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### DEEP INTEGRATION IN EU FTAs

Peter Holmes

Economics Department  
University of Sussex  
[p.holmes@sussex.ac.uk](mailto:p.holmes@sussex.ac.uk)

**Abstract:** This paper explores the paradox that the EU invests significant effort into including regulatory issues into Free Trade Agreements with apparently little binding impact other than in the case of prospective candidate countries who are likely to become members of the EU. The explanation does not appear to be pressure from the EU for binding agreements that is resisted by developing country partners. The main non trade issues in the recent CARIFORUM EPA appear to have been sought by the CARIFORUM negotiators, perhaps for internal reasons. The EU may also be seeking to establish soft-law precedents for more binding rules, but there is little evidence as yet of this and the EU itself is equally unwilling to be bound, eg on competition policy, leaving the mystery still unresolved

**JEL Classification:** F15 - Economic Integration

**Key Words:** Non trade issues, bilateral trade agreements

## 1. Introduction

As a successful customs union the EEC and now the EU (as we will refer to what has now become the European Union ) has always been ambivalent about the benefits of a purely multilateral approach to trade policy and has used bilateral agreements as an active tool of foreign and external economic policy. For a while at the end of the 1990s and the beginning of the new century the EU explicitly looked to the WTO as both the primary means of liberalising trade and in a limited way as a means of extending on the global plane its internal “rules-based” regime and pronounced itself wholly committed to this system. More recently it has shifted the emphasis back towards bilateralism as multilateral negotiations faltered and in particular after key elements of regulatory issues (the Singapore issues) were progressively dropped from the multilateral Doha Roundagenda

As the EU has deepened its own economic integration through the building of the single market and notably the pursuit of the four freedoms of free movement of goods, services, labour and capital, through a complex process of regulatory harmonisation and mutual recognition, the more it has sought to include similar issues in its regional or bilateral trade agreements with non members. This is what we mean by deep integration.

The term *Deep Integration* was first coined by Lawrence in 1996. He used it to refer to a process of removing barriers to trade and investment that are *behind the border*, notably regulatory barriers or even mere differences that make it harder to do business across borders than within jurisdictions. The term deep integration should perhaps be extended so that the policy dimension referred to here can be called Deep Institutional Integration (DII) while simultaneously we should be aware of market processes that are related to this.

## 2. An Overview of EU Bilateral Agreements

Since the 1960s the EU has constructed a complex network of bilateral preferential trade agreements, mostly with developing countries. As a result the EU conducts trade with most of its partners on a non-MFN basis. However, the small number of MFN partners including USA and Japan, with limited preferences for China, account for about 30% of trade by value.<sup>1</sup>

Historically the main preferential agreements were with the countries in Africa, Caribbean and Pacific (ACP) and the countries of the Mediterranean region. The early agreements were non reciprocal and incomplete. The EU opened its markets to ACP country goods but they did not have to liberalise in the same way. This principle violates Article XXIV of the GATT but was given a waiver in the GATT – the so-called Lomé Waiver which was not renewed when its extension to cover the Cotonou Agreement which renewed the Lomé agreement, was refused by GATT members. In the case of the early generation of Mediterranean agreements, before the Euromed notion was developed, an attempt was made to square the circle by declaring that the agreements were full free trade areas but that the market opening by the southern partner was to be postponed more or less

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<sup>1</sup> Own calculations from COMTRADE

indefinitely. The EU eventually under pressure of the loss of the Lomé Waiver had to propose Economic Partnership Agreements (EPA) which were fully reciprocal FTA. Meanwhile the EU has continued to negotiate and sign FTAs with countries from two distinct groups. First, it has worked to consolidate its links with countries whose economies are tightly interlinked with the EU, most obviously with the eastern and southern European actual and potential candidate countries. Some of these agreements notably the members of the European Economic Area and Turkey are of long standing and include significant elements of deep integration. Others such as those with the candidates and potential candidates in the southern and western Balkans are explicitly aimed at moving the partners towards full implementation of the single market Acquis Communautaire. The EU has tried via first its neighbourhood policy (which included the Euromed countries) but latterly through the more focussed the Eastern partnership agreements being negotiated with countries such as Ukraine, Moldova and the republics in the Caucuses that in principle meet the first and necessary condition of EU membership of being geographically in Europe. These latter all aim to be reciprocal FTAs with elements of deep integration

At the same time the EU has concluded in the last 10 years a series of FTA that can hardly be described as “regional” trade agreements, with partners such as Mexico, Chile and South Africa. In some cases these were motivated by political logic. The launch process for what became the Doha Round of multilateral trade negotiations at first prompted the EU to hold back on launching new FTA negotiations beyond those designed to facilitate its own enlargement. But since 2006 the EU has embarked on an ambitious project to launch FTA talks with trading partners to whom it thinks market access is important for the EU itself, and the EU-India project for example, fits into this pattern, even though it is reported that the initiative came from New Delhi.

