

Kelsey, Jane

**Research Report**

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**LEGAL ANALYSIS OF SERVICES AND  
INVESTMENT IN THE CARIFORUM-EC EPA:  
LESSONS FOR OTHER DEVELOPING  
COUNTRIES**

Jane Kelsey



# **RESEARCH PAPERS**

**31**

## **LEGAL ANALYSIS OF SERVICES AND INVESTMENT IN THE CARIFORUM-EC EPA : LESSONS FOR OTHER DEVELOPING COUNTRIES**

**PROF. JANE KELSEY<sup>1</sup>**

**SOUTH CENTRE**

**JULY 2010**

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## ACRONYMS

ACP	African, Caribbean and Pacific
ASEAN	Association of South East Asian Nations
BIT	Bilateral Investment Treaty
CARICOM	The Caribbean Community comprising Antigua & Barbuda (ATG), Bahamas (BAH), Barbados (BRB), Belize (BEL), Dominica (DOM), Grenada (GRD), Guyana (GUY), Haiti (HAI), Jamaica (JAM), St Lucia (LCA), St Kitts & Nevis (KNA), St Vincent and Grenadines (VCT), Suriname (SUR)
CARIFORUM	Grouping of CARICOM and the Dominican Republic (DRA) created for the purposes of interaction between Caribbean ACP states and the European Union
CaPRI	Caribbean Research Policy Institute
CCIN	Caribbean Cultural Industries Network
CPC	United Nations Central Product Classification
CPCprov	United Nations provisional Central Product Classification
CPC 1.0	United Nations Central Product Classifications, first revision
CRNM	Caribbean Regional Negotiating Machinery
CSME	CARICOM Single Market Economy
CSS	Contractual Services Supplier
DR	Dominican Republic
EC	European Communities
ENT	Economic Needs Test
EPA	Economic Partnership Agreement
EU	European Union
FTA	Free Trade Agreement
GATS	(WTO) General Agreement on Trade in Services
GATT	(WTO) General Agreement on Tariffs and Trade
ILO	International Labour Organisation
IMF	International Monetary Fund
IP	Independent Professional
ISIC	International Standard Industrial Classification of All Economic Activities
ISICRev.3	International Standard Industrial Classification of All Economic Activities, Third Revision
LDC	Least Developed Country
MA	Market Access
MFN	Most Favoured Nation
MRA	Mutual Recognition Agreement
NAFTA	North American Free Trade Agreement
NGO	Non-government Organisation
NT	National Treatment
PACP	Grouping of fourteen Pacific Islands states within the ACP for the purposes of interacting with the EU
TRIMS	(WTO) Agreement on Trade-related Investment Measures
UNESCO	United Nations Educational, Scientific and Cultural Organisation
SP	Stabilization Programme
USO	Universal Service Obligation
W/120	WTO Document on Classification of Services Sectors
WTO	World Trade Organisation



## OVERVIEW OF LEGAL RISKS

The malaise that afflicted the global South from a financial crisis that originated in the United States and Europe has provided a timely reminder that unrestrained global markets can have devastating economic and social consequences, and that governments have both the right and responsibility to regulate in the interests of their people. Paradoxically, the crisis coincided with growing pressures and incentives for governments in the global South to bind themselves to a model of development that is based on the liberalisation, deregulation and globalisation of services and foreign investment and to restrict their regulatory autonomy through free trade agreements (FTAs).

The number, complexity and range of these agreements is staggering. Studies and assessments that are funded through technical assistance to governments tend to focus on the projected gains from these agreements or on adjustment costs and strategies. Technically informed analysis of their legal implications lag far behind the negotiations because such analyses are speculative without access to a text. Critical legal analyses are even more rare, because they are swimming against a strong tide.

The development of a template agreement by the EU has made it easier to project the implications for other countries in advance. This paper draws on the precedent-setting Economic Partnership Agreement (EPA) between the CARIFORUM states and the EU, which was initialled in December 2007, signed in October 2008 and provisionally applied from December 2008 pending completion of procedures necessary for it to enter into force. The report identifies legal risks arising from the text that CARIFORUM states have the opportunity to revisit in their forthcoming five year review, and aims to provide an early warning of similar risks for ACP regions and other states that are considering, or already engaged in, negotiations on services and investment with the EU.

The analysis reveals five principal categories of legal risk: (i) asymmetry in favour of the EU; (ii) the unpredictable and unlimited multiplier effect of most-favoured nation and 'regional preference' obligations; (iii) an externally imposed regional integration model; (iv) closure of policy space; (v) complexity, uncertainty and a heightened risk of errors with no structured opportunity to correct them. The following summary provides cross-references to the relevant sections in the report.

### 1. Asymmetry in favour of the EU

Title II of the CARIFORUM-EC EPA is a strongly WTO-plus agreement with almost no explicit development sensitivities. It establishes a dangerous precedent for other countries from the global South, especially for ACP states that have no legal obligation to negotiate on services and investment and have been more reserved than their CARIFORUM counterparts regarding the desirability, relevance and capacity to implement the EU's model text.

*1.1 Asymmetries of negotiating power:* The legal text of Title II on services and investment follows a template designed to serve the EU's Global Europe strategy (Section 2.1). The Commission can only negotiate according to that mandate. The structure and rules of the services and investment component of the EU-Korea FTA and the draft Canada-EU FTA are almost identical, as was the original text that the EU presented to the Pacific ACP region, refusing to consider an alternative text that the Pacific proposed. The CARIFORUM-EC EPA shows the EU does make concessions *within* that template. The principal examples in the relate to investor responsibilities (Section 4.5), inclusion of a section on tourism (Section 11), coverage of contract service suppliers and independent professionals (Section 5.5), light-handed treatment of offshore financial services centres (Section 9.7), a more permissive prudential exception for financial services (Section 9.5), and some variations in drafting.

- 1.2 Asymmetries of economic power:* A legal level playing field under the EPA does not mean equal commercial opportunities. Europe and the global South have starkly contrasting capacities to utilise the opportunities that the agreement creates for foreign investors and for firms and individuals supplying cross border services (Sections 2.2.3, 4.1). That imbalance is most evident in the sector-specific chapters on telecommunications, courier and financial services (Sections 7, 8 and 9), mobility of key business personnel (Section 5.4) and access for cultural practitioners (Section 10.2). The asymmetry is implicitly recognised in relation to tourism, where the EU commits to ‘appropriate measures’ to constrain anti-competitive practices by global tourism distribution networks, although the effectiveness of that commitment remains to be seen (Section 11.4).
- 1.3 Asymmetry of commitments:* The EU’s interpretation of compliance with Article V of the GATS is that Southern governments must commit between 60 and 70 percent of sub-sectors in an economic integration agreement. That interpretation ignores the mandatory development flexibilities in Article V and exceeds the controversial ‘benchmarks’ that the EU proposed during the GATS 2000 negotiations. The resulting increase in commitments by CARIFORUM states over their GATS 1994 schedules and GATS 2000 offers is grossly disproportionate in comparison to new commitments made by the EU in the EPA (Section 2.2). A flow-on effect of that threshold is that CARIFORUM states are exposed to a further layer of constraints on their ability to regulate socially significant sectors, such as postal, telecommunications and finance.
- 1.4 Asymmetry of labour mobility:* The open-ended scope of mode 4 in the GATS is restricted in Chapter 4 of the EPA to six categories of personnel that privilege executive personnel that are linked to foreign investment, exclude lower skilled labour, and impose tight constraints on contractual services suppliers and independent professionals, especially in the areas of greatest interest to CARIFORUM, being culture and tourism (Sections 5, 10.4 and 11.3).
- 1.5 Asymmetry between obligations to liberalise and promises to cooperate:* There is a stark contrast between the strong liberalisation obligations (Section 4.3) and regulatory disciplines (Section 6) in sectors of commercial interest to the EU (Sections 7, 8 and 9), and the soft promises of cooperation in CARIFORUM’s priority areas of culture and tourism (Sections 10.3 and 11.4).
- 1.6 Asymmetry of compliance costs:* The asymmetry of commitments flows through to implementation costs. Commitments on commercial presence, cross border services and labour mobility trigger the application of the regulatory framework in Chapter 5. That framework imposes obligations to establish and maintain national and regional competition policies and regimes, and licensing, regulatory and judicial institutions. These arrangements already operate in Europe, but they are still under development in CARIFORUM and do not exist, or are embryonic, in most ACP and many other Southern countries (Section 6.3). Similarly, the professional bodies on the EU and the Caribbean have vastly differential capacities to participate effectively in the proposals for Mutual Recognition Arrangements (Section 5.8).

## **2. Unpredictable and Unlimited Multiplier Effect of MFN Obligations**

The EPA does not stand alone. It is part of a matrix of mutually reinforcing FTAs and bilateral investment treaties (BITs) whose most favoured nation (MFN) provisions will progressively ratchet up the sectoral exposure and regulatory constraints in the EPA in ways that are potentially unlimited and impossible to predict. Cross referencing among these multiple treaties will be technically difficult and will generate contestable interpretations, especially because they use variable texts and scheduling structures.



- 2.1 Benefits to CARIFORUM from new EU FTAs:* CARIFORUM states automatically receive any better treatment on commercial presence and cross border supply of services that the EU gives to any other country or region through an EPA or FTA (Section 2.3.1). That will entitle them to new concessions that countries with more negotiating power can secure from the EU. However, new entitlements do not automatically equate to concrete commercial opportunities. Conversely, awareness of this MFN obligation might constrain the EU in its future negotiations with the remaining ACP and other Southern countries.
- 2.2 Exclusion of labour mobility:* The MFN obligation relates only to commercial presence and cross border supply, not to labour mobility (Sections 2.3, 5.3). That means CARIFORUM states are not entitled to any more extensive concessions that the EU gives to other countries, such as India, on the key categories of Contractual Services Suppliers and Independent Professionals.
- 2.3 Benefits to the EU from new CARIFORUM FTAs:* A CARIFORUM state must give the EU any better treatment on commercial presence and cross border supply that it gives to other countries or integrated economic groupings that are considered major commodity trading economies (Section 2.3.1). That means the EU can receive those additional benefits without making any reciprocal concessions to CARIFORUM. A waiver of this obligation would require the consent of the EU. The most immediate prospect is the CARICOM-Canada FTA that is currently under negotiation.
- 2.4 MFN benefits to future FTA partners:* Some countries, including the US and Canada, include a MFN provision in their FTAs that applies retrospectively. If CARICOM signs such an agreement with Canada, it would automatically have to provide the best treatment the EU receives on services and investment in the EPA, meaning the rules and concessions in the EPA would effectively become a minimum entitlement in the negotiations with Canada (Section 2.3.2).
- 2.5 MFN obligations in Bilateral Investment Treaties (BITs) with EU states:* As of June 2009 there were 34 BITs in effect between CARIFORUM states and EU member states (Sections 2.3.3, 4.6). These remain live and will cross-fertilise with the EPA in various ways. For example, most BITs do not create strong pre-establishment rights for investors. If a European investor secures a right to establish a commercial presence under the EPA, and claims that the CARIFORUM state has indirectly expropriated its investment by some kind of regulatory action, it could invoke the investor protection and investor-state enforcement mechanisms under the BIT.
- 2.6 MFN obligations in BITs with non-EU states:* There are 23 BITs in effect between CARIFORUM states and states outside the EU (Sections 2.3.3, 4.6). Most of these agreements have MFN provisions that entitle the investors and investments of those states to any better treatment that is given to third countries, which includes the sectoral commitments and disciplines on regulation. The EPA is presumed to fall within a commonly found exception for 'free trade areas' in those BITs.

### **3. An Externally Driven Regional Integration Model**

- 3.1 Mandatory application of the EU model to Caribbean regionalism:* The 'regional preference' clause in Article 238 requires each CARIFORUM state to extend the EPA commitments it has made to the EU to all the other CARIFORUM states and hence import them into the CSME and the CARICOM-Dominican Republic (DR) FTA. (Sections 2.3.4, 4.4, 5.8) The rules and commitments on services and investment in CSME and the CARICOM-DR FTA must accord, in law and in practice, with the template the European Union has developed to meet its own commercial needs and priorities under the Global Europe strategy (Sections 2.1, 2.3.4, 7.2, 9.8). The effect of the

regional preference on the CSME will be limited because CARICOM states are legally committed under the Revised Treaty of Chaguaramas to remove restrictions on the right of establishment, provision of services and capital movements within the community and to the goal of free movement of nationals. However, some legal texts are still under negotiation, notably the CARICOM Financial Services Agreement and CARICOM Investment Code; implementation and administrative arrangements are lagging; enforcement mechanisms are much weaker than in the EPA; and the EPA lacks the same flexibilities in relation to exceptions, safeguards, waivers and amendments. The situation of CARICOM is also unusual among ACP states. The regional preference obligation *will* effectively determine the shape and minimum content of trade in services and investments chapters in the CARICOM-DR FTA that are still under negotiation and in other ACP regions whose internal integration obligations in these areas are limited.

*3.2 Denial of regional self-determination:* The EU's insistence on using its template as the basis for the rules, commitments, obligations, regulatory disciplines, institutional arrangements and implementation periods and on including a regional preference obligation in the EPA contravenes assurances of the self-determination of ACP states in the Cotonou Agreement (Section 2.3.4).

*3.3 Externally determined regional configurations:* The CARIFORUM grouping was established in the early 1990s for the unique purpose of providing an interface between the EU and the Caribbean Forum on ACP States under the Lomé Agreement, its successor the Cotonou Agreement and most recently the EPA negotiations. This configuration provides the basis for the institutional arrangements between the two parties and therefore endures for the life of the EPA. There are concerns that applying the 'regional preference' obligation to this special purpose grouping will distort endogenous regional relationships within CARICOM and between CARICOM and the Dominican Republic that are still evolving (Section 2.3.4).

*3.4 Moves to neutralize the regional preference:* The December 2007 draft of the Explanatory Notes to CARIFORUM's Title II schedules on services and non-services investment contained a paragraph that would have contradicted the 'regional preference' obligation. This was amended in the legal scrubbing that produced the final EPA text to conform to the 'regional preference'. The explanation for the original wording, and the catalyst for the amendment, is not clear. (Section 2.3.4).

#### **4. Closure of Policy Space**

*4.1 All levels of government are bound:* The GATS requires national governments to take reasonable steps to ensure compliance by their provincial and local governments and delegated authorities. The EPA removes that limited flexibility. The obligations of Title II apply equally to all levels of government – national, provincial, municipal and delegated authorities (Section 3.2).

*4.2 Right to regulate:* As with the GATS, the EPA asserts that governments retain the right to regulate. This reassurance is deceptive, as the purpose of the general rules under Title II and schedules of sectoral commitments is to restrict the *ways* in which governments are permitted to regulate services, investments and labour mobility (Section 3.5, 6.1). Moreover, the EPA goes further than the GATS by recognising the right to regulate for 'legitimate objectives'. The Headnotes to both CARIFORUM schedules reserve a broader right to regulate in the 'national interest', raising the potential for dispute if the EU considers that a CARIFORUM state exercise its powers to regulate in pursuit of illegitimate objectives.

- 4.3 Extensive restraints on how governments can regulate:* The core rules of Title II follow the GATS. They govern a broad range of government measures, from legislation and policy to administrative decisions, and apply where those measures ‘affect’ the ‘supply’ of cross-border services, investment or movement of business personnel, whether that effect is intentional or not (Section 4.2). Market access rules aim to limit a wide range of policy and regulatory options that are commonly used by Southern governments. These include requirements to invest through joint ventures or subject to meeting an economic needs test; limits on the level of foreign investment, the size of ventures or the market share that one firm can hold; and bans on commercial activities (Sections 4.2.1, 5.3, 9.3, 10.2, 11.2). National treatment restrictions prevent preferences for local firms, such as use of public land, or restrictions that apply only to foreign firms, such as requirements for technology transfer or use of local inputs (Sections 4.2.2, 5.3, 9.3, 10.2, 11.2).
- 4.3 Standstill on existing measures:* CARIFORUM states made a voluntary commitment to a standstill on those measures affecting the cross border supply of services and services investments that fall within the market access and national treatment rules (Section 3.3.3). The legal effect of the standstill is complicated by the use of a positive list schedule. At least three interpretations are tenable, with vastly different consequences for the application of the national treatment, market access and MFN rules and the sectoral disciplines. This uncertainty poses serious implementation issues for CARIFORUM regulators nationally and within the CSME and CARICOM-DR FTA as a result of the ‘regional preference’. It also increases the potential for legal disputes with the EU, unless an interpretive note can be agreed.
- 4.4 Public services:* The exception for economic activities and services supplied ‘in the exercise of governmental authority’ has also been imported from the GATS without any clarification of the circumstances in which it does and does not apply (3.4). To qualify the service must not be commercial or supplied in a competitive market. The exception therefore does not automatically cover ‘public health, energy and water services’ as most commentators have claimed. The standstill obligation in the Headnote to the CARIFORUM services schedule excludes ‘public services’. However, that term that is unknown to services agreements and attempts by CARIFORUM states to give it a broader reading than ‘services supplied in the exercise of governmental authority’ may lead to disputes (Section 3.4). Intrusive disciplines on the regulation of postal (Section 7.1), telecommunications (Section 8.5) and financial services (Section 9.3) will impact most heavily on the right of governments to determine the nature, form and delivery of their public services.
- 4.5 Subsidies:* The application of the EPA to different kinds of government funding for establishments and services is uncertain. Subsidies are excluded from coverage of Title II. CARIFORUM excluded ‘subsidies or grants’ through the Headnote to its services schedule. However, it is debatable whether either exclusion extends to other forms of financial support, such as preferential lending, access to public lands, and support in kind (Section 3.7).
- 4.6 Financial instability:* Despite the financial crisis of 2008-2009 CARIFORUM governments have vastly extended their exposure to rules that require the liberalisation and deregulation of financial services and investments (Section 9.2). Commitments on market access and national treatment trigger additional disciplines on financial services, including a pre-commitment to allow the cross-border trade in potentially toxic products in circumstances that are more liberalised than the equivalent in the voluntary GATS Understanding on Financial Services (Sections 9.3, 9.4). At the least, the standstill in the Headnote to the services schedule prevents CARIFORUM states from adopting more rigorous regulation in relation to sectors they have committed in their schedule, unless it can be brought within the prudential exception (Section 9.2.2).

- 4.7 Prudential exception:* The exception that allows states to regulate for a prudential purpose is less restrictive in the CARIFORUM EPA than in the GATS (Section 9.5). This was an important concession secured by CARIFORUM, as the prudential exception in the EU-Korea FTA, the draft Canada-EU FTA and original the PACP draft text made prudential measures subject to a restrictive necessity test. However, the exception does not allow governments to adopt measures to address the devastating economic or social, rather than prudential, fallout from a financial crisis.
- 4.8 Capital controls:* The GATS requires capital account liberalisation, but only for cross border services and commercial establishment and only where sectoral commitments have been made (Sections 3.6, 9.6). Title III of the EPA goes further and requires comprehensive capital account liberalization in relation to all direct investment, and other investments made in accordance with CARIFORUM states' commitments, along with all proceeds of liquidation and profits from such investments. So CARIFORUM states have adopted more extensive financial services commitments that potentially increase the risk of hot money flows, but no longer have the right to impose capital controls in relation to the EU, except in very limited circumstances (Sections 3.6, 9.6). The risk is mitigated slightly by the right to impose short-term restrictions where there is a serious threat to the exchange rate or monetary policy. However, the choice of measure is subject to a stringent necessity test, meaning the government must be able to demonstrate that the measure was the least restrictive response it could have taken to the situation (Section 9.6).
- 4.9 Balance of Payments:* An IMF-consistent emergency provision is also available to respond to a balance of payments crisis, but there is an obligation to endeavour to avoid its use. Any measures must be short term and comply with both WTO and IMF rules, and the government must be able to show they were necessary to remedy the situation. The most recent US FTAs do not have either a safeguard or a balance of payments exception. An MFN obligation in an FTA with the US would entitle it financial services commitments that the CARIFORUM states made in the expectation that these emergency measures would be available under the EPA.
- 4.10 Limited exceptions:* The standard closed list of exceptions apply for public order, public morals, human and animal plant life and health, subject to a necessity test and to the caveat that measures must be non-discriminatory and not constitute disguised trade barriers (Section 3.7). An exception on 'national treasures' has been imported from the GATT, but a necessity test has been added (Section 10.2).
- 4.11 Prior consultation:* Governments are required to endeavour to consult with firms of the other party that are potentially affected by new financial services regulation (Section 6.1). The broader obligation of prior consultation is stronger in the 'transparency' rules in the EU-Korea FTA, the draft Canada-EU FTA and original PACP draft EPA.
- 4.12 Amendment of schedules:* The Headnote to CARIFORUM's non-services investment schedule provides a two-year window for a state to list additional non-conforming measures. That period runs from the time the EPA comes into force and only applies to measures that were already in effect in the CARIFORUM state as of October 2008. There is no comparable provision in the services schedule (Section 3.3.4).
- 4.13 Withdrawal of commitments:* The EPA makes no formal provision for signatory states to withdraw or amend their commitments on commercial presence, cross border supply or movement of key personnel, even to the limited extent that exists in the GATS (Section 3.3.4). The effect in the EPA may be similar in practice, as a CARIFORUM state could seek to amend an entry in the region's schedule and the EU would have to agree on the terms. However, the asymmetry of negotiating power suggests that meetings of the parties

are more likely to be used by the EU to press for extended negotiations, rather than to relieve CARIFORUM states of burdensome, undesirable or unexpected obligations (Section 4.7).

*4.14 Extension of Title II of the EPA:* Title II has two inbuilt requirements for future negotiations with the aim of extending the level of liberalisation (Section 3.8). The timing of both depends on when the EPA formally enters into force, which has not yet occurred. Article 62 mandates negotiations to extend liberalisation commitments in investment and trade in services to begin five years after the agreement comes into effect (Section 3.8). There is only provision for one round of negotiations. Unlike Article XIX of the GATS, these renewed negotiations are not subject to any explicit development flexibilities.

*4.15 Review of Investment in the EPA:* A second review, specific to investment, is required no later than three years after the EPA comes into force. Its scope is framed broadly to cover the ‘investment legal framework’, investment environment and flow of investment between the parties, ‘consistent with their commitments in international agreements’ (Section 3.8). The review will provide an opportunity for the introduction of BITs-style investment provisions within the EPA. Since the EPA was negotiated, the Lisbon Treaty has extended the powers of the European Union to include foreign direct investment (Sections 3.8, 4.6). The FTA between the EU and Canada is being negotiated in the post-Lisbon context, and Canada proposed investor protection and enforcement mechanisms in the draft text of January 2010. If those powers are retained in the final EU-Canada agreement the EU can be expected to promote similar provisions in its future negotiations and in the review of the CARIFORUM EPA. As CARIFORUM states originally sought the inclusion of such provisions in the EPA they might be expected to agree. Such an amendment would add significant new liabilities to the commitments that CARIFORUM states have made on commercial presence, without any guaranteed right to renegotiate them. The ability of European corporations to threaten litigation directly against states would increase their leverage and the potential chilling effect on government regulation. Acceptance of this extension of the EPA by CARIFORUM states would create a precedent that other ACP states would find difficult to displace.

*4.16 Review of the EPA:* The parties agreed in the form of a Joint Declaration adopted at the signing of the EPA to review its application within five years. The review will take place under the broad umbrella of Article 5, which mandates ongoing monitoring of the EPA’s achievement of a range of development and other social objectives (Sections 3.3.4, 4.7). The first review is scheduled no later than October 2013, with further reviews at five yearly intervals. The Declaration states that the EPA will be amended if necessary as a result of this mandatory review. It is therefore the only formal opportunity for the parties to retract or reduce their obligations under the EPA. The objectives of this review are at odds with the review of investment and the negotiation of further liberalisation required under Title II and its fate will be critically important for other ACP regions.

## **5. Complexity and Uncertainty**

Title II of the EPA has multiple layers of obligations that determine its legal effect. There are complexities, uncertainties and contradictions at each stage that will create a morass for regulators at all levels of government, for businesses and for all people wishing to engage in policy debate. They will also leave CARIFORUM states vulnerable to challenge by the EU, and potentially by European firms under BITs and any future investor protection rights in the EPA.

*5.1 Inconsistent scheduling:* Each states’ commitments are expressed through an extremely complex matrix of schedules (Section 3.3). The parties are not required to follow a specific format. The EU has formulated four schedules that match its template. These

cover 1) commercial presence, 2) cross-border supply, 3) movement of key personnel and 4) movement of Contractual Services Suppliers and Independent professionals (Sections 4.3, 5.5). CARIFORUM states have only two schedules (Sections 4.3, 5.6) that are configured in a totally different way from the EU: 1) a collation and extension of the GATS schedules of each state in all four modes of supplying a service; and 2) a schedule for non-services investment. The former follows a positive list; the latter is effectively takes a negative list approach to five economic activities, committing CARIFORUM states to the constraints on regulating commercial presence and any associated regulatory disciplines for all the activities that fall under the ISIC classification, unless the schedule indicates otherwise (Section 4.3.3).

*5.2 Complex Interpretation:* Interpreting the schedules is further complicated because:

- Each chapter (on commercial presence, cross-border supply and temporary labour mobility) is subject to different assumptions and textual constraints;
- The Headnotes to each schedule provide interpretative guidance and list further exclusions and qualifications; and
- The regional nature of the agreement requires each state's commitments to be aggregated within a single schedule, so they need to be disaggregated and reconstituted to identify an individual state's obligations.

Interpretation is especially problematic for CARIFORUM where the non-services schedule effectively operates as a negative list for five very broad categories of investment (Section 4.3.2) and a standstill applies to the services schedule (Section 4.3.3).

*5.3 Classifications:* In addition to the classification system used in the GATS for scheduling purposes, which is based on the provisional United Nations Central Product Classification (CPC) 1991, the parties use an updated version of the CPC and the International Standard Industrial Classification of All Economic Activities (ISIC) (Section 3.3.2). That makes comparison with GATS schedules difficult. Comparison between the parties is also difficult because each party uses a different combination of classifications for its schedules. Both make use of ISIC, which combines services and investment. However, the EU uses it for all kinds of investment. CARIFORUM uses ISIC only for its non-services investment schedule, which creates anomalies and overlap with the mode 3 commitments in its services schedule that uses CPCs (Sections 4.3.1, 4.3.3). Some CARIFORUM commitments have no accompanying classification (Section 4.3.1).

*5.4 Scheduling and Drafting errors:* Given the complexity of the schedules it is not surprising that they contain errors. A sample of entries for two CARIFORUM states in the region's services schedule reveals a number of contradictory commitments for important social services that were not picked up in the legal scrubbing (Section 4.3.2). CARIFORUM's non-services investment schedule was apparently intended to apply to five categories under ISIC. However, the Headnote describes the schedule as 'including' those five categories. That drafting, and the negative list approach that only excludes stated and activities that are explicitly referred, exposes CARIFORUM states to a potentially open ended set of obligations (Sections 3.3.2 and 4.3.3). Some anomalous drafting in the Headnote to CARIFORUM's non-services investment schedule was corrected in the final text, but other errors and omissions that could have significant consequences remain (Sections 4.3.3). The Headnote to CARIFORUM's non-services schedule preserved a two-year window to add existing non-conforming measures to its reservations, but there is no such provision in the services schedule and no formal mechanism for amending the schedules of commitments (Section 3.8). Under Article 48 of the Vienna Convention on the Law of Treaties (Vienna Convention), states are bound by errors to which they have

contributed. In the *US-Gambling* case the US was held to commitments that it insisted were unintended.<sup>2</sup>

*5.5 Inconsistencies between Headnotes and Text:* In places CARIFORUM has used the Headnote to its schedules to alter the terms of the core text, creating potential for dispute where states rely on the Headnote (Section 3.1). As noted earlier, the text asserts the right to regulate for ‘legitimate objectives’ while both CARIFORUM’s Headnotes assert the right to regulate for ‘national policy objectives’ (Section 3.5). The services Headnote also introduces terms that are not previously used in trade in services and investment agreements and are not defined, such as the exclusion of ‘public services’ from the standstill obligation (Section 3.4). The EPA excludes subsidies from Title II, whereas the CARIFORUM note excludes ‘subsidies or grants’ (Section 3.7).

*5.6 Standstill:* The Headnote to CARIFORUM’s services schedule commits states to a standstill of measures affecting market access and national treatment that existed at the signing of the Agreement (Section 3.3.3), subject to an exception for the undefined category of ‘public services’ (Section 3.4). A standstill is most commonly accompanied in contemporary FTAs by a ‘negative list’ that reserves the right to adopt more restrictive measures than the status quo. CARIFORUM’s adaptation of its GATS positive list schedule without explaining the relationship to the standstill creates confusion about its meaning and effect that goes to the core of the Title II obligations. It is unclear whether CARIFORUM states reviewed their GATS schedules that use a positive list to take account of the standstill obligation (Section 4.3).

*5.7 Triggering the regulatory disciplines:* Application of the far-reaching disciplines in the Regulatory Framework in Chapter 5 is contingent on ‘liberalisation’ of the relevant sectors. There is no clarification in the text of what constitutes liberalisation and it is open to divergent interpretations (Sections 6.2, 7.2, 8.1 and 9.2):

- (i) If the standstill is interpreted broadly, it could in itself constitute liberalisation. That would mean disciplines apply to all sectors in all CARIFORUM states, except where a sector is explicitly unbound or where reservations are less liberal than the status quo.
- (ii) Liberalisation could be limited to each state’s commitments by sub-sector, mode and rule. That would most closely align the regulatory obligations with the degree of liberalisation on market access and national treatment that a country has agreed to in its schedule, but result in a complex and widely varying regulatory regime.
- (iii) A sector might be considered ‘liberalised’ and subject to the regulatory disciplines once any sub-sector has been committed in any mode. That would mean that a state that consciously limited its exposure would be required to adopt a highly liberalised regulatory regime across the whole sector. This appears to be the negotiators’ interpretation

The difficulty of interpreting ‘liberalisation’ is compounded by the use of different language in different sectors (Sections 6.2, 9.4). The resulting uncertainty opens the decisions of regulators on key areas of services and investments to dispute. As the regulatory framework forms part of the ‘regional preference’ obligations, this legal uncertainty also impacts on the regulatory regime that CARIFORUM states are required to apply under the ‘regional preference’.

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<sup>2</sup> WTO, United States – Measures Affecting the Cross-border Supply of Gambling and Betting Services, Panel report, WT/DS285/R, 10 November 2004 (*US-Gambling Panel*), para 6.138

- 5.8 *Ambiguous or uncertain language*: The text uses different terminology and levels of specificity for the equivalent provisions in different parts of Title II. This is especially problematic where restrictions are imposed on the way that states can operate their universal service obligations for postal and telecommunications services (Sections 7.4 and 8.5).
- 5.9 *Unresolved GATS uncertainties*: A number of ambiguous and contestable terms are carried over from the GATS, notably the blurred boundary between mode 1 (cross-border supply) and mode 2 (consumption abroad) (Sections 3.1 and 9.4); the range of measures that will be accepted as falling within the prudential exception (Section 9.5); the extent of the exception for services supplied in the exercise of governmental authority (Section 3.4); and the scope of the ‘necessity’ test for general exceptions (Section 3.7) and the ‘strict’ necessity test for the safeguard on capital movements (Sections 3.6 and 9.6).



## **RECOMMENDATIONS**

### **For Non-CARIFORUM States:**

1. States, especially in the ACP grouping, should assert their right not to negotiate an agreement with the EU on services and investment.
2. Prior to any decision to embark on services and investment negotiations governments should conduct a comprehensive analysis of their domestic needs and capacity, identify both their non-trade objectives for policy and regulation and their existing legal obligations, and assess the implications of an EPA-style agreement for those priorities and responsibilities.
3. A coalition of current and potential negotiating parties should press the EU to adopt an alternative template on services and investment that genuinely aims to enhance the capacity of states to meet the development needs and aspirations of their people through relationships and forms of assistance that do not constitute an economic integration agreement and therefore avoid the need for GATS compatibility.
4. If negotiations do proceed on a WTO-based model, Southern governments should insist that the mandatory development flexibilities in GATS Article V are given full legal effect by requiring minimal commitments from developing countries, no commitments from least developed countries beyond their existing GATS obligations, and no commitments from countries that are not members of the WTO.
5. The right to self-determination means there should be no 'regional preference' provision that requires any regional grouping to replicate the rules and commitments to the EU within its own integration arrangements.
6. Given the unique and systemic risks attached to the liberalisation and deregulation of financial services and investments, the financial sector should be excluded from these agreements.
7. If financial services and investments are covered in an agreement, the parties should insist on the CARIFORUM EPA approach to the prudential exception and vehemently rejected any necessity test. That provision should be complemented by a broader safeguard mechanism that allows governments to adopt economic and social, not just prudential, measures in response to a financial crisis.
8. Governments should insist on retaining full authority over capital movements.
9. Any regulatory framework on services and investment must ensure that governments retain the capacity to comply with their existing international and domestic obligations and responsibilities.
10. The 'right to regulate' and the exclusions of measures that are designed to serve a public good and social function should be framed in ways that guarantee governments the flexibility to respond to policy and market failure, social need, climate change and other ecological catastrophes, and democratic and accountable decision-making by all levels of government.
11. Governments that aspire to secure binding commitments from richer countries on labour mobility should carefully evaluate the costs and gains in the CARIFORUM-EC EPA and take the opportunity to re-evaluate the implications of a labour export strategy from a broader non-trade perspective.

**For CARIFORUM States:**

1. The only formal opportunity to address the concerns raised in this report is the review that was mandated by the Joint Declaration of the Parties on the Signing of the Economic Partnership Agreement, to be conducted pursuant to Article 5 of the EPA.
2. Article 5 requires the parties to undertake continuous monitoring of the operation of the Agreement through (a) their own participative processes and institutions and (b) those set up under the Agreement, as in the Joint Declaration.
3. The Declaration requires the review to be undertaken within five years after the date of signature, meaning December 2013, and further reviews at five yearly intervals.
4. The object of the mandatory review is ‘to determine the impact of the Agreement, including the costs and consequences of implementation’. The Declaration stresses the need for the structure and content of the Agreement, and the manner and spirit of its implementation, to be supportive of the objectives, policies and priorities of the CARIFORUM states, with due regard to the aims and objectives of the CARICOM Single Market Economy.
5. As the review is conducted pursuant to Article 5 it must address the three elements that are explicitly identified as the subject of ongoing monitoring:
  - the objectives of the Agreement;
  - its proper implementation; and
  - maximising the benefits that people derive from the partnership.

The Declaration specifically requires the review to examine the cost and consequences of the implementation of the Agreement.

6. It is clear from the Declaration that this review is intended to be comprehensive and generate a sufficiently concrete analysis to inform a decision on whether amendment to the provisions of the Agreement and adjustment of their application is required. That requires sound empirical research. In preparation for this review individual CARIFORUM states should conduct a comprehensive analysis of the implications of the EPA for their domestic services and non-trade objectives and legal obligations. Article 5 requires any monitoring process set up under the Agreement to involve participative processes and institutions.
7. The legal risk analysis in this report has already identified issues of major concern in relation to each of the objectives of monitoring under Article 5:
  - i. *the objectives of the agreement:* The asymmetry in favour of the EU, the unpredictable and unlimited multiplier effect of the MFN obligations and the ‘regional preference’, the externally driven regional integration model and the closure of policy space all impinge on the objectives of the agreement; and
  - ii. *its proper implementation:* The complexity and uncertainty arising from the text and the schedules, the implications of the regional preference; the difficulties already encountered in implementing the CSME and completing the CARICOM-DR EPA, and the lack of structured opportunity for correcting errors and revising commitments, impinge on the proper implementation of the Agreement.
8. The third object, maximising the benefits to the people, requires an empirical analysis of the current and prospective impacts on men, women, young people and children with

particular reference to the Objectives in Article 1. The first of these objectives requires the Agreement to contribute to the reduction and eventual eradication of poverty through a trade partnership, consistent with the objective of sustainable development, the Millennium Development Goals and the Cotonou Agreement.

9. Article 230 vests responsibility for oversight of those objects in the CARIFORUM-EC Trade and Development Committee, which has the power to make recommendations to the Joint CARIFORUM-EC Council. It is reasonable to expect the Committee to take responsibility for the implementation of the mandatory review and make recommendations as envisaged by the undertaking in the Joint Declaration 'to amend its provisions and adjust their application as necessary'.
  10. Alternatively, the Joint CARIFORUM-EC Council is responsible under Article 227 for monitoring the fulfillment of its objectives and to examine any major issue arising within the framework of the Agreement. The Council is explicitly empowered to examine proposals and recommendations from the parties for the review of the Agreement.
  11. Whichever mechanism is used, the preparatory work for the review will need to be initiated well in advance of 2013 if the review is to be completed within the requisite five-year period.
  12. The Joint Declaration clearly asserts the mutual intent of the parties to amend the provisions of the EPA as necessary in light of the mandatory review. That intention is reinforced by the resolution of the European Parliament on 5 February 2009 on the development impact of Economic Partnership Agreements (EPAs), which:
    11. Stresses that EPAs agreements should incorporate a revision clause for a revision 5 years after their signature, to which national parliaments, the European Parliament and civil society must be formally associated; stresses also that this period will enable a detailed evaluation of the impact of EPAs on the economies and regional integration of the ACP countries and appropriate reorientations to be carried out.
- and
14. Underscores the need for stronger monitoring and evaluation provisions in the EPAs which will determine the impact of the EPA on country and regional development and poverty reduction objectives, not merely EPA compliance levels.

It is therefore incumbent on the EU to ensure adequate funding for this review, separate from aid and adjustment funding.

13. The Declaration of the Parties contains an undertaking to amend the provisions of the Treaty and their application as necessary as a result of the review, presumably through a Protocol to the EPA. While there is no explicit power in the EPA to make such amendments, the Joint Council has power to examine proposals and recommendations from the parties for review of the Agreement and take decisions in respect of all matters that it covers.
14. Such amendments are not inconsistent with Article 246 in Part V of the EPA. That makes provision for extending the Agreement with the aim of broadening and supplementing its scope in light of the experience gained in its implementation, but is silent about amendments to narrow its application. Pursuant to Article 31 of the Vienna Convention, a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms in their context. The Joint Declaration made between all the parties in connection with the conclusion of the treaty is part of that context. Both Article 246 and the Joint Declaration must therefore be read in the manner that gives legal effect to both.



## 1. THE SIGNIFICANCE OF THE CARIFORUM-EC EPA

The implications of the CARIFORUM-EC EPA extend well beyond its parties, for a number of reasons.

First, this agreement is one of seven under negotiation between the EU and most of the former African, Caribbean and Pacific (ACP) colonies of the European powers,<sup>3</sup> pursuant to the Cotonou Agreement 2000.<sup>4</sup> It is the first comprehensive agreement to be concluded. However, the final CARIFORUM-EC EPA text and the draft PACP (Pacific ACP)-EC EPA text submitted by the European side in May 2006 were almost identical. A comparison of those texts makes it possible to identify with some certainty the EU's baselines for negotiations on services and investment with the five African and one Pacific ACP regions.

A second, related reason is that Caribbean negotiators were enthusiastic about concluding an agreement on services, investment and related subjects. Most of their counterparts in Africa and the Pacific are not. The WTO-plus package agreed to by the CARIFORUM states can potentially undermine the defensive arguments being made by other ACP sub-regions and individual states. Conversely, an understanding of the legal risk associated with its provisions could strengthen the resolve of those states to defer negotiations on services, investment and other trade-related subjects for as long as possible, and perhaps indefinitely.

Third, the CARIFORUM-EC EPA is the first free trade agreement concluded by the EU using the template approved the Council of Europe to give effect to its Global Europe strategy.<sup>5</sup> This template sets the mandate for the European Commission in all its trade negotiations. The second such agreement, the EU-Korea FTA initialled in October 2009,<sup>6</sup> varies only in minor ways from the CARIFORUM-EC EPA in relation to trade in services and investment. The legal risk analysis of the CARIFORUM-EC EPA is therefore relevant to other countries in their negotiations with the EU. However, this report shows that it is also important to cross-reference between texts to identify areas where the EU has made concessions and where its template may produce more onerous demands in other negotiations.

The EU's template is still evolving<sup>7</sup>. A draft text of the EU-Canada FTA became available informally in April 2010 and shows very similar architecture and rules, with square brackets that indicate the points of disagreement.<sup>8</sup> That draft text is significant for two reasons: first, it involves negotiations between developed countries, which may result in greater contest over areas of sensitivity in the EU template and produce more liberalising outcomes in areas of common offensive interest; second, at Canada's initiative the draft includes strong investor protection provisions that are not in the EU template but are consistent with the EU's new competency under the Lisbon treaty. The outcome may set new precedents for the EU.

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<sup>3</sup> South Africa is a notable exception.

<sup>4</sup> *Partnership Agreement between the Members of the African, Caribbean and Pacific Group of States on the One Part, and the European Community and its Member States of the Other Part, Signed in Cotonou, Benin on 23 June 2000* [The Cotonou Agreement] [www.acpsec.org/en/conventions/cotonou/accord1.htm](http://www.acpsec.org/en/conventions/cotonou/accord1.htm)

<sup>5</sup> Article 21:3 of the Treaty on European Union as amended by the Treaty of Lisbon 2007 makes this explicit through the 'principle of consistency' between different areas of external action, and between these areas and its internal action.

<sup>6</sup> The EU-Korea FTA was initialled on 15 October 2009. However, the process and verification of the translation of the text into the various official languages of the EU is still not complete. Ratification by all EU Member States is expected to take another two to three years. Provisional application of the agreement is expected later in 2010 once the consent of the National Assembly of the Republic of Korea and the European Parliament have been obtained.

<sup>7</sup> The EU-Colombia FTA that was agreed in March 2010 became available too late for analysis in this report

<sup>8</sup> Available at <http://www.tradejustice.ca/tiki-index.php> (accessed 20 May 2009)

A fourth significant feature of the CARIFORUM-EC EPA is the interpretation of WTO-compatibility that the EU insisted upon. Article V of the General Agreement on Trade in Services (GATS) is the bridge between the WTO and the EPA in relation to services. Article V requires any new economic integration agreement that covers trade in services to contain ‘substantial sectoral coverage’ if it is to avoid the application of the most-favoured nation (MFN) rule, and hence the obligation to extend any new liberalisation in the EPA to all other WTO Members. The rationale for Article V is to protect the integrity of the MFN rule and reduce the trade-distorting effects of preferential agreements.<sup>9</sup>

However, Article V contains explicit development flexibilities. The EU has insisted on a pro-liberalisation interpretation with quantitative thresholds that negate those flexibilities. Because most ACP states currently have a very low level of exposure to the GATS compared to the EU, the EPA has massively extended their exposure to a wider set of constraints on policy and regulation at all levels of government. As this report shows, the EU has made very little new liberalisation beyond its already extensive GATS commitments, especially in areas of interest to CARIFORUM. The result is a gross asymmetry of liberalisation in the EPA in favour of the EU. If this perverse interpretation of Article V is left unchallenged it may legitimise demands that Southern countries make potentially crippling commitments to liberalise, deregulate and globalise services and foreign direct investment in all future FTAs, not just with the EU.

Several WTO-plus innovations in the CARIFORUM-EC EPA also warrant special attention. It is now common to find variations on the GATS in the architecture and scope of trade in services and investment agreements. The EPA is less radical in some ways than the US template; for example, the US insists on a negative list approach to schedules of commitments, listing sectors and measures that are excluded, and on the inclusion of investment expropriation provisions that can be enforced through investor-initiated arbitration.<sup>10</sup> However, the EU’s agreements contain more extensive disciplines on the domestic regulation of services and investment, which impose serious constraints on the right of governments to regulate their key infrastructure services and privilege commercial interests and market mechanisms ahead of social priorities and peoples’ needs. In particular, the regulatory framework for financial services requires signatory states that generally have few financial services obligations in the GATS to bind themselves more deeply to the failed model of liberalisation and market-driven regulation that has fuelled the recent financial crisis.

A further far-reaching element of the EPA is the complex matrix of MFN provisions that will have a dynamic ratcheting effect on the parties’ initial obligations. The EU and CARIFORUM parties incur different degrees of obligations to extend to each other any new liberalisation agreed to in future FTAs with other states. Those agreements will contain their own MFN provisions. In the case of US and Canada’s FTAs, the MFN obligation can be expected to apply to existing agreements, which would make the CARIFORUM text effectively the starting point for such negotiations.<sup>11</sup>

A related, but little remarked feature of the CARIFORUM-EC EPA is the crossover between the *regional* EPA and the *bilateral* investment treaties (BITs). Many CARIFORUM states have BITS with individual states within and outside the EU that contain a range of rights and protections for foreign investors that are directly enforceable. Like most contemporary ‘trade’ agreements, the EPA also contains rules and commitments that apply directly and indirectly to aspects of investment. The approach in the CARIFORUM-EC EPA is less extensive than, for example, the US FTAs, due to the awkward division of competencies that existed at the time of the negotiations, whereby the European Union was responsible for trade and its member states had authority over foreign direct investment. However, that division of competencies has changed with the ratification of the Lisbon Treaty.

