used to strengthen an important national regulatory institution and cooperation between such institutions.
References


Part III: Other Trade Dimensions


Endnotes


2 No attempt is made here to evaluate other government policies, whether they are directly border-related (such as tariffs) or have indirect effects on commerce.

3 It would be wrong to suggest that these vested interests are necessarily corrupt, many could be the recipient of favours from governments that are known and accepted by much of society.

4 It should also be noted that when governments reduce discrimination against foreign sellers to their procurement markets on a preferential basis then the long-standing concerns about trade diversion—which can arise in all goods markets not just procurement markets—are pertinent here. Specifically, trade diversion is said to occur when the reduction or elimination of discrimination on preferential basis induces buyers (in this case state purchasers) to shift from those foreign producer or producers with the lowest production costs to foreign producers that have higher costs (but are the beneficiary of the implied preference generated by the RTA’s creation.) For over 50 years economists have accepted that trade diversion reduces the welfare of the purchasing nation.

5 In a paper written for a Northern NGO on the government procurement provisions in the CARIFORUM EPA (and therefore of direct relevance to the material contained in this paper), Woolcock (2008a) contends that “it is not clear that smaller developing countries can reap similar gains” from improving the transparency of procurement processes. Readers may want to bear in mind that Woolcock offers no empirical evidence to support this contention.

6 The research findings in this respect are also summarised in Evenett and Hoekman (2005).

Article 4.3 references The Revised Treaty of Chaguaramas; the Treaty of Basseterre establishing the Organization of Eastern Caribbean States; and the Agreement establishing a Free Trade Area between the Caribbean Community and the Dominican Republic.

We are doubtful, therefore, of the merits of allowing countries to retain preferential procurement policies to the detriment of the other developing country members of the EPA. In a paper for an international organisation Woolcock (2008b), for example, calls for ACP states to be able to “retain preference schemes that serve clearly defined and objective development aims” (his italics, page 32). Notwithstanding the arguments made earlier about the lack of empirical evidence concerning the success of these schemes (at least in attaining the stated goals and not in enriching certain parties), if such an exemption were allowed it should only be invoked if the following four conditions were met: (i) that the preferential policy’s effectiveness can and has been demonstrated in independent, objective research, (ii) that such research has shown that the preferential policy is indispensable (no other state or private sector measure can attain the same outcomes at lower cost) at the time of implementation and remains so throughout so long as the policy is in place, (iii) that the proposed preferential policy is no wider in scope than is absolutely necessary to attain the development goals, and (iv) that the proposed preferential policy is implemented no longer than is necessary to attain the development goals. Implementing such conditions would effectively require that any preferential policy be subject to frequent and independent review.

Evenett (2005) identifies five ways in which the enforcement of competition law can improve the so-called supply side of developing economies. Each of these five means effectively influences the nature and form of private sector development in poorer countries, which for many is an important developmental goal in its own right.

Some have argued, but not necessarily in the context of the EPA negotiations, that provisions on competition law and policy in trade agreements may restrict the “policy space” of developing country governments. Like the discussion on public procurement, this assertion is rarely backed up with evidence that the policy intervention in question is effective, indispensable, and has benefits that exceed the costs to society. (In the context of competition law most of the latter costs relate to the higher prices paid by customers, including the poor and governments, as governments try to form monopolies and other large firms.) Evenett (2007) contains an extensive analysis of the flawed arguments used by some to advance the proposition that governments should circumvent competition principles in the vain effort to promote development. It is unclear why the arguments and evidence referred to in Evenett (2007) do not apply with similar force in the ACP nations.


CARICOM comprises fourteen Member States and five Associate States.

These RTAs without competition statements in the preamble include: EU-Chile, Singapore-Australia, Canada-Chile, Japan-Malaysia, Japan-Mexico, Korea-Singapore, New Zealand-Singapore, US-Australia, US-Chile, and US-Peru RTAs.
The Japan-Philippines and Japan-Singapore RTAs. The former, for example contains a preamble statement: “Acknowledging that encouraging innovation and competition and improving their attractiveness to capital and human resources can enhance their ability to respond to [such] new challenges and opportunities.”

