

**SERVICES AND INVESTMENT IN THE EC-CARIFORUM ECONOMIC PARTNERSHIP AGREEMENT:  
INNOVATION IN RULE-DESIGN AND IMPLICATIONS FOR AFRICA**

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I. Introduction

The imminent expiration of the World Trade Organisation (WTO) waiver on December 31, 2007, which provided legal cover for the EC's preferential trade regime for goods originating from the African Caribbean and Pacific (ACP) countries, coupled with the improbability of securing a renewal of the waiver, signalled the end of non-reciprocal EC-ACP trade relations. Such a change in ACP countries' trading environment has so far spawned vastly different responses within the six ACP negotiating regions. These run the gamut from the CARIFORUM<sup>2</sup> group's decision to enter into a comprehensive economic partnership agreement (EPA) with the EC to the Interim EPAs signed by some members of the Pacific Region, Southern Africa Development Community (SADC), West Africa, Eastern and Southern Africa (ESA) and East Africa (EAC), all of which apply solely to goods trade, leaving open the possibility of concluding more comprehensive EPAs in future. The lack of consensus within the latter regions was vividly illustrated by the decision of some non-LDCs to opt-out of the interim EPAs, foregoing their preferential access to EC markets. Meanwhile, a number of ACP LDCs saw limited value-added in entering onto EPAs, preferring instead to continue to export under the EC's Everything But Arms (EBA) initiative affording them non-reciprocal duty-free access to the EC market.

The signature on December 16<sup>th</sup>, 2007 of the EC-CARIFORUM Economic Partnership Agreement (EPA) drew a curtain on thirty years of preferential access to European markets enjoyed by Caribbean producers. Failure to negotiate a WTO-consistent trade regime was a luxury the CARIFORUM region could ill afford since the application of GSP rules would have disrupted trade as the majority of the region's exports to Europe would need to contend with higher levels of GSP import duties. The challenge for the region was thus to negotiate "a development friendly, asymmetrical, reciprocal agreement whose net welfare benefit... would be greater than that under the best available GSP."<sup>3</sup>

In several regards, the CARIFORUM EPA exceeds the thresholds laid down under GATT Article 24 and GATS Article V to determine WTO-compatibility. The EPA also features

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<sup>2</sup> CARIFORUM stands for the Caribbean Group of the African, Caribbean and Pacific Forum. It refers to the fourteen member states of CARICOM (Antigua and Barbuda, Bahamas, Barbados, Belize, Dominica, Grenada, Guyana, Haiti, Jamaica, St. Kitts and Nevis, St. Lucia, St. Vincent and the Grenadines, Suriname and Trinidad and Tobago) plus the Dominican Republic and for the purposes of the EPA negotiations excluded Cuba.

<sup>3</sup> Anthony Peter Gonzales, "Choosing a Comprehensive EPA," database online, available from [http://www.crnw.org/documents/ACP\\_EC\\_EPA/epa\\_agreement/Choosing\\_a\\_Comprehensive\\_EPA\\_by%20AGonzales.pdf](http://www.crnw.org/documents/ACP_EC_EPA/epa_agreement/Choosing_a_Comprehensive_EPA_by%20AGonzales.pdf) accessed March 20, 2008.

many WTO-plus provisions. The CARIFORUM EPA represents a significant departure from earlier trade arrangements between the EC and the CARIFORUM region by moving beyond goods trade and incorporating areas such as trade in services, investment, government procurement, competition policy and trade-related intellectual property matters.

Indeed, even while allowing for inevitable differences in EPAs to be (possibly) concluded with the African and Pacific regions owing to differences in economic structures, development levels and collective preferences, the argument can be made that the CARIFORUM EPA has arguably set the bar for all subsequent EPA negotiations and perhaps indeed for future preferential trade agreements entered into by the EC. There is little doubt that such a bar is quite high.

Given the precedent-setting value of the CARIFORUM EPA, some of the questions that are bound to be uppermost in the minds of trade officials of sub-Saharan African countries are: (i) what lessons can sub-Saharan African countries learn from the WTO+ provisions in the CARIFORUM EPA?; and (ii) which WTO+ CARIFORUM EPA elements hold the potential, if replicated in the African EPAs, to stimulate development in these countries?

Against this background, this paper examines what are arguably three of the most innovative and precedent-setting elements of the CARIFORUM EPA: (i) the Title on Services, Investment and E-Commerce; (ii) the Chapters on Public Procurement and Competition Policy and the Protocol on Cultural Development; and (iii) the Development Finance and Cooperation provisions of the Title on Services and Investment. The paper then draws key main lessons for African ACP members and highlights a number of issues sub-Saharan African negotiators might need to consider should they opt to conclude a more comprehensive compact on services and investment with the EC.

## II. THE CARIFORUM EPA

### II.1 *Services and Investment*

#### II.1.1 Core Disciplines

##### *a. Most Favoured Nation Treatment (MFN)*

As under the GATS, the EPA's MFN obligation is framed as a general obligation applicable to all measures affecting services trade and investment. The MFN obligation is drafted in a virtually identical manner in both the commercial presence and cross-border services chapters, with minor alterations to take account of differences between the two modes of supply.

It is noteworthy that the MFN provision does not appear in the rules governing the temporary movement of natural persons. This is arguably less than fully surprising given that migration- and labour market-related areas are policy areas in which governments tend to exhibit considerable reluctance to bestow access privileges unconditionally to all comers. Labour mobility is thus one area where both EPA partners can, if they so desire, accord better treatment to a third state than that accorded to each other.

The MFN provisions in these two chapters have been tailored to meet the demands of a preferential trade agreement (PTA) between unequal partners. Article 70(1)a allows the CARIFORUM region to benefit from any more favourable treatment that the EC may grant to any other third state with which it has concluded an economic integration agreement (EIA).<sup>4</sup> CARIFORUM investors, service suppliers and member states stand to benefit if any subsequent regional economic partnership agreements (REPAs) succeed in granting more favourable treatment in the EC market than that accorded under the CARIFORUM-EC EPA in the areas of services and investment. This may well be deemed unlikely in an EPA context, to the extent that CARIFORUM is by far the most service-centric partner of all those the EC is currently negotiating with, such that the market access package embedded in the EPA probably represents the best the EC is prepared to offer.<sup>5</sup> More probable is that other REPAs might be able to free ride on the terms of the CARIFORUM EPA, provided that the latter agreements feature an MFN clause similar to that found in Article 70 (1) a. CARIFORUM states stand a better chance of benefiting from the Agreement's MFN clause if the EC negotiates a more favourable economic integration agreement with a third country, if the EC grants more favourable treatment than that provided for in the CARIFORUM EPA.

Significant policy controversy has arisen over Article 70(1)b, which allows established EC firms and investors to benefit unconditionally via the EPA's MFN provision from any more favourable treatment which the CARIFORUM states may provide to any industrialised country or major trading economy<sup>6</sup> with which they conclude a subsequent economic integration agreement (e.g. the United States, Canada, BRICs). Brazil, in particular, has expressed concern in the WTO General Council that the insertion of such a provision into the CARIFORUM EPA and the interim EPAs may have the effect of discouraging developing countries from concluding PTAs with EPA partners. Such a clause, Brazil has argued, is a disincentive to South-South trade.<sup>7</sup> In Brazil's view, such a requirement runs contrary to the principles underlying the WTO's Enabling Clause, which aims at increasing trade between developing countries and increasing their participation in global trade. Interestingly, paragraph 5 of Article 70 states that when a CARIFORUM state becomes a Party to such an EIA, the EC and the CARIFORUM states shall enter into consultations to decide whether the CARIFORUM state may deny the more favourable treatment to the EC Party.

Neither CARIFORUM nor EC officials appear to find Brazil's arguments persuasive. CARIFORUM officials contend that major developing country partners are unlikely to match the terms of the EPA. Accordingly, the likelihood that the CARIFORUM region might accord to the latter countries better treatment than that granted to the EC appears slight. From the perspective of the EC, the inclusion of such a clause, whose precedent was established in the NAFTA, is generally considered as preserving an equality of access with

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<sup>4</sup> The EPA defines an EIA as an agreement on services and investment.

<sup>5</sup> The situation may however be different in the context of a future EU-India FTA, given India's offensive interests in services and the greater negotiating leverage that stems from the size of its internal market.

<sup>6</sup> The EPA defines a major trading country in Article 70(4) as any developed country or any country accounting for a share of world merchandise exports above one percent in the year before the entry into force of the EIA with CARIFORUM or any group of countries acting individually, collectively or through an economic integration agreement accounting collectively for a share of world merchandise exports above 1.5 percent in the year before the entry into force of EIA with CARIFORUM.

<sup>7</sup> Cheikh Tidiane Dièye and Victoria Hanson, "MFN provisions in EPAs: a threat to South-South trade?" *Trade Insights* 7, no. 2 (2008):1- 3.

that of its main commercial rivals in EPA markets, all the more so as the EC has granted CARIFORUM countries an Aid for Trade package that other trading partners might not be able or willing to match. Moreover, the EC has defended its policy on the grounds that while the Enabling Clause permits trade preferences among developing countries, it does not prohibit the extension of such preferences to other WTO Members.<sup>8</sup>

Another element of the EPA's MFN obligation is an exclusion clause commonly found in several bilateral investment treaties (BITs) and the investment chapters of several PTAs. Such a clause essentially precludes the extension of any existing or future preferential treatment granted by the members of a PTA within the context of their own integration arrangements, through the operation of the MFN clause, to any third country with which the PTA members concludes an EIA. Thus the benefits from any further integration among the CARICOM states will not be extended to the EC (and third Parties) and *vice versa*. Accordingly, the EC does not become a *de facto* member of CARICOM; neither does CARICOM become a *de facto* EC member.

*b. National Treatment*

As in the GATS, the EPA's national treatment obligation is also conditional and subject to limitations entered into each Parties' schedule of commitments. The EPA obliges treaty partners to offer, subject to the possibility of scheduling non-conforming measures, treatment no less favourable than that given to *like* domestic commercial presences and investors.<sup>9</sup> The national treatment obligation may be satisfied through the Parties granting to foreign suppliers operating via a commercial presence either formally identical or formally different treatment to that accorded to like domestic suppliers. Treatment is considered to be less favourable when it "modifies the conditions of competition" in favour of like suppliers/investors. Finally, nothing in the EPA requires the Parties to compensate for inherent competitive disadvantages resulting from the foreign character of the relevant commercial presences and investors.<sup>10</sup>

The EPA's national treatment provision, which is identical in both the commercial presence and cross-border services chapters, has come under fire from critics who argue that the obligation circumscribes the CARIFORUM governments' flexibility to foster the development of national service sector capacity, notably through the discriminatory provision of subsidies to nascent suppliers.<sup>11</sup> Such a criticism appears largely spurious to the extent that Article 60 (3) explicitly carves out subsidies from the scope of Title II in a manner that is more straightforward and absolute than that found under the GATS where both the MFN and, in scheduled sectors, national treatment disciplines apply to services-related subsidies pending the adoption of multilateral disciplines envisaged under the Article XV negotiating mandate.

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<sup>8</sup> Tidane Dièye and Hanson, "MFN provisions in EPAs," 2.

<sup>9</sup> *Ibid.*, Article 68.

<sup>10</sup> This latter provision mirrors footnote 10 to GATS Article XVII:1, which was intended to cover circumstances such as the host countries' legislation being in a different language from that of the service supplier.

<sup>11</sup> Norman Girvan, "Implications of the CARIFORUM-EC EPA," Database online. Available from <http://normangirvan.info>.