<sup>9</sup> Thomas Cottier and Martin Molinuevo (2008) ‘Article V GATS: Economic Integration’ in Rüdiger Wolfrum, Peter-Tobias Stoll and Clemens Feinäugle, *WTO. Trade in Services*, Leiden: Martinus Nijhoff, 125 at 127

<sup>10</sup> The Australia-US FTA is the only recent US agreement from which investor-state disputes were omitted.

<sup>11</sup> Pierre Sauvé and Natasha Ward (2009) ‘The EC-CARIFORUM Economic Partnership Agreement: Assessing the Outcome on Services and Investment’, Brussels: ECIPE, January 2009, 6

This situation creates serious legal uncertainty. The legal interface between the EPA and BITs involving EU Member States is opaque, especially on the rights of investor-state enforcement. The EU's new competencies are likely to generate pressure during future reviews of the EPA for the inclusion of more extensive investment rules that replicate the BITs, with no guarantee that CARIFORUM states can revisit the commitments they have made on investment.<sup>12</sup> Some individual CARIFORUM states also have MFN obligations in their bilateral investment treaties with states outside the EU, but the exception for free trade zones or areas arguably relieves them of the obligation to extend any new rights conferred in the EPA to those investors.

A further complication arises from the EU's insistence on region-to-region negotiations with the ACP states. That approach has been widely criticised for cutting across a range of existing and often embryonic regional integration initiatives involving ACP countries. The CARIFORUM grouping was formed during the 1990s specifically for interaction with the EU in relation to the Lomé, and later Cotonou and Economic Partnership, agreements. The group combines the Caribbean Community (CARICOM)<sup>13</sup> with the Dominican Republic, with whom CARICOM has an incomplete FTA.

The CARIFORUM-EC EPA contains a 'regional preference' that requires CARIFORUM states to extend to each other any additional commitments they make to the EU. An apparent attempt to neutralise that obligation in CARIFORUM's final December 2007 offer through an entry in the Explanatory Notes to its schedules on services and investments did not survive into the final official text. While the Caribbean negotiators maintain that the legal obligations under the CARICOM Single Market Economy (CSME) are consistent with or exceed what is required in the EPA, the analysis in this report supports the contention that the 'regional preference' could have a significant impact on CARICOM's regional integration through the CSME and largely shape the services and investment content of the FTA between CARICOM and the Dominican Republic. The impact of the regional preference would be much more severe where regional arrangements are limited and fragile.

Finally, the fact that this WTO-plus agreement includes a significant number of ACP states may have a boomerang effect on the WTO. The ACP group has vigorously defended the right to limit their commitments during the new round of GATS negotiations that began in 2000. They played an important role in defeating proposals led by the EU that would have required developing countries to meet onerous minimum benchmarks of scheduled commitments,<sup>14</sup> and in resisting the early iterations of Annex C on services in the Declaration of the Hong Kong Ministerial Conference 2005.<sup>15</sup> The ACP rejected the inclusion of the 'Singapore issues' of investment, competition and government procurement in the WTO,<sup>16</sup> and helped to stall the passage of far-reaching disciplines on domestic regulation of services. The CARIFORUM-EC EPA has already fractured that solidarity. The more ACP and other Southern governments that accept the EU template, the less point there will be in resisting similar demands at the WTO.<sup>17</sup>

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<sup>12</sup> The ratification of the Lisbon Treaty potentially removes that anomalous situation from future EU negotiations and opens the way to extend the EPA's investment provisions during the three-year review of investment provisions and flows. Damon Vis-Dunbar (2009) 'The Lisbon Treaty – Implications for Europe's International Investment Agreements', ICTSD *Trade Negotiations Insights* vol 8, no 9, November 2009, <http://ictsd.org/i/news/tni/59585/>. See further discussion in Sections 3.8 and 4.6

<sup>13</sup> Antigua and Barbuda, Bahamas, Barbados, Belize, Dominica, Grenada, Guyana, Haiti, Jamaica, St Lucia, St Kitts and Nevis, St Vincent and Grenadines, Suriname, Trinidad and Tobago

<sup>14</sup> Jane Kelsey (2008) *Serving Whose Interests? The Political Economy of Trade in Services Agreements*, Abingdon UK: Routledge, 46-7

<sup>15</sup> 'Alternative Annex C (Services) by the G-90 (ACP, African Union and LDCs)', undated, <http://www.hkcsi.org.hk/reports/mc6/att10.pdf>

<sup>16</sup> 'Brazil upbeat on agriculture outcome, ACP Group confirm their stand on Singapore issues', TWN Report, 11 September 2003. <http://www.twinside.org.sg/title/update3.htm>

<sup>17</sup> South Centre (2008), 'The EU-CARIFORUM EPA on Services, Investments and E-Commerce. Implications for other ACP Countries', Analytical Note SC/AN/TDP/EPA/1, May 2008, Geneva: South Centre, para 75

## 2. WTO-PLUS LIBERALISATION THROUGH THE EPAS

Over the past decade the GATS has been effectively rewritten and vastly expanded through bilateral and regional agreements on trade in services and investment, often importing proposals that have failed to gain acceptance in the WTO. This section focuses on four features of the EU's GATS-plus approach to services and investment in the CARIFORUM-EC EPA: the Global Europe strategy; the obligation of WTO compatibility under the GATS Article V; the architecture and scope of the text and its associated schedules; and the ratcheting effect of MFN obligations.

### 2.1 The Global Europe Strategy

The EU and the US have taken the lead in developing GATS-plus templates for services and investment, as each of them seeks to advance its hegemonic influence, especially in the face of other, rapidly emerging economic powers. These new generation agreements involve a delicate balancing act between textual innovations, consistency across a state's treaty obligations, coherence between the multilateral and bilateral levels, and compliance with WTO rules. It is easier for the major powers to achieve that balance because they set the legal framework for their negotiations.<sup>18</sup> Southern governments face a more complex 'spaghetti bowl' of rules and obligations when they negotiate with the larger powers, each of which has its own template and negotiate with each other.

#### 2.1.1 The European Commission's Mandate

While there are strong similarities between the US and EU approaches, there are also significant differences that reflect their distinct economic and strategic priorities and paradigms.<sup>19</sup> The EU aims to achieve internal and external coherence in a seamless global market by exporting its model of regional economic integration through its FTAs. The vision of a Global Europe was launched in October 2006 and embodies the 'principle of consistency' among different areas of external action, and between these areas and its internal action.<sup>20</sup> According to this strategy,

to build a stronger EU economy at home Europe has to be more competitive abroad. ... We will require a sharper focus on market opening and stronger rules in new trade areas of economic importance to us, notably intellectual property (IPR), services, investment, public procurement and competition.<sup>21</sup>

These priorities are incorporated in the revised Lisbon Treaty under Part V 'External Action by the Union'. Article 207 of Title II: Common Commercial Policy reads:

The common commercial policy shall be based on uniform principles, particularly with regard to changes in tariff rates, the conclusion of tariff and trade agreements relating to trade in goods and services, and the commercial aspects of intellectual property, foreign direct investment, the achievement of uniformity in measures of liberalisation, export policy and measures to protect trade such as those to be taken in the event of dumping or subsidies. The common commercial policy shall be conducted in the context of the principles and objectives

<sup>18</sup> The EU refused to engage with an alternative framework for trade in services and investment in the EPA that was proposed by the Pacific ACP group. Communication from Hon Joe Keil, Lead Spokesperson for PACP Trade Ministers, to Peter Mandelson, EC Commissioner for Trade, 11 June 2008. It is difficult to assess whether other ACP groups have had any greater success, as current negotiating texts are heavily bracketed.

<sup>19</sup> Foreign policy and national security objectives have been much more important for the US. See Kelsey (2008), 54

<sup>20</sup> Article 21:3 of the Treaty on European Union. CLEER, 'The EU's contribution in enhancing regional and global stability and prosperity', Centre for the Law of EU External Relations, The Hague, 1 December 2009, 6-7, [http://www.asser.nl/upload/documents/1212009\\_51615CLEER%20-%20RESEARCH%20PROGRAMME%20-%20091201.pdf](http://www.asser.nl/upload/documents/1212009_51615CLEER%20-%20RESEARCH%20PROGRAMME%20-%20091201.pdf) (accessed 28 December 2009)

<sup>21</sup> European Commission (2006) *Global Europe: Competing in the World. A contribution to the EU's jobs and growth strategy*, 7, [http://trade.ec.europa.eu/doclib/docs/2006/october/tradoc\\_130376.pdf](http://trade.ec.europa.eu/doclib/docs/2006/october/tradoc_130376.pdf)



of the Union's external action.<sup>22</sup>

Consistent with the EU's commitment to the common policy, the Commission presented virtually identical draft texts of the EPA to all ACP sub-regions (and to other states negotiating with the EU<sup>23</sup>). This approach drew complaints from the Pacific ACP group that

our region has worked tirelessly to elaborate an innovative services proposal [including on movement of natural persons] ... Unfortunately, our proposals have not been accepted by the EC, which has not been in a position to demonstrate the flexibility needed to enable PACPS to be genuine service providers in the EU market in the near future.

The European approach to developing countries assumes that their own regional economic integration strategy and commercial interests correspond to the development needs of their negotiating partners. That argument was consistent with the pro-liberalisation orientation of CARIFORUM's negotiators, who espoused 'an holistic approach to development that combines the articulation of rules with the elaboration of CARIFORUM development priorities to benefit from EU assistance'.<sup>24</sup> Where other ACP groupings were more cautious, the Caribbean Regional Negotiating Machinery (CRNM) saw the EPA as a potentially 'good vehicle through which to advance the region's development by addressing a number of the supply-side constraints which have been negatively affecting our competitiveness' and catalyse its sluggish regional integration programme.<sup>25</sup>

The CARIFORUM negotiators secured some variations within the EU's framework. These primarily involve (nominal and sometimes reverse) asymmetry, (slightly) longer implementation periods, (soft) promises of cooperation, and (highly targeted and often illusory) market access concessions in priority areas of labour mobility, entertainment and tourism. An important GATS-minus innovation was made to the prudential exception on financial services regulation. A number of other compromises created legal and operational contradictions. Examples discussed below include the scope of two five-year reviews of the EPA and the provisions on governmental services.

### **2.1.2 Development Objectives and Principles**

Both parties agreed on a two-pronged approach to development cooperation. Part One of the EPA set out objectives and principles for a Trade Partnership for Sustainable Development. Subject-specific development sensitivities were to be covered in Part Two: Trade and Trade-related Matters. The EPA text would be supported by aid funding to assist the CARIFORUM states to implement their obligations and adjust to global competition.

The objectives in Article 1 of Part One combine pro-liberalisation and pro-social goals. They include the reduction and eventual eradication of poverty through a trade partnership that is consistent with sustainable development, the Millennium Development Goals and the Cotonou Agreement; promoting the gradual integration of CARIFORUM States into the world economy in conformity with their political choices and development priorities; establishing and implementing an effective, predictable and transparent regulatory framework for trade and investment to promote regional integration, economic cooperation and good governance; enhancing supply capacity, competitiveness and economic growth in the region; and supporting a new trade dynamic between the EU and CARIFORUM states through the progressive, asymmetrical liberalisation of trade and deeper cooperation.

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<sup>22</sup> European Union, Consolidated Version of the Treaty on the Functioning of the European Union, 9 May 2008, *Official Journal of the European Union*, C115/47

<sup>23</sup> The author has sighted three other draft texts whose chapters on services, investment and e-commerce are virtually identical.

<sup>24</sup> Errol Humphrey (2008), 'CARIFORUM-EC EPA Negotiations: Initial Reflections on the Outcome', DG Trade-organised workshop on the CARIFORUM-EC EPA, Brussels, 13 February 2008, 6

<sup>25</sup> Humphrey (2008), 1

The Principles in Article 2 state that the EPA will complement and reinforce the Fundamental Principles and Essential and Fundamental Elements in the Cotonou Agreement. The core concept of ‘sustainable development’ in Article 3 requires the application of the EPA to ‘fully take into account the human, cultural, economic, social, health and environmental best interests of their respective populations and of future generations’. The partnership is also to take account of the levels of development, needs, geographical realities and sustainable development strategies and priorities of CARIFORUM states (Article 4). Article 4:4 recognises that regional integration is a matter to be determined exclusively by those states ‘in the exercise of their sovereignty and given their current and future ambitions’; however, this is ‘without prejudice to the commitments undertaken in the Agreement’. The development cooperation priorities set out in Article 7 are to be applied, according to Article 8:2, to all chapters in the agreement; these priorities are directed towards assistance to implement the Agreement, not to the nature and extent of the rules and obligations themselves.

Article 31 of the Vienna Convention requires Part Two on Trade and Trade-related Matters to be interpreted in the light of these objects and purposes. However, the effect of that cross-fertilisation should not be overstated. The provisions in Part One lack teeth compared to the sanction based enforcement of the rules and commitments in Part Two on trade and investment, which essentially follow the same EU template used in agreements with more developed countries, notably EU-Korea. Interpretation of Part Two can be expected to draw primarily on orthodox trade jurisprudence in the WTO and elsewhere.

Moreover, Article 60 of Title II on Investment, Trade in Services and E-Commerce has its own, more selective and restrictive version of the Part One objectives. Regional integration and sustainable development, and the smooth and gradual integration of CARIFORUM States into the world economy, are to be achieved through ‘progressive, reciprocal and asymmetric liberalisation’. Recognition of the right of the States to regulate is circumscribed by reference to ‘legitimate policy objectives’. Article 60 contains no comparable language to the pro-social objectives and principles in Part One. Even the development flexibilities in the GATS that explicitly state the right of developing countries to make lesser liberalisation commitments are absent from Title II, which contains only a vague reference to ‘asymmetry’. It therefore seems unrealistic to expect that a dispute body dealing with a trade or investment-related complaint would import a strongly pro-development, let alone a pro-social, reading of Part One’s objectives and principles into Title II.

### ***2.1.3 The Option not to Negotiate***

The positive endorsement of the EU’s model EPA as pro-development by CARIFORUM’s negotiators and prominent international commentators<sup>26</sup> will make it more difficult for other ACP regions to insist on more appropriate alternatives. For example, the PACP objected that the text they received in March 2008

appears to be clearly inspired by what has been included in the CARIFORUM-EC EPA. However, the circumstances and the developmental requirements of Caribbean ACP States differ significantly from those in the PACP region. While including a wide array of trade-related rules in an EPA might be appropriate and constructive in the Caribbean, the PACPS do not see the value of including them in its EPA at this time, given the more fundamental developmental issues faced by countries in this region.<sup>27</sup>

The alternative is not to negotiate on services and investment. In relation to services, the parties to the Cotonou Agreement reaffirmed in Article 41 their respective commitments under the GATS and underlined the need for special and differential treatment to ACP services suppliers. Through

<sup>26</sup> Humphrey (2008), 6; Sauvé and Ward (2009), 58

<sup>27</sup> The PACP also noted that the inclusion of some proposed chapters in an EPA, especially intellectual property rights, public procurement and personal data protection would result in some, if not all, PACPS not becoming party to the EPA. Hon Joe Keil, Lead Spokesperson for PACP Trade Ministers, to Peter Mandelson, EC Commissioner for Trade, 11 June 2008

paragraph 4 they

further agree on the objective of extending under the economic partnership agreements, *and after they have acquired some experience in applying the Most Favoured Nation (MFN) treatment under GATS*, their partnership to encompass the liberalisation of services *in accordance with the provisions of GATS and particularly those relating to the participation of developing countries in liberalisation agreements*. [emphasis added]

The Cotonou Agreement's provisions on investment fall within Title II: Financial Cooperation of Part 4 on Development Finance Cooperation. The most specific obligation regarding investment negotiations is in Article 78 and is directly principally towards BITs: the parties 'affirm the importance of concluding, in their mutual interest, investment promotion and protection agreements which could also form the basis for insurance and guarantee schemes'.

Any commitment by ACP states to enter future negotiations in the EPA context therefore relates only to services and is contingent on countries having acquired experience of MFN treatment under the GATS. With the exception of newly acceded countries, most African and Pacific WTO members have very few GATS commitments and consequently very little relevant experience.<sup>28</sup> Only four of the 14 Pacific ACP (PACP) countries are even members of the WTO. In June 2008 the Pacific states informed the European Trade Commissioner they were not ready to negotiate on services or investment:

[W]hat has been offered by the EC and EU Member States in regard to trade in services and [temporary movement of natural persons] does not satisfy the fundamental concerns of the PACPS at this time. Given that situation, our region proposes that negotiations on trade in services be suspended for the time being and a rendezvous clause be included in the EPA that would commit both sides to revisit services and TMNP in the future.<sup>29</sup>

Most other ACP sub-regions have also been reluctant to launch into serious negotiations on services and investment.<sup>30</sup> The EU has much less leverage to force the pace on these areas than it had with the expiry of the WTO waiver on goods in December 2007.

## **2.2 WTO Compatibility**

Members of the WTO have a legal obligation to ensure that any FTAs they adopt are WTO compliant. Parties to bilateral and regional negotiations are also bound by any related agreements between themselves, such as the Cotonou Agreement 2000. Those obligations in relation to services and investment in the EPAs are complicated. First, the Cotonou Agreement does not require ACP states to negotiate on services, at least not immediately. Second, not all ACP states are WTO members.<sup>31</sup> Third, WTO compatibility does not apply to those aspects of the EPA that are not currently covered by WTO agreements, notably non-services investment. Fourth, the requirements of GATS Article V and permit much greater flexibility for developing countries than the EU has been willing to allow.

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<sup>28</sup> For countries' GATS schedules see [http://www.wto.org/english/tratop\\_e/serv\\_e/serv\\_commitments\\_e.htm](http://www.wto.org/english/tratop_e/serv_e/serv_commitments_e.htm)

<sup>29</sup> Correspondence from Hon Joe Keil, Lead Spokesperson for PACP Trade Ministers, to Peter Mandelson, EC Commissioner for Trade, 11 June 2008

<sup>30</sup> European Commission (2009), 'Economic Partnership Agreements: Overview of State of Play', as of 30 September 2009, <http://epawatch.files.wordpress.com/2009/10/eu-commission-state-of-play-jpa-ep-090930.pdf>

<sup>31</sup> ACP states that are neither WTO members nor observers are: the Cook Islands, Eritrea, Kiribati, Marshall Islands, Micronesia, Nauru, Niue, Palau, Somalia and Timor-Lesté. States that are observers and engaged in WTO accession are the Bahamas, Comoros, Equatorial Guinea, Ethiopia, Liberia, Samoa, São Tomé and Príncipe, Seychelles, Sudan and Vanuatu. WTO, 'Groups in the WTO', updated 13 November 2009, [http://www.wto.org/english/tratop\\_e/dda\\_e/negotiating\\_groups\\_e.doc](http://www.wto.org/english/tratop_e/dda_e/negotiating_groups_e.doc) (accessed 28 December 2009)

### 2.2.1 *The Cotonou Mandate*

GATS compatibility only becomes an issue once parties have agreed to negotiate an agreement on 'measures affecting trade in services'.<sup>32</sup> The CARIFORUM states were keen to do that. According to a lead negotiator:

CARIFORUM states, as small economies, increasingly dependent on the services sector, saw the EPA as offering an opportunity to improve and guarantee access to the EU market for the region's services suppliers. The services sector is the most significant contributor to GDP in all CARIFORUM States, except Guyana and Suriname. Therefore, favourable and assured access to the EU services market was one of our principal objectives in order to stimulate economic growth across the Caribbean.<sup>33</sup>

Commitments on services and non-services investment were also expected to stimulate foreign direct investment. CARIFORUM negotiators believed that a goods-only agreement would reduce their ability to use goods concessions to gain leverage on services and investment.

As noted earlier, the Cotonou Agreement does not require the rest of the ACP to negotiate on services, at least not immediately, and not at all on investment. If negotiations do begin, Article 41 of the Cotonou Agreement requires any liberalisation agreement to accord with the GATS provisions and particularly those relating to participation of developing countries in liberalisation agreements.

There is no corresponding assurance in the CARIFORUM-EC EPA text: under Article 60:1, which sets out the Objectives of Title II, the parties reaffirm their commitments under the WTO and 'lay down the necessary arrangements for the progressive, reciprocal and asymmetric liberalisation of investment and trade in services and for cooperation on e-commerce'. While the objectives refer to asymmetric liberalisation, they are silent on the other development flexibilities and protections in the GATS. The argument that Title II should be interpreted in the context of the objectives and principles in Part One and the commitment to asymmetrical liberalisation in Part Two was critiqued above (2.1.2).

### 2.2.2 *GATS Article V*

The requirement for GATS compatibility applies only to measures by WTO members 'affecting trade in services' and only the level of commitments is subject to specific requirements. These requirements are complex, vague and highly contestable. The primary reference point is the GATS Article V, which was adapted from the GATT Article XXIV on free trade agreements in goods. Article V is effectively an exception to the MFN rule. Preferences created through an economic integration agreement are exempt from MFN obligations if the agreement meets the requirements set down in Article V:1:

This Agreement shall not prevent any of its Members from being a party to or entering into an agreement liberalizing trade in services between or among the parties to such an agreement, provided that such an agreement:

- (a) has *substantial sectoral coverage*<sup>1</sup>, and
- (b) provides for the *absence or elimination of substantially all discrimination, in the sense of Article XVII [national treatment], between or among the parties, in the sectors covered under subparagraph (a), through:*
  - (i) *elimination of existing discriminatory measures, and/or*
  - (ii) *prohibition of new or more discriminatory measures, either at the entry into force of that agreement or on the basis of a reasonable time-frame, except for measures permitted under Articles XI, XII, XIV and XIV bis [transfers and payments, balance of payments safeguards, general exceptions and security exceptions].*

<sup>1</sup> This condition is understood in terms of *number of sectors, volume of trade affected and*

<sup>32</sup> Under Article 1:1 the GATS applies to 'measures by Members affecting trade in services'.

<sup>33</sup> Humphrey (2008), 2.

*modes of supply*. In order to meet this condition, agreements should not provide for the *a priori* exclusion of any *mode of supply*. [emphasis added]

Article V:3 requires that developing countries are given special dispensations regarding these conditions:

Where developing countries are parties to an agreement of the type referred to in paragraph 1, flexibility *shall* be provided for regarding the conditions set out in paragraph 1, particularly with reference to subparagraph (b) thereof, in accordance with the level of development of the countries concerned, both overall and in individual sectors and subsectors. [emphasis added]

Flexibility is mandatory. The expectations placed on developing countries must reflect their development overall and in specific sectors and subsectors. While the dispensation stresses flexibility in relation to national treatment and the time frame for implementation, it also applies to the requirement for ‘substantial sectoral coverage’, which is explained further in its own footnote 1.

Neither the italicised terms in paragraph 1 nor the nature and extent of flexibility in paragraph 3 is further defined in the GATS text or by WTO jurisprudence.<sup>34</sup> Their ordinary meaning, especially the relationship between paragraphs 1 and 3, is not clear on its face. In such circumstances, Article 31 of the Vienna Convention requires identification of their ordinary meaning by reference to the context, object and purpose of the words as found in the GATS text, including the preamble and annexes. The EPA poses two distinct legal questions: whether the EU’s approach to assessing substantial sectoral coverage meets the requirements of Article V:1; and whether the threshold of subsectoral commitments the EU required of more and lesser developed CARIFORUM states satisfies the development flexibilities in Article V:3.

### **2.2.3 Substantial Sectoral Coverage**

Expert commentaries routinely treat the CARIFORUM-EC EPA as GATS-compatible because it satisfies the EU’s interpretation of Article V that parties to such agreements must liberalise at least 80 percent of the services trade covered by the agreement.<sup>35</sup> That percentage is calculated by counting how many of the sub-sectors on the GATS classification list<sup>36</sup> the parties have committed in their schedules. The EU’s interpretation of ‘asymmetry’ in the CARIFORUM-EC EPA allowed the lesser-developed countries<sup>37</sup> to commit 65 percent of subsectors and the more developed countries 75 percent, with individual states deciding which sectors to include.<sup>38</sup> The EU’s commitments, calculated to be 94 percent of subsectors, contributed the balance of the 80 percent.<sup>39</sup>

Superficially, that equation constitutes a moderate asymmetry in favour of the CARIFORUM states. Yet, the level of commitments the EU demanded of developing countries exceeds the controversial ‘benchmarks’ that it unsuccessfully promoted in the lead up to the Hong Kong

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<sup>34</sup> In *Turkey - Textiles* WT/DS34/AB/R, 22 October 1999 at 12 the WTO Appellate Body unhelpfully interpreted ‘substantially all trade’ in goods in Article XXIV of the GATT to mean ‘not the same as *all* the trade ... but considerably more than merely *some* of the trade’.

<sup>35</sup> Sauvé and Ward, 22

<sup>36</sup> MTN.GNS/W/120, known as W/120. The list is based on the Provisional United Nations Central Product Classification 1991, [http://www.wto.org/english/tratop\\_e/serv\\_e/mtn\\_gns\\_w\\_120\\_e.doc](http://www.wto.org/english/tratop_e/serv_e/mtn_gns_w_120_e.doc). The technical problems with this calculation are discussed below.

<sup>37</sup> As defined by CARICOM; only Haiti is a Least Developed Country using UN classifications.

<sup>38</sup> Sauvé and Ward (2009) at 21 note that some CARIFORUM states’ commitments averaged approximately 50 percent. However, the Dominican Republic committed 90 percent of sub-sectors. See also Allyson Francis and Heidi Ullrich (2008) ‘Analysis of Economic Partnership Agreement: Trade in Services. Case Study of the CARIFORUM-EU Agreement’, Eschbarn, Germany: GTZ, 10

<sup>39</sup> Lodge, Junior (undated) ‘CARIFORUM EPA Negotiations: an initial reflection’, Jamaica: CRNM, [http://www.sice.oas.org/TPD/CAR\\_EU/Studies/CRNM\\_epa\\_reflection\\_e.pdf](http://www.sice.oas.org/TPD/CAR_EU/Studies/CRNM_epa_reflection_e.pdf) (accessed 28 December 2009), 3

ministerial conference in 2005.<sup>40</sup> The result is a massive increase on what CARIFORUM states committed in their GATS 1994 schedules and offered in the GATS 2000 negotiations; for example, Suriname went from 15 to 75 percent, Grenada from 23 to 69 percent and Guyana from 19 to 82 percent.<sup>41</sup>

Although the EU committed a total of 94 percent of sub-sectors, which exceeded its offer in the GATS 2000 negotiations, the increase was disproportionately small. Sauvé and Ward report there was no significant increase in commitments on cross border services, a number of improvements in commercial presence, and some new commitments on labour mobility (although those are subject to very strict conditions).<sup>42</sup> This comparison relates to the EU's Doha round offer, not to its GATS 1994 schedule, but that does not affect the point being made here that CARIFORUM states have assumed disproportional additional obligations under the EPA. The practical effect of the EU's formula is therefore profoundly asymmetrical in its favour.

The sector-counting approach to Article V is defective for various methodological and substantive reasons. Merely counting the subsectors that are committed in a positive list schedule ignores the quality of those commitments, which may be subject to extensive horizontal or sectoral reservations that render them nugatory. In the case of the CARIFORUM's services schedule, the entries are subject to a standstill commitment whose legal effect is unclear (3.3.3). A strong interpretation of the standstill - that a CARIFORUM state cannot adopt more restrictive measures for services investments than applied in October 2008 in any sector, unless it has reserved the ability to do so in the schedule - would constitute to a 100 percent commitment of subsectors, discounted by the number and substance of reservations.<sup>43</sup>

The sector-counting approach also fails to engage the footnote to Article V:1, which defines 'substantial sectoral coverage' with reference to the volume of trade affected and modes of supply, as well as the number of sectors. That combination reflects the underlying objective of the provision: to maintain the integrity of MFN and avoid trade distortion. Technically, the fragmentation of the EU's schedules across investment, cross-border services and two on the movement of natural persons makes it complicated to assess the multi-modal quality of its sectoral commitments.

More importantly, weighting the number of subsectors and modes that were committed by the EU and CARIFORUM states according to volume of trade would provide a more sophisticated measure of asymmetry. That equation is technically problematic; it is not possible to calculate volumes of trade in services with any accuracy, as there are no statistics that correlate with the definition of 'trade' used in the GATS,<sup>44</sup> let alone the new version in the EPAs.<sup>45</sup> Nevertheless, the

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<sup>40</sup> The EU's proposal would have required developing countries to commit 93 of 163 subsectors in their GATS schedules, and LDCs would be encouraged, but not required, to make commitments: 'EC non-paper', 27 October 2005. On file with author. Kelsey (2008), 46-7

<sup>41</sup> Based on CARIFORUM calculations reported in Francis and Ullrich (2008), 26

<sup>42</sup> Sauvé and Ward (2009), 30-33

<sup>43</sup> Sauvé and Ward attempt a more sophisticated comparison of the GATS and EPA commitments of various CARIFORUM states, but acknowledge some major methodological impediments. For example, the EPA excludes subsidies, which makes all commitments GATS-minus except where a party scheduled an equivalent reservation in the GATS. Sauvé and Ward (2008), 26

<sup>44</sup> An Inter-Agency Task Force that included officials from a number of international institutions produced a manual in 2008 that aims to establish an internationally agreed framework for the compilation of statistics of international trade in services ([http://www.wto.org/english/res\\_e/statis\\_e/its\\_manual\\_e.htm](http://www.wto.org/english/res_e/statis_e/its_manual_e.htm)). Its deficiencies are discussed in Chakravarthi Raghavan (2009) 'Financial Services, the WTO and Initiatives for Global Financial Reform', Report to the Intergovernmental Group of 24, 29-33, <http://www.iatp.org/tradeobservatory/library.cfm> (accessed 2 June 2010)

<sup>45</sup> For example, remittances from temporary migration include many occupations that fall outside the EPA and it would be virtually impossible to disaggregate them to reflect scheduled commitments.

available data establishes without doubt that the EU dominates commercial services transactions and foreign direct investment between the parties.<sup>46</sup>

The combination of the value of trade and the commitments made by CARIFORUM, including the standstill, reveals a massive asymmetry of economic impact, restriction of policy space and implementation obligations in the EU's favour. Given that CARIFORUM states have relatively advanced services economies,<sup>47</sup> those asymmetries would be far greater for ACP sub-regions that include many least developed countries (LDCs) and non-WTO members.

It does not appear that the CARIFORUM negotiators vigorously contested the EU's interpretation. Indeed, they hailed the outcome as pro-development.<sup>48</sup> Regional think tank CaPRI described the asymmetry as 'generous'.<sup>49</sup> If the CARIFORUM-EC EPA is allowed to establish this threshold as a precedent the effect on other ACP states that do not want to and cannot implement that level of liberalisation and the accompany regulatory disciplines will be potentially devastating, with serious flow-on effects for FTA negotiations everywhere.

#### **2.2.4 Development flexibilities**

Given the lack of clarity in the Article V text, the development flexibilities in paragraph 3 must also be interpreted with reference to context, object and purpose, which are found in the GATS Preamble, Article XIX:2 and Article IV:3. Paragraph 29 of the Declaration of the Hong Kong Ministerial Conference 2005 is also relevant as 'subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions'.<sup>50</sup>

The GATS *Preamble* recognises there are asymmetries in the development of services regulations and that developing countries have a particular need to exercise their regulatory capacity.

*Article IV:1* urges WTO members to make commitments that advance the participation of developing countries in world trade. *Article IV:3* is more relevant to the current question, as it addresses the demands that can be made of LDCs. Specifically, it calls on developed countries to take particular account of

*the serious difficulty of least developed countries in accepting negotiated specific commitments in view of their special economic situation and their development, trade and financial needs.*  
[emphasis added]

In addition, *Article XIX:2* makes progressive liberalisation by individual developing countries through subsequent rounds of GATS negotiations subject to

*appropriate flexibility ... for opening fewer sectors, liberalizing fewer types of transactions, progressively extending market access in line with their development situation and, when making access to their markets available to foreign service suppliers, attaching such access conditions aimed at achieving the objectives referred to in Article IV.* [emphasis added]

'Appropriate' flexibility is not defined. Again, a vague term must be given a contextual reading. The flexibilities in this situation relate to the positive list approach to scheduling mandated in Article XX,

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<sup>46</sup> EU accounted for 27.1 percent of world trade in commercial services in 2005; the Dominican Republic was the only CARIFORUM state in the top 40, with a 0.2 per cent share, [http://www.wto.org/english/res\\_e/statistics\\_e/its2006\\_e/its06\\_bysubject\\_e.htm](http://www.wto.org/english/res_e/statistics_e/its2006_e/its06_bysubject_e.htm) (accessed 28 December 2009). Sauv  and Ward report that 60 percent of all CARIFORUM exports to the EU are in tourism and travel-related services, Sauv  and Ward (2009), 5

<sup>47</sup> Sauv  and Ward (2009), 5

<sup>48</sup> eg. Humphrey (2008), 5

<sup>49</sup> CaPRI (2009) 'The Impact of EPA on Caribbean Economies. A Structural Analysis of Four Caribbean Countries', Jamaica: CaPRI, November 2009, 8

<sup>50</sup> Article 31:3 of the Vienna Convention

which allows a WTO member to choose how many commitments it makes. Southern governments have insisted on maintaining that flexibility during the GATS 2000 negotiations and emphasised the plight of LDCs. The Hong Kong Ministerial Conference in 2005 declared that:

Negotiations shall have regard to the size of economies of individual Members, both overall and in individual sectors. *We recognize the particular economic situation of LDCs, including the difficulties they face, and acknowledge that they are not expected to undertake new commitments.*<sup>51</sup> [emphasis added]

In sum, the GATS Preamble recognises the need to preserve the policy space of developing countries, while Article XIX:2 relates liberalisation expectations to members' levels of development. Article IV:3 and the Hong Kong Declaration recognise that the special economic situation of LDCs means they would have serious difficulty accepting specific commitments and exempts them from any new commitments in the GATS 2000 negotiations.

It is incumbent on WTO members to adopt the interpretation of Article V:3 that can best be reconciled with these development flexibilities. In addition, Article 31:3 of the Vienna Convention requires the negotiating parties to take into account any subsequent agreement between them regarding the interpretation and application of its provisions. Article 61 of the Cotonou Agreement, made after the GATS, provides the mandate for the negotiations on services in the EPA. As noted earlier, this requires services liberalisation to accord with the GATS provisions, in particular 'those relating to the participation of developing countries in liberalisation agreements.'

It would be legally perverse to apply Article V in a way that requires LDCs that are judged to be unable to cope with *any* new commitments at the multilateral level to make liberalisation commitments in an EPA in favour of a major services exporting country in *two thirds* of services sub-sectors. Indeed, a development-sensitive interpretation of Article V militates against *any* significant demands of LDCs in trade in services negotiations. There is a complication when determining which CARIFORUM states this dispensation should have applied to, as the EPA uses the classification of lesser-developed countries that is applied within CARICOM,<sup>52</sup> rather than the United Nations category of LDCs. But even if all CARIFORUM states were treated as developing countries, a GATS-compatible approach would still not require them to make a level of GATS-plus commitments that is many times greater than those made by the developed country party in the new economic integration agreement.

### 2.2.5 *Alternatives to the EU interpretation*

Commentators on the EPA have failed to engage adequately with this fundamental legal issue. Sauvé and Ward conclude that CARIFORUM has easily fulfilled WTO strictures, especially with the standstill provision and a built in agenda for further liberalisation of services and investment after five years.<sup>53</sup> They concede there is a problem on its face with the EU's claim that the EPA delivers on 'special and differential treatment', but argue that 'a careful reading of the liberalization schedules reflects a recognition of a number of principles set forth in GATS' Article IV [on development]'.<sup>54</sup>

In support of this claim Sauvé and Ward cite the asymmetrical number of subsectors scheduled, longer phase in periods for lesser-developed countries, CARIFORUM's right over two years to list any non-conforming measures they omitted to schedule (which only applies to the schedule on non-services investments), and the EU's 'unprecedented' liberalisation commitments in aspects of labour mobility of interest to CARIFORUM (a perception that is critiqued in Sections 5, 10.4, 11.3).

<sup>51</sup> WTO 'Ministerial Declaration', WT/MIN(05)/DEC adopted 18 December 2005, para 26

<sup>52</sup> Article 4 of the Revised Treaty of Chaguaramas

<sup>53</sup> Sauvé and Ward (2009), 5 and 22

<sup>54</sup> Sauvé and Ward (2009), 8



In a report commissioned by the German government, a more cautious Francis and Ullrich suggest the strength of services in CARIFORUM countries should enable them to generate development opportunities, despite the ‘relatively narrow asymmetry in liberalization’. They are somewhat more critical when assessing the ACP-wide implications and argue for ‘greater asymmetric liberalization (i.e. minimal liberalization by LDCs)’, with a focus on sequencing for other ACP negotiating groups that have low levels of services infrastructure.<sup>55</sup>

This report goes further. GATS-compatibility needs to be based on sound legal principles. The combination of the development flexibilities in GATS Article V:3 when read in their context, the negotiating mandate in Article 41 of the Cotonou Agreement and the requirement of ‘asymmetry’ in Article 60:1 of the EPA supports that very different outcome.

What constitutes ‘substantial’ sectoral coverage will always be a value judgement, but it needs to reflect the economic realities and relativities of the parties. On a weighted approach to services trade, even using imperfect data, the requirements of Article V:1 can be met largely through the EU’s schedule alone.<sup>56</sup> Least developed countries should not have to make any sectoral commitments at all in an EPA, whether they are WTO members or not. Developing countries that are outside the WTO, and therefore have no GATS commitments, should also be exempt. The expectations on developing countries that are WTO members should be commensurate with their right to make limited new commitments in the GATS 2000 negotiations, and subject to extensive limitations and long implementation periods. At most, they could be required to meet the shortfall in the EU’s contribution to ‘substantial sectoral coverage’ based on value of trade, with ‘substantial’ still to be defined.

That starting point would allow any negotiations on services and investments with the EU to reflect careful research and assessment of future policy implications, rather than a crude quantitative calculation that has no development rationale.

### **2.2.6 WTO Compatibility of Investment Provisions**

Although non-services investment is not subject to WTO-compatibility, there is some potential crossover with the WTO Agreement on Trade-related Investment Measures (TRIMS), especially in relation to natural resources, such as mining, forestry or fisheries, which are the focus of the non-services investment schedules. TRIMS prohibits governments from imposing certain conditions on foreign investments that would impact negatively on trade in goods, such as requirements to process resources locally, use locally produced inputs or export a certain proportion of products. While there is no explicit reference to TRIMS in the EPA, those obligations still apply to the parties in their capacity as WTO members.

## **2.3 Most Favoured Nation Obligations**

The WTO-plus nature of the EPA is subject to a further multiplier effect through a matrix of most-favoured nation (MFN) obligations. These obligations broadly require that:

- commitments the EU makes on commercial presences and investors and to cross border services and suppliers in any future economic integration agreement must automatically be extended to CARIFORUM states;<sup>57</sup>
- commitments that signatory CARIFORUM states make on commercial presences and investors and to cross border services and suppliers in a future economic integration agreement with any ‘major trading economy’ must be extended to the EU, unless the EU agrees otherwise;<sup>58</sup>

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<sup>55</sup> Francis and Ullrich (2008), 10

<sup>56</sup> As the EU is the dominant trader, its schedule of commitments in 94 percent of subsectors should satisfy the combination of relevant factors and address the objective of Article V to maintain the integrity of MFN and avoid trade distortion.

<sup>57</sup> Articles 70:1(a) and 79:1(a)

<sup>58</sup> Articles 70:1(b) and 79:1(b)

- any more favourable treatment that an individual CARICOM state gives the EU in the EPA must be extended to all CARICOM states;<sup>59</sup> and
- any more favourable treatment that an individual CARIFORUM state (members of CARICOM or the Dominican Republic) gives to the EU in the EPA must be extended to each other, with a phase-in period of one to five years depending on the country's level of development.<sup>60</sup>

Comparable MFN obligations do not apply as between the CARIFORUM and EU parties in relation to their respective regional integration processes. That exclusion applies in general across the EPA.<sup>61</sup> It is reiterated in Title II with regard to any preferences to commercial presences and investors or to cross border services and suppliers that arise when either Party, or an individual CARIFORUM state, concludes a 'regional economic integration agreement' that creates an internal market or that requires them to harmonise their legislation. Internal integration arrangements in the European Economic Area, pre-accession agreements to the European Union, the CARICOM Single Market and Economy, and the CARICOM-Dominican Republic Free Trade Agreement are explicitly covered.<sup>62</sup>

The EPA also explicitly excludes from MFN coverage

- temporary movement of natural persons;<sup>63</sup>
- taxation or mutual recognition treaties;<sup>64</sup>
- capital movements under Title III;<sup>65</sup> and
- present or future provisions on commercial establishment in BITs between CARIFORUM states and EU member states or third countries.<sup>66</sup>

Other MFN obligations may also arise outside the EPA. CARIFORUM states may be parties to existing or future FTAs with non-EU states that entitle the other party to at least as favourable treatment as that given to the EU in the EPA. While individual CARIFORUM states may be parties to BITs with non-EU states that contain similar MFN obligations, these arguably fall within an exception for free trade zones or areas.

### **2.3.1 MFN treatment between the EPA Parties**

CARIFORUM states are entitled to any better treatment on measures affecting commercial presence (Chapter 2)<sup>67</sup> or cross border supply (Chapter 3)<sup>68</sup> that the EU gives to any other state in an economic integration agreement that is concluded after the EPA was signed, being 15 October 2008.

#### **DIAGRAMME 1: MFN TREATMENT OF CARIFORUM STATES BY THE EU**



<sup>59</sup> Article 238:2

<sup>60</sup> Articles 238:2 and 238:3

<sup>61</sup> Article 238:1

<sup>62</sup> Articles 70:2 and 79:2, including footnotes 11 and 15.

<sup>63</sup> There is no equivalent of Articles 70 and 79 in chapter 4

<sup>64</sup> Articles 70:3 and 79:3

<sup>65</sup> The MFN obligations are specific to chapters 2 and 3 and their related schedules

<sup>66</sup> Under Article 70 MFN treatment for commercial presence only applies to future economic integration agreements. See discussion below.

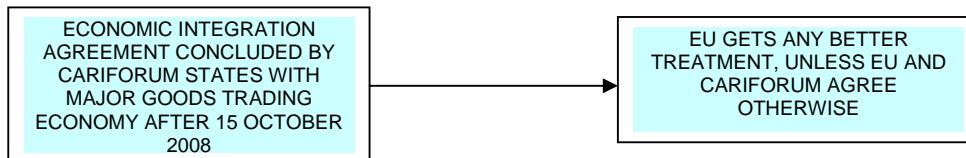
<sup>67</sup> Article 70:1(a)

<sup>68</sup> Article 79:1(a)

The MFN provision carries potential benefits to CARIFORUM, although it should not be assumed that increased commitments translate to greater economic opportunities. Conversely, this obligation may act as a discipline on the EU not to concede better terms in EPAs with other ACP groupings or non-ACP parties.<sup>69</sup> Whether agreements like the EU-Korea FTA 2009,<sup>70</sup> or those under negotiation with India, ASEAN, Mercosur and Canada, contain more favourable treatment depends on a detailed comparison of the relevant schedules alongside any variations in the text.

Correspondingly, the EU is entitled to any better treatment on measures affecting commercial presence (Chapter 2)<sup>71</sup> or cross border supply (Chapter 3)<sup>72</sup> that any CARIFORUM state gives to any 'major trading economy' in an economic integration agreement concluded after 15 October 2008.

## DIAGRAMME 2: MFN TREATMENT OF THE EU BY CARIFORUM STATES



A 'major trading economy' is defined as either a developed country or a country that accounted for more than 1 percent of world *merchandise* exports in the year preceding the new agreement or group of countries whose comparable share of world merchandise exports is 1.5 percent. Brazil has complained at the WTO that including such clauses in an EPA could discourage the negotiation of South-South agreements with major developing countries, contrary to the objectives of the Enabling Clause; the EU has rejected those claims.<sup>73</sup>

This MFN obligation is subject to mandatory consultations on whether the EU may be denied the benefit of MFN.<sup>74</sup> However, denial of that benefit requires a joint decision of the parties, which effectively means the EU must agree to waive its MFN entitlement. This provision gives the EU the benefit of stronger provisions in those FTAs without having to make reciprocal concessions.

### 2.3.2 MFN Entitlements in FTAs with Non-parties

As of October 2008, CARIFORUM states were party to very few other FTAs.<sup>75</sup> None of them cover investment and cross border services with the exception of the US-DR-CAFTA. However, CARICOM states are negotiating a new FTA with Canada and are also looking to do so with the US. Both are developed countries and the agreements would therefore be caught by the MFN obligation.