Canada-Costa Rica, EFTA States-Chile, EFTA States-Mexico, EFTA States-Singapore, and US-Singapore RTAs.

See for example, the Singapore-Australia, Japan-Thailand and Korea-Singapore RTAs.


Article 170 1(b) (i).

Article 173 Subsections (e) – (h).

Article 170 (3) (a – c).

In the case of the Sub-Saharan African countries, Evenett, Jenny, and Meier (2006) have constructed a database of allegations reported by African sources in Sub-Saharan Africa. Summary statistics on these allegations of anti-competitive practices, broken down by country affected and by anti-competitive practice (amongst other categories), can be downloaded from http://www.evenett.com/ssafrica.htm
Analysis of Social Aspects and the Environment in Economic Partnership Agreements

Philipp Schukat
1. Analysis of the social chapter and of regulations in other chapters on social, labour and environmental standards

Overall the integration of social and environmental issues into the CARIFORUM EPA reaches the usual standard of integrating these issues in Free Trade Agreements (FTAs) achieved in recent years. Unfortunately the CARIFORUM EPA does not intend to go beyond these existing models. The possible impact of the social and environmental chapters could have been significantly improved by consistently building on best cases of other FTA and exploring the recent lessons learned. The CARIFORUM EPA does not represent an advanced or improved approach to promoting social and environmental standards through FTAs. The following provides a more detailed overview.

Social and environmental standards are mainly promoted through separate chapters (Title IV: Chapter 4: Environment and Chapter 5: Social Aspects) but are furthermore also integrated into other chapters, such as the chapter on Agriculture and Fisheries (Chapter 5 of Title I), the chapter on Commercial Presence (Chapter 2 of Title II) and Section 7 on Tourism Services (Chapter 5 of Title II).

1.1 Reference to international conventions

The social and environmental obligations of the signatory parties always refer to relevant international conventions and declarations, but, with the exception of foreign direct investment, not also to the enforcement of national social, labour or environmental laws. Since there is a greater chance of obliging parties to enforce their respective national law than to enforce international conventions, which they might not have ratified yet, this limits the nature of the obligations and therefore their impact. Firstly we will look at the obligations regarding international conventions, and secondly at the advantages of also including obligations to enforce national law.

In Title IV: Chapter 5: Social Aspects, the parties reaffirm their commitment to the declaration by the UN Social and Economic Council on Full Employment and Decent Work, and the ILO Declaration on Fundamental Principles and Rights at Work and its Follow-Up (Article 191 Para. 1). The only explicitly mentioned conventions are the ILO core labour standards. The Parties reaffirm their obligations to respect, promote and realise these standards, namely:
- freedom of association and the effective recognition of the right to collective bargaining (ILO Convention 87 and 98);
- the elimination of all forms of forced or compulsory labour (ILO Convention 29 and 105);
- the effective abolition of child labour (ILO Convention 138 and 182); and
- the elimination of discrimination in respect of employment and occupation (ILO Convention 100 and 111).

Most CARIFORUM Member States except Haiti, Surinam and St. Lucia have ratified the core labour conventions. Haiti and St. Lucia both still have to ratify convention 138 (child labour), Surinam still has to ratify conventions 100 and 111 (discrimination) as well as convention 138 (child labour). Unfortunately the EPA does not supply any timeframe or any other further incentive for these three countries to ratify and implement the missing core labour standards. The example of the European General System of Preferences (GSP) shows, that better market access can be used as a significant incentive to speed up ratification of the core labour standards. A number of Latin-American countries would have lost their preferential access to the European Market under the General System of Preferences if they had not ratified all core labour conventions. This economic consequence created enough political will to support quick ratification of the missing core labour conventions.