## 2.1 “Global Europe”

In 2006 Peter Mandelson launched the “Global Europe” initiative. Underlying this was the proposition that the EU should consider its own offensive interests more clearly, not least in the face of active US bilateralism notably in Asia, and strive bilaterally for what it could not get at the WTO. This initiative includes two important elements - the choice of large growing markets as partners; going beyond tariffs reduction as the way to get market access. It is not certain how far the new trade strategy of Commissioner de Gucht will continue on the same lines, but for now we write as if the strategy remains the same<sup>2</sup>.

The EU’s current strategy in all of its trade agreements places great emphasis on deep integration in the sense that it recognises that “shallow” integration in the form of the removal of trade barriers at borders such as tariffs and QRs is inadequate. Not least because its own tariffs and other border barriers are relatively low (outside the highly sensitive area of agriculture), which reduces the EU’s attractiveness as a partner in any form of reciprocal liberalisation process. It sees such deep integration agreements as important for realising Europe’s “competitiveness”.

The 2006 background paper on “Global Europe”<sup>3</sup> made it clear that the EU would be seeking to complement the WTO with bilateral trade deals with major partners.

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<sup>2</sup> See the consultations at [http://trade.ec.europa.eu/consultations/?consul\\_id=144](http://trade.ec.europa.eu/consultations/?consul_id=144)

<sup>3</sup> COMMUNICATION FROM THE COMMISSION TO THE COUNCIL: A Contribution to the EU's Growth and Jobs Strategy {COM(2006) 567 final}

“The key economic criteria for new FTA partners should be market potential (economic size and growth) and the level of protection against EU export interests (tariffs and non tariff barriers).”

The text insists that the new generation of FTAs must address services and regulatory issues.

“New competitiveness driven FTAs would need to be comprehensive and ambitious in coverage, aiming at the highest possible degree of trade liberalisation including far-reaching liberalisation of trade in services covering all modes of supply.”

It offers sets ambitious targets for the new type of FTA:

“Future FTAs would also need new ways of addressing non tariff barriers. The effectiveness of competitiveness-driven FTAs will depend in part on their capacity to tackle non tariff barriers. Our ability to tackle NTBs will differ depending on our trade partners. Regulatory convergence, for example, is more likely to be achieved with neighbourhood partners than others. But these issues must be on the agenda with all our prospective partners. Mutual recognition agreements should be concluded where necessary and useful.”

The last sentence is remarkable since the EU has had great difficulty implementing such an agreement with the USA, and this was even the last element of EU’s internal market to function. The mutual recognition element of the Turkey-EU custom union only followed 10 years later.

The initial negotiations under this rubric were opened with India and South Korea both of whom had expressed a desire to have such FTAs with elements of deep integration. We will look at both of these agreements. As we note, “deep integration” implies major internal regulatory reform and it has been suggested that this is an aim of the Indian side as well as the EU and Korea. The EU paper claims:

“Our potential partners such as India, Korea and ASEAN seek a very high level of ambition as regards investment which goes well beyond the provisions of current EU FTAs.”

If we are to be realistic about this process, we have to accept that very little progress has actually been made in deep integration so far, other than with the EEA and candidate countries. The EU recently commissioned a survey of deep provisions in its own and other FTAs and found them wanting.<sup>4</sup> Strong agreements have been signed with the EU’s neighbours and with accession candidates but with hardly any other partner.

“The current geography of EU FTAs mainly covers our neighbourhood and development objectives well, but our main trade interests less well. The content of these agreements also remains limited: they may deliver on market access

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<sup>4</sup> Bourgeois Dawar Evenett (2007)

commitments but even an advanced agreement like the EU-Chile FTA does not present major progress in areas such as IPR, subsidies, SPS or TBT.<sup>5</sup>”

A recent study by Sapir Horn and Mavroidis (2009)<sup>6</sup> finds that, although EU FTAs frequently appear to include deeper commitments in GATT/WTO domains and commitments in areas where there are no multilateral commitments, these are generally little more than declaratory except for actual and potential EU candidate countries. The EU is still negotiating under this mandate but it is not clear that with arrival of the new Commissioner de Gucht this policy will continue in the same way.

## 2.2 Deep integration provisions in EU agreements

The most comprehensive significant trade agreements the EU has signed with non-members was the European Economic Area Switzerland (which include the 4 Freedoms except for agriculture and fisheries). The EEA agreement is a deep Free Trade Area, but not a Customs Union. It requires partners to sign up to all the EU *acquis* except for fisheries and agriculture, and external tariffs; where the *acquis* were in place the EU renounced the use of contingent protection. The EEA partners had to commit to amending all their relevant domestic legislation and subject themselves to a supranational tribunal the ESA (EFTA Surveillance Authority) which would enforce EU law in their territory. It involved a major loss of sovereignty, rendered acceptable probably because most of the governments who signed it expected to join the EU. Once a state has joined the EEA, membership of the EU becomes attractive because in order to get some say in the rules. For countries whose overwhelmingly important main market is the EU, conformity to EU norms is a market necessity.<sup>7</sup> The EEA model is unlikely to be attractive to many other partners. The loss of sovereignty is extreme, however, the EU will only give unconditional free access where it gets a total guarantee of conformity.

