

# ACP regionalism: thwarted by EPAs and interim agreements on services and investment

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During negotiations on Economic Partnership Agreements (EPAs), European Commission (EC) negotiators, representing the 27 member states of the European Union (EU), have frequently asserted that EPA provisions on investment and services will support regional integration in the six African, Caribbean, and Pacific (ACP) regions. When the EU proposed at the end of October 2007 that it would sign interim framework agreements with some ACP regions on goods only, it nevertheless insisted on including *'binding commitments to continue negotiations in outstanding areas'* such as services and investment in 2008<sup>1</sup>.

This paper questions whether the proposed EPA provisions on services and investment do actually support the ACPs' own regional integration processes, aspirations, and choices. It provides examples of how the EU has been pushing for liberalisation of services and investment in EPAs far beyond the pace and approaches that the various ACP regions have agreed among themselves. The paper also argues that if interim agreements and (goods-only) EPAs involve commitments to negotiations on services and investment after December 2007 – according to the same approach as the EC has pursued up until now – this could seriously undermine ACP regional processes in the future.

<sup>1</sup> Communication on Economic Partnership Agreements, from the Commission to the Council and the European Parliament, 23 October 2007.



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# SUMMARY

First, the EC has consistently used strong and undue pressure to include services and investment liberalisation in EPAs, and in interim agreements, against the stated wish of African Ministers.

Secondly, the approach of the EU differs in important respects from that of the ACP regions on the question of how to deal with services and investment, if at all, in EPAs.

- The EU's proposals require ACP regions to make binding commitments and restrictions on national or regional regulation in order to liberalise trade in services and investments ('establishment') in services as well as non-services sectors. These commitments would go beyond what the ACP regions have agreed in the General Agreement on Trade in Services (GATS). Although GATS Article V allows for flexibility in agreements between developing and developed countries, the EC's approach has been to push hard for wide coverage of the sectors to be liberalised. This pressure to include more sectors is pre-empting regional decisions, given the current stage of regional integration processes within ACP regions.
- The ACP regions themselves have prioritised cooperation-based approaches to dealing with investment and services in order to strengthen these sectors and their institutions, and to underpin sequenced liberalisation with appropriate regulations and institutions. However, the EC has generally refused ACP requests to support cooperation provisions in EPAs without commitments from the ACP regions to liberalise in return.
- The EC has imposed an approach in EPA negotiations whereby the EU is part of the liberalisation commitments ('open regionalism') and makes EPAs instrumental for integration in the world economy, rather than giving priority to common ACP regional processes, including the pan-African integration agenda.
- The EC's proposed definition of regional integration is extremely narrow. It limits the potential for ACP regions to derogate from 'most favoured nation' treatment *vis-à-vis* the EU – as proposed by the EC. It affects their scope for prioritising each other over EU investors, and for creating a common market according to their own approaches.

Thirdly, the EU is imposing a different liberalisation model through EPAs to that which ACP countries have been pursuing through existing initiatives. The EC has been pushing to liberalise investment according to GATS rules, but this model has not been tested for non-services sectors. The GATS model is at odds with many regions' own agreements whereby services and investments are dealt with separately, in more comprehensive ways, or according to bilateral investment agreements (BITs). EPAs are adding a further layer of complexity to existing BITs (between many European member states and ACP countries), to other regional processes, and to other donor-driven investment initiatives.

Fourthly, the EC has been forcing the pace of ACP regional services and investment liberalisation in an unhelpful manner regarding sectors to be liberalised, priority to be given to regional and national companies in preference to those of the EU, and regulations to be adopted.

Finally, the EU is refusing to include the many alternative proposals made by ACP regions, and listed in this paper, to build safeguards into EPAs to minimise negative effects and to balance the rights and responsibilities of investors. The SADC region has made interesting proposals to prevent EPAs or interim agreements committing ACP regions to negotiate services and investment after December 2007 against their own interests and regional processes.

