Liberalising Investment in the CARIFORUM-EU Economic Partnership Agreement: EU Priorities, Regional Agendas and Developmental Hegemony

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A. Introduction

In October 2008, the first economic partnership agreement (EPA) was signed between the European Union (EU) and its member states, and the states of the CARIFORUM region.[1] The ongoing negotiations and, in certain instances, signature of interim economic partnership agreements[2] between the EU and its member states, on the one hand, and the African, Caribbean and Pacific (ACP) groupings of States, on the other, signals an important – it might even be said seismic – shift in EU-ACP relations.[3] The CARIFORUM states are part of the ACP grouping, which comprises of 79 states in total and includes some of the poorest developing countries around the world.[4] In many

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[1] *Economic Partnership Agreement between the CARIFORUM States of the one part, and the European Community and its Member States, of the other part,* 15 October 2008, [2008] O.J. L289/I/3 [CARIFORUM-EU EPA].

[2] For updates on the status of all current negotiations, see EC, *Regional Negotiations of Economic Partnership Agreements*, online: EC <http://ec.europa.eu/trade/issues/bilateral/regions/acp/regneg_en.htm>.

[3] Development policy and agreements with third states are conducted on the basis of the competence of the European Community, one of the three "pillars" of the European Union. Similarly, membership of the WTO is of the European Communities. References to the European Economic Community (EEC) and the European Community (EC) in this chapter are retained for the pre-1992 period.

[4] The ACP grouping of states is comprised as follows. As regards Africa, these are states, geographically speaking, found in sub-Saharan Africa (but not North Africa) and surrounding island states (for example, Cape Verde, Mauritius, Madagascar and the Seychelles). Somalia is considered to be one of the least developed ACP states, though it has not signed the Cotonou Agreement. South Africa is an ACP participant but has a separate EU cooperation agreement. In the Caribbean, all independent island states are included (except Cuba, which was admitted to the ACP group in 2000 but which has not signed the Cotonou Agreement) and the non-island states of Belize, Suriname and Guyana. The Pacific states are comprised of 15 mainly island states/archipelagos, the largest in size being Papua New Guinea. Developing countries elsewhere in Asia and the Asia-Pacific region are not part of ACP. For up-to-date

ways, the legal and political ties that have developed between the EU and ACP over the last fifty years are an excellent example of the paradox that lies at the heart of North-South relations, more generally. Though the EU-ACP relationship is often promoted – principally by the EU – as a model of mutual and benign cooperation between developed and developing countries, in reality the relationship has been much more fractious.[5] In particular, whereas the EU has sought to utilise its links with ACP States as one of the cornerstones of its external relations policy and, more specifically, to establish its own particular development assistance model, the ACP states continue to struggle to achieve true equality of bargaining position within the relationship, so as to maximise their own political, governance and sustainable economic development outcomes. Provisions on investment have in recent years come to the forefront and represent, in many ways, the new frontiers of the economic relationship between the EU and the ACP grouping.

This chapter analyses the synergies and tensions within the EU-ACP partnership within the context of one specific aspect of the CARIFORUM-EU EPA, namely its provisions on investment liberalisation. As is well understood, international rules on foreign direct investment have proved one of the most complex and contested issues within international economic relations, spanning back over a number of decades. Attempts to create multilateral agreements on investment have failed.[6] And though the general

information on the ACP grouping, see Secretariat of the African, Caribbean and Pacific Group of States, online: <http://www.acpsec.org/index.htm>.

[5] K. Arts & A. Dickson, "EU Development Cooperation: From Model to Symbol?" in K. Arts & A. Dickson, eds., *EU Development Cooperation: From Model to Symbol* (Manchester: Manchester University Press, 2004) at 3: "development cooperation policy in relation to the ACP has become a symbolic gesture from the EU, primarily useful to demonstrate its breadth of commitment to, and relationship with, the South."

[6] T. Eilmansberger, "Bilateral Investment Treaties and EU Law" (2009) 46 Common Market L. Rev. 383.

approach towards such investment has changed dramatically since the 1980s,[7] this chapter will show that significant divergences in approach remain. Even within a region such as the Caribbean where foreign direct investment is, on the whole, actively encouraged, a rule-based system of investment liberalisation is not without its challenges. The chapter will begin, however, by seeking to place such treaty activity in context, first through an analysis of EU-ACP relations and second, through a general discussion of the EPA negotiation process.

B. EU-ACP Relations: The Context

The EU's relationships with states in Africa, the Caribbean and the Pacific are an inherent part of the external dimension of the European integration process. At the time of the signature of the Treaty of Rome in 1957, some of the then six member states of the EEC,[8] principally Belgium and France, were yet to embark on a comprehensive decolonisation programme. Pre-independence territories in Africa and elsewhere were accorded the status of "associated territories" in the EEC Treaty with preferential access to the markets of other EEC member states.[9] Member states were obliged to apply the same rules to commercial exchanges with the associated territories as to other member states.[10] The EEC Treaty also laid down the requirement for member states to "contribute to the investments required by the progressive development of these countries and territories".[11]

[7] A. Lowenfeld, *International Economic Law*, 2d ed (Oxford: Oxford University Press, 2008) at 468.
[8] Namely, Belgium, France, Germany, Italy, Luxembourg and the Netherlands.
[9] Article 131-6 EEC (original text). The "countries and territories" concerned were listed in Annex IV to the original EEC Treaty. These covered much of West and Equatorial Africa (France and Belgium), settlements in Oceania and the Pacific (France), Netherlands New Guinea and Somaliland (under Italian administration).
[10] Article 132(2) EEC (original text).
[11] Article 132(3) EEC (original text).

Following the independence of most French and Belgian sub-Saharan African states in 1960, the 1963 Yaoundé Convention between the EEC, its member states and 19 newly independent states was signed. This association agreement, concluded for five years and renewed in 1969, continued the preferential and reciprocal trade access between the EEC and associated states. It also created the European Development Fund (EDF) as a supplementary source of finance,[12] and it established common institutions: an Association Council, Parliamentary Conference and Arbitration Court.[13] The Yaoundé Convention set the template for EU-ACP relations to this day. In 1974, following UK accession to the EEC and the expiry of the second Yaoundé Convention, the first Lomé Convention came into being, substantially enlarging the participating states to include former British colonies.[14] The ACP group was thus born, and the Lomé Convention was renewed on four successive occasions in 1979, 1984, 1990 and 1995. This demonstrated, on the one hand, the EU's general preference for a region-based approach to its external relations and, on the other, a bespoke European approach to North-South relations during the Cold War.[15]