Article 192 states that the Parties shall ensure that their own social and labour regulations and policies provide for and encourage high levels of social and labour standards consistent with the core labour standards and shall strive to continue to improve those laws and policies. This obligation is unnecessarily limited to the core labour standards and does not include any other ILO conventions. “Shall” obliges the parties to a certain action and in this respect the regulation is binding. But the action “to strive for” is an undetermined legal term, which opens a broad range of discretionary options for the parties. Polaski (2004) categorises such a commitment as weak, but more than hortatory, “since it would be difficult – although not impossible – to prove in a dispute settlement that a country failed to “strive” for better labour standards. For example, a country’s repeal of ILO-compliant labour laws and their replacement by non-compliant laws might be found by a panel to constitute a failure by the party to “strive to ensure” that fundamental ILO labour rights are protected.”\(^1\)
The obligations only refer to the ILO conventions, but do not comprehensively spell out social and labour standards. This allows for different interpretations, since certain ILO provisions remain to be clarified in certain issues. One example is the extent to which the right to strike is covered by ILO Conventions No. 87 and No. 111, or the scope of protection offered by the ban on discrimination in Convention No. 111. Also it is unclear what “high levels” of social and labour standards are.

Most environmental chapters of FTAs include three issues: emission of pollutants, handling of toxic substances, and protection of natural areas. The CARIFORUM EPA does not specify the areas which are covered by the environmental chapter. Instead, a reference is made to international environmental agreements (Art.185) without stating which agreements these might be. It should further be noted that the CARIFORUM states have signed only some of the internationally relevant environmental agreements.

1.2 Reference to national law

Unfortunately the EPA does not oblige the parties to enforce their national social, labour or environmental law in general. An exception is made as far as foreign direct investment is concerned, as will be shown below. In FTAs with the USA the parties are obliged not to fail in effectively enforcing their labour laws through a sustained or recurring course of action or inaction by repercussions affecting trade between the Parties. The US-Jordan FTA is generally considered to be the most rigorous example of a social chapter, mainly because it obliges the parties to enforce their respective national labour laws. This obligation is furthermore subject to dispute settlement and sanctions. Since most ILO core labour as well as other ILO conventions are actually ratified by most ACP-countries, an obligation to enforce national law would have covered more relevant issues and gone a lot further than the current social chapter.

In FTAs with the USA the obligation to enforce national law is the only obligation, which is subject to dispute settlement procedures leading to monetary penalties (e.g. maximum fine of 15 million US-$ in the FTAs US-Singapore and US-Chile). It should be noted, though, that so far disputes have always been solved before such measures were necessary. Polaski (2004): “A key principle is the recognition that the goal of potential penalties is not to utilize them per se, but rather to establish a disincentive or punishment that is adequate to deter a party from failing to carry out its obligations, and thus to encourage voluntary compliance.”
Furthermore, the North American Agreement on Labour Cooperation as well as the North American Agreement on Environmental Cooperation (NAAEC) both include a citizen submission procedure which allows NGOs and trade unions to assert a failure to effectively enforce social and environmental laws. This procedure is unique to NAAEC and has no counterpart in other FTAs or the CARIFORUM EPA. The citizen submission process of NAAEC creates an especially favourable constellation of public hearings. Subsequent to the public hearings, sanctions may follow if the party fails to resolve this matter. This constellation has proved to be more effective than public hearings which have only an informative purpose.

1.3 Foreign direct investment

Article 193 requires the parties not to encourage trade or foreign direct investment by i) lowering the level of protection provided by domestic social and labour legislation; ii) derogating from, or failing to apply such legislation and standards. This obligation is an integral part of most FTAs.

This obligation remains quite vague since “agree not to encourage” is only a description of what should be avoided, but does not explain what should be considered as such an encouragement. Standards for a fair Foreign Direct Investment would have been significantly more effective, since they present positive criteria for Foreign Direct Investment policies, which are more precise than the chosen negative criteria.