Canada and the US also routinely include strong, retrospectively worded MFN obligations in the investment and cross border services chapters in their FTAs.<sup>76</sup>

<sup>69</sup> Sauv  and Ward (2009) at 14 imply other ACP sub-regions may benefit from the CARIFORUM-EC EPA; however, the MFN obligation only applies to better treatment in subsequent agreements.

<sup>70</sup> That assessment will require a close comparison of schedules, which is beyond the scope of this paper.

<sup>71</sup> Article 70:1(b)

<sup>72</sup> Article 79:1(b)

<sup>73</sup> 'EU EPAs Could Inhibit South-South Trade Integration, Brazil Alleges', *Bridges Weekly Trade News Digest*, vol 12, no. 6, 20 February 2008, <http://ictsd.org/i/news/bridgesweekly/6627/>

<sup>74</sup> Articles 70:5 and 79: 5

<sup>75</sup> A CaPRI paper cites preferential trade agreements with Venezuela, Colombia, Cuba and Costa Rica as well as with the Dominican Republic, which is a party to the CARIFORUM-EC EPA; CaPRI (2009), 3

<sup>76</sup> MFN obligations relating to investment and cross border trade in services in existing, as well as future, FTAs can be found in Articles 804 and 903 of the Canada-Peru FTA 2008 and Articles 11:4 and of 12:3 the Korea-US FTA 2007.

### DIAGRAMME 3: MFN TREATMENT OF NON-EPA PARTIES TO FTAS WITH CARIFORUM STATES



If such a provision were included in a FTA with CARICOM it would automatically entitle Canada or the US to any better treatment that has already been given to the EU in chapters 2 and 3 of the EPA, and their associated schedules. Even if Canada or the US agreed to deviate from their standard MFN rule, it would be difficult for CARICOM states to offer them less than they have already given to the EU.

Other individual ACP states or groups of states may already have similar MFN obligations on investment and cross-border services in an FTA with a non-EU state or may conclude one ahead of a comprehensive EPA. While they would be exempt from giving the EU the benefits of any better treatment in those existing FTAs, they would have to give the parties to those FTAs any better treatment they give the EU in the EPA.

#### 2.3.3 *MFN Implications of BITS*

The interface between the investment provisions in the EPA and BITS is complex but potentially important.<sup>77</sup>

The first and easiest question is whether a EU member state or a CARIFORUM state that in the future enters into a BIT that gives more favourable treatment to investors and investments than exist under the EPA is subject to the MFN obligation. Bilateral investment treaties are not explicitly excluded from the MFN obligations in Chapter 2 (commercial presence) and Chapter 3 (cross-border services). However, the MFN provisions relate only to an ‘economic integration agreement’, which is defined in Article 61(f) as ‘an agreement substantially liberalizing trade in services and investment pursuant to WTO rules’. The liberalisation of investment under BITS is different in nature and degree from that provided by WTO rules. Chapter 2 also excludes expropriation and investor-to-state dispute settlement from the definition of ‘measures affecting commercial establishment’.

Second, both parties to a BIT may also be signatories to the EPA. As Table 1 shows, there were 34 BITS in effect between CARIFORUM states and EU member states as of June 2009.<sup>78</sup>

<sup>77</sup> Westcott examines a sample of BITS between CARIFORUM and EU states, but does not explore the MFN issue. Thomas Westcott (2008), ‘The CARIFORUM-EU Economic Partnership Agreement and Interim Agreements between Other ACP Regions and the EU: Investment Provisions and Commitments’, Working Paper, Eschborn, Germany: GTZ, 23-26

<sup>78</sup> UNCTAD maintains a relatively comprehensive list and archive of existing BITS: <http://www.unctad.org/Templates/Page.asp?intItemID=2339&lang=1>

**TABLE 1: BITS BETWEEN CARIFORUM AND EU STATES**

<b>EC Member State</b>	<b>CARIFORUM State</b>
Austria (1)	BEL
Finland (1)	DOM
France (4)	DOM, HAI, JAM, TTO
Germany (9)	ATG, BRB, DOM, GUY, HAI, JAM, LCA, VCT, TTO
Italy (3)	BRB, DMA, JAM
Netherlands (3)	BEL, JAM, SUR
Spain (3)	DOM, JAM, TTO
United Kingdom (10)	ATG, BRB, BEL, DMA, GRD, GUY, HAI, JAM, LCA, TTO

Source: UNCTAD

In that situation, the EPA explicitly entitles investors and investments to the best treatment under either agreement.<sup>79</sup> The implications of that cross-fertilisation are discussed below (Section 4.6).

A third situation involves BITS between a state that is a signatory to the EPA and a non-EPA party. There were 23 such agreements involving a CARIFORUM state in effect in June 2009 (Table 2). For example, the US has signed four BITS with CARIFORUM countries. They mainly date from the mid-1990s during the Clinton administration and are based on the 1994 prototype BIT (although the agreement with Haiti was signed back in 1983). These are not typical of current US demands in either its BITS or the investment chapters of FTAs; the Obama administration has the model BIT under review so it is unclear what template any future negotiations with CARICOM would be based on.

**TABLE 2: BITS BETWEEN CARIFORUM AND NON-EU STATES**

<b>CARIFORUM party</b>	<b>Other party</b>	<b>Date of signature</b>	<b>Entry into force</b>
<b>Barbados</b>	Canada	29-May-96	17-Jan-97
	China	20-Jul-98	1-Oct-99
	Cuba	19-Feb-96	13-Aug-98
	Mauritius	28-Sep-04	28-June-05
	Switzerland	29-Mar-95	22-Dec-95
	Venezuela	15-Jul-94	31-Oct-95
<b>Belize</b>	Cuba	8-Apr-98	16-Apr-99
<b>Dominican Republic</b>	Chile	28-Nov-00	8-May-02
	Ecuador	26-Jun-98	21-Jun-99
	Panama	6-Feb-03	17-Sep-06
	Switzerland	27-Aug-04	30-May-06
	Taiwan	5-Nov-99	23-Nov-01
<b>Grenada</b>	United States	2-May-96	3-Mar-89
<b>Guyana</b>	China	27-Mar-03	26-Oct-04
<b>Jamaica</b>	Argentina	8-Feb-94	1-Dec-95
	China	26-Oct-94	1-Apr-96
	Switzerland	11-Dec-90	21-Nov-91
	United States	4-Feb-94	7-Mar-97
<b>Trinidad &amp; Tobago</b>	Canada	11-Sep-95	8-Jul-96
	China	22-Jul-02	24-May-04
	India	12-Mar-07	7-Oct-07
	Korea, Republic of	5-Nov-02	27-Nov-03
	United States	26-Sep-94	26-Dec-96

Source: UNCTAD, as of June 2009

<sup>79</sup> Article 71

These BITs routinely contain retrospective MFN obligations. Taking the example of the BIT between Trinidad and Tobago and the United States, which came into force in December 1996, US investors and investments covered in the BIT are entitled to the most favourable treatment that Trinidad and Tobago gives any third state with respect to the establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of such investments. Non-compliance could be enforced through investor-initiated arbitration that, if successful, could involve large awards of monetary damages.

However, this BIT makes an exception for ‘any existing or future membership of a customs union, common market, free trade zone, regional or sub-regional arrangement or economic multilateral international agreement or similar international agreement to which either of the Contracting Parties is or may become a party’. Canada’s BITS refer to ‘establishing, strengthening or expanding a free trade area, common market or customs union’. Others, such as the UK BITS, refer only to an ‘existing or future customs union or similar international agreement’.

The CRNM interprets ‘free trade zone’ and ‘free trade area’ as covering the arrangement created by the EPA. On one hand that appears to be consistent with the intention of the exception, but it also creates an anomaly. The MFN exception does not appear to extend to other bilateral investment treaties, which are not explicitly mentioned and are unlikely to be considered a ‘similar international agreement’ to the class of agreements referred to, which are comprehensive in either their scope or parties. The routine incorporation within FTAs of investment chapters that are equivalent to BITs is frustrating the objective of BITs that investors and investments receive at least as good treatment as those of third countries.

That fourth variant, where BITs are incorporated within new FTAs, is perhaps most pertinent. If CARICOM concludes such an FTA with the US or Canada, the MFN provisions of the EPA would come into play, with the exception of certain BIT-style investment provisions, notably expropriation and investor-initiated disputes, that are currently excluded from the coverage of the EPA.<sup>80</sup> As noted elsewhere, these exclusions are likely to be revisited during the scheduled review of the investment provisions in the EPA.

The interplay between BITs, which in many cases pre-date even the GATS, and the FTAs into which they are now incorporated will become more significant as the number and scope of FTAs continues to expand. The explicit cross-fertilisation of the EPA and BITS strengthens the leverage that European investors can exercise over government regulation in CARIFORUM states. Non-EU states that have investment treaties with CARIFORUM and other ACP states can be expected to seek similar entitlements for their investors through new agreements, if they are frustrated by the exception provision of the BITs.

This interplay may have limited impacts on CARIFORUM states that have extensive investment liberalisation. The implications are much greater for the rest of the ACP, most of which actively regulate foreign direct investment and have many BITs with states within and outside the EU. The standard response to such concerns, that countries would benefit from broader investment obligations because it increases FDI, is addressed below (Section 4.7).

### **2.3.4      *Application of Commitments to the EU within CARIFORUM***

The most complex and controversial MFN issue is the impact of the EPA on the internal integration arrangements within CARICOM and its FTA with the Dominican Republic. The principal concern is that the EPA will pre-empt decisions yet to be taken about the CARICOM Single Market and Economy (CSME) by imposing an EU model of regional integration on the region. Prominent critic Norman Girvan foresees a process of ‘*asymmetrical, neo-colonial and neo-liberal integration* between

<sup>80</sup> Article 66, footnote 1 excludes expropriation and investor-to-state dispute settlement of the kind covered in BITS from the definition of ‘measures’ covered by chapter 2. In the EC-published version of the EPA text - L289/I/3, 30 October 2008, it is Article 66, footnote 2.

a large, highly developed “centre” economy and a set of small, disconnected peripheral economies of varying levels of development.<sup>81</sup> Girvan objects that

[t]he EPA superimposes on the incomplete CSME a scheme of regional integration that is more extensive in coverage and wider in geographical scope, simultaneously assimilating that scheme into an EU-centred economic zone with free movement of the majority of goods and services, free movement of capital and common ‘trade-related’ policies.<sup>82</sup>

As a result, ‘[r]egulatory policies in services, investment, and “trade-related” subject areas will form a seamless whole across CARIFORUM and the EU. CARIFORUM countries as a group will not have common regulatory policies that set them apart as a distinct economic space from the EU.’<sup>83</sup>

Girvan further notes that the ‘development of regional enterprises and of cross-border and cross-sectoral linkages is not a specific objective of the EPA’ and there are no waivers, exceptions or derogations to allow them to be encouraged.<sup>84</sup> Havelock Brewster and others also warn that immediate internalisation of the EPA’s national treatment obligations within CARICOM would prejudice strategies to foster the development of local and regional firms that are capable of competing globally and widen intra-regional inequalities, given that some countries are less endowed than others to take advantage of any new opportunities in the region and the EU.<sup>85</sup>

CARIFORUM negotiator Junior Lodge vigorously refutes Girvan’s propositions as ‘at stark variance with the provisions of the CARIFORUM EPA.’<sup>86</sup> He cites their rejection of an EU proposal ‘for non-discriminatory harmonisation and CAFTA-parity that would have meant the Dominican Republic effectively determined the nature of the CARIFORUM economic space’ as evidence that ‘[o]ne of CARIFORUM’s central objectives was to retain the veracity of its own regional integration process’.<sup>87</sup>

There are several provisions that appear to support Lodge’s position. Current and future liberalisation in the CSME and the CARICOM-DR FTA are excluded from the MFN obligations to the EU on investment and services. The general provision on Regional CARIFORUM Integration in Title II (Article 64) also endorses ‘the progressive removal of remaining barriers and the provision of appropriate regulatory frameworks for trade in services and investment’ among CARIFORUM states and describes the principles in Chapter 5 that aim to discipline domestic regulation in various sectors merely as ‘a useful framework’ for such liberalisation.

However, Article 4.4 in Part 1: Trade Partnership for Sustainable Development, which asserts the importance of regional integration for the CARIFORUM states, is more problematic because it uses trade agreement double-speak:

The parties further recognize, *without prejudice to the commitments undertaken in this Agreement*, the pace and content of regional integration is a matter to be determined exclusively by the CARIFORUM States in the exercise of their sovereignty and given their current and future political ambitions. [emphasis added]

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<sup>81</sup> Norman Girvan (2009) ‘Implications of the Economic Partnership Agreement (EPA) for the CSME’, *Social and Economic Studies* 58:2, 91-127, 123

<sup>82</sup> Girvan (2009), 104

<sup>83</sup> Girvan (2009), 104-5

<sup>84</sup> Girvan (2009), 106

<sup>85</sup> Havelock Brewster, Norman Girvan and Vaughan Lewis (2008), ‘Renegotiate the Cariforum EPA’, 23 March 2008, <http://www.normangirvan.info/renegotiate-epa>, 3-4

<sup>86</sup> Lodge (undated), 4

<sup>87</sup> That is especially significant as the Dominican Republic scheduled commitments in 90 percent of the services sub-sectors.

In other words, the exclusive exercise of sovereignty by CARIFORUM states can be overridden by commitments elsewhere in the EPA, including commitments on investment and cross border services and the associated schedules under Title II.

#### DIAGRAMME 4: MFN TREATMENT OF CARIFORUM STATES BY EACH OTHER



However, the fundamental contradiction between self-determination and an externally imposed regionalism is found in the ‘regional preference’ obligation in Article 238:2. This requires each CARIFORUM state to extend to all the other CARIFORUM states any greater liberalisation it has given to the EU. The ‘regional preference’ is located in the Final Provisions section of the EPA and applies across the entire treaty, including Title II and Title III on capital movements. Paragraphs 3 (ii) and (iii) of Article 238 provide a phase-in period for ‘the provisions of Annex 4’ in relation to the CARIFORUM-DR FTA, allowing one year after the date of signature before they take effect between the ‘more developed’ CARICOM states and the Dominican Republic (October 2009), two years between the Dominican Republic and the remaining states except Haiti (October 2010), and five years for Haiti (October 2014). There is no explicit power to derogate from this obligation. The draft PACP-EC text contained an identical provision, without the phase-in.

Article 238 clearly has the effect that Girvan contends in relation to the CARICOM-DR FTA. The commitments on investment and cross border services that the Dominican Republic made in 90 percent of sub-sectors and the lesser, but still extensive, commitments made by CARICOM states in the EPA effectively determines the shape and substance of the services and investment obligations in their FTA that are still under negotiation. Left to themselves, the rules and commitments in that FTA could well have differed from the EPA.

The Caribbean negotiators reject a similar assessment for the CSME, arguing that its legal obligations already equal or exceed those in the EPA.<sup>88</sup> Article 32 of the Revised Treaty of Chaguaramas prohibits new restrictions (imposes a standstill) on the right of establishment and a programme has been established pursuant to Article 33 for the removal of restrictions on that right. Articles 36 and 37 provide the equivalent for services. CARICOM states are legally committed to free capital movements and regional labour mobility is more extensive in its categories and less restricted in its conditions than in the EPA.

Without dissecting the CSME in detail, there are four problems with this argument. First, several legal elements of the CSME have not yet been finalised. The Revised Treaty foresees a Protocol on E-commerce that has yet to be concluded; that process is consistent with the regulatory dialogue on E-commerce provided for under Chapter 6 of Title II (which is therefore not addressed further in this report). The most significant unfinished business of the CSME is the Financial Services Agreement and the CARICOM Investment Code. While the content of both drafts reportedly aligns with or exceeds the EPA, that could have changed before they were finalised, certainly as the links between the financial crisis and these agreements become better understood.

Second, the regional preference assumes operational as well as legal alignment with the EPA. An analysis of implementation of the CSME obligations conducted by Girvan showed that only around half of the necessary institutional arrangements were in place by 2008.<sup>89</sup> An audit conducted for the Convocation of the CSME in October 2009 found that the relevant sub-structure arrangements, such as institutions and administrative practices and procedures, were not sufficiently developed and

<sup>88</sup> Personal communication.

<sup>89</sup> Girvan (2008), 96, Table 2



streamlined, including delays in establishing the necessary institutional and administrative arrangements for the free movement of various categories of labour.<sup>90</sup>

Third, the Revised Treaty has weak enforcement mechanisms, which provides a de facto form of flexibility. The EPA has much more rigorous disputes processes. While it is hard to imagine the EU attempting to enforce the 'regional preference', it can do so indirectly by enforcing compliance by CARIFORUM states with their obligations to the EU.

Fourth, the Revised Treaty allows considerable leeway for exceptions, safeguards and waivers that are not replicated in the EPA. Amending the Treaty or adjusting obligations, especially in response to regulatory, policy and market failures or simply changed political preferences that arise through democratic elections, is much easier in the context of CARICOM than it is through the institutional arrangements in the EPA, where the EU is driven by a range of agendas that have nothing to do with the needs and interests of the Caribbean.

The negotiators' argument is also difficult to reconcile with the attraction of the EPA as a mechanism to force the pace of regional integration. Lodge himself affirmed the role of the 'regional preference' as a key instrument in strengthening Caribbean integration, describing it as having a 'compelling economic logic' that is consistent with the MFN provision in the Revised Treaty of Chaguaramas and which has the potential to revitalise CARICOM's flagging regional integration:

in spite of being longstanding and firmly embedded in the region's political DNA, implementation of Caribbean regional integration has been sub-optimal. The CARICOM Single Market Economy (CSME) was promulgated in 1989, yet a number of regional rules and regulatory framework [sic] are yet to emerge. ... The EPA's thrust on regional integration should engender the injection of greater dynamism into the CARIFORUM-designed effort.<sup>91</sup>

A review of the EPA by the Economic Commission for Latin America and the Caribbean (ECLAC) described the EPA more bluntly as a potential

catalyst to governments in the region to implement policies that they already agreed to in regional treaties relating to economic integration. The reference recently to CARICOM as a 'ramshackle' organization by a sitting Prime Minister underscores the need for action.<sup>92</sup>

The official commentaries pay remarkably little attention to the legal implications of Article 238, especially when it is read alongside Article 4:4 and Article 64:1.<sup>93</sup> Their arguments beg the obvious questions of why CARIFORUM governments would consciously embrace an externally driven regional integration agenda with more vigour, commitment and ownership than the internal arrangements they seem reluctant to complete and implement, and whether the region will 'now be pushed at a pace that it is not fully in a position to undertake'.<sup>94</sup>

More curious still, in light of the officials' statements, is the apparent attempt to neutralise the 'regional preference' in the Explanatory Note to CARIFORUM's services and non-services investment schedules in the final offer dated 16 December 2007. The relevant paragraph read:

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<sup>90</sup> Referred to in Caribbean Community Secretariat, 'Review of the Schedule of Free Movement of Persons', Convocation on the CARICOM Single Market and Economy', CSME(CONV)/2009/1/2, 6 October 2009

<sup>91</sup> Lodge (undated), 1-2

<sup>92</sup> ECLAC (2008), 'The CARIFORUM-EC Economic Partnership Agreement (EPA): An Assessment of Issues Relating to Market Access, Safeguards and Implications for Regional Integration', LC/CAR/L.181, 26 November 2008, 16. Sauvé and Ward (2009) express similar sentiments, 3.

<sup>93</sup> See Lodge (undated), 4; and Humphrey (2008), 3 and 5. The ECLAC review cites only paragraph 1 of Article 238 that excuses the regional integration process of the parties from any MFN obligation and ignores the impact of paragraph 2: ECLAC (2008), 15-16

<sup>94</sup> Francis and Ullrich (2008), 18

The market access commitments and reservations listed in this schedule apply only to the relations between the signatory CARIFORUM States on the one hand and the European Communities and their Member States on the other. They do not affect the rights and obligations of Member States arising from obligations under the Revised Treaty of Chaguaramas Establishing the Caribbean Community including the CARICOM Single Market and Economy, or the CARICOM-Dominican Republic Free Trade Agreement.

If that wording has survived into the final text, it would have been in direct conflict with the ‘regional preference’ obligation in Article 238:2. However, the wording was amended in the final version of the schedules by inserting the critical phrase ‘Subject to Article 238’ at the beginning of the paragraph.

It is unclear what underlay the December 2007 version, assuming it was not a major drafting error. It seems unlikely that CARIFORUM’s negotiators privately sought to neutralise what they publicly acclaimed as a catalyst for a reinvigorated regionalism. Girvan speculates that the Caribbean Regional Negotiating Machinery may have negotiated Article 238, while the countries insisted on the Explanatory Note, but the latter did not survive the final review by the EU.<sup>95</sup>

Unfortunately, very few analyses refer to the original Explanatory Note and none addresses this last minute, highly significant amendment during the legal scrubbing.<sup>96</sup> Whether the EU insisted on the change is important if it continues to demand a similar provision in other EPAs. A regional preference along the lines of Article 238 would have a massive impact on other ACP areas where the general state of regional integration is more fragile and internally contested than in the Caribbean. Moreover, the preference would apply to sub-regions that cut across existing regional integration initiatives. If the ‘regional preference’ obligations cannot be omitted or evaded through a device like a headnote, the price of an EPA will be far greater than most of those economies and societies can or should be expected to bear.

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<sup>95</sup> Personal communication

<sup>96</sup> Westcott states that the schedule on commercial presence ‘clearly separates’ the EPA undertakings from commitments in the Revised Treaty on Chaguaramas and the CARICOM-DR FTA without any analysis. Westcott (2008), 28

### **3. THE SCOPE OF TITLE II**

The substantive economic obligations in the EPA are divided into four titles under *Part Two: Trade and Trade-related Matters*. Title I covers trade in goods, including agriculture and fisheries. Title II combines investment, cross border services and e-commerce. The short Title III deals with current payments and capital movement. Title IV covers a range of trade-related issues, such as competition, public procurement, intellectual property, environment, 'social aspects' and protection of personal data.

The next three sections of this report focus on the legal risks associated with the main liberalisation chapters of Title II, being Chapter 2: Commercial Presence, Chapter 3: Cross-border Supply of Services and Chapter 4: Temporary Presence of Natural Persons for Business Purpose. The analysis begins with the framework and general provisions in Title II, followed by the liberalisation of investment and cross border services and then the rules and commitments on labour mobility. Five major areas of risk emerge for Southern governments that negotiate with the EU using this template: asymmetry that favours the EU; legal uncertainties imported from the GATS or created by the EPA; increased potential for errors in drafting and interpretation; a GATS-plus closure of governments' policy and regulatory space; and inappropriate or unanticipated regional integration obligations.

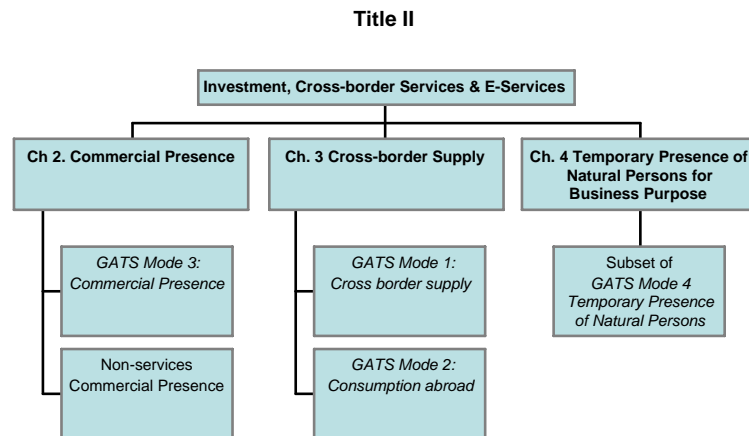
As noted in section 2, the EU has tailored the architecture and substance of Title II to achieve a level of ambition for its services firms and investors that has proved impossible in the GATS. The Global Europe strategy aims to secure coherent rules and commitments for its corporations over a seamless chain of activities. As an example, a European energy transnational ideally wants the right to establish a wholly-owned company in the host country without restrictions on exploration and mining concessions, land rights or access to water; the ability to buy all the services it needs to operate, such as engineering, data processing, sample testing, finance, transport, distribution or other 'services related to mining', from whomever it chooses inside or outside the country; the right to move its executives and technical specialists freely around the world; and unfettered movement of capital, including its profits and proceeds of sale.

The approach used in the GATS gets in the way of those commercial objectives because it imposes artificial legal distinctions between services and non-services investments, and between investment, cross border supply, and movement of personnel and capital. The corporations also have to contend with rules that are scattered across numerous BITs and the WTO's TRIMS agreement, which prohibits the imposition of various performance requirements, such as local processing, as conditions of foreign investment. The EU has been at the forefront of attempts to cut through some of that fragmentation and create stronger rights and protections for its investors. Moves to secure a 'high quality' Multilateral Agreement on Investment through the OECD failed, as did the EU's push for the WTO to develop comprehensive rules on investment.

The EU has been more ambivalent in its approach to cross border services. Rapid growth of the Internet and offshore outsourcing has provided new commercial opportunities. But those developments are politically sensitive, not least because outsourcing is seen to threaten jobs at home. Cross border supply of services has also expanded the scale and forms of risk, exemplified by the post-2007 financial crisis, and poses legal and operational barriers to effective consumer protection and supplier liability. Those competing considerations are reflected in a relatively low level of commitments and offers on remote delivery of services under the GATS, on one hand, and chapters that promote a coherent definition of computer services and enhance e-commerce on the other.

#### **3.1 Structure of the EU Template**

Title II of the EPA has redesigned the GATS framework in response to these ambitions and sensitivities. The four GATS modes of service delivery, being 1) cross border supply, 2) consumption abroad, 3) establishing a commercial presence, 4) temporary presence of natural persons, are redistributed across three chapters.

**DIAGRAMME 5: STRUCTURE OF EPA TITLE II COMPARED TO GATS MODES OF SUPPLY**

*Chapter 2: Commercial Presence* applies to a business or professional that sets up, buys or maintains a legal entity or a branch or representative office in the host country to perform a commercial economic activity. It goes beyond GATS mode 3 to cover a broad sweep of government measures ‘affecting’ all kinds of commercial presence, not just those supplying services. When states commit a sector to the rules of this chapter they trigger a presumption in favour of entry for key corporate personnel in that sector,<sup>97</sup> and any relevant disciplines on domestic regulation of the sector under Chapter 5.

*Chapter 3: Cross border supply of Services* combines the GATS modes 1 and 2 (cross-border supply and consumption abroad) into a single category. This merger has the potential to address some technical problems with modes 1 and 2 in the GATS. First, there is uncertainty about which transactions should be considered cross border supply or consumption abroad; for example, an investment made by electronic transfer to an offshore financial centre that is held and managed in the offshore bank might be considered either or both, yet a country may have commitments only in one mode.

Second, states have made many more GATS commitments in mode 2 than mode 1, which they consider more risky and sensitive. They are considered more likely to harmonise, and therefore expand, those commitments when combined into ‘cross-border supply’. Third, market access commitments in mode 1 of the GATS carry the right to unrestricted inflows and outflows of capital when that is an essential part of the service, but there is no equivalent right for capital outflows in mode 2. Perhaps surprisingly, the EPA only fully resolves the last of these.

*Chapter 4: Temporary Presence of Natural Persons for Business Purpose* narrows the scope of GATS mode 4, which technically covers all categories of services workers, and applies only to the temporary presence in a country of six, mainly elite categories of personnel to supply services for a business purpose.

The guarantee of current payments and capital movements in Title III applies to activities under all three chapters.

Despite those innovations, the EPA is still very fractured. Title II is headed *Investment*, Trade in Services and E-Commerce, but Chapter 2 is limited to commercial presence, a sub-set of investment. The parties are required to make commitments on investment, cross border services and labour mobility, but the agreement is silent about the scheduling methodology. The FTAs of other

<sup>97</sup> In GATS terminology, linking modes 3 and 4

major services exporters have used a negative list approach to schedules that specify what is not covered; this maximises liberalisation and is usually accompanied by a standstill that prevents the adoption of less liberal measures in the future. The EU largely maintains a positive list approach in its template,<sup>98</sup> and differentiates between modes 1 and 2.

The CARIFORUM-EC EPA therefore reflects a ‘high quality’ but imperfect precedent for achieving the EU’s ambitions in its future negotiations. It is beyond the ambit of this report to speculate on the reasons for that, although the divided jurisdiction of the European Union and the Members States on investment clearly drove the treatment of investment-related issues.

The next sections of this report examine the provisions that apply to all of Title II. These spell out the coverage, definitions and exclusions, make provision for reviews, require periodic new negotiations, and offer (often hortatory) assurances. Most follow the standard GATS approach, but there are some significant variations.

### **3.2 Coverage**

The stated purpose of Title II is to ‘lay down the necessary arrangements for the progressive, reciprocal and asymmetric liberalisation of investment and trade in services and for cooperation on e-commerce’ as a means to facilitate regional integration and sustainable development of CARIFORUM states.

The rules and commitments apply to the standard range of ‘measures’ found in the GATS: any law, regulation, rule, policy, procedure, decision, administrative action or similar. Basically, the agreement covers any kind of action that a government takes to regulate investments, cross-border provision of services or e-commerce. There are some specific restrictions on the application to immigration requirements, discussed below.

It makes no difference if these measures are adopted at the central, regional or local government level, or by non-government bodies that are exercising a delegated authority. While the GATS requires a central government to ‘take such reasonable measures as may be available to it’ to ensure that the other levels observe the state’s obligations, Article 61(b) of the EPA omits that crucial caveat. As a result, all commitments made in the EPA are fully and equally binding on all levels of government decision-making. This GATS-plus innovation appears to be a standard provision of the EU template, as it is also in the EU-Korea FTA and the draft PACP EPA.<sup>99</sup>

That provision has the potential to impose onerous obligations on government agencies, local bodies and village councils who have not been consulted during the negotiations, are probably not aware of their state’s commitments, and face conflicting priorities and obligations. Many will simply lack the capacity to comply. The regional scale of an agreement like the CARIFORUM-EC EPA that spans fifteen separate jurisdictions, each of which has its own structure of local government with varying levels, judicial competencies and institutional capacities, can be expected to produce widely divergent responses. Central governments will be responsible for any failure of those entities to comply.

### **3.3 Schedules**

Because the EPA has a different architecture from the GATS and introduces variable presumptions and restrictions on governments in each chapter, it requires a new approach to scheduling. Chapter 2 on commercial presence and Chapter 3 on cross-border supply assume a positive list approach that specifies the sectors that are covered, as in the GATS. The schedule for temporary movement of natural persons is more complicated. There is a presumption that corporate personnel have rights of

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<sup>98</sup> However, the leaked draft of the Canada-EU FTA reveals a negative list approach to cross-border services.

<sup>99</sup> Article 7.2(b) in the EU-Korea FTA: The Free Trade Agreement between the EU and the Republic of Korea, <http://trade.ec.europa.eu/doclib/press/index.cfm?id=443>

entry where there is a commitment on commercial presence, subject to reservations in the schedule. By contrast, the EU has listed in the text itself the 29 categories of Independent Professionals and Contract Service Suppliers that it might commit in its schedule; CARIFORUM has no such list.

### **3.3.1 Scheduling Format**

The EPA text does not prescribe a particular format for scheduling commitments. The EU and CARIFORUM took different approaches. The EU used four schedules to cover 1) commercial presence, 2) cross border supply, 3) the temporary movement managerial personnel and 4) access for Contractual Services Suppliers and Independent Professionals. The first two schedules take a positive list approach. The third schedule lists reservations to the entry of corporate personnel in the sectors it has committed in its schedule on commercial presence. The fourth makes positive list commitments within the categories of Independent Professionals and Contract Service Suppliers that it has listed in the text.

CARIFORUM opted for two schedules. The first covers the liberalisation of services in all three chapters, based on an updated schedule of each country's GATS commitments in modes 1 to 4. It uses a positive list approach. The second schedule deals only with commercial presence (investment) in non-services sectors; it effectively operates as a negative list within five designated sectors.

The substantive implications of these variations are discussed below. The initial point made here is that these innovations and variations make it very difficult to interpret the parties' commitments and compare their schedules with each other, with the GATS, and with other FTAs to which they are a party that use a different approach but often carry MFN obligations. For example, South Korea took the CARIFORUM approach in the EU-Korea FTA, but a negative list approach to its commitments in the Korea-US FTA. The complexity of these numerous schedules also increases the risk of errors, especially if governments are pressured to make high levels of commitments in a condensed period of time.

### **3.3.2 Classifications for scheduling**

The parties also tried and largely failed to address another problem with the GATS. The United Nations Central Product Classification (CPCprov) that is used for scheduling GATS commitments, and contained in a document known as W/120, was drafted in 1991 and is outmoded.<sup>100</sup> Each Party to the EPA has adopted its own mix of classification systems in its schedules. In the CARIFORUM services schedule, some sub-sectors are not accompanied by any classifications that would clarify their scope.

Both parties also use the International Standard Industrial Classification (ISIC).<sup>101</sup> However, CARIFORUM's use of ISIC in its non-services investment schedule is problematic. ISIC takes a functional approach to an activity such as mining, which does not distinguish between services and non-services. The CARIFORUM schedule purports to cover only non-services investments, but it does not identify the relevant non-services elements of the ISIC classification; indeed, it would be technically difficult to do so. This creates a potential for overlap and inconsistencies with in its services schedule where its commitments relate to the same activities. The EU does not face that problem, because its investment schedule uses ISIC for both services and non-services.

The regional nature of the EPA negotiations adds a further layer of complexity to the scheduling. Schedules record the obligations of the two parties, CARIFORUM and the EU. Each schedule is a collation of commitments and limitations that are attributed to individual states. To isolate a particular country's obligations it is necessary to extract its specific commitments from each schedule and read them alongside any region-wide horizontal entries, the Headnote and the text itself.

<sup>100</sup> WTO, 'Services Sectoral Classification List. Note by the Secretariat', MTN.GNS/W/120, 10 July 1991, [http://www.wto.org/english/tratop\\_e/serv\\_e/mtn\\_gns\\_w\\_120\\_e.doc](http://www.wto.org/english/tratop_e/serv_e/mtn_gns_w_120_e.doc)

<sup>101</sup> <http://unstats.un.org/unsd/cr/registry/default.asp?Lg=1>

To do that with total accuracy requires a level of technical skill in reading schedules that, unfortunately, not all Southern governments have. Some examples of scheduling errors are given below.

### 3.3.3 *Standstill*

There is a Headnote to each CARIFORUM and EU schedule that contains substantive qualifications, definitions and explanations.<sup>102</sup>

The Headnote to CARIFORUM's services schedule (which applies to chapters 2 to 4) adopts a 'standstill' on the level of liberalisation that prevailed in each CARIFORUM state in October 2008. The relevant paragraph reads:

8. With regard to the economic activities covered in chapters 2 and 3 of Title II on Investment, Trade in Services and E-commerce of this Agreement, other than public services, *without prejudice to the content of the list of commitments* on commercial presence and on cross-border supply in this Annex, the signatory CARIFORUM States *shall maintain the conditions of market access and national treatment* in the meaning of articles 6 and 7 and articles 15 and 16 applicable *according to their respective legislation* to services, service suppliers, investors and commercial presences of the EC Party at the time of the signature of this agreement. [emphasis added]

This standstill applies only to commercial establishment and cross border services, not to labour mobility.

The signatory CARIFORUM states promise to maintain their current levels of market access and national treatment provided in their legislation at the time the agreement was signed in October 2008. On its face, that implies a comprehensive standstill that is subject to two important qualifications. First, the standstill excludes 'public services'. As explained below, this term is unknown to trade in services agreements and may provide fertile ground for dispute if CARIFORUM states give it a wide compass (Section 3.4).

Second, the standstill is 'without prejudice to the content of the list of commitments on commercial presence and on cross-border supply in this Annex'. The plain meaning of that phrase is that any entry in the list that reserves a position less liberal than the status quo will prevail over the standstill. In other words, the standstill applies to *all cross border services and establishments* unless a state has entered a reservation that entitles it to introduce more restrictive national treatment or market access measures in that mode and sub-sector. That is effectively a negative list approach. However, it is pursued through a positive list methodology that is based on a composite of CARIFORUM states' GATS schedules. It becomes very difficult to reconcile the two. There is no specific reference to the standstill in the schedules, just the use of the standard language relating to limitations of 'none', 'unbound' or variations on that theme.

That task is further complicated by paragraph 2 of the Headnote that specifies that the Schedule 'includes only those services activities in which the Signatory CARIFORUM States are undertaking commitments'. The writer understands that the CRNM reads this paragraph as narrowing the standstill to cover only those services activities covered by chapters 2 and 3, other than public services, for which individual CARIFORUM states have undertaken commitments. That weak interpretation of the standstill is problematic for two reasons.

First, the wording in paragraph 2 restricts the Schedule to services activities in which states are undertaking commitments; that must include commitments through the other paragraphs in the

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<sup>102</sup> In several places CARIFORUM has used this to qualify the EPA text, with uncertain legal consequences. The most notable example was the wording in the final draft of the CARIFORUM services offer that would have neutralised the 'regional preference' in Article 238 through the Headnote to both its schedules.

Headnote, including the standstill. By contrast, the standstill in paragraph 8 is limited only by ‘the content of the list of commitments’. The relationship between the two provisions is ambiguous, at best.

Second, the argument that the only binding commitments are those services activities listed in the schedule would leave the standstill devoid of meaning. If a commitment is made that is ‘unbound’ or a limitation is entered that is more restrictive than the status quo, the standstill will not apply – but it would not have applied anyway. If the entry is subject to limitations that are more liberal than the status quo, it would automatically supersede the standstill. If there is no limitation entered, the standstill would be irrelevant as the sub-sector is fully committed.

How the negotiators understood the relationship between paragraphs 2, 8 and the list at the time they drafted the schedule is not relevant. Under Article 48 of the Vienna Convention on the Law of Treaties (Vienna Convention) states are bound by errors to which they have contributed. In the *US-Gambling* case the US was held to commitments that it insisted were unintended.<sup>103</sup> If the EU argued that the standstill imposes across-the-board obligations to all services and establishments, unless a state has listed an explicit limitation, the interpretation of CARIFORUM’s commitments would potentially end up in the hands of a dispute tribunal.

At first glance this uncertainty has limited importance for CARICOM states because the CSME has a similar standstill provision, although that also depends on the implementation of the standstill by the parties and a closer comparison of the texts of the EPA and the Revised Treaty with its associated programmes. Clearly, the meaning of the standstill is important for its application through the regional preference to the CARICOM-DR FTA.

However, the meaning of the standstill poses two additional legal questions, both of which turn on the meaning of ‘liberalisation’. In general terms, a standstill is more liberalising when it is compared to the existing GATS schedules of the CARIFORUM states, but it does not constitute liberalisation if it is judged in terms of ‘new liberalisation’, especially when reservations can permit measures that are more restrictive than the status quo. The GATS is silent on the matter. Negotiating practice and the proposals in the GATS 2000 negotiations would support the former interpretation. Assuming that is so, the interpretation of the standstill becomes very significant. The strong meaning, where the standstill applies comprehensively in all sectors to all states unless their list indicates otherwise, would constitute extensive liberalisation. The weak meaning that effectively equates the standstill with the scheduled commitments would mean a much lesser level of liberalisation.

The interpretation of ‘liberalisation’ arises in two contexts. One involves the assessment of GATS compatibility under Article V (Section 2.2.2). The second affects the application of the regulatory framework in Chapter 5 to a particular sector.

Dealing first with Article V, it would be consistent with the prevailing approach of counting sub-sectors to assess ‘substantial sectoral coverage’ under Article V:1 to treat the standstill as equivalent to comprehensive sectoral commitments, discounted first by any reservations that exclude a sub-sector or mode or retain the right to use measures less liberal than the status quo and second, by the exclusion of ‘public services’ through the Headnote and subsidies through Article 60:3. That is clearly not how CARIFORUM’s commitments were calculated. Indeed, the standstill is generally ignored,<sup>104</sup> and ‘substantial sectoral coverage’ is assessed by the number of sub-sectors that are listed in the schedule. That is consistent with the second, weak meaning of the standstill.

The second question of how the standstill affects the application of the regulatory framework in Chapter 5 is critical in terms of policy space. The sector-specific sections on computer, courier, telecommunications, financial, international maritime transport and tourism services apply when the sector has been liberalised under chapters 2, 3 and 4. There are several possible approaches to

<sup>103</sup> *US-Gambling Panel*, op cit., para 6.138

<sup>104</sup> Sauv   and Ward do refer to the standstill, but not in detail. Sauv   and Ward (2009), 22



interpreting this pre-condition. The first would treat the standstill as constituting liberalisation in all sectors, subject to the discounts just described. That means the disciplines would apply automatically to any CARIFORUM state that has not scheduled a sectoral limitation that negates the standstill. The consequences of that interpretation would be far-reaching and presumably unintended.

A second approach would restrict the meaning of ‘liberalisation’, and hence the application of the regulatory framework, to sub-sectors and modes in which states have made commitments to liberalise their currently applied measures, going beyond the standstill and the status quo. Identifying ‘new liberalisation’ would be complex and onerous, and would create an equally far-reaching and controversial precedent in the GATS context: Southern members have adamantly rejected proposals for commitments to a standstill plus ‘new liberalisation’ in the GATS 2000 negotiations.

A third approach would adopt the weak, and less convincing, interpretation of the standstill and assess ‘liberalisation’ purely by reference to the list of entries in the schedule. ‘Liberalisation’ could then be viewed narrowly, relating only to those sub-sectors, modes and rules where states have agreed to be bound; or broadly, treating the listing of any sub-sectors of a sector in any mode in the CARIFORUM services schedule as liberalising that sector, even when the limitation reserves a position that is less liberal than the standstill or a current GATS commitment. The latter, which seems to reflect the position of the CRNM, means that states may attract extensive obligations when their commitments indicate the contrary intention. The sectoral implications of this legal quandary are canvassed further in Sections 6 to 11.

### **3.3.4 Amendment**

Finally in relation to the schedules, Article XXI of the GATS provides a limited possibility for Members to withdraw a commitment from a schedule, subject to possible compensatory liberalisation. The EPA makes no such provision. The Headnote to the CARIFORUM schedule on non-services investments does reserve the right for states to list further non-conforming measures for two years after the treaty comes into force, which has yet to occur.<sup>105</sup> Beyond that, the only structured recourse available to states to alter the schedule is either the five year review under Article 62, whose objective is to extend, not reduce liberalization, or the separate review of the operation of the EPA that the parties agreed would take place, pursuant to Article 5, within five years of its signing. These are discussed further in Section 3.8.

## **3.4 Public services**

Some of the greatest controversies over trade in services agreements centre on public services and the meaning of the exclusion for ‘services supplied in the exercise of governmental authority’ in Article 1:3 of the GATS. It is unusual that Chapter 1 of Title II in the EPA has no similar general exclusion. The equivalent provision is found in chapters 2 and 3, but not in Chapter 4 on labour mobility. An adaptation is included in the section in Chapter 5 on financial services regulation, but not for sectors like post and telecommunications – presumably because the regulatory framework is designed to impact on the regulation of government services.

The relevant provisions (Articles 65(d) and 75:2(c) and (d) in chapters 2 and 3) use the same contentious wording as the GATS exception in Article 1:3. This is often wrongly referred to as a ‘public services’ carveout. To qualify for the exclusion, a governmental service must have neither a commercial element nor a public or private sector competitor. Expert commentators disagree on whether ‘commercial’ applies only to services conducted for a profit or includes user charges, non-profit cost-recovery and taxpayer-subsidised services. That question becomes increasingly problematic as the scope and forms of commercialisation of government-related services continue to

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<sup>105</sup> Sauv  and Ward incorrectly extend this flexibility to CARIFORUM’s services schedule. Sauv  and Ward (2009), 9

expand. Nor is it clear how similar a competing service needs to be.<sup>106</sup> The only consensus is that free services delivered through a public monopoly are excluded.

It is rare to find any government service these days that satisfies both the non-commercial and non-competitive criteria. Adherence to the Washington Consensus, supported by conditionalities on debt financing by the IMF and World Bank, has seen a widespread and ongoing transfer of public services to the commercial and semi-commercial sphere. The ambiguity of this provision may serve the EU's interests in further opening public services to commercial firms by adopting an aggressive interpretation during its periodic consultations with CARIFORUM states or by threatened and actual litigation under the EPA or by European investors under BITs.