The next deepest agreements have been the Europe Agreements signed since the early 1990s with Central European candidates for EU membership. It is actually surprising when one reads them how weak the requirements for deep integration via approximation of laws actually was in the Europe Agreements as such. The Poland agreement which was something of a template stated:

“The Contracting Parties recognize that the major precondition for Poland's economic integration into the Community is the approximation of that country's existing and future legislation to that of the Community. Poland shall use its best endeavours to ensure that future legislation is compatible with Community legislation.”

“The approximation of laws shall extend to the following areas in particular: customs law, company law, banking law, company accounts and taxes, intellectual property, protection of workers at the workplace, financial services, rules on competition, protection of health and life of humans, animals and plants, consumer

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<sup>5</sup> GLOBAL EUROPE: COMPETING IN THE WORLD

[http://trade.ec.europa.eu/doclib/docs/2006/october/tradoc\\_130370.pdf](http://trade.ec.europa.eu/doclib/docs/2006/october/tradoc_130370.pdf) p.14

<sup>6</sup> [http://www.bruegel.org/uploads/tx\\_btbbreugel/bp\\_trade\\_jan09.pdf](http://www.bruegel.org/uploads/tx_btbbreugel/bp_trade_jan09.pdf)

<sup>7</sup> Phone booths in Geneva accept Euro coins, but not because they are legally required to do so. We have not discussed here the EU South Africa TADC. It is worth remarking that S Africa unilaterally decided to adopt EU water quality rules to gain market access, not because of a TADC obligation

protection, indirect taxation, technical rules and standards, transport and the environment.”<sup>8</sup>

This is literally a “best endeavours” obligation. Approximation, indeed harmonisation, of laws proceeded at a faster pace than this text would seem to require. This was due to the process of implementation of this agreement which was accompanied by the *separate* pre-accession process wherein the candidates were told exactly what laws to change in order to become members. In fact this is part of a general phenomenon. The FTAs themselves only reflect in a small way the other factors that may drive the trend towards approximation with EU norms, the wish to accede and the need to make products that are acceptable in EU markets.

We do see an evolution of the texts in subsequent agreements. The 1995 White Paper on extending the internal market to the CEECs made it clear that the partners had to accept all relevant EU *acquis* as a necessary but not sufficient condition to the elimination of contingent protection.

### **2.3 EU- Russia, Georgia, Armenia & Ukraine**

Meanwhile thinking about EU-Russia, EU-Georgia and EU-Armenia negotiations on possible free trade agreements has highlighted a number of key issues in terms of flanking measures where the EU might wish to see deep integration aspects. We can distinguish between two main groups of problem: 1) gaps or deficiencies in domestic legislation; 2) problems of implementation of domestic legislation. Some key areas are competition policy, IPRs and conditions for investment. All three states have competition statutes on the books. In addition to technical weaknesses in the legislation, there is a serious issue of the political feasibility of competition agencies actually taking on entrenched actors. In Russia, the power of the oligarchs hardly needs to be mentioned, whilst in Armenia, the key issue is that channels of imports are in a few highly restrictive hands. Thus there are major issues that are directly relevant to trade in the competition domain and if the EU is serious about addressing all problems that create obstacles to trade. It would have to include effective competition provisions in these agreements that are tougher than the ones normally included in its non-candidate FTAs.

However, the likelihood of effective implementation of competition policy is slight. We see that the EU is torn between a political desire to sign symbolically important FTAs and the risk of further legal inflation. The situation is similar with respect to IPRs - all three states have statutes that are close to TRIPS compatible, but enforcement is patchy. FTAs might not be able to go much beyond consolidating TRIPS (which Russia is not yet a signatory to). A further issue is of technical standards. Russia has expressed willingness in the WTO context to harmonise with international standards, but given the weakness of its standards infrastructure, any mutual recognition of conformity assessment would be problematic. It is widely argued that Russia deliberately uses standards for political and protectionist purposes (Dyker 2009, Roth 2009).

The EU is currently in negotiation for a Deep Integration agreement with Ukraine. The EU wants this to be very comprehensive and reformers in Ukraine do as well, but harmonisation of rules on competition and investment are likely to be opposed by

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<sup>8</sup> [http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:21993A1231\(18\):EN:HTML](http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:21993A1231(18):EN:HTML)

oligarchs! On the other hand, Ukraine is, in one respect like Switzerland: to supply its major export market it must produce substantially to EU standards and have reliable quality controls, otherwise expect lengthy post-import inspections.

