January, 2009

THE EC-CARIFORUM ECONOMIC PARTNERSHIP AGREEMENT:
ASSESSING THE OUTCOME ON SERVICES AND INVESTMENT

By Pierre Sauvé and Natasha Ward.

Pierre Sauvé is a Director of Studies at the World Trade Institute and a Senior Fellow at ECIPE. Natasha Ward is a Research Fellow at the World Trade Institute.
Introduction

The imminent expiration of the World Trade Organization (WTO) waiver on 31 December 2007, which provided legal cover for the European Union’s (EU) 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 EU-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 group’s decision to enter into a comprehensive Economic Partnership Agreement (EPA) with the EU 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-least developed countries (non-LDCs) to opt-out of the interim EPAs, foregoing their preferential access to EU markets. Meanwhile, a number of ACP LDCs saw limited value-added in entering onto EPAs, preferring instead to continue to export under the EU’s Everything But Arms (EBA) initiative affording them non-reciprocal duty-free access to the EU market.

The signature on October 15th, 2008 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.” The only ACP region to have concluded a comprehensive EPA to date is the CARIFORUM region. A key question is whether ACP regions can afford to take the above risk. While this question is arguably moot for least-developed ACP countries, who continue to enjoy duty-free access to the EU market for goods trade under the EC’s Everything But Arms initiative, the situation may be different for middle- and higher-income countries. For instance, there is evidence that Nigeria has already begun to feel the effects of not signing an interim EPA as its cocoa processors face

---

1 The authors are grateful to Americo Begvilia-Zampetti and Fabien Gehl of the European Commission, H.E. Federico Alberto Camilo Cuello, Ambassador of the Dominican Republic to the Kingdom of Belgium and the European Communities, as well as to Junior Lodge and Ramesh Chaitoo of the Caribbean Regional Negotiation Machinery, for helpful discussions in the preparation of this paper. The authors are also indebted to Martin Molinuevo for his assistance in using the methodology for quantifying services commitments under preferential agreements developed in Fink and Molinuevo (2007). Special thanks are also extended to Gerrit Faber and Jan Orbie for their always constructive comments and suggestions in revising the manuscript.

2 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.

3 Nigeria, South Africa, Gabon and Congo have already made known their decision not to sign an EPA.

higher tariffs in the EC market.\textsuperscript{5} South African textile and clothing producers have begun to experience a similar bind.\textsuperscript{6}

A number of factors may be seen as explaining why the CARIFORUM region was both willing and able to conclude a comprehensive EPA with the EC. Chief among these were the strong commitment manifested to negotiating an EPA by the region’s political leadership and the high level of technical preparation on offer in the region, honed largely in the context of the failed FTAA negotiations. A complex set of dynamics served to reinforce such a commitment. There was, firstly, the region’s desire to bind existing levels of access to the EU market and to preclude the possibility that such preferential access become the target of WTO dispute settlement procedures.\textsuperscript{7} Secondly, the region deliberately sought to expand its access to the EC’s lucrative services market. Third, the region needed to diversify its export base and derive higher value from its exports in the face of the combined effects of preference erosion and the decline in EC agricultural support policies for Caribbean producers of bananas and sugar. Fourth, given that the process of intra-Caribbean regional integration was considered by many as suboptimal and suffering from an “implementation deficit”, the EPA’s emphasis on regional groupings was seen as offering a desirable boost to the CARIFORUM integration process. Fifth, by supporting the creation and/or strengthening of regional regimes in a number of disciplines such as, \textit{inter alia}, competition policy, government procurement, services and investment, the EPA came to be seen as offering a tool with which to advance CARIFORUM competitiveness, promote productive capacity and innovation in new products and production systems. Sixth, the region as a whole bought into the EPA’s “signalling” properties, viewing it as a powerful means to reassure foreign investors and development partners over the region’s commitment to continued economic reforms.

Another factor that facilitated the conclusion of a comprehensive EPA was that the negotiations pitted two partners that had both reached an advanced stage in their own internal process of regional integration, including in terms of the requisite machinery of regional inter-governmental cooperation. In addition, CARIFORUM was not as troubled as other ACP regions by the problem of overlapping regionalism, in which member countries are part of different integration groupings.\textsuperscript{8} (See Figure 1.1).

CARIFORUM’s capacity to negotiate a comprehensive EPA was furthermore facilitated by the fact that the region had already acquired significant experience in negotiating trade issues in several negotiating fora. Within the CARICOM grouping, the negotiation of the Single Market helped to identify barriers to internal trade as well as highlight the sectors with the greatest export potential. Hence, CARICOM Members had a head start in


\textsuperscript{8} This not to understate the existing difficulties of integration in the CARIFORUM region which are evident in the variable geometry of the sub-regional groupings, for example, the Bahamas and Haiti are members of CARICOM, but not of the Caribbean Single Market, the Dominican Republic is neither a member of CARICOM nor the Caribbean Single Market and there is a general mistrust between the Dominican Republic and the Anglophone countries.
identifying their key negotiating priorities, both offensive and defensive. Likewise, the negotiation of the CARICOM-Dominican Republic FTA provided further insights on the level of existing barriers to trade within the CARIFORUM region and clear indications of what the future liberalisation agenda should look like within the sub-region. In addition, as noted earlier, negotiations on the ill-fated Free Trade Area of the Americas (FTAA) exposed CARIFORUM negotiators to a wider range of trade issues. All of these above processes, together with experience gained in multilateral negotiations at the WTO, contributed to improving the quality of the region’s negotiating skills and boosted the region’s comfort level in dealing with many of the policy areas, old and new, that would become subject to EPA negotiations.

Figure 1.1
THE STRUCTURE OF CARIFORUM REGIONAL INTEGRATION

The EPA’s disciplines on services and investment appear to have been motivated by a number of factors. On the investment front, while there was an upward trend in European investment into the CARIFORUM region, outside of the tourism sector, European investment had stagnated in recent years.9 The investment component of the EPA is thus intended to provide a framework of rules to facilitate the easier reciprocal flow of investment, reduce the incidence of discriminatory treatment of foreign investors and give increased predictability and transparency to the investment regime. The hope in the CARIFORUM region is that such an enhanced investment regime would boost opportunities for the transfer of technology, lead to the creation of more (and better) jobs and encourage the production of quality products and services. At the same time, the expectation is that such a regime will create a more favourable investment climate for CARIFORUM investors in the European Union.

---

On the services side, several key elements played a critical role in making CARIFORUM states favourably disposed towards the completion of a full fledged services compact. For starters, service activities play a critically important role in the CARIFORUM economy, accounting for roughly 62% of CARICOM’s total exports (excluding Trinidad and Tobago) and four-fifths of exports of the OECS. Secondly, there is already a significant volume of trade in services between the two regions, with 60% of all CARIFORUM services exports to the EU in tourism and travel-related services. Thirdly, the service sector, especially knowledge-based services, represents the most viable avenue for economic diversification and global repositioning for the region given its value-added potential and the region’s factor endowments. With several CARIFORUM economies resting on a narrow production base, such a diversification imperative remains particularly compelling. For example, the overhaul of the conditions governing the entry of CARIFORUM exports such as sugar and bananas into the EU market, which were required to bring these regimes into compliance with the EC’s multilateral obligations, has all but paralysed some economies in the region, particularly smaller economies. Finally, the region has seen an increasing recognition of the role of services as a key input into the production process in other segments of the economy.

The above combination of factors served to persuade CARIFORUM policy-makers that the negotiation of an EPA with Europe presented a unique opportunity to gain market access concessions and establish rules to govern both Parties’ growing trade and investment in services.

In several regards, the CARIFORUM EPA exceeds the thresholds laid down under General Agreement on Tariffs and Trade (GATT) art. XXIV and General Agreement on Trade in Services (GATS) Art. V to determine WTO compatibility. The EPA also features 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. The EPA’s WTO+ nature has proven contentious in some quarters of the CARIFORUM region, ultimately prompting calls for the Agreement’s renegotiation. EPA critics have argued that the acceptance of WTO+ provisions in areas such as services, competition policy and investment will create legal precedents that could pave the way for their subsequent multilateralization.

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 set the bar for all subsequent EPA negotiations and perhaps indeed for future preferential trade agreements (PTAs) entered into by the EU. There is little doubt that such a bar is quite high.

---

10 Caribbean Regional Negotiating Machinery, “Getting to Know the EPA : Provisions on Services and Investment,” 2.
12 South Centre, “Understanding the Economic Partnership Agreements (EPAs).” Analytical Note SC/AN/TDP/EPA/1 (Geneva: South Centre, 2007), paragraph 33.
Even beyond the ACP context, the WTO+ provisions embedded in the CARIFORUM EPA will likely fuel attempts to see them replicated in other preferential agreements the EC is currently negotiating with South Korea, India, ASEAN and Central America. Similarly, the CARIFORUM EPA will represent a starting point (for the Caribbean countries) in possible future PTA negotiations with Canada and the United States.

This paper takes stock of the treatment of services and investment in the CARIFORUM EPA, its policy and rule-making implications of the latter agreement for other ACP regions and for the future of trade regulation at the multilateral level. The first section of the paper provides a general overview of the CARIFORUM EPA and focuses in particular on the architectural design of chapters dealing with investment, trade in services and e-commerce. The second section delves deeper into the services and investment dimensions of the agreement. It investigates the manner and degree to which the EPA has made advances on the liberalisation and rule-making agenda of the General Agreement on Trade in Services (GATS), focusing particular attention to negotiating outcomes in the key enabling sectors of telecommunications, financial services, maritime transport and e-commerce. The section also explores the development dimensions of the EPA as they relate to investment, trade in services and e-commerce. The paper’s third section explores the ways in which two other “Singapore issues” – transparency in public procurement and competition policy - have been integrated into the EPA. The fourth section considers the implications arising from the structure and nature of the CARIFORUM EPA for the other ACP regions, particularly in Africa. The paper concludes with a brief summary of the main policy lessons emerging from the analysis.

I. Architecture of the CARIFORUM EPA

The EPA represents a comprehensive trade agreement comprising five main parts. Part I covers trade partnership for development. Part II deals with trade in goods, investment, trade in services and e-commerce, current payments and capital movements and trade-related issues. Part III relates to Dispute Avoidance and Settlement. Part IV contains the General Exceptions. Institutional provisions and general and final provisions are contained in Parts V and VI respectively. The Annexes and Protocols constitute an integral part of the EPA.