Given these limitations it is surprising to see many expert commentaries claim that the EPA excludes 'public health, energy and water services'.<sup>107</sup> Those sectors are not referred to explicitly in the text and they frequently do not qualify for the exclusion.<sup>108</sup>

CARIFORUM implicitly recognised this risk when it used the Headnote to its services schedule to exclude the broader notion of 'public services' from its standstill commitment. However, 'public services' is not defined. The term is never used in trade in services agreements and a CARIFORUM state that invoked it to justify re-regulating or restricting foreign investment or cross border supply in a commercially lucrative sector could expect the EU to object. Within the services schedule itself, CARIFORUM restricts the scope of its commitments on education to the private sector,<sup>109</sup> but does not do the same for various public health related commitments such as ambulance, hospitals, medical, paramedical and midwifery services.

In a further attempt to mitigate concern about public services, Article 60:2 declares that the Agreement shall not be construed to *require* the privatisation of public undertakings. This appears to be a CARIFORUM initiative, as the same provision does not appear in the draft PACP EPA or the EU-Korea FTA. However, that reassurance would not prevent a claim that a CARIFORUM state has scheduled a commitment to privatise, including a pre-commitment that binds the hands of a future government. The Headnote to the CARIFORUM schedule on services has taken a further step to pre-empt such a claim, asserting that its commitments cannot be 'construed in any way as *offering*' privatisation.

As with the 'public services' proviso, 'privatisation' is not defined. An 'undertaking' commonly refers to an enterprise over which public authorities exercise a dominant direct or indirect influence. The privatisation of an 'undertaking' would clearly apply to the sale of state assets, shares in state corporations or public monopolies. Some other forms of privatisation, such as concessions, public private partnerships and private finance initiatives arguably fall under government procurement. But neither Article 60:2 nor the Headnote extends to privatisation through the deregulation and unbundling of public monopolies, which can have just as negative an effect on quality, access and affordability of public services as old-style asset sales.<sup>110</sup> Indeed, public monopolies are actively targeted in Chapter 5.

<sup>106</sup> Kelsey (2008), 123-27; Pierre Sauvé (2002), 'Trade, Education and the GATS: What's in, What's out, What's all the Fuss About?', *Higher Education Management and Policy*, 14(3): 48-80 at 48-9; Markus Krajewski (2001) *Public Services and the Scope of the General Agreement on Trade in Services (GATS). A Research Paper*, Geneva: Center for International Environmental Law, 7-17

<sup>107</sup> Sauvé and Ward describe these provisions as a 'carve-out [that] is found in virtually all PTAs as well as in the GATS', Sauvé and Ward (2009), 9. See also Francis and Ullrich (2008), 11; CRNM (2008a), 'The Treatment of Professional Services in the EPA', Jamaica: CRNM, February 2008, 1

<sup>108</sup> The EU does exclude drinking water from the public procurement disciplines in Chapter 3 of Title IV, and measures to protect human life and health fall under the limited exceptions provision in Article 224, discussed in Section 3.7.

<sup>109</sup> The commitment excludes non-profit, public and publicly funded education services.

<sup>110</sup> Advocates of privatisation stress the converse, positive effect. Both can occur, which makes the omission of that form of privatisation significant.

For completeness, the scope and meaning of the government services exclusion needs to be reconciled with Article 224:2 in Part IV: General Exceptions. This says Title II and the related schedules shall not apply to the respective social security systems of the parties or to activities in their territories 'which are connected, even occasionally, with the exercise of official authority'. This provision echoes Article 51 of the Treaty on the Functioning of the European Union,<sup>111</sup> and relates narrowly to conduct undertaken in an official capacity, such as a public notary.<sup>112</sup>

### 3.5 The Right to Regulate

In another GATS-plus innovation, Article 60:4 in Chapter 1: General Provisions affirms the right of governments to regulate and introduce new regulations for 'legitimate policy objectives'. The same provision appears in the draft PACP EPA and the EU-Korea FTA.<sup>113</sup> This reassurance of the 'right to regulate' can mislead. First, it does not affirm a government's right to choose *how* it wants to regulate a particular sector or activity or for a particular objective. The very purpose of trade in services and investment rules is to restrict the ways in which governments can regulate, as the panel in the *US-Gambling* dispute made clear:

Members' regulatory sovereignty is an essential pillar of the progressive liberalization of trade in services, but this sovereignty ends whenever rights of other Members under the GATS are impaired.<sup>114</sup>

Second, the right to regulate is affirmed only for '*legitimate* policy objectives' [emphasis added], a term that aims to restrict the grounds on which a government can regulate. The EPA does not attempt to define what kind of policy objectives might be considered 'legitimate'. The term 'legitimate' is not found in the equivalent preamble in the GATS and attempts to introduce it during the WTO negotiations on disciplines on domestic regulation have been blocked.<sup>115</sup>

However, 'legitimate' is used in the GATS Disciplines on the Accountancy Profession (which are not yet in effect).<sup>116</sup> Those disciplines set out an illustrative list of legitimate objectives, being the protection of consumers and ensuring the quality of the service, professional competence and the integrity of the accountancy profession. It does not include the profession's social or public service responsibilities - a critical omission given the role of major accountancy firms in a number of massive corporate failures and the post-2007 global financial crisis.<sup>117</sup> Imposing similar restrictions on the

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<sup>111</sup> Formerly Article 45 in the EC Treaty.

<sup>112</sup> 'Official authority is that which arises from the sovereignty and majesty of the State; for him who exercises it, it implies the power of enjoying the prerogatives outside the general law, the privileges of official power and power of coercion over citizens', Case 2/74 *Reyners v Belgium* [1974] ECR 63 quoted in Paul Craig and Gráinne de Búrca (2008) *EU Law: Text, cases and materials*, 4 edn, Oxford: Oxford University Press, 795-6

<sup>113</sup> The EU-Korea FTA makes extensive use of the phrase 'legitimate policy objectives', including Article 7:1:4 Objectives for the chapter on services and establishment.

<sup>114</sup> *US-Gambling Panel*, para 6.316

<sup>115</sup> The Australian government first proposed that domestic regulation must be for 'legitimate' policy objectives, with an indicative list of what is considered legitimate: WTO Working Party on Domestic Regulation, 'Communication from Australia. Necessity and Transparency', S/WPDR/W/8, 15 September 2000. The European Commission expressed scepticism about the chances of that being accepted in the WTO: EC, 'Second Issue Group on Services. Summary report', 27 June 2000, 2 [http://trade.ec.europa.eu/doclib/docs/2005/april/tradoc\\_122215.pdf](http://trade.ec.europa.eu/doclib/docs/2005/april/tradoc_122215.pdf). For a discussion of the proposals on 'necessity' including 'legitimate objectives', see Panagiotis Delimatsis (2008) 'Determining the Necessity of Domestic Regulations in Services: The Best is Yet to Come', *European Journal of International Law* v.19, 365-408, at 392-6

<sup>116</sup> The accountancy disciplines do not come into effect until the end of the GATS 2000 round of negotiations, which has been incorporated into the Doha round. WTO, 'Disciplines on Domestic Regulation in the Accountancy Sector', December 1998, [www.wto.org/english/news\\_e/pres98\\_e/pr118\\_e.htm](http://www.wto.org/english/news_e/pres98_e/pr118_e.htm)

<sup>117</sup> This link should not be surprising as the Disciplines were designed by the (then) Big Six accounting firms; Anthony Depalma (2002) 'W.T.O. Pact Would Set Global Accounting Rules', *New York Times*,

objectives of domestic regulation of services and investment in all sectors through an EPA would severely constrain the regulatory autonomy and policy space of all governments at all levels.

The CARIFORUM negotiators attempted to strengthen Article 60:4 in the Headnote to the services schedule by reserving the right to regulate ‘any sector or economic activity in order to meet *national* policy objectives’ [emphasis added]. As noted earlier, the Headnote forms part of the text. Different treaty provisions are to be given a consistent meaning where possible. A broad reading of ‘legitimate’ to mean all ‘national’ objectives would be supported by Article 1(c) of Part 1, which states as one objective for a Trade Partnership for Sustainable Development ‘promoting the gradual integration of the CARIFORUM States into the world economy, in conformity with their political choices and development priorities’. In Article 3 the parties make a commitment that the Agreement ‘shall fully take into account the human, cultural, economic, social, health and environmental best interests of their respective population and of future generations’. Based on this argument, the EU would have difficulty sustaining a narrow definition of ‘legitimate objectives’ in a dispute. However, if CARIFORUM governments were to promote regulations that served social and developmental, ahead of pro-market objectives, the EU might well use its leverage to challenge them in meetings of the parties or scheduled reviews.

### 3.6 Capital movements

Title II needs to be read in conjunction with Title III, which contains three articles that guarantee movement of capital. Article 122 obliges parties to allow all payments for current transactions between their residents in freely convertible currency. In Article XI of the GATS this only applies to sectoral commitments.<sup>118</sup>

Article 123 requires unrestricted capital movements, including liquidation and repatriation of capital and any profits, for any direct investment made under the laws of the host country, whether or not those investments are covered by EPA commitments, and to any other investment established in accordance with Title II. This has the effect of extensive capital account liberalisation. The comparable obligation under GATS Article XI applies only to scheduled commitments, with an associated obligation in footnote 8 to Article XVI: Market Access to allow unrestricted capital *inflows* and *outflows* that are an *essential* part of a cross-border service (mode 1), and *inflows related* to the supply of a service by commercial establishment (mode 3). There is no provision to opt out of the Title III obligations.

The impact of Article 123 is mitigated somewhat through a safeguard provision in Article 124. In ‘exceptional circumstances’ a government may restrict payments and capital movements between the parties that cause or threaten to cause serious difficulties for the operation of monetary or exchange rate policy. The safeguard is limited to impacts on monetary and exchange rate policy. The measures taken in relation to capital movements must be ‘strictly necessary’, meaning governments invoking the safeguard provision must satisfy a rigorous ‘necessity’ or ‘least-trade restrictive’ test, and the measures cannot be applied for more than six months. The use of this provision is subject to oversight by the Joint CARIFORUM-EC Council.

In addition, Article 240 allows CARIFORUM states or the EU to adopt restrictive measures on goods, services and establishment in response to serious balance of payments and external financial difficulties. Use of such measures must be avoided where possible. Where they are applied, they are subject to non-discrimination, necessity and time limitations, and must be consistent with both WTO

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[http://topics.nytimes.com/top/reference/timestopics/organizations/w/world\\_trade\\_organization/index.html?s=clsest&query=TREATIES&field=des&match=exact](http://topics.nytimes.com/top/reference/timestopics/organizations/w/world_trade_organization/index.html?s=clsest&query=TREATIES&field=des&match=exact)

<sup>118</sup> Barbados has a horizontal entry in the services schedule that subjects all transfers and payments of currency to its Exchange Control Act, contrary to Article 122. The legality of this measure will rest on Article 108.2, which exempts activities conducted by a monetary authority in pursuit of exchange rate policies from the Agreement.

agreements and IMF instruments. Oversight of such measures and possible alternatives falls under the jurisdiction of the CARIFORUM-EC Trade and Development Committee.<sup>119</sup>

Title III is part of a broader strategy by Northern governments to achieve comprehensive capital account liberalisation. The US FTAs go further, as they lack any safeguard provision or balance of payments exception.<sup>120</sup> Significantly, the IMF has recently rescinded its support for full capital account liberalization by developing countries in the aftermath of the global financial crisis.<sup>121</sup> For the EU to maintain this position and require some of world's most fragile economies in the ACP to make binding commitments of that kind seems reckless in the extreme.

### **3.7 Exclusions and Exceptions**

Two general exclusions are set out in Article 60 of Title II. One, for subsidies, addresses the special sensitivities that surround the payment of taxpayer subsidies to foreign firms. There is no similar exclusion in the GATS, where WTO members must explicitly exclude subsidies from any national treatment commitments in their schedules. However, 'subsidies' is a technical term. The CARIFORUM services schedule contains a broader horizontal reservation 'with respect to subsidies or grants', but even this does not cover all forms of preferential financing; there is no equivalent reservation in the schedule on non-services investment.<sup>122</sup> All the EU's schedules reiterate the Article 60:3 exclusion. By contrast, the EU Korea FTA excludes subsidies or grants, including government-supported loans, guarantees and insurance.

Article 60 also excludes public procurement, one of the 'Singapore issues' that the EU sought unsuccessfully to have included in the WTO. However, 'transparency' in public procurement of goods and services is covered under Chapter 3 of Title IV: Trade-related Rules. That chapter contains a list of service-related exceptions, including real estate, some financial services, material for broadcasting, research and development, public employment contracts, and agricultural support programmes including food aid. The interface between government procurement and Title II is very important, but regrettably beyond the scope of this paper.

There are also several exclusions that are common to Chapters 2 and 3. Those for nuclear materials and the arms trade are standard. The exclusion of audio-visual services reflects the EU's longstanding 'cultural exception', discussed in Section 10 of this report. The wording of the air transport exception largely mirrors the GATS Annex on Air Transport Services: scheduled and unscheduled air services are excluded, as are services directly related to the exercise of air traffic rights, but not the highly commercialised activities of repair and maintenance, sales and marketing of air services and computer reservation systems. Both chapters also explicitly include coverage for lucrative ancillary services, such as ground handling and airport management, which are often outsourced or run by subsidiaries of major airlines.

The General Exceptions and Security Exceptions in Part IV of the EPA apply across the entire treaty. The former, in Article 224, follows the standard WTO approach that allows derogations to achieve specified public policy objectives for a closed list of purposes. Caribbean negotiators tend to overstate its effect, claiming the agreement 'does not apply' to measures aimed to safeguard human, animal and plant life or health, public safety, morals or national security.<sup>123</sup> However, most of these objectives are subject to a 'necessity' or least trade restrictive test, and the chapeau to Article 224

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<sup>119</sup> Article 8:2 of the EU-Korea FTA reserves some more rights for government, but imposes a qualified standstill on restrictions of movements of capital.

<sup>120</sup> The IMF's legal counsel has taken exception to this: Deborah Siegel (2004), 'Using Free Trade Agreements to Control Capital Account Restrictions: Summary of Remarks on the Relationship to the Mandate of the IMF', *ILSA Journal of International & Comparative Law*, 10: 297–304, 297

<sup>121</sup> International Monetary Fund, 'Capital Inflows: The Role of Controls', IMF Staff Position Note, IMF, Washington, 2010, SPN10/04

<sup>122</sup> Article 7:1:3

<sup>123</sup> CRNM (2008a), 2

requires that the measures taken do not unjustifiably discriminate or constitute disguised barriers to trade.

One notable inclusion in the policy objectives listed in Article 224 is the right to take measures to protect national treasures of artistic, historic or archaeological value, which is found in GATT Article XX but not in the GATS; however, the EPA has introduced a necessity test. This exception is discussed further in Section 10.2.

The Security exception in Article 225 is more expansive than in the GATT and GATS, reflecting the post-Iraq position of both the US and EU in their FTAs. It reserves the right to carry out obligations a Party 'has accepted for the purpose of maintaining international peace and security', not just through UN Resolutions.

### 3.8 Continuing Liberalisation

The goal of Title II, as specified in Article 60:1, is '*progressive, reciprocal and asymmetric liberalisation*'. That momentum is fostered through Article 62, which requires the parties to embark on new negotiations on investment (not just commercial presence) and trade in services within five years of the EPA entering into force.<sup>124</sup> These negotiations would aim 'to enhance the overall commitments' undertaken in Title II. The CSME points out that, as of June 2010, the agreement was still only being provisionally applied and had not yet entered into force. The date of those negotiations is therefore uncertain.

This provision is similar to the negotiations built into Article XIX of the GATS, with three notable exceptions. First, Article 62 only provides for one review, not periodic reviews. Second, the aim is to 'enhance overall commitments' under Title II, which could be achieved by concentrating on either cross border services or investment, and on either national treatment or market access. Third, Article 62 makes no explicit reference to development flexibilities or asymmetry, as found in Article XIX of the GATS; it merely refers back to the objectives of Title II that uses the vague terminology of 'facilitating regional integration and sustainable development' and 'smooth and gradual integration into the world economy' through 'progressive, reciprocal and asymmetric liberalisation'.

A separate inbuilt review is required under Article 74 and relates only to investment:

With a view to the progressive liberalisation of investments, the Parties shall review the investment legal framework, the investment environment, and the flow of investment between them consistent with their commitments in international agreements no later than three years after the entry into force of this Agreement and at regular intervals thereafter.

The wording aims broadly to extend the liberalisation of investment. The focus of the review relates to the rules, context and substance of investment, not specifically to the EPA. The review of the 'investment legal framework' may provide an entry point for the inclusion of investor protection and enforcement that are not currently in the EPA, although this would require formal amendment of the EPA text. Again, the date of the first review is uncertain.

Both these reviews sit uncomfortably with the Joint Declaration that the Parties adopted at the time of signing the EPA - an initiative of Guyana in response to mounting public controversy over the Agreement. The Declaration provides for a mandatory and comprehensive review of the EPA within the first five years of its signing 'in order to determine the impact of the Agreement, including the costs and consequences of implementation', and at subsequent five-yearly intervals.<sup>125</sup> The parties

<sup>124</sup> There was no equivalent provision in the draft PACP-EC EPA, which suggests that it was added late in the CARIFORUM-EC negotiations.

<sup>125</sup> Joint Declaration on the Signing of the Economic Partnership Agreement, Final Act, 15 October 2008 AF/CARIFORUM/CE/DC/en 6

undertook to ‘amend its provisions and adjust their application as necessary’. This review will be conducted in the context of Article 5, which requires the parties to monitor the operation of the Agreement continuously to ensure its objectives are realised, it is properly implemented and ‘the benefits for men, women, young people and children deriving from their Partnership are maximised’.

These contrasting reviews set the scene for ongoing political friction: one review carries the prospect that parties may alter the text and withdraw scheduled commitments in ways that reduce overall liberalisation, while the other two are directed to achieve additional overall liberalisation. The first review must begin within the first five years of *signing* the EPA (October 2013) and will come before the first three-year review of investment, unless the EPA comes into force before October 2010. The same applies to the five-year review under Article 62. The potentially fraught relationship between these reviews will involve a political not a legal resolution. The outcome will be pivotal if other ACP negotiations on services and investment have not been concluded.

#### 4. LIBERALISATION OF SERVICES AND INVESTMENT

It is convenient to examine Chapter 2 on commercial presence and Chapter 3 on cross border services together, as there is extensive overlap in the objectives of the parties, the core legal rules and schedules of commitments, and the impact of the ‘regional preference’. In addition, this section reviews the inter-relationship between the investment provisions of the EPA and BITs, and the innovations in the EPA on investor responsibility. The analysis reveals a level of complexity that carries a high risk of error and makes it impossible to assess accurately the obligations and restrictions on CARIFORUM states or the implications for the CSME and CARICOM-DR FTA. However, it is clear that the EPA will impose severe long-term constraints on domestic policy and regulatory autonomy.

##### 4.1 Objectives

Both parties approached negotiations on these chapters from a strongly pro-liberalisation perspective that focused principally on investment. While the EPA follows the EU’s template, it contains variations that reflect CARIFORUM’s offensive and defensive interests.

The EU was constrained during the EPA negotiations by the split competency for foreign investment between the European Union and Member States, with the former entering agreements on market access and pre-establishment rights and the latter on investment protection, mainly through BITs. Subsequently, the Reformed Treaty of Lisbon brought the entire Common Commercial Policy under the European Union’s jurisdiction.<sup>126</sup> The implications of that change for the EPA are discussed in section 4.6.

The CARIFORUM negotiators were reportedly frustrated by the Commission’s limitations.<sup>127</sup> They were keen to conclude a comprehensive investment chapter that could provide a ‘one-stop-shop’ for European investors and provide a

forceful signal – to both investors and development partners – of the earnestness of a [sic] Caribbean’s programme of economic reform. As net capital importing countries, CARIFORUM States can use an EPA to lever increased investment and heighten the region’s appeal as a premier investment destination.<sup>128</sup>

They hoped to achieve a balance of rules that would foster investment flows in areas of greatest economic importance to the Caribbean and help diversify the economy beyond tourism, while reserving the most sensitive areas of investment activity to ensure that governments retained the policy space needed for national development.<sup>129</sup> They also saw investment negotiations in the EPA as an opportunity to incorporate responsibilities of investors in the text, something that is not possible in BITs that are designed to enhance and protect investor rights.<sup>130</sup>

While investment took priority, both parties also had offensive and defensive interests in cross border services.<sup>131</sup> CARIFORUM states, in particular, hoped to secure commitments that would reduce the need to rely on commercial presence and access for their people into Europe.<sup>132</sup>

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<sup>126</sup> Damon Vis-Dunbar (2009)

<sup>127</sup> Westcott (2008), 12

<sup>128</sup> Lodge (undated), 2

<sup>129</sup> Westcott (2008), 11

<sup>130</sup> This author earlier attributed these investor responsibility provisions wrongly to the EU. However, there was no similar provision in the draft EPAs circulated to the PACP, and the latter proposed investor responsibility provisions in their own draft. The EU’s position on such measures is murky, with a preference that labour issues are dealt with through the ILO: Jan Orbie, Hendrik Vos and Liesbeth Taverniers (2005) ‘EU trade policy and a social clause: a question of competences?’, *Politique européenne* vol 3, no 17, 159-87.

<sup>131</sup> Neither the EU nor any CARIFORUM states were party to the plurilateral request on cross border supply in the GATS 2000 negotiations.



## 4.2 Core Rules

The principal rules in Chapter 2 and Chapter 3 aim to guarantee market access and to prevent discrimination that favours locals (national treatment) and other countries (MFN).

These rules apply to measures ‘affecting’ commercial presence and cross border supply. ‘Affect’ is interpreted broadly in WTO jurisprudence to mean measures that may have an effect on a particular economic activity, not just measures that are specifically directed to that activity.<sup>133</sup> A government might therefore face challenges to a measure that has a secondary or unintended effect on the activity of an investor or service supplier in a sector where it has made a commitment (such as a central or local government measure to ration water in favour of local households that impedes a mining or fish processing operation).

Chapter 3 applies to measures affecting the cross border ‘supply’ of a service. ‘Supply’ is given the same expansive meaning used in the GATS, being ‘production, distribution, marketing, sale and delivery’ of a service. It effectively describes the supply chain for the service, even though activities like distribution or advertising are also covered by separate sectors or sub-sectors.

Each chapter has articles on market access<sup>134</sup> and national treatment<sup>135</sup> that are derived from the GATS.

### 4.2.1 Market access

A full market access commitment applies to actions at all levels of government and bodies exercising delegated powers and prevents them from employing various measures on a national or local basis. The categories of prohibited market access measures in the GATS Article XVI are redistributed as appropriate between ‘commercial presence’ and ‘cross border supply’. Some measures are relevant only to foreign investment. A full market access commitment of a sector under Chapter 2 would prevent a regulator from limiting the level of foreign shareholding in an enterprise or the total value of individual or aggregate foreign investment. Nor could they require investment through joint ventures or other legal forms, such as subsidiaries rather than branches (although footnote 10 excuses the parties from scheduling a reservation when they require investors that incorporate under their law to take a particular legal form).

By disarming themselves, CARIFORUM governments also deepen their dependence on EU cooperation. In Article 121:2(f) of the Cooperation chapter of Title II the parties promise to *cooperate* through technical assistance, training and capacity building to establish mechanisms to promote investment and joint ventures between their service suppliers. Yet a *requirement* to invest through a joint venture or a cap on ownership levels is a market access barrier. Similarly, the objective of Article 43 that the parties should cooperate to promote downstream processing of agriculture and fisheries products and ‘public private partnerships’ is undermined when the government cannot require investment through joint ventures, apply an economic needs test (ENT) or use an investment condition that the WTO prohibits under TRIMS.

Quantitative restrictions on market access, such as limits on the number of firms, value of transactions or number of activities, apply to both commercial presence and cross-border supply. Those limits might take various forms, such as numerical quotas, monopolies, exclusive rights or ENTs. Examples of prohibited quantitative restrictions that are commonly used at central and local

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<sup>132</sup> CRNM (2008a), 3

<sup>133</sup> The WTO Appellate Body concluded that ‘the use of the term “affecting” reflects the intent of the drafters to give a broad reach to the GATS’ and is equivalent to ‘have an effect on’: WTO, *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, Appellate Body report, WT/DS27/AB/R, 9 September 1997, (EU-Bananas), para 220

<sup>134</sup> Article 67 and 76

<sup>135</sup> Article 68 and 77

government levels include the number or size of mines, garbage dumps, retail stores, fish processing plants, taxi firms, hotels, real estate developments or tourism operators in a specific area.

It is not clear whether CARIFORUM negotiators understood that a ban on commercial activities is considered a zero quota and hence a market access restriction.<sup>136</sup> The Headnotes to both CARIFORUM schedules describe the kind of measures that they consider do not to involve market access restrictions and therefore do not require scheduling. One example is the ‘non-discriminatory requirement that certain activities not be carried out in environmental protected zones or areas of particular historic and artistic interest’. A state that failed to schedule the right to apply such a ban for the relevant sector would need to rely on the limited general exceptions in Article 224. The examples that CARIFORUM used, which relate to environmental zones and historic sites, may fall within Article 224,<sup>137</sup> but a ban on forestry operations in tribal areas or food outlets in unspoiled tourist locations would not. US experience shows that governments should not assume the general exceptions provisions would rescue such measures.<sup>138</sup> The EU’s equivalent list avoids similar examples.

Economic needs tests are also considered quantitative restrictions. The EU and other major powers have strongly criticised the scheduling of ENTs in the GATS as too vague, although they also employ them.<sup>139</sup> CARIFORUM addressed this concern by spelling out its criteria in the Headnote to the services schedule as ‘the assessment of the relevant market situation where the service is to be provided, with respect to the number of, and the impact on, existing service suppliers’. Separate criteria apply for ENTs on movement of natural persons. The EU took the same approach for its two labour mobility schedules, but left it to individual states to define ENTs for commercial presence and cross-border supply. The treatment of ENTs in the EPA is important, especially for other ACP states, as they are often relied on to protect local enterprises that serve important economic and social functions and which could not survive in open competition with transnational corporations and cross-border suppliers.

#### 4.2.2 *National Treatment*

National treatment prevents governments from using measures that discriminate in favour of locals – although it does not prevent measures that give privileges to foreign investors.<sup>140</sup> A full national treatment commitment would prevent governments from reserving economic activities to local communities so as to protect their principal source of livelihood or preserve a fundamental cultural connection. Boards of directors could no longer be required to include a proportion of nationals or meet residency requirements, measures that are often used to encourage connection to the local context and facilitate legal liability. Likewise, foreign investors are often required to undertake technology transfer and provide training to build local capacity for the future, conditions that do not apply to local firms.

In a subtle extension of the GATS, once a market access commitment has been made in a sector, national treatment obligations automatically apply to the other parties’ ‘like’ commercial presences and investors, and cross-border services and service suppliers, unless conditions and

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<sup>136</sup> The WTO Appellate Body ruled in *US-Gambling* that a prohibition on Internet gambling breached the US market access commitment on cross border supply of sporting service. WTO, *United States – Measures Affecting the Cross-border Supply of Gambling and Betting Services*, Appellate body report, WT/DS285/AB/R, 7 April 2005, para 252 (US-Gambling AB)

<sup>137</sup> Relevant exceptions involve protection of plant life or health, which is subject to a ‘necessity’ test, or conservation of exhaustible natural resources, which is linked to restrictions on domestic supply or consumption of services. Both are subject to the chapeau requirements regarding non-discrimination and disguised restrictions on trade.

<sup>138</sup> One of the US gambling laws failed to meet the discrimination test in the chapeau of Article XIV.

<sup>139</sup> The EU’s GATS 2000 requests routinely sought clarification and/or removal of ENTs.

<http://www.gatswatch.org/requests-offers.html>

<sup>140</sup> Articles 68 and 77.

qualifications are scheduled.<sup>141</sup> The national treatment column for such a sector becomes the equivalent of a negative list, putting the onus on the government to identify and reserve all current and future forms of preference it might want to give to local firms and services. This makes it risky to transpose schedules from the GATS. As in the GATS, the legal meaning of 'like' commercial presence and cross border service or supply is unclear.<sup>142</sup>

### **4.3 Scheduled Commitments**

The EPA does not prescribe the way that parties should schedule their commitments. As a result the EU and CARIFORUM schedules under Annex 4 take very different forms.

The EU has separate positive list schedules for commercial presence (Chapter 2) and cross border services (Chapter 3). Both schedules follow the same format: one column designates the sectors the EU has committed and a second column records any individual state's reservations. Reservations on cross border services differentiate between modes 1 (cross-border) and 2 (consumption abroad). Both the schedules have Headnotes that set their parameters. They also describe the scheduling methodology and classifications, being a mixture of CPCprov and CPC 1.0 for the cross border services schedule, with the addition of ISIC Rev. 3.1 for commercial presence.

CARIFORUM elected to build on the existing positive list GATS schedules and GATS 2000 offers of each CARIFORUM state, and consolidate them into a regional schedule on trade in services. The services schedule for modes 1 to 4 is complemented by a separate negative list schedule on non-services investment. The following analysis focuses on CARIFORUM's schedules.

#### **4.3.1 Headnotes**

The Headnote to each CARIFORUM schedule sets out its coverage, classification system and modes of designating a state's commitments. The schedules apply to all CARIFORUM states except the Bahamas and Haiti, unless they state otherwise. CARIFORUM uses the W/120 classification system (based on CPCprov) for its services schedule, including commercial presence in services activities. Some states supplemented that approach with services sub-sectors that have no classification. CARIFORUM's schedule for commercial presence in non-services sectors uses ISIC Rev. 3.1.

Each schedule's Headnote also contains the important substantive content noted earlier. Both record the caveats on privatisation and national policy objectives. The Headnote for the services schedule contains the voluntary commitment by all CARIFORUM states to maintain a 'standstill' on levels of market access and national treatment for cross border services and commercial presence that existed in their legislation at the time the EPA was signed. That 'standstill' is subject to the broad exclusion for 'public services'. As discussed earlier, its legal effect is unclear.

The Headnote for the non-services schedule specifies five categories of 'economic activities other than services' that it covers, subject to a negative listing of countries and obligations. The heightened risk of error or omission in a negative list approach is recognised by reserving the right to add to the schedule any non-conforming measures that existed at the time the EPA was signed (in October 2008). Any such additions must be made within two years of the EPA's entry into force, which is yet to occur. The specification of 'existing' measures would prevent the addition of any precautionary reservations to preserve the future policy space of CARIFORUM governments over crucial aspects of their nation's patrimony. There is no equivalent opportunity to add to the services schedule.

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<sup>141</sup> GATS Article XX:2 provides that measures inconsistent with both Articles XVI (Market Access) and XVII (National Treatment) shall be inscribed in the market access column and any limitation will also apply to national treatment.

<sup>142</sup> Discussed in Joel Trachtman (2003), 'Lessons for the GATS from Existing WTO Rules on Domestic Regulation' in Aaditya Mattoo and Pierre Sauvé, *Domestic Regulation and Services Trade Liberalisation*, Washington: World Bank, 54-81 at 62-64

### 4.3.2 *CARIFORUM's Services Schedule*

CARIFORUM's decision to build on its members' GATS schedules, rather than start afresh, makes practical sense, but it also creates problems for each schedule.

The schedule for services uses the standard GATS structure and language: the left column lists the sectors or sub-sectors that are covered by the schedule; the second column lists any limitations that a state is placing on the extent to which the sub-sector is governed by the rule on 'market access'; and the third column lists any limitations a state is placing on the rules on 'national treatment' (an example is given below). There can be different commitments for the various modes of supplying the service and limitations on the exposure of a sector to the market access and national treatment rules.

Because the second and third columns are structured as 'limitations' on a full commitment the language appears counter-intuitive, as in the GATS:

- 'none' means no limitations on the application of the rule;
- 'unbound' means no commitment to the application of the rules;

The regional scale of the CARIFORUM services schedule means that it covers 15 states for all four 'modes' (cross-border supply, consumption abroad, commercial presence, and temporary presence of natural persons) on market access and national treatment across more than 150 possible sub-sectors of services. That complex structure increases the risk of errors by individual states.

A few examples involving Trinidad and Tobago and Suriname illustrate the problems.<sup>143</sup> The first example is set out in Table 3 as it appears in the schedule. This commitment relates to 'waste and waste-water management', which is a sub-sector within the 'Other' category of environmental services. Nine CARIFORUM states made some kind of commitment in this sub-sector and their initial appear in the left hand column.

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<sup>143</sup> These examples were identified during work on these countries' schedules. It would be surprising if there are not similar errors for at least some other countries.

**TABLE 3: CARIFORUM EPA SERVICES SCHEDULE ON ENVIRONMENTAL SERVICES: TRINIDAD & TOBAGO**

<b>6. ENVIRONMENTAL SERVICES</b>	<b>Limitations on Market Access</b>	<b>Limitations on National Treatment</b>
<b>D. OTHER</b>		
<b>Waste and waste water management (CPC 94090)</b>	<b>ATG, DOM:</b> 1), 2), 3) None	<b>ATG, DOM:</b> 1), 2), 3) None
<b>ATG, BEL, DOM, GRD, KNA, LCA, VCT, SUR, TTO</b>	<b>GRD, LCA, VCT, <u>TTO</u>:</b> 1) Unbound; 2) None; <u>3) Joint venture required</u>	<b>GRD, KNA, TTO:</b> 1), 2) Unbound; 3) None
	<b>BEL:</b> 1), 2) None; 3) Transfer of knowledge and technology required	<b>BEL, LCA, VCT:</b> 1), 2) None; 3) Unbound
	<b>KNA, <u>TTO</u>:</b> 1), 2) Unbound; <u>3) None</u>	
	<b>SUR:</b> 1) Unbound; 2) None; 3) None as of January 1, 2018. Transfer of technology required. Subject to the development of relevant regulations.	<b>SUR:</b> 1) Unbound; 2) None; 3) Unbound
	<b>ATG, BEL, DOM, GRD, KNA, LCA, VCT, SUR, TTO:</b> 4) Unbound except as indicated in the horizontal commitments	<b>ATG, BEL, DOM, GRD, KNA, LCA, VCT, SUR, TTO:</b> 4) Unbound except as indicated in the horizontal commitments

The contradictory commitment by Trinidad and Tobago (underlined) for market access in mode 3 reads both 'none' and 'joint venture required'; so Trinidad and Tobago has guaranteed European investors unrestricted rights to establish a commercial presence to run waste and wastewater services, but also said they can only do so as a joint venture. Similarly, Trinidad & Tobago's entry for Noise abatement services (CPC94050) reads 'none' (no restriction) and 'unbound' (the right to impose any restrictions) for national treatment in mode 3. Its schedule on temporary entry for foreign personnel (market access in mode 4) to supply Marina services (for which there is no CPC description) reads both 'none' (meaning no restrictions on foreign personnel entering the country temporarily to supply the service) and 'Unbound as indicated in horizontal commitments' (entry is subject to work permits, etc). The same duplication applies for 'national treatment' of natural persons in the General construction and engineering sector (CPC51260).

In some subsectors that Suriname has committed there is no entry recorded for some modes; in other places, SUR appears twice for the same mode, but with different commitments. Again, the example in Table 4 is shown as it appears in the schedule:

**TABLE 4: CARIFORUM EPA SERVICES SCHEDULE ON HOSPITAL SERVICES: SURINAME**

<b>8A. HOSPITAL SERVICES (CPC 9311)</b>	<b>Limitations on Market Access</b>	<b>Limitations on National Treatment</b>
ATG, BEL, DMA, DOM, GUY, GRD, JAM, KNA, LCA, VCT, <u>SUR</u> , TTO	ATG, BRB, BEL, DMA, DOM, GRD, GUY, JAM, KNA, LCA, VCT, <u>SUR</u> , TTO: 1), 2) None	ATG, BRB, BEL, DMA, DOM, GRD, GUY, JAM, KNA, LCA, VCT, <u>SUR</u> , TTO: 1), 2) None
BRB (CPC 93110 only)		
	DMA: 3) Unbound. None from 1 January 2018	DMA, VCT: 3) None, except as indicated in the horizontal commitments
	ATG, BRB, BEL, DOM, GRD, GUY, JAM, KNA, LCA, <u>SUR</u> : 3) None	GRD, KNA: 3) Unbound, limit on number of foreign professionals
	<u>SUR</u> , TTO: 3) Unbound	ATG, BRB, BEL, DOM, GUY, JAM, LCA: 3) None
	VCT: 3) None, except as indicated in the horizontal commitments	<u>SUR</u> , TTO: 3) Unbound
	ATG, BRB, BEL, DMA, DOM, GRD, GUY, JAM, KNA, <u>SUR</u> : 4) Unbound except as indicated in the horizontal commitments	BRB, BEL, DMA, DOM, GRD, GUY, JAM, KNA, VCT, <u>SUR</u> , TTO: 4) Unbound except as indicated in the horizontal commitments
	LCA, TTO: 4) None	ATG, LCA: 4) None

In Hospital Services (CPC 9311) Suriname has guaranteed unrestricted market access in mode 3 for European firms to establish a commercial presence ('none'), and preserved the unfettered right to apply market access measures ('unbound'). Some of Suriname's scheduling language is also contradictory. The entry for News agency services (CPC962) in mode 3 reads: 'None. Establishment of press agencies by foreign investors is subject to reciprocity' (that entry is shared with nine other states). On private higher education (CPC 923), Suriname and five others have made a reservation on national treatment in mode 3 that protects subsidies, grants and measures relating to the supply of education and training, but they have made no commitment on national treatment in mode 3 anyway ('unbound').

Some other errors appear to have been picked up during the 'legal scrubbing' process before the agreement was signed.<sup>144</sup> However, the above errors (and presumably others) were not identified and they are in sectors that may result in significant constraints on governments' ability to regulate for social objectives. There is no structured way to correct them. As noted earlier, there is no general provision in Title II for amending the parties' schedules. CARIFORUM's Headnote has reserved the right to add existing non-conforming measures in the schedule on non-services investment, but not for services.

One further point needs to be made about the services schedule. Following WTO jurisprudence, all commitments will be subject to the principle of 'technological neutrality'. That means a commitment in a particular mode automatically extends to any new technologies through which the service might be delivered, even if that technology raises unanticipated concerns for which the government wishes to regulate.<sup>145</sup> Some commitments in the CARIFORUM schedule are currently denoted 'unbound for lack of technical feasibility'; those states may face pressure to amend these entries as new technologies come on-stream. A simple 'Unbound' avoids the pre-commitment to

<sup>144</sup> For example, Suriname made open-ended commitments in mode 3 for 'Other services' without designating what those services might be. For 'business services' provided by Midwives, physiotherapists, nurses, paramedics (CPC 93191) it made an unrestricted commitment to allow commercial presence (mode 3), but also maintained limitations on commercial presence for physiotherapists and para-medical personnel until 2015.

<sup>145</sup> *US-Gambling* (2004) paras 6.285–7

potentially risky new technologies, while leaving governments open to allow those services and technologies if they wish.

#### **4.3.3 CARIFORUM's Schedule on Non-services Investment**

Four problems are identified in CARIFORUM's schedule on non-services investment. The first is a drafting issue. The Headnote purports to restrict its coverage to five sectors: A. Agriculture, hunting and forestry; B. Fishing; C. Mining and quarrying; D. Manufacturing; and E. Production, transmission and distribution on own account of electricity, gas, steam and hot water. The Note clouds that intention by saying the schedule 'includes' those sectors, which implies that it may cover more sectors - as the EU's schedule does.<sup>146</sup>

A more technical problem involves the use of the International Standard Industrial Classification of all Economic Activities (ISIC Rev. 3.1) to designate commitments. The Schedule is entitled 'List of Commitments on Investment (Commercial Presence) in Economic Activities *other than Services Sectors*'. Yet the ISIC classification does not distinguish between services and non-services sectors. Indeed, the ISIC classification for each of the five sectors designated in the schedule includes extensive services activities. Many of those services activities also appear in W/120 and are subject to scheduling under CARIFORUM's services schedule. For example, 'Agriculture, Hunting and Forestry' has a subheading 'Agricultural and animal husbandry service activities, except veterinary activities'. That subheading includes a range of services, such as the operation of irrigation systems. It also covers landscape gardening for constructing, maintaining and redesigning landscapes such as parks and gardens for private and public housing or public buildings, and for sports grounds, play grounds and other recreational parks, such as golf courses. Seven CARIFORUM states have made some kinds of commitments on services incidental to agriculture, hunting and forestry. However, the non-services schedule does not identify and exclude the services content of these ISIC classifications (doing so would itself have been a technically difficult task). As a result, the CARIFORUM non-services schedule includes commitments on investment in services activities made by CARIFORUM states that potentially overlap or conflict with their commitments in the services schedule.

The EU also uses ISIC for investment, but it avoids this problem because it combines services and non-services in one schedule.

A third problem relates to the format of the schedule. It looks like a positive list:<sup>147</sup> the sectors that are covered are listed in the left column and any restrictions, limitations and exceptions in the right column. However, the Explanatory Note makes it clear that the schedule commits all CARIFORUM states in relation to all activities in the five ISIC categories, unless the converse is indicated. It also says this approach applies to Sectors A to D, but it does not say anything about E (electricity, gas, steam and hot water).

The schedule effectively becomes a negative listing of the economic activities within those five sectors that are subject to limitations or reservations. Interpreting the commitments requires a number of steps:

- If there is no reference in the left column of the schedule to a specific economic activity that falls under one of the five ISIC categories, all CARIFORUM states are automatically committed to apply the rules of Chapter 2 to investments in that activity. To identify what *is* covered it is necessary to check the relevant ISIC descriptions.
- The listing of an economic activity in the left column of the schedule indicates that it is subject to some reservation, limitation or exception.

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<sup>146</sup> Further confusion existed in the December 2007 draft of the Explanatory Note, which said the offer covered all sub-sectors of the four (instead of five) sectors; that was corrected in the final schedule.

<sup>147</sup> Westcott treats it as a standard GATS-style schedule, Westcott (2008), 13

- However, that is only a reservation, limitation or exception for those states whose names appear in the right hand column. All other CARIFORUM states remain fully committed for that economic activity.
- The reservation, limitation or exception only applies to the extent of the ‘non-conforming measures’ that are recorded next to the state’s name.

In the extract in Table 5, seven CARIFORUM states have reserved the right to restrict foreign investment in agriculture and hunting, on the terms described.

**TABLE 5: CARIFORUM EPA NON-SERVICES INVESTMENT SCHEDULE ON AGRICULTURE & HUNTING**

<b>A. AGRICULTURE, HUNTING &amp; FORESTRY</b>	<b>Description of reservations, limitations or exclusions</b>
<b><u>Agriculture and hunting</u></b> (ISIC rev 3.1:01)	<p><b>BEL, DMA, KNA:</b> The State reserves the right to adopt or maintain measures on investment in this sector.</p> <p><b>DOM:</b> The superintendents, janitors/administrators/butlers, supervisors and any other employees that labour in agricultural tasks should be of Dominican nationality.</p> <p><b>GRD:</b> Legislation reserves this sector to domestic producers but foreign investment may be allowed only for the production for export.</p> <p><b>JAM:</b> May be reserved to nationals, particularly the cultivation of sensitive products using high level agricultural technology (e.g. hydroponics)</p> <p><b>LCA:</b> Legislation prescribes production exclusively for the domestic market.</p> <p><b>VCT:</b> The State reserves the right to prohibit, control or restrict cultivation of certain crops and import or export of certain crops.</p>

Table 6 shows that only three states made reservations for manufacturing of food products and beverages:

**TABLE 6: CARIFORUM EPA NON-SERVICES INVESTMENT SCHEDULE ON MANUFACTURING OF FOOD PRODUCTS & BEVERAGES**

<b>D. MANUFACTURING</b>	<b>Description of reservations, limitations or exclusions</b>
<b><u>Manufacture of food products and beverages</u></b> (ISIC rev 3.1:15)	<p><b>BEL, DMA:</b> The State reserves the right to adopt or maintain measures on investment in this sector.</p> <p><b>GRD:</b> Regarding ISIC 151, 153, 154, 155, legislation reserves this sector to domestic producers but foreign investment may be allowed only for the production for export.</p> <p><b>LCA:</b> Regarding ISIC 1512, 1541, 1544, 155, legislation prescribes requirements for the granting of a license or production exclusively for the domestic market.</p>

The reservations in relation to each economic activity need to be read alongside the ‘horizontal’ section of the schedule:

- CARIFORUM states collectively made a ‘horizontal’ reservation at the beginning of the schedule for nuclear-related investments; this applies for all countries to all economic activities.
- Individual CARIFORUM states made ‘horizontal’ reservations that apply to all economic activities. For example, all except for Guyana and Jamaica made some kind of reservation on land ownership. Various entries also reserve the right to adopt a specific type of commercial presence and application of foreign investment laws.



The more specific the entry under the right hand column, the more tightly governments are tied to maintaining that particular policy prescription.<sup>148</sup> The examples given here show that some states have used broad precautionary language that keeps their options open. Dominica ‘reserves the right to adopt or maintain measures on investment’ in most of the sectors. Other states, like Belarus and St Vincent and the Grenadines, did the same for some sectors, but not others.