The Lomé Conventions granting preferential trade relations on a non-reciprocal basis were designed to be more beneficial to the ACP states than the Generalised System of Preferences (GSP) which, alongside access to the EDF, was intended to promote a more-rounded development model within ACP states. Evidence suggests, however, that

[12] Yaoundé Convention, 20 July 1963, [1964] O.J. 93/1431, Articles 16-17.
[13] *Ibid*. at Articles 39-53.
[14] For these states, many of whom had been sceptical of the preferential system of preferences accorded through part IV of the EEC Treaty, had already negotiated bilateral agreements with the EEC in the late 1960s. See J. Mayall, "The Shadow of Empire: the EU and the former Colonial World" in C. Hill & M. Smith, eds., *International Relations and the European Union* (Oxford: Oxford University Press, 2005) at 296.
[15] G. Edwards, "The Patterns of the EU's Global Activity" in Hill & Smith, *ibid*. at 44; S. Meunier & K. Nicolaïdis, "The European Union as a Trade Power" in Hill & Smith, *ibid*. at 264.

such mechanisms did little to increase actual trade between the EU and the ACP states.[16] Additional incentives to help stabilise rapidly falling prices in agricultural and mineral commodities (STABEX and MINEX) were created in 1979 and 1984 respectively.[17] The existence of these helped to reaffirm the preferential nature of the EU-ACP economic relationship, and though not in the spirit of multilateralism of the GATT, fulfilled a political purpose for the EU (and, in turn, the US) in dissuading the ACP states from pursuing closer ties with the Soviet Union.

It was only in the post-Cold War global context that the content of the EU-ACP agreements began to diversify. Against the background of the creation of the European Union in the 1992 Treaty of Maastricht, which included provisions on foreign policy so as to improve the EU's presence on the world stage, the content of the final Lomé Convention[18] (1995) and Cotonou Agreement[19] (2000) was adapted to include provisions on human rights. This was linked to the EU's promotion of itself internationally as the "friend" of the developing world with whom it shares solidarity[20] whilst affirming a strong commitment to the protection of human rights and an apparent willingness to tie the incentives and advantages given to its partners more closely to their domestic politics.[21] In the case that one of the parties fails to fulfil an obligation

[16] Mayall, *supra* note 14 at 307.
[17] *Ibid*. at 306.
[18] *Revised Fourth Lomé Convention*, 4 November 1995, [1998] O.J. L156/3.
[19] *Partnership Agreement between the Members of the African, Caribbean and Pacific Group of States of the one part, and the European Community and its Member States, of the other part,* 23 June 2000, [2000] O.J. L317/3 [Cotonou Agreement]
[20] See EC, *European Consensus on Development – Joint statement by the Council and the representatives of the governments of the Member States meeting within the Council, the European Parliament and the Commission on European Union Development Policy: 'The European Consensus'*, 24 February 2006, [2006] O.J. C 46/01, online: EC <http://ec.europa.eu/development/icenter/repository/european_consensus_2005_en.pdf> at para. 55.
[21] Cotonou Agreement Articles 9 (political dialogue) and 96 (consultation procedure on human rights). See also K. Arts, "ACP-EU Relations in a New Era: The Cotonou Agreement" (2003) 40 Common Market L. Rev. 95.

relating to the respect for human rights, democratic principles or the rule of law, a consultation procedure can be initiated, followed by "appropriate measures" to be taken if necessary. Suspension of the agreement can occur as a last resort.[22]

Yet, the lack of definition of the human rights and good governance agenda – often referring to the need for "transparency", "inclusiveness" and a "process approach" within the strategy papers applying to each country – point to the dominant position of the EU in setting the agenda in such negotiations.[23] This approach of including non-trade issues in agreements, whilst suiting the EU's internal decision-making processes, has been criticised on differing grounds by both proponents of liberal trade economics and developing countries as an over-burdensome obstacle to progress in liberalising trade.[24]

Elsewhere, the EU's 2006 Consensus on Development contains commitments to promoting "effective multilateralism" and "common values of … respect for human rights, fundamental freedoms, peace [and]democracy."[25] Furthermore, there is a strong belief that "[d]eveloping countries have the primary responsibility for creating an enabling domestic environment for mobilising their own resources, including conducting coherent and effective policies."[26] The synergy between the EU's view of how development aid should be used and the direction of the Lomé Convention and Cotonou Agreement thus becomes much clearer. It should also be noted that the ACP

[22] Article 96. A similar provision, Article 97, covers consultation in instances of alleged corruption.
[23] P. Leino, "The Journey Towards All that is Good and Beautiful: Human Rights and 'Common Values' as Guiding Principles of EU Foreign Relations Law" in M. Cremona & B. de Witte, eds., *EU Foreign Relations Law: Constitutional Fundamentals* (Oxford: Hart, 2008) at 278.
[24] S. Woolcock, "Trade Policy: From Uruguay to Doha and Beyond" in W. Wallace, H. Wallace & M. A. Pollack, eds., *Policy-Making in the European Union*, 5th ed (Oxford: Oxford University Press, 2005) at 396.
[25] *Supra* note 20 at para. 13.
[26] *Ibid*. at para. 14.

States are, comparatively speaking, far less significant in economic terms for the EU than was the case in 1975. Neither do they stand as the States which benefit the most from preferential agreements, having gradually been displaced by non-EU States in Europe and around the Mediterranean.[27] As such, some have stated that the ACP agreements no longer justify the almost exclusive focus accorded to them in studies of the EU's relations with the developing world.[28]

In any event, the need to reform the content of the EU-ACP agreement was prompted by the adverse decisions in GATT and the WTO during the 1990s which related to the disputes over the EU's banana imports.[29] The Cotonou Agreement therefore represented a significant break from the past, most notably in mandating that, because the preferential trade relations were incompatible with the same states' obligations under WTO rules,[30] they were to be replaced with EPAs premised upon reciprocity of

[27] Pre-enlargement states in Central and Eastern Europe concluded "Europe Agreements" which facilitated their eventual entry into the EU in 2004 and 2007. The EU has concluded bilateral Association Agreements with all the states who participate in the Euro-Mediterranean Partnership. These include North African states (Morocco, Algeria, Tunisia and Egypt), states in the Middle East (Lebanon, Jordan, Syria, Israel) and an interim agreement with the Palestinian Authority. Turkey is also a participant in EuroMed but has a separate agreement and customs union with the EU. It continues to pursue full membership negotiations.

[28] C. Stevens, "The EU-ACP Relationship after Lomé" in P. van Dijk &G. Faber, eds., *The External Economic Dimension of the European Union* (The Hague: Kluwer, 2000) at 223.