A key EPA departure from GATS practice can be found in regard to the level of binding of national treatment and market access commitments. Whereas the GATS permits countries to bind at levels below the regulatory *status quo*, paragraph 9 of CARIFORUM's Annex 4.VI requires them to maintain the conditions of market access and national treatment applicable according to their respective legislation to services, service suppliers, investors and commercial presence at the time of the signature of the Agreement.<sup>12</sup> This obligation covers both commercial presence and cross-border services. It is notable that no corresponding obligation applies to the EC, presumably because the EC's EPA commitments typically embed or improve on the regulatory *status quo*.

*c. Market Access*

Allowing for differences in structure between the GATS and the EPA, the market access obligation dealing with what are primarily non-discriminatory quantitative restrictions to services trade and investment, is similarly structured under both agreements, with Parties required to offer treatment no less favourable than that provided for in their schedules of specific commitments and allowance made for maintaining specific types of market access limitations so long as they are listed in schedules. While the types of admissible limitations are modelled on those found in GATS XVI:2, the respective chapters on commercial presence, cross-border services and the temporary movement of persons detail the types of limitations that are relevant to each particular mode of supply. For instance, in the chapter governing the temporary movement of natural persons, the only GATS XVI:2-like limitation that is mentioned is that restricting the total number of persons that an investor may employ as key personnel or graduate trainees in a specific sector in the form of numerical quotas or a requirement of an economic needs test.<sup>13</sup>

## II.2 Characterising the EPA's liberalisation harvest

The level of liberalisation achieved in the EPA represents a significant improvement on the current GATS commitments of both the CARIFORUM states as well as EC Members. Once again, this should come as no surprise to the extent that both Parties GATS commitments relate to circumstances prevailing in the early 1990's (and to end 1997 in the case of telecommunications and financial services) and the extent of unilateral liberalisation that has been achieved since the conclusion of the Uruguay Round.

According to the Caribbean Regional Negotiating Machinery (CRNM), the EC has made commitments on more than 90% of sectors found in the WTO's W/120 list of service sectors.<sup>14</sup> In the case of the CARIFORUM states, the respective levels of market access by lesser (LDCs) and more developed members (MDCs) reached 65% and 75% respectively (expressed in terms of the share of W/120 sectors subject to scheduled commitments). The

<sup>12</sup> In one sense the standstill may be regarded as GATS+; however, it can be argued that GATS V:I, which addresses the removal of discrimination through the elimination of *existing* discrimination or prohibition of new discriminatory measures, inherently demands at minimum some form of standstill commitment.

<sup>13</sup> EPA, Article 81 (2)

<sup>14</sup> CRNM, *Highlights: Services and Investment in the CARIFORUM-EU Economic Partnership Agreement*, database online; available from [http://www.crnmm.org/documents/ACP\\_EU\\_EPA/epa\\_agreement/Dec%2018-Web-Services&%20Investment%20in%20EPA.pdf](http://www.crnmm.org/documents/ACP_EU_EPA/epa_agreement/Dec%2018-Web-Services&%20Investment%20in%20EPA.pdf), 3.

final text features a standstill provision for cross-border services on the CARIFORUM side (but not for investment) as well as a built-in agenda of further liberalisation of services and investment commencing five years after the EPA's entry into force.<sup>15</sup>

## II.2.1 EU Commitments

### *a. Investment*

In the non-services area, the EC has scheduled commitments on investment in agriculture, hunting and forestry, fishing and aquaculture, mining and quarrying, manufacturing and production, transmission and distribution on own account of electricity, gas, steam and hot water.

In the area of services, the EC has made commitments on investment in business services, communications services, construction and related engineering services, distribution services, privately funded education services, environmental services, financial services, privately funded health services and social services, tourism, transport and new services not included elsewhere.<sup>16</sup> It should be noted that most of the restrictions on commercial presence in the health services sector which the EC removed in the EPA still remain in the EC's revised conditional GATS offer.<sup>17</sup> In terms of privately-funded education services, the EPA features marginal improvements over the EC's GATS commitments.

The EC's commercial presence schedule features a number of horizontal limitations, some of which apply on a community-wide basis while others apply to specific Member States. Such limitations relate to real estate, public utilities, types of establishment, as well as investment in certain geographical zones.

### *b. Cross-border trade in services*

The EC's commitments on cross-border trade in services apply to the same range of activities liberalised in its commercial presence schedule. However, they are subject to only one horizontal restriction relating to the acquisition of real estate which was inscribed by over half of the 27 EC Members.

### *c. Movement of natural persons*

The EC's specific commitments on the temporary entry and stay of key personnel and graduate trainees were made in the areas of business services, construction, distribution, education (only privately funded services), financial services, health (only privately funded services, tourism, recreational and transport services. In the latter sector, such commitments

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<sup>15</sup> As mentioned earlier, the standstill clause is found in paragraph 9 of the Annex IV. 2. Article 62 states that 'the parties shall enter into further negotiations on investment and trade in services no later than five years from the entry into force of this Agreement with the aim of enhancing the overall commitments undertaken under this Title.'

<sup>16</sup> The latter includes funeral services, cremation and undertaking services; services of membership organisations; dyeing and colouring services; dry cleaning services and cosmetic treatment, manicure and pedicure services.

<sup>17</sup> The only restriction removed by the EC in its GATS offer is Estonia's requirement that all foreign trained professionals must present a certificate of auxiliary training from the national university.

are in the air, road, pipeline transport for goods other than fuel and a number of services auxiliary to transport.

A few EC Member states have scheduled horizontal restrictions linked to the maintenance of economic needs tests, the scope of intra-corporate transferees and managing directors and auditors. The EC as a whole also inscribed a limitation on recognition stating that admission to practice a regulated professional service in one EC member state does not grant CARIFORUM service providers the right to practice in another member state.

The EC has made commitments in 29 sub-sectors for contractual service suppliers (CSS) in business services, education, environmental services, tourism and entertainment services. In addition, it has granted market access for independent professionals (IPs) in 11 sub-sectors in the business services sector. The EC has inscribed two main types of horizontal limitations in relation to the above categories, namely transitional periods and recognition requirements. While there is no transitional period for the EC-15, commitments for the newer members - Cyprus, Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovakia and Slovenia – commitments will enter into force on January 1st, 2011 and on January 1st, 2014 for Bulgaria and Romania. As in the case of key personnel and graduate trainees, the EC inserted a limitation on recognition.

## II.2.2 CARIFORUM Commitments

### *a. Investment*

In the case of non-services activities, CARIFORUM, like the EC, has undertaken liberalisation commitments on investment in agriculture, hunting and forestry, fishing, mining and aquaculture, manufacturing and production, transmission and distribution on own account of electricity, gas, steam and hot water. It should be noted that in the subsectors of the broader sectors that are *not* listed in Annex 4.V, CARIFORUM is committed to providing national treatment and market access to EC investors/service suppliers and investment/commercial presences.<sup>18</sup> There has been minimal market opening in some of the more sensitive sectors such as the production, transmission and distribution of electricity, gas, steam and hot water, with only the Dominican Republic making a commitment in the latter sector with one reservation preserving the flexibility to subject economic activities considered to be public utilities to public monopolies or exclusive rights to private operators. Some subsectors in manufacturing, such as the manufacture of wood and wood products, were also clearly sensitive as member states inscribed limitations reserving the right to adopt or maintain measures on investment. Moreover, CARIFORUM has been granted the right to inscribe in its schedule any non-conforming measures which existed at the time of signature within two years of the signature of the Agreement.<sup>19</sup>

The above commitments are subject to the horizontal limitations inscribed by a number of CARIFORUM member states in relation to land holding, type of commercial presence and investment. The only CARIFORUM-wide restriction is one that prohibits investment in

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<sup>18</sup> EPA Annex 4.V paragraph 2.

<sup>19</sup> Ibid. paragraph 5.

activities related to radioactive materials, nuclear fuel, energy and waste and the production of heavy water.

*b. Cross-border trade in services*

With respect to cross-border trade in services, commitments were made on professional services, communications services, construction and related engineering services, distribution, education, environmental services, financial services, health related and social services, tourism and travel-related services, transport services and new services not included elsewhere. A horizontal limitation was made restricting the region's national treatment obligation with respect to subsidies and grants. In addition, Jamaica and Belize went a step further and limited the application of the national treatment obligation as it applies to subsidies and grants, particularly in sectors deemed to exhibit public good or universal access characteristics, such as public health and education services. The latter were the only two CARIFORUM maintaining limitations on the cross-border supply of services.

With the exception of Antigua and Suriname, all CARIFORUM states inscribed horizontal restrictions with respect to commercial presence. Among the main limitations listed are local incorporation and registration requirements, requirements for the acquisition of real estate, reservations carving out business opportunities for small and medium sized enterprises and limitations on equity ownership. All CARIFORUM states inscribed a market access restriction on the temporary movement of natural persons, permitting only the movement of key personnel and graduate trainees not available locally. In addition to this restriction, some countries such as Barbados and St. Lucia added labour market and/or economic needs tests. Other countries listed discriminatory licensing and registration requirements.

## II.3 Documenting the extent of GATS+ liberalisation

### II.3.1 CARIFORUM

The following section depicts the nature and extent of the liberalisation commitments made by the four largest CARIFORUM members - Barbados, the Dominican Republic, Jamaica and Trinidad and Tobago. Such trends are summarized in the Annex to this paper.

While the *scope* (e.g. sectoral coverage) of these countries' EPA commitments generally exceeded those found in their respective GATS schedules, there was little by way of significant deepening of *existing* GATS commitments. This was notably the case for business, construction, environment, financial, tourism, recreational and tourism services and other services not included elsewhere where CARIFORUM states either made commitments in the particular sector for the first time or undertook commitments in previously uncommitted subsectors of particular (broader) sectors. For the four countries surveyed, none of the new EPA commitments in modes 3 and 4 were full commitments.

The schedules of Barbados, Dominican Republic and Trinidad and Tobago featured advances over their GATS schedules in no more than two sectors.<sup>20</sup> For Barbados and the Dominican Republic, WTO+ EPA improvements comprised full commitments in modes 1 and 2, while Trinidad and Tobago undertook both partial and full commitments in mode 2 only.

### II.3.2 The EC

#### *a. Commercial Presence*

The EC's EPA schedule contains a number of improvements over its latest offer in the Doha Development Agenda (DDA). In many sectors, the commitments cover more EC member states; involve the removal of many nationality requirements, some residency requirements and limitations on juridical form. The elimination of many of these restrictions is evident throughout the EC's EPA schedule for commercial presence. In a number of cases, the above restrictions were removed by members of the EC-15, such as Germany and France. This is particularly significant as CARIFORUM service suppliers can be expected to be mainly interested in accessing the markets of the EC-15 on better terms, and especially its largest Members' markets.

In some areas, the EC's EPA commitments essentially mirrored its DDA offer whereby all market access and national treatment restrictions were eliminated. Such sectors include the entire computer services sub-sector as well as advertising, management consulting and services related to management consulting. However, the EC's commitments under the EPA in such sectors are more liberal as some countries such as Austria, Cyprus, Malta, Portugal and Slovenia removed some or all of their national horizontal restrictions. These national requirements included authorisation requirements for economic activities using certain types of legal form, foreign equity limitations, incorporation requirements and minimum capital requirements.

#### *b. Cross-Border Services*

The EC's commitments on the cross-border supply of services via mode 1 do not reveal a significant level of improvement over its Members' collective DDA offer. Much to the chagrin of the CARIFORUM states, many EC Members listed reservations on mode 1 or listed supply through this mode as unbound.<sup>21</sup> CARIFORUM states had hoped for increased market access, particularly in professional services given the technological advances in ITC services and the dramatic drop in the cost of supplying such services remotely.