There are also some CARIFORUM-wide reservations for specific activities. These allow all governments to reserve certain activities in mining and quarrying, and manufacture of wood products and furniture for local small enterprises. The logic behind the choice of sectors is not clear to an outsider, but it illustrates the potential for a precautionary approach.

Finally, it is important to note that some of these reservations, such requirements that investors export all their products, would contravene the obligations that states already have under the TRIMS agreement at the WTO and which continues to apply to them as WTO members even though it is not explicitly incorporated into the EPA.

CARIFORUM may have had sound logistical reasons for adopting this approach to its schedules, but the result is a high-risk of errors and unanticipated obligations. In particular, the non-services schedule assumes a vast coverage of economic activities that relate particularly to natural resources. Whatever is not explicitly mentioned and then limited is covered. No states made any reservations on many of the sub-sectors in the five ISIC categories; these activities include services and carry with them unrestricted capital flows and entry for élite personnel. These sweeping obligations in the ‘non-services’ schedule are compounded by the uncertainty relating to the standstill commitment in the services schedule. The Headnote to the schedule on non-services investment allows a two year period from the time of the EPA entering into force for the listing of further measures that existed at the time the EPA was signed, but no similar leeway exists for commitments on mode 3 in the services schedule.

Cumulatively, the EPA commitments impose severe constraints on the future capacity of CARIFORUM governments to regulate in relation to the EU and among CARIFORUM states themselves.

#### **4.4 Regional Implications**

Assessing the impact of the ‘regional preference’ on the CSME requires a painstaking analysis of all CARIFORUM states’ commitments, to the extent they are clear, and comparing them to CSME programmes and their actual implementation.

One of the few detailed studies of the investment commitments in the CARIFORUM-EC EPA concludes that its ‘investment provisions are unlikely to disrupt regional integration and may provide additional momentum’. This view is founded on three arguments.<sup>149</sup> First, Title II and CARIFORUM’s investment schedule specifically acknowledge the importance of regional integration. Second, Article 64 endorses the progressive liberalisation of investment. Article 64:2 refers to the principles in Chapter 5: Regulatory Framework as a desirable framework for further liberalisation of investment and services and does not impose any obligation on the CARIFORUM parties. The ‘principles’ section of Chapter 5 does not create obligations for the regional integration of CARIFORUM states either. Third, CARIFORUM’s schedule on commercial presence clearly separates the EPA undertakings from the rights and obligations under the Revised Treaty of Chaguaramas and the CARICOM-DR FTA.

Surprisingly, that study makes no reference to the ‘regional preference’ in Article 238, an omission that fundamentally undermines the assertion.<sup>150</sup> The ‘regional preference’ obligation will

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<sup>148</sup> Westcott also points out that vaguely worded limitations are problematic. Westcott (2008) 13

<sup>149</sup> Westcott (2008), 28

<sup>150</sup> Article 238 applies to the entire EPA including Title II Chapter 5.

have the greatest impact in relation to the CARICOM-DR FTA where no services or investment schedules have yet been drafted. The impact should be less in the CSME, as the Revised Treaty of Chaguaramas already applies a standstill in relation to commercial establishment and services and mandates a programme for eliminating restrictions.<sup>151</sup> However, the CARICOM Investment Code is still in draft form. Further, Girvan estimates that in 2007 only 50 percent of the actions required for free movement of services and rights of establishment in the CSME were complete and 55 percent for free movement of capital.<sup>152</sup> The remaining implementation would have to be reconfigured to satisfy the requirements and timetable of the EPA in relation to the EU, even without the internalisation of those obligations among CARIFORUM states through the 'regional preference'.

#### 4.5 Investor responsibilities

The CARIFORUM negotiators complemented their commitments to liberalisation with innovative provisions that sought to place responsibilities on foreign investors through Article 72: Behaviour of Investors and Article 73: Maintenance of Standards. They have high expectations of what the text is likely to deliver:

The EPA also contains obligations that will ensure that investors safeguard the environment and maintain high labour, occupational health and safety standards. Furthermore, the Agreement proscribes the Parties from lowering environmental standards in order to attract investment, and forbids investors from engaging in corruption to secure special concessions from public officials.<sup>153</sup>

These expectations seem overly optimistic. Article 72 requires the EU and CARIFORUM states to use national legislation of general application to ensure certain behaviour, like forbidding forbid investors to engage in corruption, such as bribes, and making them liable if they do. The law must also require investors to act in accordance with core ILO labour standards and not manage their investment in ways that circumvent the state's obligations in international environment and labour treaties. The accompanying obligation in Article 73 is a more common 'not lowering standards' provision. Governments must not weaken legislation and standards on domestic environmental, labour, occupational health and safety or cultural diversity, or core labour standards so as to encourage foreign direct investment.

The weaker requirement in Article 72(d) to legislate for measures 'as may be necessary' to ensure that investors establish liaison processes with affected communities, especially for projects involving natural resource-based activities, applies only where such processes are 'appropriate'. Governments are therefore only obliged to ensure that a foreign investor liaises with the local community if they consider it is 'appropriate' for the investor to do so.

Moreover, measures that require local community liaison processes must not 'nullify and impair' the benefits that the investor expects from an EPA commitment. It is difficult to predict the circumstances in which claims of nullification or impairment of the competitive benefits that investors expected to result from the agreement might arise in this context. Presumably, that situation might arise if liaison processes only apply to investors over a certain size or local governments impose a presumption against large-scale mining or forestry operations in their territory unless local communities consent.

Without devaluing the goal of imposing responsibilities on foreign investors, there needs to be a reality check about the effectiveness of these provisions. ILO and international environmental agreements are blunt instruments that are often remote from the realities facing workers and the environment. The more fundamental threat that an EPA poses to the livelihoods of workers, especially women, is likely to come from its liberalisation obligations and potential cuts to public sector jobs and

<sup>151</sup> Articles 32 and 36 of the Revised Treaty of Chaguaramas

<sup>152</sup> Girvan (2009) 96, Table 2.

<sup>153</sup> Lodge (undated), 3-4

services arising from the loss of government revenue from tariffs. Even studies that assume the EPA will generate a positive redistribution of resources concede there will be immediate 'adjustment costs' in the quest for longer-term growth.<sup>154</sup>

Recourse under national law to enforce the contractual and statutory liability of investors for their behaviour may also be undermined by market access commitments that prevent governments from requiring investors to adopt certain legal forms. Foreign firms will usually choose the legal form that allows them to minimise risk through transfer pricing, intra-firm loans or thin capitalisation, or to rely on home, rather than host, state regulation through representative offices or branches.

Ultimately, Articles 72 and 73 do not impose obligations on investors themselves. Unlike BITs, where investors can pursue their *rights* directly against states, these *responsibilities* rely on the willingness of governments to raise the matter with the other Party in consultations. The EPA does not provide an effective remedy.

The application of similar provisions to other ACP regions would raise further complications. While states should comply with core ILO standards, that expectation may be unrealistic in where states are not full ILO members<sup>155</sup> or have signed few of the ILO Conventions.<sup>156</sup> Indeed, the ILO reports that it is providing ongoing assistance with compliance within the Caribbean.<sup>157</sup>

The not-lowering-standards obligation is an equally positive objective. However, it conflicts with the establishment and operation of free trade or special export zones that offer exemptions to foreign investors from minimum wage, environmental planning and resource consent, water use, and other compliance with other standards. Again, those policies may be socially undesirable. But Article 73 does not differentiate between existing and future incentives and would require some ACP governments to make dramatic and immediate changes to their foreign investment strategy, with significant consequences for the economy and employment.

#### **4.6 Relationship between the EPA and BITs**

The awkward relationship between the EPA and BITs was discussed earlier in terms of the MFN implications. There is a separate issue of treaty-shopping that arises explicitly from Article 71, which entitles investors of a state of either Party to claim the better treatment they receive under a BIT or the EPA:

Nothing in this Title shall be taken to limit the rights of investors of the Parties to benefit from any more favourable treatment provided for in any existing or future international agreement relating to investment to which a Member State of the European Union and a Signatory CARIFORUM State are parties.

Understanding the implications of this for an individual CARIFORUM state requires the cross-referencing of any BITs it has signed with an EU state to its commitments on services and non-services investment in the two EPA schedules.

As of 1 June 2009 34 bilateral investment treaties were in effect between EU Member States and CARIFORUM states (Table 1, 2.3.3). The earliest of these BITs was signed between Germany and Haiti in 1973 and the most recent between the Netherlands and Suriname in 2005. The United Kingdom with 10 and Germany with 9 dominate that legal landscape; many of their agreements were negotiated in the 1980s and early 1990s.

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<sup>154</sup> see CaPRI (2009) 'The Impact of the EPA on Caribbean Economies. A Structural Analysis of Four Caribbean Countries', November 2009

<sup>155</sup> Only 7 PACP states (Fiji, PNG, Solomon Islands, Kiribati, Vanuatu, Samoa and Marshall Islands) are ILO members.

<sup>156</sup> <http://www.ilo.org/public/english/region/asro/bangkok/arm/pac.htm>

<sup>157</sup> [http://www.ilocarib.org.tt/portal/index.php?option=com\\_content&task=view&id=1101&Itemid=962](http://www.ilocarib.org.tt/portal/index.php?option=com_content&task=view&id=1101&Itemid=962)

These BITs contain some identical obligations to the EPA. For example, both require unrestricted transfers of returns and proceeds of total or partial sale in freely convertible currency. However, there are some significant differences.

In some areas the BITs are more extensive and stronger. Investments are broadly defined to include moveable and immovable property (land), all forms of participation in a company, intellectual property rights and goodwill, claims to money including specific performance of contracts, and business concessions, including for the exploitation of natural resources. The EPA only applies to an economic activity performed by a natural or juridical person by setting up a commercial presence, effectively foreign direct investment.

Both agreements provide post-establishment rights, but again the BITs are stronger.<sup>158</sup> The coverage of the EPA depends on scheduled commitments, whereas most BITs apply across the board. EPA exclusions are also generally broader. In particular, there is no equivalent in BITs of the EPA's exception for services supplied in the exercise of governmental authority. National treatment obligations in the BITs apply to investments and returns, pre-empting any special restrictions on repatriation of profits by foreign investors, although Title III of the EPA arguably has the same effect.

The most significant strength of the BITs is their protections for investors. Nationalisation, expropriation and measures tantamount to expropriation (sometimes known as 'takings') require full and prompt compensation, even where this occurs for a public purpose. Otherwise, it is actionable under the BIT. Investors can seek monetary damages directly against the host state through international arbitration. Claims by foreign investors for massive damages on the grounds that government regulations have reduced their profits or asset or share value have generated a backlash against the expropriation provision and many recent FTAs have narrowed its scope.<sup>159</sup> BITs retain the original wording.

Investment treaties involving CARIFORUM states operate for a minimum of five to twenty years and continue until a state withdraws, usually by giving six month's notice. Existing investors continue to enjoy rights under the agreement for a further five to twenty years. The EPA operates indefinitely, but (in theory) either Party or a Signatory CARIFORUM State can withdraw at six month's notice and investors' rights would then terminate.

There are some situations, however, where investors might prefer to rely on the EPA. Its rules have broader scope: both use the same definition of 'measures', but the EPA extends to measures 'affecting' commercial presence. Pre-establishment rights under BITs are traditionally weaker than in the EPA.<sup>160</sup> For example, the right of establishment under the BIT between the UK and Trinidad and Tobago only requires the parties to 'encourage and create favourable conditions' for the other's investors. The EPA confers much stronger rights to constitute and acquire a juridical person or create or maintain a branch or representative office (Article 65(a)).<sup>161</sup> While BITs provide for effective

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<sup>158</sup> The standard obligations are to provide 'fair and equitable treatment' and 'full protection and security' of investments, and not to 'impair by unreasonable or discriminatory measures the management, maintenance, use, enjoyment or disposal of investments in its territory'.

<sup>159</sup> Eg. Korea-US Free Trade Agreement, Annex 11:B 'Expropriation'

<sup>160</sup> US BITs with CARICOM countries also prohibit various performance requirements, broadly along the lines of TRIMS, but these are not in the European BITs.

<sup>161</sup> Constitution and acquisition include capital participation in a juridical person with a view to establishing or maintaining lasting economic links. When this involves equity participation the level should enable the shareholder to participate effectively in the management or control of the company. Participation may include long-term loans for more than five years, such as those to subsidiaries or in profit sharing arrangements. Definitions of juridical persons also differ. In the EPA a juridical person of a party is set up in accordance with the laws of a signatory state, and has its registered office, central administration or principal place of business in that territory. Entities that only have a registered office or central administration in the territory do not qualify unless engaged in substantive business operations. Special rules apply to shipping companies. Under the UK

investor-initiated disputes, their inter-state disputes process has fewer teeth than the EPA, as there is no potential recourse to retaliatory sanctions to secure compliance.

The technical difficulty in interpreting CARIFORUM's investment commitments makes the cross-fertilisation of the EPA and BITs a legal minefield for regulators. Advocates of investor protections would argue that this would be reduced if BITs-style provisions on expropriation and investor-initiated disputes were included in the EPA - something the CRNM would apparently have welcomed.

The Lisbon Treaty, which came into force on 1 December 2009 following its ratification by Ireland and the Czech Republic, now makes that possible. Article 207:1 of the Treaty on the Functioning of the European Union brings foreign direct investment within the exclusive competence of the EU. That clears the way for its future EPAs and FTAs to contain comprehensive investment chapters, including expropriation and investor-state dispute settlement, along similar lines to the FTAs negotiated by US and other OECD countries. Significantly, there was a full BITs-style section on investor protections and investor-state disputes in the draft Canada-EU FTA dated January 2010, the first that has been negotiated in the post-Lisbon context. This is a Canadian initiative and was in square brackets. However, the EU's extended competency does not alter the requirement for the treaty to be adopted unanimously by the Council of Europe, which effectively gives any individual state a veto.<sup>162</sup>

It seems very likely that the EU and CARIFORUM may jointly promote a major revision of Chapter 2 during the review that is provided for in Article 74. A formal amendment to the text would be required, probably by adding a new Protocol; that would be consistent with the revision clause in Article 246, which provides for extension of the agreement to broaden and supplement its scope.

If the review did lead to the expansion of the investment provisions along those lines, the parties would have to determine the status of the existing BITs. Would they remove the option to choose the better outcome of BITs or the EPA? Would they expect states to terminate their BITs in favour of the EPA and if so what would happen to the right of existing investors to enjoy residual benefits for between five and twenty years? Might an EU-wide investment treaty subsume the bilateral agreements? How would the EU handle an investor-state dispute under an EPA or implement the outcome when the measure or action in dispute relates to a Member State?

European investment experts have been grappling with similar questions. One commentator reasons that the Treaty of Lisbon makes no provision for Member States to keep their existing investment treaties in place, even where they comply with EU law; hence, existing BITs will have to be denounced and replaced by agreements at the EU level. A grandfathering approach would have avoided this, but the Lisbon Treaty does not provide one.<sup>163</sup> A more nuanced interpretation suggests that the new approach is intended to bring pressure on EU states to renegotiate their existing BITs, but imposes no obligation to do so.<sup>164</sup> Those who have reflected on the political and practical difficulties that investor-initiated disputes pose for the EU have predicted that it might leave those mechanisms

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Trinidad and Tobago BIT the company needs to be incorporated or constituted under the law of the territory, with no further definition.

<sup>162</sup> Most decisions made by the European Council on trade agreements will be by a qualified majority. However, Article 207:4 states: 'For the negotiation and conclusion of agreements in the fields of trade in services and the commercial aspects of intellectual property, as well as foreign direct investment, the Council shall act unanimously where such agreements include provisions for which unanimity is required for the adoption of internal rules.'

<sup>163</sup> George-Dian Balan, 'The Common Commercial Policy under the Lisbon Treaty', Jean Monnet seminar, April 2008, 7, [http://www.pravo.hr/\\_download/repository/GDB\\_JM\\_CCP.pdf](http://www.pravo.hr/_download/repository/GDB_JM_CCP.pdf)

<sup>164</sup> Herbert Smith Institute (2009), 'The Lisbon Treaty and the Future of European Investment Treaties' Herbert Smith Investment Protection E-bulletin, 6 November 2009, <http://www.herbertsmith.com/NR/rdonlyres/E8F367AC-6AD2-454A-AD6F-8944AEFDFABA/13273/TheLisbonTreatyandthefutureofEuropeaninvestmenttre.html>

out of future investment agreements.<sup>165</sup> Resolving these questions will be a priority for the EU in advancing its Global Europe strategy. States considering future negotiations with the EU on services and investments should expect that investor protections and the right of investors to initiate disputes directly against states will form a central part of any agreement.

#### 4.7 Risk Factors

The CARIFORUM negotiating machinery reportedly claims that very little legislative change is needed to give effect to its commitments on commercial presences and cross-border services, because they basically bind the existing regulatory practice and limit the future tightening of regulation.<sup>166</sup> That is a brave call, for several reasons.

CARIFORUM's decision to maintain a positive list schedule for services in modes 1 to 4, a quasi-negative list schedule for non-services investment, unrestricted capital movements and cross-referencing to European BITs makes it almost impossible to untangle the implications for an industry, a regulatory agency, a government or an affected community.

That approach also carries a high risk of unintended obligations. Even if few changes were required to investment laws initially, enforceable commitments would prevent governments from rolling back the existing liberalisation if the EPA failed to deliver the anticipated high quality and socially responsible foreign investment. The negotiators who make these commitments do not have a crystal ball and the various exclusions and reservations they point to as protection for sensitive areas are far from watertight. Commitments to a standstill of uncertain legal effect and to future negotiations that aim to lock in further liberalisation have long-term consequences for the ability of democratic governments to respond effectively to policy or regulatory failure, social, economic or ecological crises, or even to implement their electoral mandates.

The negotiators hope that making these extensive commitments will attract more foreign investors to the Caribbean. As Brewster et al have observed of goods liberalisation, “‘market access’ has not automatically converted to ‘market presence’”.<sup>167</sup> The optimism of the Caribbean negotiators would be more convincing if they cited evidence to show that economic benefits have flowed from the multiplicity of existing BITs between Caribbean and EU states. Reflecting on the broader ACP experience in this regard, Damon Vis-Dunbar observes that:

Whether these BITs achieve their objective of increasing FDI flows is contentious; at least in the absence of other important factors, such as political stability and a growing economy, it seems BITs do little to boost FDI. The benefits of BITs also need to be carefully weighed against the risks. As a number of ACP countries have experienced firsthand, BITs offer foreign investors a powerful tool for challenging government actions they deem to be unfair or discriminatory. These disputes require that governments have the skills and financial resources to adequately defend themselves.<sup>168</sup>

The regional implications have also been seriously under-estimated. Implementing the EPA obligations to the EU will pre-empt options that were otherwise available to CARIFORUM states to design the remaining rules and appropriate flexibilities, apply waivers and exemptions, determine the appropriate time frames, and reconsider the wisdom of what they have agreed to.

When reflecting on these risks it is important to recall that the EPA makes no structured provision to amend the schedules and the window reserved in CARIFORUM's Headnote to revise its schedules applies only to non-conforming measures for non-services investment that existed in October 2008. The opportunities for review in Articles 62 and 74 of Title II only foresee policy and

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<sup>165</sup>Herbert Smith Institute (2009)

<sup>166</sup> Westcott (2008), 16

<sup>167</sup> Brewster et al (2008), 2

<sup>168</sup> Vis-Dunbar (2009)

regulation moving in the direction of further liberalisation. Neither offers the legal space to reduce or withdraw commitments, unless the Article 74 review can accommodate some rebalancing within an overall increase in liberalisation. Any reconsideration of the wisdom of binding the liberalisation of services and investment in this way will rest on the Article 5 review that the parties agreed belatedly to at the time the EPA was signed.

## 5. TEMPORARY LABOUR MOBILITY

The legal asymmetry in the EPA text is most obvious in Chapter 4 on temporary labour mobility, known in the GATS as mode 4. This section of the report explains how the concept is redesigned in the EPA to reflect EU's offensive and defensive interests by enhancing entry into CARIFORUM countries for personnel linked to European transnational corporations, specifying a restricted range of skilled contractors and independent professionals from CARIFORUM countries who are potentially eligible for expedited entry into Europe, and excluding workers in lower skilled services occupations from the EPA entirely.

The chapter critically evaluates the gains that CARIFORUM negotiators claim to have achieved in light of the restrictive criteria in the text and the EU's two relevant schedules. The implications for labour mobility under the CARICOM-DR FTA and CSME are then discussed. The chapter concludes by reflecting on the lessons for other countries that are tempted to view the CARIFORUM-EC EPA as a promising precedent.

### 5.1 Objectives

When most ACP countries are negotiating trade in services their principal aim is to secure access for their people to work temporarily in the services sectors of larger and more prosperous economies. Governments may be motivated by a range of objectives: to soak up unemployment, generate remittances to shore up the balance of payments, supplement incomes of families and communities, extend the diaspora, and meet the aspirations of a political and economically significant middle class. Even where Europe is not the preferred destination, many ACP countries hope that an EPA might create precedents that could be leveraged in other negotiations and at the WTO.<sup>169</sup> The assumption that temporary movement of services workers can and should be dealt with under the rubric of 'trade' has become so dominant within many governments that it crowds out much-needed debate on the social, human rights and development ramifications of a remittance-dependent economy.<sup>170</sup>

As a major services exporting country, the EU approaches labour mobility with very different offensive interests: to facilitate access for elite personnel who are associated with foreign investments and for independent professionals and consultants. In an equal negotiation both parties' interests would be engaged. But that has never been the way that temporary labour mobility has fared in trade

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<sup>169</sup> For example, Pacific ACP states are too remote from Europe to take much advantage of any access rights under an EPA, but have sought concessions from the EU to provide leverage in negotiations with Australia and New Zealand pursuant to the Pacific Agreement on Closer Economic Relations (PACER).

<sup>170</sup> When Southern negotiators seek concessions on labour mobility they offer to liberalise goods, services and investment in return, even though these trade-offs can exacerbate the push factors that drive remittance migration. There is a risk that these offers remain on the table even where no progress is made on labour mobility. A preoccupation with 'mode 4' tends to reinforce the economic model of remittance economies at the expense of other development models that aim to strengthen domestic capacities, self-reliance and subsistence. Programmes that train potential foreign services workers at government expense or in fee-paying institutions feed the dependency on people's ability to export their labour. The post-2007 economic crisis indicates that remittance-dependent economies are as vulnerable to systemic economic downturns as commodity exporters.

As the trade paradigm, trade ministries and 'mode 4' mentality come to drive government policy on labour mobility the social implications of the long-term absence of women and men from their families, communities and cultures tend to be sidelined. Indeed, governments that become dependent on remittances may lack the incentive to ensure the protection of individual workers from exploitation and abuse, or their right as taxpayers to access the same protections as locals in social security, unemployment and workplace disputes. Again, the current crisis has seen many foreign services workers left stranded and deeply indebted when their employment goes sour.

Added to these economic and social factors is the difficulty that governments face in regulating the remittance industry of immigration consultants, employment brokers, lenders, international money transfers, and private degree mills, especially when they operate transnationally. These services suppliers may even become more protected from active regulation by a government's commitments under the trade in services agreements.



in services negotiations. Instead, the Europeans have used the EPA to circumscribe the scope of temporary labour mobility as a mode of trade to reflect their commercial and political priorities.

## **5.2 Mode 4 of the GATS**

Chapter 4 of the EPA, entitled 'Temporary Presence of Natural Persons for Business Purpose' reflects a trend among Northern governments to reverse the compromises they made over temporary labour mobility in the GATS. Because Southern governments rest such hopes in mode 4 it is necessary to canvass that history briefly to understand the significance of that change.

Throughout the Uruguay round Southern governments insisted that a global services market requires free movement of both capital and labour and claimed that labour was their principal source of 'comparative advantage'. That argument is implicitly acknowledged in the GATS, where the international movement of services labour is one of four modes of supplying services, defined as the supply of a service 'by a service supplier of one Member, through presence of natural persons of a Member in the territory of any other Member' (Article 1:2(d)).

Mode 4 is notable for its generality. The Annex on Movement of Natural Persons defines 'trade' negatively to exclude measures that 'affect' natural persons seeking access to the employment markets of a member, and measures regarding citizenship, residence or employment on a permanent basis.<sup>171</sup> There is no distinction between categories of services labour. 'Temporary' and 'permanent' are not defined. Nor is there any bright line between 'trade' and 'immigration'; governments making sectoral commitments in mode 4 retain the right to regulate entry and temporary stay of individuals, but only where this does not nullify or impair their specific commitments.

Technically, therefore, the GATS covers all classes of services workers on very vague terms. In practice, the positive list approach to scheduling of GATS commitments has allowed states like the EU that are preferred destinations to avoid the political and economic fallout of an open-ended mode 4 and restrict their commitments largely to the managerial and professional categories. Élite labour is treated as a trade issue; mundane labour remains purely a matter for immigration policy.<sup>172</sup>

The WTO Secretariat observed in a note in 1998 that Members tended to approach the scheduling of mode 4 very differently from other modes: 'they normally started from a general "unbound" which was then qualified by liberalisation commitments applying to specified types of persons (e.g. managers), movements (e.g. intra-corporate) and stays (e.g. up to four years)'.<sup>173</sup> Many schedules linked modes 3 and 4, providing access for personnel to establish a commercial presence and intra-corporate transferees,<sup>174</sup> although the Secretariat suggested such rights of entry might already be integral to mode 3 as a measure 'affecting' the obligation.<sup>175</sup> It noted that pre-employment with a firm was the single most important entry criterion, referred to in over 100 cases. Numerical quotas were retained in close to 80 cases, with ENTs the next most common.<sup>176</sup> Despite an extension to negotiate additional mode 4 commitments beyond the end of the Uruguay round,<sup>177</sup> very few additional commitments of interest to the South were made.<sup>178</sup>

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<sup>171</sup> WTO, *Annex on Movement of Natural Persons Supplying Services Under the Agreement*, para 2

<sup>172</sup> The CRNM (2008a) ignores the distinction.

<sup>173</sup> WTO Secretariat, 'Background Note on Presence of Natural Persons', S/C/W/75, 8 December 1998

<sup>174</sup> Over two-thirds of entries in Members' GATS 1994 schedules concern executives, managers and specialists; more than one third explicitly involve intra-corporate transferees linked to mode 3. Only 17 percent of all horizontal entries could potentially cover low-skilled persons as well ('business sellers', 'non specified' and 'other').

<sup>175</sup> S/C/W/75 (1998), para 7

<sup>176</sup> S/C/W/75 (1998), para 44

<sup>177</sup> This was a quid pro quo for the extension of negotiations on financial services and telecommunications that the US insisted upon.

<sup>178</sup> Six countries improved their commitments, mostly relating to foreign independent professionals. [http://www.wto.org/english/tratop\\_e/serv\\_e/mouvement\\_persons\\_e/mouvement\\_persons\\_e.htm](http://www.wto.org/english/tratop_e/serv_e/mouvement_persons_e/mouvement_persons_e.htm)

The most common rationale for the class bias in favour of managerial and professional personnel is that they do not seek to enter the host country's competitive employment market in the way that less qualified workers do. That is not necessarily true; the pressure on Southern governments to eliminate ENTs in mode 4 confirms that intra-corporate transferees and professionals do perform work that could be done by locals and therefore are part of the employment market. Likewise, the rationale fails to address the logic that a globalised services market assumes the free movement of both factors of production.

Mode 4 has remained a fraught issue during the GATS 2000 negotiations. India, as the most powerful Southern demandeur, has (so far) unsuccessfully sought a guaranteed quota for higher skilled services labour operating through contract service suppliers and independent professionals, primarily into the US. Requests from other developing countries, especially LDCs, to include entry for lower skilled categories have received short shrift.<sup>179</sup>

The same North/South tensions have infused more recent FTA negotiations and generated many new formulations. A study of labour mobility in regional trade agreements in 2002 identified seven different approaches,<sup>180</sup> even before the number of negotiations spiralled. Agreements between geographically distant countries with contrasting levels of development were generally the least liberal.<sup>181</sup> A prevalent feature of the new generation free trade agreements is the explicit restriction of labour mobility to elite personnel, which was first seen in the Canada-US FTA 1988 and NAFTA 1993.<sup>182</sup> The EU's template takes that approach.<sup>183</sup>

CARIFORUM negotiators were working against that backdrop to secure an unprecedented shift in position from the EU, which had never before made binding commitments on independent professionals or contractual services suppliers. The Europeans were wary of the fraught internal politics surrounding migrant labour and the precedent that any concessions would set for other bilateral agreements, especially with India, and the GATS negotiations in the WTO.

### 5.3 Core Rules

Chapter 4 redefines the GATS mode 4 by narrowing its scope to a closed list of six categories: key personnel; graduate trainees; business service sellers; Contractual Services Suppliers; independent professionals; and short term visitors for a business purpose. Each category is tightly proscribed in the text and their markedly different entitlements reflect the EU's offensive and defensive interests.

A number of other features also stand out. Unlike Chapter 2: Commercial Presence and Chapter 3: Cross-border Supply, there is no MFN obligation in Chapter 4 to give the parties the benefit of any more liberal approaches taken by the other in future agreements. A presumption of entry operates in favour of key personnel and graduate trainees in sectors where commercial establishment commitments are made, skewing the benefits in favour of the EU as the predominant investor. While commitments relating to elite personnel (referred to here as Tier 1) can be made in all sub-sectors, the EU has restricted contractual services suppliers and independent professionals (Tier 2) – the categories of most interest to CARIFORUM – to a maximum of 29 and 11 occupations, respectively.

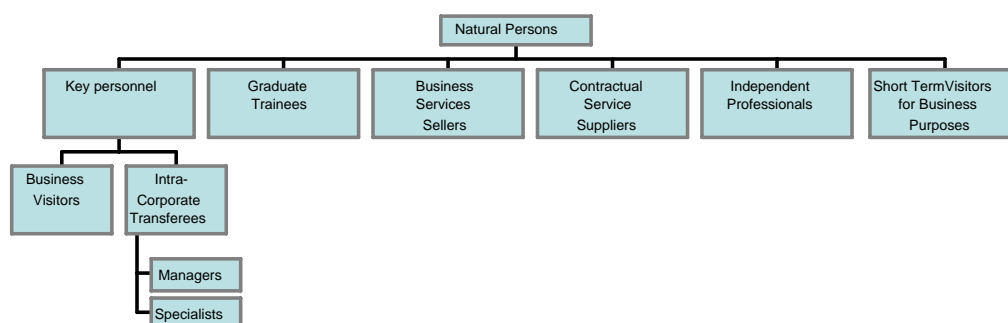
<sup>179</sup> For an official assessment of the state of play as at July 2005 see Council for Trade in Services, Report by the Chairman to the Trade Negotiations Committee, TN/S/20, paras 58-65; and on countries' assessments of the outcome of the plurilateral negotiations on Mode 4 at the Council for Trade in Services at the meeting of 28 September 2007 see Council for Trade in Services, 'Report of the Meeting held on 28 September 2007', TN/S/M/27.

<sup>180</sup> Julia Nielson (2002), 'Labour Mobility in Regional Trade Agreements', Paris: OECD, 1.

<sup>181</sup> There are some exceptions. For example, the New Zealand China Free Trade Agreement 2008 includes references to employment for a very limited category and number of semi-skilled workers and an unenforceable side letter with rights of access for people on working holidays

<sup>182</sup> Ironically, the US has not used that approach in some of its more recent FTAs, eg. the US-Peru FTA.

<sup>183</sup> Sauv   and Ward (2009), 6

**DIAGRAMME 6: CATEGORIES OF LABOUR MOBILITY IN THE CARIFORUM-EC EPA**

Source: Sauvé and Ward (2008), 18

### 5.4 Tier 1: Key Personnel

*Key personnel* are people responsible for the setting up, or the proper control, administration and operation, of a commercial presence. Two distinct roles are identified:

- a ‘business visitor’ is a senior executive who enters the host state to set up the investment and is not subject to any requirement of prior employment with the firm; and
- an ‘intra-corporate transferee’ must have already been a partner with or employed by the company for a year and is transferred temporarily to direct the management or to perform specialist responsibilities that require an uncommon knowledge.

Key personnel must be employed and paid by a home company (not being a non-profit organisation).

*Graduate trainees* are the second privileged category. They have a right to enter the country for career development purposes or to gain training. There is a pre-employment requirement of twelve months in their home country before they are transferred to either the parent company or a subsidiary in the other party’s territory. They must have a university degree.

Governments cannot use a quota or an ENT to restrict the number of key personnel and graduate trainees they allow to enter unless they have scheduled a reservation. These categories enjoy moderately long periods of entry under Article 81: intra-corporate transferees can stay for up to three years and graduate trainees for a year.

*Business service sellers* perform a distinctive function, entering the host country as a representative of a service supplier to negotiate the sale of a service or sign a contract to supply services in that territory. They must be paid by the service supplier at home and not be delivering services directly to the general public in the host country. While there is no specific qualification requirement, these may be imposed through the schedule. Business sellers in sectors gain a right of entry and temporarily stay for up to 90 days in any twelve months where there is a commitment on commercial presence in the relevant sector, subject to any reservations.

A further category of *short-term visitors for business purposes* enjoys rights of entry for up to 90 days in a year. This access is restricted to a closed list of activities specified in Article 84: research and design on behalf of a home country company, market research, training seminars, trade fairs and exhibitions, sales agents taking orders and negotiating contracts for a home company, buyers for a home country company and tourism personnel attending conventions of exhibitions. Business visitors cannot deal directly with the public or be supplying the services themselves, and they must not be paid from within the host country. There is a further, opaque requirement that business visitors must not

provide the service within the framework of a contract between an entity that is not established in the EU or host CARIFORUM state and a consumer that is from the EU or CARIFORUM state.<sup>184</sup>

While Article 81 is notionally neutral, the presumption of entry where there is a commitment on commercial presence is intrinsically biased in favour of European personnel. CARIFORUM states are not expected to establish a significant number of investments in the EU.<sup>185</sup> Many more Europeans will have a pre-existing relationship with a firm that has a commercial presence in the Caribbean.

The requirement in most Tier 1 categories that the employment relationship, payment or employing contractor is located outside the host country may be intended to reinforce the distinction between temporary entry for a business purpose ('trade') and participation in the employment market. If so, it suffers from several inconsistencies. First, graduate trainees and intra-corporate transferees are more likely than key personnel to be engaged in work that a local could do, and those categories can be paid from within the host country. Second, as Sauv   and Ward point out, the GATS provides for movement from the parent company to a subsidiary or between subsidiaries; the EPA includes the transfer of a trainee from a subsidiary to its headquarters, meaning the natural person would be supplying the service to a domestic company.<sup>186</sup>

### 5.5 Tier 2: Contractual Services Suppliers and Independent Professionals

The categories of *Contractual Services Suppliers* and *Independent Professionals* are treated very differently from Tier 1. The eligibility criteria are set out in three separate places: Article 80 (d) and (e) define the two categories, Article 83 refines the definition, and the schedules record the parties' commitments. This accumulation complicates interpretation and obscures the extent to which restrictions on entry remain. The following lists set out the criteria as they apply to CARIFORUM countries:

A Contractual Service Supplier must

- be a national of a CARIFORUM state;
- be an employee of a firm that is a juridical person of that state;
- have been supplying services for the same company for at least the year immediately preceding the application for entry;
- have at least three years professional experience in the sector that is subject of the contract; and
- except for fashion models, non-audio-visual entertainers and chefs, all others must have a university degree or equivalent qualification, and a professional qualification where that is required by law in the country where they will provide the service.

The firm they work for must

- not have a commercial presence in the EU country where it wants to supply the service;
- have a bona fide contract to supply a service to a final consumer in the other territory; and
- seek entry for the fewest people necessary to fulfill the contract.

The contract must

- involve work that cannot be done by cross border supply, in that it must be necessary for an employee to go to the country temporarily to perform the contract;
- be for no longer than twelve months; and

<sup>184</sup> It is unclear if the latter is also the host state.

<sup>185</sup> Girvan notes that within CARICOM only a handful of firms have engaged in significant cross-border investment. Girvan (2009), 115

<sup>186</sup> Sauv   and Ward (2009), 19

- not be secured through a personnel or employment agency.<sup>187</sup>

While performing the contract in the host country the Contractual Service Supplier

- can only undertake the work they are contracted to do;
- must not be paid for the service except by their employer; and
- must be present for no longer in total than six months,<sup>188</sup> or less if the contract is shorter.

An Independent Professional must

- be a national of a CARIFORUM state;
- supply a service as self-employed through a company;
- not have a commercial presence in the EU country where they want to supply the service;
- have at least six years experience in the particular activity that is subject of the contract;
- hold a university degree or equivalent qualification; and
- have professional qualifications where that is required by law to practice the profession in the EU country where they will deliver the service.

The contract must

- be a bona fide contract to supply a service to a final consumer in that EU country;
- not be secured through a personnel or employment agency; and
- be for no longer than twelve months.

While performing the contract in the host country the Independent Professional

- can only undertake the work they are contracted to do;
- do not have a right to use the local professional title; and
- can be present for no longer than six months in total,<sup>189</sup> or less if the contract is shorter.

Sauvé and Ward suggest the longer period of experience required for independent professionals is a way to increase the likelihood that those individuals return home, given there is no employer to hold liable for their return.<sup>190</sup>

In stark contrast to Key Personnel, Intra-corporate Transferees and Business Sellers, who have a presumed right of entry linked to sectoral commitments on commercial presence, the EU has restricted Contractual Services Suppliers and Independent Professions to 29 and 11 categories respectively under Article 83:2 and 83:3. Sectors that appear in both categories are italicised:

- 1) *Legal advisory services in respect of international public law and foreign law (i.e. non-EU law)* [CSS & IP]
- 2) Accounting and bookkeeping services [CSS]
- 3) Taxation advisory services [CSS]
- 4) *Architectural services* [CSS & IP]
- 5) *Urban planning and landscape architecture services* [CSS & IP]
- 6) *Engineering services* [CSS & IP]

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<sup>187</sup> Referred to in Article 80:2(d) and (e) as CPC 872. That CPC covers Placement and supply services of personnel with sub-classes that cover Executive search services, Placement services of office support personnel and other workers, Supply services of office support personnel, Supply services of domestic help personnel, Supply services of other commercial or industrial workers, Supply services of nursing personnel, and Supply services of other personnel. See <http://unstats.un.org/unsd/cr/registry/regcs.asp?Cl=9&Lg=1&Co=8720>

<sup>188</sup> The stay in Luxembourg is no longer than 25 weeks

<sup>189</sup> The stay in Luxembourg is no longer than 25 weeks

<sup>190</sup> Sauvé and Ward (2009), 21

- 7) *Integrated engineering services* [CSS & IP]
- 8) Medical and dental services [CSS]
- 9) Veterinary services [CSS]
- 10) Midwives services [CSS]
- 11) Services provided by nurses, physiotherapists and paramedical personnel [CSS]
- 12) *Computer and related services* [CSS & IP]
- 13) *Research and development services* [CSS & IP]
- 14) Advertising services [CSS]
- 15) *Market research and opinion polling* [CSS & IP]
- 16) *Management consulting services* [CSS & IP]
- 17) *Services related to management consulting* [CSS & IP]
- 18) Technical testing and analysis services [CSS]
- 19) Related scientific and technical consulting services [CSS]
- 20) Maintenance and repair of equipment, including transportation equipment, notably in the context of an after-sales or after-lease services contract [CSS]
- 21) Chef de cuisine services [CSS]
- 22) Fashion model services [CSS]
- 23) *Translation and interpretation services* [CSS & IP]
- 24) Site investigation work [CSS]
- 25) Higher education services (only privately-funded services) [CSS]
- 26) Environmental services [CSS]
- 27) Travel agencies and tour operators' services [CSS]
- 28) Tourist guides services [CSS]
- 29) Entertainment services other than audiovisual services [CSS]

Access to the EU within these Article 83 categories is subject to further regional or country-specific limitations on entry, including ENTs, which are recorded in the EU's schedule. That additional layer of restrictions creates the potential to deepen the asymmetries established in the text.

Because these categories are specified in Chapter 4 itself, any additions would require an amendment to the text, rather than expansion of a schedule. Reopening a text is much less common than extending schedules. Article 246 governs such amendments. An expansion of the Article 83 categories would meet the criterion for extensions to the agreement: that it aims to broaden or supplement its scope in light of experience gained during its implementation.

Article 246 provides no specific procedure. The most likely opportunity to press for such changes would be the Article 62 negotiations on investment and trade in services that take place five years after the agreement comes into force. This review aims to enhance overall commitments; 'commitments' implies through schedules, but could also refer to the text. These negotiations presumably include labour mobility. While Title II does not define 'trade in services', the heading 'Investment, Trade in Services and E-Commerce' to cover all chapters would support an interpretation of trade in services that combines cross-border services and labour mobility. On the other hand, the two chapters are distinct, there is no reference to trade in services in Chapter 4, and the latter is subject to less liberal provisions, notably the absence of the MFN obligation.

CARIFORUM has no equivalent restrictions on the categories of Contract Service Suppliers and Independent Professionals that may be guaranteed entry through its schedule of commitments.

## **5.6 The EU's Schedules**

The EU's divergent approaches to Tier 1 and Tier 2 dictated separate schedules for each. That makes it relatively easy to identify each state's commitments. The complexity arises when cross referencing those commitments to the criteria for each category of personnel in Articles 80 and 83, and to the commitments on commercial presence that attract the presumption of entry for Tier 1 and enable professionals to establish a business within Europe.

The EU's schedules on Tier 1 and Tier 2 are framed by separate Headnotes. Some features are common to both. First, the commitments do not apply where the intent or *effect* of the temporary presence is to interfere with or otherwise affect the outcome of any labour/management dispute or negotiation. That 'effect' may arise after the fact of the contract and the application for entry and it may be unintended by the foreign personnel.

Second, European states reserve the right to apply additional qualification, licensing and standards requirements, as well as measures regarding employment, work and social security conditions, which are not considered to be market access restrictions under Article 67. These relate particularly to the professions and include the

need to obtain a license, need to obtain recognition of qualifications in regulated sectors, need to pass specific examinations, including language examinations, need to have a legal domicile where the activity is performed, need to comply with national regulations and practices concerning minimum wages and with collective wage agreements in the host country.

Third, the main criteria for ENTs will be 'the assessment of the relevant market situation in the Member State or the region where the service is to be provided, including with respect to the number of, and the impact on, existing services suppliers.' That opaque criteria fails to meet the EU's own GATS 2000 request for greater specificity of ENTs, if they are retained at all.

The EU's Tier 1 schedule limits its commitments for key personnel and graduate trainees to the sub-sectors on which it has made commitments to allow a commercial presence, and which it is obliged under Article 81 to include. Within those sub-sectors, the schedule operates as a negative list: if there is no entry for an EU state under a sub-sector that state is fully open to Tier 1 personnel, unless an EU-wide horizontal or sector-specific reservation applies. The schedule uses the same combination of CPCprov, CPC 1.0 and ISIC Rev. 3.1 classifications that is used for commercial presence. Most of the country-specific reservations on Tier 1 personnel involve residency and nationality requirements, especially by new EU members.

These reservations need to be read alongside the EU's limitations on commercial presence. Its market access restrictions for business services particularly target the professions of legal services, accounting, auditing and bookkeeping, taxation, medical and dental. They include maximum foreign shareholding, requirements for joint ventures, legal form, ENTs, and a quota for legal services.<sup>191</sup> The practical impact of these combined limitations may be lessened because many of them apply to the Eastern European states, which are not preferred destinations.

CARIFORUM negotiators had also hoped the EU would make significant commitments to support the development of offshoring by professionals, which could avoid the costs of commercial establishment and travel to Europe.<sup>192</sup> They described the outcome as 'less than ideal': the EU's schedule for cross-border services lists reservations in every professional service in the W/120 list of sub-sectors, especially for mode 1.

The EU's Tier 2 schedule is limited by the categories of contractual services suppliers and independent professionals specified in Article 83. Champions of the EPA stress the unprecedented move by the EU to open access for these occupations with no quotas or economic ceilings;<sup>193</sup> but they ignore or downplay the restrictions.

Unlike Tier 1, the schedule for Contractual Services Suppliers and Independent Professionals operates through a positive list within the designated categories, meaning there is no commitment for

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<sup>191</sup> CRNM (2008a), 2

<sup>192</sup> CRNM (2008a), 3

<sup>193</sup> CRNM (undated), 'Highlights re Services and Investment in the CARIFORUM-EC Economic Partnership Agreement', Jamaica: CRNM, 2; Lodge (undated), 3. However, the restrictions are spelt out in some detail in the CRNM paper on professional services CRNM (2008a).

any occupation unless it is expressly stated. The activities of most interest to CARIFORUM (and other ACP) countries tend to face the heaviest constraints. For example, all EU states have left medical, veterinary, midwives, nurses and paramedics either ‘unbound’ or subject to an ENT.