In terms of the EPA’s legal underpinnings, much of the agreement is understandably influenced by the WTO Agreements and can, in many cases, be seen as a regional codification of WTO law. For example, the EPA Chapter on Government Procurement bears a number of similarities with the GATT’s plurilateral Agreement on Government Procurement (GPA). However, there are areas in which the Parties have for varying reasons looked towards other sources of rule-making, such as the North American Free Trade Agreement (NAFTA) or the EC Treaty itself. For instance, in Title II - Investment, Trade in Services and E-Commerce, the EPA’s structure bears many similarities to that of the NAFTA by featuring separate chapters on commercial presence (investment, but in all sectors, i.e. mining, agriculture, fishing, manufacturing and services), cross-border trade in services and the temporary movement of natural persons (once again generically drawn and not limited to services). This stands in contrast to the GATS, whose framework provisions encompass all four modes of supplying services under a common roof. Despite the above structural
difference, many of the EPA provisions on services replicate language found in the GATS. The EPA’s disciplines on competition policy appear to be inspired by the EC treaty and the Revised Treaty of Chaguaramas establishing the Caribbean Single Market Economy.

Although the EPA is reciprocal in nature, the Agreement takes into account the inherent inequality between the two negotiating partners by providing for various means of special and differential treatment. This is mainly done through the assumption of asymmetrical commitments and obligations. Examples of such asymmetry can be found in the goods and services schedules, where EC commitments are higher than those assumed by CARIFORUM members.\textsuperscript{13} In goods trade, CARIFORUM has agreed to liberalise its imports from the EC over a fifteen year transition period, with an additional ten years for a number of sensitive products.\textsuperscript{14} Further, whereas CARIFORUM has retained the right to use export subsidies, such a right is denied the EC. Also taken into account are cross-country differences within the CARIFORUM grouping. For example, the CARICOM LDCs were given extended transition periods for implementing the EPA chapter on public procurement.

**I.1 Architecture of the Investment, Trade in Services and E-Commerce Title**

Title II which deals with Establishment, Trade in Services and the Temporary Movement of Natural Persons comprises seven chapters. The first chapter sets out the general provisions. The second chapter, which deals with commercial presence/establishment, applies as under NAFTA-type agreements to both services and non-service economic activities. The third chapter relates to cross-border trade in services. The fourth chapter deals with the temporary movement of natural persons and the fifth one with the regulatory framework. The sixth chapter addresses the issue of e-commerce while the seventh one lays out the co-operation (aid for trade) package for services.

In reviewing the architecture of Title II on Investment, Trade in Services and E-Commerce, the following section briefly identifies systemic issues before examining the approach taken to scheduling market opening commitments. The section that follows also reviews the key disciplines found in the Chapters on commercial presence (GATS mode 3), cross-border supply (GATS modes 1 and 2) and the temporary movement of natural persons (GATS mode 4). Each of the Chapters is treated separately as they contain unique features worthy of analytical attention.

**I.1.1 Systemic Issues**

**a. Regional Integration**

Article 238 (2) requires that any preference and advantage granted under the EPA by any CARIFORUM state to the EC shall also be enjoyed by each signatory CARIFORUM state. When read in conjunction with the liberalisation commitments undertaken in Title II, the EPA’s Services and Investment Chapter can be seen as in effect providing the services and

---

\textsuperscript{13} Lodge, “CARIFORUM EPA negotiations,” 7.

investment chapters of the CARICOM-Dominican Republic FTA to the extent that the Dominican Republic is a Party to the EPA and in light of the inability of the former partners to reach agreement in this area within their own regional integration process. Moreover, it is notable that the Dominican Republic will be liberalising faster with the EC than with the rest of CARIFORUM. Such flexibility in the pace of liberalisation is foreseen under Article 238 (3) (ii) and (iii), which permits the phased application of the regional preference according to the level of development of the CARICOM State. Consequently, one year after the signature of the EPA, any more favourable advantage granted by CARICOM’s more developed countries (MDCs) to the EC must be extended to the Dominican Republic. The transition period for the less developed countries (LDCs) is two years while it is five years for Haiti, the region’s poorest member.

b. Special and Differential Treatment

The GATS features a number of provisions on special and differential treatment, notably Article IV relating to the increasing participation of developing countries in services trade\(^\text{15}\), Article V (3) on the participation of developing countries in economic integration agreements (EIAs), as well as Article XIX on progressive liberalisation.

The EPA equivalent of Article IV of GATS is found in the co-operation Chapter in Title II and is reinforced by the main development priorities identified in Article 8 of Part I. (A more comprehensive discussion on the development co-operation chapter is presented in Section II of this paper). Article IV (3) of the GATS directs members to take into account the serious difficulties of the least developed countries in accepting negotiated commitments in view of their special economic situation, as well as their development, trade and financial needs. At the time of writing, it was not possible to verify whether Haiti’s status as a least developed country has translated into significantly lessened market opening commitments as Haiti has been granted an extended period within which it must submit its schedule.

According to the EC, the “services and investment provisions include reciprocal but asymmetrical commitments, with gradual and effective market opening, consistent with WTO rules, taking into account the level of development of the CARIFORUM countries.”\(^\text{16}\)

While the EPA’s Title on Investment, Trade in Services and E-Commerce does not at first glance appear to contain much by way of S&DT provisions, a careful reading of the liberalisation schedules reflects a recognition of a number of the principles set forth in GATS’ Article IV and tends to support the EC’s above claim. For example, the liberalisation of services sectors has been asymmetrical, with the EC and the Dominican Republic\(^\text{17}\) liberalising a greater number of sectors than the CARICOM MDCs and LDCs. In addition, in the key area of labour mobility, the EC has made commitments to liberalise market access

\(^{15}\) Article IV (1) requires that the increasing participation of developing country members be facilitated through negotiated commitments, by different Members, relating to strengthening their domestic services capacity and its efficiency and competitiveness, _inter alia_, through access to technology on a commercial basis; the improvement of their access to distribution channels and information networks; and the liberalisation of market access in sectors and modes of supply of export interest to them.


\(^{17}\) The Dominican Republic has a greater number of commitments as it essentially gave the EU parity with the US-CAFTA.
for contractual service suppliers (CSS) and independent professionals (IP) in specified sectors. Another example is the fact that the CARICOM LDCs have made use of phase-in commitments to be implemented over time spans ranging from 5 to 13 years. A further instance of flexibility is the preservation of the right of the CARIFORUM party to set out in its Schedule, within two years of the date of entry into force of the Agreement, any non-conforming measures which exist at the time of signature, but have not been scheduled.\(^\text{18}\)

c. **Scheduling**

Each of the three modes of supplying services under the EPA features some degree of sectoral carve-out, thereby precluding the full application of the disciplines to such sectors. For commercial presence, sectoral exclusions relate to mining, manufacturing and the processing of nuclear materials; production of - or trade in - arms, munitions and war material; audio-visual services; national maritime cabotage; national and international air transport services, whether scheduled or unscheduled, and services directly related to the exercise of traffic rights, other than aircraft maintenance, the selling and marketing of air transport services and other ancillary services that facilitate the operation of air carriers, such as ground handling, rental services of aircraft with crew and airport management services. The coverage of aviation services in the EPA is more encompassing that what is found in GATS and in numerous PTAs that do not specifically cover and seek liberalization commitments in some of the ancillary services described above.

As regards provisions governing cross-border trade in services, the chapter does not apply to audio-visual services; national maritime cabotage; national and international air transport services, whether scheduled or unscheduled, and services directly related to the exercise of traffic rights, other than the activities described above and covered under the investment chapter.

For the temporary movement of natural persons, no explicit sectoral exclusions have been scheduled. Instead, for the EC, wherever there is a liberalisation commitment for commercial presence, then the other Party’s key personnel and graduate trainees are permitted subject to any reservations inscribed in EU members’ schedules of specific commitments. For CSS, access is permitted in 29 sub-sectors. For independent professionals (IP), 11 sub-sectors have been liberalised (see Box 1.1). For CARIFORUM members, access for the latter category of service suppliers is controlled primarily through the application of economic needs tests (ENTS).

Also excluded from the EPA are social security and pensions and services supplied in the exercise of governmental authority, such as public health, energy and water services.\(^\text{19}\) The latter carve-out is found in virtually all PTAs as well as in the GATS.

\(^\text{18}\) EPA, Annex IV. E, paragraph 5.

Box 1.1 EC Commitments on the temporary movement of natural persons

(i) Contract Service Suppliers (CSS)
1) Legal advisory services in respect of international public law and foreign law (i.e. non-EU law)
2) Accounting and bookkeeping services
3) Taxation advisory services
4) Architectural services
5) Urban planning and landscape architecture services
6) Engineering services
7) Integrated Engineering services
8) Medical and dental services
9) Veterinary services
10) Midwives services
11) Services provided by nurses, physiotherapists and paramedical personnel
12) Computer and related services
13) Research and development services
14) Advertising services
15) Market Research and Opinion Polling
16) Management consulting services
17) Services related to management consulting
18) Technical testing and analysis services
19) Related scientific and technical consulting services
20) Maintenance and repair of equipment, including transportation equipment, notably in the context of an after-sales or after-lease services contract
21) Chef de cuisine services
22) Fashion model services
23) Translation and interpretation services
24) Site investigation work
25) Higher education services (only privately-funded services)
26) Environmental services
27) Travel agencies and tour operators’ services
28) Tourist guides services
29) Entertainment services other than audiovisual services.

(ii) Independent Professionals (IPs)

1) Legal advisory services in respect of international public law and foreign law (i.e. non-EU law)
2) Architectural services
3) Urban planning and landscape architecture services
4) Engineering services
5) Integrated Engineering services
6) Computer and related services
7) Research and development services
8) Market Research and Opinion Polling
9) Management consulting services
The EPA adopts a GATS-like hybrid approach to scheduling liberalisation commitments, whereby only particular sectors and sub-sectors, are committed in a voluntary (positive) manner subject to the negative listing of non-conforming measures maintained in listed sectors and sub-sectors. Under this approach, EPA signatories remain “free to decide how trade is restricted and what types of transactions are allowed in a particular service sector.”

In terms of the schedules themselves, two different approaches were used by CARIFORUM and the EC, which is somewhat anomalous and complicates attempts at comparisons and analysis. The EC’s schedule is split into four sections. Annex IV.A, which deals with commercial presence in relation to both the services and non-services activities, sets out the horizontal limitations in relation to this mode of supply as well as the specific commitments of EU Members. Annex IV. B contains the horizontal limitations and specific commitments of EU Members that relate to the cross-border supply of services. Annex IV.C sets out the horizontal commitments and specific commitments relating solely to the entry and admission of key personnel and graduate trainees. Annex IV.D performs the same function in relation to the CSS and IP categories of natural persons. No distinction is drawn in the EC schedule between market access and national treatment limitations. While the EC approach allows for a rapid identification of the types of restrictions maintained for specific modes of supplying services in a given sector, it complicates attempts at assessing in a comprehensive manner the limitations scheduled for all modes in one particular sector.

