RESEARCH PAPERS

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DEVELOPMENT AT CROSSROADS: THE ECONOMIC PARTNERSHIP AGREEMENT NEGOTIATIONS WITH EASTERN AND SOUTHERN AFRICAN COUNTRIES ON TRADE IN SERVICES

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ACRONYMS

ACP	African, Caribbean and Pacific
AGOA	African Growth and Opportunities Act
AU	African Union
CCIA	Common Investment Area
COMESA	Common Market for Eastern and Southern Africa
CET	Common External Tariff
CRTA	Committee on Regional Trade Agreements
CTD	Committee on Trade and Development
CTG	Committee on Trade in Goods
CTS	Council for Trade in Services
EAC	East African Community
ECOWAS	Economic Community of West African States
EPA	Economic Partnership Agreements
ESA	Eastern and Southern Africa
ESM	Emergency Safeguard Mechanism
EU	European Union
FDI	Foreign Direct Investment
FTA	Free Trade Agreement
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
GDP	Gross Domestic Product
IGAD	Inter-Governmental Authority on Development
IRCC	Inter-Regional Coordination Committee
LDC	Least Developed Countries
MFN	Most Favored Nation
MTS	Multilateral Trading System
NDTPF	National Development and Trade Policy Forum
NT	National Treatment
RTA	Regional Trade Agreements
SAPs	Structural Adjustment Programmes
TDCA	Trade and Development Cooperation Agreement

EXECUTIVE SUMMARY

The relationship between African, Caribbean and Pacific (ACP) countries and the European Union (EU) is undergoing an overhaul. ACP countries are engaged in trade liberalization negotiations, based on reciprocity, to agree Economic Partnership Agreements (EPAs) with the EU. The introduction of reciprocity into a previously preferential arrangement between these groups of countries poses critical challenges for the development prospects of ACP countries. Owing to weak production and export capacities, the ACP countries are not at the stage where they can compete on equal footing with the EU in trade in goods and services. By signing a reciprocal trade Agreement with the EU, the ACP countries will be singling out the EU for more favourable treatment than is available to other WTO members, but they will not benefit from market openings in the EU in ways remotely comparable to the benefits to be enjoyed by the EU.

The EU is faced with great pressure from other WTO members to correct what they view as illegal and discriminatory preferential treatment to the ACP countries under the Enabling clause. In signing EPAs, the EU will have solved the questions of WTO incompatibility of certain aspects of the Lomé Conventions, which are the legal basis for the preferences it currently grants to the ACP group of states. However, aside from resolving this legal technicality, EPAs will not represent any significant development prospects for ACP countries, either in the short or long term.

This paper examines the dynamics of services trade in Regional Trade Agreements (RTAs) within the context of the EU-ACP EPA negotiations currently under way, assessing what is at stake for the Eastern and Southern African (ESA) group of countries involved in this negotiation. The paper makes the argument that while the EPAs have as a stated aim to ensure the development of ACP countries, the potential outcome will not be development oriented. The paper analyses multilateral rules and negotiations on trade in services as contained in the World Trade Organisations's (WTO) General Agreement on Trade in Services (GATS), and its interface with the ESA-EPA negotiations. It analyses the RTA perspective, assessing the state of play in EU-ACP EPA negotiations and exploring the development impact on ESA countries. Affirming the notion that the process will serve to enhance EU development rather than that of ESA countries, the paper makes the case that the real priorities for ESA countries lie in the development of overall and sector specific national policies on services, the development of capacity for the supply of services mainly at the domestic level, so as to meet universal access to basic services obligations, and the development of effective regulatory capacity in services so as to ensure a balance between commercial interests and other national development oriented plans.

In terms of integration and liberalization priorities, the paper argues for a choice of sequencing that prefers intra-regional liberalization prior to inter-regional liberalization as envisaged in the EPA process. Such a choice would allow the concerned ESA countries to develop capacity, both of supply and regulation domestically and within their various regional groupings such as the East African Community, COMESA, and others, and then at a point in the future, when these have been developed, for ESA countries to consider free trade areas with the EU. It is certain that liberalization of trade in services through the EPAs at this stage would only work to the commercial benefit of entities in Europe that are already far ahead in world-wide competitiveness in trade in services.

The paper makes the case that a development-oriented, and somewhat compromise solution to this issue would be to reduce the level of ambition from a trade Agreement to a *development and co-operation* Agreement through which the EU can channel targeted technical, and financial assistance to assist ESA countries in developing the necessary capacity in the services sector.

I. INTRODUCTION

In simple terms, Regional Trade Agreements (RTAs) are intergovernmental Agreements that manage and promote trade activities in specific regions of the world, aimed at reducing or eliminating tariff and non-tariff barriers to trade between members[1]. RTAs may solely address trade integration, or may be part of a wider Regional Integration Agreement (RIA), which encompasses governance and political issues. In Africa, RIAs are the most common form of integration and major examples in the region include the Common Market for Eastern and Southern Africa (COMESA), African Union (AU), Southern African Development Cooperation (SADC), and the East African Community (EAC). The rules concerning Economic Integration Agreements, which are embodied more specifically in the World Trade Organization's (WTO) General Agreement on Trade in Services (GATS) refer to agreements aimed at enhancing trade in services through, for example, providing for the elimination of existing discriminatory measures, and/or prohibition of new or more discriminatory measures. [2]

In the past, most RTAs only covered trade in goods. However, in recent times, services chapters are taking centre stage in various regional trade negotiations. Services for the purposes of this paper are understood to mean commercial services and not those offered by governments as part of their commitment to public welfare. This approach to defining services is also followed in the GATS where in Article 3 (b), services are defined to include any service in any sector except services supplied in the exercise of governmental authority. A service supplied in exercise of governmental authority is defined as any service which is supplied neither on a commercial basis nor in competition with one or more service suppliers.[3] With the increase in the scope of their coverage, RTAs have become a very important tool for bolstering trade between contracting parties through the elimination/reduction of barriers to trade in goods and services. In addition to importance in terms of sectoral coverage, RTAs involving services chapters are increasingly becoming an important avenue for the development of rules at that level.

This paper seeks to analyse negotiations between the European Union (EU) and African, Caribbean and Pacific (ACP) countries in the context of Economic Partnership Agreements (EPAs), assessing what is at stake in development terms for Eastern and Southern African (ESA) countries engaged in this process.

RTAs are recognized in the WTO as those that fulfill the criteria set out in Article XXIV of the General Agreement on Tariffs and Trade, (GATT) and Article V of the General Agreement on Trade in Services (GATS). A key condition of this criteria is whether the proposed RTA includes "*substantially all trade"* in the case of goods, or "*substantial sectoral coverage*" in the case of services. In the services context, according to Article V (1) of the GATS, this condition is understood in terms of number of sectors, volume of trade affected, and modes of supply. Article V further provides that there must be an absence or elimination of substantially all discrimination in place prior to formation of the RTA, in favor of nationals, amongst all members involved in the RTA. Another way in which this condition is considered to be fulfilled is the prohibition of new or more discriminatory measures within the RTA.[4]

The WTO is the sole international body that oversees the negotiation and implementation of international trade Agreements at the multilateral level. However, the pace at which the number of

[1] http://ucatlas.ucsc.edu/trade/subtheme_trade_blocs.php

[2] See Article V: 1 of GATS.

[3] See Article 3 (c) of GATS.

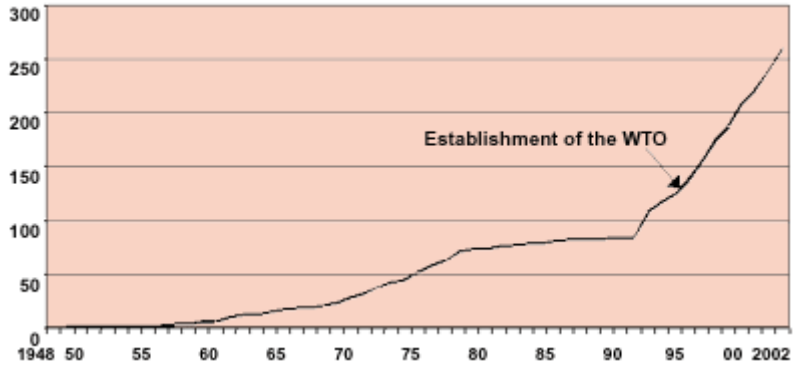
[4] See Article V (b): ii of GATS.

RTAs is growing makes them formidable complements, if not alternatives to the Multilateral Trading System (MTS).[5] In its relationship with RTAs, the WTO envisages complementarity and not substitution. It does so by setting out criteria that RTAs have to fulfill in order to pass the test of compatibility.[6] The WTO ensures that the criteria are met through requirements for notification as laid out in GATT Article XXIV 7 (a) and GATS Article V 7(a). These provisions require that members party to a proposed RTA shall promptly notify the WTO of any such Agreement. In the case of services, the notification must go to the Council for Trade in Services (CTS). Upon receipt of such notification, WTO members undertake an evaluation process in the Committee on RTAs (CRTA) to examine whether the notified RTA fulfills the requirements as stipulated in the aforementioned provisions, i.e. reduction or elimination of discrimination amongst members.