In mode 2, there was marginal improvement over the EC's DDA offer, reflecting the fact that this mode of supply is already the least restricted. Many of the EC's GATS+ EPA improvements were made by extending pre-existing commitments to most or all EC

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<sup>20</sup> For Trinidad and Tobago, these sectors were the communications and education; for Dominican Republic, they were transport and business services; and for Barbados, they were communications and financial services.

<sup>21</sup> CRNM, "The Treatment of Professional Services in the EPA," database online, available from <http://www.crn.org>, accessed March 5, 2008.

Member states, an outcome that is likely to be replicated at the end of the DDA (such that the EPA should be expected to yield limited (or transient) margins of preference to CARIFORUM suppliers). With a few exceptions, the EC has liberalised mode 2 services trade in the EPA context.

*c. Movement of Natural Persons*

i) Key personnel and graduate trainees

In the DDA, the provision of services through all categories of natural persons is listed as unbound or unbound except as governed by horizontal commitments. The EC improved on its DDA mode 4 offer in the EPA. Horizontal restrictions have been inscribed by seven member states. For five of them, such restrictions relate to residency and nationality requirements for managing directors and auditors. Hungary will apply ENTs for graduate trainees and remains unbound for intra-corporate transferees (ICTs) who have been a partner in a juridical person of the other party. Bulgaria will also apply ENTs for graduate trainees and the number of ICTs employed in a Bulgarian juridical entity with more than 100 employees must not exceed 10% of the total.

As noted earlier, the EC allows the entry of key personnel and graduate trainees in sectors where it has undertaken a commitment to liberalise the supply of services through a commercial presence. However, two points stand out in reviewing its Members' schedules. First is the significant number of economic needs tests that remain in place. These can prove highly effective barriers to market entry, especially if they are administered in an opaque or unduly discretionary manner by host country regulatory authorities. Second is the high incidence of nationality and residency requirements which, when applied to professional services, can easily nullify or impair access conditions. For CARIFORUM states, however, this may not prove unduly problematic to the extent that most such restrictions are maintained by newer EC states whereas CARIFORUM commercial ties tend to concentrate in the EC's original grouping. That said, a number of EC-15 members, notably France, have scheduled nationality and residency requirements.

Sectors in which mode 4 limitations are most prevalent include professional services (most notably in legal advisory services, medical and dental services, rental/leasing services relating to personal and household goods, security services and duplicating services), tourist guide services, services auxiliary to maritime transport as well as a number of services not included elsewhere in the CPC.

ii) Contractual Service Suppliers (CSS) and Independent Professionals (IPs)

In the EC's DDA offer, there are currently no commitments to permit the entry of CSS and IPs. As discussed earlier, the EPA advances the liberalisation agenda significantly in a number of sectors linked to labour mobility. There are no major horizontal restrictions for CSS and IPs apart from the transitional measures governing the dates when the commitments of newer EC members enter into force. In sectors subject to liberalisation commitments, both original and newer EC Members will continue to make significant use of ENTs to control market access conditions given that entry for these categories of suppliers is

quota free. There are some countries that have remained unbound for specific sub-sectors, but overall there seems to have been a genuine effort to allow access to the European market. Notably, there is a striking difference in the access granted to CSS under the EPA and the EC's DDA offer. In many of these sub-sectors, almost half of the EC member states made full commitments while the remaining states took partial commitments. In addition, for the first time in any trade agreement, the EC took commitments in chef de cuisine services and fashion model services. CARIFORUM has also hailed the EC's decision to open the entertainment services sub-sector to access by CSS for the first time in a trade agreement as a significant gain.

## II.4 Rules for services trade

### II.4.2 Regulatory disciplines

Chapter 5 specifically sets forth the general regulatory framework governing services trade under the EPA. It deals in turn with matters of transparency and procedures and maps a future negotiating agenda on matters of mutual recognition.

#### *a. Transparency*

The provisions on transparency require the prompt response to all requests for information on measures of general application or international agreements which pertain to or affect the EPA.<sup>22</sup> In addition, the Parties are required to establish one or more inquiry points to provide requested information to investors and service providers. These EPA rules are roughly equivalent to the transparency disciplines established by Article III (4) of the GATS.

#### *b. Procedures*

The provisions on procedures can be looked upon as the EPA equivalent of Article VI disciplines of the GATS on domestic regulation. However, such EPA rules remain embryonic and fall short even of those found in the GATS (which apply to both Parties already), and which have themselves been the object of protracted and, to date, inconclusive negotiations since well before the start of the DDA. The EPA bears little trace of attempts by either of the Parties to achieve a GATS+ outcome on this issue or even to embed some of the progress made in the GATS Working Group on Domestic Regulation (e.g. the accountancy disciplines of 1996 or recent advances on non-discriminatory regulatory measures).

Article 87(1) of the EPA provides for the Parties' competent authorities to inform applicants of decisions within a reasonable time or to provide without undue delay information related to the status of a pending application for regulatory approval. Article 87(2) obliges the signatories provide recourse of affected service suppliers to judicial, arbitral, administrative tribunals or procedures as well as appropriate remedies for administrative decisions affecting the supply of a service. These essentially reflect the *status quo* prevailing under Articles VI: 2(a) and 3 of the GATS.

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<sup>22</sup> CARIFORUM-EC EPA, Article 86.

The EPA even shies away from customary language found in the GATS Article VI:1 and in most PTAs to the effect that measures of general application should be administered in a reasonable, objective and impartial manner. Neither is there any reference to the customary notions that: (i) regulatory requirements be based on objective and transparent criteria; (ii) not be more burdensome than necessary to ensure the quality of a service; and (iii) do not in themselves constitute restrictions on the supply of a service.

The weakness of EPA provisions in this critical area of services trade regulation represents a missed opportunity and confirms the tendency of PTAs to focus primarily on market access issues and to defer to the WTO negotiating process for any novel advances on unfinished rule-making issues. Such a trend partly belies the notion that PTAs are potentially useful rule-making laboratories. For the most part, and with few exceptions (notably in the realm of government procurement), they are not insofar as the GATS' unfinished rule-making agenda is concerned.

*c. Mutual Recognition*

The first important element of the EPA's treatment of mutual recognition is to be found in Article 85(1), which preserves the right of Parties to determine qualification requirements for the temporary entry and stay of natural persons. Unlike the NAFTA and many PTAs as well as the GATS (Article VII), the EPA does not feature any specific disciplines on the question of mutual recognition. However, it does contain a negotiating agenda and spells out a process and timeline for doing so.

In theory, PTAs should provide a more optimal setting for the pursuit of MRAs due to the fact that the process is limited to a relatively narrower subset of countries, such that the challenge of regulatory diversity may prove more manageable. However, the *practice* of MRAs suggests that outcomes can be heavily dependent on the nature and extent of substantive regulatory differences between PTA partners.

The CARIFORUM EPA mandates that any recognition agreement must be in accordance with the relevant provisions of the WTO Agreement and in particular Article VII of the GATS.<sup>23</sup> As a first step in the EPA recognition process, the relevant professional bodies in the Parties' respective territories will be encouraged to jointly develop and provide recommendations on mutual recognition to the CARIFORUM-EC Trade and Development Committee to determine the criteria to be applied by the parties for the authorisation, licensing, operation and certification of investors and services suppliers. Once the recommendation has been found to be consistent with the Agreement and there is a sufficient level of correspondence between the relevant regulations of the Parties, the Parties

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<sup>23</sup> The GATS imposes two main disciplines affecting the pursuit of recognition agreements. First, a member that is Party to a recognition agreement must afford adequate opportunity to other interested members to accede to the agreement or to negotiate a comparable agreement or arrangement (i.e. the notion of "open" regionalism, which contrasts with the closed regionalism practiced under GATS Article V). Under GATS Article VII, any interested Member must be given the opportunity by other members that are Parties to an MRA to demonstrate that its education or experience, licenses or certifications obtained or requirements met in the other members' territory should be recognised. Moreover, a member must not accord recognition in a manner that would constitute a means of discrimination between countries in the application of its standards or criteria or a disguised restriction on trade in services. In addition, the GATS encourages that wherever appropriate, recognition should be based on multilaterally agreed criteria.

are to negotiate through their competent authorities an agreement on mutual recognition of requirements, qualifications, licences and other regulations.

The EPA accords priority attention to recognition efforts in accountancy, architecture, engineering and tourism. It also features a separate provision that mandates Parties to encourage<sup>24</sup> the relevant professional bodies in their respective territories to start negotiations three years after the EPA's entry into force in order to jointly develop and provide recommendations on mutual recognition. This recommendation is to be reviewed by the Committee to determine whether it is consistent with the Agreement.

The CARIFORUM-EC Trade and Development Committee is to review progress made on matters of mutual recognition every two years. It bears noting that while the lack of a mutual recognition agreement at this stage may hamper professional mobility, the market access provided for under the EPA's chapter on the temporary movement of natural persons is immediate (except for the newer EC Member states). Such access should prove a spur to the conclusion of recognition agreements in regulated professions.

#### II.4.3 Sectoral Issues

An interesting feature of the services component of the EPA is the creation of sector specific frameworks, including in respect of regulatory cooperation. The EPA contains specific provisions on computer services, courier services, telecommunications services, financial services, international maritime transport services and tourism services. Many of the sectoral disciplines found in the EPA represent a codification of GATS practice.<sup>25</sup> However, whereas in the multilateral system member states are given the option to voluntarily sign on to some or all of these texts (e.g. the Understanding on commitments in financial services, the Reference paper on pro-competitive regulatory principles in basic telecommunications), they form an integral and binding part of the EPA. In the case of maritime transport services, the EPA has succeeded in establishing rules for governing trade in the sector whereas multilateral discussions have to date failed to produce any tangible results. The following describes advances made in three areas where CARIFORUM states had offensive interests in the negotiations: tourism, e-commerce and maritime transport services.

##### *a. Tourism*

The EPA provisions dealing with tourism services offer a novel, GATS+, approach to an industry in which a majority of CARIFORUM countries have strong offensive interests. Such provisions, which draw their inspiration from DDA proposals for a GATS Annex on tourism services which a number of CARIFORUM members have co-sponsored, focus attention on the prevention of anti-competitive practices, the question of mutual recognition, the promotion of sustainable forms of tourism, compliance with environmental and quality standards as well as development co-operation and technical assistance.

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<sup>24</sup> A "mandate to encourage" may seem somewhat contradictory, but in the field of professional services it merely confirms the limited ability of Parties to compel delegated regulatory bodies (i.e. licensing bodies) to comply with treaty provisions, all the more so when such regulatory bodies operate under authorities delegated to them by sub-national governments.

<sup>25</sup> In some instances, the EPA disciplines are deeper than those found in the GATS. These differences are discussed in detail in Sauv e and Ward in "The EC-CARIFORUM Economic Partnership Agreement: Assessing the Outcome on Services and Investment" forthcoming.

The inclusion of disciplines on anti-competitive practices was of key importance to CARIFORUM states as the global tourism industry is characterised by vertically integrated market structures and consolidated distribution channels controlled by a limited number of large international players, many of which in the EU.<sup>26</sup> In accordance with Chapter 1 of Title IV (which deals with competition policy), Article 111 compels the Parties to maintain or introduce measures to prevent suppliers from materially affecting 'the terms of participation in the relevant market for tourism services by engaging in or continuing anti-competitive practices, including, *inter alia*, abuse of dominant position through imposition of unfair prices, exclusivity clauses, refusal to deal, tied sales, quantity restrictions or vertical integration.' The inclusion of such anti-competitive disciplines is precedent-setting and can be described as a form of incipient internationalisation of competition law, albeit on a sectoral basis, as is the case with the GATS' reference paper on basic telecommunications.