The investment chapter, Article 72 (Title II, Ch 2; behaviour of investors) goes into more detail and obliges parties to take the necessary measures to ensure that

- investors do not make us of bribes or other kinds of corruption,
- investors act in compliance with the core labour standards the parties have ratified,
- investors do not circumvent international environmental or labour agreements of which the parties are members, and
- investors establish and maintain, where appropriate, local community liaison processes.

Article 73 furthermore states, that the parties shall ensure that foreign direct investment is not encouraged by lowering domestic environmental, labour or occupation-
al health and safety legislation and standards, or by relaxing core labour standards or laws aimed at protecting and promoting cultural diversity.

The provisions of Articles 72 and 73 are fully subject to dispute settlement and represent the only obligation regarding social and environmental issues which could theoretically lead to suspension of trade concessions.

### 1.4 Existing regional treaties

In Article 194 the parties recognise the importance of establishing social cohesion policies and measures to promote decent work at regional level. In this light it is important that EPAs build on and be at least as demanding as regional agreements. A good example of the CARIFORUM EPA is that in line with the Treaty of Chaguaramas child labour is treated on the same level as prison labour (Article 224, exception clause). The exception clause of the Treaty of Chaguaramas states that: “Nothing in this chapter shall be construed as preventing the adoption or enforcement by any Member State of measures relating to child or prison labour.” Usually, for instance under WTO legislation and in most FTAs, the exception clause only applies for prison labour, not child labour (Article 20 GATT).

### 1.5 Consultation and cooperation

The main focus of the FTA lies on consultation and cooperation. The areas of cooperation listed in Article 196 are based on the Decent Work concept and therefore include the necessary broader range of relevant issues which go beyond the core labour standards. The rules and procedures for the cooperation on social and environmental issues are the same as for any other area of cooperation. Furthermore Article 8 lists the cooperation priorities. Only social and environmental standards are explicitly listed as part of the broader cooperation priority to enhance the technological and research capabilities of the CARIFORUM States. It could be doubted that technological and research capabilities are really a priority issue as far as social and environmental issues are concerned.

Clear procedures providing for a timeframe to assign priorities in social and environmental cooperation as well as for implementing such cooperation are lacking. The extent of cooperation and the involvement of stakeholders all remain undefined. Also it is unclear when and how the parties have to report on their cooperation activities, the funds dedicated to these issues, and the impact achieved.
1.6 Private and public voluntary and market-based schemes

The EPA is outstanding in its recognition of private and public voluntary and market-based schemes, especially concerning environmental issues. The promotion and facilitation of these schemes is listed in the environment chapter in Article 190 as a possible area for cooperation. Such a reference is missing in Article 196 which outlines possible cooperation on social issues. Article 191 in the social chapter nevertheless states that the Parties recognise the benefits of commerce in fair and ethical trade products and the importance of facilitating such commerce between them. In the section on Tourism Services, standards for sustainable tourism are explicitly mentioned as an area for cooperation in Article 117. Article 43 in the chapter on Agriculture and Fisheries also refers to cooperation on environmentally and socially sound agricultural practices and organic and non-genetically modified foods.

1.7 Dispute settlement

The dispute settlement procedures also apply (with useful adaptations) to disputes on social and environmental issues. The social and environmental chapter includes an additional consultation process. Where the Parties have failed to resolve a dispute by recourse to consultations as provided for in Article 204, or by recourse to mediation as provided for in Article 205, the complaining Party may request the establishment of an arbitration panel. Article 207 ensures that the panel shall comprise at least two members with specific expertise on social or respectively environmental issues. If a party fails to notify any measure taken to comply with the arbitration panel ruling, Parties can adopt appropriate sanctions. Sanctions, such as fines, would be permitted; only suspension of trade concessions are ruled out for disputes concerning the social and environmental chapter. This does not necessarily represent a weakness of the CARIFORUM EPA, since fines used directly to improve the labour problem may be even more effective in improving the social and environmental situation than a withdrawal of trade benefits.12

1.8 Other aspects

Social and environmental standards are lacking in the chapter on public procurement (Chapter 3 of Title IV). This is especially unfortunate, as in the respective EU Regulation social and environmental standards are explicitly allowed as conditions for performance of contracts.
In contrast to most FTAs with the USA, the CARIFORUM EPA does not include rules concerning access to justice for the public in the event of violations of social or environmental laws.

