

THE EU- CARIFORUM EPA ON SERVICES INVESTMENTS AND E COMMERCE- IMPLICATIONS FOR OTHER ACP COUNTRIES

SYNOPSIS

At the close of 2007, the EU completed a comprehensive Economic Partnership Agreement (EPA) with the Cariforum countries. The EPA with the Cariforum is comprehensive in the sense that it extends to trade in goods, services and all the new generation issues including government procurement, competition law, and others. This analytical note provides an overview of key provisions related to trade in services in the Cariforum EPA text and comments on the possible implications for other ACP countries in Africa and the Pacific, which may soon initiate negotiations for the reciprocal liberalisation of trade in services with Europe.

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THE EU- CARIFORUM EPA ON SERVICES INVESTMENTS AND E COMMERCE- IMPLICATIONS FOR ACP COUNTRIES

I. INTRODUCTION

1. At the close of 2007, the EU completed a comprehensive Economic Partnership Agreement (EPA) with the Cariforum countries. With the rest of the regions negotiating these Agreements, Europe secured interim Agreements on trade in goods only. The EPA with the Cariforum is comprehensive in the sense that it extends to trade in goods, services and all the new generation issues including government procurement, competition law, and others. This Agreement: Its structure, scope, and specific commitments will clearly have implications for the African and Pacific countries involved in these EPA negotiations as it will most likely be presented as the blue print for other regions. As such, it is important to analyse it carefully and draw lessons from its implications for other countries.
2. This analytical note provides an overview of key provisions in the EPA of the Cariforum region and comments on the implications for other ACP countries in Africa and the Pacific, which may soon initiate negotiations for the reciprocal liberalisation of trade in services with Europe.

II. THE ROLE OF SERVICES IN POOR COUNTRIES

3. The importance of the services sector for ACP countries transcends mere economic and commercial significance leaning more towards social and welfare enhancing functions. Socially, services provide key functions essential for human existence such as health, sanitation and water thereby enhancing the quality of human life and allowing for a productive pool of human resource that can then engage in commercially meaningful activities, contributing towards the attainment of national development objectives. Education services provide the skills necessary for building government and private work.
4. Most ACP countries are agro-based economies. The bulk of activity relates to tilling the land mainly for subsistence, with surplus being sold to local markets. In such cases, trade in services becomes important with transportation and distribution services providing connectability to markets where farmers can sell their produce and get linked to industrial production processes (in which energy services play a critical role). Services also provide employment especially to women in tourism, which is important as a diversification tool to stand shocks related to the continual fluctuation in agricultural commodity markets.

5. Financial services through credit and loans are pivotal in ensuring that poor people participate in trade as a route out of poverty. Communication services are also important for millions of poor farmers in accessing market information. Furthermore, professional services such as Legal, Accounting, Auditing and bookkeeping, Taxation, Architectural Engineering and others create a flourishing hub of expertise that is useful in the context of private entities and profit making, as well as government employment. Their professional expertise allows enhanced efficiency and competitiveness in government departments. Those in the private sector contribute through taxation to government plans to deliver wider social services.

III. TRENDS IN GROWTH OF SERVICES IN ACP COUNTRIES

6. The intangibility of most services, their non stockability and the highly informal nature of the sector in ACP countries makes it difficult to capture with precision the statistical importance of services. However, figures available show that in the CEMAC region, the sector experiences an annual growth rate of 6.5%. The share in total regional exports amounts to 8% with imports averaging at 45%.¹ In the Central African Republic (CAR), IMF data indicates the contribution of the services sector to GDP is 28.4% in 1996/9 dropping to 0.9% in 2004/5.² Tourism contributed receipts averaging US\$4.7million per annum between 1988 and 2004. In Cameroon, the services sector contributes about 40% to GDP.
7. In the ECOWAS region, the services sector is also economically significant. In Nigeria, for instance, services represent about 33.3% of GDP with key sectors being finance, insurance and energy.³ Senegal has at least two-thirds of GDP contributed by services⁴; Cote d'Ivoire has a diversified financial sector⁵ whereas Cape Verde is strong in transportation, travel and other commercial services.⁶

¹ Report of ILEAP workshop on trade in services negotiations, and trade facilitation in the Central African Economic and Monetary Union (CEMAC). Predominant sectors are distribution services, public services, transportation and other services to households, all amounting to an average of 65% of the production of services in the sub-region.

² World Bank (2007) Concept paper, Central African Republic Diagnostic Trade Integration Study under the Integrated Framework, p.6

³ The economist intelligence unit (2007) Country profile Nigeria, London.

⁴ The economist intelligence unit (2007) Country profile Senegal, London.

⁵ The economist intelligence unit (2007) Country profile Côte d'Ivoire, London.

⁶ ITC calculations based on COMTRADE and WTO statistics.

8. Services contribute about 50% to GDP of many countries in the Eastern and Southern African region (ESA)⁷. Furthermore, these countries are involved in a process of regional harmonization of regulation and policy across Eastern Africa Community (EAC), Southern Africa Development Community (SADC) and the Common Market of Eastern and Southern Africa (COMESA).
9. In the Pacific region, the services sector contributes more than 50% to GDP⁸ with key sectors being tourism and off shore banking services.
10. In spite of the significant importance of Services to the economies of the ACP countries overall, a clear trend in the African and Pacific ACP regions is that they are **net importers of services**⁹. Some exceptions include tourism sector in countries such as South Africa or Mauritius which exports some services like off shore banking services.
11. The Caribbean region is therefore the only ACP region that is net exporter of services. Key sectors include tourism particularly in the areas of business travelers or expatriates returning for home visits, beach-based holidays and cruise traffic. Main markets for the industry are the US, UK, the EU and Canada.¹⁰ Other sectors are offshore financial services especially in the OECS and Belize, Telemarketing, informatics including software development, Information technology, Data processing and software development, education, communication, distribution, banking and insurance, and others.¹¹
12. Table 1 below shows the contribution of services as a percentage of GDP in 2002, according to the Economic Commission for Latin America and the Caribbean (2002).