Similarly, in the tourism sector about half the EU states have reserved an ENT for travel agencies and tour operators, while five are unbound on tourist guide services; only one European state has no restrictions. The exemption for models, chefs and entertainers from qualifications requirements in Article 83:2(c) have largely been restored through scheduled reservations. Extracts from these schedules are set out in below (Sections 10.4, 11.3).

By far the most prevalent reservation listed by EU states is the right to apply an ENT, as defined in the Headnote. For every sub-sector listed in Article 83, around half the EU member states have reserved the right to use an ENT, especially the newer EU members; the remaining countries generally maintain no restrictions. CARIFORUM negotiators play down the impact of these ENTs as ‘not really burdensome’. They point out the EU has used such tests on a discretionary basis for years and claim that ‘[i]n most instances, the ENTs are not really applied, but the ENT condition in the formal market access commitment gives flexibility to regulators in the event that they need to use them in extenuating circumstances.’<sup>194</sup> However, there is no guarantee of that approach, especially in recessionary times. Conversely, the CARIFORUM negotiators cite their own retention of ENTs for all key personnel and graduate trainees, and in many sectors for Contractual Services Suppliers and independent professionals in response to concerns about an influx of foreign competitors into the Caribbean.<sup>195</sup>

Some commentators are less sanguine than the CRNM about the achievements for labour mobility. Sauv  and Ward suggest the significant number of ENTs that remain in place for Tier 1 could operate as highly effective barriers to entry, especially when ‘administered in a opaque or unduly discretionary manner by host country regulators’.<sup>196</sup> In relation to Tier 2, they predict that EU states will continue to make significant use of ENTs to restrict access in occupations where entry has become quota-free.<sup>197</sup>

Francis and Ullrich conclude that significant limitations scheduled in mode 4, especially for Tier 2, reduce the developmental impacts of the EPA for the Caribbean. In particular, the requirements for academic and professional qualifications and ENTs could be prohibitively costly for less developed countries. ‘Thus, despite the substantial scope of market access opening in Mode 4, the actual developmental impact will likely be relatively limited given the burdensome requirements placed on the service providers’.<sup>198</sup>

## 5.7 The CARIFORUM Schedule

It is more cumbersome to identify the commitments by CARIFORUM states under Chapter 4. A country’s mode 4 entries have to be extracted from the composite services schedule of all states and all modes, then combined with additional commitments in the non-services investment schedule that attract the presumption of entry. As with the EU, commitments in cross border services are also relevant, especially for professional services. According to the CRNM, all CARIFORUM states liberalised some professional services activity in at least one mode, taking an approach to cross border services that reflected the existing level of liberalisation.<sup>199</sup>

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<sup>194</sup> CRNM (undated), 2

<sup>195</sup> CRNM (undated), 4

<sup>196</sup> Sauv  and Ward (2009), 32

<sup>197</sup> Sauv  and Ward (2009), 32

<sup>198</sup> Francis and Ullrich (2008), 11

<sup>199</sup> CRNM (2008a), 5



The Headnotes to both schedules assert the right to regulate for national policy objectives and to apply non-discriminatory requirements and procedures for professional qualifications and licensing mentioned earlier (Section 4.3.1). There are three additional restrictions for labour mobility. First, the automatic right of entry that attaches to a commercial presence commitment is subject to an ENT, unless the schedule says otherwise. The main criterion for that ENT is the availability of persons with the requisite skills in the local labour market. Second, Contractual Services Suppliers and Independent Professionals are only covered where specifically indicated and are automatically subject to the restrictive criteria in Article 83, unless otherwise stated. Third, the standstill for services regulation does not apply to mode 4.

There is a certain irony that CARIFORUM states themselves took a very defensive approach to the entry of Tier 2 personnel. For example, Trinidad and Tobago's entries contain many new GATS-plus commitments, but very few of these were for contractual services suppliers or independent professionals. The GATS and EPA schedules for Trinidad and Tobago both contain a horizontal reservation that: 'Employment of foreign natural persons over 30 days is subject to obtaining a work permit granted on a case-by-case basis. Foreign natural persons shall be employed only as managers, executives, specialists and experts'. The EPA schedule adds that mode 4 is 'unbound' except for key personnel and graduate trainees not available locally - effectively an ENT. In what may have been a scheduling error in its original GATS schedule, Trinidad and Tobago promised no limitations on rights of entry under mode 4;<sup>200</sup> those services sectors remain fully open in the EPA. The EPA schedule also includes a vast number of new sectors that are described as 'Unbound except as indicated in the horizontal commitments'; many of those relate to sectors that were committed for commercial presence. Trinidad and Tobago made commitments in only three sectors (Research and Development in Natural Sciences, Interdisciplinary Research and Development, and Insurance Retrocession) for Contractual Services Suppliers and independent professionals, and those are subject to the horizontal reservation and an ENT.

## **5.8 Mutual Recognition**

Effective entry for those who qualify as Contractual Services Suppliers and Independent Professionals depends on some structured method for accreditation or recognition of professional qualifications, and associated licensing procedures. Mutual recognition of professionals is a long-standing demand of the G-90, in which the ACP predominates.<sup>201</sup> It is also a very sensitive issue; professional bodies are largely self-regulating and often have long-standing country specific requirements.

The GATS takes an arms-length approach to mutual recognition agreements.<sup>202</sup> The EPA moves cautiously beyond that. The parties are required to 'encourage' their relevant professional bodies to develop and provide recommendations jointly on mutual recognition that would help investors and Contractual Services Suppliers to meet their various authorisation, licensing, operation and certification requirements. The four disciplines that are given priority - accounting, architecture, engineering and tourism - are considered by CARIFORUM states to be the most organised and competitive with the EU.<sup>203</sup> Their respective professional bodies must be 'encouraged' to begin negotiating such arrangements within three years.

Once they reach agreement there are several further steps to the process. The recommendations from the professions are subject to review by the Joint Trade and Development Committee to decide if they are consistent with the EPA. If they are, and the regulations of the parties are sufficiently similar, the Committee must begin negotiations to implement the recommendations

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<sup>200</sup> Mode 4 entries read 'none', with no reference back to the horizontal limitation.

<sup>201</sup> ACP, 'G-90 Declaration on the 6<sup>th</sup> WTO Ministerial Conference, 1 December 2005', ACP/61/057/05, 9 December 2005, para 73

<sup>202</sup> The GATS Article VII: Mutual Recognition obliges Members that enter into a MRA to allow other Members to seek accession or an MRA on similar terms.

<sup>203</sup> Francis and Ullrich (2008), 31

through a Mutual Recognition Agreement that covers requirements, qualifications, licences and other regulations. The progress of the overall process must be reviewed every two years.

Article 86 therefore describes a lengthy process that has no guaranteed outcome and depends on the ‘encouragement’ of governments. The history of attempts to promote mutual recognition agreements through the GATS and other trade agreements has been politically and technically fraught.<sup>204</sup> Schloemann and Pitschas suggest the immediate access provided for services personnel under the Chapter 4 schedules should add pressure to conclude such agreements and provide leverage to ensure that discussions at the level of professional associations do occur. They also describe the administrative burden as ‘arguably limited’, although they note that accreditation bodies may not be fully operational in all CARIFORUM states.<sup>205</sup>

Francis and Ullrich are more pessimistic, emphasising the lack of capacity of various professional bodies in the Caribbean to participate effectively in the process. Most CARIFORUM states have professional associations, but not all have operational accreditation bodies. There is limited convergence of national regulations, which is a pre-requisite for regional harmonisation.<sup>206</sup> Although various model Professional Services Bills have been drafted, few have been adopted in their entirety.<sup>207</sup> Francis and Ullrich predict that the need to develop additional administrative bodies to oversee these arrangements will add to the cost of EPA implementation. Professional bodies in many other ACP states would face even greater capacity deficits in seeking to take advantage of a similar opportunity.

Unless and until such arrangements are agreed, recognition and accreditation will be governed by Article 85:1 and the parties’ schedules. Article 85:1 affirms the right of states to require the qualifications and/or professional experience necessary for people to deliver a service in their territory. The Headnotes to both parties’ schedules also preserve the right to apply their own non-discriminatory regimes without the need to schedule them. The EU’s Tier 1 and Tier 2 schedules have a horizontal reservation which states that EC directives on mutual recognition of diplomas only apply to its nationals, and the right to practice a regulated profession in one state does not confer the right to practice in others.

## 5.9 Regional Implications

Girvan sees labour mobility as another area where the EPA may dictate the nature and pace of integration in the CSME without a clear understanding of the substantive and administrative obligations.<sup>208</sup>

On paper, CARIFORUM’s EPA commitments should have a minimal impact on labour mobility in the CSME, whose scope is much broader and explicitly includes wage earners seeking employment. The Revised Treaty of Chaguaramas aims to create a single market through *inter alia*, the right of establishment and the free movement of services and selected skills categories. The commitment in Article 45 of the Revised Treaty to the goal of free movement of nationals within the community has resulted in a right to seek employment for a number of classes, currently university graduates, sports persons, media workers, artistes, musicians, nurses, teachers, holders of associate degrees, artisans and household domestics with a Community Vocational Qualification.<sup>209</sup> Self-employed service providers and persons establishing a business are also supposed to have automatic mobility.

<sup>204</sup> Sauv  and Ward (2009), 36 for a description of the GATS process.

<sup>205</sup> Hannes Schloemann and Christian Pitschas (2008), ‘Cutting the Regulatory Edge? Services Regulation Disciplines in the Cariforum EPA’, Eschborn, Germany: GTZ, 8-9

<sup>206</sup> Francis and Ullrich (2008), 17; also Schloemann and Pitschas (2008), 9.

<sup>207</sup> CRNM (2008a), 6

<sup>208</sup> Girvan (2009), 96, Table 2

<sup>209</sup> Caribbean Community Secretariat (2009), 3-4

The issues of mobility and accreditation are related. The audit conducted for the Convocation of the CSME in October 2009 reported that free movement has been implemented for graduates, artistes, musicians, media workers and sportspersons. The legislative process for teachers, nurses and holders of associate degrees were at various stages. However, mobility was currently limited by the inability of most states to issue the Community Vocation Qualification and associated skills certificate required for artisans.<sup>210</sup> The certification and regulation requirements for self-employed service providers and persons establishing a business were not yet in place, so very few people in those categories had moved either.

Girvan calculated in 2009 that only 60 percent of the actions needed to complete the labour mobility commitments within CSME had been completed in 2007. Just over 60 percent of those related to the free mobility of skills and 46 percent to the accreditation and equivalency mechanisms.<sup>211</sup> The programme of further liberalisation of labour mobility had been suspended. As a result, 'EPA Mode 4 obligations appear likely to overtake those of the CSME in specificity, enforceability and scale of impact.'<sup>212</sup>

Arguably, however, the impact of the 'regional preference' may be less for labour mobility than for investment and cross border services: the standstill in the CARIFORUM services schedule does not apply, Tier 1 business personnel already have formal rights of mobility in CARICOM, and CARIFORUM states made very few commitments on Independent Professionals or Contractual Services Suppliers. The impact will be much greater for the CARICOM-DR FTA, where schedules on labour mobility have not yet been agreed.

#### **5.10 Risk factors**

CARIFORUM negotiators clearly believe they have achieved positive outcomes under Chapter 4 by securing unprecedented, binding obligations to allow entry into Europe by independent professionals and contractual services suppliers. Whether these commitments amount to concrete gains is impossible to assess at this stage. The EU's schedule only records the *bound* commitments of its member states. Nothing prevents them from continuing to apply or adopting more liberal criteria, although there may be domestic pressure for them not to do so, and they are not obliged to apply the restrictive eligibility criteria in Articles 80 to 83 or the schedules.

What Chapter 4 does make clear is the deep asymmetry of the EPA in favour of the EU. In most other parts of the agreement that asymmetry arises from the EU's economic and geopolitical dominance. When it comes to labour mobility the asymmetry is explicit. Chapter 4 creates a presumption of entry for elite personnel related to foreign investments and lists a limited range of occupations that will be considered for commitments in a positive list schedule on independent professionals and contract workers, excluding those who secure contracts through recruitment agencies. Guaranteed access for Contractual Services Suppliers and Independent Professionals from the CARIFORUM states will be governed through multiple layers of potentially onerous conditions and reservations.

That outcome should provide a reality check for other ACP countries that see labour mobility as their principal gain from services negotiations with the EU and might be tempted to consider making major concessions in other aspects of their negotiations with the EU in the expectation of any significant access for their services workforce. It might also prompt a broader reflection on the 'export strategy' of training personnel, especially nurses and caregivers in anticipation of securing guaranteed access under trade in services agreements.<sup>213</sup> More fundamentally, recognition of that

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<sup>210</sup> Caribbean Community Secretariat (2009), 6

<sup>211</sup> Girvan (2009), 96, Table 2

<sup>212</sup> Girvan (2009), 115

<sup>213</sup> One such programme that originated in the Caribbean (Marla Salmon, Jean Yan, Hermi Hewitt, and Victoria Guisinger (2007) 'Managed Migration: The Caribbean Approach to Addressing Nursing Services Capacity',

reality may also encourage a broader engagement with the economic, social, cultural and human rights implications of a remittance-based development economy than is likely to occur when labour mobility is viewed through a narrow 'trade' lens.

## **6. DISCIPLINES ON DOMESTIC REGULATION**

The first three sections of this report put the CARIFORUM-EC EPA in its broader context. Chapters 4 and 5 focused on the legal risks attached to liberalisation of market access and national treatment for commercial presence and cross border services and to asymmetrical labour mobility. The remainder of this report examines the equally important component of Title II that aims to discipline the way governments can regulate commercially significant services.

### **6.1 The Scope of Regulatory Disciplines**

The regulatory framework in Chapter 5 applies regulatory disciplines to post and courier, telecommunications, financial, computer, international maritime transport and tourism services when they have been liberalised in accordance with chapters 2, 3 and 4. All except tourism are standard features of the EU template and they contain many of the proposals the EU unsuccessfully sponsored in the GATS negotiations. The regulatory framework for tourism is a tailor-made response to CARIFORUM's demands, but is couched in softer 'endeavour' language.

This report focuses on the three sectors that have the most far-reaching implications for policy space and regulatory autonomy: post and courier, telecommunications and financial services. The final two sections examine tourism and culture, the sectors that CARIFORUM identified as its priorities.

There is some dispute over whether the kind of disciplines contained in Chapter 5 is properly defined as deregulation or pro-market regulation. Whatever term one uses, the aim is to restrict the policy and regulatory options that are available to governments by instituting a pro-market bias. Disciplines on domestic regulation add to the restrictions that already result from the market access, national treatment and MFN obligations and target some of the residual behind-the-border measures that impact on commercial operations. Attempts to develop these rules in the WTO have been especially controversial because they constitute a more naked intrusion on the core rights and responsibilities of national governments to serve their communities, foster local businesses, enhance culture and protect the environment.

The original GATS adopted a compromise that limited such 'disciplines' to three categories of domestic regulation: professional qualifications and procedures, licensing and technical standards. Even those three forms of regulation affect a wide range of sensitive matters, such as building regulations and land use zoning, water quality, financial liquidity requirements, issuing of eco-tourism and taxi licences, and the right to practice as midwives, engineers or lawyers. Under GATS Article VI:5 those kinds of domestic regulation must use objective and transparent criteria, be the least burdensome that is necessary to achieve quality and, for licensing procedures, not in themselves be a limit on supply. Crucially, these constraints only operate in sectors that a WTO member has committed in its GATS schedule and only where those regulations could not reasonably have been expected at the time the schedule was made.

A similar provision to Article VI:5 was included in the EU-Korea FTA.<sup>214</sup> However, there is no equivalent in the CARIFORUM-EC EPA; nor is there a comparable requirement to GATS Article VI:1 that regulations of general application must be administered in a reasonable, objective and impartial manner. This regulatory flexibility creates an important precedent for ACP and other developing countries, although it is counter-balanced by the sector-specific disciplines described below.

The omission of those provisions led Schloemann and Pitschas to describe the EPA as a GATS-minus outcome.<sup>215</sup> Sauvé and Ward went further and rued the 'missed opportunity' to use the

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<sup>214</sup> Article 7.23

<sup>215</sup> Schloemann and Pitschas (2008), 8

EPA as a laboratory to address the unfinished rule making on domestic regulation in the WTO.<sup>216</sup> They were referring to the negotiations under Article VI:4 to develop more extensive ‘disciplines’ on domestic regulation. To date, that mandate has produced only one sectoral agreement on the accountancy profession - those disciplines were referred to earlier in Section 3.5 to show how the term ‘legitimate objectives’ could severely restrict a government’s right to regulate for public good and social objectives. With the GATS negotiations on domestic regulation stalled, the major services exporting countries have used their FTAs to advance their preferred positions bilaterally and regionally and to create precedents. The EU’s template, and hence the EPA, incorporates a number of GATS-plus provisions.

These innovations take three main forms. The first involves the reclassification of priority services sectors to reflect the EU’s commercial and defensive interests. These definitions commonly reflect clusters or supply chains of service activities that are integral to the operations of major services firms or sectors. Elements of this approach are found in Section 2: Computer Services, Section 4: Telecommunications, Section 5: Financial Services and Section 6: International Maritime Transport.

A second innovation imports into the EPA an expanded version of two GATS voluntary side agreements: the Annex on Basic Telecommunications and the Understanding on Commitments in Financial Services. The latter is especially important as it requires governments to adopt deregulatory measures that are implicated in the post-2007 financial crisis. Nigeria is the only ACP country to have signed onto the Understanding in the WTO.

The third and possibly most far-reaching innovation imposes competition-based disciplines on activities that were traditionally public monopolies, notably postal and courier services and telecommunications, and restricts the way that universal access to those services can operate. These rules also require non-core services in those sectors to be open to competition and the establishment of independent competition bodies.

The aim of these regulatory provisions is to establish ‘high quality’ GATS-plus precedents. Aside from the omission of GATS Article VI equivalents and the unique section on tourism, there is no recognition of development realities, even when states obviously lack the administrative capacity and resources to develop the kind of sophisticated developed-country regime that is prescribed. Some ACP governments do not yet have any regulatory regimes for these services, which were until recently or still are public monopolies. If they adopt this framework they will have little policy space to decide what approach is most appropriate to meet the needs of their country.

## **6.2 Triggering the Sectoral Disciplines**

A sectoral discipline only applies to a state that has liberalised services in that sector under chapters 2 to 4. Various ways of interpreting ‘liberalisation’ in this context were canvassed earlier. First, the standstill obligation in CARIFORUM Headnote to CARIFORUM’s services schedule might constitute ‘liberalisation’ on the grounds that it is a GATS-plus commitment. That approach would see the Chapter 5 disciplines apply to CARIFORUM states *carte blanche*, subject to any country and sector specific limitations that neutralised the standstill obligation. A second option is to treat the standstill and sectoral commitments as effectively the same and either limit the application of the disciplines to the specific commitments of each state by sub-sector and mode or apply them to an entire sector even when just one sub-sector is committed with a very low level of liberalization, which appears to be the CRNM preference.

On one hand, it seems unreasonable to apply disciplines where a state has clearly sought to limit the exposure of a particular sector in its schedule, especially as there is no provision for scheduling limitations on the application of Chapter 5 disciplines. Such an approach would seem

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<sup>216</sup> Sauv  and Ward (2008), 36

especially problematic where particular disciplines are relevant to subsectors and modes that a state has consciously left unbound.

On the other hand, restricting the disciplines to the sectors and modes a state has committed would produce an uneven and fragmented regime that would be complex and impractical for regulators and business. That falls far short of the regulatory coherence that the EU is clearly aiming to achieve. If different states' commitments attracted different regulatory obligations it be impossible to internalise the Chapter 5 disciplines through the 'regional preference' on a regional level, especially as CARICOM and the CARICOM-DR FTA do not currently have similar regulatory regimes.

The variable wording used in Chapter 5 adds to the uncertainty. Section 2: Computer Services applies a new definition '*to the extent that trade in computer services is liberalized* in accordance with Chapters 2, 3 and 4' (Article 88:1). The principles in Section 6: International Maritime Transport apply obligations '*regarding the liberalization of international maritime transport services*'. Regulatory disciplines in the sections on courier, telecommunications, financial services and tourism apply to '*all ... services liberalized* in accordance with Chapters 2, 3 and 4'. Some of these disciplines, such as telecommunications, are quite general. However, even where the application is quite specific, such as the pre-commitment to permit the supply of any 'new financial service' under Article 106, the accompanying footnote repeats the term used elsewhere in Title II: 'This Article applies only to financial services activities covered by Article 103 [the definition] and liberalised according to this title'.

This conundrum is explored further with reference to the specific sectors and reveals that each interpretation has different consequences depending on the services to which it applies.

### **6.3 Risk Factors**

The regulatory framework in Chapter 5 is a direct assault on governments' right and responsibility to regulate in ways that serve social as well as economic functions, especially in core sectors of postal, telecommunications and financial services. Their options are constrained within a pro-market and light handed regime that relies principally on market competition that will, in practice, be dominated by large transnational firms. The uncertainty that surrounds the scope of their application to individual countries and the potential for European firms to challenge CARIFORUM states directly through international arbitration under existing BITs or an expanded EPA add to the chilling effect on governments' regulatory decisions. The 'regional preference' imports these constraints and uncertainties into the CSME and CARICOM-DR FTA.

A second set of obligations in Chapter 5 cause concern because they are potentially burdensome for small and poor states. Article 86 deals with transparency and disclosure of information. States must establish a contact point(s) to respond to requests from investors and service suppliers for information on any measures of general application or international agreements that are relevant to the EPA. What appears to be a straightforward and sensible administrative requirement may be especially onerous where, for example, a state is party to various BITs and other interlocking arrangements. This transparency provision is weaker than the EU-Korea FTA obligation to 'endeavour' to publish measures in advance, to provide reasonable opportunities for interested persons to comment on such proposed measures they are introduced, and to 'endeavour' to consider their views.<sup>217</sup> However, Article 105 in the financial services section does require governments to

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<sup>217</sup> Article 12:3:2: 'The parties shall ... (b) provide reasonable opportunities for interested persons to comment on such proposed measure, allowing, in particular, for sufficient time for such opportunities; and (c) endeavour to take into account the comments received from interested persons with respect to such proposed measure. See also in the WTO context: Communication from the European Community and its member States, WT/WGTI/W/110, March 2002 relating to foreign investment. A similar obligation exists in the WTO Agreements on the Application of Sanitary and Phytosanitary Measures (SPS) and Technical Barriers to Trade (TBT). The obligation in the GATS Accountancy Disciplines is to 'endeavour' to consult.

‘endeavour’ to provide advance notice and an opportunity to comment on measures of general application.

Similar compliance concerns relate to authorisation procedures. Where authorisation is required to supply a service or make an investment, the competent authorities must inform the applicant of the decision within a reasonable time and respond to requests for information about the status of the application without delay. The parties must also maintain judicial-style tribunals or procedures that can promptly review and provide, on request, ‘appropriate remedies’ for administrative decisions that affect commercial presence, cross border supply or temporary presence of services personnel. Where the procedures are conducted by the same agency as that which made the decision, the review must be objective and impartial.

Procedures that ensure timely dealings and provision of reasons are appropriate, provided they are realistic. However, the judicial-style review process is very problematic, as it assumes an effective national or regional decision making and review mechanism that does not exist in many ACP regions. Establishing such a mechanism would be complex and a costly drain on limited resources. Even where the EU provides some funding, those resources will be diverted from more pressing priorities.



## **7. POSTAL AND COURIER SERVICES**

Deregulation and privatisation of the postal and courier sector is of major commercial interest to the EU and its transnational courier firms like German DHL. According to the private courier and express delivery industry, public sector postal services enjoy an unfair competitive advantage, especially by cross subsidising courier services from the state agencies' monopoly on basic mail delivery and universal service obligations (USO).<sup>218</sup>

During the GATS 2000 negotiations, the EU unsuccessfully proposed a reference paper on postal and courier services, based on the precedent of the GATS Reference Paper on Basic Telecommunications. The proposal sought to proscribe the scope of the universal postal service and the activities that are, and are not, reserved to it.<sup>219</sup> WTO members would be invited to adopt the reference paper by inscribing it in their GATS schedule. Elsewhere, the EU argued that the extensive liberalisation of the sector since the early 1990s when the GATS schedules were drafted meant that countries could now make more extensive commitments without eroding their right to maintain a USO.<sup>220</sup>

The EU has imported a version of the proposed reference paper into its FTA template. However, the effect is more potent than in the GATS because the disciplines are located in the text, rather than voluntarily adopted through the parties' schedules, and they automatically bind any state that 'liberalises' courier services in its schedule. There is no provision to schedule limitations on the scope or application of the disciplines.

The response to this innovation has been cautious in other countries. South Korea deferred the adoption of a text on the sector in the EU-Korea FTA: under the heading 'postal and courier services', the parties made a commitment to establish principles within three years 'with a view to ensuring competition in postal and courier services not reserved to a monopoly in each Party'. However, those principles would address anti-competitive practices, universal service, individual licenses and nature of the regulatory authority – the same headings used in the CARIFORUM-EC EPA.

### **7.1 The Public Postal Service**

Section 3 of Chapter 5 of the EPA text was originally entitled 'Postal and Courier Services'. It seems likely that the removal of 'postal' in the final text reflected CARIFORUM negotiators' concerns about applying the disciplines to the national postal administration. Any such concern would have been disingenuous on the EU's part. It has already criticised the CPCprov classification that informs the W/120 list of services for scheduling purposes as outmoded, because CPC 7511 assumes that postal services are the domain of the national postal administration, while CPC 7512 confines couriers to the residual private sector. The EU has argued for an updated CPC classification to reflect what it sees as commercial reality.<sup>221</sup>

However, the omission of 'postal' services was largely cosmetic. If Section 3 was genuinely limited to 'courier' services as defined by CPC 7512 the public postal service would be unaffected by its rules. Yet a primary objective of the rules is to intensify competition between private courier firms and the national postal service, including activities that fall within the scope of the USO. Such

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<sup>218</sup> This formed the basis of the complaint lodged by UPS against Canada Post under NAFTA in 2000, discussed below.

<sup>219</sup> Council for Trade in Services, 'European Communities. Postal/Courier: Proposal for a Reference Paper', S/CSS/W/26, 17 January 2005.

<sup>220</sup> Council for Trade in Services, 'European Communities. GATS 2000: Postal/Courier Services' S/CSS/W/61, 23 March 2001

<sup>221</sup> Both post and courier come under the same subsectoral heading in the W/120 GATS classifications, but the CPC distinguishes between 7511 'postal services', which are provided only by the national postal administration, and 7512 'courier services' that are delivered by other service suppliers.

competition has the potential to erode the viability of the public postal service. Article 90 targets dominant firms whose practices have an impact on price and supply in the relevant ‘courier’ market – a complaint that is principally directed at cross-subsidisation between the courier and postal operations of the public postal service.

Indeed, Article 91 specifically refers to ‘postal services’ – necessarily so, because it imposes conditions on the universal postal obligation that can only be delivered by the national postal administration. Article 92 restricts the right of governments to require the licensing of courier services to those activities that fall within the USO and compete with the national postal administration. Article 93 obliges states to operate a regulatory agency that is independent from the national postal service.

## 7.2 Scope of application

The regulatory disciplines in Section 3 apply when a state has ‘liberalised’ courier services, raising the questions of interpretation discussed earlier. A review of the CARIFORUM services schedule in Table 7 shows how the interpretation would affect the application of the regulatory disciplines:

**TABLE 7. CARIFORUM STATES’ EPA COMMITMENTS ON COURIER SERVICES**

<b>B. COURIER SERVICES CPC7512</b>													
Modes	ATG	BRB	BEL	DMA	DOM	GRD	GUY	JAM	KNA	LCA	VCT	SUR	TTO
1 MA	√	√	√	-	√	√	√	√	√	√	-	√	√
1 NT	√	√	√	√	√	√	√	√	√	√	√	√	√
2 MA	√	√	√	-	√	√	√	√	√	√	-	√	√
2 NT	√	√	√	√	√	√	√	√	√	√	√	√	√
3 MA	X	√	X	√2018	√	X	X	√§	√	X	H	√	X
3 NT	X	√	√	H	√	X	X	X	√	X	X	√	√ (2x)#
4 MA	H	H*	H	H	H	H	H	H	H/H*#	H	H	H	H*
4 NT	H	√	H	H	H	√	H	H	√	H	H	H	√

MA= Market access

NT = National treatment

§ except hybrid mail & Interisland transshipment

\* subject to economic needs test for Contract Service Suppliers

# scheduling error

Commitments vary widely, especially in relation to commercial presence:

- Thirteen CARIFORUM states made some sectoral commitments on CPC 7512 courier services.
- Eleven states guaranteed full market access for modes 1 and 2. Dominica and St Vincent made no entries for those modes, which under a strong reading of the standstill means they would be fully committed. All thirteen states made national treatment commitments in modes 1 and 2.
- However, only four states made full market access commitments in mode 3 (Barbados, Dominican Republic, St Kitts and Nevis, Suriname). Dominica will phase in its commitment in 2018. Jamaica restricted mode 3 market access to hybrid mail services and inter-island transshipment. St Vincent cross-referenced its mode 3 market access commitment to the horizontal entry that requires foreign investors to be locally incorporated or registered, but otherwise operates as a full commitment. Trinidad and Tobago and Belize made a mode 3 commitment for national treatment, but not for market access. Four states made no commitment for mode 3 (Antigua and Barbuda, Grenada, Guyana and St Lucia).

- Almost all states left mode 4 unbound except for their horizontal commitments.

A narrow reading of ‘liberalisation’ that applied Section 3 only on the basis of each state’s sectoral and modal commitments, would reflect governments’ obvious sensitivities regarding mode 3. The disciplines would apply to all CARIFORUM states for cross-border courier services (assuming the standstill constitutes liberalization by Dominica and St Vincent), but not to courier firms seeking to establish a commercial presence and compete on the ground with the national postal administration and any other private operators in Antigua and Barbuda, Grenada, Guyana or St Lucia and only partially to Jamaica, Trinidad and Tobago and Belize. Developing a fragmented regulatory regime

across CARIFORUM states and the EU based on that matrix, and importing those obligations into CARICOM and the CARICOM-DR FTA pursuant to the 'regional preference', would undermine the longer-term objective of Chapter 5 to establish regulatory coherence.

Alternatively, if the standstill was given its strong meaning and interpreted as constituting 'liberalisation', the full framework of disciplines would apply to all CARIFORUM states in relation to the EU, and within CARICOM and the FTA, aside from the scheduled exceptions. However, those exceptions relate principally to commercial presence and would generate the same result as the previous interpretation.

The third option, which the CRNM seems to favour, is to treat the scheduling of any sub-sector or mode, including limitations that are less liberal than the status quo, as constituting liberalisation of the entire sector. That is the simplest solution, but it would impose obligations on four states that consciously did not guarantee EU firms the right of foreign investment in their countries and others that scheduled significant limitations. The result comes very close to the kind of neo-colonial and neo-liberal integration that Girvan predicted: a seamless post and courier network between Europe and the Caribbean states that Europe's transnationals can dominate.

### **7.3 Anti-competitive Practices**

The wholesale application of the EPA's Section 3 (Courier services) disciplines, in addition to the restrictions that already result from the market access and national treatment rules, would have far-reaching consequences. Under Article 90 states must introduce or maintain 'appropriate' measures to prevent suppliers of courier services who, individually or collectively, have the ability to affect materially the terms (price and supply) on which others participate in the market from engaging in anti-competitive practices.

'Anti-competitive' practices are not defined in the same detail for courier services as they are in the telecommunications section. Schloemann and Pintschas suggest it is 'safe to assume' that the definition of anti-competitive practices for telecommunications, which includes cross-subsidisation and the restriction on use of information from competitors with anti-competitive results, would apply by analogy to courier services.<sup>222</sup> But the drafters could have included a similarly explicit provision in Section 3 and they did not. That decision is significant, because the EU's proposed reference paper on postal services at the WTO explicitly declined to transpose the examples of anti-competitive practice from the telecommunications reference paper, saying that further analysis of the sector-specific practices appeared necessary.<sup>223</sup> It is not clear whether the EU anticipated that postal services might involve a broader, narrower or different range of practices; the former seems most likely, given that cross-subsidisation is a long-standing concern of the courier industry.

It could be argued, alternatively, that the cross-reference in Article 90 to the Competition chapter of Title IV defines the scope of anti-competitive practices. Article 129(4) requires progressive changes to commercial state monopolies to remove any discriminatory conditions for the sale of goods or services between EU and CARIFORUM parties, or their nationals, unless that discrimination is inherent to the monopoly. The more narrowly the monopoly is defined, the broader the scope of the obligation to make those changes. Article 127 of the Competition chapter also requires CARIFORUM states to have competition laws in force and establish a regional competition authority within five years. However, relying on the cross-reference to the Competition chapter to define anti-competitive practices does not resolve the interpretation problem as the telecommunications chapter has the same cross reference, as well as its own detailed illustrative list of anti-competitive practices.

To bring the argument full circle Article 90, and hence the relevance of the Competition chapter, are governed by the scope of Section 3, which is defined in Article 89 in terms of 'all courier

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<sup>222</sup> Schloemann & Pintschas (2008), 14

<sup>223</sup> Cited in Schloemann & Pintschas (2008), 14 fn 16.

services liberalised'. It would be difficult to apply these competition obligations differentially according to the subsectors and modes committed by individual states; on the other hand, Article 90 invokes the Competition chapter in relation to anti-competitive practices in 'the relevant market' for courier services, which suggests a disaggregated approach.

The meaning that is given to Article 90 will have real consequences for public postal services. CPC definition of 'courier services' is based on the non-state identity of the supplier, not the nature of the service.<sup>224</sup> However, Article 90 clearly aims to prevent monopoly providers of core postal services, which are almost always state agencies, or an oligopoly that may include a spun-off privatised courier service from influencing price, volume and market share of private courier firms. At a minimum those practices can be expected to include cross-subsidising 'courier' activities by using the same facilities, staff or distribution networks for postal and courier services. To avoid such practices, the local provider, usually the state postal service, would have to separate commercially, quit or sell its courier operations.

There are sound reasons for concern about the consequences of Article 90. Large foreign courier providers have the advantage of integrated international networks and advanced technology that public providers find difficult to compete with. If the latter lose market share and the associated income, their core postal operations may no longer be commercially viable. That is especially problematic if they are structured as fully commercial state owned enterprises. Foreign courier firms may initially be more efficient and cheaper and operate below cost to establish themselves in the market. But commercial pressures will lead them to concentrate on the most lucrative segments of the market. Some communities may end up without a basic service, especially once any loss-leading activities are shed.

The uncertainty about the scope of application of Section 3 and the potentially broad meaning of 'anti-competitive' practices will be highly problematic for regulators and leave CARIFORUM states and other countries that adopt the EU template vulnerable to challenge. There are precedents. American firm UPS alleged that Canada Post was cross-subsidising its courier operations and lodged an investor-state dispute under NAFTA's investment chapter. The case prompted accusations that UPS was using NAFTA as a backdoor way to privatise Canada Post.<sup>225</sup> UPS lost the case in a decision that may have been influenced as much by concerns over NAFTA's flagging legitimacy, as by legalities.<sup>226</sup> Whatever, the legal arguments in the EPA would be different and so might the result.

#### **7.4 Universal Postal Service**

The potential impact of Article 90 on public postal services makes the USO vitally important, especially for states that have many remote islands, languages and dialects, and high costs of delivery.

The logical response from a liberalisation perspective is to allow private and foreign courier firms to bid for the right to deliver USOs. The definition of universal service in Article 89 is similar to, but less detailed than the Universal Postal Union definition, which lists the elements of the USO as supply on a permanent basis, unlimited geographical reach, unlimited numbers of consumers who may benefit, specified criteria for quality and affordable prices.<sup>227</sup> However 'universal service' is defined as 'the permanent provision of a *postal service* of specified quality at all points in the territory' of the EU or CARIFORUM state 'at affordable prices for all users'. A 'postal service' is tied by CPC7511 to the national postal administration.

<sup>224</sup> Schloemann & Pintschas (2008), 13

<sup>225</sup> Canadian Union of Postal Workers, 'What does the UPS NAFTA decision mean?'

<http://www.publicpostoffice.ca/9/6/6/0/index1.shtml>

<sup>226</sup> Cliff Sosnow and Prakash Narayanan (2007), 'Canada: The UPS Decision - Victory Or Temporary Relief For NAFTA Governments?', [http://www.mondaq.com/article.asp?article\\_id=51654](http://www.mondaq.com/article.asp?article_id=51654)

<sup>227</sup> Schloemann & Pinschas (2008), 13

Article 91 is careful to reassert the right of states to define the *kind* of USO they want to maintain, if any. However, it requires that the service must be ‘administered’ in a ‘transparent, non-discriminatory and competitively neutral manner’ to avoid being considered anti-competitive. That provision is once more drawn from the EU’s proposed reference paper and goes far beyond the universal access provisions in the GATS Reference Paper on Basic Telecommunications.

It is not clear what ‘administered’ refers to: it could mean either the allocation of the right to deliver the USO or how the service is delivered by the entity that operates it. The former would mean that the right to provide the universal postal service must be opened to non-discriminatory and competitively neutral tender, including private foreign bidders, without any preference or privilege for state or local private suppliers, which seems to contradict the CPC descriptors. If a tender did proceed, and the public postal service was unable to compete successfully, especially against a loss-leading bid, any taxpayer subsidy would then go to the foreign firm.

That interpretation would be consistent with the requirement of ‘competitive neutrality’ in Article 91. A private courier firm may compete with the official USO provider by providing a similar courier service. But it is difficult to understand what competitively neutral treatment for private courier operators would mean in that situation if they were not allowed to tender for the right to deliver the USO and receive a subsidy. Unfortunately, Article 90 is silent on subsidies for the postal USO.

There is a further complication - Article 60:3 says the provisions of Title II do not apply to subsidies granted by the parties. That clearly envisaged the non-application of national treatment obligations to subsidies, but it is unclear whether it might also apply to the downstream impacts on the postal USO. Article 100:3 in Section 4 on Telecommunications explicitly discusses establishment of a mechanism to compensate providers of the USO. To the extent that involves subsidies, it would appear to override the general exclusion in Article 60:3. The compensation mechanism for postal services seems more likely to involve direct subsidies than some other form of cost sharing among courier services suppliers. Whether a similar interpretation applied to postal services would therefore depend on whether the more explicit wording of the telecommunications section is seen as deliberately different or just a more detailed explication of the same disciplines for the postal USO, and whether the two services are viewed as directly comparable.

A narrower interpretation of ‘administered’ is also possible. The equivalent provision on the USO for telecommunications in Article 100 makes explicit reference to the right of private/foreign firms to become providers of universal telecommunications services; there is no such reference in Article 90. That variation could support a more limited reading of ‘administered’ to mean how the operator delivers the service, which would have to be non-discriminatory; but the meaning of ‘competitive neutrality’ would remain problematic.

If Section 3 (Courier services) does require the USO to be opened to competitive tender, that would imply the separation of the national postal administration, which is responsible for the USO, from the national postal service. Such an outcome would be consistent with the need to establish an independent regulatory body, pursuant to Article 93. Schloemann and Pinschas seem to support that interpretation: ‘as the said conditions concern the “administration” of the obligations pertaining to universal services, they also apply to the actual granting of licenses required for the supply of such services’.<sup>228</sup> The lack of legal certainty regarding such an important public service activity and the potential application of these disciplines where states have left market access and national treatment for commercial presence unbound, is a serious cause for concern.

There is a second requirement that the USO is ‘not more burdensome than necessary’ for that kind of universal service. The ‘necessity’ test restricts the scope of the USO to the minimum intrusion on a competitor’s operations that is necessary to achieve the goal of the USO. What a local Caribbean

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<sup>228</sup> Schloemann and Pinschas (2008), 15

community sees as the most appropriate way to deliver the services may be deemed anti-competitive by the EU if its courier firms believe the universal service could be ‘administered’ in a less burdensome way.

### **7.5 Licensing**

In a further move to deregulate the sector, Section 3 severely limits the ability of governments to require licensing of courier operators. Article 92 says that suppliers of courier services (meaning private operators) cannot be required to hold an individual license except for those activities that fall within the scope of a least burdensome USO. ‘Individual licence’ is defined as ‘an authorisation, granted to an individual supplier by a regulatory authority, which is required before supplying a given service’. The criteria, terms and conditions for those licenses must be publicly available and the reasons for the refusal of a license must be made known. There is a right to appeal against such a refusal to a body that is independent of other providers through a transparent and non-discriminatory appeal procedure. That approach is consistent with separation of the national postal administration from the state postal service. As noted earlier, such mechanisms do not exist in many poor or small countries.

The CARIFORUM text does not include several of the EU’s other GATS proposals for the sector. In particular, it wanted WTO members to incorporate their obligations to the Universal Postal Union within their schedules to achieve coherence under both regimes.<sup>229</sup> This would effectively require the UPU obligations to be interpreted in ways that are WTO-compatible and bring that interpretation within the WTO disputes mechanism. Such a proposal may resurface in future FTA negotiations.

### **7.6 Risk factors**

Section 3 is a regulator’s nightmare. The lack of clarity about the application of the disciplines, the meaning of crucial terms, and the capacity of the state to retain control over key decisions affecting the nature, operation and delivery of its public postal service puts regulators in CARIFORUM states in danger of challenges by the EU, or potentially by European courier firms through BITs or an amended investment chapter in the EPA. There is a risk that governments may respond to such uncertainty by adopting the most far-reaching and pro-market interpretation that undermines the integrity and viability of the state postal system and rights of access to affordable postal services.

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<sup>229</sup> For the Universal Postal Union’s analysis see [http://www.upu.int/wto\\_issues/en/2002-04-09\\_document\\_the\\_gats\\_implications\\_for\\_postal\\_services\\_en.pdf](http://www.upu.int/wto_issues/en/2002-04-09_document_the_gats_implications_for_postal_services_en.pdf)

## **8. TELECOMMUNICATION SERVICES**

Europe's telecommunications companies or telcos - BT, France Telecom, Telefonica among others – are future focused. The benefits from privatization of basic telecommunications continue, but the real profits lie in value added services and technological innovations. They have traditionally sought market access and national treatment commitments that prevent governments from requiring investment through a joint venture or capping foreign shareholdings, reserving part of the market for the state provider, subsidising public services, or restricting cross border telecom operations. Now they also want an unrestricted right to operate in niche and new markets, with full access to any necessary networks at minimum cost.

As with public postal services, consumers may enjoy the benefits of innovative, more efficient and cheaper telecommunications services as a result. But telecommunications are also social services, especially in countries with remote regions and outlying islands. A country that is totally dependent on private telcos to meet their social needs must rely on regulation or trust the market will provide. The social function of telecommunications becomes especially vulnerable if foreign firms come to dominate and then eschew those responsibilities or decide to exit. The EU's template for telecommunications assumes that those risks can be minimised and that both commercial and social objectives can be satisfied by creating an efficient competitive market.<sup>230</sup> In an example of systemic asymmetry, Europe's major telcos have the advantages of scale, technological capacity, capital and marketing power that provide an inherent competitive advantage in the competitively neutral market that Section 4 of the regulatory framework aims to create.

### **8.1 Scope of Section 4**

The CARIFORUM-EC EPA advances this agenda quite aggressively. Telecommunications services are subject to similar but more extensive disciplines than post and courier. The classification of 'telecommunications services' under Section 4 follows the EU's proposal in the GATS 2000 negotiations: it applies to transmission and reception of electro-magnetic signals, but excludes broadcasting and the content that is transported by telecoms – colloquially, it covers carriage but not content.<sup>231</sup> Article 95 spells out the nature, powers and operations of regulatory authorities. The procedural provisions cover the allocation and licensing of telecommunications providers (Article 96), the allocation and use of scarce resources (Article 99) and protection of confidential information (Article 101). The handling of disputes comes under Article 102. The three provisions that contain substantive disciplines cover competition (Article 97), interconnection (Article 98) and universal service obligations (Article 100).

Most of Section 4 is drawn from the GATS Reference Paper on Basic Telecommunications, which WTO members can choose to adopt as an 'additional commitment' to their market access and national treatment obligations. Around half of CARIFORUM states have done so. Guyana, St Kitts and Nevis, St Lucia, St Vincent and the Grenadines and Haiti have not; Bahamas is not a WTO member. As with post and courier and financial services, the EPA incorporates the sectoral disciplines into the text itself and applies them automatically to all parties that 'liberalise' telecommunications services in their EPA schedules.

Demanding a high threshold of commitments makes it more likely that some liberalisation of telecommunications services will occur, however they are defined. That would have the effect in other ACP regions not only of imposing voluntary GATS obligations on WTO members, but also on states that are not and probably will never be. Telecommunications networks and regulatory regimes in most of those countries are far less developed than in the Caribbean.