**Box: Negotiation of the social and environmental chapter**

*By Audel Cunningham, Legal Advisor CRNM*

**The pre- EPA regimes within the CARIFORUM States**

Prior to the commencement of the EPA negotiations, all CARIFORUM states enjoyed a tradition of complying with their obligations under international conventions dealing with labour standards and environmental protection. Separately and apart from the obligations imposed by these conventions, the domestic law and practices of the CARIFORUM states have always evinced the highest respect for workers’ rights and environmental protection.

In the light of this, it was not CARIFORUM that demanded a Chapter on Social Aspects and the Environment in the EPA. Rather, the EC demanded these provisions, given the apparent need to ensure that as far as possible EPAs reflect current European Community notions of “good governance” and produce overall politically and socially acceptable results.

**CARIFORUM negotiating challenges**

Given the country-specific nature of the subject matter of the chapters on Social Aspects and the Environment, no negotiating challenges were posed by the negotiating configuration. By this is meant that the current absence of any existing regional regimes addressing the relevant issues did not result in any use of red ink by CARIFORUM founded upon concerns for the need to avoid any commitments in the EPA that could pre-determine the content of any future regional regimes.

**CARIFORUM negotiating strategies**

Notwithstanding the fact that they did not demand the chapters on Social Aspects and the Environment, the CARIFORUM States had strong pro-active interests in the area of development cooperation. CARIFORUM’s negotiating strategies therefore centred around:

(i) Establishing an inventory of development needs and conditioning CARIFORUM acceptance of certain EC proposals upon the provision of appropriate development support,
(ii) Re-defining the scope of the Chapter. This involved the process of identifying precisely the scope of EC ambition / agenda and rejecting those aspects of the ambition which went beyond CARIFORUM’s vision of the scope or purpose of the Chapter. The clearest example of the deployment of this strategy arose in relation to the original EC position that the failure of a CARIFORUM State to abide by the obligations of the Chapter could via the general dispute settlement provisions of the EPA result in that State being subjected to traditional trade sanctions. CARIFORUM’s position on this issue was that it would not accept any obligation in this area, non-observance of which would be tied to the invocation of the dispute settlement mechanism and possible traditional trade sanctions. CARIFORUM was successful in obtaining agreement for the establishment of special mechanisms to deal with disputes in this area. As reflected in Articles 189 (3) – 189 (6) and 195 (3) – 195 (6), these mechanisms are:

(a) The ability of either Party to seek advice or opinions from relevant International Bodies to aid the interpretation of obligations,

(b) Special obligations to enter into consultations on issues in dispute,

(c) Referral of issues in dispute to a Committee of Experts.

By rejecting the broad scope of the EC ambition as illustrated above, CARIFORUM’s use of its negotiating strategy in effect led to CARIFORUM exercising control over the scope of a Chapter in respect of which it had no pro-active interests.

(iii) Asserting control over the framing of the nature of the obligations by insisting upon the adoption of specific standards.

With respect to several of the proposed obligations, the EC proposed adopting certain standards which are applied within the Community on the basis that these exceeded international standards. These proposals were particularly disquieting for the CARIFORUM States owing to concerns over the subjectivity of the standards and the potential inability of the CARIFORUM States to sufficiently appreciate their content so as to be able to comply with them. CARIFORUM was successful in its rejection of EC demands in this respect and its insistence on the adoption of international standards only. In this way CARIFORUM was able to successfully frame the Chapter in a manner that gave it utmost assurances of its ability to comply with the stated obligations.
2. What implications will the EPA have on the labour and social standards in the CARIFORUM states?