For its part, the schedule of CARIFORUM Members is divided into two parts. Annex IV.E lists horizontal restrictions and specific commitments for non-services activities whereas Annex IV.F adopts the GATS format to scheduling and comprises horizontal commitments as well specific market access and national treatment commitments in relation to Modes I to IV. The CARIFORUM schedule does not currently include commitments by the Bahamas and Haiti, both of whom have been granted an additional six months to complete their schedules. EPA Article 63 provides that preferential treatment granted by the EC will not be extended to the Bahamas and Haiti until the CARIFORUM-EC Trade and Development Committee decides on the inclusion on these schedules in Annex 4.

I.1.2 Core Substantive Disciplines

a. Commercial Presence

Unlike the GATS, where commercial presence is limited to the ‘supply of a service by a service supplier of one Member, through commercial presence in another Member’, the EPA’s investment disciplines cover both services and non-services economic activities,

---

21 The Trade and Development Committee is the main subsidiary body to the Joint Council composed of senior official representing the Parties and meeting at least once a year. The Committee is tasked with the administration of the EPA and should ensure the attainment of its objectives. CARIFORUM-EU EPA, Article 230.
subject to the exclusions noted above. The latter approach mirrors that taken under the NAFTA, though the extent of the Agreement’s investment disciplines are significantly less encompassing than those found in Chapter 11 of the latter agreement. Still, it is noteworthy that, in keeping with a trend that is now firmly rooted within preferential trade agreements, the EPA adopts a framework of rules to govern an area of economic activity – cross-border investment – that has proven particularly challenging at the multilateral level.

Like the GATS, the EPA’s investment provisions cover both the pre- and post-establishment phase of an investment as the term ‘commercial presence’ applies to the constitution, acquisition or maintenance of a juridical entity and the creation or maintenance of a branch or representative office.

Unlike the NAFTA, the EPA’s investment package features no provisions on performance requirements as well as on senior managers and the composition of boards of directors. While the absence of EPA disciplines on performance requirements implies that both Parties are bound by the terms of the WTO Agreement on Trade-Related Investment Measures (TRIMs), such an approach departs from the trend witnessed in many PTAs towards a detailed codification and expanded range of prohibited measures.

The EPA’s investment chapter does not contain disciplines on the core investment protection issues of minimum standards of treatment, expropriation and compensation, nor does it provide recourse to investor-state arbitration procedures. The latter outcome reflects the shared competency between Member States and the European Community on matters of investment regulation. Indeed, the Commission is not yet fully able to speak on behalf of Member states in matters of investment protection, a state of affairs that would be possible once the Lisbon Treaty is ratified by all Members.

Allowing for the difference in structure between the GATS and the EPA, the market access obligation 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 five types of market access restrictions so long as they are scheduled. Such restrictions, which have been adapted to include non-services activities, are similar to those found in GATS XVI:2, with the exception of limitations on the number of natural persons employed which has, for obvious reasons, been excluded given the generic treatment of such a mode of supplying services. These are as follows:

- Limitations on the number of commercial presences, whether in the form of numerical quotas, monopolies, exclusive rights or other commercial presence requirements such as economics needs tests;
- Limitations on the total value of transactions or assets in the form of numerical quotas or the requirement of an economics needs test;
- Limitations on the total number of operations or the total quantity of output expressed in terms of designated numerical units in the form of quotas or an economics needs test;

22 CARIFORUM- EU EPA Article 67:2.
- Limitations on participation of foreign capital in terms of maximum percentage limit on foreign shareholding or the total value of individual or aggregate foreign investment; and
- Measures which restrict or require specific types of commercial presence (subsequent, branch, representative office) or joint ventures through which an investor of the other Party may perform an economic activity.

As in the GATS, the EPA’s national treatment obligation is also conditional. 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. 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. Thirdly, treatment is considered to be less favourable when it “modifies the conditions of competition” in favour of like suppliers/investors. Finally, nothing in the agreement requires the Parties to compensate for inherent competitive disadvantages resulting from the foreign character of the relevant commercial presences and investors. 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.

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 are of the view 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. Such a criticism would appear 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 completion of fuller disciplines envisaged under the Article XV negotiating mandate.

A key EPA departure from GATS practice can be found in regard to the binding of national treatment and market access conditions. 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. This obligation covers both commercial presence and cross-border services. It should be noted that no corresponding obligation applies to the EC, presumably because the EC’s EPA commitments typically embed or improve on the regulatory status quo.

23 Ibid., Article 68.
25 In one sense the standstill may be regarded as GATS+; however, it can be argued that GATS V:1, 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.
As under the GATS, the EPA’s most favoured nation (MFN) obligation is framed as a general obligation applicable to all measures affecting services trade and investment. Once more, the MFN obligation is also almost identical in both the commercial presence and cross border services chapters, with minor alterations to take account of differences between the two modes of supply.

The MFN provisions in these two chapters have been tailored to meet the demands of a 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).26 The CARIFORUM states could potentially benefit if any of the other regional economic partnership agreements (REPAs) succeeded in negotiating more favourable treatment in the EC market in both areas (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 EU is currently negotiating with, such that the market access package embedded in the EPA probably represents the best the EU is prepared to offer.27 Hence, it appears more likely that other REPAs might be able to free ride on the terms of the CARIFORUM EPA, provided that the former 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 a third country, if the EC grants more favourable treatment than that provided for in the CARIFORUM EPA.

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 economy28 with which they conclude a subsequent EIA (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.29 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 increase 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 trading partners are unlikely to match

---

26 The EPA defines an EIA as an agreement on services and investment.
27 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.
28 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.
the terms of the EPA. Accordingly, the likelihood that the CARIFORUM region might accord better treatment than that granted to the EC appears slight. From the perspective of the EC, the inclusion of such a clause, which can also be found in the NAFTA, is generally considered as preserving an equality of access with that of its main commercial rivals in EPA markets, all the more so as the EC has granted CARIFORUM countries an Aid for Trade (AfT) 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.30

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 their integration arrangements, through the operation of the MFN clause, to any third country with which the PTA members conclude 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. Hence, the EC does not become a de facto member of CARICOM; neither does CARICOM become a de facto EC member.

There are two main ways in which the EPA’s commercial presence chapter goes beyond the GATS framework. First, the chapter contains a number of rules governing the behaviour of investors. In particular, the Parties are required to cooperate and where necessary take measures to ensure that investors are forbidden to bribe or attempt to corrupt public officials whether directly or indirectly in order to secure any favour in relation to a proposed investment. Parties are also required to ensure that investors: (i) act in accordance with ILO core labour standards; (ii) do not operate their investments in a way which circumvents international environmental or labour obligations arising from agreements to which the signatories are Parties; and (iii) must establish and maintain local community liaison processes. It bears noting that the above provisions were insisted into the EPA at the behest of CARIFORUM.

The question naturally arises as to why the region sought to have such ‘trade and … issues’ included in the EPA when they – alongside the vast majority of developing countries - have consistently resisted them in the multilateral context. Discussions with officials from the region suggest that CARIFORUM Members were in fact highly comfortable in negotiating on investment issues and exploiting the potential “signalling” properties of negotiating advances in this area. The latter were arguably more ambitious than the EC in this regard, their demands extending beyond market access issues to matters of investment promotion and protection. However, as noted above, the European Commission could not accommodate all such requests for reasons of constrained competence in the investment field.

One CARIFORUM official noted that it made little sense to conclude a comprehensive trade agreement that excluded investment issues. In addition, there was an express desire to

30 Tidane Dièye and Hanson, “MFN provisions in EPAs,” 2.
rebalance the general thrust of BITs which accorded rights to investors and placed obligations on states. Therefore, the EPA’s chapter on commercial presence aimed at securing host country rights. It was important to the region, however, that this be done in a manner that did not contradict the operation of those BITs which individual CARIFORUM members had already concluded.

b. Cross Border Services

Since the nature and scope of the national treatment and most favoured nation obligations found in the chapter on commercial presence is largely replicated in the chapter governing cross-border trade in services, this section will not duplicate the previous section’s discussion. It is worth noting however that while the market access provision is virtually identical, the Parties are precluded from maintaining three types of restrictions affecting the cross-border supply of services unless they are explicitly scheduled. These are: (i) limitations on the number of service providers; (ii) limitations on the total value of services transactions or assets; and (iii) limitations on the total number of service operations or on the total quantity of service output.

NAFTA Article 1205 imposes an obligation on the parties not to make the establishment of a local presence a requirement for the provision of cross border services. Such an obligation, which is subject to reservations, is meant to promote a regulatory presumption in favour of cross-border supply by discouraging forced establishment as a precondition for supplying services in a host country market. The EPA, like the GATS, does not contain such a right of non-establishment. While the NAFTA model provides a significant level of comfort to service providers, there may be legitimate reasons for preserving flexibility to maintain local presence requirements. For instance, regulators may wish to ensure that the there is a local presence in case there are issues of liability relating to the provision of a service or merely to ensure that domestic clients have an effective way of contacting service suppliers.

The EPA schedules reveal that the EC has made some use of the flexibility to require local presence, especially in the financial services sector. For example, in the insurance and insurance related sectors, Finland has scheduled a limitation under Mode I stating that ‘only insurers having their head office in the EC or a branch in Finland may offer direct insurance (including co-insurance) services. The supply of insurance broker services is subject to a permanent place of business in the EC.’ In the banking and other financial services sub-sectors, Belgium has inscribed a limitation stating that ‘establishment in Belgium is required for the provision of investment advisory services.’ In contrast, the CARIFORUM states have hardly made use of the ability to impose local presence requirements. The Dominican Republic in the travel agencies and tour operators services subsector has inscribed a national treatment limitation on modes I and II which requires that ‘foreign travel agencies must be duly authorised in their country of origin and represented by a local agency.’

---

31 The actual wording of the local presence requirement will determine the extent of trade-restrictive impact. On the one hand, a limitation which states that local presence is required can be interpreted as permitting cross-border supply but requiring that the service provider to have some form of local presence. On the other hand, a limitation that restricts the provision of cross-border services to local presence only amounts to a zero quota on providing cross-border services. From a holistic perspective any such requirement is likely to increase the cost of doing business, particularly for CARIFORUM service providers, which will tend to be relatively smaller than their European counterparts.