It is estimated that over 250 RTAs have been notified to the WTO, and approximately an additional 70 are operational without notification.[7] This implies that there may be over 300 RTAs in the world and that every country in the world belongs to at least one RTA. Owing to the closer level of economic integration that comes out of the RTA process, it is estimated that more than half of world trade is currently taking place within actual or prospective RTAs.[8] Because the inclusion of services on the RTA agenda is relatively new, the number of services-specific RTAs that have been notified to the WTO is significantly lower than those relating to goods, or those that combine goods and services.

It is increasingly clear that the outcome of the interface between multilateral and regional processes has profound implications for the development and growth prospects of developing countries.[9] Each of these processes is setting binding rules for the way in which trade will be administered in these regions. It is therefore important that the developments in RTAs are critically monitored. The table below shows the consistent increment in the number of RTAs over the years.

Evolution of Regional Trade Agreements in the World, 1948-2002



Number of RTAs

Source: WTO Secretariat

[5] Gibb and Machalak have argued that the MTS is on the decline and regionalism is in ascendancy, Gibb, R. and Michalak.W. (Eds) "Continental trading blocs: the growth of regionalism in the world economy". New York: John Wiley & Sons, 1994.

[6] The specific criteria in the context of services will be analyzed later in the paper.

[7] Abugattas Luis Majluf, "Swimming in the Spaghetti Bowl: Challenges for Developing Countries under the 'new regionalism'", 2004.

[8] Ibid.

[9] Yamada, 2003.

I.1 Formation Motivations for RTAs

In the post-colonial period, African countries embraced regional integration for political reasons. Regional integration was seen as a step in the direction of African nationalism and solidarity. Therefore, although ambitious on paper, often the premise of regional integration was merely political rhetoric, resulting in limited economic progress.[10]

Today, the reasons behind regional integration in Africa have somewhat changed, going beyond the fostering of African solidarity in order to achieve peace and security. Currently, regional integration is a mechanism for solidarity in achieving economic development. Accordingly, it is common to find economic development chapters in the founding instruments of regional integration processes in Africa such as the Treaties of AU, COMESA, and the EAC. In addition, countries form RTAs to tap into the advantages of bigger markets, typically among countries of comparable economic development and close geographical proximity. Such RTAs usually focus on the dismantling of tariffs and border measures that hamper trade between parties. Cases in point include COMESA, and the EAC.

In recent times, more RTAs are being formed, seeking greater integration between developed and developing countries, where there are considerable differences between levels of economic development, and certainly limited geographical proximity. These north-south RTAs cover a wide range of areas, including trade in services. They include: the EU-South Africa Trade, Development and Cooperation Agreement (TDCA), US-Chile Free Trade Agreement (FTA), the Central America Free Trade Agreement (between the US and Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua and the Dominican Republic), the Mexico-Japan Agreement on strengthening economic partnership, as well as the Chile-Canada Free Trade Agreement. The inclusion of services chapters in RTAs is worth noting since international and even regional trade in services is a relatively new concept in international and regional trade rules, having become part of the WTO multilateral process only in September 1986 as part of the Uruguay Round launched at Punta Del Este, in Uruguay.

Developing countries, including those in Africa, seek RTAs in the search for effective policy instruments aimed at achieving sustainable economic development. This can be seen from the COMESA and SADC Treaties, as well as from the objectives contained in the preamble to the negotiating guidelines for EPAs. In this case, regional integration is seen as part of a wider process that would lead to the integration of developing countries into the global economy. Traditionally, developing countries view developed nations as sources of knowledge and expertise, as well as of more lucrative markets for their goods and services.[11] In the ACP negotiating guidelines for example, there is clear emphasis on the need to create market access opportunities for ACP countries in EU markets so as to promote sustainable development, and thus eradicate poverty, whilst increasing their share of world trade.[12]

I.2 Motives behind North-South RTAs

Traditionally, the relationship between north-south countries was based on unilateral preferences given to developing countries, typically on the basis of the WTO Enabling Clause, which allows, by exception, developed countries to give developing nations more favourable treatment than is available to

[10] Mutai, Henry "Memberships in Multiple Regional Trading Arrangements: Legal Implications for the Conduct of Trade Negotiations". Tralac Trade Briefs, August, Cape Town: http://www.tralac.org/scripts/content.php?id=1914, 2003.

[11] See ACP negotiating Guidelines for the Negotiations of EPAs, 21/06/2001.

[12] ACP/61/056/02 [FINAL], ACP Guidelines for the Negotiations of Economic Partnership Agreements, 5 July 2002.

other WTO members. However, in recent times, this relationship is shifting to one based on reciprocity, encompassing a wide range of areas. A case in point is the situation envisaged at the phasing out of the Trade Cooperation Chapter of the Cotonou Agreement between the EU and ACP countries. While the Cotonou Agreement gives non-reciprocal preferential market access to ACP countries in the EU market, it envisages negotiations for reciprocal-based Economic Partnership Agreements (EPAs) in order to achieve WTO compatibility, as enshrined in Article 36 of the Cotonou Agreement. Other examples of unilateral preferences given to developing countries include the United States African Growth and Opportunity Act (AGOA) and its Generalized System of Preferences (GSP), as well as the Japanese and Canadian GSP programmes for developing countries. By agreeing to negotiate such RTAs, on the basis of reciprocity, developing countries sign off their beneficiary rights to non-reciprocal arrangements. They also open themselves to laborious reviews and rigorous WTO processes regarding ascertaining compatibility. It is a shift that has significant implications on policy options and national development strategies of ACP countries.

A common thread that runs through the motives of both developing and developed countries in forming RTAs is the quest to increase market access as well as other trade opportunities for themselves. With the increasingly slow pace at which trade deals can be struck at the multilateral level, countries are looking for more effective options through moving towards complementary approaches that can achieve the market access that they want. Examples of what such market access would entail in the context of services includes lower trade barriers, removal of regulatory barriers, restrictions to entry and establishment, and reduced trade diversion especially through better and more effective regulation. In addition, greater economic integration through RTAs may ease *'behind the border'* measures that would typically restrict trade in services such as renewal of licenses, complex technical standards, issues of recognition of qualifications and others. Countries therefore seek to form RTAs in order to gain from the economic prospects that they present. Over the years, developed countries have established strong industrial bases that are ready to venture into extended markets, having saturated domestic demand. In such a case, the ACP countries, which have not developed equal demand and yet still have great capacity for consuming services, are an attractive option for the EU.[13]

Regional integration could also be used as a route to achieve results that are seemingly difficult through multilateral negotiations. In the WTO negotiations for example, the African and least developed countries (LDC) groups have specified that enhanced market access for the movement of natural persons supplying a service (Mode 4), is an area in which they have real commercial interest. Here they propose that cumbersome visa/work permit procedures and restrictions, and recognition of qualifications be streamlined with a view to facilitating movement of services suppliers. Developed countries are unyielding, arguing these are immigration issues which should be dealt with outside a trade agreement. Since the prospects of attaining this objective through the multilateral route look weak, some of these developing countries, especially those in the EPA process, have decided to pursue this agenda aggressively in trade negotiations in the regional context.[14] In the same vein, there are some issues that the EU may be interested in such as greater protection for intellectual property rights beyond the TRIPs Agreement. Since the TRIPs Agreement only sets minimum standards, and since most developing countries benefit from various exceptions in the TRIPs Agreement, the EU is pursuing enhanced protection of intellectual property rights through its various RTAs.

For developed countries, the RTA route is an avenue towards greater access, particularly in developing countries, in areas that are perceived as outside the WTO negotiating mandate. In WTO jargon, this has come to be called the *WTO plus* agenda, whereby some issues have been removed from the Doha Development Agenda of negotiations because they are seen as either contravening the rules, as overly stifling developing country flexibilities, or merely going beyond what is politically feasible at this stage. The RTA route is attractive in this case because it allows a country to try and push such issues in that forum. This stems from the logical thought that a country would not enter into negotia-

[13] Also see Lopez-Cordova and Mesquita, 2002.

[14] For the greater part of mid-2006, the WTO negotiations themselves were suspended, showing in part the frustration that can be generated by a multilateral process.

tions in the RTA for what is already provided for, in satisfactory terms, in the WTO. In the case of services therefore, a country would be looking for expanded sectoral and modal coverage, and reduction of regulatory barriers, beyond what is already available under various countries' schedules of commitments in the GATS. The European Union has pursued its *WTO plus* agenda in the EPA negotiations through inclusion of such issues as investment and competition policy in the EPA process, which were rejected as the infamous *Singapore issues* and removed from the agenda of WTO negotiations at the Cancún Ministerial conference in 2003.