EPA provisions on the prevention of anti-competitive practices, mutual recognition and development co-operation are all legally binding while those dealing with access to technology, small and medium enterprises and compliance with environmental and quality standards are framed as best endeavours. This combination of binding and non-binding provisions is an interesting example of variable geometry in rule-making. By most accounts, most of the above provisions, which were formulated with the active participation of the CARIFORUM members' private sector, were resisted by the EC.<sup>27</sup> With respect to the non-binding provisions, it is likely that while such elements were of more importance to the CARIFORUM countries than to their EC counterparts, the priority for CARIFORUM states was to ensure that the key provisions relating to anti-competitive behaviour, mutual recognition and development co-operation were made legally binding. Perhaps the EC's acceptance of these stronger provisions may be linked to its own desire to include an MFN clause which extends any preference granted by CARIFORUM states to a major trading country to the EC as well as to its desire to have sector specific disciplines on service industries in which it had an interest, such as e-commerce, telecommunications, courier, maritime transport and financial services.

Also notable in the EPA's treatment of tourism services is the fact that the sector features distinct development co-operation provisions, in contrast to other sectors where such issues are addressed in a generic manner. The EPA puts forward an explicit commitment on the part of the EC to help in the advancement of the tourism sector in the CARIFORUM states and sets out a non-exhaustive list of specific areas in which the Parties agree to co-operate. These include capacity building for environmental management, the development of internet-based marketing strategies for small and medium sized tourism enterprises, as well as the upgrading of national accounts systems with a view to facilitating the introduction of tourism satellite accounts<sup>28</sup> at the regional and local level.

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<sup>26</sup> CRNM, "The Treatment of Tourism in the CARFORUM-EC Economic Partnership Agreement," February 21, 2008.

<sup>27</sup> Caribbean Negotiating Machinery, "The Treatment of Tourism in the CARIFORUM-EC Economic Partnership Agreement," February 21, 2008, 1.

<sup>28</sup> A Tourism Satellite Account (TSA) is a statistical instrument to analyse the economic importance of tourism. According to the European Commission, 'a complete TSA contains detailed production accounts of the tourism industry and their linkages to other industries, employment, capital formation and additional non-monetary information on tourism. See <http://www.unwto.org/statistics/index.htm> and [http://ec.europa.eu/enterprise/services/tourism/tourism\\_satellite\\_account.htm](http://ec.europa.eu/enterprise/services/tourism/tourism_satellite_account.htm).

b. *E-commerce*

Article 119 of the EPA, which deals with e-commerce, essentially codifies the state of play of multilateral discussions on the subject matter (although the latter has yet to be embedded into WTO law). The main elements of the EPA's e-commerce package include an agreement to develop digital trade among the Parties, provisions aimed at ensuring that the development of e-commerce proceeds in accordance with the highest international standards of data protection and language stipulating that trade delivered electronically is to be considered as a cross-border *service* transaction to which customs duties are not to be applied.

On the question of customs duties, a number of WTO Members have long argued that "the standstill on customs duties applied to electronic transmissions decreed at the December 2001 Ministerial meeting should become permanent and legally binding."<sup>29</sup> However, with the fate of the standstill remaining unsettled, the WTO's December 2006 Hong Kong Ministerial Declaration simply extended the moratorium on the imposition of customs duties on deliveries by electronic transmissions until the next WTO Ministerial.<sup>30</sup> By contrast, Article 119 (3) of the EPA settles the question definitively for EPA members by permanently forbidding the imposition of customs duties on all electronic transmissions.

The EPA Parties also agreed to maintain dialogue on a number of regulatory issues relating to e-commerce, such as the recognition of certificates of electronic signatures and the facilitation of cross-border certification services, the liability of service providers with respect to the transmission or storage of information, the treatment of unsolicited electronic commercial communications and the protection of consumers in the ambit of electronic commerce. In all these respects, the EPA marks precedent-setting advances over the GATS.

Compared to PTAs negotiated by the United States, the EPA is arguably not the most advanced in terms of its rules for e-commerce and digital trade.. For example, the US-Chile FTA contains a more detailed framework than the EPA and, in addition to the elements contained in the EPA, includes the right for the Parties to impose internal taxes on digital products and an obligation not to discriminate among digital products originating from the other party, with some exceptions for non-conforming measures.<sup>31</sup> In addition, the scope of regulatory dialogue and co-operation is somewhat wider in US PTAs as the latter agreements typically encompass co-operation to overcome obstacles faced by small and medium sized enterprises using e-commerce and encouraging private sector methods of self-regulation. Nevertheless, it should be pointed out that the list of areas for dialogue and co-operation in both the EPA and the US-Chile FTA are open-ended and hence new issues and regulatory challenges may be addressed in future.

By contrast, the EU-Chile FTA has less developed provisions on e-commerce than the EPA. The parties to the EU-Chile FTA only agreed to promote the development of e-commerce

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<sup>29</sup> Council for Trade in Services, Work Programme on Electronic Commerce, Interim Report to the General Council, S/C/8, March 31, 1999.

<sup>30</sup> WTO, Hong Kong Ministerial Declaration, December 18, 2005, item 46. Available from [http://www.wto.org/english/thewto\\_e/minist\\_e/min05\\_e/final\\_text\\_e.htm](http://www.wto.org/english/thewto_e/minist_e/min05_e/final_text_e.htm). Database online. Accessed April 24, 2008.

<sup>31</sup> United States-Chile Free Trade Agreement, Chapter 15.

between them, in particular by co-operating on market access and regulatory issues related to e-commerce.<sup>32</sup> Overall, it may be argued that these agreements potentially foreshadow future WTO disciplines as they single out elements over which some rudimentary form of international consensus appears to be emerging. The EPA provisions on e-commerce must also be seen in the context of provisions and liberalization commitments on the cross-border supply of computer services as well as on the movement of service suppliers involved in IT-related activities, both of which arguably add commercial and development-promoting value to the EPA compact on e-commerce.

*c. Maritime Transport*

A third sector in which notable progress has been made in the EPA context relative to continued stalemate under the GATS is that of international maritime transport services. The EPA provides for unrestricted access to international maritime markets and trade on a commercial and non-discriminatory basis. Vessels of the Parties are to be accorded national treatment with regard to, *inter alia*: access to ports, use of infrastructure and auxiliary maritime services of the ports as well as related fees and charges, customs facilities and the assignment of berths and facilities for loading and unloading.

The EPA partners have further undertaken not to introduce cargo-sharing arrangements with third countries concerning maritime transport services and to terminate existing arrangements within a reasonable period of time and to abolish and abstain from introducing any unilateral measures and administrative, technical and other obstacles which would constitute a disguised restriction to trade in the sector. Each Party has also committed to permit international maritime service suppliers of the other Party to establish a commercial presence in their territory under conditions no less favourable than those accorded to their own service suppliers or those of any third party, whichever are better. The Parties are also to specify the port services that will be provided to the suppliers of the other Party on reasonable and non-discriminatory terms.

The liberalizing anchor for trade in international maritime services can be found in Article 42(1) of the Cotonou Agreement that commits the Parties to ‘promote the liberalization of maritime transport and to this end apply effectively the principle of unrestricted access to the international maritime transport market on a non-discriminatory and commercial basis.’ It is hardly surprising that sectoral advances would prove possible in the EPA given that maritime transport is the only service sector specifically earmarked for liberalization under the Cotonou Agreement and given EC pledges to support ‘the ACP States’ efforts to develop and promote cost-effective and efficient maritime transport services in the ACP States with a view to increasing the participation of ACP operators in international shipping services.’<sup>33</sup> In fact, the Cotonou Agreement already contained a national treatment obligation with respect to ‘access to ports, the use of infrastructure and auxiliary maritime services of those ports, as well as related fees and charges, customs facilities and the assignment of berths and facilities for loading and unloading’ which the EPA has in effect consolidated.<sup>34</sup>

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<sup>32</sup> Association Agreement between the European Union and Chile, Article 104.

<sup>33</sup> Cotonou Agreement 2000 -2020, Article 42, para. 4

<sup>34</sup> *Ibid.* para. 3

### III. New kids on the regional block: government procurement, competition policy and cultural cooperation

It may come as somewhat of a surprise that while a number of developing countries – including from the CARIFORUM region - fought against the inclusion of a number of new issues in the Doha Development Agenda, such as investment and competition policy, and have shied away from joining the WTO's plurilateral set of disciplines under the Government Procurement Agreement (GPA), the CARIFORUM EPA includes provisions on all the above issues.

Perhaps even more remarkable is the fact that the above issues found a place in the EPA even though CARIFORUM states had yet to work out their own internal arrangements on these issues (both within CARICOM and between CARICOM and the Dominican Republic). Having already addressed the EPA's treatment of investment issues, the following section takes up the issues of government procurement and competition policy.

#### III.1 Government Procurement

Disciplines on government purchases can be found in Chapter 3 of Title IV of the EPA (Trade-Related Issues). The Chapter applies to public procurement of both goods and services. The chapter's inclusion is noteworthy to the extent that, as noted above, the CARICOM group has yet to fully work out its own internal disciplines on government procurement and the fact that its Members are not signatories of the 1994 GPA. Nevertheless, the CARICOM countries did not negotiate in a complete vacuum as the regional grouping has been developing a Protocol on Government Procurement within the context of the CARICOM Single Market and the broad contours of the Protocol had already been delineated. In addition, the Dominican Republic already has an open public procurement market.

In its recent strategy paper, *Global Europe: Competing in the World*, the EC identified government procurement as a policy domain of key importance for EC companies to better compete in international markets.<sup>35</sup> For their part, CARICOM states doubtless rationalised that the EPA could help speed up the pace of their own regional integration efforts and help overcome intra-regional resistance to procurement liberalisation, a perennially thorny issue in small markets characterized by high degrees of concentration favouring local or foreign established dominant suppliers. Another major consideration in the CARIFORUM's decision to embed a public procurement chapter into the EPA is the fact that agreed provisions relate chiefly to transparency in public procurement (a "failed" Singapore Issue) rather than to market access. For this reason, the region had little difficulty in accepting a chapter that does not unduly constrain its future plans for establishing an intra-regional public procurement regime.

The provisions of the EPA chapter on public procurement apply to the entities listed in Annex 6 and to procurement above the specified thresholds set forth in the Annex. The Annex identifies the level of government to which EPA rules apply. For the CARIFORUM

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<sup>35</sup> Tomasz Iwanow and Colin Kirkpatrick, "Public Procurement and EPAs," *Trade Negotiations Insights* 7, no. 1 (2008): 15.

states, the thresholds for supplies and services were set at SDR 155,000 each, while the threshold for construction work was set at SDR 6,500,000. For the EC, the thresholds were set lower, at SDR 130,000 for goods and services and at SDR 5,000,000 for construction work. Such variable geometry is meant to offer some measure of additional protection to CARIFORUM suppliers in their home markets. The EPA thresholds to be applied by the EC are the same as those it applies under the WTO's GPA. While the EC has not granted CARIFORUM countries WTO+ access to its procurement markets, the reciprocal nature of the EPA nonetheless affords access to CARIFORUM suppliers of procurement markets that was hitherto denied them as non-GPA signatories.