32 CARIFORUM-EC EPA, Annex IV.B.
### Chart 1.2
**Main Provisions of the EPA's Investment and Services Chapters**

<table>
<thead>
<tr>
<th>Provision</th>
<th>Modes I &amp; II</th>
<th>Mode III</th>
<th>Mode IV</th>
</tr>
</thead>
<tbody>
<tr>
<td>Definitions</td>
<td>Article 75</td>
<td>Article 65</td>
<td>Article 80</td>
</tr>
<tr>
<td>Coverage</td>
<td>Article 75</td>
<td>Article 66</td>
<td>Article 80</td>
</tr>
<tr>
<td>Market Access</td>
<td>Article 76</td>
<td>Article 67</td>
<td>Articles 82-84</td>
</tr>
<tr>
<td>National Treatment</td>
<td>Article 77</td>
<td>Article 68</td>
<td>None</td>
</tr>
<tr>
<td>Most Favoured Nation Treatment</td>
<td>Article 79</td>
<td>Article 70</td>
<td>None</td>
</tr>
<tr>
<td>More Favourable Treatment from other agreements</td>
<td>None</td>
<td>Article 71</td>
<td>None</td>
</tr>
<tr>
<td>Behaviour of Investors</td>
<td>n/a</td>
<td>Article 72</td>
<td>n/a</td>
</tr>
<tr>
<td>Standards</td>
<td>n/a</td>
<td>Article 73</td>
<td>n/a</td>
</tr>
<tr>
<td>Review</td>
<td>None</td>
<td>Article 74</td>
<td>None</td>
</tr>
<tr>
<td>Future liberalisation</td>
<td>Article 62</td>
<td>Article 62</td>
<td>Article 62</td>
</tr>
</tbody>
</table>

n/a- not applicable
c. Temporary Movement of Natural Persons

The EPA chapter on labour mobility-related matters addresses familiar categories of key personnel: business service sellers, independent professionals and contractual service suppliers, but the chapter devoted to this sensitive issue in which CARIFORUM Members have clear offensive interests reveals a number of innovations over the GATS. The chapter’s coverage is depicted in Diagram 1.2. The term ‘key personnel’ is applied to a category of professionals including business visitors and intra-corporate transferees (ICT), both of which are readily found within the GATS classification. The ICT category is further subdivided into managers and specialists. The only difference with the key personnel category is that it has been extended to cover natural persons engaged in non-service sector activities and extended to cover a number of new service sectors. Under the EPA, ICTs are granted temporary entry and stay privileges for up to three years. This is the same duration of stay as envisaged in current Mode 4 discussions under the DDA but which have yet to be agreed.

**Diagram 1.2**
Categories of Natural Persons in the CARIFORUM EPA

![Diagram of categories of natural persons](image)

The category of graduate trainees has been widened in the EPA. According to an Informal Note by the WTO Secretariat, the graduate trainee category is included in the schedules of some individual WTO Members. This category refers to persons with a university degree who are being transferred for career development purposes or to obtain training in business techniques or methods.\(^\text{33}\) Such a category does not appear in the EC 27 schedule, but is a part of the EC’s revised conditional DDA offer. The EC’s offer adds the condition that the recipient company in the EC may be required to submit a training programme covering the duration of the stay for prior approval, demonstrating that the purpose of the stay is for

\(^{33}\) World Trade Organisation, *Categories of Natural Persons Subject to Commitments under Mode 4*. Informal Note by the Secretariat. JOB (03)/195 (Geneva: WTO, 2003), 5.
training. Under the GATS, graduate trainees are able to move from headquarters to subsidiary or from subsidiary to subsidiary.

Graduate trainees are similarly defined in the EPA. However, the category has been widened to include the movement of the graduate trainee from a company’s subsidiary to its headquarters. It is presumed that such movement would not be classified as a form of covered trade under the GATS as the natural person would be supplying the service to a domestic company. Beyond the possibility that the recipient commercial presence may be required to submit a training programme, the graduate trainee must be employed by a juridical person of one of the Parties for at least one year. In addition, for Spain, France, Germany, Austria and Hungary, the training must be linked to the university degree which has been obtained. This category of personnel is permitted to stay for one year.

Unless they are scheduled, the Parties may not maintain measures on the temporary movement of key personnel and graduate trainees in sectors liberalised in chapter 2 on commercial presence which limit the total number of persons that an investor may employ as key personnel and graduate trainees in a specific sector in the form of numerical quotas or a requirement of an economic needs test and other discriminatory limitations.

Business visitors, a subset of key personnel, are persons working in a senior position who are directly responsible for setting up a commercial presence. In the case of business visitors, for every sector liberalised in the chapters on commercial presence and cross-border trade in services, the Parties allow temporary entry and stay for a period of 90 days in any twelve month period.

A further innovation over the GATS concerns short-term visitors for business purposes who are not linked to a commercial presence. This category of persons is also permitted to stay, once admitted, for 90 days in any twelve month period.

The MFN provision does not appear in the EPA’s rules governing the temporary movement of natural persons. This is arguably less that fully surprising given that migration- and labour market-related areas are policy areas in which governments tend to be most reluctant in bestowing 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 market access granted to CSS is subject to a number of conditions under the EPA. These include:

- The natural persons must be supplying the service as employees of a juridical person and the juridical person must have obtained a service contract for a period not exceeding twelve months;

34 CARIFORUM-EC EPA, Article 80: 2 (b).
35 Ibid., Art. 81 (2).
36 CARIFORUM-EC EPA, Article 81 (1).
37 Ibid, Article 84 (2).
The natural person must have been an employee of the juridical person for at least one year immediately preceding the state of submission of an application for entry into the other Party and the natural person must possess at the date of submission at least three years of professional experience in the sector which is the subject of the contract;

With the exception of fashion model services, chef de cuisine services and entertainment services other than audiovisual services, the natural person must possess a university degree or qualification demonstrating knowledge of an equivalent level and professional qualifications where this is required pursuant to laws, regulations or requirements applicable where the service is supplied;

The only remuneration to the natural person should be that paid by the CSS;

The maximum period of stay is a cumulative period of not more than 6 months, and in the case in Luxembourg, 25 weeks in any twelve month period or for the duration of the contract, whichever is less.

The number of persons covered by the services contract shall not be any larger than necessary to fulfil the contract; and

Other discriminatory limitations which are specified in Annex IV.

It should be noted that some of the above conditions can be found in the horizontal section of the schedules of WTO Members or, less commonly, as sector specific limitations. One prime example is a so-called prior employment requirement – i.e., the condition that the natural person must be an employee of the juridical person for at least one year prior to seeking temporary entry, which is founded on the belief that foreign workers with longer employment affiliations to their employers are less likely to seek alternative employment opportunities illegally in the host country.

An important consideration is whether CARIFORUM service providers will be able to satisfy the above conditions or whether these will frustrate their potential mobility in the EU market. In the case of IPs, market access is subject to the following conditions in receiving states:

- The natural person must be engaged in the supply of a service as self-employed persons and must have obtained a service contract for a period not exceeding twelve months;
- The natural person must possess at least six years of relevant professional experience at the date of submission of an application for entry;
- The natural person must possess a university degree or equivalent and professional qualifications where this is required to exercise the activity according to the regulations of the host state; and
- The temporary entry and stay of natural persons shall not exceed a cumulative total of six months (25 weeks in the case of Luxembourg), in any twelve month period or for the duration of the contract.

---

For example, in order for a natural person to supply a service on behalf of a CSS, the CSS must have succeeded in negotiating a contract; the natural person must be an employee of the CSS for at least one year; the natural person must have three years of experience in the sector. This is in addition to any other discriminatory limitations which are found in the schedules in Annex IV.
One of the more notable differences between the conditions attached to CSS and IPs is the length of time of professional practice. IPs are required to have twice as much professional experience as CSS. This difference is justified on grounds that IPs are not linked to any commercial presence and there is thus no company that is ultimately liable for the return of the professional to the home territory. For this reason, it was felt that an IP with more experience was more likely to be well established in the home territory and hence have a greater likelihood of returning to his home country at the end of the contract period.

As opposed to the categories discussed above, the commitment to permit the entry and temporary stay of short-term visitors for business purposes is merely hortatory in nature, expressed on a “best endeavours” basis. This is so because the EC found it politically impossible to introduce such a new category against which to assume binding commitments.

Business visitors are permitted in the following activities:

- Research and design;
- Marketing research;
- Training Seminars;
- Trade fairs and exhibitions;
- Sales;
- Purchasing; and
- Tourism personnel attending or participating in tourism conventions or tourism.

II. 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.

One of the main outcomes sought by CARIFORUM negotiators was increased market access for Caribbean service providers in all EU jurisdictions at both the state and sub-national levels in federal EC Member states in regard to mode 4 trade. According to the Caribbean Regional Negotiating Machinery (CRNM), the EC has opened up more than 90% of sectors on the WTO’s W/120 list of service sectors. In the case of the CARIFORUM states, the initial targets for market access to be granted by lesser (LDCs) and more developed (MDCs) were 65% and 75% respectively (expressed in terms of the share of W/120 sectors subject to scheduled commitments). However, it is estimated that some CARIFORUM states’ commitments averaged approximately 50%.

39 CRNM, Highlights re Services and Investment in the CARIFORUM-EU Economic Partnership Agreement, Brief No. 3200.3/EPA-02[08], (Kingston/Christ Church: CRNM, 2008), 2.
II.1 Is the EPA WTO-compatible?

A prime concern in negotiating a WTO-compatible services chapter in a PTA is whether it satisfies the conditions laid down in GATS Article V:1 (Economic Integration Agreements). These conditions stipulate that a PTA must: (i) have substantial sectoral coverage; (ii) provide for the absence or elimination of substantially all discrimination among the parties in the sectors covered through the elimination of existing measures and/or the prohibition of new or more discriminatory measures; and (iii) not raise the overall level of barriers to trade in services to third parties in respect of covered sectors or sub-sectors compared to the level applicable prior to such an agreement.

The definition of what precisely is meant by the expression ‘substantially all trade’ has long bedevilled trade officials and the WTO Committee on Regional Trade Agreement (CRTA) has, not surprisingly, been unable reach agreement on a way to translate the concept into consensually agreed quantitative thresholds. Some have argued that it should be meant as 80%, others 85% and still others 90%. The EC has argued that such a condition could be satisfied by liberalising 80% of covered trade. It remains wholly unclear whether the EPA fulfilled this requirement by liberalising 80% of the volume of trade or of the CPC list or some combination thereof. However, it should be noted that GATS Article V:3(a) provides that when developing countries are Parties to an economic integration agreement, flexibility is to be accorded in evaluating whether the agreement satisfies the three main legal tests of Article V.1. The EC seemed particularly keen to ensure that the EPA met any reasonable “substantially all trade” test since they did not want to find themselves open to a legal challenge in the WTO and compelled to extend the CARIFORUM EPA concessions on an MFN basis to the entire WTO membership.