⁷ World Bank (2005) World Development Indicators, World Bank, Washington D.C. Available at: <http://devdata.worldbank.org/wdi2005/Cover.htm>

⁸ World Bank (2003) World Development Indicators (2003) quoted in Scoping study. Special and Differential Treatment in Post-Cotonou Services Negotiations, UK.

⁹ For more information on the situation of services in ACP countries, see Myriam Vande Stichele (2006) The risks and dangers of liberalization of services in Africa under EPAs. Briefing Paper, SOMO. On line available <http://www.somo.nl>

¹⁰ In Barbados the UK contributes 38.5% and the US 23.4%. For Belize, the contribution is at 61.7%, with the EU at 13.9% and Canada at 6.3%. Jamaica has the US contributing 71% with the EU and Canada at 25%. Antigua and Barbuda has 40%, with the US at 30% and Canada at 5%, while St Lucia has 39% for the US, with 27% for the EU and Canada at 6%. Economic Commission for Latin America and the Caribbean (2002)

¹¹ See WTO (2007) Trade Policy Review OECS WTO-Members OECS Trade Policy Review. Report by OECS-WTO Members, WT/TPR/G/190, Geneva.

**Table 1: Services contribution as a percentage of GDP and total exports
Caricom countries, 2002**

Country	Percentage	Services as % of exports	Country	Percentage	Services as % of exports
Antigua	92.9%	91.4%	Jamaica	71.1%	56.6%
St. Lucia	87.1%	81.9%	Trinidad	12.5%	67.9%
St. Kitts	84.2%	68.2%	Belize	44.8%	62.4%
Barbados	84.1%	n.a.	Haiti	37.6%	61.8%
Grenada	83.9%	72.1%	Suriname	18.6%	61.5%
St. Vincent	83.3%	66.9%	Guyana	21.1%	46.5%
Dominica	76.4%	n.a.	Barbados	79.6%	
The Bahamas	n.a.	78.6%			

Source: IDB (2005) Institute for the Integration of Latin America and the Caribbean, Caricom Report No.2, Buenos Aires.
n.a.: not available

13. Table 2 below shows the *Average* value of EU's Exports and Imports with the Cariforum region over the period 1999-2003. Table 3 presents an annual breakdown of the same.

Table 2: Average value of EU imports and exports with Cariforum for the period (1999-2003) (Euro Millions)

Sectors	Services Exports	Services Imports	Services Balance
Total EU Services with all Cariforum	696	1,672	(976)
Transport	49	114	(64)
Travel	105	1,000	(895)
Communication services	3	42	(39)

Construction services	47	22	25
Insurance services	85	71	14
Financial services	31	11	20
Computer and information services	23	1	23
Royalties and licence fees	1	1	0
Other business services	231	150	81
Personal, cultural and recreational services	2	1	1
Government services, n.i.e.	1	17	(16)

Source: Quoted in Chaitoo, Ramesh (2006) Trade, development and financial services issues in Caricom.

Table 3: Annual value of EU Services balance with Cariforum, 1999-2003 (Euro Millions)

Year	1999	2000	2001	2002	2003
Total EU Services with all Cariforum	(722)	(978)	(982)	(727)	(1,469)
Transport	(27)	(86)	(50)	(50)	(108)
Travel	(686)	(780)	(838)	(821)	(1,350)
Communication services	(3)	(1)	(159)	(24)	(7)
Construction services	1	17	30	60	18
Insurance services	(18)	(59)	82	(9)	72
Financial services	6	37	18	22	15
Computer and information services	6	15	19	36	36
Royalties and licence fees	0	0	2	(1)	(1)
Other business services	8	140	115	130	13
Personal, cultural and recreational services	0	(0)	2	3	0
Government	(1)	(21)	(29)	(22)	(5)

services, n.i.e.					
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Source: Quoted by Ramesh Chaitoo in presentation made in Kampala, Uganda in the context of a regional training on services in the EPA negotiations. Available at: http://www.ileap-jeicp.org/downloads/kampala_08/III/CHAITOO_EU-Cariforum-Services-Trade.pdf

14. The tables above show that the EU has a deficit in services trade with the Cariforum region for the period 1999-2003, and for every year over that period. The figures also indicate that the transport and travel sectors account for most of the positive trade balance in services of the Cariforum countries with the EU.

IV. CHALLENGES OF THE SERVICES SECTOR IN AFRICA AND PACIFIC COUNTRIES¹²

A. Underdeveloped domestic services capacity

15. The challenges vary from one region to the other, but there are some overarching trends. One of these is being able to guarantee the provision of efficient and quality services for domestic consumption. Many ACP countries are grappling with the need to guarantee access of the population to key sectors such as health, education, water and sanitation, thereby lagging behind in meeting universal access obligations and the millennium development goals. These countries also face severe challenges of poor supporting infrastructure services such as roads, railway networks and other distribution channels. In the tourism sector, one of the sectors in which the regions have relative advantages for export, the limitations in infrastructure services hindrance the full potential of tourism. Banking and financial services are concentrated in urban areas where the relatively better off live. Farmers and the rural poor, including women, have very limited access to financial intermediation services thus constraining their ability to invest in and expand production.