Although the social and environmental obligations are not completely discretionary, they are still not as binding as actual commitments, which can be enforced through dispute settlements. Therefore the impact of the CARIFORUM EPA depends to a large degree on the political will of the parties and the cooperation financed and realised under the agreement. The CARIFORUM EPA also offers opportunities for strengthening ILO’s supervisory work and existing initiatives to improve the social and environmental situation in CARIFORUM Member States.

Lack of resources and capacity, lack of awareness of the economic benefits of implementation (reduced social and environmental cost), and lack of political will are seen as the major reasons for limited implementation of social and environmental standards in developing countries\(^\text{13}\). In general, the combination of positive incentives for implementing social and environmental standards and improved information about the social and environmental conditions not only on country level, but also on company level, is likely to produce swifter and wider compliance than the threat of punishment for non-compliance\(^\text{14}\).

The need for capacity-building and therefore for cooperation is enormous for ACP-countries. If cooperative capacity-building and technical assistance as part of an FTA are to have any noticeable impact, financial resources of a higher order of magnitude than usual must be committed\(^\text{15}\). A useful analogy is made by Polaski, who refers to the European social cohesion funds set up to improve the enforcement of laws, working conditions and social safety nets of poorer European countries when they joined the European Union.

Many useful examples of efficient cooperation on social and environmental issues exist. These include the build-up of supportive national or regional infrastructure to provide companies with cost-efficient tools and trainings on how to improve social and environmental practices. Another potential example would be national or regional company monitoring and information systems, which could be set up in cooperation with the private sector including foreign buyers. A good example can be found in Cambodia, where such a monitoring system has been built up as part of the US-Cambodian FTA\(^\text{16}\).
Regarding the effectiveness of social chapters in FTAs, Doumbia-Henry (2006) states, that despite the shortcomings of recent FTAs, there is evidence that the majority of FTA signatories have made some progress in terms of compliance with and improvement of their labour regulations. Where a country has ratified an ILO convention, the ILO does have a supervisory system that can determine compliance – the system’s main legal organ being the Committee of Experts on the Application of Conventions and Recommendations (CEACR), a body of 20 independent high-level judges and lawyers representing all continents and all legal systems. As some observers have rightly pointed out, the cooperation mechanisms and monitoring systems built into FTAs may offer opportunities for strengthening the ILO’s own supervisory work and related advisory services. In fact, in some instances consistent comments and requests for information by the CEACR have provided the basis for country-level initiatives addressing the institutional or policy hurdles underlying the problems detected by the CEACR.17

The risk of protectionist abuse of labour and environmental obligations in FTAs is no greater than that relating to commercial or any other obligations of an FTA. Since the same dispute solution mechanisms are applied, the same constraints for any abuse are built in. The neutral determination of whether there has been a violation of social, labour or environmental commitments also helps to address concerns about asymmetry of power in trade relationships18.

It should be noted that the North American Agreement on Labour Cooperation as part of the North American Free Trade Agreement has also led to dispute settlements regarding social and labour issues in the USA and Canada19. The social chapters of the EPAs could also have a beneficial impact on the working conditions of legal and illegal immigrants from ACP countries in the European Community.

3. What are the lessons learned for other EPA regions?

Some suggestions to improve the integration of social and environmental issues into the remaining EPA are made in the following. In the Annex a complete proposal for an alternative social chapter made by Müller and Scherrer can be found.
3.1 Integrate Decent Work indicators and monitoring

The Economic Partnership Agreements and other economic policies will have an impact, not only on the number of jobs, but also on the quality of employment. Theoretical considerations and empirical evidence suggest that globalisation has the potential to create a net increase in employment. Most cross-country studies conclude that increased trade can, at least in the long run, be correlated with higher rates of economic and employment growth.\(^{20}\)

The potential gains are, however, neither automatic nor painless, or evenly distributed across all population groups. Some will gain employment, others may lose it. All this depends on initial conditions, external economic developments and policies. For the benefits to materialise, some adjustments are inevitable and beneficial policies are needed.