CARIFORUM states were therefore under some pressure to make a services offer which would both be WTO-compliant and satisfy EC expectations. CARIFORUM negotiators proposed to include a standstill clause preventing the imposition of new restrictive measures as well as language committing the region to future liberalisation efforts. Given that GATS Article V:3 is specifically designed to lower the expected level and pace of liberalisation for developing countries, the CARIFORUM offer can be seen as easily fulfilling WTO strictures. The final text features a standstill provision for services (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.

II.2 Comparing commitments

II.2.1 EU Commitments

a. Investment

---

40 Information based on discussions with CARIFORUM officials.
41 As mentioned earlier, the standstill clause is found in paragraph 9 of the Annex IV. F. 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.’
In the non-services area, the EC has liberalised 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 services, the EC has made commitments 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. 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.

It comes as somewhat of a surprise that the EC has made commitments in education and health services (albeit only in regard to privately-funded services). In relation to health services, a number of the national treatment limitations scheduled under the GATS by states such as Austria, Belgium, France, Italy, Spain, Netherlands, Portugal, Poland, Estonia and Slovenia have been removed. These restrictions included limitations on the number of beds and the use of equipment, qualification requirements and funding from public resources. In lieu of many of these state-specific restrictions, the EPA contains an EC wide reservation which limits the participation of private operators in the health and social networks to concession and economic needs tests may apply. Such a broadly formulated restriction may in effect allow the EC states to apply limitations scheduled under the GATS.

It should be noted that most of the restrictions on commercial presence which the EC removed in the EPA still remain in the EC’s revised conditional GATS offer.42

In terms of education services, there are some very marginal improvements in the EPA relative to the EC’s GATS commitments. For example, Bulgaria, the Czech Republic and Slovakia have all removed some of their restrictions in the primary education services sub-sector.43 It should be noted however, that the EC has inscribed a region-wide entry which clarifies that participation of private operators in the education sector is subject to concessions.

The EC’s commercial presence schedule features a number of horizontal limitations, some of which are Community-wide 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

---

42 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.
43 For the Czech Republic and the Slovak Republic, the restrictions removed relate to the need to obtain authorisation from the competent authorities to establish and direct an education institution and to teach, and the condition of ensuring quality and level of education and suitability of school facilities. For Bulgaria, the restriction relates to the need to acquire authorisation from the Council of Ministers in order for a juridical person to establish or operate privately funded primary schools. The latter access is conditioned on the service provider complying with state educational and health requirements.
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, these commitments are in the air, road, pipeline transport for goods other that fuel and a number of services auxiliary to transport.

A few EC Member states have scheduled horizontal restrictions linked to the maintenance of economics needs test, 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.

As mentioned earlier, 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 these two 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 - 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 these broad sectors which 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 presence.44 There has been minimal market opening in the 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

44 EPA Annex IV.E, paragraph 2.
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 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.45

These commitments are subject 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 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 countries inscribed horizontal restrictions with respect to commercial presence. Among the main limitations listed are local incorporation/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 countries 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/economics needs tests. Other countries listed discriminatory licensing and registration requirements.

II.3 Documenting the extent of GATS+ liberalisation

The following section explores the EPA’s sectoral commitments in comparison with both Parties’ existing GATS commitments in assessing the degree to which the EPA’s liberalisation agenda extends beyond the GATS. The discussion focuses on the commitments of Barbados, Jamaica, Trinidad and Tobago and the Dominican Republic on the

45 Ibid., paragraph 5.
CARIFORUM side and the EC as a whole on the other. The section highlights the main areas where the EC’s commitment represents an improvement on its GATS offer.

II.3.1 CARIFORUM

Before proceeding, it is important to flag a few issues in terms of the methodology used to quantify the CARIFORUM commitments made under the EPA. Given that subsidy measures are specifically excluded from the agreement’s remit, the scope of the EPA’s services provisions is somewhat narrower than that of the GATS. Accordingly, in calculating the level of EPA commitments of selected CARIFORUM countries, even in the absence of horizontal or sectoral restrictions on commercial presence, the inscription ‘None’ (no restriction) is not considered as a full commitment since at least one trade restrictive measure can be applied, namely a discriminatory subsidy. This method was applied only to mode 3 given the prevalence of discriminatory incentive measures affecting such a mode of supplying services. However, in the case of Jamaica, where a horizontal limitation specified that the limitation on subsidies applied to all modes of supply, all of the sectors and modes in which the term “None” was scheduled were considered to be partial commitments.

a. Barbados

In the WTO’s inaugural round of services negotiations, Barbados undertook a very limited number of commitments in the business services, communications services, financial services and recreational, cultural and sporting services sectors. WTO data reveals that Barbados made commitments in 21 sub-sectors. By contrast, a dozen years later, under the EPA, Barbados made commitments in a wider range of sub-sectors. However, while the scope of its EPA commitments exceeded those found under the GATS, there was no significant deepening of existing GATS commitments (see Chart II.1).

Commitments additional to those found in Barbados’ GATS schedule were made in the business, communications, financial and recreational services sectors. New commitments were made in construction and related services, transportation services, distribution, environmental, health related and social services, tourism and other services not mentioned elsewhere. In terms of modal coverage, all of the new full commitments were made in respect of modes 1 and 2, reflecting the much greater salience of e-commerce today as a potent mode of supplying services relative to the environment that prevailed at the end of the Uruguay Round as well as rising comfort levels over the regulatory implications of cross-border supply. For modes 3 and 4, the level of commitment was roughly the same as found under the GATS. Where no full commitments were scheduled, partial commitments were typically made.
b. **Dominican Republic**

The Dominican Republic undertook commitments in some 60 sub-sectors under the GATS. These sub-sectors range from business services, communications, construction, financial services and health to tourism and transport services sectors. Under the EPA, the Dominican Republic improved on its existing GATS commitments in business and transport services and made commitments in new sub-sectors within these broad sectoral headings (see Chart II.2 below). In addition, new commitments were made in a number of previously unbound sectors such as education, environment, distribution, transport and recreational services sectors. A number of full commitments were made in regard to modes 1 and 2. By contrast, in the sectors being liberalised under modes 3 and 4, the Dominican Republic made only partial commitments.

**Source:** Authors’ calculations based on Barbados’ EPA and GATS schedules.
c. Jamaica

Jamaica undertook relatively more commitments in the GATS than its CARICOM neighbours. The WTO’s 2006 World Trade Profile indicates that Jamaica made commitments in 48 services sub-sectors. Jamaica’s GATS commitments are in the business, education, financial, communications, health, tourism, recreation and transport services sectors. Most of Jamaica’s EPA commitments are in new sub-sectors of broader sectors in which the country had already scheduled some GATS commitments; remaining commitments are in the previously unbound sectors of construction and environment. No full commitments were made for modes 3 and 4. As explained earlier, while in some sectors Jamaica may have made full commitments, the methodology used required that any trade-restrictive measure be counted against this entry. Hence, the limitation on subsidies in modes 1 to 4, in addition to other restrictions on modes 3 and 4, tended to reduce the value of the scheduled sectoral EPA commitments. (See Chart II.3 below).
d. Trinidad and Tobago

Under the GATS, Trinidad and Tobago undertook commitments in 32 sub-sectors. These commitments were in the business, communications, financial, recreational and transport services sectors. In the EPA, Trinidad improved upon its GATS commitments in communications and educational services. Only in mode 2 were there full commitments representing improvements on existing GATS commitments. Trinidad undertook new commitments in distribution, environment and services not listed elsewhere. All of its full commitments relate to modes 1 and 2, while partial commitments were made for modes 3 and 4 (see Chart II.4).
II.3.2 The EC

a. Commercial Presence

The EC’s EPA schedule contains a number of improvements over its latest DDA offer. For instance, 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 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 supply cross-border services via mode 1 does not reveal a significant level of improvement over its Members’ collective DDA offer. Much to the chagrin of the CARIFORUM states, many of the EC member states listed reservations on mode 1 or listed supply through this mode as unbound. 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.

Twenty-one EC Member states inscribed limitations on auditing services; 13 states maintained restrictions on architecture, urban planning and landscape architecture services. In medical and dental services, 21 states maintained their limitations; 23 states did the same for veterinary services and a similar situation obtained in services provided by midwives, nurses and physiotherapists and para-medical personnel where 26 (of 27) members scheduled limitations.

The maintenance of restrictions by the majority of EC member states is also found in the financial services sector and some major sub-sectors in entertainment services, tourism and travel related services as well as transportation services. There are some sectors in which all restrictions were removed, but in most cases this reflects the DDA offer. Such sectors include computer-related services, telecommunications equipment rental and a number of business services (namely, advertising, market research and opinion polling, management consultants, advisory and consulting services incidental to manufacturing) as well as postal and courier services.

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 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). A significant level of restrictions on mode 2 trade remains in legal advisory services as well as in the insurance and insurance-related sectors. Otherwise, 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 regulators. 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 countries, 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 few of the EC-15, for example France, have scheduled a number of 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) CSS and 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

---

47 Examples include advertising services, management consulting services and travel agencies and tour operators.
entertainment services sub-sector to access by CSS for the first time in a trade agreement as a significant gain. Some of the market access gains for the CARIFORUM group are illustrated in Chart 1.3 below.
CHART 1.3
Highlights of EC mode 4 market access commitments on CSS to CARIFORUM in the EPA versus the WTO

(Number of EC Member States)