B. Weaknesses in regulatory capacity

16. The regulatory framework in most of these countries is very weak or at most, incipient in many sectors and sub-sectors. Furthermore, the institutional capacity and human resources to develop, monitor and enforce such regulatory frameworks are also limited.
17. Given these considerations, the timing and sequence of liberalisation of the services sectors must be considered carefully. As countries open their services markets, they need to keep a watchful oversight role to ensure

¹² While these challenges are presented as affecting Africa and the Pacific, it is true that many of them also extend to the Caribbean region.

not only that holders of licenses perform efficiently and on the basis of contracted terms, but also that these providers contribute to key objectives such as achieving universal access to basic services. This is a big challenge particularly as countries start to open up social sectors such as education, health and environmental services. Equally important is guaranteeing that commercially meaningful sectors with supply potential for the domestic market and for export, are not prematurely subject to liberalisation undermining the development of the sector and the dynamic gains that could arise from it.

V. THE EU-CARIFORUM EPA: SCOPE, RULES, SCHEDULES AND IMPACT.

A. Scope of the Agreement

18. As mentioned above, the EU- Cariforum EPA is broad in scope involving disciplines and commitments on trade in goods and services, but also in other areas such as competition law, government procurement, etc.
19. Disciplines and commitments on trade in services are subsumed under a Title of the agreement that covers investment, trade in services and electronic commerce. The agreement states that the objective of the parties is the “progressive, reciprocal and asymmetrical liberalisation of investment and trade in services, and cooperation on e-commerce”. Furthermore, article 62 of the agreement commits the Parties to enter into future negotiations on investment and trade in services, with a view to enhance the commitments made under this Title of the agreement. Investors are provided access to the markets of each other party under the sectors identified in Annexes to the agreement, in the same way that suppliers of services under mode 3 of GATS. Therefore, investors will be provided access to markets and other protections derived from GATS-type provisions as well as others more commonly found in bilateral investment treaties such as the free movement of capital for direct investments (article 123 of the agreement).
20. The Agreement extends to the legal provisions, sectors and modes committed in the various Annexes on services and investment. The Agreement provides that subsidies, government procurement or anything that may be construed to require the privatization of public undertakings are excluded from the Agreement’ scope. Nevertheless, as will be discussed below, the extent of market access and national treatment commitments made as part of the agreement, makes it difficult to see how the exclusion of requirements for privatization can work in practice. Moreover, there is a limited prevalence of sectors that have full government ownership owing to the effect of public-private partnerships

and the overall drive for private sector led growth in many developing countries.

21. Issues regarding definitional elements are also important in a discussion on scope. For example, the agreement defines a “measure” as any measure taken by the parties to the Agreement in the form of a law, regulation, rule, procedure, decision, administrative action or any other form, taken by central, regional or local governments as well as non governmental organizations in the exercise of delegated functions. This captures all levels, but in many ways mirrors GATS provisions and so ideally countries should already be operating on their basis.
22. It is important to stress however, that to the extent that the Agreement covers investment and not only commercial presence as defined in GATS, its scope is significantly broader and consequently, so may be its implications. Countries would have to bear this in mind when enacting regulations at all levels of government and assess whether they fall within the scope of the Agreement. While disciplines on the treatment of investment are not per se new for many of these countries, the terms of binding access or establishment for investments in specific sectors is. This clearly forecloses policy options to regulate in the public interest and in favor of domestic service suppliers.
23. From the sectoral perspective, just like the GATS, the Agreement provides for general most favoured nation and transparency provisions. The more specific scope of national treatment and market access rules relate to sectoral and sub-sectoral specific commitments made by the Parties and reflected in Annexes to the Agreement. There are regulatory disciplines specifically in the areas of computer and related services, telecommunications, courier services, financial services, international maritime transport services, and tourism.
24. It should be recalled that all the efforts that Europe put in introducing multilateral rules on investment, and other elements of the so called Singapore agenda (e.g. competition and government procurement) has always faced with rigorous resistance from developing countries, almost coming at the price of the entire Doha Development Round of negotiations in Cancun. Some of the reasons advanced by developing countries in this opposition were their limited institutional and regulatory capacity to undertake commitments in all these areas, in addition to the clear lack of consensus on the philosophy underpinning the possible approach to regulation in the same areas.

B. Implications of non discriminatory rules:

- i) *Most favoured nation, market access and national treatment*

25. In the most favoured national clause, the parties agree to accord each other's services, service suppliers and investors treatment no less favourable than the most favourable type they may accord to like services, service suppliers and investors of any third country with whom they conclude an Economic Integration Agreement (IEA) in the future. The EU therefore has direct access to any favourable treatment that Cariforum would give to other countries or groups thereof. This provision will negatively impact on the potential for growth in South-South trade.
26. Exemptions to the MFN rule are envisaged in situations where a party concludes a regional economic integration agreement creating an internal market or requiring parties to significantly approximate their legislation with a view to removing non-discriminatory obstacles to establishment and to trade in services. The treatment that such parties grant to establishments or investors of these countries in sectors subject to the internal market or the significant approximation of legislation is not covered by the provisions of MFN. Such examples include processes related to the European economic area, pre accession agreements to the EU, the Cariforum single market and economy, and the Caricom-Dominican Republic Free Trade Agreement. The Agreement defines a major trading economy for purposes of application of such provisions, any industrialized developed country or any other country accounting for a share of world trade merchandise exports above 1 percent in the year before the entry into force of the EIA or any group of countries, individually or collectively or through an EIA accounting collectively for 1.5 % in the year before the entry into force of the EIA.
27. This criterion clearly captures giants like the US, Japan, Canada and others, but also other large developing countries such as Brazil, China and India. It is no surprising that Brazil raised this issue in the WTO requesting clarification of the exact wording of the provision, rational and possible implications.
28. The provision also excludes the application of the MFN rule to existing MFN exemptions of the Parties under the GATS. Measures regarding recognition of qualifications, licenses, or prudential measures in accordance with Article VII of the GATS or its Annex on financial services are also excluded from the scope of the agreement regarding MFN treatment related to the cross-border supply of services (Modes 1 and 2) and establishment (Mode 3).
29. Various studies have call attention to the risks for developing countries in undertaking liberalisation commitments on services through full or even partial national treatment, especially in the context of the EPA

negotiations which involve parties at significantly different levels of development.¹³ In conceding to national treatment, the Cariforum has limited the scope of regulatory capacity in services at various degrees and with respect to different sectors, as per individual schedules attached to the agreement. In particular, the option of promoting and encouraging local or domestic services suppliers through targeted specific measures will be limited, in the sectors in which it has made commitments.