Whether to include investment provisions in the FTAs is highly problematic. As with the Euromed and CARIFORUM partners (see below), the key to securing development gains from deep integration elements in FTAs is that the external negotiations provide a lever for policy makers to secure necessary internal reform that will, for example, ensure greater business certainty across the board for domestic as well as foreign investors. If the willingness to do this is absent, then we are faced with the question of whether it makes sense to use FTAs as signals of aspirations.

## **2.4 The extent of deep integration in the agreements with Mediterranean Partners**

The EU recently proclaimed its intention to allow Euromed partners to have a “stake in the internal market”. However, the lack of clarity in the EU aims has led to the shelving of this notion and a more realistic assessment of the realities and possibilities. We consider here some areas where the Euromed process has aspirations that go beyond the basic shallow integration process.

It is well known in the literature that technical standards as such are not barriers to trade. Standards themselves are just standard definitions of product or process specifications. They can become barriers to trade if they are linked to restrictive mandatory regulations. Trade can be obstructed even when standards are harmonised if the process of verifying compliance with standards problematic (conformity assessment), or if there is an inadequate infrastructure to assess the processes of conformity assessment in partner country (accreditation). A commitment by a partner country to adopt EU norms as standards would have very limited effect. A commitment to adopt and make them mandatory would facilitate trade so long as the producers in question could easily get documentation certifying their conformity.

The problem for a partner country is that committing to mandatory adoption of EU standards can secure very little by way of market access unless the EU is able to trust the whole standards infrastructure of the partner. If it does not, then the partner has to incur the costs of conforming to EU norms and of the certification of exports. There is a limited gain for exporting firms until they get the mutual recognition of their local conformity assessment. However, for purely domestic businesses, the gains are not so clear since they might be driven out of business by higher costs.

Mutual recognition of conformity assessment is a step that can only follow a major internal reform process; it is not something that a trade agreement can create without pre-conditions. It has been included in EU-Korea; however, as mentioned above, it took 10 years before mutual recognition of conformity assessment was implemented after the EU-Turkey custom union was signed. In the case of the agreements between EU and US, mutual recognition agreement on conformity assessment signed in 1998 was a framework arrangement only and it took many years for the first sectoral agreements to be signed.

The recent generation of Euromed agreements contain provisions on technical barriers in general and in the food and agricultural areas, as covered by the WTO TBT and SPS agreements. However, detailed examination of the texts reveals the vagueness. The

fact remains that countries cannot sell into the EU unless their food standards infrastructure satisfies the EU Food and Feed Directive – and the private standards regimes associated with it such as the supermarkets' Europgap (now Globalgap<sup>9</sup>) rules. We should also note that the 1996 EU-Turkey Customs Union has features of a pre-accession agreement. Its demands are indeed very strong by way of harmonisation, especially on competition including state aids. Turkey was called on in effect to harmonise all its technical regulations with the EU. This did not, however, guarantee market access for Turkish products because it was not until 2006 that a Mutual Recognition agreement was signed with respect to conformity assessment, without which Turkish goods were subject to administrative checks at the border. The Euromed agreements did not have this pre-accession character.

Muller-Jentsch (2004) argue the actual degree of market opening in services in Euromed is very small even though the gains from service trade expansion were potentially much greater for the region than that for goods. To go further would require changing the whole domestic system in the partners.

### **3. Other agreements EU- Chile, India, Korea, Colombia-Peru**

Looking more briefly at other agreements, we find the EU-Chile FTA (1999) makes quite limited commitments on TBT and SPS norms. It is clearly not possible to expect Chile to adopt EU rules and the chosen strategy is one of creating procedures to establish “equivalence”. The EU-Chile FTA is remarkably in details laying out a pathway for mutual recognition of standards and conformity assessment with a-partner who could not be expected to adopt EU norms, but with its own quite sophisticated standards infrastructure. Despite detailed terms of the agreement the path to actual mutual recognition has not been taken. These carefully crafted provisions do not appear to have been used, leaving them still in the category of “legal inflation”.

EU-Chile FTA does include what appear to be sectoral commitments beyond GATS on services. It is hard to read how much extra they give without very careful inspection. Chile, for example, leaves mode 4 “Movement of natural persons” unbound, except for “transfers of natural persons within a foreign enterprise established in Chile, in accordance to [ Mode] (3)”. The EU-Chile FTA does include some other elements that Chile has not committed to at the WTO, eg Government Procurement.