Apart from the perceived trade benefits, developed countries are also increasingly joining RTAs to establish, and extend spheres of influence that go beyond trade policy to political-economic areas. A typical way in which developed countries do this is through combining development assistance components, as well as political benchmarks into the agenda in trade negotiations at the regional level. In the Cotonou Agreement for example, Title II is dedicated to issues like the political environment, peace building policies, conflict prevention and resolution, human rights, good governance, rule of law, and measures against corruption. All of these, whilst plausible, lend themselves to a situation wherein value judgments on the part of developed countries determine whether other countries would benefit from market openings. In such cases, a country may withdraw concessions made in an RTA if in its estimate; the beneficiary thereof is not practicing democracy. In addition, some countries have used RTAs to promote their national domestic agenda on specific issues such as that of security on the part of the United States of America in the period post September-11-2001 terrorist attacks.

A major north-south RTA, still under negotiation, is the EPAs between the EU and ACP states. The EPA negotiations are unique given that they are negotiated with the EU on the one hand, and various regional groupings within the ACP States. These negotiations are undertaken with countries from the six ACP regions that have declared themselves to be in a position to negotiate EPAs. For purposes of this negotiation, countries have constituted themselves into groups that have a semblance to the RTAs in which they have a presence in their regions such as COMESA, SADC and the Economic Community of West African States (ECOWAS). It is likely that the EPAs will have negative systemic implications such as trade diversion, destruction of infant industries, loss of revenue, and reduced economic development of ACP countries. It is of even more concern that such complex areas as trade in services have been introduced into the EPA agenda when ACP countries, particularly those in the Eastern and Southern African (ESA) region, do not even have the capacity to supply services to meet domestic demand, thereby making their ability to export and compete with the EU very weak. It is likely therefore that EPA negotiations will have a negative effect on as opposed to fostering the development prospects of ESA countries.

II. TRADE IN SERVICES IN ESA COUNTRIES: SITUATION AND PROSPECTS

International trade and investment in services is an increasingly important part of global trade. Mattoo and Stern emphasize that services trade and foreign direct investment (FDI) in services have grown faster than that in goods over the past decade and a half. [15]

While the gains that can result from trade in services are less straightforward, in contrast to merchandise trade, owing to the intangible and invisible nature of services, and the fact that they usually require simultaneous production and consumption, it is clear that services play a critical role in the lives of many; through the social and human development functions they play in the form of essential services such as water, health and education, the economic activity they create, and the inter-sectoral connectivity they bring across various sectors in the economy. However, in order for all of this to create economic and sustainable development, there is the need for efficient and sufficient, regulatory institutions and capacities to remedy market failures, and appropriately sequence services reforms.

The countries that constitute the ESA grouping are Burundi, the Democratic Republic of Congo, Djibouti, Eritrea, Ethiopia, Kenya, Madagascar, Malawi, Mauritius, Rwanda, Seychelles, Sudan, Uganda, Zambia and Zimbabwe. For a long time, ESA countries have relied on agriculture for their export earnings. This trend is not unusual, as it is observed in typical economic growth paradigms that agriculture and subsequently manufacturing initially play an important role in economic development, and later decline respectively to give way to services.[16] However, there are some exceptions, as is the case with countries like Djibouti, which rely entirely on port-related services for agriculture, owing to their geographic positioning. As many of the ESA countries are still the least developed in the world, this is understandable. In these countries, services sectors are not well developed. Frequently, the real challenges to the provision of services are at the domestic level *vis-à-vis* meeting the governments' obligations to meet requirements for universal access to basic services. In such cases, export of services is secondary, as a national priority.

Liberalization of trade in services in the *multilateral context* is a relatively new phenomenon that can be traced back only to the recent WTO Uruguay Round negotiations.[17] This must be differentiated from autonomous liberalization of trade in services, in which developing countries have had experiences, particularly in the context of their relations with the World Bank and the International Monetary Fund Structural Adjustment Programmes (SAPs). Liberalization was presented to developing countries as a condition precedent to their accessing of development loans from the World Bank. The result was that many developing countries, including those from the ESA region, undertook unilateral liberalization of their services sectors, outside the WTO.

[15] Mattoo and Stern, "Overview for the World Bank e-learning course", 2006, most of which was adopted from Matoo, A. (2005a), "Economics and Law of Trade in services," unpublished (February).

[16] Jansen, Marion 2006.

[17] Abuggatas Luis Majluf, supra.

Table 1
Sectoral Shares in total exports of commercial services, 2002

Country	Services as % of GDP
Five highest	
Djibouti	82.1
Seychelles	68.1
Kenya	62.9
Mauritius	62.2
Eritrea	61.2
Sub average	*67.3*
Four lowest	
Angola	23.6
Burundi	31.2
Rwanda	37.5
Swaziland	37.9
Sub-average	*32.5*
Overall Average	***50.6***

Source: World Bank, WDI 2005, online, with author's calculations

The services sector is of growing importance to ESA countries. In many cases, the sector contributes up to an average of 50 per cent to Gross Domestic Product in these countries[18]. However, the participation of ESA countries in international trade in services through their exports has been low, accounting for only about 0.5 per cent of world exports.[19]

More than half of these exports have been destined for Europe, with about 77 per cent of these accruable to the transport and travel services. Tourism in particular has stimulated exports in these two sectors, with its importance in most ESA countries forming about 50 per cent of total commercial services exports in countries like Malawi, Mauritius, Seychelles, Uganda and Rwanda. The same is true of transportation services for Kenya and Ethiopia, which are homes to the biggest airline industries in the region.

[18] World Bank, WDI 2005 online.

[19] Commercial services, WTO SDB database on line.

The figures for 2006 continue to support the fact that services is a critical sector in ESA countries, as seen below.

Percentage contribution of services to GDP of ESA countries in 2006

Country	% of GDP from services
Burundi	33.4
DR Congo	34
Djibouti	59.6
Eritrea	64.3
Ethiopia	42.6
Kenya	65
Madagascar	56.6
Malawi	47
Mauritius	69.7
Rwanda	37.3
Seychelles	66.7
Sudan	39.7
Uganda	48.5
Zambia	51.2
Zimbabwe	24

Source: CIA Fact Book (2006 estimates)

Because Europe imports more than 50 per cent of ESA countries' services, it is an important market for the ESA region. However, ESA countries comprise only a fraction of Europe's import sources collectively, providing only 6.6 per cent of Europe's services imports,[20] Compared to ESA, the EU has a much more developed services industry, indeed one of the most competitive worldwide.

[20] These figures reflect the picture of the EU-15.

III. RTAS IN THE GATS

The Most Favored Nation (MFN) principle is core in WTO law. It provides that where a country gives favourable treatment to one WTO member, it must accord, immediately, and unconditionally, treatment no less favourable to all other WTO Members. In the case of services, it is provided that each party shall accord, immediately and unconditionally to services and services suppliers of any other member treatment no less favourable than that it accords to like services and services suppliers of any other country.[21] The MFN principle is a cornerstone of GATS and WTO law in general as it sets the ground for non-discrimination amongst WTO members. It is therefore guarded jealously by members. However, as is the case in trade in goods with the enabling clause, exceptions such as those in GATT Article XX, and more specifically provision for non-observance of MFN in the case of RTAs in GATT Article XXIV, in services there are also exceptions envisaged. One such exception is the provision for preferential treatment to members of an RTA as provided under Article V of GATS on economic integration.[22] This Article allows for the formation of RTAs in services, as does Article XXIV of GATT, which deals with territorial application, frontier traffic, customs unions and free trade.

According to Article V of the GATS, the aim of services economic integration is to facilitate trade between the parties. According to Article V (4), such RTAs shall not raise the overall level of barriers compared to levels applicable prior to the formation of the RTA.

Article V lays out the criteria that must be met for RTAs to be WTO GATS compatible. In this, the following conditions must be met:

i) The RTA must have "substantial sectoral coverage" in terms of sectors, volume of trade affected and modes of service delivery, with no *a priori* exclusion of any mode of supply,

ii) The RTA must provide for national treatment for services providers of Members eliminating "substantially" all discrimination through:

a) Elimination of existing discriminatory measures, and/or:
b) Prohibition of new or more discriminatory measures.

These conditions must be complied with either upon entry into force of the Agreement or within a reasonable time frame thereafter. However, there is flexibility under Article V (3) in the fulfillment of these two basic requirements in cases where developing countries are parties to the RTA. In such cases, flexibility shall be provided for regarding the basic conditions, particularly with reference to requirements for absence or elimination of all discrimination in the sense of national treatment, taking into account the level of development of the countries concerned both overall and in individual sectors and sub-sectors.[23] The other case in which special and differential treatment and flexibility is granted is in the case of RTAs that involve only developing countries. In such cases, Article 3 (b) of the GATS provides that more favorable treatment may be granted to juridical persons (companies) owned or controlled by natural persons of the parties to such an Agreement. In evaluating whether the basic conditions for an RTA are met, consideration may also be given to the relationship of the Agreement to a wider process of economic integration or trade liberalization among the countries concerned. This

[21] See Article II of GATS for MFN in services.

[22] The GATS provides for other general exceptions such as in Article XIV.