30. The Agreement also has a regional MFN clause wherein Cariforum looks at utility in the regulatory frameworks in various areas relating to the liberalization of trade in services and investment amongst themselves-as a useful framework for further liberalization in the regional context. This clause has been hailed as a key provision for the Cariforum. Less clear are the reasons for including such provision in a bilateral agreement with Europe when this is something that the Caribbean countries could have done on their own accord.
31. An important question here is what needs to come first? It is broadly acknowledged that an important aspect in trade policy regarding liberalization is its sequence. There is need for regional groups to think about how best to liberalise and reap the economies of a wider market and then become competitive globally. In any event, the Agreement is signed as a group with the EC as the other. For the EPA Cariforum Agreement, the presumption, subject to country specific limitations as inscribed, would be that the Cariforum countries have liberalised amongst themselves. The strength of the regional MFN clause would have to be tampered with this reality.
32. It is also important to note that where better treatment is given to a third country by a Cariforum State, than is available to the EC, then the parties need to enter consultations with the view to consider if such more favourable treatment may be denied to the EC. Therefore, all parties would participate in the decision on whether the concerned state may give or deny the favourable treatment contained in the EIA to the EC. A joint Council (Cariforum/EC) would adopt any necessary measures to adjust the provisions of the EPA thereto. This is a further safety net for the EC to ensure that they get any additional access that may be done at the Cariforum or individual Member States level.
33. In terms of market access, the 'more developed' CARIFORUM countries have promised to liberalise 75% of their services trade with the EU and

¹³ See for instance, South Centre (2007) *Fact Sheet No. 5: Demystifying Trade in Services: A Strategic Guide for ACP EPA Negotiators*, Analytical Note (SC/AN/TDP/EPA/5), Geneva and South Centre (2007) *Why inclusion of services in the EPAs is problematic: Legal and development implications*, Policy Brief No. 10, Geneva.

the LDCs 65%. Cariforum made concessions in market access and national treatment, many times without restrictions, in various sectors. The sectors in which commitments have been made include the following: legal, accounting, auditing and book keeping services; taxation, construction and related engineering services; medical and dental services (including many commitments for the set up of commercial presence and presence of natural persons); veterinary services; services provided by midwives, nurses, physiotherapists and para-medical personnel; computer and related services; research and development services; real estate services; a multiplicity of other business services such as advertising, market research, public opinion polling services, management consulting etc.; communication services; distribution services; educational; environmental; financial; health related and social services; tourism and travel related services; recreational, cultural and sporting services; and transport services. National treatment will be provided by the Cariforum countries to the EU investors and suppliers of services, in the sectors where such commitments have been made, with the limitations reflected in the schedules.

34. In addition to specific commitments on market access and national treatment, the region bound itself to regulatory disciplines particularly in telecommunications, computer and related services, tourism, financial services and others.

ii) Provisions in relation to cross border supply of services

35. The Agreement covers under a specific chapter provisions on cross border supply of services which in terms of GATS terminology cover cross border supply and consumption abroad or Modes 1 and 2.¹⁴

36. The following sectors are however, excluded from the scope of the Agreement's provisions on cross border supply of services:

- Audio-visual services,
- National maritime cabotage,
- National and international air transport services (whether scheduled or not) and services directly related to the exercise of traffic rights other than: i) aircraft repair and maintenance services during which an aircraft is withdrawn from service, ii) the selling and marketing of air transport services, iii) computer reservation system (CRS) services, and iv) other ancillary services that facilitate the operation of air carriers, such as ground handling services, rental services of aircraft with crew and airport management services.

¹⁴ See GATS Article 1 on modal definition of services.

37. Two issues arise here: What is the commercial importance of the excluded sectors for other African and Pacific countries? Does their exclusion remove key sectors from the market? For instance, audio visual services has certain relevance for some African countries (Nigeria), but overall, does it create a comfort zone because these countries are building numerous small and medium size enterprises such that leaving out these is room to develop?
38. On the other hand the type of air transport services that are included such as CRS, and ground handling services etc, do present some market potential, so one may say that this is possibly a new market that needs to be welcomed. Especially in light of the fact that a big issue in tourism has been the difficulties of developing country airlines accessing computer reservation systems. However, if one takes the issue of ground handling services- what are the real issues in these sectors? Is it market access? Is it regulation? Is it competition rules? Some papers have dealt with these issues.¹⁵
39. An important cross border issue for African countries is not only the capacity to supply these services, but also the capacity to trade in them. Where the service is provided on the basis of the strength of information communication and technologies, various African countries find it difficult to cope in terms of adequately regulating the sector and guaranteeing oversight of providers, even in a situation where suppliers are within the jurisdiction of the country and are *within reach* so to say (such as for instance under Mode 3 of supply). It will be even more difficult to do so in the context of trade taking place in the context of cross border trade, particularly that akin to Mode 1 in the GATS. The reality may be different for the Caribbean countries with regulation and strength of information communications and technologies, but in Africa with severe strains in the power network, among other hindrances, it is hard to envisage export potential, let alone adequate domestic supply in these areas immediately.
40. In market access, the agreement locks in equal treatment for like services and service suppliers, in sectors where specific commitments are made. In addition, the Agreement states that the parties will not maintain or adopt certain measures, listed below, in the sectors subject to market access commitments. These limitations mirror provisions under the GATS.