<table>
<thead>
<tr>
<th>Sub-sector</th>
<th>Commitment:</th>
<th>CARIFORUM EPA</th>
<th>GATS</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td>Full</td>
<td>Partial</td>
</tr>
<tr>
<td>Legal Advisory Services in respect of public international law and foreign law (i.e. non-EU law)</td>
<td></td>
<td>10</td>
<td>14</td>
</tr>
<tr>
<td>Accounting and Bookkeeping Services</td>
<td></td>
<td>13</td>
<td>14</td>
</tr>
<tr>
<td>Taxation Advisory Services</td>
<td></td>
<td>13</td>
<td>14</td>
</tr>
<tr>
<td>Veterinary services</td>
<td></td>
<td>0</td>
<td>21**</td>
</tr>
<tr>
<td>Midwives services</td>
<td></td>
<td>1</td>
<td>21**</td>
</tr>
<tr>
<td>Services provided by nurses, physiotherapists and paramedical personnel</td>
<td></td>
<td>0</td>
<td>22**</td>
</tr>
<tr>
<td>Computer and Related Services</td>
<td></td>
<td>12</td>
<td>12</td>
</tr>
<tr>
<td>Research and Development Services</td>
<td></td>
<td>0</td>
<td>27</td>
</tr>
<tr>
<td>Chef de cuisine services</td>
<td></td>
<td>0</td>
<td>27**</td>
</tr>
<tr>
<td>Fashion Model Services</td>
<td></td>
<td>0</td>
<td>27**</td>
</tr>
<tr>
<td>Maintenance and repair of vessels</td>
<td></td>
<td>14</td>
<td>13</td>
</tr>
<tr>
<td>Maintenance and repair of rail transport equipment</td>
<td></td>
<td>15</td>
<td>12</td>
</tr>
<tr>
<td>Maintenance and repair of aircraft and parts thereof</td>
<td></td>
<td>15</td>
<td>12</td>
</tr>
<tr>
<td>Site investigation work</td>
<td></td>
<td>16</td>
<td>11</td>
</tr>
<tr>
<td>Travel Agencies and Tour Operators Services (including tour managers)</td>
<td></td>
<td>14</td>
<td>13</td>
</tr>
<tr>
<td>Tourist Guides Services</td>
<td></td>
<td>1</td>
<td>21**</td>
</tr>
<tr>
<td>Entertainment Services other than audiovisual services (including Theatre, Live Bands, Circus and Discotheque Services)</td>
<td></td>
<td>0</td>
<td>26</td>
</tr>
</tbody>
</table>

Source: Data based on information from the CRNM

Explanatory Notes:
ENTs are considered to be partial limitations to market access
**- the only existing limitation is an ENT
II.4  Rules for services trade

II.4.1  Subsidies and emergency safeguard measures

Similar to the situation prevailing at the multilateral level, the EPA Title on Establishment and Investment features no disciplines dealing specifically with the unfinished GATS agenda of subsidies and emergency safeguard measures in services trade. As noted already, the EPA is arguably GATS-minus in the area of subsidies to the extent that Article 60(3) specifically carves-out subsidies for services and investment from the scope of the EPA. A measure of the policy sensitivity prevailing on this issue, reflecting a clear collective preference for regulatory inaction at the preferential level as well, is the fact that both the EC and CARIFORUM in their respective schedules have also inscribed horizontal limitations on the granting of subsidies. In the case of Jamaica and Belize, a limitation has also been entered on the granting of national treatment for subsidies involving all modes of supply. It is therefore abundantly clear that the Parties had no intention to discipline the use of subsidies under the EPA.

The EPA is also bereft of any specific language on the thorny question of emergency safeguard measures, an issue where the generally hostile negotiating stance taken by EC Members, notably towards ASEAN countries in the context of discussions in the Working Group on GATS Rules, most likely deterred any desire or attempt by CARIFORUM to negotiate seriously on this issue.

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.48 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 recently in the GATS Working Group on Domestic Regulation (e.g. the

---

48 CARIFORUM-EC EPA, Article 86.
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 to 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.

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 increasingly belies the notion that PTAs are potentially useful rule-making laboratories. For the most part, and with few exceptions, they are not. In some sense though, it must be recognised that the EPA has succeeded in establishing disciplines on a sectoral basis.

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 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. As a first step in the EPA recognition process, the relevant professional bodies in the

---

49 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
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 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 their 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 co-operation. 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 represent a codification of GATS practice. However, whereas in the multilateral system member states are given the option to voluntarily sign on to some of these texts (e.g. the Understanding on commitments in financial services, the Reference paper on basic telecommunications), they form an integral and binding part of the EPA. The following depicts some of the rules governing trade in key sectors subject to EPA disciplines.

a. Financial Services

There are several similarities between the EPA provisions on financial services and the GATS Annex on Financial Services. First, they both contain provisions on domestic regulation which allow members to take measures for prudential reasons. The EPA text reaffirms that the Agreement cannot be construed to require the Parties to disclose disguised restriction on trade in services. In addition, the GATS encourages that wherever appropriate, recognition should be based on multilaterally agreed criteria.

50 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.
information relating to individual consumers or any confidential or proprietary information in the possession of public entities.

Like the GATS, the EPA also explicitly excludes financial services provided by public entities or a private entity performing the functions of a central bank or authority, when exercising those functions. In the same vein, the EPA explicitly allows the Parties or their entities to exclusively conduct or provide in their territories activities or services forming part of public retirement plan or a statutory system of social security. The Parties cannot, however, rely on this exclusive right if the activities are carried out by financial service providers in competition with other public entities or with private institutions. The EPA also permits the conduct or provision of activities or services for the account or with the guarantee or using the financial resources of the party or its entities. However, while the Annex on Financial Services makes the latter activities or services subject to the disciplines of the GATS if they are provided by financial service providers in competition with public entities and private institutions, the EPA does not. Seen this way, the EPA’s financial services provisions can be interpreted as broadening the scope of excluded financial services transactions relative to the GATS.

The EPA also features provisions not found in the Annex on Financial Services. These include provisions on transparency, new financial services and data processing, most of which are also found in the NAFTA and some of which appeared as scheduling possibilities (though not rules) under the GATS Understanding on commitments in financial services.

Article 105(1) of the EPA addresses the issue of prior comment on proposed regulatory changes, albeit in a hortatory manner. It calls on the Parties to endeavour to provide in advance to any interested Party all measures of general application which any of the Parties proposes to adopt in order to afford such persons an opportunity to comment on the proposed measure. Paragraph 2 of the same Article requires the Parties to make available to interested Parties requirements for completing applications relating to the supply of financial services. In addition, if requested, the Parties are required to inform the applicant of the status of its application and to notify the applicant without undue delay if it requires additional information from it. The latter two provisions mirror the rules found in the general section of the Agreement’s regulatory framework. The final section of Paragraph 2 requires the Parties to endeavour to facilitate the implementation and application in their territory of internationally agreed standards for regulation and supervision in the financial services sector. This provision remains as a best endeavours clause only as CARIFORUM countries perceived it as an attempt to regulate their financial services industry through the backdoor by making them comply with OECD country standards in this area. This issue remains a sensitive one in the region owing to past tensions between some CARIFORUM states and the OECD over matters of tax policy, offshore financial market regulation and money laundering.

The EPA contains a commitment to permit a financial supplier of a Party to provide any new financial service similar to those services which home country financial services suppliers are allowed to provide under their domestic law in like circumstances. The Parties preserve the right to determine the juridical form through which financial services may be provided in their territories and may require authorisations for the provision of the service. Finally
the decision to permit the service must be made within a reasonable time frame and may only be turned down on prudential grounds. These concepts essentially mirror those found in Article 1407(1) of the NAFTA.

The EPA further replicates NAFTA Article 1407(2) in permitting financial service suppliers to transfer data in electronic or other forms into and out of their territory, to engage freely in data processing where such processing is required in the ordinary course of business of a financial service supplier. On these two latter points, the EPA goes beyond the GATS. One element of the EPA’s data processing provisions that is found neither in the NAFTA or the GATS is the requirement that adequate safeguards be adopted for protecting the privacy and fundamental rights of - and freedom on – individuals, especially with regard to the transfer of personal data. The inclusion of the latter provision is rooted in EC Directives on data protection and dovetails with the Agreement’s chapter on protection of personal data which was agreed to by the CARIFORUM states with a view to enhancing their domestic regulatory framework and, by extension, business opportunities.

b. Telecommunications Services

The section on telecommunications services builds on the principles established in the Reference paper on pro-competitive regulatory disciplines appended to the 1997 GATS Agreement on Basic Telecommunications. However, whereas the Reference paper is voluntary, the EPA advances a set of legally binding obligations governing the regulation of trade in the sector.

The EPA’s definition of telecommunications services differs from that in the GATS Annex on telecommunications services. Specifically, the EPA defines telecommunications services as “all services consisting of the transmission and reception of electromagnetic signals and do not cover the economic activity consisting of the provision of content which requires telecommunications for its transport.”51 Such a more narrow, precise, definition, when coupled with the inclusion of an Understanding on Computer Services in the EPA, affirms the desire of EC negotiators to draw a clear distinction between telecommunications, computer and audiovisual services.

While both the EPA and the Reference paper stipulate that regulatory authorities in telecommunications must be legally and functionally independent from any supplier of telecommunications services and that regulatory decisions and procedures must be impartial, the EPA further mandates that the regulatory authority must be sufficiently empowered to regulate the sector.52 In addition, a supplier affected by the decision of a regulatory authority enjoys a right of appeal before an appellate body that must be independent of the Parties involved. If such an appellate body is not of a legal nature, then its decisions can be subject to review by an impartial and independent judicial authority.53 Further, decisions taken by appellate bodies must be effectively enforced. All of the above provisions represent an evolution of multilateral rules, offering evidence of the iterative nature of rule-making advances between PTAs and the WTO.

51 CARIFORUM-EC EPA, Article 94 (1) a.
52 Ibid., Article 95:2
53 Ibid., Art. 95:2
The EPA also establishes a framework governing how and when authorisation to provide telecommunications services is to be granted, which is another GATS+ concept. Article 96(1) of the EPA states that, as much as possible, provision of services shall be authorised following mere notification. The agreement gives the Parties the option to use a licensing system to address issues of attribution of telephone numbers and radio frequencies.

The licensing rules in the EPA differ slightly from those found in the GATS Reference Paper (RP). While both agreements require that all licensing criteria be made publicly available and that decisions on licensing applications be reached within reasonable periods of time, the EPA excludes the RP obligation to make the terms and conditions of individual licenses publicly available. Both the RP and the EPA give the applicant the right to be informed of the reasons for the denial of its application, but only the EPA provides for recourse to an appellate body by would be licensees in cases where a license is alleged to have been unduly denied. As well, the EPA stipulates that the fees required for granting a license are not to exceed the administrative costs normally incurred in the management, control and enforcement of the applicable license.

The EPA sets out rules on interconnection far more clearly than is the case under the GATS, reflecting in some measure some of the lessons flowing from WTO jurisprudence in the sector (i.e. the Mexico-Telecommunications dispute). First, any supplier authorised to provide interconnection services has the right to negotiate interconnection with other providers of publicly available telecommunications networks. Interconnection should in principle be agreed on the basis of commercial negotiation. Second, regulatory authorities must ensure that the suppliers that acquire information from another undertaking during interconnection negotiations use that information solely for the purpose for which it was supplied and respect the confidentiality of the information transmitted or stored. Other interconnection rules essentially mirror those found in the GATS Reference Paper. This is also the case as regards rules on anti-competitive safeguards and the allocation and use of scarce resources.