This raises the following question: what kinds of jobs are created and which are eliminated? Are they low-end jobs with little security and low wages, or are they high-end jobs with adequate job security and good wages? How will job creation, or destruction, affect the gender gap in the labour market? Will youth unemployment be reduced? How will it affect child labour? What is the nature of worker-employer relations in the sectors where employment growth has taken place?

An old management adage states that you can’t manage what you don’t measure. This also holds true for governments trying to set up policies to promote Decent Work. Therefore an integral part of the EPAs should be a regional Decent Work monitoring system, based on suitable indicators elaborated in cooperation with ILO. This would be an extremely useful tool to design supportive cooperation and technical assistance.

3.2 Build on regional treaties

The EPAs should build on and be at least as demanding as regional agreements. Relevant Charters are the African Charter on Human and Peoples’ Rights (1981) of the African Union and the Charter on Fundamental Social Rights in SADC of August 2003\(^{21}\). Especially the latter goes a lot further than the current proposal of a social chapter in the EPA with SADC. Müller and Scherrer (2008) made a very recommendable study, suggesting various alternative social chapters for the EPAs. In the Annex, two of their proposals are combined to provide an insight on how most of the above criticisms could be overcome. It should be noted that the SADC
Charter is actually closer to the proposed alternative than to the current draft version of a social chapter for the EPA with SADC.

Further examples of promoting regional approaches can also be found in the SADC Charter, which, for example, states that Member States shall establish regional mechanisms to assist Member States in complying with the ILO reporting system.

### 3.3 Provide a supportive framework for effective cooperation

Since the impact of the social and environmental chapter will depend largely on the cooperation realised, a more stringent framework would help to increase the political will for cooperation on a meaningful scale. Clear procedures which provide for a timeframe to assign priorities in social and environmental cooperation as well as to implement such cooperation should be added. Also, rules on when and how the parties have to report on their cooperation activities, on the funds dedicated to these issues, and on the impact achieved would be needed.

### 3.4 Include social and environmental standards in the chapter on public procurement

Public procurement can provide an important incentive for companies to improve the social and environmental impact of their production. Procurement based on internationally recognised social and environmental criteria would reward those companies which are trying to follow these standards. The following suggestions for an inclusion of social and environmental standards in the chapter on public procurement build on the current European legislation:

- a) Procuring entities may lay down special conditions relating to the performance of a contract, provided that these are compatible with this Agreement and are indicated in the contract notice or in the specifications. The conditions governing the performance of a contract may, in particular, concern social and environmental considerations.
- b) Procuring entities may demand that tenderers who have been awarded contracts shall respect internationally agreed core labour standards, e.g. the ILO core labour standards, conventions on freedom of association and collective bargaining, elimination of forced and compulsory labour, elimination of discrimination in respect of employment and occupation, and the abolition of child labour.
3.5 Extend obligation to enforce national law to national investors

Since it is more likely to be possible to oblige parties to enforce their respective national law than to enforce international conventions, which they might not have ratified yet, this extends the nature of the obligations and therefore their impact, as explained above.
References

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Endnotes

1  Cited from Polaski (2004), page 19.
2  Cited from Müller et al. (2008), page 28.
3  Müller et al. (2008).
5  Jordan ranks 86th in the Human Development Index and 102nd in GDP per capita by Purchasing Power Parity (http://dataranking.com/table.cgi?TP=ne03-2&LG=e&RG=0&FL=s), which is comparable to CARIFORUM member countries.
9  Müller et al. (2008).
10 Founding treaty of the Caribbean Community including the CARICOM single market and economy.
11 Article 226 of the Treaty of Chaguaramas.
16 www.betterfactories.org.
20 This paragraph and the following two are largely cited from ILO (2006) page 2ff.
21 Müller et al. (2008).
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