¹⁵ See Kategekwa, Joy (2006) Reflections on implications of EPA liberalization for ACP countries: The Case of Eastern and Southern African countries in services negotiations. Paper presented in November 2006 at ICTSD African regional dialogue.

- limitations on the number of service suppliers whether in the form of numerical quotas, monopolies, exclusive service suppliers or the requirements of an economic needs tests;
- limitations in the total value of service transactions or assets in the form of numerical quotas or the requirement of an economic needs tests;
- limitations on the total number of service operations or on the total quantity of service output expressed in terms of designated numerical units in the form of quotas or the requirement of an economic needs tests.

41. In terms of national treatment, the Agreement commits parties to grant to services and service suppliers of each other, treatment no less favourable than that granted to like domestic services and service suppliers, in the sectors in which market access commitments are undertaken. The Agreement states, that such treatment may be provided through formally identical treatment or formally differential treatment that upsets the conditions of competition between foreign and like domestic services and services suppliers. Such provisions are not to be understood as a commitment on the part of the parties to compensate for competitive disadvantages that may result from the foreign character of the relevant service suppliers.

iii) Commercial presence

42. Commercial presence is defined as any type of business or professional establishment through constitution, acquisition or maintenance of a juridical person or the creation or maintenance of a branch or representative office in the territory of the parties to the Agreement, for the purpose of performing an economic activity. The terms 'constitution' and 'acquisition' of a juridical persons is defined to include capital participation of a juridical person with a view to establishing or maintaining lasting economic links (read substantive business operations). Lasting economic links is understood, in turn, in the case of a company limited by shares, as a situations where the amount of shares allows for the effective participation in the management of the company or in its control. Whereas, long term loans of a participatory nature are loans that exceed 5 years. This definition is quite restrictive and the challenge remains the applicability of this sort of definition to, or the propensity of SMEs to benefit there from.

43. This definition is also important because many commitments particularly in Mode 4 require a link to commercial presence meaning that any natural person who wants to supply a service in the EU market has to have links to juridical persons as defined above.

44. The provisions of the Agreement related to commercial presence apply to measures adopted by the parties in all economic sectors, except a list provided in the agreement including mining manufacturing and processing of nuclear materials; production of or trade in arms, munitions and war material; audio visual services; national maritime cabotage, and national and international air transport services whether scheduled or not and services directly related to the exercise of traffic rights other than: i) aircraft repair and maintenance services during which an aircraft is withdrawn from service; ii) the selling and marketing of air transport services; iii) computer reservation system (CRS) services; iv) other ancillary services that facilitate the operation of air carriers such as ground handling services, rental services of aircraft with crew and air management services. The issues raised above on cross border supply of services are relevant hereto.

45. With regard to market access, the parties agree to accord each other's commercial presences and investors, treatment no less favorable than is provided in the schedules on specific commitment listed in the annexes to the Agreement. It is also agreed that subject to scheduling, and in the sectors in which market access commitments are undertaken, the measures which a signatory shall not maintain either on the basis of a regional subdivision or the entire territory are those indicated below, following closely GATS relevant provisions.

- limitation on number of commercial presences whether in the form of numerical quotas, monopolies, exclusive rights or other commercial presence requirements such as economic needs tests;
- limitations on the total value of transactions or assets in the form of numerical quotas or the requirements for an economic needs test;
- limitations on the total number of operations or on the total quantity of output expressed in terms of designated numerical units in the form of quotas or the requirement of an economic needs test;
- limitations on the participation of foreign capital in terms of maximum percentage limit on foreign shareholding or the total value of individual or aggregate foreign investment; and
- measures which restrict or require specific types of commercial presence (subsidiary, branch, representative office) or joint ventures through which an investor of the other Party may perform an economic activity.

46. Of course the key issue is that a country can exclude from applicability many of these measures through scheduling but a look at the scheduled commitments of Cariforum shows that countries in the region thought it was in their best interest not to avail to a large extent of the flexibilities

provided by the scheduling modalities of GATS with respect to the services in which specific commitments were undertaken. It is important to note though that if a country gives up a right to maintain these market access restrictions, such as on the type of economic entity, it becomes difficult to have any policies on the ground that are aimed at protecting SMEs, and other trade-related national development objectives. It must be recalled, that the commercial presence provisions under the EU-Cariforum EPA cover establishment of investments. Other ACP countries may want to evaluate this further.

47. It is also interesting to note that specific commitments assumed under national treatment will not be construed to require the EC party to compensate for inherent competitive disadvantage which result from the foreign character of the relevant commercial presences and investors. In effect, this would mean that if EC companies are too strong, and create a real threat to domestic ones, there will be no requirement for compensation. In a round about way, this may have some impact on the inability to invoke any safeguard measures because the possibility for compensation is contractually excluded.
48. The importance of safeguards comes in from the obvious asymmetry between the two parties to this Agreement. A safeguard clause that allows short term correction of unforeseen circumstance resulting from an upsurge in the market of EPA-related services imports and investments and e-commerce commitments is important. The only aspect that may be related to the safeguard as a defence instrument in the EPA is in Article 97. It talks about competitive safeguards on major suppliers. Competition rules are provided for to preventing suppliers who alone or together are a major supplier from engaging in or continuing anti-competitive practices including cross subsidization, using information obtained from competitors with anticompetitive results, not making available to other service suppliers on timely basis technical information about essential facilities and commercially relevant information necessary for them to provide services.
49. While there is value and a possible contribution for competition law to the taming of anticompetitive practices in investment issues, it would be interesting to analyze more specifically their application to trade in services. In the GATS negotiations, the focus has been on the development of an emergency safeguard measure that can right the wrongs that may be triggered by an upsurge in foreign services and service suppliers in the domestic market. This discussion has been led by the ASEAN group of countries. Here they have faced blockage from developed countries on what the latter view as the non-feasibility and desirability of this mechanism. The relegation of the safeguard issues to competition law makes for a vacuum and uncharted waters, in a