[23] National treatment is a core principle in WTO law which calls for equal treatment of foreign services suppliers, as is available for domestic services suppliers, in areas where market access commitments have been made.

flexibility, as seen above, may be understood to mean flexibility in meeting the requirements under Article V (1) i.e. covering fewer sectors, a lower volume of trade, or making commitments in fewer modes of delivery, and enjoying a wider spectrum of limitations to national treatment.[24]

The RTAs are to be notified to the WTO Council for Trade in Services (CTS). These notifications are then referred to the Committee on Regional Trade Agreements (CRTA) to evaluate their consistency with Article V. Recommendations, if appropriate, may be made to the RTA contracting parties. According to Article V 7 (a) and (b), the Council for Trade in Services may establish a working party to examine the Agreements and to report to the Council on their consistency with Article V. In addition thereto, members which are parties to an Article V RTA in services, which is implemented on the basis of a timeframe must periodically report to the CTS on its implementation. The CTS would make recommendations on this process as it deems appropriate. A member to such an RTA is estopped from seeking compensation for trade benefits that may accrue to any other member from such an Agreement.

In spite of these provisions, many of the RTAs on services have not yet been notified to the WTO for examination by the CRTA. As such, they exist without any multilateral oversight. It may be due, in part, to the fact that many RTAs have services as chapters and are not *exclusively* devoted to services. In such cases, the notification may fall under Article GATT XXIV processes and not Article V of GATS. There has been a call for a revision of Article V, particularly in paragraph 29 of the Doha Ministerial Declaration, wherein Ministers stressed the need for WTO members to address those issues affecting the evaluation of compatibility with Article V. One of the reasons for this is the ambiguity in the clear meaning of the provisions.[25] There were proposals in the WTO's CRTA, Committee on Trade in Goods (CTG), and Committee on Trade and Development (CTD), and the CTS to streamline notification processes for RTAs through use of a single document detailing provisions for Articles XXIV: 7 (a) of GATT, V: 7 (a) of GATS, and paragraph 4 (a) of the Enabling clause.[26] A key feature of these proposals is that notification is simplified through a single sheet that covers all aspects of the RTA be it goods, and services. The CTG has adopted this proposal and what remains outstanding is for the CTD, CTS, and CRTA to follow suit.

There is no clarity in GATS Article V as to what constitutes proper fulfillment of the conditions set out for RTAs in services.[27] Firstly, the limited statistics available on trade in services make it difficult for members to quantify sectoral coverage, and its volume. Some of the modes of supply particularly mode 1 on cross border supply are very difficult to track, making it difficult to capture substantial modal coverage. The other major issue is whether substantial coverage means coverage of every single sector or a good number of them, and if so what number. The lack of clarity on what constitutes substantial sectoral coverage has led some countries, such as the EU, to exclude certain critical sectors, and modes, even in the context of their RTA processes, such as audiovisual, and air transport as well as maritime transport. The extent to which Mode 4 is captured in EU RTAs also leaves to the ambition of interested developing countries. Many times, this is problematic because developing countries may have a commercial interest in the sectors excluded. However, this argument would have to be furthered with a nuance, because an across-the-board strict interpretation and application of the requirement for substantial sectoral coverage, if taken to mean the inclusion of every sector, although positive in the context of north-south relations, may be burdensome for developing countries, since the implication would be that they must liberalize more widely, their services sectors. Such a requirement would impose undue burdens on developing countries. Inspite of the Article V flexibilities for developing countries, the fact is that in practical terms, developing countries face a significant amount of pressure in RTAs to liberalize widely in terms of sectoral and modal coverage.

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[24] Abugattas Luis Majluf, supra.

[25] See Para 29, Doha Ministerial Declaration.

[26] See WT/REG/16.

[27] The WTO secretariat has summarized these in TN/RL/W/8/Rev.1, 1 August 2002.

The relationship between RTAs and the GATS has not been adequately tested. Notwithstanding this, services chapters continue to appear frequently in north-south RTAs, stressing the need for conformity with WTO rules. This is a particularly critical issue in the EPA negotiations, because they will have to be WTO compatible.

In order to ensure WTO compatibility of the outcome of EPA negotiations, the provisions of *GATS Articles IV and XIX* have also got to be taken into account**.** According to Paragraph 5 of the Preamble to the GATS, a major objective of the Agreement is to attain the increasing participation of developing countries in international trade in services, as well as expand their exports. Article IV (1) provides more operative language when it gives detail as to how this increasing participation of developing countries in world trade shall be facilitated. It provides that the increasing participation shall be facilitated through negotiated specific commitments relating to:

i) strengthening the domestic services capacity of developing countries,

ii) improving developing country access to distribution channels and information networks, and,

iii) liberalization of market access in sectors and modes of supply of export interest to developing countries.

This Article emphasises the special treatment of developing countries in terms of building capacity to export, and increasing commercially meaningful market access.

Article XIX (2) deals with the negotiation of specific commitments, and progressive liberalisation, granting flexibility to developing countries. It calls for the process of progressive liberalisation to take place with due regard for national policy objectives, and the level of development of individual members, both overall and in individual sectors. It allows for appropriate flexibility for developing countries in opening fewer sectors, liberalizing fewer types of transactions, progressively extending market access in line with their development situation and in cases where they are making their markets accessible to foreign service suppliers, the attaching of conditions to such access, aimed at achieving the objectives of increased participation as enshrined in Article IV.

The EPA negotiations therefore have to respect GATS principles in process and outcome. This means that simple mention of the GATS in working documents will not suffice. In order to appreciate the implications of EPA negotiations, *vis-à-vis* questions of WTO compatibility and coherence, it is worthwhile taking a look at the situation of ESA countries in the context of the GATS negotiations. The following section therefore looks at services negotiations under the GATS, and the state of play in these negotiations.

III.1 Services Negotiations under the GATS in the WTO

Services were first introduced into the WTO in the Uruguay Round of negotiations that gave birth to the General Agreement on Trade in Services (GATS) in 1995. Prior to this, the WTO mainly concerned itself with trade in goods, focusing on the elimination of tariffs and to some extent, other border restrictions. The GATS preamble spells out the aim of the Agreement as expansion of trade under conditions of transparency and progressive liberalization, and as a means of promoting economic growth and development of all trading partners. The principle of *progressive liberalization* is reiterated in Article XIX (1) of the GATS, which provides that there shall be successive Rounds of negotiations aimed attaining progressively higher levels of liberalization. A critical concept behind this principle is that countries are allowed to determine the pace and scope of liberalizing their services sectors,

from a sectoral and modal perspective, through progressively higher levels of liberalization in successive Rounds of negotiation.[28]

On the basis of the above-mentioned principles, and continuing on from the results of the Uruguay Round on services, the WTO launched an *in-built agenda* of service negotiations under the GATS in 2000, as part of the Doha Development Agenda. These negotiations were given a five-year span to end in 2005, but owing to unforeseen events such as the collapse of the Cancun Ministerial, this deadline was not met. The main areas of negotiation in services are on ***market access***, guided by Articles XVI (Market Access limitations), XVII (National Treatment) and XIX (Progressive Liberalization) and ***rule-making*** negotiations under Article VI: 4 on Domestic Regulation, Article X on Emergency Safeguard Measures (ESM), Article XIII on Government Procurement and XV on Subsidies.

Market access commitments are based on the positive list approach, which allows countries to list only that which they are willing to open up under their preferred terms and conditions. Non-listed sectors and modes are thus not part of the commitment. It is because of this ability to pick and choose in the GATS that the commitments members undertake under the GATS are at times referred to as *a la' carte* in nature. GATS negotiations are conducted through a bilateral and plurilateral request-offer process. In the bilateral request-offer process, a member presents a request to another member for liberalization of sectors and modes, as well as reduction in limitations attached to market access. The member responds as it deems fit, sometimes by way of a conditional offer.

Under the plurilateral approach, a group of members interested in a sector, typically referred to as *friends of…* make a collective request to one or more members. By way of example, a group of ten countries interested in Country X's telecommunications market, being *friends of telecom*, could collectively request country X to open or eliminate restrictions in the sector. This method is expected to win a critical mass of commitments in key sectors, and is known to impose significant pressure on countries requested so that they can give in to liberalization. Some of the sectors in which plurilateral negotiations have been focused are Telecommunications, Financial services, Transport, Energy and others.

III.2 State of Play in GATS Negotiations

In the period after the Hong Kong Ministerial conference of December 2005, plurilateral negotiations gained a lot of momentum, with developing countries receiving numerous plurilateral requests. All in all, there were 20 plurilateral groups, namely: Computer and Related Services, Cross Border, Telecoms, Financial, Audio Visual, Maritime Transport, Services Related to Agriculture, Air Transport, Postal Courier, Distribution, Logistics, Mode 4, Environment, Construction, Architecture/Engineering, Legal, Energy, Mode 3, MFN Exemptions, and Education. Most of the technical discussions in the plurilateral meetings focused on the substance of the requests, including:

- the scope of the cross-border mode 1 and 2 objectives;
- the implications of cross-border liberalization on the ability of domestic regulators to protect consumers and maintain quality standards;
- definitional and classification issues;
- how to address existing economic needs tests; and,
- how transparency is to be addressed.