According to the Commission “The EU-Mexico FTA is one of the most comprehensive in the global economy” But the 2000 agreement confirming the 1997 EU Mexico FTA <sup>10</sup> has little to say on technical norms beyond:

“The Parties shall intensify their bilateral cooperation in this field in light of their mutual interest to facilitate access to both Parties markets and to increase mutual understanding and awareness of their respective systems. To this end, the Parties shall work towards: (a) exchanging information on standards, technical regulations and conformity assessment procedures;”

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<sup>9</sup> See [www.globalgap.org/](http://www.globalgap.org/)

<sup>10</sup> **DECISION No 2/2000 OF THE EC-MEXICO JOINT COUNCIL of 23 March 2000** on the Interim Agreement on trade and trade related matters [http://trade.ec.europa.eu/doclib/docs/2004/october/tradoc\\_111828.pdf](http://trade.ec.europa.eu/doclib/docs/2004/october/tradoc_111828.pdf)

On the other hand, in public procurement, it does go somewhat beyond the WTO and it also establishes a cooperation mechanism in competition policy.

The EU-India agreement is currently under negotiation. It is too early to predict the exact contents of the agreement. Our preliminary analysis suggests that there is at least the possibility of an agreement with deep integration elements. To be realistic, progress on technical barriers in goods and SPS is likely to be limited. There are, however, a number of areas where services liberalisation might be made to add up to a mutually beneficial bargain, eg in legal services. Most of the areas where something might happen are those where either India is generally closed or the issue to be addressed calls for simplification and transparency of Indian procedures. The biggest pay-off to India would come in the form of domestic reform. A draft version of the chapter on trade in goods published by [bilaterals.org](http://bilaterals.org)<sup>11</sup> indicates that the SPS section appears to have been modelled on the EU-Chile agreement. It could create a pathway towards recognition of equivalence in standards and compliance which may or may not involve further inspection of goods as they arrive in the EU, however, it does not provide a guaranteed access, and in any case could be suspended at any time. The Chilean model if applied could eventually lead to major advances in the recognition of equivalence, but as we have seen, even in the US and the Chilean cases, the sectoral implementation agreements have not happened as hoped for.

The information we had on services suggested that India was seeking to use this as a chance to further continue with its unilateral liberalisation, perhaps in areas where there are net gains to India with clearly identifiable winners and losers. An obvious example arises in the case of pressures to liberalise Indian retailing. It seems likely that opening to foreign competition will increase efficiency, but not only will many small shopkeepers suffer, so too will those consumers unable to access new retail outlets so easily. On the other hand, liberalising commercial legal services would allow the same firms who were suffering from additional competition from newly entering EU firms to profit from outsourcing. The IPR section of the draft text is very long and detailed. The leaked draft notes that India is ready to negotiate for a high level of protection for geographical indicators, and the draft text goes into many details of domestic rules, such as the liability of internet providers under “mere conduit”. At various points in the text it is noted that India would prefer less binding language but the degree of detail being discussed is striking. This appears to be an instance where some of it could still be binding.

Overall, in the case of EU-India, *if* a comprehensive agreement takes place it will cover those areas where there is an autonomous will on the India side to liberalise. The EU will not relax its scrutiny on technical standards in the areas which it does not wish. India will not open markets where there is no domestic policy interest. At the time of writing negotiations are stuck on trade and labour issues, though as we shall see, EU agreements so far do not set a very strong precedent.

There are clearly political pressures in the EU with regards to EU- Korea and EU-Colombia-Peru FTAs on labour issues . The texts of the agreements reveal again much symbolism. The draft of EU- Peru/Colombia appears to reaffirm merely a commitment to applying existing laws.<sup>12</sup>

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<sup>11</sup> [http://www.bilaterals.org/IMG/pdf/EU-India-Texts\\_Goods\\_SPS\\_IPR\\_feb2009.pdf](http://www.bilaterals.org/IMG/pdf/EU-India-Texts_Goods_SPS_IPR_feb2009.pdf)

<sup>12</sup> Article 1 and Article 267 Right to regulate and levels of protection “Recognising the sovereign right of Parties to set their domestic policies and priorities of sustainable development, their own levels of environmental and labour

EU-Korea is a model for an FTA with an industrial country that is not in the EU sphere of influence. It contains important services commitments and whilst it obviously does not have as its basis of harmonisation with EU norms, the sensitive area such as cars and the electronics provisions provide for MR including element of conformity assessment. The agreement does contain labour and environment provisions but these are largely aspirational and the one firm commitment appears to be “A Party shall not fail to effectively enforce its environmental and labour laws, through a sustained or recurring course of action or inaction, in a manner affecting trade or investment between the Parties.” The labour provisions do not appear to be subject to binding dispute settlement.<sup>13</sup>

#### **4. EU-ACP EPAS: Non trade issues**

The EU was forced to replace its unilateral preferences to ACP countries by reciprocal FTAs to ensure WTO compliance. The EU aspired to secure deals that were genuinely deep. However, only the CARIFORUM agreement is a full “EPA”. Interim agreements have been signed with others. But in this section we look at what is in the CARIFORUM EPA and what rendez-vous clauses are in the interim agreements as indications of the parties’ intentions.