[29] GATT, *EEC – Import Regime for Bananas*, GATT Doc. DS38/R, [1994] ILM 177. This report was not adopted by the contracting parties (an essential procedure in pre-WTO GATT) but further challenges after the entry into force of the WTO Agreement by Latin American states (supported by the United States) led the EU to finally adopt a WTO-compatible regime in 2001: , *EC – Regime for the Importation, Sale and Distribution of Bananas – Notification of Mutually Agreed Solution* (2 July 2001), WTO Doc. WT/DS27/58; *EC – Regime for the Importation, Sale and Distribution of Bananas – Recourse to Arbitration by the EC under Article 22.6 of the DSU*, (9 April 1999), WTO Doc. WT/DS27/ARB; and *EC – Regime for the Importation, Sale and Distribution of Bananas – Recourse to Article 21.5 by Ecuador* (12 April 1999), WTO Doc. WT/DS27/RW/ECU. The relevant EU measure is Council Regulation 2587/2001 of 19 December 2001 amending Regulation (EEC) No 404/93 on the common organization of the market in bananas: [2001] O.J. L 345/13. For a comprehensive account of the challenges to the EU banana regime, see P. Eeckhout, *External Relations of the European Union* (Oxford: Oxford University Press, 2004) at 381-391.

[30] Article 36(1) Cotonou Agreement: "In view of the objectives and principles set out above, the Parties agree to conclude new World Trade Organisation (WTO) compatible trading arrangements, removing progressively barriers to trade between them and enhancing cooperation in all areas relevant to trade."

treatment. The original date foreseen for their replacement was 1 January 2008.[31] The EPAs are to be negotiated with the ACP states organised largely through six regional blocs: the Economic Community of West African States (ECOWAS), the *Communauté Economique et Monétaire de l'Afrique Centrale* (CEMAC), Eastern and Southern Africa (ESA), the Southern African Development Community (SADC), the Caribbean (CARIFORUM), and the Pacific group.

C. The Cotonou Agreement: "Trade or Development", "Trade and Development" or "Development through Trade"?

Given the long history of the EU-ACP partnership, the colonial/post-colonial context of relationships between the EU member states and ACP states and the continued and widening gap between rich and poor, characterising the Cotonou Agreement as primarily a tool for development suits the EU's projection of itself as the protector of the developing world against the forces of globalization. Yet, the EU and its member states remain at the forefront of the international trading system and were instrumental in the creation of the WTO. Given these potentially diverging forces, much can be garnered from understanding the emphasis of EU competence in the area. As with other areas of EU external relations policy, the internal division of competences in the EU institutions is telling. Under the original EEC Treaty, provisions on development fell within trade provisions and competence relating to what is now Article 133 on the common commercial policy. The Maastricht Treaty in 1992 created specific provisions on development, with Article 177 of the revised EC Treaty reading as follows:

[31] This was the first day after the end of the WTO waiver (Decision of 14 November 2001) which temporarily legitimised the EU-ACP preferential trade relationship.

> "1. Community policy in the sphere of development cooperation, which shall be complementary to the policies pursued by the member States, shall foster:
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> - the sustainable economic and social development of the developing countries, and more particularly the most disadvantaged among them,
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> - the smooth and gradual integration of the developing countries into the world economy,
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> - the campaign against poverty in the developing countries.
>
> 2. Community policy in this area shall contribute to the general objective of developing and consolidating democracy and the rule of law, and to that of respecting human rights and fundamental freedoms."

However, this is not the legal basis for the Cotonou Agreement, which is instead found in Article 310 EC, a general provision which states that "the Community may conclude with one or more States or international organisations agreements establishing an association involving reciprocal rights and obligations, common action and special procedure."[32] However, it is worth noting that the legal basis of the CARIFORUM-EU EPA is Article 133, the common commercial policy, which thus points to trade – and not necessarily development – as the principal basis of the EU competence for these new breed of partnership agreements.[33]

The EU has asserted that, notwithstanding the removal of trade preferences and, more generally, the move towards reciprocity, such EPAs would continue to incorporate a

[32] As per EC, *Council Decision 2003/159/EC of 19 December 2002 concerning the conclusion of the Partnership Agreement between the African Caribbean and Pacific Group of States, of the one part, and the European Community and its Member States, of the other part, signed in Cotonou on 23 June 2000*, [2000] O.J. L 65/27.
[33] EC, *Council Decision 2008/805/EC of 15 July 2008 on the signature and provisional application of the Economic Partnership Agreement between the CARIFORUM States, of the one part, and the European Community and its Member States, of the other part*, [2008] O.J. L 289/I/1.

significant developmental focus. As the Cotonou Agreement stated, "[n]egotiations shall take account of the level of development and the socio-economic impact of trade measures on ACP countries, and their capacity to adapt and adjust their economies to the liberalisation process."[34] This flexibility is to be achieved in numerous ways, though the principal device is the entrenchment of "asymmetrical reciprocity" within the legal texts. In other words, though EPAs are to be premised upon ACP states opening up their markets to the EU, this will be done more gradually and more slowly than the EU will open its own markets to ACP states. Whether such asymmetrical reciprocity is compatible with WTO rules, specifically Article XXIV GATT on regional trade agreements (RTAs), remains uncertain. The Cotonou Agreement itself recognises that the EU and ACP Parties will have to collaborate in the WTO "with a view to defending the arrangements reached, in particular with regard to the degree of flexibility available."[35] This is hardly a cast-iron guarantee of WTO-compatibility, though any challenge will depend on the likelihood of a WTO member indirectly engaging the legality of the EPA during a dispute brought before the WTO's dispute settlement mechanisms[36] or, much more likely, seeking to question the EPA during discussions in the Committee on Regional Trade Agreements.

Moreover, the issue of WTO compatibility is just one amongst a broad array of questions that have arisen around the negotiation and conclusion of EPAs. Of particular note is the rather one-sided and heavy-handed way in which the European Commission is alleged to have conducted the negotiations. The EU's commitment to completing

[34] Article 37(7) Cotonou Agreement.
[35] Article 37(8) Cotonou Agreement.
[36] Moreover, as Eeckhout notes, the WTO banana dispute (and in particular the US support for Latin American countries) was motivated as much by the private interests of US-based banana producers as the states concerned: Eeckhout, *supra* note 29 at 388.