However, plurilateral negotiations on services, like other aspects of the Doha negotiations were held hostage to the stalemate in agriculture negotiations which led to an overall suspension of the negotiations in July 2006. Since resumption of negotiations, there have been two clusters of services meet-

[28] See Article XIX (1) GATS.

ings in late January and late February 2007. No plurilateral meetings were held in either of the two clusters and many of the services demanders reverted back to the bilateral format.

LDCs were largely excluded from the plurilateral negotiations owing to the December 2005 Ministerial decision in Hong Kong, which released the LDCs from having to make market access commitments.

Owing to the overall apparent deadlock in the Doha negotiations, whereby developed countries are reluctant to reduce their domestic subsidies in agriculture, developing countries are reluctant to make any conditional offers of market access commitments in services, while agriculture remains hardly improved. Many developing countries, particularly those that are also ACP members also stand to lose a lot of market access owing to the erosion of preferences that will automatically result from reduction in tariffs on industrial products. As such, they are holding back on making big commitments in services. The WTO services negotiations have also faced several challenges that make it difficult to achieve commercially meaningful commitments from members. Some of these are:

i) The fact that developing country' interests are barely taken into consideration, even where there is a specific mandate to do so, such as in the case where developed countries are obligated to liberalize sectors of export interest to developing and least developed countries. Developing countries have identified the movement of natural persons (Mode 4), as being of export interest to them. However, to date, it still accounts for only about 2 per cent of total GATS modal commitments. Even where commitments are undertaken, they come with restrictions such as residency requirements, economic needs tests, or cover only highly skilled professionals, which hinders developing countries from meaningfully and maximumally utilizing such openings.

ii) There is a lack of consistency between overall ambition of countries in services, and actual commitments made, especially by developed countries. Whereas developed countries have clearly sought deeper liberalization commitments from developing countries, they have failed to make deep meaningful commitments themselves. This puts developing countries on the guard, as they can see that there is not much benefit for them in terms of enhanced market access.

iii) The lack of assessment of trade in services, in developing countries is a handicap to their effective participation in the negotiations. Because these countries have not undertaken comprehensive assessments, they cannot make informed decisions as to which sectors to liberalize and what conditions to attach to such liberalization. From a more offensive viewpoint, the absence of assessments worsens the inability of developing countries to identify national interests and craft them into GATS-type requests. As a result, many developing countries, especially LDCs find themselves on the receiving side of numerous requests, thereby only pushing for a defensive agenda in these negotiations.

iv) The slow pace of negotiations in *rule-making* particularly on the Emergency Safeguard Mechanism (ESM), and clear, precise and operational special and differential treatment in the context of domestic regulation negotiations, has also affected the overall pace of GATS negotiations. The absence of strong rules on safeguards leaves members, especially developing countries, without protective tools for use in the event of liberalization resulting in outcomes that are not developmental. Developing countries have also emphasised the direct linkage between meaningful rules on domestic regulation and their potential enhancement for movement of natural persons, the absence of which compromises prospective benefits from Mode 4.

IV. EPA NEGOTIATIONS: A CASE STUDY OF THE ESA NEGOTIATING REGION

IV.1 Background

The EU and ACP countries first signed a cooperation Agreement in Lomé, Togo, in 1975. The Lomé Convention, at the time, mainly covered Trade in goods and provided non-reciprocal preferential treatment for goods originating from ACP countries. However, Title V of the Lomé Convention contained provisions relating to *"establishment and services"*. These provisions provided for *non-binding* national treatment of national and foreign companies from the contracting parties.[29] The fact that provisions on trade in services were only scanty and hortatory in nature, coupled with a hitherto restrictive, non commercialized state provision of services helped to keep the focus of the Lomé-convention largely on trade in goods.

The subsequent Lomé Conventions that were amended and expanded, particularly the Lomé IV Convention, parts 1 and 2 signed in 1990 and 1995 respectively, cover services more extensively. Title IX of the Convention covers the development of services, with the objective, *inter alia*, to "support ACP States' efforts to increase their domestic capacity to provide services with a view to improving the working of their economies…" The provisions specifically point out certain sectors such as tourism, transport and communications. The references provide that EU member states would implement programmes to assist and enable ACP member states to develop their services capacities.

Development of services, as opposed to trading in services, was the main emphasis of the Lomé Conventions. Development of services focuses on access and availability of services, in the domestic context, which were, at the time, mainly state provided. Trade in services, on the other hand, entails the involvement of the private sector for commercial purposes, where services are bought and sold on competitive basis. However, as services sectors in ACP countries remain heavily underdeveloped, it is clear that there were deficiencies in the implementation of the Lomé Convention provisions dealing with the development of capacity.

The EU-ACP cooperation on this preferential basis existed for nearly forty years. In later years, the EU made a significant policy shift in this relationship through the ACP-EU Partnership Agreement signed in Cotonou, Benin in 2000 and ratified in 2003. From this point, the EU-ACP trade relations were geared towards the creation of reciprocal EPAs in the form of Free Trade Agreements between the EU and ACP countries by 2008. The Cotonou Agreement runs until 2020, with the exception of the Trade Cooperation Chapter of the Agreement which expires on 31 December 2007, and has to be replaced by EPAs in order to be WTO compatible.[30]

Several factors explain the shift in EU policy towards a reciprocal basis. In an EU policy position paper of 1996,[31] it was observed that nearly forty years of preferential non-reciprocal market access had not yielded the expected gains in terms of economic development for many of the ACP countries. Secondly, the EU was coming under significant pressure through a series of legal challenges to its Lomé arrangements in the WTO dispute settlement mechanism from members such as India in the

[29] Article 62, Chapter 1 of Title V of the Lomé Convention.

[30] See Article 95(4) of the Cotonou Agreement for details on any post-Cotonou arrangement.

[31] EU (1996) Green Paper on relations between the European Union and the ACP countries on the eve of the 21st Century: Challenges and options for a new partnership, Brussels.

EC-Trade Preferences case.[32] These members contested the legality of what was deemed to be discriminatory trade preferences to former colonies contrary to the WTO cornerstone principle of most favoured nation enshrined in Article II of the GATT. The position paper also pointed to other factors that warranted reform of the EU-ACP relationship, such as the changing geopolitical interests of the EU in the 21st century including EU enlargement, and new strategic trade alliances with other regions such as the Mediterranean and South America. The EU therefore looked at phased-in reciprocity as a way of becoming WTO compliant.

IV.2 EPA Negotiations in the ESA Region

Although the Cotonou Agreement leaves some room for the negotiation of EPAs with individual ACP countries, the EU signaled a strong preference for EPAs to be concluded by ACP countries under regional integration arrangements.[33] In light of this, the African continent was sub-divided into several negotiating groups based, to the extent possible, on existing regional groupings such as Common Market for Eastern and Southern Africa (COMESA), Southern Africa Development Cooperation (SADC), Economic Community of West African States (ECOWAS), and Southern African Customs Union (SACU).

The countries that constituted themselves into the ESA region include: Burundi, DR Congo, Djibouti, Eritrea, Ethiopia, Kenya, Madagascar, Malawi, Mauritius, Rwanda, Seychelles, Sudan, Uganda, Zambia and Zimbabwe. Many of these countries are members of COMESA. However, the fact that not all these countries are in COMESA with some being in Inter Governmental Authority on Development (IGAD), SADC, and EAC, creates problems for practical implementation and enforceability of whatever outcomes of the EPA process. That notwithstanding, the situation in the COMESA region is important to bear in mind for the ESA countries in the EPA negotiations because the COMESA Secretariat is a key player in servicing the EPA negotiations for the ESA grouping.[34] It is logical to expect that the Secretariat would very much take into account developments in its own intra-regional processes in assisting ESA countries in the EPA negotiations.

By geographical coverage, COMESA is the widest RTA in the African region. Established in 1994 as a successor to the Preferential Trade Area (PTA), it aimed at establishing a common market within a period of 10 years. However, progress has been slow and today, only a partial FTA exists. The other objectives of COMESA include liberalizing trade by lowering tariffs and non-tariff barriers within and among members states, and simplifying customs procedures with the aim of increasing trade. In 2000, COMESA established a Free Trade Area (FTA) and twelve members have removed their trade barriers to COMESA originating goods. Some of these countries include Ethiopia, Swaziland, Democratic Republic of Congo, the Comoros islands, and Madagascar. Other countries like Uganda are in the process of doing so. Agreement on a common external tariff (CET) was also reached in 2000, paving the way for the creation of a customs union.

In 2004, COMESA launched a project to include trade in services in its integration process. The process was aimed at preparing countries in the COMESA region for negotiations on EPAs with the EU, as well as for GATS negotiations, and services trade liberalisation intra-regionally.

COMESA member states are in the preparatory stages for negotiations on intra-regional trade in services. The COMESA secretariat developed GATS templates (a regional matrix on country regula-

[32] European Communities - Conditions for the granting of tariff preferences to developing countries, where India was the complainant, with several countries as third parties, e.g. USA, Brazil, Colombia, Bolivia, etc.