The chapter applies to eligible suppliers which are defined as suppliers who are "allowed to participate in the public procurement opportunities of a Party or signatory CARIFORUM state, in accordance with domestic law"<sup>36</sup> and without prejudice to the chapter. The concept of "eligible supplier" does not appear in the GPA. It essentially means that the decision to determine who is an eligible supplier lies solely within the discretion of the procuring state. In practice, such a provision arguably limits the scope of the application of the agreement. The notion of an eligible supplier must thus be distinguished from automatic eligibility to participate, which would be required if there was a market access obligation.<sup>37</sup>

The Chapter sets forth a comprehensive framework of rules on, *inter alia*, valuation methods, transparency, methods of procurement, rules of origin, technical specifications, qualification of suppliers, negotiations by procuring entities, opening of tenders and awarding of contracts and bid challenges. For the most part, the EPA's public procurement chapter represents a codification of GPA practices. However, the Agreement does feature a number of interesting deviations from the GPA, some of which are WTO+ in character, while others appear weaker than that which prevails under the GPA, reflecting the generally lukewarm appetite of CARIFORUM states in an area where most of them had predominantly defensive interests. In a number of areas, as well, the EPA codifies some of the changes proposed for adoption under the GPA's ongoing revision.<sup>38</sup>

### III.2 Competition Policy

The GATS features two provisions whose aim is to help WTO Members address the issue of anti-competitive behaviour - Article VIII on monopolies and exclusive service suppliers and Article IX on business practices.<sup>39</sup> Beyond these two rather timid provisions and the

<sup>36</sup>CARIFORUM-EC EPA, Article 166(5).

<sup>37</sup> Caribbean Regional Negotiating Machinery, Understanding the Nature and Scope of the Public Procurement Chapter of the CARIFORUM-EC Economic Partnership Agreement (EPA)" 2.  
[http://www.crn.org/documents/ACP\\_EU\\_EPA/epa\\_agreement/CF\\_EU\\_PP\\_Chap\\_final.pdf](http://www.crn.org/documents/ACP_EU_EPA/epa_agreement/CF_EU_PP_Chap_final.pdf)

<sup>38</sup> This revised text is the outcome of negotiations mandated by Article XXIV:7 of the 1994 GPA which aims at improving the Agreement and achieving the greatest possible extension of its coverage among all Parties on the basis of mutual reciprocity and eliminate existing discriminatory measures. The negotiations are also intended to facilitate the accession of additional parties to the Agreement. The agreement of the negotiators is provisional as it is subject to a final legal check and to a mutually satisfactory outcome to the negotiations on market access. See [http://www.wto.org/english/tratop\\_e/gproc\\_e/overview\\_e.htm](http://www.wto.org/english/tratop_e/gproc_e/overview_e.htm)

<sup>39</sup> Article VIII places an obligation on WTO Members to ensure that monopolies and exclusive service suppliers do not, in the course of supplying the monopoly service or the competitively restricted service in the relevant market, act in a manner which is inconsistent with Members' MFN obligation or their specific commitments. WTO Members are also required to ensure that in cases where these types of suppliers compete in the supply of a service outside of the scope of their monopoly rights or exclusive rights and in which Members have taken specific commitments, Members are required to ensure that the suppliers do not abuse their dominant position or act in a manner that is inconsistent with Members' obligations. In terms of remedies, if

competition-like disciplines found in the Reference paper appended to the 1997 Agreement on Basic Telecommunications, WTO members have not made much headway in dealing with the interface between trade and competition issues (in general and in the area of services) as the WTO General Council decided in July 2004 that the issue of competition policy “will not form part of the Work Programme set out in that (Doha Development) Declaration and therefore no work towards negotiations on any of these issues will take place within the WTO during the Doha Round”.<sup>40</sup>

Although the EPA’s competition chapter is not a detailed framework for dealing with anti-competitive practices, it does count as another area in which the EPA has succeeded in adding some value on competition disciplines within a trade policy context. There can be little doubt that progress in this area was facilitated by the fact that both the EC and CARICOM already had intra-regional arrangements in place to govern the anti-competitive behaviour of enterprises and governments. Moreover, there is a significant level of similarity between the EC and CARICOM competition policy frameworks, even as enforcement capacities differ markedly.<sup>41</sup>

It bears noting that while the EPA features a coherent chapter on competition applying to goods and services alike, there are elements of competition policy to be found in a number of areas throughout the EPA which have been adapted to fit the specificities of individual sectors. For example, competition rules of various types can be found in the EPA chapters on tourism, courier services and telecommunications services. The EPA's approach to competition policy for these sectors is more advanced than that taken in some of the other agreements entered into by the EC. For instance, while there are general competition frameworks in the EC's FTAs with Chile, Mexico and South Africa, the latter PTAs feature no sector-specific competition disciplines. The question remains of whether the EPA may set a precedent for the EC by influencing its negotiating positions in other REPAs and future WTO negotiating rounds. In the REPAs, this precedent could see the EC pushing for sector-specific competition disciplines in those service sectors in which it maintains offensive interests while relying on general competition rules in sectors of where anti-competitive conduct may be less prevalent. In the WTO context, such an approach may prove to be one way of building a case for incremental competition rules on a sector by sector basis, most likely anchored in GATS.

The EPA provisions on competition policy borrow some concepts which are common to both the EC Treaty and the Treaty of Chaguaramas as they relate to the regulation of competition among enterprises. In particular, the EPA identifies two types of anti-competitive behaviour that are deemed incompatible with the functioning of the Agreement.

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another Member believes that the operations of a monopoly or exclusive service provider of any other member is acting in a manner inconsistent with these provisions, the former may, via the Council for Trade in Services, request that the Member establishing, maintaining or authorising such a supplier to provide specific information concerning the relevant operations. Article IX recognises that certain business practices, other than those which fall under the scope of Article VIII, can restrain competition and thereby restrict trade in services. Each Member shall, at the request of any other Member, enter into consultations with a view to eliminating these practices. The Member addressed must accord full and sympathetic consideration to such a request and provide publicly available non-confidential information of relevance to the matter.

<sup>40</sup> “Working Group on the Interaction between Trade and Competition Policy (WGTCPP) - History, Mandates and Decisions,” [http://www.wto.org/english/tratop\\_e/comp\\_e/history\\_e.htm#julydec](http://www.wto.org/english/tratop_e/comp_e/history_e.htm#julydec), database available online, accessed April 24, 2008.

<sup>41</sup> The Dominican Republic, however, has not yet fully put in place its own competition policy regime, though it has already passed the relevant legislation and is in the process of establishing its domestic competition authority.

First, the EPA targets collusive agreements and concerted practices which have the aim or effect of preventing or substantially lessening competition in the territory of the EC or the CARIFORUM states as a whole or in a substantial part of them. Second, it seeks to discipline instances of abuse of dominant positions.

There are however a number of EPA rules on competition which are not found in the Treaty of Chaguaramas establishing the Caribbean Single Market nor in other trade agreements to which the EC is Party. These include the framework of guidelines for inter-competition agency co-operation in the exchange of information and enforcement co-operation, which are contained in Article 128. This Article will come into force when all of the Parties' competition legislations enter into force and national competition authorities are established.

Much of the co-operation on offer is voluntary in nature. However, there are rules that must be adhered to when co-operation does take place. One such rule calls on competition authorities to inform other competition authorities about enforcement proceedings against anticompetitive business practices which fall within the scope of the chapter and are taking place in the latter Party's territory.

The EPA also features rules on the treatment of public enterprises and enterprises entrusted with special or exclusive rights, including designated monopolies. According to Article 129(1), following the entry into force of the EPA, the Parties are required to ensure that no measure is enacted or maintained that distorts trade in goods or services to an extent contrary to the Parties' interests. In addition, such entities are to be subject to the competition rules in so far as the application of these rules does not obstruct the entities' performance of their assigned tasks.

The exact meaning of some elements of Article 129 remains, to some extent, obscure. For instance, the EPA does not define or qualify the terms 'public enterprises', 'enterprises entrusted with special or exclusive rights' or 'designated monopolies'.<sup>42</sup>

By way of derogation from Article 129 (2), the EPA's competition rules do not apply to public enterprises in signatory CARIFORUM states when they are subject to sectoral rules as mandated by specific regulatory frameworks. This variable geometry in the application of rules may be due to the fact that the competition policies in many CARIFORUM states may not yet extend to all areas of economic activity. In some cases, the regulatory frameworks for some sectors may have been established before the more comprehensive competition rules were established or some sectors are simply considered best dealt with on a sectoral level. Again however, questions have been raised about the interpretation of such sectoral rules. Specifically, it remains unclear whether the existence of scattered regulation on a particular sector should be enough to exempt the sector from EPA disciplines.<sup>43</sup>

Article 129 (4) requires the Parties to progressively amend the practices of any state monopoly of a commercial nature or character (i.e. operating in what could be a competitive

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<sup>42</sup> South Centre, Competition Policy in Economic Partnership Agreements (CARIFORUM Text) Analytical Note SC/AN/TDP/EPA/15, Fact Sheet N°8, March 2008, 13.

<sup>43</sup> Ibid, 13.

market environment) so that, by the fifth year after the entry into force of the EPA, no discrimination regarding the conditions under which goods and services are sold or purchased exists between goods and services originating in the EC Party and those of the CARIFORUM states or between nationals of the EC Member States and those of the CARIFORUM states, unless such discrimination is inherent to the monopoly. The very language of this provision remains opaque as it is not clear what precisely needs to be amended: the regulations that govern the state enterprise or the operations of the entity itself? A recent study by the South Centre (2008) on the competition aspects of the EPA highlights a number of concerns on the above provision. The main concerns include: (i) the fact that the agreement targets conditions rather than measures, which could potentially widen the scope of the provision to all governmental measures and state policy practices that discriminate against EC nationals, goods and services; and (ii) the fact that while the WTO agreements already provide some discipline on any discriminatory behaviour by state trading enterprises in the export and import of goods, the EPA goes a step further by disciplining all discriminatory behaviour in the sale and purchase of goods and services.<sup>44</sup> This arguably represents a further example of WTO+ rule-making in the EPA context.

For services, Article 129 (4) seems to be wider in scope than Article VIII of GATS, which requires WTO Members to prevent monopolies and exclusive service suppliers from acting in a way that is inconsistent with their unconditional MFN obligation and with their conditional national treatment and market access commitments. The EPA provision, *a contrario*, seems to provide for unconditional national treatment.

As regards the implementation of the EPA's competition disciplines, the Parties are required to ensure that they have laws in force to address collusion and abuse of dominant positions as well as a competition authority within five years of the entry into force of the EPA.<sup>45</sup> With respect to technical assistance, the Parties agree to co-operate by: (i) facilitating support for the effective functioning of the CARIFORUM competition authorities; (ii) providing assistance in the drafting of guidelines, manuals and, where necessary, legislation; (iii) providing independent experts; and (iv) providing for the training of key personnel involved in the implementation and enforcement of competition laws.<sup>46</sup> The operation of the competition chapter is subject to review six years after the EPA's entry into force, so as to allow a sufficient period of cooperation and confidence-building to be established between EC and CARIFORUM competition authorities.<sup>47</sup>

### III.3 Protocol on Cultural Co-operation

Another novel feature of the CARIFORUM EPA is its inclusion of a Protocol on Cultural Co-operation between the Parties. The Protocol establishes a clear precedent in addressing matters relating to cultural industries within preferential trade agreements, laying the basis for the inclusion of similar provisions in other EPAs. The inclusion of language on cultural cooperation matters marks a significant evolution in EC attitudes towards the subject matter in a trade policy context, hitherto marked by a desire to preserve maximum policy

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<sup>44</sup> South Centre, Competition Policy in Economic Partnership Agreements, 14-15.

<sup>45</sup> CARIFORUM-EC EPA, Article 127 (1).

<sup>46</sup> CARIFORUM-EC EPA, Article 130 (2).

<sup>47</sup> *Ibid.*, Article 127 (2).

autonomy by eschewing any commitments in trade agreements and, in the case of the DDA, by refusing to direct negotiating requests to its trading partners and to entertain offers in response to trading partner requests in cultural industries. The advances made in the Protocol are particularly welcome on the CARIFORUM side given its strong offensive interests in this area, notably the music industry.