EPAs within such a short timeframe, and the inclusion of a wider range of issues than just trade, has been criticised both by commentators and many ACP states themselves. As a 2005 British Parliamentary report on EPA negotiations commented, "The relationship between the EU and the ACP has never been an equal one. This has not changed in the negotiations for the Economic Partnership Agreements."[37] The ACP Council of Ministers put it more forcefully in 2007 when it noted that "Ministers deplore the enormous pressure that has been brought to bear on the ACP States by the European Commission to initial the interim trade arrangements, contrary to the spirit of the ACP-EU partnership,"[38] and further that "Ministers observed that European Union's mercantilist interests have taken precedence over the ACP's developmental and regional integration interests."[39] Similarly, the ACP-EU Joint Parliamentary Assembly in April 2009 noted that only the CARIFORUM grouping had signed an EPA but that the European Commission was pushing ahead, without a full opportunity for the ACP states to discuss "contentious clauses".[40] The Assembly resolution stated that "neither the conclusion nor the renunciation of an EPA should lead to a situation where an ACP country may find itself in a less favourable position that it was under the trade provisions of the Cotonou Agreement."[41]

This point is symptomatic of an over-arching question as to the relationship between the trade liberalisation model proposed by the EU for the EPAs and ACP development. Even if one accepts that greater integration into the global economy is a key aspect in

[37] UK House of Commons, International Development Committee, *Fair Trade? The European Union's Trade Agreements with African, Caribbean and Pacific Countries*' (HC 68, 6 April 2005) at para. 6.
[38] Declaration of the ACP Council of Ministers at its 86th Session Expressing Serious Concern of the Status of the Negotiations of the Economic Partnership Agreements (ACP/25/013/07, 13 December 2007).
[39] *Ibid*.
[40] ACP-EU Joint Parliamentary Assembly, Resolution on Economic Partnerships (EPAs) and their impact on ACP states, 6-9 April 2009 (ACP-EU/100.463/A/p9/FIN) at para. J.
[41] *Ibid*., Article 3(a).

promoting development (a premise which is not without criticism),[42] it is likely that the benefits of opening up developing country markets are rarely automatic but dependent upon endogenous capacity-building, developmental assistance (particularly in areas such as infrastructure and other supply-side constraints) and flexibility in implementation. In addition, it must be remembered that liberalisation results in reduction in much-needed governmental revenue through the imposition of import tariffs, something which developing countries will need help to adjust to over both the short- and medium-term.[43] Moreover, one can point to the rather blunt nature of asymmetrical reciprocity; longer run-in times and variable geometry in the scope of binding commitments will not necessarily, in themselves, be sufficient to accommodation the special concerns and considerations of developing countries. While the EU would seem to recognise the importance of such matters (such as endorsing an aid-for-trade financial package),[44] its preferred method is to consider these issues "off table" and certainly, as far as possible, not within the text of the EPAs themselves. The concern is that the economically and politically weaker ACP states have little choice but to accept this negotiating stance. This point is particularly acute considering the lack of financial and technical support specified in the EPA. A study by the European Parliament reported in March 2009 that:

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[42] See generally J. Stiglitz, *Making Globalization Work* (London: WW Norton & Co, 2007).

[43] See generally PriceWaterhouseCoopers, *Sustainability Impact Assessment of the EU-ACP Economic Partnership Agreements* (May 2007), online: SIA-ACP <http://www.sia-acp.org/acp/download/20070516-Rapport-SIA-EU-ACP-UK.pdf>; CEPII, *An Impact Study of the EU-ACP Economic Partnership Agreements in the Six ACP Regions* (January 2008), online: <http://www.cepii.fr/anglaisgraph/workpap/summaries/2008/wp08-04.htm>; and South Centre, *EPAs and Development Assistance: Rebalancing Rights and Obligations* (September 2008), online: <http://www.southcentre.org/index.php?option=com_content&task=view&id=902>.

[44] See EC, *Communication from the Commission to the Council and the European Parliament: Economic Partnership Agreements* (COM (2007) 635 final, 23 October 2007) at para. 5: "Full EPAs will allow EDF funding to be directed towards the range of adjustment needs arising from commitments taken by ACP countries and will help establish priorities for additional funding from Member States."

> "Although EU donors have made commitments that appear to be adequate there is no guarantee that they will be applied in an appropriate and timely way – and there is complete uncertainty over the funds for EPA support that will be committed by the European Commission and EU member States beyond 2013."[45]

Of particular controversy is the extent to which EPAs should include rules on the so-called "Singapore issues", namely foreign direct investment, competition, government procurement and trade facilitation. Developing countries have successfully removed these issues (apart from trade facilitation) from negotiation at the global trade level within the Doha Development Round.[46] The EU has been keen to ensure that these topics are negotiated within the context of EPAs. Most ACP states, however, have been singularly more reticent and defensive about their inclusion.[47] They point to the fact that the Cotonou Agreement, whilst mentioning these issues, does not require the explicit adoption of a comprehensive rule-based framework within EPAs. The wording of the Cotonou Agreement simply requires that "general principles on protection and promotion of investments" be "introduce[d]" within EPAs.[48] In fact, if the underlying purpose of EPAs is primarily to ensure compatibility with WTO *trade* commitments, then clearly such negotiations are additional to the core requirements.

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[45] European Parliament, Directorate-General for External Policies, *The CARIFORUM-EU Economic Partnership Agreement (EPA): the Development Component (Study)* (2009) EXPO/B/DEVE/2008/60 at 10.

[46] Though included in the initial 2001 Doha Declaration, due to the absence of consensus within the WTO membership, these issues were jettisoned in the so-called July 2004 package.

[47] See S. Woolcock, *Government Procurement Provisions in CARIFORUM EPA and Lessons for Other ACP States* (London: LSE, 2008) online: <http://www.lse.ac.uk/collections/internationalTradePolicyUnit/documents.htm>.

[48] Article 78(3) Cotonou Agreement.

More fundamentally, many ACP states are concerned that the inclusion of Singapore issues within EPAs jeopardises their overall developmental focus. As one commentator noted in evidence to the British Parliamentary investigation, "what [ACP states] fear is that the EU will twist their arm to accept with the EPAs things they would never have to accept on a more level playing field."[49] Moreover, the ongoing negotiation and conclusion of interim EPAs with a number of regional groupings and individual states is entirely due to the fact that these ACP states have so far refused to agree rules on, amongst other things, the Singapore issues. Nevertheless, the incorporation of so-called *rendez-vous* provisions within these interim agreements, setting forth areas (such as investment liberalisation) to be included in the subsequent negotiations towards the conclusion of comprehensive EPAs,[50] against the general wishes of ACP negotiators, again indicates both the wariness of ACP states to negotiate on these issues as well as the unequal bargaining strength of the EU.

Of particular note is the ACP Investment Facility under the Cotonou Agreement, by which 2.2 billion euros were allocated for projects aimed at strengthening the private sector in ACP states between 2003 and 2008. At the outset, the institution responsible, the European Investment Bank (EIB), clearly saw the investment provisions in the ACP in terms of both trade and development:

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[49] *Supra* note 37 at para. 25 (evidence submitted by Dr Christopher Stevens, Research Fellow, Institute of Development Studies).