[33] EU (2002) Commission Draft Mandate, Brussels.

[34] The EAC, IOC, and IGAD Secretariats also play a role in this process.

tions on services) and sectoral in-depth assessments in key sectors. A good number of member states have submitted their responses while a few have had difficulty in comprehending and completing the questionnaires, with only 10 having filled in the GATS templates. According to the report of the twenty-second meeting of the COMESA Council of Ministers, this process is moving very slowly.[35]

Trade Ministers of the ESA region met in December 2003 and established the relevant organization and structures for the EPA negotiations with the EU. Here, the ESA region opted to negotiate in six clusters (see Table below) and have also agreed on the allocation of responsibilities, at the Ambassadorial level, in terms of taking a lead role in the negotiations as lead spokespersons or alternate spokespersons. The table below summarizes ESA's negotiating clusters and allocation of duties:

Cluster	Ministerial Lead Spokesperson(s)	Ministerial Alternate Spokesperson(s)
Development issues	Sudan	DR Congo
Market Access	Mauritius/Rwanda	Burundi and Zambia
Agriculture	Malawi	Uganda and Ethiopia
Fisheries	Madagascar	Seychelles
Trade in Services	Zimbabwe	Rwanda
Trade Related Areas	Kenya	Djibouti

Cluster	Ambassadorial Lead Spokesperson(s)	Ambassadorial Alternate Spokesperson(s)
Development issues	Ethiopia	DR Congo
Market Access	Kenya	Zambia and Burundi
Agriculture	Mauritius	Zimbabwe and Madagascar
Fisheries	Eritrea	Seychelles and Madagascar
Trade in Services	Malawi	Rwanda and Uganda
Trade Related Areas	Sudan	DR Congo and Burundi

The ESA Negotiating Mandate calls on member countries to establish a multi-sectoral and multi-stakeholder National Development and Trade Policy Forum (NDTPF). The main function of the NDTPF is to determine the optimal development and trade negotiating position for each country and to prepare briefs outlining these positions for use in the regional negotiation forum. The regional negotiation forum then prepares positions for negotiations with the EU. The ESA countries are to liaise continuously with other ACP regions involved in EPA negotiations through the all-ACP follow-up mechanism. The role of regional secretariats is also emphasized through the Inter-Regional Coordination Committee (IRCC).

IV.3 Key Features of the Economic Partnership Agreements

In this section, the paper considers the main modalities of negotiations under the EPAs as contained in the Cotonou Agreement in general, with a specific focus on services.

The Cotonou Agreement's key objective is the promotion and acceleration of economic, cultural and social development of the ACP States. It also aims to contribute to peace and security and to promote a stable and democratic political environment. In addition, it aims at reducing and eventually eradicating poverty, consistent with the objectives of sustainable development and the gradual integration of the ACP countries into the world economy. The Cotonou Agreement also aims at providing a coherent support framework for the development strategies adopted by each ACP State, e.g. development of the private sector at the national level and improvement of access to productive resources. It

[35] Report of the Twenty-Second Meeting of the Council of Ministers, page 18-29, COMESA document CS/CM/XXII/9, November 2006.

is also a goal of the Agreement to build the capacity of actors in development and improving the institutional framework.

The provisions on trade in services are dealt with in Part 3, Title II, Chapter 4, and Articles 41-43. The general provisions reaffirm the commitments entered into under the General Agreement on Trade in Services (GATS) and commit the EU and the ACP to liberalizing services in accordance with the provisions of the GATS under the EPAs.

In Article 41, the EC also undertakes to give sympathetic consideration to the ACP States' priorities for improvement in the EU schedule, with a view to meeting their specific interests, under the framework of Article XIX of the GATS. This could be viewed as an EU commitment to provide better market access than that in its WTO schedule in the EPA process.

Article 41 (2) of the Cotonou Agreement stresses the need for special and differential treatment as well as the importance of capacity building in services provision and negotiation. In Article 41 (4), it is stated that liberalization of services under EPAs will be in accordance, *inter alia*, with GATS provisions relating to the participation of developing countries in liberalization agreements. Although, it does not clearly specify which provisions these are, it can be concluded that these are Article IV and XIX: (2) of the GATS which are the special and differential treatment provisions, as well as the provisions that emphasise progressive liberalisation. In addition, it can be construed that the architecture of the GATS is to be preserved in the EPA negotiations, thereby introducing the need for the EPAs to be compliant with GATS Article V, and the maintenance of positive list approaches to scheduling commitments, etc.

In terms of sectoral coverage, the Agreement commits the EU to assist in developing ACP States' capacity particularly in services related to labour, business, distribution, finance, tourism, culture, and construction and related engineering services, maritime transport and information and communication technology. The aim is to improve their competitiveness, thereby increasing the value and volume of ACP states' trade in services.[36]

Article 43 of the Agreement recognises the important role which information and communication technologies can play in the successful integration of ACP countries into the world economy.[37] It reaffirms the commitments made under multilateral Agreements; particularly the Protocol on Basic Telecommunications attached to the GATS, and commits the EU to take measures that will enable inhabitants of ACP countries easy access to information and communication technologies through, among others, the following measures:

- the development and encouragement of the use of affordable renewable energy resources;
- the development and deployment of more extensive low-cost wireless networks.

In the context of negotiations, the EU has presented positions to the ESA countries on what it seeks in terms of market access and regulatory issues from ACP countries. Below, this paper looks at these positions and the implications that they have on ESA countries' potentials for economic development.

[36] With regard to maritime services, the provisions of the Agreement commit the EU and ACP to extending national treatment to shipping operators with respect to access to ports, the use of infrastructure, and auxiliary maritime services of those ports, as well as related fees and charges, customs facilities and assignment of berths and facilities for loading and unloading. See Article 42.3 Cotonou Agreement.

[37] See Article 43.1Cotonou Agreement.

IV.4 Development Challenges Posed by the EU Position in EPA Services Negotiations

At the 3rd high-level Ambassadorial/ Senior officials negotiating session in July 2006 of the ESA-EC EPA, the EC presented its position to the ESA members. It pointed out that the key elements in this negotiation are the need to build infrastructure for services in the ESA Region, the need for a flexible approach to commitments so as to avoid asymmetry, and the need for GATS consistency.[38]

Here below, the paper takes a closer look at some of the development-related challenges posed by the EU position and their implications for ESA countries.

IV.4.1 Liberalization principles: Most Favoured Nation, and National Treatment

The EU has proposed to follow GATS-type liberalization principles. This can be seen from the overall spirit of the EU-ESA text: that EPAs must not only be WTO compatible, but also that WTO core principles such as Most Favoured Nation (MFN) treatment and National Treatment obligations must be respected. In addition, it means that the GATS principles of progressive liberalization will have to inform the negotiations and their outcome.

Progressive liberalization is a guiding principle of the GATS. It is the distinguishing feature between the GATS and other WTO Agreements. such as agriculture, subsidies and others. From the preamble to the GATS, an objective of the negotiations is the attaining of progressively higher levels of liberalization of trade in services, through successive Rounds of negotiation. Put simply, the principle of progressive liberalization would allow for countries to be in control of the extent, scope, and timing of the liberalization of their services sectors. The principle of progressive liberalization allows for negotiations to be aimed at the reduction or elimination of the adverse effects on trade in services of measures, as a means of providing effective market access. Developing countries are further protected in Article XIX: 2, when they are given the legal space to open fewer sectors, liberalize fewer types of transaction and progressively extend market access in line with their development situation. Developing countries are also allowed to attach conditions aimed at achieving development and more participation in international trade in services, when making their markets available to foreign services suppliers.

EPA compatibility with WTO would require that the flexibility which the GATS gives to developing countries, to judge the extent and timing of their liberalization in services, is respected. The EU has asked for full commitments to national treatment from ESA countries in the EPA negotitions. By doing so, the EU is clearly going against this flexibility. ESA countries would have to provide similar treatment to EU services and services suppliers as they do to like services and services suppliers in the sectors in which the EPA commitments will extend. Developing countries may wish to have mandatory recruitment of a certain number of their nationals, as a condition precedent to liberalization in certain services sectors. Some of the reasons that such countries may have in mind include skills circulation, employment opportunities, technology transfer, build up of eventual export capacity, and general welfare improvement. ESA countries may also want to require joint ventures with local companies as a condition precedent to accessing their markets through mode 3, which is the provision of services through the establishment of commercial presence. to their markets. Requesting national treatment which would mandate ESA countries to provide EU services suppliers with treatment not less favourable than is received by ESA services suppliers, implicitly blocks policy space for ESA countries to pursue some of the above-mentioned development-policy objectives.

The EU would like most-favoured-nation treatment for its establishments and investors in ESA countries. While it is not absolutely certain what this would mean in the context of inter-regional ar-

[38] Conclusions of the ESA-EC EPA, 3rd Ambassadorial/ Senior officials' Negotiating Sessions, 26 July 2006.

rangements, and MFN application in WTO processes,[39] it is clear that EU services suppliers would have rights to immediate and unconditional access equal to that which is available under the integration processes of ESA countries in their various groupings. In short, the EU would have COMESA-like, EAC like, SADC like, treatment.