The EPA Protocol establishes a framework within which the Parties can co-operate with a view to facilitating exchanges of cultural activities, goods and services and improving the conditions governing such exchanges. The Protocol features a number of hortatory (i.e. best endeavours) measures aimed at enhancing the capacity of Parties to develop and implement cultural policies and to strengthen their cultural industries, notably through enhanced exchange opportunities accorded on a preferential basis. While the EPA's cultural cooperation provisions specifically eschew market access commitments, the protocol can still be viewed as the first concrete response to Article 16 of the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions dealing with preferential treatment.

While Article 3 of the Protocol is not a binding obligation on the Parties, it retains its significance as it commits the Parties to endeavour to facilitate the entry and temporary stay in their territories of artists and other cultural professionals and practitioners from the other Party who cannot avail themselves of the commitments undertaken under the EPA's Title on 'Establishment, Trade in Services and E-Commerce' and who are artists, actors, technicians and other cultural professionals and practitioners involved in the shooting of cinematographic films or television programmes; or artists and other cultural professionals and practitioners. When allowed, temporary entry and stay privileges are extended for a period of up to 90 days in any twelve month period.

The Protocol also features a number of provisions on audio-visual services, including cinematographic co-operation; temporary duty-free importation of material and equipment for the purpose of shooting cinematographic films and television programmes; performing arts; publications and protection of sites and historic monuments. The Parties further agree to encourage the negotiation of new - and implementation of existing - audio-visual co-production agreements between one or several Member States of the European Community and one or several signatory CARIFORUM States. The Parties also agree to facilitate the access of co-productions between one or several producers to their respective markets, including the granting of preferential treatment. These co-produced audio-visual works are to benefit from preferential market access within the EC Party by virtue of their qualification as European works once specific conditions are satisfied. According to the CRNM, the conclusion of co-production agreements will make it possible for Caribbean audiovisual producers to access new sources of funding for creative projects. Given the EC's longstanding sensitivities in the audio-visual sector, this Protocol likely represents as close to new market access opportunities as the EC's EPA partners could have hoped for without actually resulting in new liberalisation commitments on national treatment or market access.

#### IV. Co-operation and Financing for Development

The co-operation elements of the EPA affirm the EC's attempt to infuse the Agreement with a concrete development dimension. In so doing, the EPA charts useful new territory at a time when the multilateral community is struggling to give operational meaning to the concept of Aid for Trade. Part I of the EPA, which focuses on the issue of Trade Partnership for Sustainable Development, provides the umbrella provisions on development. However, more issue- and sector-specific development provisions can be found in all of the EPA's various Titles.

Part I of the EPA makes clear that development co-operation can take financial and non-financial forms. Further, Article 7(3) clarifies the relationship between the EPA and the Cotonou Agreement by providing that "EC financing is to be carried out according to the framework of rules and relevant procedures provided for in the Cotonou Agreement, in particular the programming procedures of the European Development Fund (EDF) and within the framework of relevant instruments by the General Budget of the European Union."

The EPA text does not feature explicit language on the level of development financing made available overall nor on the specific issues and sectors subject to the Agreement's coverage. This has sparked much criticism throughout the CARIFORUM region over the alleged unbalanced nature of the Agreement insofar as its development provisions remain somewhat abstract and not legally enforceable while its liberalisation commitments are up front, legally binding and enforceable. Responding to such critiques, the Caribbean Regional Negotiating Machinery (CRNM) has cautioned that "any perceptions about the EPA's practical deficiencies with respect to the treatment of development and development cooperation and assistance should first be tempered by the recognition that as a trade agreement, the EPA should not be perceived to be the primary vehicle through which development may be achieved."<sup>48</sup> Rather, it should be considered as "one strategic instrument in a range of economic development strategies."<sup>49</sup>

The tenth EDF covers the period from 2008 to 2013 and provides an overall budget of €23 billion.<sup>50</sup> Of the total, €22 billion is allocated to ACP countries. The amount for the ACP countries is divided accordingly: €18 billion to national and regional indicative programmes, €2.7 billion to intra-ACP and intra-regional cooperation and €1.5 billion towards investment facilities<sup>51</sup> An innovation in the tenth EDF is the creation of "incentive amounts" for each country.<sup>52</sup>

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<sup>48</sup> CRNM, "RNM Update 0802," [http://www.crnmm.org/documents/updates\\_2008/rnmupdate0802.htm](http://www.crnmm.org/documents/updates_2008/rnmupdate0802.htm)

<sup>49</sup> Ibid.

<sup>50</sup> European Commission, "The European Development Fund," <http://europa.eu/scadplus/leg/en/lvb/r12102.htm>.

<sup>51</sup> The Investment Facility, which was established within the framework of the Cotonou Agreement, is a revolving fund managed by the European Investment Bank which supports ACP private sector and commercially run public sector projects with loans, guarantees and a series of risk sharing instruments. See <http://www.eib.org/about/press/2003/2003-055-eib-launches-the-cotonou-agreement-investment-facility.htm>

<sup>52</sup> These funds essentially represent a reward for countries which are committed to good governance in a broad sense. The elements which constitute the recipients governance profile are (i) political and democratic governance and the rule of law; (ii) control of corruption (iii) economic governance; (iv) social governance; (v) external and internal stability; (vi) regional integration and trade issues; and (vii) quality of partnerships with stakeholders. See [http://ec.europa.eu/external\\_relations/human\\_rights/doc/sec06\\_1020\\_en.pdf](http://ec.europa.eu/external_relations/human_rights/doc/sec06_1020_en.pdf)

According to the Joint Declaration on Development Co-operation, which is annexed to the EPA and constitutes an integral part of the Agreement, a package of €165 million has been set aside for the six years following the Agreement's entry into force to fund activities identified and rank-ordered in the Caribbean's regional indicative plan (RIP). This regional package includes the above-mentioned incentive tranche, which amounts to €32 million.

Of the €165 million made available, CARIFORUM states have indicated that the region intends to devote thirty percent of its RIP and the full amount of the incentive tranche to matters of EPA implementation. In addition to funding for the regional indicative plan, each CARIFORUM state will receive funds for its national indicative plan (NIP). However, each CARIFORUM state must identify two priority projects for such additional funding. The Dominican Republic and Jamaica have already announced that they will be using the financing under their respective NIPs for purposes of EPA implementation.

Besides the EDF mechanism, there are commitments from individual EC member states to provide development financing under the Aid for Trade strategy. In the Joint Declaration on Development Co-operation, EC members reaffirmed their intent that an equitable share of Member States' Aid for Trade commitments should benefit the Caribbean ACP States, including for funding programs related to the implementation of the EPA.

In addition, the EC has committed to increasing its Trade-Related Assistance to €2 billion per year by 2010, with half of the funding coming from the Commission and the other half from the Member States.<sup>53</sup>

The minimum cost of implementing the EPAs provisions on Investment, Trade in Services and E-Commerce, and addressing the capacity constraints of CARIFORUM states at the national and regional levels has been estimated at €15.6 million.<sup>54</sup> Key areas concerned include the building of regulatory capacity, overcoming information asymmetries in order to assist CARIFORUM firms and entities to identify business opportunities in the European market and the development of productive capacity in goods and cultural services. Pre-feasibility plans are being drafted to determine how to allocate funding to the various projects under the RIP.

An additional feature of the EPA's development dimension is the establishment of a regional development fund (RDF). According to EPA Article 8(3), the RDF will be used to mobilise and channel EPA-related development resources from the EDF and other potential donors. The Parties have agreed that the CARIFORUM states are to endeavour to establish the fund within two years of the date of signature of the Agreement.

In the context of the Investment, Services and E-Commerce Title, the generic co-operation provisions contained therein are complemented by a few sector specific co-operation provisions on tourism. Co-operation activities foreseen under Title II are premised on the

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<sup>53</sup> Towards an EC Aid for Trade Strategy, <http://europa.eu/scadplus/leg/en/lvb/r13002.htm>

<sup>54</sup> CARICOM Secretariat, implementation of the CARIFORUM-EC Economic Partnership Agreement. The constraints identified include insufficient numbers of specialists and experts; limited human resources, both within the public and private sectors; the absence of an organised Services sector body through which the stakeholders can be mobilised; general absence of infrastructure; and the inadequacy of financial resources.

belief that trade-related technical assistance and capacity building are important elements in complementing the liberalisation of services and investment, supporting the CARIFORUM states' effort to strengthen their capacity to supply world competitive services and facilitating the implementation of scheduled commitments and regulatory undertakings.

Subject to the provisions of Article 7, which speaks directly to the question of development financing, the specific co-operation envisaged includes providing support for technical assistance, training and capacity building in a number of areas. These include: (i) improving the ability of CARIFORUM service suppliers to gather information on and meet regulations and standards of the EC Parties; (ii) improving the export capacity of local service suppliers; (iii) facilitating interaction and dialogue between service suppliers of both Parties; (iv) addressing quality and standards in needs in those areas where the CARIFORUM states have undertaken commitments; (v) developing and implementing regulatory regimes for specific services at the CARIFORUM level and in the signatory CARIFORUM states; (vi) establishing mechanisms for promoting investment and joint ventures between service suppliers of the Parties; and (vii) enhancing the capacities of investment promotion agencies in CARIFORUM states.<sup>55</sup> The progress made in the EPA in articulating the operational elements of an aid for trade strategy for services marks an important precedent that is likely to influence the development provisions of subsequent EPAs, PTAs (by the EU as well as other major donor countries) as well as in the WTO as a complementary element of any DDA outcome.

#### V. Lessons for African EPAs

For the African members of the ACP grouping, it has now become clear that the EC considers EPAs as the best available option for structuring its trade, regulatory and development cooperation, relationship with ACP partners. The African regional groups will thus need to evaluate what trading arrangements are best suited to satisfying their development goals based on a comprehensive strategy for sustainable development and poverty alleviation.

African countries are confronted with a range of options in deciding the basis upon which to pursue their trading relation with the EC. These include agreeing to a comprehensive, (asymmetrically) reciprocal EPA that delves beyond trade in goods into areas such as investment, services, government procurement, competition policy as well as cultural cooperation matters, together with the attendant development assistance and technical cooperation dividends. Another option involves continued reliance on the EU's GSP scheme or, for the least developed ACP countries, continued benefits under the EU's Everything But Arms (EBA) initiative, the latter two forms of preferential treatment however being confined to goods trade only and whose time horizon is not necessarily indefinite.

As regards more specifically the services and investment chapters of prospective EPAs, the main question facing African ACP members is whether they can use such a chapter and its likely development finance and technical assistance complements as a useful developmental tool. While there is no legal obligation stemming from WTO law compelling African

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<sup>55</sup> Ibid., Article 121 (2).

countries to negotiate chapters on services, investment and other behind the border issues in an EPA context, there is little doubt that the EC expects that comprehensive EPAs will of essence feature services and investment commitments.

Given the marked differences in the economic make-up between the African groupings and the CARIFORUM, the services and investment chapters of EPAs concluded with African partners need not (and probably cannot) be as extensive as those found in the CARIFORUM agreement, and the various formulas of variable geometry that the CARIFORUM EPA has seen emerge could be further adjusted to relax the reciprocal nature of the EPA's rules and market access commitments while nonetheless satisfying the requirements of GATS Article V.

Embedding such chapters in a flexible manner could prove useful in enhancing domestic and regional investment climates and in promoting greater competition through new entry in service sectors of crucial importance to economy-wide performance, including in agriculture, fisheries, mining and manufacturing and in helping promote needed economic diversification.