[50] European Centre for Development Policy Management, State of EPA Negotiations in January 2009: Briefing Note (Maastricht: ECDPM, 2009), online: FES<http://www.fes.de/cotonou/DocumentsEN/ThematicFocus/trade_finance_economy/StateofEPAnegotiations.pdf> at 1: "In parallel to the preparations for signature of the interim agreements, throughout 2008 negotiations towards comprehensive regional EPAs have been taking place in all regions, in line with the rendez-vous clauses contained in the interim deals. These clauses specify areas in which negotiations are to be held, in particular relating to trade in services and trade related issues, and in most cases set a deadline for concluding these by the end of 2008… However, at this point it seems very likely that work towards full EPAs may stretch into 2009 in all regions."

> "The significance of Cotonou is that it sees poverty reduction as dependent on economic growth, and economic growth dependent in turn on better governance and greater integration into the world market economy. Through our joint signing of Cotonou, we all recognize that the target has to be a fuller participation in the multilateral trading system to raise standards of living in the ACP, while minimizing the adverse affects and creating new opportunities for the most vulnerable. And all is so much dependent on development of the private sector."[51]

The debate over the inclusion of investment within the EPAs is therefore not unsurprising. If, as noted above, there is a general debate about how far and how quickly developing countries should be integrated into the global economy on a level of *reasonable* parity, differences in viewpoint become ever more intense when viewed from the perspective of the regulation and liberalisation of foreign direct investment. Investment provisions, along with those on services, vary greatly between the CARIFORUM states to the extent that the legal, procedural and administrative requirements have been termed as "bewildering".[52] Given that only one state in CARIFORUM, Haiti, has Least Developed Country status, it can be presumed that the complexity of differentiating between the even more diverse states within, for example, the ECOWAS or COMESA blocs will be even greater.

While, of course, other international economic issues demand scrutiny over a state's internal system, the extent to which a state should allow foreign investment into its

[51] P. Maystadt, *Launch of the EIB's Investment Facility According to the Cotonou Agreement* (Luxembourg: EIB, 2003), online: EIB <http://www.eib.org/attachments/general/events/sp_launch_cotonou_020603.pdf> at 3-4.
[52] European Parliament, *supra* note 45 at 11.

economy, and as importantly on what terms, is a highly sensitive topic. It raises many challenges to the notions of economic independence and economic sovereignty. Investment is never just a matter of extra capital being brought into a national economy. There is everything else that foreign investment entails: greater foreign interference in national economic matters, a culture of dependency on foreign capital, possible influx of foreign personnel, profits potentially flowing out of the country rather than being reinvested within it. These challenges become more acute when the foreign investment occurs in highly politicised areas of a national economy (such as infrastructure, power generation and some aspects of the service sector). From a developmental perspective, therefore, investment policy inevitably polarises an already strained debate. As one non-governmental organisation has clearly noted,

> "[t]he EU and ACP countries agree on the potential value of investment and of sound, well-functioning regulatory regimes for development. What is in dispute is the added value of a rules-based investment agreement between the regions. Many ACP states already have ongoing domestic reforms relating to their investment regimes. The added value of an ACP-EC agreement could only be the EC's belief that it would ensure implementation and 'locking in' of reforms – thus increasing attractiveness to EU investors – or that it would act as an additional impetus for this reform agenda."[53]

[53] M. Masiiwa *et al*., *EPAs and Investment* (Christian Aid, 2006), online: Christian Aid <http://www.christianaid.org.uk/Images/epas_and_investment.pdf> at 6.

The same report is however sceptical of such value: "[d]eveloping countries want to attract inward investment, and manage such investment through regulation to minimise costs and maximise benefits. The usefulness of binding international rules on investment for developing countries is controversial, as they tend to limit these policy choices and do little to attract new investment."[54] Thus, the remainder of this chapter focuses on the first (and, at the time of writing, the only) full EPA that has so far been signed – between the EU and the CARIFORUM states – and specifically on its rules on foreign direct investment.

D. The CARIFORUM-EU EPA: A Meeting of Minds?

Unlike many ACP states, the CARIFORUM states[55] were, as a whole, more willing to engage in comprehensive negotiations, in particular on investment and cross-border services.[56] To that extent, the very process of regional EPA negotiations has fragmented any semblance of ACP global policy coherence; those more cynical would note the EU's ability to strengthen its own position by undertaking disparate negotiations with

[54] *Ibid*. at 9.

[55] CARIFORUM covers members of the Caribbean Community (CARICOM) (Antigua and Barbuda, Bahamas, Barbados, Belize, Dominica, Grenada, Guyana, Haiti, Jamaica, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, Suriname and Trinidad and Tobago) and the Dominican Republic.

[56] *Cf*. Traidcraft, *First Economic Partnership Agreement (EPA) is Signed Amid Confusion* (Traidcraft, 2008), online: <http://www.traidcraft.co.uk/news_and_events/news/first_deal_signed.htm>: "The first EPA was signed between the EU and 13 Caribbean countries on 15th October 2008. The disarray surrounding the signing shows the extent of their unpopularity in the region and the pressure that the EU had to resort to in order to secure agreement. The signing was postponed several times after parliamentarians, leading academics and civil society organisations across the Caribbean voiced their concerns over the effects the deals would have on development. Of the 13 countries that finally signed the deal, several made it clear that they did so to prevent damaging tariffs which the EU was threatening to inflict on crucial exports such as bananas. Haiti did not sign at all and The Bahamas reportedly signed only part of the deal. The EU refused Guyana's request to sign a goods-only deal and tightened the screws by gearing up to impose taxes that could devastate their sugar industry. But Guyana held fast and did not sign yesterday, citing fundamental concerns about the deal's impact on development. It is likely Guyana will sign later this month. The EU's tactics – led by former Commissioner Mandelson - have severely damaged relationships with the Caribbean and have sent shockwaves through African and Pacific countries that are still negotiating."

different regional groupings.[57] Whilst the regional groupings are loosely based on pre-existing regional integration schemes, this does not necessarily help their bargaining position. In particular, the EPA is concluded with the Caribbean states acting collectively under the name of CARIFORUM, rather than as the Caribbean Community (CARICOM) as a regional bloc. It is unclear as to whether CARICOM (not a party in itself to the EPA and including only 14 of the 15 states covered by the EPA) can represent the states in their dealings with the European Commission. This potentially opens the door to CARIFORUM states competing with each other, causing regional disintegration rather than integration, thus undermining one of the stated aims of the EPA.[58]