There are reasons why it may be in the interests of COMESA, EAC, and other ESA group countries, to extend MFN treatment to each other, to create enhanced market access, in the hope of growing together towards development. From the intra-regional perspective, it may even serve to build competitiveness in certain sectors, allowing for countries to develop niche competitiveness within the region. It would also allow countries in the ESA region to build regulatory competitiveness from an intra-regional perspective, creating strength for the inter-regional liberalization which would follow later. Whether it is wise at this stage in the integration processes of ESA countries, to open up, on MFN terms for the EU is very unclear and curious. Even if one argued that the EU would be giving MFN in return to ESA countries, the balance would definitely still tilt in favour of the EU, because only they would have sufficient capacity to take advantage of market access openings in the ESA-wide market.

Another observation looking at the countries that constitute the ESA group is that most of them are Least Developed Countries (LDCs) according to the United Nations list of classifying countries. For LDCs, services play a key role in the eradication of poverty, as most of them do not have a purely commercial role, but also perform social, cultural, and welfare-enhancing functions. The services sector plays a crucial role in human development in the form of essential services, as a hub of economic activity such as in tourism, and through the linkages, both forward and backward, created with other sectors such as manufacturing, investment, agriculture, and others. The multi-faceted role that services play in LDCs is well summarized in Paragraph 2 of the Modalities for the Special Treatment of LDCs in the GATS negotiations, which states that the importance of services for LDCs goes beyond pure economic significance due to the major role services play for achieving social and development objectives, and as a means of addressing poverty, upgrading welfare, improving universal availability and access to basic services, and in ensuring sustainable development, including its social dimension.

Under the GATS, the Ministerial conference in Hong Kong agreed that LDCs will not be required to undertake any commitments in market access. Even in the GATS itself, the special difficulty that LDCs have in accepting negotiated specific commitments is acknowledged in Article IV:3. With this in mind, there is a clear contradiction on the part of the EU in asking LDC ESA countries to make commitments in EPAs. It also puts in question the meaning that the EU attaches to WTO compatibility.

In the WTO, LDCs needs are considered special and warranting priority treatment. The burden is placed on other members to develop methods that can lead to greater participation of LDCs in international trade in services. One of the ways proposed for this to happen is through negotiated specific commitments.[40] Members are called upon to undertake commitments that can strengthen LDC domestic supply capacity, efficiency and competitiveness, improve LDC access to distribution channels, and to open up markets in sectors and modes of export interest to LDCs.[41] Clearly the onus lies on developed countries to perform for the benefit of LDCs, since they are singled out as requiring special priority in the fulfillment of all of these functions.[42] By seeking reciprocity with LDC ESA countries, the EPA process is a clear derogation from what LDCs have secured as *policy space* and *flexibility* in the GATS, as well as a contravention of what the EU has accepted as an obligation in the GATS, which the EPA process seeks to complement. Rather than building on these provisions, the EU position goes counter to such provisions in the WTO Agreement.

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[39] The harmonization of regulatory issues within COMESA, and its infancy, would be shaken by granting EU services suppliers unfettered rights to MFN treatment.

[40] See Article IV, GATS.

[41] Article IV in general also applies to the wider group of developing countries.

[42] See Article IV: 3, GATS.

IV.4.2 Scope and coverage of proposed commitments

Liberalization under the GATS follows a positive list approach. This means that countries determine the sectors in which they wish to undertake commitments, detailing the extent of market access, from a modal perspective[43], whether they offer national treatment, and on what terms,[44] and whether they wish to list any additional commitments, such as on qualifications, standards or licensing matters.[45]

On the market access side, the EU has an ambitious agenda for ESA countries. The sectors that are excluded from applicability to the EPA process are mining, manufacturing and processing of nuclear materials, production of, or trade in arms, ammunition and war material, audio-visual services, national maritime cabotage, and air transport.[46] By implication, all other sectors are open for inclusion and part of the EU request to ESA countries. ESA countries cannot take any comfort in the fact that some of the sectors are excluded given that the excluded sectors are not sensitive for ESA countries and do not have any commercial value for this group of countries. Excluding these sectors therefore adds no real value.

The EU further proposes that countries secede the right to maintain quantitative restrictions through quotas, to have limitations on the total value of transactions, economic needs tests, limitations on the number of operations and limitation on the participation of foreign capital, or even restrictions on the types of establishments. It is in the interest of ESA countries to have a firmer hand on the type of services suppliers that come into their countries, how they operate in ESA countries, how much they contribute in terms of employment, creation of wealth, and the extent to which such firms contribute to the meeting of national development objectives. Losing this power, at LDC status for example, is equivalent to ceding development tools to the EU.

From a modal perspective, the EU has strong ambitions in the area of cross-border supply (Mode 1), and commercial presence (Mode 3). In order for countries to benefit from Mode 1 commitments, they need well developed telecommunications infrastructure, electricity, financial services, and others. In addition, it is critical that countries intending to utilize Mode 1 have developed regulatory capacities to follow up on how these services are being traded, whether fees and licenses are being paid, whether the services being provided meet national quality standards, and whether overall, there is a contribution to national development priorities. ESA countries have very weak services infrastructure. Many of them are still grappling with the provision, even of electricity, to their constituents. Mode 1 commitments can only mean that ESA countries are opening up their markets, to give more favourable benefits to EU services suppliers, for whom the issues of capacity to export and the existence of supporting infrastructure, are minor.

With regard to Mode 3, the definitions provided for juridical persons, who would then be the utilizers of these provisions, are telling of the fact that ESA countries would stand a minimal chance to participate, not to mention compete in mode 3 trade in services with the EU. It is proposed that such persons have a registered office, central administration, or principal place of business in the territory either of the EU, or of ESA countries. The real chances of ESA countries, whose firms are mainly small and medium size, lacking skills and high competence, lacking finance and capital, setting up commercial presence in the EU, are meagre. On the other hand, the EU has a tradition of big business with international dominance in many of the sectors in services worldwide. Many of the EU juridical persons have already set up commercial presence in many ESA countries. ESA commitments on Mode 3 would only serve to enlarge the business area for EU countries, without parallel benefit for their own small and medium size enterprises.

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[43] See Article XVI, GATS.

[44] See Article XVII, GATS.

[45] See Article XVIII, GATS.

[46] This provision excludes aircraft repair and maintenance, selling and marketing of air transport services, and computer-reservation systems.

On Mode 4, the EU defines natural persons as nationals of one of the Member States of the Community, or the ESA countries according to their respective national legislation. The targets they talk about as beneficiaries are key persons (managers, specialists), graduate trainees, business visitors, contractual services suppliers, and independent professionals. These persons are already covered in the EU's GATS schedule. There is very limited added value, if any, for ESA countries many of whom are interested in liberalization of markets for semi-skilled services suppliers. Without an outcome showing sensitivity to this issue, the EPA process does not stand to help ESA countries in mode 4 which they all agree is of utmost commercial meaning to their economies.

IV.4.3 Regulatory concerns

A robust regulatory framework is a prerequisite for the development of any sector, or sub-sector in services. In ESA countries, regulation is weak and often non-existent. The EU has detailed provisions on their preferred scope of regulation on mutual recognition, transparency and disclosure of confidential information. The proposal further details specifics of how the EU wishes to see the regulation of computer services, financial, telecommunication, and other services. It is important that countries preserve regulatory autonomy so as to fulfill national development plans. For ESA countries, the guiding principles for regulation may not necessarily be commercial. Obligations to meet universal access requirements and improvement in welfare may be more relevant for ESA countries. In order to do this, ESA countries would need to retain regulatory autonomy. Even in the GATS negotiations, developing countries are putting up a spirited fight for their right to regulate. ESA countries would best proceed cautiously in surrendering regulatory prerogatives to the EU. In the WTO domestic regulation negotiations, the right of countries to regulate has been considered sacred. Because of their capacity constraints, LDCs are pushing for exclusion from mandatory application of the disciplines under negotiation. By emphasizing a contrary position with such sectoral detail and specificity on regulation, as the EU does in their position in EPAs, a WTO incoherent outcome is guaranteed.

V. A SNAPSHOT OF ESA POSITIONS

The ESA countries seem to be moving towards a consensus that commitments under the GATS, the ESA EPA mandate and Cotonou Partnership Agreement mandate contained in Articles 41-43 form the basis of ESA/EC cooperation in trade in services. In terms of sequencing, priority for the ESA countries is the development of a regional framework Agreement on trade in services such that progressive liberalization with the EU is secondary to this. This is a good approach as it allows for the consolidation of intra-regional trade as a priority.

The liberalization in trade in services will be undertaken on a progressive basis using a positive list approach adapted to the development of the ESA countries concerned both in overall terms and in terms of their services sectors and sub-sectors and to their specific constraints. However there seems to be an overlap in the draft COMESA Common Investment Area Agreement where plans are for full liberalization under Mode 3 except for a sensitive list. In other words all sectors are included unless specifically stipulated. This implies a *negative list* approach and contradicts the preferred positive list in the area of services. This contradiction was caused by having separate negotiators, without a harmonizing forum. However, this can be further remedied in the course of negotiations, to iron out such contradictions.