The EPA spells out more elaborate rules on the issue of universal service obligations (USOs). Both the Reference paper and the EPA: i) permit Parties to choose the kind of USO that they wish to maintain; and (ii) affirm that such obligations are not anti-competitive per se, provided that they are administered in a transparent, objective and non-discriminatory way and the administration of such obligations must be neutral with respect to competition and not more burdensome than necessary for the type of universal service defined. The EPA also adds guidelines about how suppliers should be designated as eligible to provide universal service and the determination of whether to compensate a supplier that is unfairly burdened by the USO or to share the net cost of USOs. The EPA also makes it mandatory that (i) directories of all subscribes be made available to users and that such directories be updated on a regular basis and (ii) organisations that provide the service of compiling directories apply the principle of non-discrimination to the treatment of information that has been provided to them by other organisations.

---

54CARIFORUM-EC EPA, Article 100.
Unlike the GATS Reference paper, the EPA tackles the issue of confidentiality of telecommunications and related traffic data. On the question of disputes arising between the suppliers of telecommunications services in connection with rights and issues deriving from the EPA’s regulatory chapter, the regulatory authority, once requested to intervene, must issue a binding decision to resolve the dispute. Where such disputes involve cross-border trade in services, the regulatory authorities are to co-ordinate their efforts in helping to resolve the conflict.

The consent of the CARIFORUM region to the above rules must be seen against the backdrop of the far-reaching domestic and region-wide telecommunications reforms enacted by many countries in the region in recent years. For the most part, negotiations in the sector confronted few difficulties.

c. **Maritime Transport**

Another 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 that 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.”

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

---

55 Cotonou Agreement 2000-2020, Article 42, para. 4
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.\textsuperscript{56}

d. Tourism

The EPA provisions dealing with tourism services offer a novel 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, promoting sustainable forms of tourism, compliance with environmental and quality standards as well as development co-operation and technical assistance.

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,\textsuperscript{57} many of which in the EU. Specifically, 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, \textit{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 is a case of the incipient internationalisation of competition law, albeit on a sectoral basis, as is the case with the 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 and perhaps reflects the dynamics of negotiations. 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.\textsuperscript{58} With respect to the non-binding provisions, it is likely that while such elements were of more importance to the CARIFORUM countries than 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 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.

\textsuperscript{56} Ibid. para. 3

\textsuperscript{57} CRNM, “The Treatment of Tourism in the CARFORUM-EC Economic Partnership Agreement,” Brief No. 3200.3/EPA-09[08], (Kingston/Christ Church: CRNM, 2008), 2.

\textsuperscript{58} Ibid., 1.
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. This includes 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 accounts59 at the regional and local level.

e. 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. 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 is 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 should become permanent and legally binding.”60 However, with the fate of the standstill remaining unsettled, the WTO’s December 2005 Hong Kong Ministerial Declaration simply extended the moratorium on the imposition of customs duties on deliveries by electronic transmissions until the next WTO Ministerial.61 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.

In comparison with other PTAs, notably those to which the United States is a Party, while the EPA is not the most advance in terms of establishing rules for e-commerce, it does come close to some of the more advanced agreements. 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

59 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 online at http://www.unwto.org/statistics/index.htm and http://ec.europa.eu/enterprise/services/tourism/tourism_satellite_account.htm.


61 WTO, ‘Hong Kong Ministerial Declaration,’ (Geneva: WTO, 2005), item 46.
some exceptions for non-conforming measures. In addition, the scope of dialogue/co-
operation is somewhat wider as it also encompasses 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/co-operation in both the EPA and the US-Chile FTA are open-ended and hence
issues may be added as the Parties deem fit. In one respect, the US-Singapore FTA
provisions on e-commerce are more advanced than the EPA as it prohibits discrimination
between domestic products and those of the other Party, with the exception of some non-
conforming measures. In other respects, however, the EPA is more advanced as the US-
Singapore agreement contains no agenda for regulatory dialogue or co-operation (aid for
trade) provisions.

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
between them, in particular by co-operating on market access and regulatory issues related
to e-commerce. 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.

II.5 Co-operation & 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 a 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 it 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 or for 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

---

62 United States-Chile Free Trade Agreement, Chapter 15.
63 United States-Singapore Free Trade Agreement, Article 14.3 (3).
64 Association Agreement between the European Union and Chile, Article 104.
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.”65 Rather, it should be considered as “one strategic instrument in a range of economic development strategies.”66

The tenth EDF covers the period from 2008 to 2013 and provides an overall budget of €23 billion.67 Of the total, €22 billion is allocated to ACP countries. The amount for the ACP countries is divided accordingly: €18 billion to the national and regional indicative programmes, € 2.7 billion to intra-ACP and intra-regional cooperation and €1.5 billion towards investment facilities.68 An innovation in the tenth EDF is the creation of "incentive amounts" for each country.69 Diagram II.2 below situates development financing earmarked for investment, services and e-commerce within the broader architecture of development assistance under the Cotonou Agreement.

**DIAGRAM II.2**

Situating development co-operation funding on investment, services and e-commerce

---

66 Ibid.
69 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 online at [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), accessed April 20, 2008.
According to the Joint Declaration on Development Co-operation, which is annexed to the EPA and constitutes an integral part of the EPA, 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 abovementioned incentive tranche, which in this case amounts to €32 million.

Of the €165 million being made available, CARIFORUM states have indicated that the region intended to devote thirty percent of the 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 plans (NIP) but must identify two priority projects for such additional funding. The Dominican Republic and Jamaica have already announced that they will be using some of the financing under their respective NIPs for purposes of EPA implementation. Much of the support that the EC extends to the establishment of the CSME and Caribbean regional integration more broadly will be of direct or indirect use in implementing the EPA commitments.

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 have reaffirmed their desire that an equitable share of Member States’ AfT 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 coming from the Commission and the other half from the Member States.70 Half of this sum is allocated to ACP countries.

The minimum cost of implementing the EPAs provisions on Investment, Trade in Services and E-Commerce and addressing the capacity constraints at the national and regional levels has been estimated at €15.6 million.71 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. While there are some basic rules

---

71 CARICOM Secretariat, “Implementation of the CARIFORUM-EC Economic Partnership Agreement.” (Georgetown: CARICOM Secretariat, 2008), 10. 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.
about transparency and accountability, the EC will not be playing a role in the management of the Fund. One of the aims of the RDF is to increase the speed at which funds are disbursed to the CARIFORUM countries.

The development priorities identified in Part I of the EPA include the provision of: (i) technical assistance to build, human, legal and institutional capacity in the CARIFORUM states in order to facilitate compliance with the commitments of the EPA; (ii) assistance for capacity building and institution building for fiscal reform; (iii) the provision of support measures aimed at promoting private sector and enterprise development; (iv) the diversification of CARIFORUM exports of goods and services through investment and the development of new sectors; (v) enhancing the technological and research capabilities of the CARIFORUM states so as to facilitate the adoption of - and compliance with - internationally recognised SPS measures, technical standards and labour and environmental standards; (vi) the development of CARIFORUM innovation systems; and (vii) the development of infrastructure in support of trade.  

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 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 in the supply of services and facilitating the implementation of scheduled commitments.

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.  

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

---

72 CARIFORUM-EC EPA, Article 8(1).
73 Ibid., Article 121 (2).
have shied away from the WTO’s plurilateral set of disciplines on government procurement under the GPA, the CARIFORUM EPA includes provisions on all the above issues.

Even more remarkable is the fact that two of the above issues (investment and government procurement) found a place in the EPA even though CARIFORUM countries 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 in 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 nor are they signatories to the multilateral 1994 Government Procurement Agreement (GPA). Nevertheless, the CARICOM countries did not negotiate in a complete vacuum as the integration grouping has been developing a Protocol on Government Procurement within the context of the CARCOM Single Market and the broad contours of the Protocol had already been delineated. By contrast, the Dominican Republic already has an open public procurement market.

In its 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. In the specific context of the ACP-EPA negotiations, perhaps two motivations explain the EC’s desire to include a procurement chapter. First, and most straightforwardly, the EPAs offer the EC the possibility of improved access to ACP public procurement markets, all the more so as ACP countries are not signatories of the WTO’s GPA and the Cotonou Agreement did not feature disciplines and market opening in this area (as for services, investment and competition policy). Second, the EPAs provide a platform to promote potential economy-wide gains on the part of ACP countries by improving ACP business climates, helping in the fight against corruption, improving domestic regulatory regimes and administrative procedures and affording cash-strapped ACP governments better value for money in procurement transactions and foster the establishment of firms capable of tendering from one island into the market of another.

For its part, the CARICOM states doubtless rationalised that the EPA could help speed up the pace of their own regional integration scheme and help overcome intra-regional resistance to procurement liberalisation, a perennially thorny issue in small markets often characterized by high degrees of concentration favouring local or foreign established dominant suppliers. Another major consideration in the CARIFORUM’s decision to conclude a public procurement chapter is that the nature of the EPA commitments relate primarily to matters of transparency rather than to market access and hence the region had

---


48
no great difficulty in accepting the conclusion of such a chapter as it was considered not to unduly constrain the region’s future plans for establishing a public procurement regime.

The provisions of the 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 the EPA applies. For the CARIFORUM states, the thresholds for supplies and services are set at SDR 155,000 each, while the threshold for construction work is set at SDR 6,500,000. For the EC, the thresholds for supplies and services is set lower, at SDR 130,000, as is that for construction work at SDR 5,000,000. Such variable geometry is meant to offer some measure of additional protection to CARIFORUM suppliers in their home markets. The EPA thresholds 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” and without prejudice to the Chapter. This concept of an eligible supplier does not appear in the GPA. This essentially means that the decision to determine who is an eligible supplier lies solely within the discretion of the procuring state. In effect, such a provision serves to limit 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.

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 what prevails in 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 revision. Some of these elements are discussed in greater detail in Annex 1.

III.2 Competition Policy

75CARIFORUM-EC EPA, Article 166(5).
77This 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 eliminating 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 online at http://www.wto.org/english/tratop_e/gproc_e/overview_e.htm.
The GATS features two provisions whose aim is to help Members address the issue of anti-competitive behaviour - Article VIII on monopolies and exclusive service suppliers and Article IX on business practices. 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 the Member’s MFN obligation or its specific commitments. The Member is 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 the Member has taken a specific commitment, the Member is required to ensure that the suppliers do not abuse their dominant position or act in a manner that is inconsistent with the Member’s obligations. In terms of remedies, if 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 Art 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.

Beyond the two rather timid provisions described above and the 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”.78

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. 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 competition authority.