situation where many developing countries do not have competition laws, policies and institutional frameworks to oversee the running of this branch of law. This needs to be borne in mind. By comparison, the EU's own competition commission has some of the best jurisprudence on the subject signalling a wealth of internal comprehension and expertise.

50. The issue of competition laws in services is probably less important for the Cariforum since they have a full section on competition in their EPA (see Title IV Cariforum EPA). This probably means that the countries in the region have made a positive assessment about the desirability of these provisions in their own context thus agreeing to this strategy. In other regions, the sentiment is still very much against the inclusion of competition policy in the scope of EPAs mainly due to the real challenges facing the countries in terms of regulatory capacity.

iv) Movement of Natural persons (Mode 4)

51. For the Cariforum countries, as well as for many other ACP countries, Mode 4 represents one of the limited aspects in the services negotiations where they can and have articulated an offensive agenda. Therefore, it is useful to assess the concessions by the European Union in this area to Cariforum in order to understand to what extent these respond to the demands of the ACP countries as articulated in the WTO and EPA negotiations, specifically.

52. An analysis of the EU's commitments in the EPA with Cariforum shows concessions remain within the scope of the EU's GATS schedule or Doha Agenda offer. Commitments cover very highly skilled professionals only: business visitors and intra corporate transferees (managers, specialists such as graduate trainees, business service sellers, contractual service suppliers and independent professionals). In all the sectors in which the EC makes mode 4 commitments for contractual service suppliers¹⁶ the Agreement requires to have links to commercial presence, severely limiting the commitment's utility. Cariforum countries, together with other developing ones have been seeking commitments de-linked from commercial presence in the GATS negotiations. Failure to secure this in the EPAs limits the Agreement's value.

53. Additionally, the natural persons need to have a service contract for not more than a year, have worked for the company for at least the year immediately preceding the date of submission of an application for entry

¹⁶ Legal, Accounting and bookkeeping, Taxation advisory services, Architectural, Urban planning and landscape architecture services, Engineering, Medical and dental services, Veterinary, Midwives, nursing, physiotherapists and paramedical personnel services, computer and related, Research and development services, Advertising, Market Research and Opinion Polling, Management consulting, Technical testing and analysis services, Maintenance and repair of equipment, Translation and interpretation, Higher education services, Entertainment etc.

into the EC, at least 3 years professional experience¹⁷ in the sector of activity and a university degree or a qualification demonstrating knowledge of an equivalent level¹⁸ and professional qualifications. A host of other conditions apply including remuneration receipt, duration and limitations on number of persons.

54. In the case of independent professionals, in all the sectors where the EC has made commitments¹⁹ the beneficiary needs to have a service contract for a period not exceeding a year, at least six years professional experience in the sector of activity, requisite qualifications such as university degree or a qualification demonstrating knowledge of an equivalent level²⁰ and professional qualifications.
55. All the commitments are crowded with economic needs tests, which remove certainty. More so, the real market entry barriers such as qualification requirements and procedures, technical standards and licensing requirements and procedures, and measures regarding employment, work and social security conditions are excluded from the scope of the Agreement leaving competence to Members states. Many of the commitments will only come into force in 2011 with others even later in 2014. Mutual recognition issues are left opened with a long process relying on various uncertainties before negotiations on this can even commence. The EC excludes Cariforum access to EC directives on recognition.
56. The movement of natural persons supplying chef de cuisine services and fashion model services is in principle exempt from specific formal qualifications imposed on other services, according to article 83.2(c) of the agreement. However, a careful consideration of the EC's schedule shows that the same requires the chefs de cuisine an advanced technical qualification and 6 years work experience at that level. Regarding fashion model services a technical qualification is also required; both services are subject to economic needs tests. In any case, all of this needs to be tampered with the reality of *behind the border* regulations which make it very difficult to access the EC market. The real value of the EC's concessions to the Cariforum countries will become apparent only when the agreement is implemented and service suppliers from the Caribbean countries deal with the conditions on the concessions on the movement on natural persons in a practical manner, taking into account the financial

¹⁷ Obtained after having reached the age of majority.

¹⁸ Where the degree or qualification has not been obtained in the Party where the service is supplied, that Party may evaluate whether this is equivalent to a university degree required in its territory.

¹⁹ Legal, Architectural, Engineering services, Computer and related services, Research and development, Market Research and Opinion Polling, Management consulting, Translation and interpretation services.

²⁰ Where the degree or qualification has not been obtained in the Party where the service is supplied, that Party may evaluate whether this is equivalent to a university degree required in its territory.

constraints in which these suppliers work in and other institutional limitations. The text as is, would suggest that the additional value of the EC's concessions may be rather limited.

57. On the other hand, the agreement establishes a set of obligations that will require significant human and financial resources to comply with. Other ACP countries must take these aspects into account as they engage with the EC in negotiations on services; from aspects related to the scope of commitments to be made by the EC (i.e. skilled versus un-skilled workers) to the detailed regulatory requirements attached to such commitments which may reduce the value of the same in practice. A sober cost-benefit analysis should be made by the interest countries so as to avoid making concessions based on the assumption that commitments by the EC on mode 4 will provide for an overall balanced outcome.