The COMESA Common Investment Area (CCIA)

Although the COMESA member states have yet to integrate their services economies, the Common Investment Area (CCIA) has made progress in liberalization of investment regimes, which would have a serious impact on the COMESA Commercial presence (Mode 3) negotiations. The following provisions are contained in the CCIA but have yet to be approved by the Council of Ministers:

- National Treatment to be provided by Members to COMESA members by 2010 and to non-COMESA members by 2015, subject to exceptions;
- *Opening up all economic sectors to COMESA member states by 2010 and to non-COMESA investors by 2015, subject to a sensitive sectors list;*
- The right of investors to hire technically qualified persons from any country, although priority should be given for the same qualifications to the host member state or any other COMESA member.

The above liberal provisions have a direct impact on EPA negotiations on Mode 3 in services. Members must take such issues into account as they participate in negotiations either in the EPAs or in the WTO context.

ESA countries are agreed on the need for liberalization to take place progressively, based on principles of special and differential treatment, asymmetry and positive regional discrimination, which would allow for greater preferences for regional members, as well as the right to regulate in pursuit of national policy objectives. It is also expected that the EU will provide full market access in all four modes of supply by all EU member states by 1st January 2008.[47] However, if one takes the EU request to ESA countries as an indication of what they themselves can bear in terms of market access,

[47] See Conclusions of the ESA-EC EPA, 3rd Ambassadorial/Senior officials' Negotiating Sessions, 26 July 2006.

then it is clear that the ESA countries will be disappointed with the outcome. ESA countries seem decided on concluding a trade agreement with the EU, albeit with special provisions on favourable treatment. This is worrisome because in the case of the WTO, favourable treatment has proven to be of limited real use in developing the capacity of developing countries to participate, and compete in international trade. It would therefore make more sense for ESA countries to settle for cooperation with the EU rather than a trade Agreement. This approach would allow for the development of capacity such that ESA countries can also participate in the markets that will be opened through the EPAs at a later stage.

In terms of *sectoral coverage***,** ESA countries have identified the following as areas in which they would like to see more commitments [48]: Financial Services: Banking, Insurance and Securities; Transport Services: Maritime transport, Road and Railway, Air transport; Energy Services: Electricity; Communications: Telecommunications; Construction and related engineering services; Professional Services: Legal-Francophone system, and Tourism services.

In the area of rule-making**,** ESA countries have expressed interest in domestic regulation. These countries hope that the negotiations result in the development of regulatory reforms and institution building, the addressing of supply-side constraints, flexibility for regulatory autonomy, assistance in the promotion of export capacities in ESA countries, assistance in developing national unity/bodies for development of national standards, assistance in participation in activities of international-standards-setting bodies in services, transparency and development of publications of regulations applicable to trade in services.[49] All these are areas in which these countries have clear problems and they are seeking solutions in the EPAs. This goes to show that ESA countries are seeking development of capacity outcomes, which are best dealt with in the context of a cooperation agreement between the two parties. These details should be further elaborated on by ESA countries in what should be a Development Cooperation Agreement between the EU and ESA.

[48] Ibid, Madagascar.

[49] Ibid, Madagascar.

VI. CONCLUSIONS AND RECOMMENDATIONS

With the frustratingly slow pace of WTO negotiations, it could be argued that negotiations between the EU and ESA on trade issues are a welcome process. However, welcome can only be adjudged against the premise of the likelihood of this process yielding development results for ESA countries. From a sectoral perspective, the EU stands to gain unfettered wide market access in many ESA countries. From a modal perspective, the EU is not willing to liberalize in commercially meaningful ways for ESA countries to benefit. A strong Mode 4 package for ESA countries should be a prerequisite for their engagement in EPA services negotiations at all. Short of this, these countries should rather negotiate on how to better cooperate on development terms with the EU, than get into a legally binding contract that is clearly for the sole benefit of the EU.

In the market access negotiations, the EU is very clear on what they want out of this. The detailed modal and sectoral commitments show their specific interest as indicated in their sectoral exclusions as well as the expression of preferred modal and sectoral commitments. However, ESA countries are still generalizing and in the exploratory phase of what they really should be demanding in these negotiations. In this case, it would make more sense for the ESA countries to move cautiously. They should rather speed up the pace of their own assessment programmes so as to understand clearly what it is that they want in services, and how negotiations can fill this need. In this regard, the EU should support the timely completion of work on the GATS templates, strengthening its aim to go beyond a mere stocktaking of liberalization levels and applicable rules and regulations. The assessment should tackle key questions such as the implications of sector specific liberalization and inter-sectoral linkages, as well as the overall impact that such liberalization would have on individual ESA economies. The EU should support these efforts by providing the financial and technical resources to assist in this process.

On the regulatory side, it is clear that ESA countries face a great challenge of developing regulatory capacity in most services sectors. Strong regulation is critical for the efficient performance of any services sector. It is important that ESA countries develop national strategies aimed at boosting regulatory capacity which can provide a balance between the goals of universal access to basic services, and competitiveness, as well as efficiency. In addition to mainstreaming this issue in national plans including through budgetary allocations, and investment in institutional and human capital, ESA countries should present technical assistance proposals to the EU for the development of regulatory capacity, a goal that falls squarely within the Cotonou aspirations.

The ESA countries are grappling with a set of issues, whose purpose cannot be served by liberalization as spelt out by the EU position on services in the EPA negotiations. The most urgent needs for ESA countries concern development of national policies on services in general, and the development of services capacity from a sectoral viewpoint. These countries also need to develop sector-specific regulation in many cases and improve that which already exists. These countries need to develop capacity to meet the challenges of provision of services especially at the domestic level. Liberalizing without capacity to participate in the results of market openings would amount to giving up preferential arrangements, even though in services they are non-binding, without any thing in return from the EU. This would constitute a big gift, from the poorest of countries to the EU.

The ESA countries would best proceed cautiously on services, drawing lessons from the complexities involved in their own *intra-regional processes* of integration. The COMESA countries are at the stage of a draft framework agreement on services. The EAC is not even ready to negotiate services, although they are at the customs union level of integration. ESA countries need to let their own processes mature, while developing their own capacities through intra-regional processes. The sequencing should have *intra-regional* liberalization as a first choice, so as to slowly develop capacity,

experiment with regulation, and then at such a time as it suits national development strategies, to extend the scope to include *inter-regional processes* as envisaged in the EPA context. This approach would be WTO compatible, as it is recognized therein that the special situation of such countries warrants their special treatment.

REFERENCES

- Abugattas Luis Majluf, (2004), *"Swimming in the Spaghetti Bowl: Challenges for Developing Countries under the "New Regionalism, Policy Issues in International Trade and Commodities"* Study Series No. 27.

- ACP (2002), *"Guidelines and EU negotiating mandate: A comparison"*, The European Research Office.

- Adlung Rudolf and Roy Martin (2005), *"Turning Hills into Mountains? Current Commitments Under the General Agreements on Trade in Services and Prospects for Change"*, ERSD 2005-01.

- COMESA (2006), *"Report of the Twenty-Second Meeting of the Council of Ministers"*, CS/CM/XXII/9.

- EU (1996), *"Green Paper on relations between the European Union and the ACP countries on the eve of the 21st Century: Challenges and options for a new partnership"*, Brussels.

- Gibb, R. and Michalak W. (1994*), "Continental trading blocs: the growth of regionalism in the world economy"*, New York: John Wiley & Sons.

- Jansen Marion (2006), *"Services trade liberalization at the regional level: does southern and eastern Africa stand to gain from EPA negotiations?"* ERSD-2006-06.

- Mattoo and Stern (2005a), "*Economics and Law of Trade in Services,"* unpublished.

- Mattoo, Aaditya (2005b*), "Services in a development round: three goals and three proposals"*, Journal of World Trade.

- Mattoo, Aaditya and Sauve, Pierre (2005), *"Regionalism in Services"*, Available On line: http://www.worldbank.org

- Mashayekhi Mina and Taiseku Ito (2005), *"Multilateralism and Regionalism, the new dimension"*, UNCTAD, Available On line: http://www.unctad.org

- Mashayekhi Mina, Bonapas Onguglo and Taiseku Ito (2006), *"Development Issues in the negotiations of Economic Partnership Agreements between African ACP States and EU"*.

- Mutai, Henry (2003), *"Memberships in Multiple Regional Trading Arrangements: Legal implications for the conduct of Trade Negotiations"*. Tralac TradeBriefs, Available On line: http://www.tralac.org

- Roy Martin, Marchetti Juan and Lim Hoe (2006), *"Services liberalization in the new generation of Preferential Trade Agreements (PTAs): How much further than the GATS?"* ESRD-2006-07.

- Stephenson Sherry (2002), *"Regionalism in Services, Lessons from Latin America*", Available On line: http://www.pecc.org

- World Bank, WDI 2005, Available On line: http://www.worldbank.org