As regards the provisions on investment in the CARIFORUM-EU EPA, it is important to note certain background factors that undoubtedly influenced the negotiations. First, as already noted, unlike many ACP states, there was a willingness amongst many of the CARIFORUM governments to negotiate on investment issues. In fact, as an analysis of the EPA notes, "CARIFORUM is by far the most service-centric partner of all those the EU is currently negotiating with."[59] More specifically, it seems that these states "were in fact highly comfortable in negotiating on investment issues and exploiting the potential 'signalling' properties of negotiating advances in this area."[60] This is perhaps

[57] South Centre, *supra* note 43 at para. 103: "The European Union's Commission must recognize that the problems that have arisen as a result of the negotiations – the internal splintering of ACP regions, the lack of ACP countries signing before the deadline, and the concerns continually brought up by ACP negotiators – as indications of the problematic issues inherent within the EPAs."
[58] H. Brewster, N. Girvan & V. Lewis, "Renegotiate the CARIFORUM EPA" (2008) 7:3 Trade Negotiation Insights, online: ICTSD <http://ictsd.net/i/news/10687>.
[59] P. Sauvé & N. Ward, *The EC-CARIFORUM Economic Partnership Agreement: Assessing the Outcome on Services and Investment* (Brussels: European Centre for International Political Economy, 2009), online: ECIPE <http://www.ecipe.org/publications/ecipe-working-papers/the-ec-cariform-economic-partnership-agreement-assessing-the-outcome-on-services-and-investment/PDF> at 14.
[60] *Ibid*. at 15. Later on (at 57), the same authors also note that "the perception that BITs provided more rights than obligations to investors led CARIFORUM countries to use the EPA to embed greater rights for host countries."

an overly generous assessment of the situation; certainly, a number of CARIFORUM states had (and continue to have) significant reservations over the entire EPA process.[61]

Second, and building upon the previous point, CARIFORUM states had in fact sought to take investment negotiations further to include not only matters of market access and liberalisation – the topics that were eventually to form the core of the final investment commitments – but also issues on investment protection and promotion. These topics are, however, largely beyond the current competence of the EU, as the application of its common commercial policy to investment is presently restricted. In fact, it will only be with the entry into force of the Treaty of Lisbon that specific mention of foreign direct investment will enter into EU treaty vocabulary.[62] Up to this point, investment negotiations have been undertaken under the guise of the international trade competence[63] and even then member state approval is required due to its "mixed" nature.[64]

Thus, it will be for any bilateral investment treaties (BITs) agreed between individual Caribbean and European states to continue to determine matters such as expropriation and compensation, and the possibility of recourse to international arbitration.[65] To that

[61] For instance, see Article 63 CARIFORUM-EU EPA, concerning the application of the investment and service provisions to the Bahamas and the Haiti.
[62] Eilmansberger, *supra* note 6 at 394; S. Woolcock, "The Potential Impact of the Lisbon Treaty on European Union External Trade Policy" (2008) 8 European Policy Analysis, online: Swedish Institute for European Policy Studies <http://www.lissabonfordraget.se/docs/the-potential-impact-of-the-lt-on-eu-external-trade-policy-epa_nr.8_2008.pdf>.
[63] Namely, Article 133 EC.
[64] Essentially, the "mixed" nature refers to the reliance on competences granted to the EU institutions and those retained by the member states. For a comprehensive analysis of how and why mixed agreements have arisen, see P. Koutrakos, *EU International Relations Law* (Oxford: Hart, 2006) at chapter 4.
[65] Footnote to Article 66 CARIFORUM-EU EPA. Moreover, as van Harten has noted, the lack of an investor-state dispute mechanism may not prevent the market access commitments from being used by European investors to trigger arbitration proceedings: "This exposes CARIFORUM states to major liabilities arising from the prospect of direct claims by investors and damages awards against the state. Such claims may arise in any sector with substantial foreign ownership and are particularly prevalent in

extent, existing BITs will remain extremely relevant to many aspects of foreign direct investment between these parties. Moreover, the EPA contains no minimum standard of treatment rules;[66] as will be noted below, the EPA's provisions on post-establishment regulatory conduct are both limited and potentially qualified in nature. The EPA's focus is investment liberalisation: through market access, national treatment, and the application of the most-favoured-nation (MFN) concept.

Third, as with trade obligations, investment and service commitments are asymmetrical in nature[67] (as set out in Annex IV to the EPA). In summarising the level of these commitments, the European Commission notes that "the EU opens up for investment to a much wider extent than Cariforum countries do towards the EU. Cariforum applies many more conditions and limitations to a more limited sectoral coverage."[68] And in relation to cross-border services, the Commission calculates that the EU "makes commitments in 94% of sectors while CARIFORUM does so, on average, in 75% of sectors."[69] As an aside, it should be noted that unlike the GATS, but like NAFTA, the investment rules cover both service and non-service economic activities (referred to as "commercial presence") in title II, chapter II; cross-border services are regulated separately (in title II, chapter III) though many of the basic precepts remain the same.

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the energy and resource sectors and in privatized sectors." G. van Harten, *Investment Provisions in Economic Partnership Agreements* (Toronto: York University, 2008), online: <http://osgoode.yorku.ca/osgmedia.nsf/0/D1A4A0AAD421D8E385257563006DDB98/$FILE/Investment%20provisions%20in%20EPAs.pdf>.

[66] For instance, rules on expropriation and fair and equitable treatment. On investment protection, see generally S. Subedi, *International Investment Law* (Oxford: Hart, 2008).

[67] The list of commitments made under the commercial presence chapter is set out in Annex IV to the CARIFORUM-EU EPA.

[68] EC, *CARIFORUM-EC EPA: Investment*, online: <http://trade.ec.europa.eu/doclib/docs/2008/october/tradoc_140979.pdf> at 1.

[69] EC, *CARIFORUM-EC EPA: Trade in Services*, online: <http://trade.ec.europa.eu/doclib/docs/2008/october/tradoc_140974.pdf> at 1.

Though it is not possible to discuss all the investment provisions of the EU-CARIFORUM EPA, certain aspects are clearly worth highlighting. First, the EPA does not adopt a comprehensive definition of investment, but rather is based upon the notion of "commercial presence",[70] which is either the "constitution, acquisition or maintenance of a juridical person"[71] (which itself requires the establishment or maintenance of "lasting economic links"[72]) or "the creation or maintenance of a branch or representative office … for the purpose of performing an economic activity"[73] (which itself is defined as having "the appearance of permanency").[74] Highly volatile share dealings – sometimes considered as foreign direct investment in certain contexts but which would be unlikely to support the host country's long-term development – would fall outside this definition.