At first impression to the outside observer the non-trade provisions of the CARIFORUM agreement could be seen as an attempt by the EU to force “deep” integration issues on to a reluctant CARIFORUM partner. We do have the evidence however that the non-trade issues included were those that the CARIFORUM negotiators saw as meeting the development needs of CARIFORUM countries. This should be accompanied by the caveat that the CNRM negotiation team who did the negotiations on behalf of all CARIFORUM countries might have had different preferences from the individual states.

Most of the provisions in CARIFORUM agreement are fairly weak, and if this is the ideal model for other EPA agreements, there may be little to hope or fear. Striking provisions which have some possible development implications are the IP provisions which do include elements likely to be of interest to the region eg on music; the intra-CARIFORUM liberalisation of procurement; and the interesting trade and environment provision which do not lay down any new obligations but rule out reductions in standards to attract investment. The investment provisions are hard to read.<sup>14</sup> The interim EPAs by definition do not include non-trade issues but one can see from the differences in the texts what development aims might have been in the minds of the negotiators for eventual full EPAs.

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protection, consistent with the internationally recognised standards and agreements referred to in Articles 3 and 4, and to adopt or modify accordingly their relevant laws, regulations and policies; each Party shall strive to ensure that its relevant laws and policies provide for and encourage high levels of environmental and labour protection”.

<sup>13</sup> ARTICLE 13.14: GOVERNMENT CONSULTATIONS;  
[http://trade.ec.europa.eu/doclib/docs/2009/october/tradoc\\_145185.pdf](http://trade.ec.europa.eu/doclib/docs/2009/october/tradoc_145185.pdf)

<sup>14</sup>But Ramesh Chaitoo of the CNRM has stated that CF wished to go further than the EU “[EPA Negotiations - Services and investment](#)” (Digital Library:Negotiation Arenas/CARIFORUM-EC EPA/EPA Related Workshops/Regional EPA Media Workshop/Media Workshop Presentations) Tuesday, 28 July 2009” at <http://www.crnrm.org>

The interim agreements are not identical and vary according to the negotiations. Whether the pattern of differentiation corresponds to any discernible development needs is another question. CARIFORUM countries saw a clear interest in including all the issues. Others did not. But it is not clear to the observer what lies behind the choice of priorities in the declared aspirations. Why should “Central Africa” (ie Cameroun) commit to negotiate on data protection and make firmer but, one suspects, unsustainable commitments to negotiate on competition than ESA and SADC? The latter have in fact begun to develop competition infrastructure at both regional (COMESA) and national (South Africa) level and might well have been able to profit from firm commitments on cooperation.

The TBT provisions in all the interim agreements are fairly vacuous but tailored to each case. Only SADC speaks of the possibility of an eventual mutual recognition agreement. We know, however, that this has proved extremely hard to implement even in the case of EU-US and EU-Chile. It is difficult to know what the long but variable list of aspirations for future negotiations signify. Some of the agreements provide for social and environment negotiations but all without content. Arbitrariness is suggested by the fact that the Central Africa Agreement contains extremely ambitious promises for further negotiations (including data protection and TBT), and makes reference to “Central Africa” as a party whereas the signatory is in fact Cameroun. If it is indeed the case that the agreement binds only Cameroun, it is very hard to see what could be meant by a loose commitment to harmonise standards in “Central Africa” or to allow free circulation within the region.

The TBT provisions in the interim EPAs are fairly vacuous in every case even where they are more rather than less detailed. EU-Ghana has a single chapter on SPS and TBT The EU-SADC agreement is the most elaborate with regards to TBT issues. It has a fairly ambitious aspirations, but no binding obligations. The language refers to the possibility of a mutual recognition agreement, it is in fact much less explicit on the potential pathway to achieving it.

With regards to institutions and dispute settlement, all the agreements, even the CARIFORUM are a little vague about how deeper provisions are to be negotiated or implemented, though some have more than others. However, several of the agreements contain very detailed provisions for multi-layered dispute settlement processes. It is far from obvious without specialised legal analysis what these mean. It is particularly uncertain what the development implications of having more details in the dispute settlement process than in the nature of the obligations.

Horn, Mavroidis and Sapir (2009) are especially critical in their analysis of EU FTAs agreements which purport to give binding effect to commitments that are so vague it would be very hard to decide whether one party has for example refused to “cooperate”.<sup>15</sup>

#### **4.1 CARIFORUM**

We now explore in more depth the CARIFORUM. It would be tempting to see the CARIFORUM EPA as a model and consider its implications for negotiators of other texts,

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<sup>15</sup> *Horn*, Henrik, *Mavroidis*, Petros C. and *Sapir*, Andre, Beyond the WTO? An Anatomy of EU and Us ... *Bruegel* 2009

but this would be misleading. As Sauv  and Wood (and also discussions with CARIFORUM negotiators make clear) the CARIFORUM outcome is specific to that region where there were:

- quite specific “offensive” interests that fitted with the EU’s aim of a broad agreement
- a well established regional negotiating machinery
- existing agenda for regional integration that matched the EPA concept
- some individual member states eager to push the deal

Hence the broad scope was not something that was resisted by the CARIFORUM side. One CARIFORUM negotiator has said that the topics agreed in the EPA were all ones where the CARIFORUM side wanted to make progress except for one area where they were subsequently convinced that it was in fact in their interest.<sup>16</sup>

On competition policy, it has a standard feature of EU agreement but little of substance. The competition provisions go little beyond asserting that anti-competitive behaviour that distorts trade is incompatible with the agreement and allowing (not obliging) information exchange. There is an exemption to enshrine the right to keep state monopolies but these must not act to distort trade. The context contains the marks of already active development of the CARICOM Competition Commission. Meanwhile the IP provisions clearly see compromise from both sides and are also a mixture of new measures that the EU wants everyone to adopt, many of which are of no relevance to the CARIFORUM states. The public procurement chapter interestingly includes an instrument for intra CARIFORUM liberalisation as well as market opening to the EU. As Sauv  and Wood note that the main obligations are for transparency rather than liberalisation as such. The environmental and social provisions contain few binding constraints, and reaffirm the right to regulate at developmentally appropriate levels, but do provide an interesting requirement against the lowering existing standards as an investment incentive.(Art 73) The provisions on investment are hard to read. Title II is called “INVESTMENT, TRADE IN SERVICES AND E-COMMERCE”. It appears to cover all investment and yet almost every detailed provision is about services.

The investment provisions would appear to rule out any investor-state implications, but it is not clear if investment is excluded from state to state dispute. Na ve reading of these texts in the absence of any insight into the negotiations process would lead one to suppose that during the negotiations the EU had demanded CARIFORUM enter into a comprehensive Trade and Investment Agreement but that CARIFORUM had insisted on discussing only GATS issues . A completely different interpretation is however suggested by R. Chaitoo Head, Services Trade Unit of the CNRM<sup>17</sup>. Chaitoo makes it clear that the agreement covers investment and services not investment in services. He clearly states that it was the CARIFORUM side who wanted a more comprehensive investment agreement.

The TBT provisions are very loose indeed. The CARIFORUM agreement does not contain any binding obligations other than to “cooperate”. It states as an aim to use single

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<sup>16</sup> Junior Lodge at WTO Public Forum 2008

<sup>17</sup> See “[EPA Negotiations - Services and investment](http://www.crn.org)” (Digital Library:Negotiation Arenas/CARIFORUM-EC EPA/EPA Related Workshops/Regional EPA Media Workshop/Media Workshop Presentations) Tuesday, 28 July 2009” at <http://www.crn.org>

point of contact to consult over any issues that arise. The whole TBT section of the agreement is approximately a page long with no implementation mechanism spelled out. There is no reference to any procedures or processes to give effect to it.

With regards to environment and labour, as noted above the CARIFORUM agreement contains an interesting and innovative provision that requires CARIFORUM not to reduce its standards to attract FDI without adding any other commitments. This is not the case in any of the other agreements, for examples, Ghana, Cote d'Ivoire and SADC are essentially silent on these issues. Central Africa and ESA EPAs have references that can hardly be seen as a binding obligation. There is no explicit reference to labour standards.

#### **4.2 Dispute Settlement in CARIFORUM and the Interim EPAs**

The exact significance of the dispute settlement provisions requires a lawyer to examine in detail what they might mean, and in fact a lawyer with a crystal ball to figure out how they will be used. The most obvious interpretation would be that they provide a detailed pathway for arbitration and the achievement of a diplomatic solution. It is interesting to note that there is a provision for (voluntary) offer of financial compensation for non compliance with a DS decision. Nevertheless at the end of the diplomatic process there is a provision that allows certain measures to be taken.

Interviews with CARIFORUM officials suggest their commitment to an agreement with deep integration elements. However, other source suggest that like the EU, CARIFORUM itself was trying to use the external negotiations and external pressures to press its member states to move faster to create their own single market. Other regional EPAs certainly lack this.

Examining the interim EPAs, it is clearly seen that there are no other provisions rather than trade in goods, but have some form of rendez-vous clause. This means a commitment to complete the Interim agreement with subsequent deeper agreements. As background research for a report on the EPA process the prospective coverage of all the rendezvous clauses in the interim EPAs was reviewed. The basic conclusion is that they differ from agreement to agreement suggesting that the EU did not simply impose a common template, certainly in all interim agreements signed by African countries.

Despite lack of substance, the dispute settlement provisions of the interim EPAs are quite lengthy and again would need legal reading. Some are brief but where they are spelled out they follow CARIFORUM. There is a lengthy mediation process spelled out to be followed by an arbitration process, but it is far from clear that these are in a formal sense binding. Moreover, as Horn, Mavroidis and Sapir (2009) point out, very vague commitments cannot be justiciable.