An EPA compact on services and investment cannot be viewed merely as a stand alone element. It must rather be seen as part of a determined effort at enhancing the infrastructure for trade and lowering the overall cost of producing goods and other services and bringing them to markets at home and abroad. The novel aid for trade components embedded into the EC-CARIFORUM EPA, including those specific to services and investment, are likely to be replicated in an African context. This would help ensure that efforts at progressively opening up key services markets are coupled with needed investments in capacity strengthening in service sectors, both in regulatory terms and in terms of private sector supply capacities. In pondering whether to engage into EPA negotiations with the EC in these areas, African countries must determine the likelihood that the WTO process might yield equally tangible forms of needed capacity building benefits and weigh such benefits against the possible costs (and benefits) stemming from the deeper liberalization of services trade and investment likely to emerge from EPA negotiations (if only to satisfy the requirements of GATS Article V) relative to the WTO, where African Members, especially LDCs, face considerably weaker pressure to make market opening commitments.

In the above equation, a number of important elements need to be considered. First is the need to ensure that both the wider EPA and its services and investment chapters provide for development co-operation benefits that adequately support the implementation of any commitments made. An equilibrium must indeed be found between the agreed rules and the commitments scheduled in services and investment chapters while also maintaining conditions of asymmetrical reciprocity.

Second, African EPA partners must get the timing and sequencing of their liberalisation right. More so than the CARIFORUM states, most African economies will need more time to allow for the building up of regulatory and productive capacity. Perhaps a first step would be to work within the EPA at building up such capacities and to backlog liberalisation commitments on the part of African ACP Members. Such a process could entail the gradual opening of those sectors in which the two elements noted above already exist – i.e. a

readiness to open up progressively and the needed funding to ensure that regulatory, implementation and supply capacities are properly buttressed.

Third, the services and investment titles in the CARIFORUM-EC EPA represent one of a range of possibilities for structuring relations in trade in services and investment policy. If more flexibility is required, which seems likely, then the African EPA partners should pay particular attention to formulating their own proposals on the nature of required flexibilities.

The experience of the CARIFORUM countries offers several useful insights which can assist their African counterparts in the negotiations. For starters, the EC-CARIFORUM experience has shown that an EPA *can* be development friendly; however, there is nothing automatic in securing such an outcome and it requires vigilance at the negotiating table. African countries must be clear about their development strategy, place themselves in a position to articulate such a strategy and allow it to inform the development thrust contained in an EPA's services and investment chapters. Consequently, African countries need to engage in the necessary technical work to clearly identify their offensive and defensive interests and be clear on how they would want to see such interests crystallised in the context of an EPA's services and investment chapters.

Any fears that the conclusion of an EPA may give rise to a more rigorous framework of general trade and investment disciplines may be assuaged by two observations. On the one hand, the likelihood of the inclusion of investment and services rules in an EPA that are more fully developed or more constraining of domestic policy space than those found at the multilateral level appears low. In the CARIFORUM EPA, there has been minimal progress on the bulk of the unfinished business of GATS rule-making, be it in the area of subsidy disciplines, emergency safeguards or domestic regulation.

On the other hand, the conclusion of a services and investment pact within the context of an EPA may be an effective means of redressing perceived imbalances in existing regulatory frameworks that would have served to disadvantage developing countries. For instance, the perception that bilateral investment treaties (BITs) provided more rights than obligations to investors led CARIFORUM countries to use the EPA to embed greater rights for host countries.

The CARIFORUM-EC EPA also illustrates that asymmetrical commitments and variable geometry in rule-making offer useful tools to structure investment and trade in services relations between unequal trading partners. Significantly, such tools may be tweaked to encourage deeper and faster integration among developing countries before embarking on a later stage of integration between developing country partners and the EC. Such a process may arguably result in increased predictability and transparency in the intra-regional services and investment environment. As the CARIFORUM case shows, deeper levels of (prior) intra-regional integration make the conclusion of an EPA with the EC significantly easier. Hence an EPA can serve as an impetus to the more expeditious creation of intra-regional services and investment ties and strengthened regional regulatory frameworks tailored to the specific needs of developing country groupings.

Finally, a key lesson emerging from the CARIFORUM-EC service and investment compact is that EPAs may be a platform for the internationalisation of the regulation of key service industries on a sector by sector basis. Actively shaping these regulatory frameworks has two benefits. Developing country partners can, in an EPA context, push to ensure that their interests are taken on board in the tailoring of agreed regulatory frameworks and the latter strengthened through targeted technical assistance funding and capacity building activities. By insisting on the need to work towards sounder regulatory frameworks in sectors in which they have offensive interests, such as tourism, creative industries, or labour mobility, developing countries can ensure that an EPA's disciplines on services and investment are not unduly skewed towards developed country objectives and interests.

Given that the negotiation and implementation capacity of African countries is in most instances severely constrained, one priority WTO+ issue area should be the negotiation of regulatory frameworks (either on a sectoral or general basis) and the provision of needed development co-operation assistance to ensure the fulfilment of commitments in this regard. For the most part, African countries have consistently identified weak regulatory capacity a particular area which has hindered any progress on the services front. A comprehensive EPA may represent a useful opportunity to push ahead in this specific area as the combination of binding commitments on the part of the African countries coupled with the provision of development assistance and financing from the EC hold the potential to stimulate economic diversification into services.

While CARIFORUM states and African countries may share a number of common characteristics and negotiating interests, the negotiation contexts for these two groups of countries nonetheless shows significant differences. This paper has shown several instances where similarities in legislation and regulatory frameworks between the EU and CARICOM facilitated the attainment of WTO+ outcomes in the EPA context. The level of regional integration achieved within CARICOM prior to entering into the EPA ensured that the region had either already put in place its own institutional arrangements on some of the WTO+ issues at play in the negotiations (e.g. competition policy, a single market for services, intra-regional labour mobility and mutual recognition of professional qualifications, etc.) or was working on doing so (e.g. government procurement. Taking the next step of concluding a comprehensive EPA with the EC was thus hardly revolutionary. This combination of circumstances and the extent of regulatory convergence between regions characterized by sophisticated internal processes of integration and the attendant institutional machinery is less likely to obtain in many or most African negotiating groups. The implication that follows is that certain elements of the CARIFORUM-EC EPA, such as disciplines on competition policy, transparency in public procurement or regulatory frameworks in certain sectors (such as e-commerce/digital trade) may not always be ripe for inclusion in an EC-African EPA. Accordingly, the range of behind the border issues to be tackled under such agreements may need to be narrowed.

## **VI. Concluding remarks**

The CARIFORUM-EC EPA represents an important, precedent-setting, evolution in preferential trade agreements. The Parties essentially worked within the construct of a PTA to bring about a development dimension to their international trading arrangements. The

Agreement underscores the fact that PTAs pitting highly unequal partners can nonetheless generate outcomes that offer tangible benefits to the weaker side. Such an approach may heighten the interest of lesser developed ACP partners to conclude EPAs and to potentially improve the terms on which they become increasingly integrated into regional and/or global production networks.

In several respects, the EPA can be considered a WTO+ agreement as it goes beyond the commitments and rules governing services trade in the WTO and creates a detailed (if far from comprehensive or fully coherent) framework of rules on investment.<sup>56</sup> The EPA also marks important advances, with novel forms of variable geometry, in addressing the issues of competition policy, government procurement, and in advancing an innovative set of cooperation activities for cultural industries, all areas that have encountered repeated and, in some cases, protracted, difficulties at the multilateral level.

The GATS+ character of liberalisation is evident in CARIFORUM commitments on a wider range of service and investment activities, particularly in key infrastructural sectors. EPA progress is significantly more limited however as regards the depth of commitments scheduled in areas where the Parties had already made GATS commitments. GATS+ advances are also illustrated by the improvements in access to the EC market for commercial presence and, especially, in regard to the temporary entry of natural persons and the treatment of cultural industries, even as the latter do not *per se* involve the granting of new market access commitments.

The EPA can be described as a successful attempt to give operational meaning to the principles and objectives of GATS Article IV (Increasing Participation of Developing Countries) as the EC has made evident efforts to respond to demands to open sectors and modes of supply of relevance to CARIFORUM states. This can also be seen in the EPA's concrete mechanisms to support the strengthening of domestic services capacity in a number of sectors and the improvement of CARIFORUM's access to distribution channels and information networks in the EC.

The biggest challenge now facing CARIFORUM states lies in implementing the terms of the EPA. On the financial side, the funds and technical assistance made available through EDF funding should help to ease the adjustment burden flowing from the agreement and help CARIFORUM service suppliers and investors to take advantage of newly opened market opportunities in EC markets. If the CARIFORUM region applies a similar level of commitment to the implementation process as it did to the EPA's negotiating process, the adjustment challenges arising from the Agreement should prove surmountable. CARIFORUM states at the highest level appear convinced that there is no turning back and that survival in the global economy requires a strategic repositioning of the region based in part on some of the tangible advantages that the EPA confers. Such pragmatism on the part of a small player eager to confront its vulnerabilities and diversify its economic tissue while also affording its ample supply of qualified workers, professionals and artists greater

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<sup>56</sup> Reflecting the still incomplete nature of Community competence in investment policy matters (such competence is shared with EU member states), the EPA does not cover issues relating to investment protection nor does it provide recourse to investor-state dispute settlement procedures. The latter continue to be covered by the dense network of bilateral investment treaties entered into and implemented by EU Member states.

mobility and opportunities in world markets explains why CARIFORUM states ultimately opted for a comprehensive EPA.