Second, the contracting Parties agree to open up only those sectors listed in their schedules of commitments – and this after taking into account those sectors which are *ex ante* excluded.[75] Within those schedules, Parties may set out limitations and qualifications, both in relation to market access and the obligation of national treatment. Moreover, these qualifications may be not just those current non-conforming measures which states wish to retain but also where states wish to post a reservation as to the

[70] Article 65(a) CARIFORUM-EU EPA: "'commercial presence' means any type of business or professional establishment". The definition of "investor" is equally tied to the notion as an "investor" is "any natural or juridical person that performs an economic activity *through* setting up a commercial presence" (Article 65(b), emphasis added).
[71] Article 65(a)(i) CARIFORUM-EU EPA.
[72] Footnote to Article 65(a)(i) CARIFORUM-EU EPA: "When the juridical person has the status of a company limited by shares, there is a lasting economic link where the block of shares held enables the shareholder…to participate effectively in the management of the company or in its control. Long-term loans of a participating nature are loans for a period of more than five years which are made for the purpose of establishing or maintaining lasting economic links."
[73] Article 65(a)(ii) CARIFORUM-EU EPA.
[74] Article 65(f) CARIFORUM-EU EPA.
[75] Article 66 CARIFORUM-EU EPA. Exceptions include the "mining, manufacturing and processing of nuclear materials" and the "production of or trade in arms, munitions and war material."

possibility of enacting future non-conforming regulations. The view expressed in one recent review – that "[l]iberalisation will therefore principally be achieved through the binding of existing regulatory practice and the resulting limitations on future attempts to close the door further to foreign investors"[76] – is thus limited by speculative reservations as to future regulatory conduct that the schedules may include.

Thus, in those sectors where market access commitments are agreed, Parties commit themselves to a range of obligations, subject to whatever qualifications they have included.[77] These obligations are to "not maintain or adopt" (i) limitations on the number of commercial presences, (ii) limitations on the total value of transactions or assets, (iii) limitations on the total number of operations or on the total quantity of output, (iv) limitations on the participation of foreign capital, and (v) measures which restrict or require specific types of commercial presence.[78] As regards national treatment, subject to the scheduling of non-conforming measures, parties guarantee to each other "treatment no less favourable than that they accord to their own like commercial presences and investors."[79]

Third, and often viewed as one of the most controversial provisions, is the MFN obligation. Despite the controversy, the CARIFORUM-EU EPA highlights that it is possible to negotiate a highly asymmetrical commitment in this regard. In particular, while the EU commits to providing CARIFORUM states the same rights and privileges

[76] T. Westcott, "Investment Provisions and Commitments in the CARIFORUM-EU EPA" (2008) 7:9 Trade Negotiations Insights, online: ICTSD <http://ictsd.net/i/news/tni/32972>.
[77] Article 67(1) CARIFORUM-EU EPA: "[the respective states] shall accord to commercial presences and investors of the other Party a treatment no less favourable than that provided for in the specific commitments contained in Annex IV."
[78] Article 67(2) CARIFORUM-EU EPA.
[79] Article 68 CARIFORUM-EU EPA.

as it gives to any third country with which it negotiates a future economic integration agreement with improved terms,[80] the MFN obligations on CARIFORUM states is significantly less extensive. First, CARIFORUM states are not obliged to give the EU MFN status unless they negotiate a future economic integration agreement with a "major trading economy" (rather than simply with any third party).[81] Moreover, the grant of MFN to EU member states is not automatic but will be subject to "consultations" between the relevant EU and CARIFORUM parties.[82] Second, CARIFORUM states are not required to grant MFN status to EU member states where the increased liberalisation is the result of greater regional integration amongst the CARIFORUM states themselves.[83] In short, the asymmetry has led some to wonder whether the EPA "reduces the MFN commitment to almost zero."[84] Others, however, still remain concerned that the very existence of the inclusion of an MFN provision exacerbates the economic disparity between the parties still further.[85] Moreover, as it is possible that the larger developing country economies, such as Brazil, may fall within the definition of "major trading economy",[86] such an MFN provision might also undermine South-South liberalisation if the EU were able to take advantage of greater rights given to other countries in the region.[87]

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[80] Article 70(1)(a) CARIFORUM-EU EPA.
[81] Article 70(1)(b) CARIFORUM-EU EPA.
[82] Article 70(5) CARIFORUM-EU EPA: "The Parties may decide whether the concerned Signatory CARIFORUM State may deny the more favourable treatment contained in the economic integration agreement to the EC Party."
[83] Article 70(2) CARIFORUM-EU EPA.
[84] Westcott, *supra* note 76.
[85] M. Stichele, *ACP Regionalism: Thwarted by EPAs and Interim Agreements on Services and Investments* (SOMO, 2007), online: SOMO <http://somo.nl/publications-en/Publication_2530/view> at 2: "The EC's proposed definition of regional integration is extremely narrow. It limits the potential for ACP regions to derogate from 'most favoured nation' treatment *vis-à-vis* the EU – as proposed by the EC."
[86] Article 70(4) CARIFORUM-EU EPA.
[87] In fact, the issue will often have less to do with concerns within CARIFORUM states but with the other states in the region. See Sauvé & Ward, *supra* note 59 at 14-15: "Brazil, in particular, has expressed concern in the WTO in the WTO General Council that the insertion of such a provision into the CARIFORUM EPA and the interim EPAs may have the effect of discouraging countries from concluding [preferential trade agreements] with EPA partners. … Neither CARIFORUM nor EC officials appear to

Fourth, in what was clearly a "win" for CARIFORUM states, the EPA includes a singularly important provision on investor behaviour.[88] Though the EU had been prepared to consider general wording, perhaps of a more preambular kind, the final result was a legally binding provision. The provision is worth quoting extensively: "The EC Party and the Signatory CARIFORUM States shall cooperate and take, within their own respective territories, such measures as may be necessary, *inter alia*, through domestic legislation, to ensure that:" (a) investors "are forbidden from, and held liable for, offering, promising or giving any undue pecuniary or other advantage" for the purposes of bribing or corrupting public officials; (b) investors "act in accordance with [International Labour Organization] core labour standards"; (c) investors act in a way that does not "circumvent … international environmental or labour obligations"; and (d) investors "establish and maintain, where appropriate, local community liaison processes, especially in projects involving extensive natural resource-based activities."[89] As another review of the EPA notes, "[i]t bears noting that the above provisions were insisted into the EPA at the behest of CARIFORUM."[90] This is itself telling both as to the EU's own negotiating priorities and its regard for the values inherent within the Cotonou Agreement. It is unclear how far the EU will adopt legal measures to regulate *extra-territorially* the activities of its private investors in the CARIFORUM region.

find Brazil's arguments persuasive. CARIFORUM officials contend that major developing trading partners are unlikely to match the terms of the EPA."