58. The link of mode 4 commitments to requirements for commercial presence brings the question of juridical persons into discussion. The latter is defined as one set up in accordance with the laws of a member to the agreement having its registered office, central administration or its principal place of business in the territory to which the Treaty applies. In light of the fact that setting up a business in Europe comes with large start up costs, possibly coupled with minimum capital requirements at various Member State levels, and other regulations regarding licenses, it remains quite a challenge to imagine African and Pacific Small and Medium size enterprises, (SMEs) accessing the EU market in any way remotely comparable to Europe.

59. It is also provided that it is not enough to simply have a registered place of office but also to engage in substantive business operations and the test here is effective and continuous link with the economy (being equivalent to substantive business operations provided in Article V paragraph 6 of the GATS). There are limited flexibilities for shipping companies established outside the EC or Cariforum states and controlled by nationals of a member state if either party or their vessels are registered in accordance with their respective legislation and carry the flag of either Member.

C. The role of Mutual recognition Agreements

60. Many times the difference between who is considered eligible as a natural person supplying a service and who is not is the person's qualifications. Whether these are considered equivalent is key. MRAs are therefore a very important tool in enhancing the utility of market access and national treatment commitments. The EU-Cariforum EPA has not tackled this leaving its consideration for the future and pending decisions for the

launching of negotiations in this area. Other ACP countries may want to insist on this issue being addressed in a more direct manner, in case they entertain services negotiations with the European Union. The chart below, we look at the multi-step process that the Carifoum EPA foresees before even negotiating the MRA.

The various steps to MRAs

- Parties will encourage relevant professional bodies to jointly develop and provide recommendations on MR to the joint committee
- Purpose is the fulfilment of the criteria applied by each party for the authorization, licensing, operation and certification of investors and service suppliers especially in professional services. (Art.85.2).
- Parties are to encourage the relevant professional bodies in their jurisdiction to start negotiations no later than 3 years after the coming into force of the Agreement
- Purpose is to jointly develop and provide such recommendations on mutual recognition, among others, in accounting, architecture, engineering and tourism etc. (Art.85.3).
- On receipt of such recommendations, the joint committee is to review them within a specific period
- Purpose is to determine their consistency with the EPA.
- If it is consistent, **and** there is sufficient level of correspondence between the relevant regulations of the parties,
- Parties shall, with a view to implement the recommendations, negotiate through their competent authorities an agreement on mutual recognition of requirements, qualifications, licenses and other regulations.
- Such negotiations will take into account the relevant GATS provisions in Article VII.

61. What comes out clearly is that while the market access and national treatment are committed, recognition issues, which in many ways are market entry pre-requisites, are not dealt with satisfactorily. MRAs and their future in the EPA are subject to a series of uncertainties and an important test of consistency and sufficient level of correspondence, before even commencing negotiations. That notwithstanding, there is merit in doing the preparatory work in the sectors of interest to the Cariforum and for other countries that will negotiate services with the EU so as to build inroads into a timely possibility of launching negotiations on mutual recognition so as to enhance the commitments, in case addressing the issue in a more direct manner in the agreement itself would not be possible.

62. That aside, the GATS provides that other Members should be notified of the plan to negotiate an MRA with sufficient possibility for others interested to join. What is clear is that once others joined, it would become very complicated and the results thereof can not be expected any time soon.

D. The right to regulate in the public interest

63. A novelty in this trade agreement is to go into detail as to how parties can regulate their services. In the GATS, the approach taken so far is one of avoiding deep regulatory disciplines with emphasis on a Member' right to regulate instead. Indeed, it is anticipated that the new disciplines being developed in the Working Party on Domestic Regulation (WPDR) will be couched in best endeavour language and be of a general nature. The EPA Cariforum text on the other hand, includes sector specific regulation in the areas of computer and related services, telecommunications, courier services, financial services, international maritime transport services, and tourism. The language referred to in the EPA is that parties *subscribe* to the Understandings, but is also clear that these are obligations that countries will have to follow when they make market access and national treatment commitments. It is therefore acceptance to regulate *only in a specific way* clearly foregoing the option to maintain any other regulation that may not be in conformity with the standards in the Agreement.

E. Universal service and access

64. Many governments in developing countries face a major challenge in meeting their obligations of universal access to basic services. The important question is whether the EPA enhances countries' ability for meeting this obligation either through making it easier for governments to finance the provision of services (due to increased government revenue through taxes, licences, etc) or through conditions attached to market access concessions made in the context of the trade agreement.

65. In the Cariforum EPA, provisions on universal service obligations will not be considered as 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 the kind of universal service defined. (See Art. 91 of Title II of the EPA).

66. An important question here is what sort of meaningful universal service obligations can pass the test of non-discrimination? Take the health

sector, some of the issues thought for balancing mode 4 with universal access to basic health services obligations are requiring foreigners to do certain things that domestic firms will not be required to.²¹ At the same time, taking into account the limited capital of local providers, it would be unrealistic for governments to impose greater burdens on local services suppliers. What the EPA has done is to provide market access certainty to European service suppliers in the Cariforum countries, and soon Africa and Pacific markets to come, without certainty regarding concomitant obligations on universal access. In such a case, regulatory standards, and liberalization as such, are given more importance than universal access obligations.

67. In the case of telecommunications, for instance, if a universal service obligation imposes an unfair burden on the organization designated to provide it, national regulatory authorities may then decide whether a mechanism is required to compensate suppliers or to share the cost. This is amidst a situation where for the EU curve itself protection from compensation in the cases where owing to market access and national treatment commitments, the Cariforum companies are facing disadvantages. The EU companies will not be required to pay compensation. In practice, the limitations on universal service in the EPAs put to test not only a government's right to regulate, but also the policy objectives it seeks to pursue.