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<sup>230</sup> The EU-Korea FTA is very similar to the CARIFORUM-EC EPA, but is weaker in several crucial areas – notably the rights for foreign telcos to negotiate interconnection and for all telecommunications providers to bid for the right to deliver the USO and the circumstances in which that service is subsidised.

<sup>231</sup> By contrast, the US promotes a definition that includes digitized content.

The interpretation of ‘liberalisation’ is less problematic for telecommunications as all thirteen CARIFORUM signatory states have made market access commitments for basic voice telephone services in the EPA, with minor reservations in mode 3:

**TABLE 8. CARIFORUM STATES’ EPA COMMITMENTS ON VOICE TELEPHONE SERVICES**

<b>C. TELECOMMUNICATIONS SERVICES Voice Telephone Services CPC7521</b>													
	ATG	BRB	BEL	DMA	DOM	GRD	GUY	JAM	KNA	LCA	VCT	SUR	TTO
1 MA	√2012	√ PUB R NON-P	R	√	X	√	√	X	X	√	√	R PUB R NON-P	√
1 NT	√	√	√	√	X	√	√	√	√	√	√	√	√
2 MA	√	√	√	√	X	√	√	√	√	√	√	R PUB √ NON-P	√
2 NT	√	√	√	√	X	√	√	√	√	√	√	√	√
3 MA	√2012	√ Pub R Non-P	ENT	√	√	√	√	√	√	√	√	R Pub R Non-P	√
3 NT	√	√	√	√	√	√	√	√	√	√	√	√	√
4 MA	H	H	H	H	H	H	H	H	H	√	H	H	H
4 NT	H	H	H	√	H	√	H	H	H	√	H	H	H

MA = Market access

NT = National treatment

R = Restricted

ENT = Economic Needs Test

H = Unbound, except as in the horizontal commitments

Pub = Public telecommunications service

Non-P = Non-public telecommunications service

## 8.2 Procedural Requirements

The regulatory mechanisms specified in Article 95 focus on the legal and functional independence of regulators from all telecommunications suppliers. Decisions must be impartial with respect to all market participants. A supplier affected by the decision of a regulatory authority must have access to an independent appeal body. Where that body is not judicial in nature, it must give written reasons for its decision. That decision must, in turn, be subject to judicial review and all decisions must be effectively enforced. The Article leaves it open for countries to use a sector specific regulator or a broader regulatory body, provided it has a sufficient mandate and powers to perform its functions.

This provision is modelled on the sophisticated regulatory regime that governs the EU’s competitive telecommunications market, and is far from the reality of most ACP countries. It takes time and training to develop an adequate regulatory framework to deal with competition generally and telecommunications specifically, let alone the multiple layers that are envisaged here. The idea of two levels of appeal that culminate in costly judicial review proceedings increases the risk that threats by major telcos to litigate will have a chilling effect on legitimate regulation. A common suggestion is to short cut the development of national regulatory mechanisms by creating a regional body; that might reduce the capacity constraints, but can be fraught with hazards if it adopts a uniform approach to countries with diverse regulatory, social, geographical and commercial circumstances.

Similar issues arise with the special provisions for disputes between suppliers under Article 102. The national authority that regulates telecommunications is made responsible for resolving disputes between suppliers over rights and obligations that arise from Section 4. When the dispute involves cross-border supply, the relevant national authorities must coordinate their efforts to resolve the matter. The authority/ies must issue a binding decision in the shortest possible timeframe; in the PACP-EC draft EPA this was limited to a maximum of four months, even though many PACP states do not currently have the kind of regulatory regime required under Article 95.



### **8.3 Licensing and Competition**

The procedural provisions of Section 4 aim to deregulate the sector in ways that large telcos easily dominate. The agreement severely restricts the use of licensing requirements. Article 96 says mere notification should, as far as possible, be adequate to authorise the provision of telecommunications services. Licensing can only be required to address allocation of numbers and frequencies, on terms that are made public. Allocation of frequencies, numbers and other 'scarce resources' must be objective, prompt and non-discriminatory, meaning they cannot favour the public telco. The criteria and time period for licensing must also be public. Applicants that are denied a license must be given reasons if they ask and have access to an appeal body. License fees must not exceed the administrative costs incurred in management, control and enforcement of licences.

In theory, this licensing regime will ensure unlimited competition to provide much needed improvements to telecom networks. However, a large number of operators competing in a small market often results in dominance by major foreign telcos that take over or eliminate smaller, usually local operators that may be more attuned to community needs. Full market access commitments remove the right of governments to require investment through joint ventures or cap foreign shareholding.

Reducing the number of licences issued and the level of license fees will also reduce an important income stream for many ACP governments. Schloemann and Pitschas note there is no exception for the auctioning or other sale of licenses, so countries that privatise those sectors in the future would be denied the massive windfalls that many European countries obtained through their privatisations.<sup>232</sup>

The freely accessible market is reinforced by the competition regime in Article 97. Its text is drawn from the Reference Paper on Basic Telecommunications that only half the CARIFORUM states have adopted. States are required to maintain 'appropriate' measures to prevent major suppliers, alone or together, from engaging in or continuing anti-competitive practices. These practices are defined to include anti-competitive cross-subsidisation; using information from competitors with anti-competitive results; and not making technical information about essential facilities and necessary commercially relevant information available on a timely basis. Such activities are most commonly attributed to public telecoms providers.

The rationale for defining cross-subsidisation as an anti-competitive practice is to prevent a local monopoly (or oligopoly) from using revenues from the monopoly activity to subsidise another commercial activity, for example using income from a local call monopoly to subsidise a lower price for international calls. As with postal services, this aims to force public monopolies to separate those operations and either privatise their non-core operations or convert them into purely commercial enterprises.

In small and poor countries this 'level playing field' allows foreign telcos that have the advantage of integrated international networks and advanced technology to dominate. Competition from providers of mobile phones and Internet can significantly improve access and affordability of services, but there is no guarantee that the market model will meet social needs. Many private firms tend to concentrate ultimately on the more lucrative aspects of the market. Yet the socially oriented services of the state providers may become unsustainable without the supplementary revenue from non-core activities. Communities that depend on these services may be left without a service if private sector competitors decide they are peripheral or unprofitable.

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<sup>232</sup> Schloemann and Pitschas (2008), 19-20

## 8.4 Interconnection

Accompanying the right to operate in sectors of their choice, European telcos want guaranteed interconnection at the lowest possible rates. Article 98 gives any authorised telecommunications supplier the right to negotiate interconnection with other providers of publicly available telecom networks and services, in principle through commercial negotiation. Governments must ensure interconnection with a major supplier at any technically feasible point in the network

- on non-discriminatory terms, conditions and rates;
- of quality no worse than for the supplier's own like services or those of other suppliers or its subsidiaries or affiliates;
- provided promptly on terms, conditions and rates that are 'transparent, reasonable having regard to economic feasibility, and sufficiently unbundled that the supplier need not pay for network components or facilities that it does not require for the service to be provided'; and
- when requested, at points other than the network termination that is offered to a majority of suppliers at a charges that reflects the cost of constructing necessary additional facilities.

The procedures and agreements for interconnection to a major supplier must be publicly available and the information that is provided must be used only for that purpose. A service supplier seeking interconnection must have recourse to an independent domestic review body to resolve disputes.

This interconnection provision is also drawn from the GATS Reference Paper. However, the reference paper specifies 'cost-oriented' interconnection rates. Article 98:3(b) refers only to 'rates', which is clarified in a footnote to mean 'cost-oriented' rates for the EU and 'cost-based' rates for CARIFORUM. That is presumably a CARIFORUM innovation, as the EU-Korea FTA and the draft PACP text refer only to cost-oriented rates for interconnection. The meaning of the footnote is perplexing. On its face, 'cost based' implies a stricter test than 'cost-oriented', but it is not clear why CARIFORUM would seek that. These terms were discussed in the *Mexico-Telecommunications* dispute. The panel interpreted a 'cost-oriented' rate of return to mean all costs incurred in providing the interconnection, including a reasonable rate of return.<sup>233</sup> However, it found no substantial difference between rates based on cost and cost-oriented rates and treated the two as interchangeable.<sup>234</sup>

Whatever the precise meaning, this is a minor variation in a broader scheme. Article 98 privileges telecommunications suppliers who only operate in the lucrative parts of the market. It requires the unbundling of telecom services so that a supplier only needs to pay for components or facilities that it uses and can avoid making any contribution to the extension and upkeep of the overall network. This allows European firms to cherry-pick the most lucrative parts of the telecom sector, without contributing to the basic costs. Those costs fall instead on the supplier of last resort, which is usually the public telecom company and/or the taxpayer.

The principal way for local firms who operate with a public subsidy or are universal service providers to comply with Article 98 is to unbundle their telecom operations by running their different activities separately, or selling or discontinuing them.

## 8.5 Universal Service Obligations

Once Europe's (and other countries') telcos have a right to operate largely unlicensed and to interconnect with the network at minimum cost, the question of who delivers the USO and on what

<sup>233</sup> WTO, Mexico – Measures Affecting Telecommunications Services, 2004, Panel report WT/DS204/R, 2 April (*Mexico-Telecommunications*), para 7.184

<sup>234</sup> *Mexico-Telecommunications*, para 7.167

terms needs to be addressed. Universal service obligations are especially important for states that have many remote islands and high costs of telecom service delivery.

As with postal services, Article 100 reasserts the right of a state to define the kind of universal service obligations for telecoms that it wants to maintain. Those obligations will not be considered anti-competitive *per se*, provided they are ‘administered’ in a transparent, non-discriminatory and competitively neutral manner and are ‘not more burdensome than necessary’ for that kind of universal service. The ‘necessity’ test means that the EC, on behalf of a European firm, could challenge a state’s preferred approach to administering the USO as imposing greater burdens on participants in the sector than is necessary to provide the universal service (for example, through a levy on all telcos operating in the country). If investors secured the right to initiate disputes directly against the state through a revision of the investment chapter in the EPA, the firms could take such action themselves.

Those rules are similar to Section 3 on postal services. However, there are additional constraints on the telecommunications service obligation. The *designation* of universal service suppliers must be non-discriminatory, with all telecom suppliers being eligible to become the provider of any universal telecommunications service that the government decides it wants to maintain.

Governments that corporatise or deregulate their public telecom monopolies commonly adopt some mechanism to compensate the USO provider for the responsibility to expand and maintain the network, supply services to unprofitable areas and act as the supplier of last resort. The recipient is often a state owned enterprise or its privatised form. Article 100 reverses the presumption that a supplier of the universal telecom service can be compensated for costs incurred or require other telecom suppliers to share the cost.

First, the EU and CARIFORUM states must ‘where necessary’ assess whether the universal service imposes an unfair burden on the designated provider that outweighs any market benefits (Article 100:3). What determines ‘necessity’ is unclear. It is also unclear whether both parties must agree that some compensation is justified. If compensation is deemed justified, the national authority must then decide whether a compensation mechanism is required to compensate the provider or share the net cost among other suppliers, taking into account any market benefit that the provider gains from offering universal service (remembering that they are already prohibited from using any such benefits to cross-subsidise other operations).

This cumbersome process with an onerous burden of proof seems designed to make it very difficult for governments to provide any special treatment to its public telecom provider, who is usually responsible for universal access, and shields European firms from contributing their share of the cost of maintaining the network and the universal service.

Two final GATS-plus innovations are the obligation to ensure confidentiality of telecommunications and related traffic data and a desirable but potentially costly requirement to maintain and regularly update directories of all subscribers.

## **8.6 Risk factors**

There is less legal uncertainty in the disciplines on telecommunications than on post and courier services. However, they intrude more intensively into the regulation and provision of this core public service. While all CARIFORUM states except Haiti have made GATS commitments or offers on telecommunications,<sup>235</sup> Section 4 of the EPA constitutes a very significant expansion of those obligations. Sauvé and Ward suggest that it represents ‘an evolution of multilateral rules, offering evidence of the interactive nature of rule-making advances between PTAs and the WTO’.<sup>236</sup> An alternative assessment is that the EPA will make it difficult for states to sustain their public

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<sup>235</sup> Francis and Ullrich (2008), 21

<sup>236</sup> Sauvé and Ward (2008), 39

telecommunications operations and intensify the dominance of European telcos across the Caribbean and in other ACP and developing countries that adopt the EU's template.

## **9. FINANCIAL SERVICES AND CAPITAL FLOWS**

Agreements that tie governments to the liberalisation and deregulation of financial services are a high-risk venture, especially in light of the post-2007 global financial crisis. The EPA significantly expands the obligations on CARIFORUM states to maintain and extend that regulatory regime through first, the standstill and a schedule of commitments that far exceed those they made in the GATS; second, the regulatory disciplines imposed on financial services and investments once they are liberalised; and third, the unrestricted international mobility of capital.

The CARIFORUM-EC EPA does contain some important GATS-minus provisions and diverges in several ways from the draft PACP and EU-Korea FTA texts. That suggests the CARIFORUM negotiators had reservations about aspects of the EU template and successfully mitigated the effect of at least some of them. At the same time, some CARIFORUM states have an offensive interest in defending and expanding the operation of their offshore financial centres. CARICOM is also considering a draft financial services agreement that is largely (but not totally) compatible with the EPA.

The provisions and commitments on financial services agreed to in the EPA will form part of the three-year investment-specific review (Article 74) and the five-year review of Title II (Article 62) that are directed to achieve further liberalisation.

The more aggressive financial services chapters in the EU Korea FTA and the draft Canada EU texts suggest that CARIFORUM and other countries negotiating with EU in the future may struggle to hold the line at the level of the initial EPA, irrespective of lessons that should be learned from the financial crisis.

The only formal opportunity to review regulatory or policy failure, or new policy preferences, is in the five-yearly reviews agreed to in the Declaration of the parties at the time the EPA was signed and to be conducted pursuant to Article 5. Those reviews take on particular importance as a forum for debate about the deregulatory approach to financial services that is mandated under the EPA.

### **9.1 The GATS Financial Services Agreement**

*Section 5: Financial Services* in Chapter 5 of the EPA is framed by the treatment of financial services in the GATS. The initial idea for a trade in services agreement came from a powerful financial industry-led lobby in the US in the late 1970s.<sup>237</sup> They wanted a high quality liberalisation agreement that would ensure they could operate freely on a transnational basis, including (but not only) through foreign investment, money transfer and other data across borders without restriction, and pre-empt the regulation of new technologies and innovative financial services and products. The US, supported by the EU, insisted that negotiations on commitments on financial services (and telecommunications) extended beyond the Uruguay round. The final schedules on financial services commitments were signed off in the wake of the Asian financial crisis in late 1997. Known as the Fifth Protocol to the GATS they came into effect in March 1999.<sup>238</sup>

The GATS package on financial services is known as the Financial Services Agreement. It contains four elements:

- the basic GATS text, including rules on MFN, national treatment, market access, and current payments and capital movements;
- the Annex on Financial Services, which defines financial services and makes provision for prudential measures and financial expertise on disputes panels;

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<sup>237</sup> Kelsey (2008), 77-78

<sup>238</sup> Jamaica is one of three countries that have not yet adopted the Fifth Protocol.

- country-specific schedules of MFN exceptions and of financial services commitments in the Fifth Protocol; and
- the Understanding on Commitments on Financial Services, drafted by and for OECD countries, which contains additional regulatory restraints that WTO members adopt voluntarily. No CARIFORUM state, and only one ACP state (Nigeria), has adopted the Understanding.

The WTO's Financial Services Agreement fell short of the finance industry's demands, especially of the larger Southern countries. The GATS 2000 negotiations began just a year after the Fifth Protocol came into effect. The EU tabled a number of proposals on market access for financial services and in the negotiations on disciplines on domestic regulations under GATS Article VI:4. With those negotiations largely moribund, the EU and US have pursued an aggressively GATS-plus approach, primarily on behalf of the City of London and Wall Street, through their bilateral and regional negotiations.

## **9.2 Scope and Coverage of Financial Services in the EPA**

Financial services are principally governed by five parts of the EPA: the rules on investment, cross border supply and labour mobility in chapters 2, 3 and 4; the related schedules in Annex 4, including the standstill commitment; the framework for domestic regulation in Section 5 of Part 5, which applies to services have been liberalised for investment, cross border supply and movement of business persons; Title III on current payments and capital movements; and the MFN and regional preference obligations.

### **9.2.1 Defining financial services**

As with the GATS, the definition of financial services covers every conceivable service and product:

#### **A. Insurance and insurance-related services:**

1. direct insurance (including co-insurance):
  - (a) life
  - (b) non-life
2. reinsurance and retrocession;
3. insurance intermediation, such as brokerage and agency;
4. services auxiliary to insurance, such as consultancy, actuarial, risk assessment and claim settlement services.

#### **B. Banking and other financial services (excluding insurance):**

1. acceptance of deposits and other repayable funds from the public;
2. lending of all types, including consumer credit, mortgage, credit, factoring and financing of commercial transaction;
3. financial leasing;
4. all payment and money transmission services, including credit, charge and debit cards, travellers cheques and bankers drafts;
5. guarantees and commitments;
6. trading for own account or for account of customers, whether on an exchange, in an over-the-counter market or otherwise, the following:
  - (a) money market instruments (including cheques, bills, certificates of deposits);
  - (b) foreign exchange;
  - (c) derivative products including, but not limited to, futures and options;
  - (d) exchange rate and interest rate instruments, including products such as swaps, forward rate agreements;
  - (e) transferable securities;
  - (f) other negotiable instruments and financial assets, including bullion.
7. participation in issues of all kinds of securities, including underwriting and placement as agent (whether publicly or privately) and provision of services related to such issues;
8. money broking;

9. asset management, such as cash or portfolio management, all forms of collective investment management, pension fund management, custodial, depository and trust services;
10. settlement and clearing services for financial assets, including securities, derivative products, and other negotiable instruments;
11. provision and transfer of financial information, and financial data processing and related software by suppliers of other financial services;
12. advisory, intermediation and other auxiliary financial services on all the activities listed in sub-paragraphs (v) to (xv), including credit reference and analysis, investment and portfolio research and advice, advice on acquisitions and on corporate restructuring and strategy.

There are two slight but significant areas where the GATS definition is narrowed. First, Article 103 says the definition ‘comprises’ that extremely long list, which closes off the potential for new activities that cannot be brought within one of those descriptions. The GATS Annex says financial services ‘includes’ those activities. Second, ‘financial service supplier’ is defined as a natural or juridical person of the other party that ‘seeks’ to provide or provides a financial service, rather than ‘wishes’ to provide as in the GATS; the new wording suggests the prospective service provider must take some positive action before it can benefit from the rules.

### 9.2.2 Coverage

As with the other sectoral disciplines, the regulatory framework for Financial Services in Section 5 applies to ‘all financial services liberalised’ in the parties’ schedules. The scope of their application is especially important here, as the disciplines have different relevance and implications for various financial services sub-sectors. It is essential to know whether the disciplines apply to all financial services on the grounds that the standstill constitutes liberalisation, or to all financial services or a major sub-category of financial services (Insurance or Banking) because at least one commitment of some kind was made in one relevant sub-sector, or only to the sub-sectors committed by a CARIFORUM state in its schedule and subject to any limitations it made. To illustrate the importance of this question, Tables 9 and 10 show the huge variations in the number and nature of the commitments in a sample of three financial services sub-sectors in the EPA.

**TABLE 9. CARIFORUM STATES’ EPA COMMITMENTS ON INSURANCE SERVICES**

<b>FINANCIAL SERVICES: A. INSURANCE: A. Life, Accident &amp; Health Insurance (CPC8121)</b>													
	ATG	BRB	BEL	DMA	DOM	GRD	GUY¶	JAM	KNA	LCA	VCT	SUR	TTO
1MA	√	-	-	X	R	-	√	√	-	-	√	-	X
1NT	√	-	-	X	X	-	√	√	-	-	√	-	X
2MA	√	-	-	X	R	-	√	√	-	-	√	-	X
2NT	√	-	-	X	X	-	√	√	-	-	√	-	X
3MA	√	-	-	√§	√	-	√	R	-	-	H	-	√
3NT	√	-	-	H	R	-	√	√	-	-	H	-	√
4MA	H	-	-	H	H	-	H	H	-	-	H	-	H
4NT	√	-	-	H	R	-	H	H	-	-	H	-	H

MA = Market access

NT = National treatment

H = Unbound, except as in the horizontal commitments

R = restricted

¶ only CPC 81211

§ from 2018

**TABLE 10. CARIFORUM STATES' EPA COMMITMENTS ON BANKING AND OTHER SERVICES**

FINANCIAL SERVICES: B. BANKING & OTHER (NOT INSURANCE)																										
b) lending of all types CPC8113																										
k) advisory & auxiliary financial services on all financial services activities#																										
	ATG		BRB		BEL		DMA		DOM		GRD*		GUY		JAM		KNA		LCA		VCT		SUR		TTO	
	b	k	b	k	b	k	b	k	b	k	b	k	b	k	b	k	b	K	b	k	b	k	b	k	B	k
1MA	-	-	X	X	-	-	X	√	X	√	X	√	√	√	X	-	-	-	-	X	-	X	-	-	-	-
1NT	-	-	X	X	-	-	X	√	X	√	-	√	√	√	X	-	-	-	-	√	-	√	-	-	-	-
2MA	-	-	√	√	-	-	X	√	X	√	X	√	√	√	X	-	-	-	-	√	-	√	-	-	-	-
2NT	-	-	√	√	-	-	X	√	X	√	-	√	√	√	X	-	-	-	-	√	-	√	-	-	-	-
3MA	-	-	√	√	-	-	√§	√	√	√	√	X	√	√	√	-	-	-	-	X	-	X	-	-	-	-
3NT	-	-	√	√	-	-	H	√	√	√	-	√	R	√	√	-	-	-	-	X	-	X	-	-	-	-
4MA	-	-	H	H	-	-	H	H	H	H	H	H	H	H	H	-	-	-	-	H	-	H	-	-	-	-
4NT	-	-	H	H	-	-	H	H	H	H	H	H	H	H	H	-	-	-	-	H	-	H	-	-	-	-

MA = Market access

NT = National treatment

H = Unbound, except as in the horizontal commitments

\* only CPC 81133 and 81139

# as per MTN.TNC/W/50, including credit reference and analysis, investment and portfolio research and advice, advice on acquisitions and on corporate restructuring<sup>239</sup>

§ from 2018

Ignoring those complexities and applying the disciplines across the board on the basis of a strong reading of the standstill or because countries have made at least one financial services commitment in one sub-sector in one mode would have dramatic consequences for countries that consciously sought to limit their exposure on financial services. Even the narrowest approach of only applying the regulatory framework where and to the extent that a subsectoral and modal commitment has been made, subject to any listed limitations, would have significant ramifications. As Table 11 shows, the commitments made by CARIFORUM states vastly exceed their GATS commitments. Antigua and Barbuda, Barbados, Dominica, St Lucia, St Vincent and Grenadines, and Trinidad and Tobago scheduled only one sub-sector of financial services in the GATS. This was the Insurance activity of 'reinsurance and retrocession'. Jamaica has GATS commitments in 5 sub-sectors, Guyana in 6, Haiti in 7 and the Dominican Republic in 9.

**TABLE 11. COMPARISON OF CARIFORUM STATES' FINANCIAL SERVICES COMMITMENTS IN THE GATS & EPA**

<b>FINANCIAL SERVICES SUB-SECTORS COMMITTED IN THE GATS &amp; THE EPA</b>															
	ATG	BRB	BEL	DMA	DOM	GRD	GUY	HAI	JAM	KNA	LCA	VCT	SUR	TTO	
GATS	1	1	-	1	9	1	6	7	5	-	1	1	-	1	
EPA	3	8	1	11	16	9	10	-	7	2	5	5	1	6	

As noted earlier, it is difficult to assess the effect of the schedules without a detailed cross matching to each country's financial services regime. The standstill aside, the number of commitments under the EPA ranges between one and 16. Most CARIFORUM states have at a minimum doubled their GATS commitments; for example, Trinidad and Tobago made entries in 6 sub-sectors, Jamaica in 7, Guyana in 10 and Dominican Republic in 16. Barbados is the only CARIFORUM state to make extensive horizontal reservations, in particular on banks in mode 3.

Dominica, Grenada, St Lucia and St Kitts and Nevis also introduced an innovation into the schedule, creating a new category 'C' of financial services that includes investment and property unit

<sup>239</sup> This refers to a document tabled during the Uruguay round: 'Trade Negotiations Committee, Communication from Canada, Japan, Sweden & Switzerland', 3 December 1990. It is not clear why this paper has been used instead of either the W/120 classification or the definition in the GATS Annex on Financial Services.



trust services, mutual funds and venture capital services, and registration of offshore companies and trusts to do offshore business. Their scope is unclear because they are not defined anywhere.

The EU accrued very few new obligations as it already has extensive GATS commitments in all 17 sub-sectors. It made a region-wide horizontal reservation for mode 3 that prevents branches and agencies from enjoying the same treatment as a subsidiary formed according to host state law. Otherwise, its mode 3 commitments apply to all sub-sectors under 'insurance' and 'banking and other services'. Insurance is more open than banking, with the latter subject to a restriction that only firms with a registered office in the European Community can act as a depository of the assets of investment funds. Individual countries maintain additional restrictions on insurance and banking. The EU is more restrained on cross border supply, where commitments are generally limited to maritime insurance and insurance of goods in transit, and provision of financial information, data processing and advisory and other auxiliary services except intermediation.

### **9.3 Financial Services Rules**

The standard market access and national treatment rules in chapters 2 and 3 apply to financial services. Commercial presence is defined in Article 65(a) to cover the setting up, buying or maintaining of a legal entity, or creating or maintaining a branch or representative office to carry out an economic activity. Legal form is very important for financial services because branches, as opposed to subsidiaries, are regulated through their parent company and country, which may take a less (or sometimes more) rigorous approach than the host government would impose.

A full market access commitment means a CARIFORUM government cannot prohibit majority European ownership of particular enterprises, such as development banks or insurance firms; apply an economic needs test to European firms wanting to run pension schemes or rural lending operations; or require them to establish a commercial presence through a joint venture. Quantitative market access measures include limits on the proportion of domestic deposits held by any one institution, the total size of an investment vehicle or hedge fund, or the value or proportion of over-the-counter trades as opposed to trades conducted through open markets. A ban on a novel financial services activity that is covered by a commitment is a prohibited market access measure. Commitments on market access can also prevent quantitative measures designed to prevent the proliferation of financial providers that fosters excessive competition and drives small or vulnerable banks to adopt high-risk activities to maintain their profit margins.

National treatment rules for mode 3 can also constrain the government's pursuit of important social objectives. For example, a requirement that foreign banks, which tend to dominate or cherry pick the market, maintain services to unprofitable sectors of the community would be discriminatory unless it applied to local institutions. Conversely, domestic financial institutions are often given preferential access to credit to ensure they maintain access to services on a national or regional basis, or to disadvantaged communities (a kind of universal service obligation),<sup>240</sup> while the EPA excludes subsidies from national treatment rules, and the horizontal section of the CARIFORUM services schedule also excludes grants, this may not protect other forms of preferential financing.<sup>241</sup> Such measures would not be protected by the exception in Article 108 for activities or services conducted or provided using the financial resources of the state or a public entity, unless they operated as a monopoly.

The application of modes 1 and 2 to financial services is also problematic, especially as their remoteness heightens risks relating to information, transparency, regulation and liability. Full commitments would allow unrestricted cross border supply of the broad panoply of financial services that are not well understood and may not already be regulated. Governments would be unable to use

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<sup>240</sup>Kavaljit Singh (2009), 'Rethinking Liberalisation of Banking Services under the India-EU Free Trade Agreement', Amsterdam: SOMO, September 2009

<sup>241</sup>The draft Canada-EU FTA text has a much more extensive exception that includes preferential financing.

quantitative market access measures to restrict the total amount or proportion of funds that companies within and outside the financial sector transfer to special investment vehicles in offshore banking centres or that pension funds invest offshore in high-risk speculative products and activities. Nor could they limit the number of offshore entities authorised to supply certain services or products. The *US-Gambling* case shows that imposing a ban on remote provision of a service can fall foul of a mode 1 market access commitment, especially when it involves a precautionary ban on new technologies because their implications are not yet understood.

#### 9.4 GATS-plus Innovations

Section 5 contains four innovations that draw on the voluntary GATS Understanding on Financial Services or are GATS-plus.

##### 9.4.1 *New financial services*

*Article 106: New Financial Services* draws on paragraph 7 of the Understanding and may severely restrict a government's ability to regulate potentially toxic financial products and services. The definition of a 'new financial service' in Article 103:2(d) is 'a service of a financial nature, including services related to existing and new products or the manner in which a product is delivered'. The service must not currently be supplied in the party's territory, but must be currently supplied in the other party.<sup>242</sup> Footnote 23 to Article 106<sup>243</sup> says these financial services activities must fall within the (broad) definition of financial services - which explains the significance of using 'comprise', rather than 'includes' in the EPA definition. That new financial service must also have been 'liberalised according to' Title II. This gives a new twist on the now-familiar issue of what constitutes liberalization. While it does not resolve the status of the standstill, it implies a narrow application of the disciplines to those sub-sectors that an individual CARIFORUM state has committed. It remains to be seen how financial services suppliers, the EU and individual CARIFORUM states would determine this and how it would be applied within the CSME, whose financial services agreement is still in draft form, and in the CARICOM-DR FTA.

Within the scope of its commitments, a CARIFORUM state must allow a European financial service supplier to sell any new financial service that its law permits its own financial services suppliers to supply, in like circumstances, but which they are not. This pre-commits a government to allow a new financial activity or product that did not exist when its schedule was prepared, provided its domestic laws are drafted broadly enough to allow it to be sold. The obligation would also apply where a new technology was used to deliver a product that can legally be sold, even if that technology raised concerns about the rapid expansion of a previously marginal and unregulated activity.

The basis on which new financial products or services are judged to be similar is subjective and will depend on the criteria used for comparison. It is not clear how 'like circumstances' might be interpreted; for example, whether it could prevent cross-border internet trading if similar sales are allowed by locally based suppliers. 'Like circumstances' tests will be especially difficult to apply to novel technologies, products or activities whose nature and effect are opaque or not well understood.

In one sense the wording in Article 106 of the EPA is tighter than the Understanding, which does not require the new service to be permitted by the Party's domestic law. Although 'permit' is an active verb, permission need not be explicit; the supply of a service is permitted if it is not prevented, unless the law specifies a closed list of permitted activities. However, the EPA provision is also broader than the Understanding. The Understanding requires the foreign supplier of the new service to be established in the other party's territory; the EPA clearly envisages supply of new financial services either across the border or by commercial presence, including through as yet undiscovered

<sup>242</sup> The Understanding does not have a territorial restriction, meaning that governments must allow a financial service supplier of any WTO Member to supply a 'new financial service' supplied anywhere in the world, subject to any scheduled limitation.

<sup>243</sup> This is footnote 1 in the EC-published version of the EPA text - L289/I/3, 30 October 2008.

technological innovations.<sup>244</sup> That sits somewhat awkwardly with the accompanying recognition that states can determine the juridical form through which the new service is to be provided: a requirement to supply the service through a subsidiary would effectively neutralise its application to cross-border supply.

A state may also require authorisation for the provision of the new service, but that can only be declined for prudential reasons. As discussed below, this raises potential problems if the prudential provision is interpreted as requiring evidence of the risks that a new financial service or product poses to consumers or the integrity and stability of the financial system. It would be almost impossible to establish compelling evidence in advance of its sale, thus precluding a precautionary approach.

#### **9.4.2 Transparency and prior notification**

A second innovation aims to give the financial services industry advanced warning of and opportunities to influence government proposals to regulate the sector in the name of 'effective and transparent regulation'. The EU and other WTO members have been trying to insert an obligation of prior consultation into the domestic regulation disciplines being negotiated under the GATS, so far without success. Article 105 only obliges states to 'endeavour' to provide the opportunity to comment on a proposed measure of general application, which is less than the 'best endeavours' the EU proposed in the draft PACP EPA text. This notification extends to 'all interested persons' across all modes of supply, so compliance by CARIFORUM states would extend to European financial service providers, not just the EU Party.

The actual mechanism for notification is not onerous, being through official publication or other written or electronic form. However, prior notification of proposed financial regulation would provide the opportunity for the industry and their patron states to bring their considerable influence to bear on CARIFORUM governments. The obligation may also make it difficult to move swiftly to address an urgent matter, unless the measure can be brought within the prudential exception.

Transparency appears to be an area where the EU is prepared to compromise. The EU Korea FTA has a very bland commitment to promote regulatory transparency in financial services.

#### **9.4.3 International standards**

A third GATS-plus innovation aims to tie financial services regulation to 'internationally agreed standards for regulation and supervision' (Article 105:2). Similar proposals have been made in the WTO.<sup>245</sup> The EPA uses soft wording: parties 'shall endeavour to facilitate' the implementation and application of such standards in their territory. The post-2007 crisis has highlighted concerns that governments, especially in the global South, may be tied to standards they had no role in devising and that are inappropriate for their circumstances or flawed. A prime example is the Basel II standard that allowed major banks to assess their own risk as the basis for capital adequacy requirements. This generated incentives for banks to conduct excessive off balance sheet operations.

The EU has advanced much stronger wording in other negotiations. The EU-Korea FTA and the draft PACP text spelt out a range of relevant international standards extending beyond regulation

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<sup>244</sup> The principle of technological neutrality automatically extends existing commitments in a particular mode to any new means of supplying the service in that mode.

<sup>245</sup> In the GATS negotiations Switzerland has argued that complexity makes the regulatory task of national authorities difficult and recommended the increased use of international standards, specifically the Basel Committee, the International Association of Insurance Supervisors, the International Organization of Securities Commissions and the Joint Forum on Financial Conglomerates. It also suggested that prudential measures should be defined in terms of international standards. Council for Trade in Services, 'Communication from Switzerland. GATS 2000 Financial Services', 4 May 2001, S/CSS/W/71, paras 18-21. That has been opposed by Colombia (Council for Trade in Services, 'Communication from Colombia. Financial Services', 9 July 2001, S/CSS/W/96, para 2) and Cuba (Council for Trade in Services, 'Communication from Cuba. Negotiating proposal for financial services', 22 March 2002, S/CSS/W143, para 6)

and supervision of financial services to include the prevention of tax fraud and evasion.<sup>246</sup> They also ‘note’ the Ten Key Principles for Information Exchange issued by the G-7 Finance Ministers in May 1998.<sup>247</sup> CARIFORUM successfully resisted these provisions, presumably on behalf of its offshore financial centres. The Canada-EU draft text requires parties to make ‘best endeavours to ensure’ that the list of internationally agreed standards, for regulation and supervision and to fight tax evasion and avoidance, are implemented and applied in their territory.

#### **9.4.4 Data processing**

Finally, Article 107 prevents a party from restricting the transfer of information into and out of the territory for data processing, where such processing is a requisite for its ordinary course of business. This provision is drawn from the Understanding and it has two significant effects. First, it enables data processing and storage to occur offshore, not only in the other party. Offshoring may have efficiency gains for financial services firms, who increasingly use back office outsourcing in an intensely competitive market, but this may be at the expense of a host country that has the skill and technical capacity to process the data locally. Second, offshore data processing can make it more difficult for governments to ensure that financial services information is retained domestically and is available for effective monitoring of transactions and capital adequacy requirement.

### **9.5 Exceptions**

There are four important exceptions that operate as defenses in situations where a state is challenged for breaching its obligations on financial services. The burden of proof would lie on the government seeking to invoke them.

First, the definition of ‘financial service supplier’ excludes a public entity. That covers a central bank or monetary authority. It also applies to a state-owned or controlled entity that is principally engaged in carrying out government functions or activities for government purposes, provided it does not principally supply services on a commercial basis. The scope of this exclusion will depend on the meaning given to ‘governmental functions or activities for government purposes’.

The second exclusion is the financial services equivalent of the exclusion for ‘services supplied in the exercise of governmental authority’. The EPA version largely mirrors the GATS Financial Services Annex,<sup>248</sup> although it is structured differently. All or part of a pension or social security system that is exclusively conducted or provided by the government is excluded under Article 108, unless the country’s domestic regulation allows those services to be provided by competing financial services suppliers - for example, allowing people to choose which financial provider operates their pension fund.<sup>249</sup> Social security and pension schemes that fall outside the exception are subject to scheduling and the ‘disciplines’ on financial services regulation.

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<sup>246</sup> The list of internationally agreed standards for regulation and supervision in the financial services sector and combating tax avoidance in Article 7.24 of the EU-Korea FTA explicitly refers to the Core Principle for Effective Banking Supervision of the Basel Committee on Banking Supervision, the Insurance Core Principles and Methodology, approved in Singapore on 3 October 2003 of the International Association of Insurance Supervisors, the Objectives and Principles of Securities Regulation of the International Organisation of Securities Commissions, the Agreement on Exchange of Information on Tax Matters of the Organisation for Economic Co-operation and Development, the Statement on Transparency and Exchange of Information for Tax Purposes of the G20, and the Forty Recommendations on Money Laundering and Nine Special Recommendations on Terrorist Financing of the Financial Action Task Force.

<sup>247</sup> Published in a report of the G-7 Finance Ministers entitled *Financial Stability - Supervision of Global Financial Institutions*; see [http://www.iaisweb.org/view/element\\_href.cfm?src=1/256.pdf](http://www.iaisweb.org/view/element_href.cfm?src=1/256.pdf)

<sup>248</sup> Paragraph 1(b) and (c) of the Annex on Financial Services is substituted for GATS Article 1:3 definition of services supplied in the exercise of governmental authority, which does not have a direct counterpart in the EPA.

<sup>249</sup> Sauvé and Ward (2008), 38. The GATS does not refer to the right to conduct a service being provided by domestic regulation, but the absence of domestic regulation preventing such a service would seem to meet the requirement of Article 108.

A third exception applies to exclusive activities of the government or their public entities that conduct or provide activities or services for the account of the government, with a government guarantee, or using government financing. As noted earlier, this only applies to a limited range of monopoly activities.

The most significant and controversial exception relates to prudential measures. Concerns about the uncertainty and inadequacy of the exception have intensified in the wake of the post-2007 crisis. These concerns relate in particular to its limited scope, allowing measures for consumer protection and financial stability, but not to address economic and social fallout from a financial crisis; the potential for one government to contest another government's intention, especially when a measure is considered to benefit the domestic finance sector; the proximity of the adoption of measures to a crisis-related event and its acceptable duration; the onus of proof on a government invoking the exception, especially where governments adopt a precautionary approach before a crisis has fully transpired.<sup>250</sup>

It is clear from Article 104 of the EPA that CARIFORUM negotiators successfully resisted the inclusion of two crucial restrictions on the prudential exception. The first is from the prudential exception in the GATS Annex on Financial Services. The GATS provision is negatively worded, to the effect that WTO members are not prevented from adopting prudential measures so long as such measures are not used as a means of avoiding their commitments or obligations. The CARIFORUM EPA positively affirms the right of governments to take action for prudential purposes and omits the problematic caveat that they must not be used to avoid commitments.

There is also an insignificant shift in wording on the purposes that are considered to be prudential: the GATS says they 'include' investor protection and ensuring the integrity and stability of the financial system; the EPA uses the somewhat more restrictive term 'such as'. The EU Korea FTA includes a footnote that prudential measures may include the maintenance of the safety, soundness, integrity or financial responsibility of individual financial service suppliers.

The second, highly significant omission in the CARIFORUM EPA is the EU's draconian inclusion of a 'necessity' test in the prudential exception. The requirement that a prudential measure is the least trade restrictive approach to achieve the permitted objectives is found in the draft PACP-EC EPA, the EU Korea FTA and the draft Canada EU text. Governments invoking that exception would face a constant threat that their preferred prudential response to a crisis could be challenged for being more intrusive on foreign services firms than an alternative approach. Prudential measures must also not discriminate, meaning they cannot be targeted explicitly or de facto at dominant or predatory foreign financial services suppliers.

The cross-fertilisation with BITs adds a further, less visible risk. Most BITs use a broad definition of investment that includes a wide range of financial sector activities and entitlements. Any moves to re-regulate these activities and investments may fall foul of the protection against measures tantamount to expropriation and become subject to investor-state arbitration. The BITs contain no equivalent of the prudential carveout. The incorporation of BIT-style provisions into the EU's FTAs would put increased pressure on governments as they decide how to respond to financial crises.

## **9.6 Capital Movements**

The general legal issues arising from Title III: Current Payments and Capital Movements were discussed in Section 3.6. However, they have special implications in relation to financial services because capital flows are the defining ingredient of many 'financial services' sub-sectors and because they are central to the economic and social stability of nations.

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<sup>250</sup> Raghavan (2009), 20-21

The GATS only requires unrestricted capital flows in sectors where commitments have been made. That limited obligation is reinforced by footnote 8 to Article XVI: Market Access, which requires free inflows and outflows of capital where it is ‘an essential part’ of a service committed under mode 1 and ‘related transfers of capital’ into the host country for mode 3 commitments. Some individual states have broader obligations to ensure full capital mobility under their BITs. However, Title III of the CARIFORUM-EC EPA requires full capital account liberalization for direct investments, and for other investments established in accordance with Title II, along with liquidation and repatriation of the investment and all profits.

There is a safeguard provision in Article 124, but this only applies where the country faces threatened or actual serious difficulty for the operation of its *monetary or exchange rate policy*. The safeguard is also subject to an onerous test that it is ‘strictly necessary’ and its use for a maximum six-month duration. It would not, for example, enable a government to intervene to prevent a destabilising repatriation of capital by a branch to a financially stressed parent company or to restrict the size or frequency of capital transfers in cross-border banking and investment. Because the prudential provision is a creature of Title II, its limited exceptions appear not to extend to the obligations under Title III.

Aside from the safeguard mechanism, states would need to rely on the EPA’s balance of payments exception in Article 240 to address serious balance of payments and external financial difficulties. States are required to ‘endeavour’ to avoid taking such measures. If they do invoke the provision, the measures must be non-discriminatory and of limited duration, and the state must be able to show that they do not exceed what is ‘necessary’ to remedy the situation. They must also be in accordance with WTO and IMF balance of payments obligations.

### **9.7 Implications for International Financial Services Centres**

Some CARIFORUM states have a specific interest as international financial services centres, which their critics describe as tax havens. Their situation under the EPA is relatively unchanged, with few if any new commercial opportunities or constraints. The EU made very limited sectoral commitments in cross border financial services; those that were made were subject to extensive reservations. The guarantee of unrestricted capital flows basically reflects current EU practices.

Perhaps the most significant achievement of the CARIFORUM negotiators was to deflect EU proposals to include references to a raft of International Standards, several of which were developed as part of a clamp down on what OECD countries consider are poorly regulated tax havens. Indeed, in 2009 Members of the European Parliament called on the European Commission to ‘clarify its stance on the stated EU objective of discouraging existing tax havens’, noting that eight of the 14 CARIFORUM states that signed the EPA were listed as tax havens by the OECD.<sup>251</sup>

### **9.8 MFN Implications**

The already complex layers of financial services commitments and disciplines in the EPA are amplified by a matrix of MFN and regional preference obligations that will ratchet up the liberalisation process and lock CARIFORUM states and others that adopt this template into a financial services model that has generated repeated crises and chronic systemic instability.

The ratcheting process operates at several levels. The first level is the MFN obligations for commercial presence (Article 70) and cross-border supply (Article 79). Any financial services commitments made by the EU in future FTAs, such as the pending agreements with Canada and India, will flow through to CARIFORUM states. Likewise, new commitments on financial services made by

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<sup>251</sup>European Parliament, ‘EU partnership accord with the Caribbean: green light from MEPs, with conditions’, Press release, 25 March 2009, <http://www.acp-eu-trade.org/newsletter/acp-eu-trade/no27-0309.php>

a CARIFORUM state in an FTA with a major trading partner, such as Canada or the US, will extend to the EU unless the latter agrees otherwise. It is important to note that financial services chapters in current US FTAs are more aggressive than the EPA in several key regards - notably the US insists on a negative list approach to scheduling and makes no provision for a balance of payments emergency.

A second layer is the regional preference in Article 238. This requires a CARIFORUM state to give all other CARIFORUM states any 'more favourable treatment or advantage' that it gives to the EU. This obligation applies to all of Title II; it therefore extends beyond scheduled commitments on financial services to include the regulatory framework, so far as that confers advantages on EU financial services suppliers, activities and products that do not already apply among the CARIFORUM parties. The regional preference also applies to capital movements. This means that:

- Financial services commitments made by individual CARICOM states to the EU apply to all of CARICOM, including the regulatory disciplines;
- Financial services commitments made by individual CARICOM states or the Dominican Republic to the EU, including the standstill on existing market access and national treatment measures and the regulatory framework apply to the CARICOM-Dominican Republic FTA;
- Unrestricted capital flows that are required under the EPA apply within CARICOM and to the CARICOM-DR FTA.