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 nuanced 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 that that taken in some of the other agreements entered into by the EC. 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. In the South African FTA, the Parties merely reaffirm their respective commitments made in the Fourth Protocol (Telecoms) and Fifth Protocol (Financial Services) to the GATS. The Mexican FTA does not contain any sectoral competition rules and the Chilean FTA only contains rules based on the Fourth Protocol to the GATS. A more conservative approach seems to have been adopted in these latter three FTAs. The question remains of whether the EPA may set a precedent for the EU by influencing its negotiating positions in other regional integration agreements and future WTO negotiating rounds. In REPs, this precedent could see the EC pushing for competition disciplines in the services sectors in which it has a keen interest while contenting itself with the application of the general competition rules in sectors of where anti-competitive conduct may be less prevalent. In the WTO context, this approach may prove to be one way of building a case for incremental competition rules on a sector by sector basis.

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. 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 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 legislation will 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 anti-competitive business practices which fall within the scope of the chapter and are taking place in the latter Party’s territory. In particular, Article 128(3) provides for co-operation among competition authorities and states that one authority may inform the other authorities

---

79 Trade, Development and Cooperation Agreement between the European Community and the Republic of South Africa, Article 29.3.
of any enforcement proceeding being carried out in specific circumstances such as the activity taking place partly or wholly in the jurisdiction of the other authorities; the remedy to be imposed would require the prohibition of conduct in the other Parties; or the activity involves conduct believed to have been required, encouraged or approved by the other Party or a signatory CARIFORUM state.

It seems somewhat odd that the above obligation to inform is not mandatory in respect of the first two instances as it seems to encroach upon the other state’s sovereignty. However, this anomaly has can be understood as reflecting in part the fact that CARIFORUM and the EC do not have comparable competition agencies.

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 remain, 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'. It has been argued that the obligation that any measure that distorts trade shall not be maintained or enacted gives primacy to trade policy objectives over and above any other objectives. In addition, questions have been raised about the ability of resource-scarce countries to be able to review all of their measures in light of such a broad requirement that the measures in question should not distort trade and to make them compatible with the agreement within a five year timeframe.

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.

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 market environment) so that, by the fifth year after the entry into force of the EPA, no

---

80 South Centre, ‘Competition Policy in Economic Partnership Agreements (CARIFORUM Text)’, Analytical Note, SC/AN/TDP/EPA/15, Fact Sheet No 8, Geneva: South Centre, 13.
81 Ibid, 13.
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 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) 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. This arguably represents a further example of WTO+ rule-making.

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 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. 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. 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.

III.3 Protocol on Cultural Co-operation

A 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 PTAs, 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 EU attitudes towards the subject matter in a trade policy context, hitherto marked by a desire to preserve maximum policy autonomy by eschewing any commitments in trade agreements and, in the case of the DDA, by refusing to direct

---

83 CARIFORUM-EC EPA, Article 127 (1).
84 CARIFORUM-EC EPA, Article 130 (2).
85 Ibid., Article 127 (2).
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 combination of binding and best endeavour 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. The protocol can 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 into 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 such as visual, plastic and performing artists and instructors, composers, authors, providers of entertainment services and other similar professionals and practitioners involved in cultural activities such as the recording of music or contributing an active part to cultural events such as literary fairs, festivals, etc. 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. Lessons for African EPAs

For the African members of the ACP grouping, it has now become clear that the EU 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 EU. 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 reliance on the EU’s GSP scheme or, for the least developed ACP countries, exploiting the benefits under the EU’s 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 countries to negotiate chapters on services, investment and other behind the border issues in an EPA context, there is little doubt that the EU 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 CARFORUM 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 art. 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 services and bringing them to markets at home and abroad. The novel AfT components embedded into the EU-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 EU 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 art. 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 cooperation 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 liberalization 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 liberalization 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-EU 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 EU-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 crystallized 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 BITs provided more rights than obligations to investors led CARIFORUM countries to use the EPA to embed greater rights for host countries.

The CARIFORUM-EU 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 EU. 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 made the conclusion of an EPA with the EU 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-EU service and investment compact is that EPAs may be a platform for the internationalization 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-plus issue area should be the negotiation of regulatory frameworks (either on a sectoral or general basis) and the provision of needed development cooperation assistance to ensure the fulfilment of commitments in this regard. For the most part, African countries have consistently identified weak regulatory capacity as a particular area that has hindered 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 EU 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 reveals 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-plus 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-plus 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 EU 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-EU 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 EU-African EPA. Accordingly, the range of behind the border issues to be tackled under such agreements may need to be narrowed.

Concluding Remarks

The CARIFORUM-EU EPA represents an important, precedent-setting, evolution in PTAs. 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 CARIFORUM EPA can be considered a WTO-plus 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. 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-plus character of liberalization 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-plus advances are also illustrated by the improvements in access to the EU 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.

86 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.
The EPA can be described as a successful attempt to give operational meaning to the principles and objectives of GATS art. IV (Increasing Participation of Developing Countries) as the EU 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 EU.

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

For African economies, the inclusion of chapters on services and investment could prove useful in enhancing domestic and regional investment climates and in promoting greater competition if this is done in a flexible way. As there are substantial differences between the African EPA groupings and CARIFORUM countries, the chapters on services and investment in African EPAs would arguably not be as comprehensive as those found in the CARIFORUM agreement, while the formulas of variable geometry that the CARIFORUM EPA contains could be further adjusted. Some important lessons for African groupings are the following.

First is the need to ensure that both the wider EPA and its services and investment chapters provide for development cooperation benefits that adequately support the implementation of any commitments made. The rules and commitments to be included in services and investment chapters should be carefully balanced with the conditions of asymmetrical reciprocity. Second, African economies will need more time than the CARIFORM group to build up regulatory and productive capacity. A related issue is to get the sequencing of liberalization right. Third, if African groups would like to have more flexibility in these EPA chapters, they should pay particular attention to formulating their own proposals on the nature of required flexibilities. Although the EU–CARIFORUM EPA is development friendly, there is nothing automatic in securing such an outcome and it requires vigilance at the negotiating table. A clear and well-articulated development strategy should be present to inform the development thrust of the 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.
EPAs may be a platform for the internationalization of the regulation of key service industries on a sector-by-sector basis. Actively shaping these regulatory frameworks allows developing countries, in an EPA context, to ensure that their interests are taken on board. Targeted technical assistance funding and capacity building activities should be used to strengthen the capacities to implement and use these regulations by the African countries.
Annex 1. The Treatment of Government Procurement in the EPA: Similarities and Differences with the 1994 GPA

**National Treatment**

Article III of the 1994 GPA commits Parties to offer immediate and unconditional national and most favoured nation treatment to other signatories and in effect provides them with market access opportunities. By contrast, the EPA does not provide suppliers with market access opportunities. According to the CRNM, the EPA’s national treatment provisions as contained in Article 167.1 do not give rise to market access obligations, but rather merely aim to discourage discrimination in the administration of the procurement process once the eligibility of the supplier has been established by the procuring state. As noted earlier, the determination of the eligibility of the supplier is at the sole discretion of the state.

Most of the EPA’s national treatment provisions for public procurement are couched in best endeavours language. The EPA aims to discourage discrimination in three ways. First, CARIFORUM states should try not to discriminate against locally established suppliers from another CARIFORUM state. This is aimed at supporting the creation of regional procurement markets. Second, both the EC and CARIFORUM endeavour not to discriminate against a supplier established in either Party on the basis that the goods and services offered are from either Party. Third, neither the EC nor CARIFORUM are to treat a locally established supplier less favourably on the basis of degree of foreign affiliation to - or ownership by - operators or nationals of any of the Parties. In contrast to the first two non-discrimination clauses, the latter provision is legally binding.

**Exclusions**

Unlike the 1994 GPA, the EPA carves out a number of activities from the scope of the Agreement. These include, among others, (i) the acquisition or rental of land; (ii) existing buildings or immovable property or the rights thereon; (iii) non-contractual agreements or any form of assistance that a Party or CARIFORUM state provides; and (iv) the procurement or acquisition of fiscal agency or depositary services, liquidation and management services for regulated financial institutions, or services related to the sale redemption and distribution of public debt, including loans and government bonds, notes and other securities. The latter exceptions are very much along the lines of those contained in the Revised GPA.

**Qualification of Suppliers**

Provisions dealing with the qualification of suppliers represent a merger of language found both in the 1994 GPA and the revised GPA. One major difference between the EPA and the GPA/revised GPA is that the former agreement does not provide for most favoured nation treatment or national treatment in relation to the qualification of suppliers.

---

One notable EPA innovation over the GPA is that neither EPA Party is permitted to impose a condition that, in order for a supplier to participate in a procurement, it must have been previously awarded one or more contracts by an entity of that Party or the supplier has work experience in the relevant territory. As the proverbial “new kid” on the EC procurement block, such a provision is clearly of benefit to CARIFORUM suppliers.

**Special & Differential Treatment**

In the EPA, the CARIFORUM MDCs have two years from the date of entry into force of the Agreement to implement the public procurement provisions. There is built-in flexibility to allow an additional year to individual CARIFORUM states requiring an extension. CARICOM LDCs and Haiti have been given an implementation period of five years. While the 1994 does not make mention of any implementation periods, the Revised GPA features implementation periods are similar to those found in the EPA.

The EPA does not contain any explicit exemption from the non-discrimination principle in public procurement on developmental grounds. However, Article V of the 1994 GPA allows developing countries to derogate from the non-discrimination principle on the grounds of safeguarding their balance of payments position, promoting the establishment or development of domestic industries, supporting industrial units which are wholly or substantially dependent on government procurement and encouraging their economic development through regional or global arrangements among developing countries. The exclusion of these S&D provisions from the EPA makes sense in light of the fact that CARIFORUM countries would not need to make use of such flexibilities as they remain free to limit access to the public procurement market. Nonetheless, given the in-built negotiating agenda on market access contained in paragraphs 3 and 4 of Article 167.1, CARIFORUM countries would most certainly be well advised to consider including the S&DT flexibilities of the 1994 GPA in any future public procurement chapter with the EC.

**Co-operation**

Under the 1994 GPA, the type of technical assistance to be provided is described in general terms. By contrast, the EPA is more specific and co-operation activities include facilitating support and establishing contact points; the exchange of experiences and information about best practices and regulatory frameworks; establishment and maintenance of appropriate systems and mechanisms to facilitate compliance with the obligations of the chapter; and creation of an online facility at the regional level for the effective dissemination of information on tendering processes.

---

REFERENCES

Association Agreement between the European Union and Chile.


CARIFORUM-EC Economic Partnership Agreement.


CRNM. ‘Understanding the Nature and Scope of the Public Procurement Chapter of the CARIFORUM-EC EPA’, Brief No.: 3200.3/EPA-13[08], Kingston/Christ Church: CRNM, 2008


Trade, Development and Cooperation Agreement between the European Community and the Republic of South Africa.


United States-Chile Free Trade Agreement.