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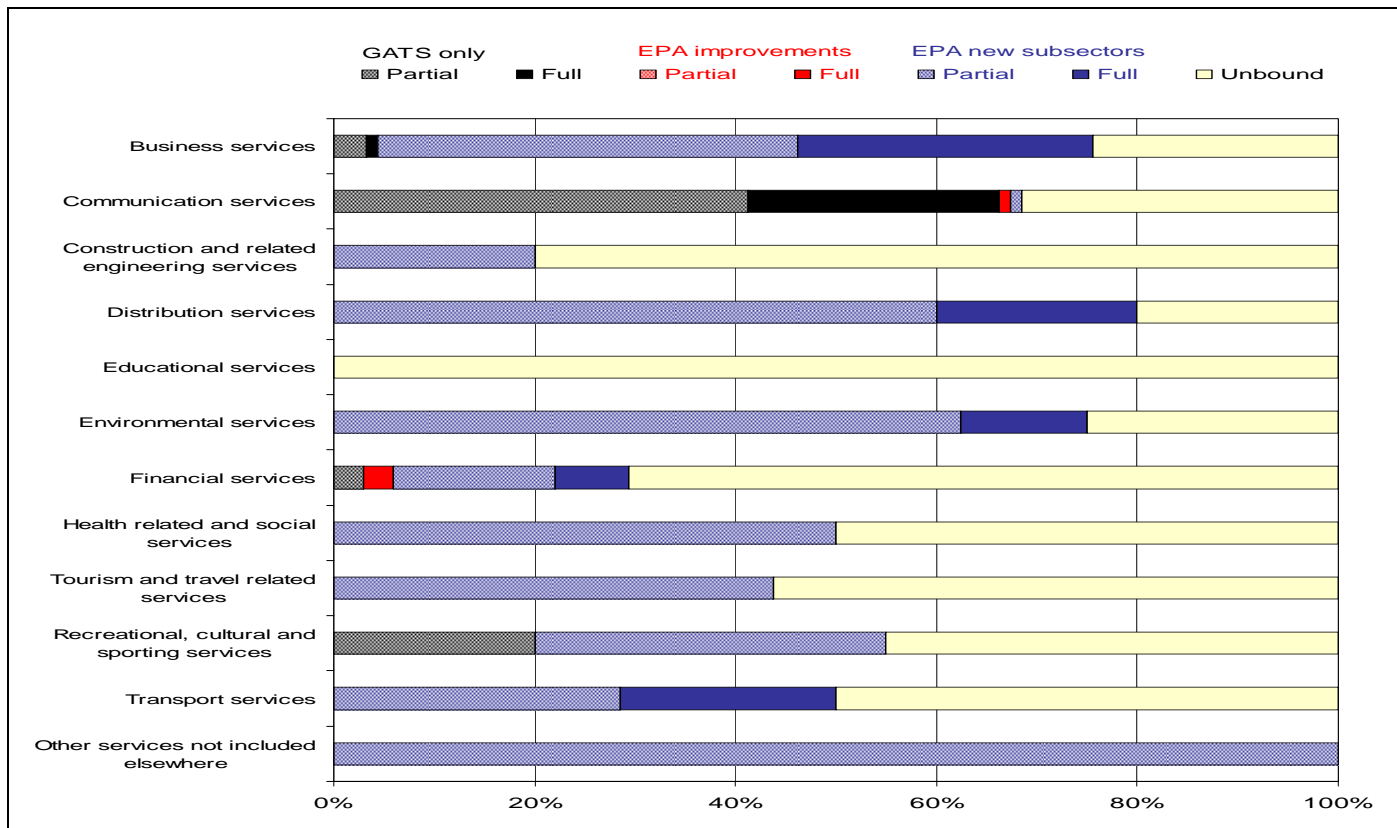
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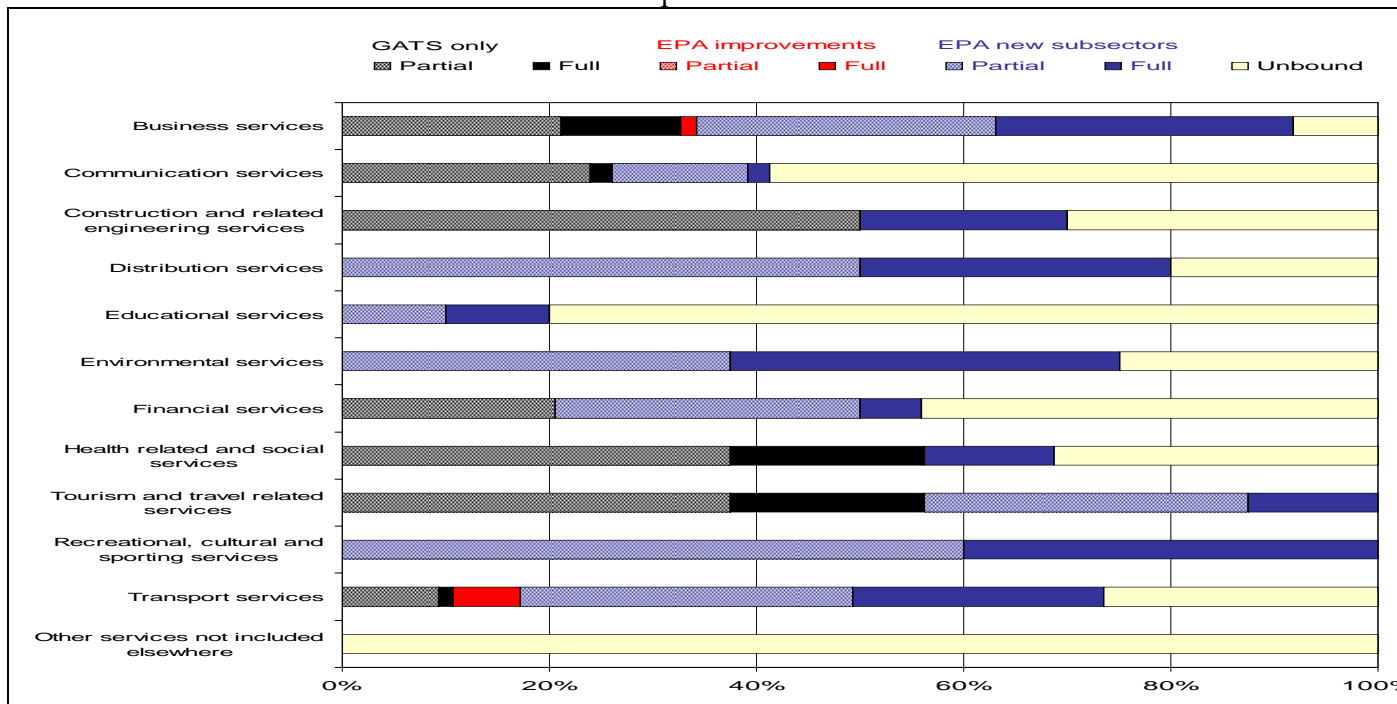
United States-Chile Free Trade Agreement.

ANNEX: Comparing the GATS and EPA Commitments

Barbados

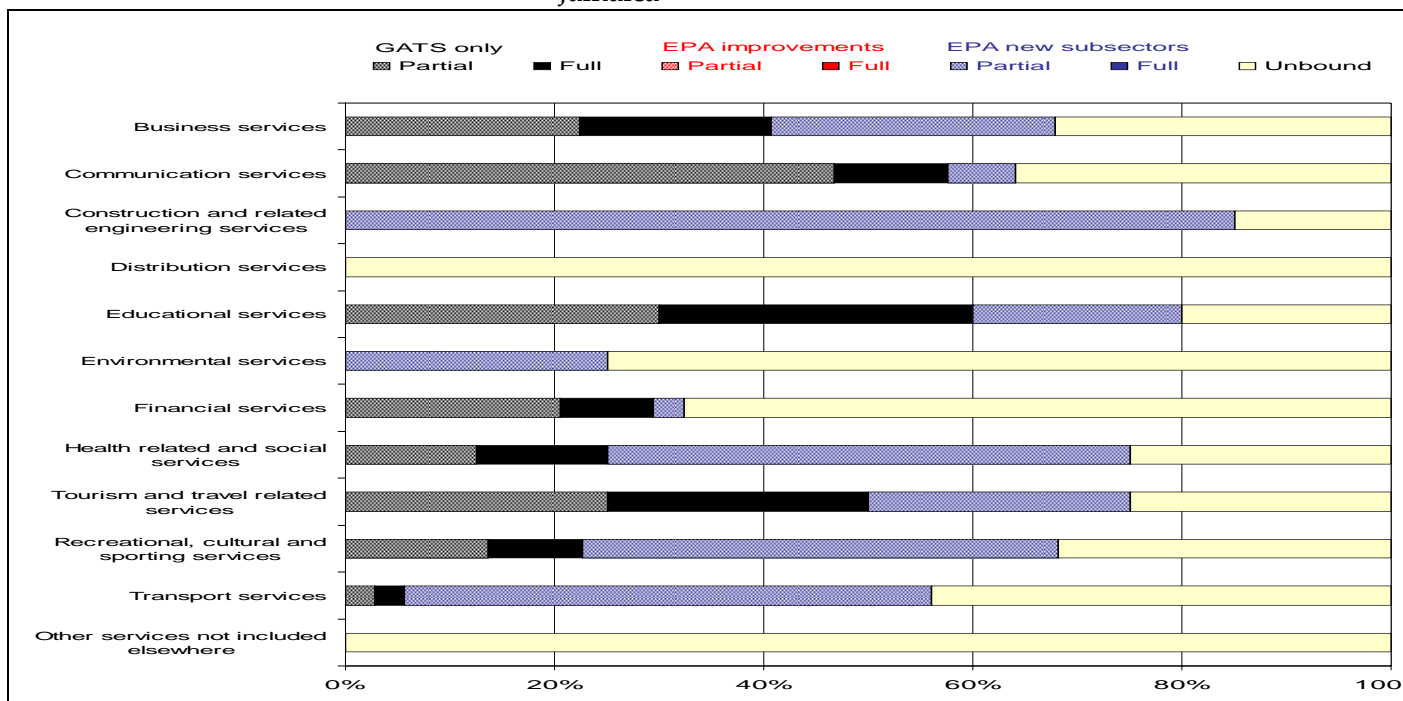


Dominican Republic

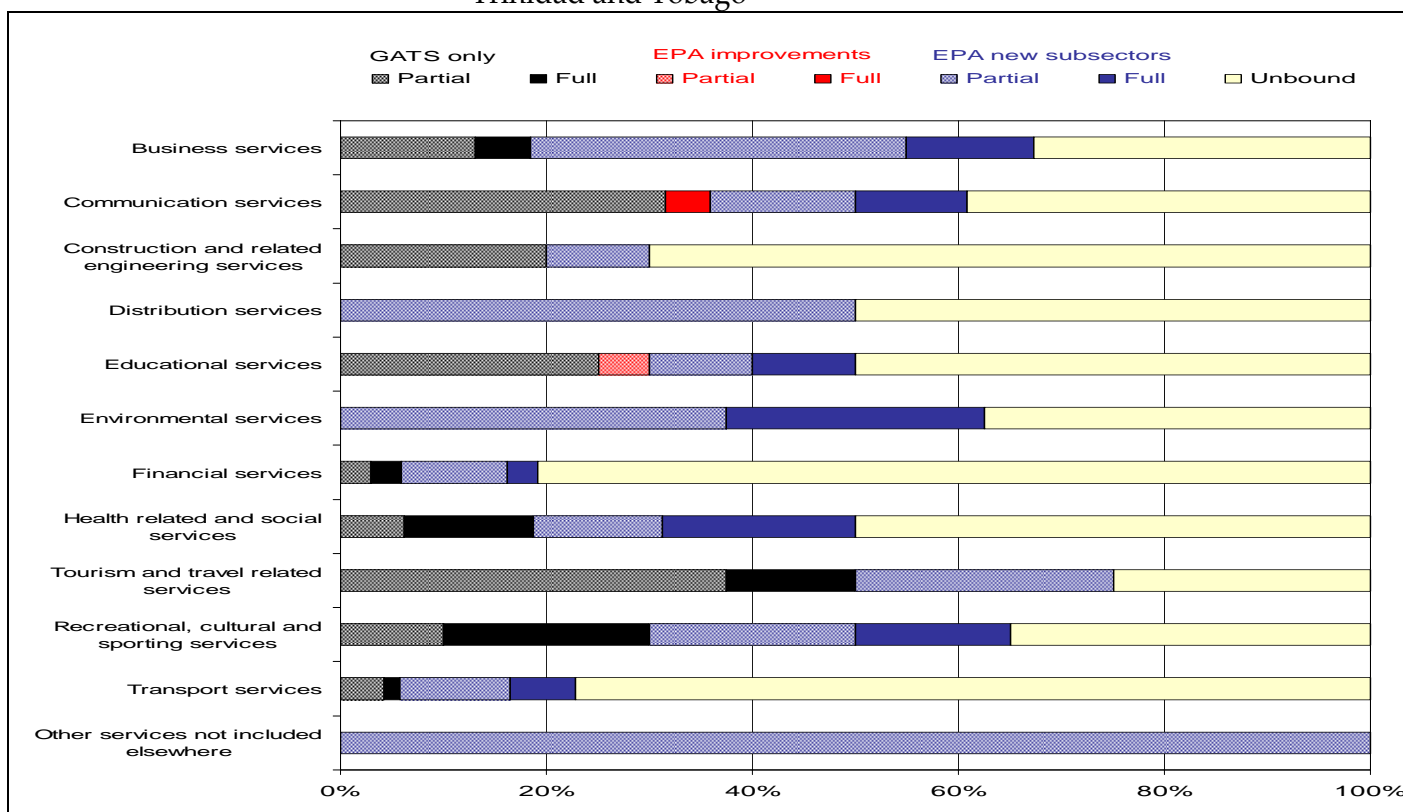


Source: Authors' calculations based on Trinidad and Tobago's EPA and GATS schedules

Jamaica



Trinidad and Tobago



Source: Authors' calculations based on Trinidad and Tobago's EPA and GATS schedules