The paper concludes that – on the basis of experience of the EC’s negotiation practices to date – it is unlikely that any (EPA) negotiations on services and investments will be free of the many concerns covered in this paper. Using the current Cotonou provisions on services and investment might be a more prudent way forward. This would allow for more comprehensive and democratically discussed innovative approaches which would directly contribute to poverty eradication and sustainable development.

2 See, for instance, M. Vander Stichele, ‘EPA negotiations do not promote the right investment policies in Africa’, SOMO, September 2006.

This paper does not address the many questions<sup>2</sup> that can be raised about certain ‘truths’ asserted by the EC concerning the inclusion of services and investment rules and liberalisation in EPAs, nor whether responses from the ACP negotiators are appropriate to the achievement of the goals of sustainable development, economic growth, and poverty eradication and other goals set out in the Cotonou Agreement.

For example, the EC’s underlying argument is that foreign investment plays an important role in the development and diversification of economies, and that ACP countries need to attract foreign investment through agreements on rules that are predictable and clear. However, the EC tends to ignore research and experience which demonstrate that foreign investment often does not increase the income of the poor; that foreign investors are often reluctant to invest in those sectors that are most critical for development, for example infrastructure in poor and remote areas; and that regulatory predictability through services or investment agreements often does not determine an investor’s decisions about whether or not to invest in a country, since the existence of infrastructure provisions and profitability forecasts is a more important factor.

# No choice for ACP regions but to cover services and investment in EPAs

Although EPAs do not need to include provisions on liberalising services and investment in order to be compatible with the rules of the World Trade Organisation (WTO), the EU has been pushing for these issues to be dealt with in EPAs through liberalisation and regulatory commitments. During 2006–07, the EU made concrete proposals to liberalise and regulate investment and trade in services between each of the six ACP regions, on the one hand, and the EU on the other hand. The EU formulated its proposals under the title *Establishment, Trade in Services and E-Commerce*.<sup>3</sup>

African trade ministers have, however, explicitly expressed their unwillingness to negotiate investment and services in EPAs, for example at African Union meetings in 2006.<sup>4</sup> Nevertheless, the EC has continued to push until the end of the EPA negotiations for commitments on liberalisation of these areas, using very strong pressure. For example, in July 2007, after West African negotiators had yielded to years of pressure to include these issues in the EPA, they indicated that they preferred to negotiate market access for services during a second phase, after the signing of the EPA; but they received a strongly worded letter from the EC, stating: *'We don't agree. ... We consider it important to make progress and conclude in this area'*.<sup>5</sup> This insistence disregarded the fact that the Economic Community of West African States (ECOWAS) does not yet have its own regional initiative or agreement on investment or services. Similarly, until the end of October 2007 the EC was continually arguing against the proclaimed choice of the Southern African Development Community (SADC) not to include trade in services and investment commitments, regardless of whether these issues *'pose serious policy challenges'* and despite the fact that *'negotiations with third parties may inadvertently foreclose regional integration options in future'*.<sup>6</sup> Furthermore, the EU has been suggesting that it might reduce finance<sup>7</sup> for regional programming if rules on services and investment are not negotiated in EPAs. For example, the EC informed the Pacific countries in July 2007 that 26 per cent of regional aid would not be allocated if they signed an agreement on goods only, without additional provisions on investment, services, government procurement, and intellectual property.<sup>8</sup>

By 23 October 2007, the EC had officially recognised that it could not reach agreements including services and investment with all ACP regions before the December 2007 deadline. The EC proposed to sign interim agreements dealing with liberalisation in goods only, but its negotiators were still taking an aggressive approach by insisting to the ACP and the EU ministers that such agreements should contain commitments to continue negotiations on services and investment after December 2007.<sup>9</sup> Such interim agreements would lock in further negotiations on liberalisation of, and rules on, investment and services between the EU and ACP regions. This might restrict ACP regional choices on what to include in an EPA. (The final part of this paper examines the potential for the ACP regions to set their own terms on how to deal with these issues.)

3 Unless otherwise specified, all article numbers referred to in this paper are from the EU's proposed text to SADC text (23 April 2007) and may differ slightly from those in the other texts.