[88] The inclusion of such a provision is still quite novel. However, see also Article 32 of Norway's Model Bilateral Investment Treaty: "The Parties agree to encourage investors to conduct their investment activities in compliance with the OECD Guidelines for Multinational Enterprises and to participate in the United Nations Global Compact."

[89] Article 72 CARIFORUM-EU EPA.

[90] Sauvé & Ward, *supra* note 59 at 15.

Moreover, some might go further and suggest the unwillingness of the EU proactively to seek such a substantive provision is an indictment of both the EU's commitment to sustainable development in its own legal framework,[91] as well as political statements to the same effect.[92] As a firmly embedded global value, sustainable development seeks the integration of economic, social and environmental considerations. One might therefore have reasonably expected any recently negotiated international text – especially that agreed between North and South – to be increasingly progressive in its content. The final version of the CARIFORM EPA is thus arguably a significant development, the future implementation of which should be studied closely. But equally significant is the reticence by which the EU was prepared to agree to such an integrated approach. Of course, the text of the treaty should be considered as a whole in this regard and it is unfortunately not the purpose of this chapter to undertake this.[93] However, on this single matter alone, the EU's approach to sustainable development *outside* its territory is perhaps rather troubling.

E. Conclusion

[91] See, for instance, Article 6 EC: "Environmental protection requirements must be integrated into the definition and implementation of the Community policies and activities referred to in Article 3, in particular with a view to promoting sustainable development".
[92] See EC, *Introduction to the CARIFORUM-EU EPA,* on-line: <http://trade.ec.europa.eu/doclib/docs/2008/october/tradoc_141029.pdf>: "Some of the key aspects of the development dimension [include] • Making sustainable development the overarching objective of the EPA…• Ensuring specific provisions address key sustainable development issues, such as eco-innovation, social issues and the environment;…• Guaranteeing each signatory the right to regulate economic activity on their territory, particularly as regards services, investment and measure".
[93] See Article 60 CARIFORUM-EU EPA: "The Parties and the Signatory CARIFORUM States, reaffirming their commitments under the WTO Agreement and with a view to facilitating the regional integration and sustainable development of the Signatory CARIFORUM States and their smooth and gradual integration in the world economy, hereby lay down the necessary arrangements for the progressive, reciprocal and asymmetric liberalisation of investment and trade in services and for cooperation on e-commerce".

So, in conclusion, how should one view the investment obligations in the CARIFORUM-EU EPA? If one is prepared to accept the argument that foreign direct investment – and more specifically, an approach that focuses upon investment liberalisation rather than simply the provision of legal certainty through the negotiation of investment protection provisions – can contribute positively to long-term development, is the CARIFORUM model one to be followed again, perhaps in the first instance in other regional EPAs?

Certainly, there are interesting elements, including (i) a circumscribed definition of investment, (ii) legitimising variable liberalisation between the parties (as permitted, *inter alia*, through asymmetrical binding of commitments and qualifications and divergences in the application of the MFN obligation), (iii) permitting parties to reserve future regulatory conduct in selected sectors, and (iv) regulating investor behaviour.

However, what must be remembered is that the CARIFORUM states were, if not unanimous on the scope of the EPA, generally willing to include investment within that scope. Moreover, CARIFORUM states have also benefited from an Aid for Trade (AfT) assistance package which, though outside the text of the EPA, is central to its effective

implementation.[94] Significant questions remain about the *positioning* of financing arrangements of the EPAs and what this tells us about EU priorities.[95]

Other states, certainly those which have less experience in the service sector and a different history towards foreign direct investment, are likely to be less willing to adopt such a rule-based liberalisation approach. Many developing countries are likely to want to endorse a much more cooperative framework, first building up local capacity and governance capability. If legal rules are to be negotiated, their principal focus should be upon development and technical assistance, as well as (if appropriate) much greater asymmetry in commitments and significant flexibility in implementation. In fact, investment liberalisation in an EPA may be simply premature if it has not yet been grounded at the regional or sub-regional level.[96] Nevertheless, for members of the ACP, other than the CARIFORUM states, the EU is adamant that investment liberalisation is

[94] C. Sinckler (Minister for Foreign Affairs, Foreign Trade and International Business in Barbados at the time of the signature of the EPA), "The Dawn of a New Wra: Caribbean Signs EPA with EU" (2008) 7:9 Trade Negotiations Insights, online: ICTSD<http://ictsd.net/i/news/tni/33013>: "The EU Aid for Trade (AfT) facility represents an important source of additional funding for the implementation of a CARIFORUM EPA. The EU AfT commitment envisages increasing trade related development support to 2 billion euros per year by 2010 with half of these resources being earmarked for EPA implementation in ACP regions. The CARIFORUM EPA text includes a declaration that the region will benefit from an equitable share of the 1 billion euros, which represents the commitments of EU member states (not including the Commission) for EPA implementation. But it must be pointed out that to date, the modalities governing access to the AfT resources of EU member states have not yet been properly elaborated despite the fact that these were to have been in place since the end of last year. Moreover, questions have been raised about the actual amount of net additional AfT resources, which will be available. I am optimistic these concerns will be immediately addressed. Failure to satisfactorily do so or to meet those commitments to their fullest extent will not only compromise the implementation of this agreement but permanently damage our future relations."

[95] South Centre, *supra* note 43 at para. 105: "In this sense, it is unfortunate that development cooperation provisions, both financial and non-financial, to support the implementation of the texts agreed to are barely developed, if not absent from the EPA legal text. The details of development cooperation instruments (e.g. Regional EPA Funds) remain to be negotiated at a later stage. Other instruments cited (e.g. EDF) are not linked in a binding manner to the costs of implementing or adjusting to interim agreements."

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[96] Much depends upon the EPA negotiations themselves. As Sauvé & Ward rightly note (*supra* note 59 at 56), "there is nothing automatic in securing such an outcome and it requires vigilance at the negotiating table. African countries must be clear about their development strategy, place themselves in a position to articulate such a strategy and allow it to inform the development thrust contained in an EPA's services and investment chapters." Though undoubtedly true, whether this sufficiently takes into account the disparity in bargaining position between the parties is to be questioned.

essential to ACP development. But just as the benefits to ACP states (and developing countries, generally) of liberalising foreign direct investment are rarely capable of being identified *a priori* as inherently positive, the success of the model for investment liberalisation being advocated is often similarly hard to predict.