68. It must be accepted that some areas are more challenging than others. Many developing countries have some experience with the reference paper on basic telecommunications in the framework of the GATS, but the level of understanding and preparedness across developing countries is not the same. Capacity in other areas remains weak. It is for this reason that developing countries have been fighting against strong disciplines in domestic regulation in the GATS. Taking on such regulatory standards as part of the EPA negotiations strategically weakens the leverage these countries may have in the multilateral negotiating process. Another issue of concern is the absence of an inbuilt process to assist in the development of a credible mechanism to support the development of regulatory capacity at the sector specific level, in country.

VI. TOWARDS A DEVELOPMENT ORIENTED STRATEGY IN THE EPAS

69. As we have seen at the introduction of this paper, the real challenges of EPAs in developing countries, specifically in Africa and Pacific which are net importers of services is the overwhelming inability to meet local demand for services. The situation of greater concern in the area of

²¹ See Kategekwa, Joy (2008) Liberalization of Trade in Health Services: Balancing Mode 4 Interests with Obligations to provide universal access to basic services, Research Papers 16, South Centre, Geneva.

essential and welfare enhancing services such as health, education, water, sanitation, and others.

70. The key question is whether the EPA as proposed by the EU fosters steps in meeting these challenges?
71. It does not appear that the EPAs will assist the poorest ACP countries in dealing with inefficient services. What the Agreement does is to open up markets for larger and better equipped European companies to reap the benefits of opened markets, while limiting the space for regulation and putting meaningful conditions on these foreign owned companies by local governments. The Agreement has also locked in status quo in the sense that the EU is not willing to give to ACP countries anything beyond what it is contemplating to give in the GATS offer meaning that these countries are not getting anything more than what they will naturally assess once the EU locks in its GATS offer.
72. As such, there is no credible reason why Africa and the Pacific should sign a services Agreement with the EU-understanding furthermore, that the agreement encompasses policy areas beyond services such as investment, competition, e-commerce, etc.
73. It remains the role of governments to guarantee universal access to the population of essential and welfare enhancing services as well as infrastructure related services which provide the platform for the thriving of commercial activity. Governments do not need to be the sole direct provider of services; it works in partnerships with the private sector with the latter many at times, taking lead in the provision of these services. But the private sector must contribute to the government's efforts in meeting universal access obligations and development objectives. It should not just be an open door for companies to reap profits. When foreign presence is part of private sector, governments should be free to attach conditions on market access, national treatment and other requirements to their participation so as to attain its development objectives. A trade Agreement which allows a government to schedule meaningful limitations can be a way to achieve this. The EPA as proposed may limit the scope of governments to do this.
74. What is needed therefore is thought as to alternatives. A lot has been written about the possibility of development cooperation in the areas of services and all the other new issues. Here, the EU can take its role as a leader in international development and provide targeted and effective technical assistance and support for capacity building to develop capacity not only for the supply of services for the domestic market where they are needed most, but also to regulate these. In the areas where developing countries already have export capacity such as in tourism, it may be

useful to assist them in meeting challenges that limit the sector's productivity such as feeder roads, hotels, access to reservation systems, or even open up the EU own market to allow these companies to set up small tour operator outfits in Europe so as to get more of the benefit from the higher value chain in the sector.

VII. CONCLUSION

75. The Africa and Pacific countries (those who are WTO members) have been seeking flexibilities in services negotiations at the WTO not only in market access but national treatment and domestic regulation. The Cariforum EPA has in-built a high level of ambition in all these areas whose implications are not as yet very clear. Still, given the specific conditions of the Caribbean countries as net exporters of services, the region positioned itself as an offensive player in the context of the EPA negotiation with Europe. The Africa and Pacific countries need to consider whether a similar approach is coherent with their own circumstances, or whether a more cautious approach such as the one articulated so far at the WTO is preferable. In particular, countries should not risk losing at the regional level flexibilities earned at the multilateral forum. Instead, policy space to pursue their development objectives should be guarded. Cooperation and not binding trade rules may be more appropriate in the context of the EPAs.
76. Furthermore, Africa and Pacific countries should also keep in mind that the Cariforum EPA has a built-in agenda for further liberalisation thus commitments that may be made for the reciprocal liberalisation of the sector with the EU constitute the starting point, not the end of the envisaged commitments. Indeed, the Cariforum EPA foresees further commitments on investment and trade in services by the parties achieved through new negotiations to take place no later than five years from date of entry into force of the Agreement. In the case of investments, it is agreed that with a view to progressive liberalization of investments the parties will 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 3 years after the entry into force of this chapter and at regular intervals thereafter.
77. African and Pacific countries do not have the same economic context as the Caribbean. Their biggest challenge is provision of efficient and high quality services at the domestic level. These countries should be left to pursue this objective as a priority.
78. The EU can nevertheless, play a significant role in assisting these countries build and develop regulatory capacity in various sectors and

sub sectors. To this extent, technical assistance and support for capacity building including through financial resources should be made available to these countries to assist in the design, development, strengthening and sustainable performance of regulatory institutions in these countries.

79. African and Pacific countries do not need to negotiate services trade agreements with the EU. The issue with WTO compatibility never related to services. In their current context, priority should be given to building the domestic capacity to provide services and putting in place the regulatory framework and institutions that will ensure the countries is able to achieve its development objectives, including creating and enhancing export capacity in services and meeting universal service obligations. The EU should focus its efforts on services, in assisting this process.

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READERSHIP SURVEY QUESTIONNAIRE
South Centre Analytical Note

The EU- CARIFORUM EPA on Services Investments and
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