4 African Union Conference of Ministers of Trade, Nairobi Declaration on Economic Partnership Agreements, 12–14 April 2006.

5 P. Thompson (EC), letter to ECOWAS and UEMOA Commissioners, 27 June 2007.

6 Press release following the July 2007 meeting (in Walvis Bay, Namibia), issued by Namibian Ministry of Trade and Industry and quoted by Traidcraft, 'Low Down on EPAs', *EPA Negotiation Update Issue 9: July–August 2007*, p. 3.

7 By the European Development Fund (EDF – the principal source of EU aid for ACP countries).

8 Email from EC to Pacific Trade Ministers, 30 July 2007, referred to in Traidcraft, 'Low Down on EPAs', *op. cit.*, p. 2.

9 Communication on Economic Partnership Agreements, from the Commission to the Council and the European Parliament, 23 October 2007.

The EU's intransigence casts doubt upon its official claim to be following ACP regions' own regional choices. Indeed, the EC argues<sup>10</sup> that its approach helps ACP regions to take difficult decisions and lock in reforms that they have not yet decided among themselves. According to a review report (August 2007) jointly prepared by the ACP, the African Union Commission, and the Economic Commission for Africa, the EU negotiators have failed to appreciate the socio-economic and political philosophy that drives regional integration processes in Africa and they have adopted a narrow interpretation of regional integration.<sup>11</sup> This might undermine regional development and regional integration, as analysed below.

10 On several occasions, including the EC-NGO civil-society meeting, Brussels, 25 September 2007.

11 F. Ayieko, 'African Union cautions African nations in signing EPA's with EU', *East African* (Nairobi), 18 September 2007.

# Different approach

In addition to forcing these issues on to the agenda of EPA negotiations, even in cases where the ACP countries have said that they do not want them, the EC takes a fundamentally different approach to the question of how ACP regions should deal with services and investment in EPAs. The EU's focus is on liberalisation commitments and rules facilitating market access between the ACP regions and the EU, requiring the ACP regions to liberalise more than required by GATS. This 'GATS-plus' approach is in contrast to the ACP approach, which instead focuses first and foremost on cooperation and is based on a more comprehensive definition of regional integration than that proposed by the EU.

## The EU focus on liberalisation aims at 'GATS plus'

The EU's proposals for the measures by which EPAs should deal with investment and services were articulated in its title *Establishment, Trade in Services and E-Commerce*. They aim to persuade ACP regions to liberalise trade in services as well as investments ('establishment') in services and non-services sectors. The ACP regions are required to do so by make binding commitments on market opening and by adopting, as in GATS, disciplines on the regulation of services and investments, based on principles of non-discrimination and rules on market access (as in GATS Art. XVI).

Once the EU's proposals for liberalising services in EPAs are adopted, GATS Article V needs to be applied.<sup>12</sup> GATS Article V stipulates that services liberalisation should cover 'substantially all' sectors and eliminate substantially all measures that discriminate between national and foreign services or services providers. In contrast, when liberalising services under GATS only, countries can freely choose which sector(s) to liberalise, if any.

GATS Article V allows some 'flexibility' or 'asymmetry' for developing countries to derogate from these obligations in free-trade agreements such as EPAs. As this provision is poorly defined in GATS and in EPA drafts,<sup>13</sup> there remains great uncertainty about the extent to which ACP countries will eventually have to liberalise under an EPA. However, reports from inside the EPA negotiations have shown that the ACP regions are being pressured to liberalise further and faster than their commitments under GATS, even if they are allowed to use a 'positive list' approach<sup>14</sup> to opening investment and services. For example, analysis of draft Caribbean texts, combined with reports from negotiators in this region, shows that the EU is pressing the region hard to liberalise substantially: up to 60 per cent or more of all services. After the Caribbean had responded positively to the EU's request to liberalise more extensively than in its original proposals, the EU was requesting in the summer of 2007 even further commitments in some sectors, such as infrastructure, and removal of horizontal limitations in other sectoral commitments which the EC considered very restrictive.<sup>15</sup> Also, when the weaker Central African region (CEMAC) was supposed to sign an EPA on 29 October 2007, the EC still opposed the low sectoral coverage<sup>16</sup> offered by CEMAC. It pressed CEMAC again to offer more market opening, or lose the broad services market opening offered by the EU.<sup>17</sup> At the same time, the EC omitted to refer to the flexibility possibilities in GATS Article V or to advice given to it that

12 Note, this would not apply to non-services investments.

13 EPA draft Art.1, proposed by the EU, states only that the liberalisation shall be asymmetric as well as progressive and reciprocal, and that it shall facilitate regional integration.