### **5. Why is it so hard to conclude deep agreements? is it worth the trouble?**

It is evident that the EU has had very limited success in its agenda of pursuing "deep integration". EU-Mexico agreement is quite advanced in some areas but other exceptions are the EU-CARIFORUM EPA, and perhaps EU-Korea and EU-India. Even in the area where the EU has been most enthusiastic about "trade and.." agenda in its

FTAs, namely competition policy, the results have been disappointing summed up in the words of Lucian Cernat: “Eager to ink, But ready to act?”<sup>18</sup>

Horn, Mavroidis and Sapir (2009) speculate on why the EU has been so eager to sign deep agreements with so little content. They offer a number of hypotheses. Pisani Ferry’s introduction summarises it thus:

“One is simply that the EU proselytises and uses trade policy to that end for lack of any other suitable instrument. It wants to promote, say, macroeconomic stability and human rights and does it through trade policy because it lacks the political power to do it through foreign policy. Legal inflation would in this case be the by-product of Europe’s political weakness. A second explanation is that Europe is seeking to persuade its partners to adopt its policy culture. The idea here is not that the EU uses trade policy purely as an instrument, but rather that it sees durable benefit in the generalisation of policy regimes inspired by its own and is willing to invest for the long term.”

Their main text offers two other interpretations of the funding that enforceable obligations are most common in the (relatively rare) cases where an issue appears either in a very small number of cases or in nearly all of them. In the former case, it may be surmised that there is a very special interest in this issue by the partner who really wanted it to be included and wanted it to be binding. While in the latter case, if the EU always includes it, it must be something where the EU has a very strong policy interest. For middling cases they find fewer binding obligations and they speculate that this could be because

“either (i) the EC sees itself as being on the ‘paying’ end in these areas, and manages to ensure that it will more easily escape enforceable obligations in these areas; or (ii) the partners have less of an interest in these areas, and manage to ensure softer legal language in return for accepting the enforcement possibilities that the EC insists on in the areas at the upper end of the scale in terms of coverage.”

For an agreement to contain binding clauses in a variety of areas the key obstacles to progress must be sidestepped. It seems likely that a positive motive for including an issue but in a non-binding way is that this represents, not so much a consensus that a non-binding text is appropriate as a compromise between those who believe it should be binding and those who believe it should be absent. It would in fact be a mistake to believe that these differences are always between parties. Trade and competition authorities frequently have different views as will trade negotiators and technical regulatory officials. The result may be that if the EU is seeking to “proselytise” the way it can do so is by first inserting soft obligations and then hoping that those in favour of using the integration process as a means for internal upgrading can then use the more technocratic association process to actually achieve the deeper institutional integration.

The very limited progress in Euromed suggests that deep integration via trade agreements can only really succeed if it is a catalyst to trigger a domestically sought process or else if it is backed by the lure of becoming a member of the EU.

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<sup>18</sup> Cernat in Brusick et al eds. See also Holmes et al in the same volume.

In the CARIFORUM case, the negotiators essentially agreed to things that they were originally or eventually persuaded were in fact in their own interest. It is clear from the preceding analysis as well as from the papers by Sapir et al and Bourgeois et al that if the EU is to really address the issue of deep integration, it will have to adopt an approach that is quite distinct from the one it has adopted so far in extending the commitments beyond GATT/WTO in extremely soft ways. It looms as if the FTAs signed by the EU had only a very marginal impact on deep integration issues. The driving force pressing countries to adopt EU rules appears to be the necessity to sell to the EU, or to be able to accede.

Garcia Bercero (2005), a senior Commission official offers a slightly different take on it. He argues that while pre-2000 EU RTAs were soft in most respects, EU-Chile and EU-Mexico are unusual in incorporating some elements of binding dispute settlement. However the most sensitive issues are typically excluded, eg anti-dumping and CVDs in EU-Mexico, Government Procurement and competition in EU-Chile. The inclusion of some non-WTO binding dispute settlement can still be seen as a first step extending the EU's rule-based approach to the rest of the world.

The one rationale we can read into this is that soft law is seen as a precursor to firm hard law provisions. The competition provisions can be read in this light: they provide a framework under which the authorities can cooperate without obliging them to do so. Similarly most TBT and SPS provisions apart from EU-Korea provide for negotiating routes. One may also speculate that these RTAs are a possible template for WTO rules. However, most analysis are sceptical whether this evolutionary path will really work even within the FTAs, and it seems very likely that both parties would have to be really committed.

The mystery then is still not so much why EU partners sign up to draconian provisions but why the EU invests so much effort in securing non-justiciable provisions. Probably the best hypothesis is the one suggested above: elaborate but meaningless provisions are a face-saving compromise between no reference and a binding commitment, but this does not exclude that the EU side genuinely hopes soft law will set precedents that can harden.

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