This provides a clear example of Girvan's argument that the EPA is setting the agenda for Caribbean integration where the legal texts have not yet been finalised, in this case the proposed CARICOM Financial Services Agreement. If the draft of that agreement dated October 2009 came into effect it would have the same effect as Article 238. Article 16 contains an open-ended obligation to internalise commitments on financial services made to third parties, which would include the EU, US and Canada:

A Contracting Party shall accord to the financial services and financial service suppliers from another Contracting Party treatment no less favourable than that which it accords to the financial services and financial services suppliers of a Third state or country, in like circumstances.

However, the text has not yet been adopted. Nor is there a financial services component to the CARICOM-DR FTA. The options that governments might consider have now been pre-empted by the EPA. The extent to which their hands are tied will depend on the interpretation given to the standstill and whether the regulatory framework is given a broad or narrow application.

## **9.9 Risk factors**

More than any other sectoral aspect of services and investment, the financial services provisions in the CARIFORUM-EU EPA create a dangerous precedent for other states that are negotiating with the EU. It is modeled on the light handed regulatory regime that has manifestly failed. Yet the core rules and regulatory disciplines on trade in financial services lock governments into that regime.

Market access and national treatment obligations remove constraints on the domestic and global concentration of market power by transnational financial institutions, allowing them to become 'too big to fail', while market access restrictions on legal form inhibit the use of firewalls between insurance, banking and securities operators. The right of financial institutions to invest through branches allows them to engage in regulatory arbitrage and opaque intra-firm transactions.

The all-encompassing definition of financial services explicitly includes over-the-counter trades in derivatives, securities and other speculative financial products, such as the synthetic collateralised debt obligations, asset backed securities and credit default swaps at the centre of the latest crisis. The promise not to prevent the sale of these 'new' financial services and products in their

territory or from offshore if their law does not already prohibit their own firms from supplying them 'in like circumstances'.

Governments are urged to adopt international standards that embody or promote self-regulation by the financial sector, exemplified by the Basel II arrangements that created incentives for major financial institutions to minimise their on-balance-sheet risk and hence their capital adequacy requirements. Extensive capital mobility ties the hands of governments seeking to restrict flows of hot money in and out of their countries and control speculation on their currencies, trading in toxic products and manipulation of commodity markets in real products, such as food and oil.

The prudential exception is held up as the tool to alleviate these concerns. The version in the CARIFORUM EPA is an advance on both the GATS, which has a troubling 'second sentence' that targets perceived protectionist intentions, and the EU's template that imposes a necessity test on prudential measures. However its scope is still limited to consumer protection and financial stability and the onus remains on states invoking the exception to show there was problem that required intervention to protect consumers or ensure financial stability. The prospect of recourse to the prudential exception may therefore be less than comforting in practice, as regulators take considerable time to identify and recognise the risks of new financial services and products, and it can be difficult to justify prudential concerns until problems have emerged.

Even if other ACP states were able to replicate the broader prudential exception in Article 104, the economic and social challenges that confront governments as a result of the latest crisis extend far beyond the issues of financial instability and consumer protections that are the focus of prudential regulation. Many ACP states currently have a poorly developed regime for financial regulation, but they retain the policy space to identify the option that best meets their reality. An EPA-style agreement would pre-empt regulatory options where they cannot be described as 'prudential' measures and constrain governments' responses in the wake of another crisis.

The draft report of the United Nations expert group chaired by Joseph Stiglitz in 2009 identified a clear relationship between the crisis and the Financial Services Agreement in the WTO. It stressed the need to revisit the existing text and allow governments to withdraw their obligations:

The framework of financial market liberalisation under the Financial Services Agreement of the WTO may serve to restrict the ability of governments to change the regulatory structure in ways which support financial stability, economic growth, and the welfare of vulnerable consumers and investors....

Trade-related financial services liberalisation has been advanced under the rubric of the WTO's (GATS) Financial Services Agreement with inappropriate regard for its consequences on orderly financial flows, exchange rate management, macro-economic stability, dollarisation, and the prudential regulation of domestic financial systems...The [Financial Services Agreement] needs to be reviewed to ensure that it becomes more consistent with the need for an inclusive international regulatory framework more conducive to crisis prevention and management, counter-cyclical and prudential safeguards, provision of development and inclusive finance as well as generally cheaper and better finance for developing countries...Agreements which restrict countries' revising their regulatory regimes in light of what has been learned about their deficiencies in this crisis obviously have to be altered.<sup>252</sup>

The CARIFORUM-EC EPA and subsequent iterations of the EU template are heading in the opposite direction. Even with its broader prudential exception, the precedents established in the CARIFORUM-EC EPA and the EU-Korea FTA will make it more difficult for other ACP sub-regions

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<sup>252</sup> United Nations, *Preliminary Draft of the Full Report of the Commission of Experts of the President of the UN General Assembly on Reforms of the International Monetary and Financial System*, 21 May 2009, United Nations, New York, para 71-72 [Stiglitz Report]



and non-ACP states to argue for a much more cautious approach given their limited existing regulation and capacity, let alone exclude financial services altogether.

## 10. CULTURE

The EPA provides special treatment for culture in four ways: exclusion of ‘audio-visual’ from the chapters on commercial presence and cross border services; aspirational commitments by the parties to promote culture through cooperation; a protocol on cultural cooperation; and scheduled commitments, especially for entry by cultural practitioners into the EU.

Assessments of the outcomes for culture are divided. This section examines the extent to which the EU has conferred new rights and benefits on the Caribbean culture sector through sectoral liberalisation and the Protocol on Cultural Cooperation. It concludes that the principal risk factor lies not in the treatment of culture itself, but in the misperception that the EU has made major concessions that justify significant trade-offs in return.

### 10.1 Objectives

The disposition of both parties meant that culture was always going to be treated differently in the CARIFORUM-EC EPA from free trade agreements involving most other countries.

The European states, especially France, have long demanded that culture is carved out from the disciplines of trade agreements.<sup>253</sup> By ‘culture’ they mean products of cultural industries and creators, principally audio-visual, not culture in its fully social sense of lifestyles, traditions and identities. As Josanne Leonard of the Caribbean Creative Industries Business Forum observes: ‘This is a jealously guarded industry, integral to their sense of culture and identity. And, it is supported by a range of cross-cutting policies, incentives, and institutional mechanisms designed to buttress, support and strengthen its competitiveness.’<sup>254</sup>

The original Contracting Parties to the GATT 1947 agreed to a special exception for film.<sup>255</sup> The EU and Canada unsuccessfully sought a corresponding carve-out for audio-visual services in the GATS, largely driven by their Francophone communities.<sup>256</sup> When the US blocked that option, they refused to schedule any commitments on audio-visual services. Consistent with that position, the EU has excluded the audiovisual sector from almost all parts of its FTA template.

The Lisbon Treaty affirms the privileged status of culture. The Common Commercial Policy requires unanimity, rather than a qualified majority, for decisions on cultural and audiovisual services (as well as educational, and social and human health services). However, Article 207 of the Treaty is conditional: ‘The Council shall also act unanimously for the negotiation and conclusion of agreements: (a) in the field of trade in cultural and audiovisual services, *where these agreements risk prejudicing the Union’s cultural and linguistic diversity*’ [emphasis added]. An assessment of whether the risks are sufficient to activate unanimity may differ when it is made from a trade perspective or by the cultural sector.

Culture was also high on the CARIFORUM negotiators’ agenda, principally to secure market access commitments in mode 4 for entertainers and other cultural practitioners. The Caribbean Cultural Industries Network (CCIN) seemed surprised by this information, noting ‘we are a long way off from making national/regional commitments that underscore the importance of our creative sectors

<sup>253</sup> For this history see Ivan Bernier (2005), ‘Trade and Culture’, in Patrick Macrory, Arthur Appleton and Michael Plummer (eds), *The World Trade Organization: Legal, Economic and Political Analysis*, Berlin: Springer International, 747–94.

<sup>254</sup> Josanne Leonard (2009) ‘As EPA ink dries: What’s next for our creative sectors in the Caribbean?’ *Trinidad and Tobago Review*, January 2009, <http://www.tntreview.com/?p=240>. She notes that this support includes the MEDIA 2007 programme which provides 775 million Euros to Europe’s audio-visual industry until 2013.

<sup>255</sup> The scope of that exception was the subject of several disputes with the US on behalf of its entertainment industry.

<sup>256</sup> Bernier (2005), 749

as a “top priority” for the Caribbean.<sup>257</sup> Conversely, the negotiators have been criticized by others for having a preoccupation with entertainment and tourism services that diverted their full attention from other critical issues, such as the removal of limitations on establishment requirements and mobility in professional and construction services.<sup>258</sup> Despite these criticisms, the CRNM views the outcomes on culture as a major achievement in the negotiations.

## **10.2 Core Rules**

In line with the European Commission’s negotiating mandate, audio-visual services are explicitly excluded from Chapter 2 on commercial presence (Article 66(c)) and Chapter 3 on cross border supply (Article 75(a)). Any subsidies to the culture sector are already excluded from the whole of Title II through Article 60:3.

The carve out is specific to audio-visual and does not extend to the wider range of services whose liberalisation has the potential to impact on national culture in its performing and professional sense. Cultural activities that remain subject to EPA commitments include architecture, urban planning and landscape architecture, advertising, photography, printing and publishing, translation and interpretation, entertainment including theatre, live bands and circuses, news agency, libraries, archives, museums and other cultural services, sporting and ‘other recreational services’.

Standard market access and national treatment rules in these sectors would prevent a government from applying local content quotas to live performances, video outlets or magazine advertising, providing preferential financing (other than subsidies and grants) to the national orchestra or art gallery, capping foreign ownership in movie theatre chains or casinos, requiring joint venture investments in museums or sports teams, or restricting the design of culturally sensitive projects to its nationals.

The Caribbean Cultural Industry Network challenged the asymmetry of an agreement that guarantees rights of establishment and cross border supply to Europe’s recording and publishing houses, but prohibits measures to support local artists and the culture sector. The Network also questioned the value of having access to the EU without quotas and economic ceilings ‘when the media business globally is concentrated in the hands of a few trans-global companies which operate across borders’, and pointed to the lack of any requirement in the EPA for reciprocity that might address ‘the burning issue of media access by Caribbean firms to effectively promote and market the music and media products we deem valuable and viable to exploit in EU markets’.<sup>259</sup>

Commitments on market access and national treatment in the telecommunications sector have equally significant impacts. Local culture in the Caribbean (and elsewhere) is hostage to transnational firms that control the telecommunications and information technology (IT) industry, especially the digital technologies. The Caribbean Network notes that the BBC already has free to air licenses to broadcast its content in the region following the liberalisation of telecommunications and broadcasting and has acquired frequencies on a limited broadcast spectrum that could have been assigned to Caribbean licensees.<sup>260</sup> CARIFORUM’s standstill and extensive liberalisation commitments on telecommunications,<sup>261</sup> combined with the regulatory disciplines on telecommunications in Chapter 5, will strengthen the market position of Europe’s telcos.

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<sup>257</sup> CCIN (2007), ‘Statement from the Caribbean Cultural Industries Network on the CARIFORUM-EU Economic Partnership Agreement’, December 2007, <http://www.normangirvan.info>

<sup>258</sup> Francis and Ullrich (2008), 28

<sup>259</sup> CCIN (2007), 1 and 2

<sup>260</sup> CCIN (2007), 2-3

<sup>261</sup> The EPA defines telecommunications services in terms of carriage, a definition that the EU proposed in the GATS 2000 negotiations; content is subject to commitments in the relevant sectors. See below.

Other services classifications that are less obviously related to culture also extend foreign dominance over cultural services and products. Supermarket chains, franchises and on-line entertainment retailers, such as Carrefour, Boots, Blockbuster UK and (arguably) Bertelsmann Online come under the heading distribution services, which is among the most widely committed of all trade in services categories. Five CARIFORUM states have made quite extensive commitments on cross border and commercial presence for retail distribution and franchising in the EPA.<sup>262</sup>

As noted earlier, there is also a limited exception in Article 224 that allows governments to take measures to protect national treasures of artistic, historic or archaeological value. A similar exception is found in GATT Article XX, but not in the GATS. Rather surprisingly, given the emphasis placed on culture by both parties, the EPA has added a 'necessity' test to the GATT Article XX wording. It is also surprising that the EPA does not go further and include more comprehensive cultural exceptions that are found in some other countries' FTAs.<sup>263</sup>

### 10.3 Cultural Cooperation

The EPA text contains numerous soft commitments to promote or protect culture. The Preamble to the Agreement reads:

CONSIDERING the need to promote and expedite the economic, cultural and social development of the CARIFORUM States, with a view to contributing to peace and security and to promoting a stable and democratic political environment; ...

Article 3: Sustainable Development requires the application of the Agreement to 'fully take into account the human, cultural, economic, social, health and environmental best interests of their respective population and of future generations'. There is further reference to culture in Title II, where the obligation in Article 73 not to encourage foreign investment by the lowering of standards applies to the relaxation of laws aimed at protecting and promoting cultural diversity. The most concrete aspirations are in Article 121:2 of Chapter 7: Cooperation, which include technical assistance, training and capacity building to improve the export capacity of service suppliers of the CARIFORUM states, with particular attention to the marketing of cultural services.

Protocol III on Cultural Cooperation complements the cooperation commitments in Chapter 7. It is a novel feature of the EU template that is also found in the EU-Korea FTA.<sup>264</sup> While the Protocol forms an integral part of the treaty text and is subject to the dispute settlement mechanism, it is a best endeavours text 'without prejudice to other provisions in the agreement'.

The Protocol is based on the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions 2005. The history of the Convention helps to explain the subordinate status of culture within the substantive trade rules of the EPA.<sup>265</sup> In the late 1990s France and Canada became leading proponents of an international instrument to promote cultural diversity, which found its home in UNESCO. The initiative came from the Canadian cultural sector who sought an

<sup>262</sup> In the EPA, Barbados, Dominican Republic, Guyana, Suriname and Trinidad & Tobago have commitments on retail distribution and/or franchising.

<sup>263</sup> For example, Australia and New Zealand have used a stand-alone article that covers a wide range of cultural activities. Its most restrictive iteration is in Article 15:1 of the Australia-New Zealand-ASEAN FTA 2008, which still includes 'measures necessary to support creative arts of national value'. A footnote to General Exceptions provision defines "Creative arts" to include 'the performing arts – including theatre, dance and music – visual arts and craft, literature, film and video, language arts, creative on-line content, indigenous traditional practice and contemporary cultural expression, and digital interactive media and hybrid art work, including those that use new technologies to transcend discrete art form divisions. The term encompasses those activities involved in the presentation, execution and interpretation of the arts, and the study and technical development of these art forms and activities.'

<sup>264</sup> [http://portal.unesco.org/en/ev.php-URL\\_ID=31038&URL\\_DO=DO\\_TOPIC&URL\\_SECTION=201.html](http://portal.unesco.org/en/ev.php-URL_ID=31038&URL_DO=DO_TOPIC&URL_SECTION=201.html)

<sup>265</sup> Kelsey (2008), 248-54

international treaty that could neutralise the threat that trade in services agreements posed to culture, especially by strengthening the dominance of the US entertainment industry. They built a vigorous international campaign to advance the Convention.

As the momentum grew, the government sponsors of the Convention became concerned to ensure that their commercial interests in the WTO were not adversely affected. The timing coincided with growing attacks on the GATS and governments feared that a counter-treaty on culture that had teeth would create a precedent for other services like education. Hence, the pivotal article that deals with trade agreements requires the Convention to be read in a manner that is consistent with trade liberalisation agreements and affirms the obligations of parties under those agreements:

**Article 20 – Relationship to other treaties: mutual supportiveness, complementarity and nonsubordination**

1. Parties recognise that they shall perform in good faith their obligations under this Convention and all other treaties to which they are parties. Accordingly, without subordinating this Convention to any other treaty,

(a) they shall foster mutual supportiveness between this Convention and the other treaties to which they are parties; and

(b) when interpreting and applying the other treaties to which they are parties or when entering into other international obligations, Parties shall take into account the relevant provisions of this Convention.

2. Nothing in this Convention shall be interpreted as modifying rights and obligations of the Parties under any other treaties to which they are parties.

In line with that compromise, the Protocol complements, yet is subordinate to the liberalisation obligations in Title II. It draws principally on Articles 14 (Cooperation for Development), 15 (Collaborative Arrangements) and 16 (Preferential treatment for developing countries) of the UNESCO Convention. The stated purpose is to create a framework to facilitate exchanges on cultural activities, goods and services, including audio-visual. Significantly, it recognises the potential for structural imbalances and asymmetry between the parties and encourages cooperation to redress them.

Pursuant to the Protocol the parties will ‘endeavour’ to facilitate training and increased contacts between specific categories of artists and practitioners (Article 3:4), provide technical assistance to the development of cultural industries and promote production and exchange of cultural goods and products (Article 4). They agree to cooperate in various ways, including through public private partnerships,<sup>266</sup> and to protect historic sites and monuments. Negotiation of new co-production agreements will be encouraged and benefit from local preferences (Article 5). Parties will promote their own territories as a location for films and television and allow the equipment needed for such productions to be imported temporarily, in accordance with local law (Article 6). Joint productions in the performing arts will be encouraged (Article 7).

The Protocol effectively extends some of the benefits<sup>267</sup> of the UNESCO Convention to the majority of CARIFORUM states that have not yet ratified it,<sup>268</sup> although the Preamble to the Protocol makes it clear they are expected to do so immediately. But, like the aspirations in the main text, the Protocol is soft law. The International Confederation of Coalitions for Cultural Diversity suggests that

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<sup>266</sup> ‘Public private partnerships’ is a preferred commercial modus operandi of Britain, which has a thriving international industry in what it calls Private Finance Initiatives.

<sup>267</sup> They do not gain access to the International Fund for Cultural Diversity that was established under Article 18 of the Convention and is allocated by the Intergovernmental Committee ‘to foster the emergence of a dynamic cultural sector’.

<sup>268</sup> The CARIFORUM states that were parties to the UNESCO Convention as at June 2010 were Barbados, Dominican Republic, Grenada, Haiti, Jamaica, St Lucia and St Vincent and the Grenadines.

the leverage it gives for CARIFORUM states to advance cultural initiatives with European countries or the EU will depend on the Caribbean culture sector promoting projects that are consistent with the aims of the Protocol and attractive to the EU.<sup>269</sup>

Speaking on behalf of the Caribbean culture sector, Leonard listed the many challenges it faces in developing strategies that can capitalise on those opportunities: the minimal level of local content it has to market; the lack of financing instruments for the audio-visual sector; very limited policy space to encourage investment in the regional audio-visual sector; and limited regional harmonisation of culture, media and telecommunications. She noted that only one co-production agreement, between Jamaica and the UK, existed with a EU state in 2009 and that did not include new multimedia platforms.<sup>270</sup>

#### 10.4 Scheduled Commitments

The major prize for CARIFORUM negotiators was the guaranteed right of access for cultural performers and professionals into Europe. A close look at the text and the schedules suggests that what the EU has given with one hand it has largely taken back with the other.

Chefs de cuisine, fashion models and entertainers (excluding audiovisual) must satisfy most of the complex and onerous criteria that are required to bring Contractual Services Suppliers within Chapter 4. Article 83:2(c) only exempts them from needing a university degree or equivalent qualification and a relevant professional qualification. Even when they meet the other requirements of Articles 80 and 83, their right to guaranteed access depends on whether the EU or any individual state has made market access commitments in their sector and what reservations they have scheduled.

**TABLE 12: EC's RESERVATIONS ON CONTRACTUAL SERVICES SUPPLIERS OF CULTURE-RELATED ACTIVITIES**

Sector or subsector	Description of Reservations
<b>Chef de cuisine services</b> (part of CPC 87909)	<b>EC:</b> Advanced technical qualification <sup>1</sup> and at least 6 years demonstrable work experience at the level of chef de cuisine may be required. Economic needs test.
<b>Fashion Model services</b> (part of CPC 87909)	<b>EC:</b> Technical qualification <sup>1</sup> may be required. Economic needs test.
<b>Entertainment Services other than audiovisual services (including Theatre, Live Bands, Circus and Discotheque Services)</b> (CPC 9619)	<b>BG, CY, CZ, DE, DK, EE, EL, ES, FI, FR, HU, IE, IT, LT, LU, LV, MT, NL, PL, PT, RO, SK, SE, UK:</b> Qualification <sup>1</sup> may be required. Economic needs test. <b>AT:</b> Advanced qualification <sup>1</sup> may be required. Economic needs test. <b>SI:</b> Duration of stay limited to 7 days per event. For circus and amusement park services duration of stay is limited to a maximum of 30 days per calendar year. <b>BE:</b> Unbound

1. Where the qualification has not been obtained in the EC and its Member States, the Member State concerned may evaluate whether this is equivalent to the qualification required in its territory.

Table 12 shows that in relation to *chefs*, all the European states have reserved the right to require an advanced technical qualification and at least six years of demonstrable work experience at the level of chef de cuisine, in addition to an ENT. *Fashion models* may need to hold a technical qualification and meet an ENT. In both cases, any European state can evaluate whether a non-EU qualification is

<sup>269</sup> IFCCD (2008), 'EU Cites UNESCO Convention in Embedding Cultural Cooperation Protocol in Trade Pacts', 9 October 2008, <http://www.ifccd.com/content/eu-cites-unesco-convention-embedding-cultural-cooperation-protocol-trade-pacts>

<sup>270</sup> Leonard (2009)

equivalent to what it requires. The category of ‘entertainment services other than audio visual services’, which includes *theatre, live bands, circus and discotheque* services, may be subject to an ENT and a possible requirement for qualifications in all but two European states. It is unbound in Belgium, meaning there is no guaranteed right of entry. In the most liberalised commitment, Slovenia has guaranteed entry for 7 days per event and 30 days a calendar year for circus and amusement park services.

The Headnote to the schedule further circumscribed these commitments by reserving the right for EU states to apply non-discriminatory qualification and licensing requirements and deny entry that might affect a labour dispute. Finally, those seeking to enter Europe must still secure a visa or work permit and satisfy immigration and any residency requirements.

The CRNM concedes that access to Europe may be subject to qualification requirements and ENTs. But it defends this as the price ‘for a full market opening by the EU **without quotas**’ (original emphasis)<sup>271</sup> This statement is misleading. The EU has not scheduled a full market opening; it has offered market access subject to highly restrictive conditions in the text, schedule and Headnote. Sauvé and Ward predict that original and new EU states ‘will continue to make significant use of ENTs to control market access conditions given that entry for these categories of suppliers is quota free.’<sup>272</sup>

The CRNM has also exaggerated the prospects for access through the Protocol on Cultural Cooperation, claiming

through the Protocol, artists and other cultural practitioners (who are not involved in commercial activities in the EU) *will be able to enter* the EU space to collaborate on projects, get training, learn new techniques, engage in production, etc. And they *will be allowed to stay* in any EU state for periods of up to 90 days in any 12-month period. ... This Protocol mechanism will be useful for the smaller artists and entertainers and any cultural practitioners who do not yet operate as a firm; *they can enter EU states under the cooperation element* and over time, develop contacts that can lead to commercial contracts. [emphasis added]<sup>273</sup>

While the Protocol on Cultural Cooperation does address the situation of artists and other cultural professionals and practitioners who cannot gain access under Title II, it does not provide any guarantees. The EU only promises under Article 3 to ‘*endeavour to facilitate, in conformity with laws*’ their entry and temporary stay for a maximum of 90 days. An ‘endeavour’ (not even a ‘best endeavour’) to ‘facilitate’ (not to ensure) entry in conformity with existing (or future) laws is a very soft commitment, and it only applies in very specific situations. To be considered, the relevant individuals must be involved in shooting films or television programmes, or recording music or taking active part in festivals. They must not be selling their services to the general public or being paid locally. And they must be providing the service through a contract with a legal person that is commercially present in the host country.

There has been a vigorous debate in the Caribbean about whether cultural practitioners actually had difficulty gaining access to the EU before the EPA and whether the EPA would make any practical difference. The Caribbean Cultural Industries Network suggests the negotiators were well intentioned, but understood very little about the workings of cultural and creative businesses and failed to seek the advice of those directly affected.<sup>274</sup> According to the Network, regional entertainers and cultural workers had been able to secure work permits once they satisfied queries from European consular officials. They feared that the EPA approach would require some kind of regional registration

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<sup>271</sup> CRNM, (2008b) ‘Provisions on the Cultural Sector in the CARIFORUM-EU Economic Partnership Agreement (EPA)’, Jamaica: CRNM, June 2008, 3

<sup>272</sup> Sauvé and Ward (2009), 32

<sup>273</sup> CRNM (2008b), 5

<sup>274</sup> CCIN (2007), 1

and certification regime, without which iconic performers like Lord Kitchener or Bob Marley would have been ineligible to enter the EU.<sup>275</sup>

The CRNM pointed out that the EPA was intended to provide a guaranteed floor that did not prevent European states from continuing to provide access on easier terms. That is true; however, the Network had grounds for its concern that all entertainers might be required to register locally in the future, especially given the embryonic state of Caribbean registration systems. The treaty did not contain any practical details about how the registration scheme would work and the negotiators had not produced any either.<sup>276</sup> Moreover, the EPA does not alter the immigration requirements for work permits or visas.<sup>277</sup>

### 10.5 Risk Factors

The region's negotiators rightly observe that the EU's commitments on entertainment services in the EPA are unprecedented. They believe this will create a major growth opportunity for the region:<sup>278</sup>

in addition to allowing Caribbean firms to invest in entertainment activities in Europe, for the first time, the EC and its Member States granted **legally binding** and significant market access for the supply of entertainment services through the temporary entry of natural persons for up to six months.<sup>279</sup> (original emphasis)

They believe this achievement was strengthened by the prospects for greater collaboration in all aspects of cultural industries, with special provisions on audiovisual activities that allow co-produced products to satisfy cultural content rules and qualify for financial support in all EU member states.<sup>280</sup> This provides a classic example of how the EPA encourages CARIFORUM governments to abandon hard policy instruments in return for soft promises of cooperation.<sup>281</sup>

There are differing views on whether the same promises of cooperation could have been achieved outside a free trade treaty. The International Confederation of Coalitions for Cultural Diversity, whose members were among the original sponsors of the Convention, doubts 'whether cultural cooperation protocols would be the subject of an equivalent commitment if initiated as stand-alone agreements' without the leverage of trade negotiations. Whether those protocols were worth the price is a separate question.

The EU's agreement to make commitments on entertainment services is indeed a significant shift in its historical position and may be of interest to other countries negotiating with the EU.<sup>282</sup> Yet the narrow definitions and stringent conditions in the EPA text, reinforced in the EU's schedule, suggest that CARIFORUM negotiators secured, at best, very limited gains in a sector they designated as a priority and to which the EU was considered sympathetic. That outcome in such optimal circumstances is a gloomy bellwether for the prospects of other negotiating partners to secure favourable outcomes in areas of priority to them.

The International Confederation also notes the irony that the use of the culture sector to sell the virtues of the EPA left it awkwardly situated in the broader controversy that surrounded the negotiations:

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<sup>275</sup> There had been two consultations with representatives of the region's cultural and creative sectors, in 2004 and 2006.

<sup>276</sup> CCIN (2007), 1

<sup>277</sup> Brewster et al (undated), 2

<sup>278</sup> ECLAC (2008), 13

<sup>279</sup> CRNM (2008b), 2

<sup>280</sup> Humphrey (2008), 4

<sup>281</sup> The industry seems sceptical about the region's political commitment to make that happen: CCIN (2007), 3

<sup>282</sup> Francis and Ulrich (2008), 10-11



in linking cultural cooperation to trade pacts, the approach could have the ironic consequence of transforming culture into a selling point for proceeding with trade deals that, as the EPA controversy in the Caribbean demonstrates, can be the subject of wide-ranging controversy for reasons having nothing to do with culture.<sup>283</sup>

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<sup>283</sup> IFCCD (2008), 3

## 11. TOURISM

Tourism was CARIFORUM's other priority but, unlike culture, the EU was a reluctant party. The results are a similar mix of liberalisation, mainly by CARIFORUM, promises of cooperation from the EU, and some soft sectoral disciplines whose most significant feature is an attempt to address the anti-competitive practices of the mega-tourism operators. This section of the report critically examines the gains to CARIFORUM that are evident from the text and the schedules, and the implications for other countries negotiating with the EU that have an interest in tourism.

### 11.1 Objectives

Special treatment for tourism was a *quid pro quo* for the inclusion in Chapter 5 of disciplines on the regulation of sectors of interest to the EU, especially post and courier, telecommunications and financial services. Sixty percent of services exports from CARIFORUM states to the EU are in tourism and travel-related services. There were strong offensive interests in creating new commercial opportunities by reducing restrictions in the European market and, following the negotiators' rationale, by deepening their own liberalisation in the hope of attracting foreign investment.<sup>284</sup>

CARIFORUM also wanted regulatory disciplines to constrain the 'sometimes suffocating' structures of the vertically integrated transnational operators that dominate the global tourism market.<sup>285</sup> The Dominican Republic had previously taken a lead at the WTO by promoting a sectoral Annex on tourism services that would address such anti-competitive practices.<sup>286</sup> CARIFORUM was apparently keen to develop a similar Annex to the EPA. Overall, the tourism negotiations were seen to offer:

An opportunity to reap benefits not achieved in the WTO: to create meaningful rules for the sector; to establish a common understanding on issues facing the sector, for example in the area of standards; to create mechanisms to make it easier for EU investors to choose the Caribbean; and to strengthen the capacity of CARIFORUM operators to increase tourism exports and competitiveness.<sup>287</sup>

The negotiators report 'some resistance' from the EU, which initially argued for a minimal text, but describe the outcome as a 'mutually satisfactory' combination of liberalisation and cooperation that would boost the capability of CARIFORUM operators to exploit increased market access to Europe.<sup>288</sup>

### 11.2 Scope and Coverage

The tourism package in the EPA has five elements: the liberalisation commitments on commercial presence, cross border supply and rights of entry for tourism-related personnel; priority on tourism for the development of mutual recognition agreements; investor responsibilities in Chapter 2; unrestricted capital mobility in Title III; and cooperation in tourism services in Section 7 of Chapter 5.

Section 7 of Chapter 5 sets out principles for the regulatory framework for 'all tourism services' liberalised under chapters 2, 3 and 4. Thirteen CARIFORUM states made commitments for modes 2 and 3 of Hotel and Restaurant services. The now-familiar issues relating to 'liberalisation' are not revisited here aside from noting that, in contrast to financial services, Section 7 contains broad-

<sup>284</sup> Sauv   and Ward (2009), 4-5

<sup>285</sup> Schloemann and Pitschas (2008), 29

<sup>286</sup> CTS, 'Communication from the Dominican Republic. Conclusions and Recommendations of the Expert Meeting on Tourism organized by UNCTAD', S/C/W/149, 23 May 2000

<sup>287</sup> CRNM (2008c), 'The Treatment of Tourism in the CARIFORUM-EC Economic Partnership Agreement', Jamaica: CRNM, 7

<sup>288</sup> CRNM (2008c), 1

brush provisions that mean a narrow sector and modal interpretation to liberalisation is not appropriate.

The sector-specific question of interpretation that arises in Section 7 is the meaning of ‘all tourism services’. The W/120 scheduling document has an explicit Category 8: *Trade and travel-related services*. But the scope of tourism services is much wider than that. The World Tourism Organisation has developed a more comprehensive Standard International Classification of Tourism Activities that the Dominican Republic and others built on during the GATS 2000 negotiations. They proposed a cluster of ‘tourism characteristic’ services that comprised 96 sub-sectors, ranging across transportation services, financial services, business services, recreational, cultural and sporting services, and ‘services not included elsewhere’, in addition to tourism and travel-related services.<sup>289</sup> It is not clear whether CARIFORUM advocated the use of that cluster in the EPA negotiations, but commentaries on tourism and the EPA tend to be limited to its narrow meaning with the addition of a small number of activities, such as marina and spa services.<sup>290</sup>

### 11.3 Liberalisation Commitments

CARIFORUM had interests in securing commitments from the EU under all chapters: cross-border supply could foster the provision of services such as travel advice or bookings through the Internet; the removal of restrictions on market access and national treatment on a commercial presence could increase the opportunities for CARIFORUM tourism firms and business personnel to become established within Europe; easier entry for tour operators and tour guides, and rights to attend conventions and exhibitions, could boost the visibility and marketing of Caribbean tourism within Europe.

In practice, the EU’s schedule on cross border services only marginally increased its GATS 2000 offer and that came mainly from new EU members. The EU made significantly more commitments for commercial presence in Hotels and Restaurants, and Travel Agencies and Tour Operator services, which carry the presumption of access for senior corporate personnel and intra-corporate trainees. According to the CRNM, almost all EU states made commitments for Tier 1 personnel in Hotels, Restaurants and Catering, Travel Agencies and Tour Operator Services. Eleven states maintained nationality requirements for Tour Guide Services.<sup>291</sup>

The Europeans’ defensive position is most evident, once again, in its Tier 2 commitments set out in Table 13. Travel Agencies and Tour Operators’ and Tourist Guide services are included in the categories of Contractual Services Suppliers that the EU recognised in Article 83, subject to stringent pre-conditions. All EU states made commitments in both subsectors. However, almost half those for Travel Agencies and Tour Operators are subject to ENTs. The negotiators portray this as a major achievement, because 16 states did not commit travel agencies or tour operators at all in the EU’s GATS 2000 offer. The EU’s commitments on Tourist Guide Services are also GATS-plus; but here, 21 states reserved ENTs and five more were unbound, meaning they reserved the right to introduce future domestic regulation and measures that might restrict market access.

<sup>289</sup> CTS.SS, ‘Communication from the Dominican Republic [and others]’, S/CSS/W/19, 5 December 2000

<sup>290</sup> e.g. CRNM (2008c)

<sup>291</sup> CRNM (2008c), 3-5

**TABLE 13: EC's RESERVATIONS ON CONTRACTUAL SERVICES SUPPLIERS OF CORE TOURISM ACTIVITIES**

Sector or sub-sector	Description of reservations
<b>Travel Agencies and Tour Operators Services</b> <b>(including tour managers)</b>  (CPC 7471)	<b>AT, CY, CZ, DE, EE, ES, FR, IT, LU, NL, PL, SI, SE, UK:</b> None  <b>BE:</b> Economic needs test, except for CSS when the annual wage is above the amount defined by the relevant laws and regulations  <b>DK:</b> Economic needs test except for CSS stays of up to three months  <b>IE:</b> Unbound except for tour managers  <b>BG, EL, FI, HU, LT, LV, MT, PT, RO, SK:</b> Economic needs test
<b>Tourist Guides Services</b>  (CPC 7472)	<b>SE:</b> None  <b>AT, BE, BG, CY, CZ, DE, DK, EE, FI, EL, HU, IE, IT, LV, LU, MT, NL, RO, SK, SI, UK:</b> Economic Needs Test  <b>ES, FR, LT, PL, PT:</b> Unbound

The EU also promised in Article 84 to 'endeavour to facilitate' entry for Short Term Visitors for Business Purposes, such as tourism personnel to attend or participate in tourism conventions of exhibitions.

Whether these commitments will generate any genuine commercial benefits to Caribbean tourism operators depends on how far they advance beyond the status quo and whether the industry can take advantage of any new opportunities. Commercial realities suggest that few Caribbean operators will seek to establish a commercial presence in Europe and very few personnel will satisfy the entry requirements in Tier 1 or Tier 2. The paucity of commitments on cross-border supply negates the hopes that the agreement might facilitate e-tourism services. The soft commitment for short-term business visitors in Article 84 may provide the greatest tangible results.

CARIFORUM's own commitments for the Tourism-specific category are prefaced by the standstill. Almost all states made extensive commitments on Hotels and Restaurants with limitations for small hotels, and in the novel subsectors of spas and marinas. Five committed Travel Agency and Tour Operators in modes 1 to 3. Any mode 4 entries referred back to the horizontal section. The CRNM reports that 'CARIFORUM has left flexibility for policy makers to introduce measures to protect the domestic industry from surges in temporary movement of natural persons',<sup>292</sup> presumably because the standstill does not apply to mode 4.

The negotiators base their case largely on the signalling effect they believe that liberalisation commitments have on potential investors. There is little recognition of the associated legal risks that its commitments will significantly constrain the range of tools available to CARIFORUM governments to shape the tourism sector and promote local tourism.

The standstill obligation is either complemented by or embodied in the market access and national treatment commitments on tourism related services. Again, the meaning of the standstill is critical. A strong interpretation would prevent governments from restricting the foreign ownership or leasing of land beyond the reservations each has made. Market access measures frozen by the standstill could include new restrictions on the number or size of hotels in the country as a whole or in specific areas, or the number of activities, such as dive operations or cruise ships visits, unless they

<sup>292</sup> CRNM (2008c), 5

could be brought within the limited environmental exception. The standstill on national treatment could remove the ability to give new preferences to local operators to secure eco-tourism licenses or access development financing. Even without the standstill, eschewing the right to impose new conditions on foreign investments through market access and national treatment commitments would make it hard to maximise the national and regional benefits that come from using local inputs, ensure the training of managerial and skills staff, supporting small and medium enterprises that cannot compete with the global chains, or reducing the massive leakage of earnings to parent companies and tourism operators outside the country.

#### **11.4 Tourism Cooperation**

The most significant and substantive obligation in Section 7 is Article 111, which requires the parties (but principally the EU) to introduce or maintain measures to control the anti-competitive practices of tourism distribution networks,<sup>293</sup> including mega-wholesalers, computer reservation systems and global distribution systems.<sup>294</sup> That obligation is cross-referenced to the Competition chapter in Title IV, which sets a framework for competition law to be administered through the EU and CARIFORUM. The generic nature of this commitment obviates the interpretation issues about liberalisation and coverage.

Effective anti-competition laws could make a significant difference to smaller tourism operators, not just in the Caribbean. However, the CRNM seems overconfident of the legal and practical effect of Article 111 when it claims that ‘large firms *will be prevented* from behaving in an anti-competitive manner in order to safeguard the interests of the mainly small firms in the Caribbean’. [emphasis added]<sup>295</sup>

That outcome is subject to four factors. First, the parties are only required to take ‘appropriate measures’ to prevent such practices, a subjective requirement especially in the minds of an already reluctant European Union. Second, the largest transnational firms that supply these activities operate through IT networks on a global basis; it may be difficult to bring them to account effectively through EU competition law. Third, Article 111 imposes the same obligations on CARIFORUM states to maintain or introduce a pro-active competition policy for tourism suppliers. Under Title IV all states must have a Community Competition Commission and national competition authorities in force within five years. Similar obligations in other ACP regions and individual states would impose onerous administrative and institutional obligations.<sup>296</sup> Fourth, there is a risk that this Article could rebound on individual states or regional tourism agencies wanting to develop their own exclusive or preferential distribution networks.

Articles 112, 113 and 115 contain a suite of promises to cooperate. All have their limitations. The EU must ‘endeavour to facilitate’ both technology transfer to CARIFORUM firms ‘on a commercial basis’ and the participation of small and medium enterprises in tourism, and it must ‘encourage’ the participation of CARIFORUM service suppliers in various levels of financing programmes to support the ‘sustainable development’ of tourism. These are soft provisions that stop short of actual commitments to technology transfer, tangible measures to increase participation by small and medium enterprises, or provision of finance for the sustainable development of tourism. Technology transfer on a ‘commercial basis’ is a substitute for the kind of technology transfer requirement that is often imposed on foreign investors to help build local capacity and which is viewed as a discriminatory national treatment measure. The approach to ‘sustainability’ reflects the World

<sup>293</sup> The examples given of such practices include unfair prices, exclusivity clauses, refusal to deal, tied sales, quantity restrictions and vertical integration.

<sup>294</sup> Four internet-based global distribution systems - Amadeus, Galileo, Sabre and Worldspan - dominated travel bookings in the world market over the past decade.

<sup>295</sup> CRNM (undated), 1

<sup>296</sup> Schloemann and Pitschas (2008), 29

Tourism Organisation bias towards the sustainability of the tourism market,<sup>297</sup> rather than sustainability of the ecosystems and communities that are affected by tourism.

The obligations in Article 116 to ‘encourage’ compliance with environmental and quality standards that apply to tourism services are even weaker. Compliance must not only be ‘in a reasonable and objective manner’, it must not constitute an ‘unnecessary barrier to trade’. This is accompanied by a promise to ‘endeavour to facilitate’ the participation of CARIFORUM states in international organisations that set the standards that apply to tourism. Mere encouragement to comply in a reasonable manner may reflect the difficulties that small and poor states face in reaching those standards. However, it also restrains what a regulator can demand. The negatively worded ‘necessity’ test means that tourism operators, such as resort hotels or cruise ships, could resist ‘encouragement’ for them to meet environment or quality standards for the sector by objecting to the government that its standards pose overly burdensome obligations on their investment or cross border activities. Again, the introduction of stronger investor rights into the EPA would greatly increase their leverage.

In a rare reference to the inherent asymmetries in development between the parties, the EU promises development and technical assistance under Article 117 by ‘facilitating support’ in a range of areas: accounting systems, environmental management, Internet marketing strategies, effective participation in standard setting bodies, and tourism exchange programmes. That cooperation is to be kept under ongoing review.

Again, this is a promise to facilitate, not a guarantee of funding. It is explicitly subject to Article 7: Development Cooperation in Part I of the EPA, which ties financing for cooperation to the rules and procedures of the Cotonou Agreement, in particular the European Development Fund, and other relevant instruments financed by the EU General Budget. Support for the tourism sector will have to compete for EU funds with other aspects of the EPA. While the existence of Chapter 5 will give added leverage,<sup>298</sup> Brewster et al caution that resource transfers are not legally binding obligations under the EPA and ‘the resources provided by the European Development Fund (EDF) are not only slow to negotiate and disburse, but woefully inadequate.’<sup>299</sup>

Finally, the parties commit to an exchange of information and a regular dialogue that includes the private sector on relevant issues related to tourism. Regular dialogue on the issue of travel advisories is described as ‘useful’. Given the soft nature of the provisions in Chapter 5 compliance will depend primarily on this dialogue and periodic meetings of the parties.

### 11.5 Risk factors

The Caribbean hotel and tourism industry, which was closely involved throughout the negotiations,<sup>300</sup> claims that the EPA will deliver new commercial opportunities and economic returns. The limited market access into Europe for tourism personnel, the difficulty giving effect to the anti-competition provisions, the soft obligations on cooperation and funding, and the commercial realities of the Caribbean industry operating within Europe suggest the outcomes are being oversold.

This is clearly the best package that CARIFORUM negotiators could extract. Given the determination with which they approached their task and the liberalisation they were prepared to offer in exchange, other states will find it difficult to extract more. In return, CARIFORUM states have

<sup>297</sup> Cited in Council on Trade in Services, ‘Tourism Services. Background Note by the Secretariat’, S/C/W/51, 23 September 1998, 8.

<sup>298</sup> Schloeman and Pitschas (2008) 30

<sup>299</sup> Brewster et al, 23 March 2008, 1. See also Diana Thorburn, John Rapley, Damien King and Collette Campbell (2009), ‘The End of an Era? The EU-CARIFORUM EPA and the Future of Caribbean Trade Relations’, Ontario: Centre for International Governance Innovation, 31

<sup>300</sup> The first draft text was produced by the private sector Caribbean Hotel Association. David Jessop, ‘Understanding the EPA – Tourism pact demands fair competition’, *Jamaica Gleaner Online*, 18 January 2008, <http://www.jamaica-gleaner.com/gleaner/20080118/business/business7.html>

conceded the flexibility that seems essential in an industry that has changed so rapidly in the past 20 years and that faces an uncertain future in the face of climate change, energy scarcity and financial instability.

Focusing on tourism within the ‘trade’ context also deflects the attention of policy makers and regulators from its broader development and social implications, such as risks of exploitation for women, children, and culture, the displacement of local communities, environmental and ecological damage, and the competition for scarce resources, such as water and land, between local communities and large-scale tourism ventures.<sup>301</sup> None of this is addressed in Section 7. Ongoing monitoring of those impacts could form part of the commitment in Article 5 to ‘ensure that the benefits for men, women, young people and children’ deriving from the ‘partnership’ are maximised. But there is so far nothing to indicate that will happen. So long as tourism, and all the other socially embedded sectors discussed in this report are viewed from a purely commercial perspective within the trade paradigm, the prospects for such multi-dimensional oversight seem remote.

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<sup>301</sup> Kelsey (2008) 276-83; EED (Evangelischer Entwicklungsdienst)/Equations, *A WTO-GATS-Tourism Impact Assessment Framework for Developing Countries*, 2005, India: Church Development Service and EQUATIONS.

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