14 In other words, making commitments by including on the list of commitments only those sectors in which they wish to commit liberalisation; as opposed to a negative list which includes only those sectors that are excluded from liberalisation – all others thus being liberalised.

15 EPA Update, in *Trade Negotiations Insights*, Vol. 6, nr. 5, September 2007: longer version viewed at <http://www.acp-eu-trade.org/index.php?loc=newsletter/tni.php>.

16 The EC claimed that the sectoral offers were between 0 per cent and 0.6 per cent, and wanted to have at least 40 per cent coverage by each of the CEMAC countries, which in total could amount to 60 per cent coverage, according to diplomatic sources.

17 EC, Central Africa – EU EPA Ministerial Meeting, Commissioner Mandelson speech, EC letter to 133 Committee, 29 October 2007: 'it is an offer which does not allow us to maintain our offer to you'.

CEMAC needs a 'clear agenda and timeline to manage necessary transitions resulting from trade and financial liberalization'.<sup>18</sup>

This pressure to liberalise a wide range of sectors may pre-empt regional decisions which have not yet been taken, given the current stage of regional integration processes within ACP regions.

## Open regionalism to the benefit of the EU

By insisting on being party to EPAs and getting market opening from ACP regions in services and investment, the EU has imposed open regionalism as the ACP approach to regional integration. This approach risks undermining initiatives and policies of regions such as SADC, COMESA, and ECOWAS which focus on strengthening the capacities of suppliers and regulators of services and investment within their regions, and liberalising first among the actors within the region. For example, COMESA's draft Regulation for a Regional Framework for Trade in Services covers cooperation and liberalisation on trade in services between its own members only, with the creation of a common market as the ultimate aim.<sup>19</sup> The draft texts for COMESA's regional services regulations framework also explicitly mention that the first priority is the implementation of these COMESA regulations before entering into progressive liberalisation with non-member states.

However, the EC is aggressively using open regionalism to drive decisions about which sectors, and how many, are liberalised. Many regions have not finalised, or in some cases even started, their liberalisation processes. Yet instead of allowing the ACP regions the space in which to decide which sectors they might want to liberalise first among themselves, and according to what timeframes, the EU is pressuring them to make such decisions just before and even at the same time as the commencement of liberalisation *vis-à-vis* the EU. The EC leaves the burden to the ACP regions to negotiate and use certain, limited, flexibilities (see sections below) in order to protect their own regional choices, priorities and preferences. However, the question remains: how far will the EU negotiators respect regional sectoral choices? For instance, financial services is a sector that the EU particularly wants to liberalise under EPAs. In contrast, drafts of the COMESA regional services framework exclude financial services and some other services sectors from the first liberalisation commitments among COMESA members – while incorporating adoption of a special programme to do so. Through the open-regionalism approach in EPA, the EC can use pressures to defend the EU's own interests, while not allowing the ACP countries to make their own strategic decisions about liberalisation commitments.

## Integration in the world economy at the expense of regional approaches

The EU stresses that liberalisation with the EU will facilitate not only regional economic development and integration but also the ACP regions' *'smooth and gradual integration in the world economy'*.<sup>20</sup> The EU argues that non-regional suppliers might provide better-quality services and need access in order to increase the region's competitiveness – assuming that EPAs will lead to more European investments, for

18 P. Hugon, F. Renversez, 'Sustainability Impact Assessment (SIA) of the EU-ACP Economic Partnership Agreements – Phase Three, Financial Services in Central Africa', presentation at the EC, 21 September 2006, p. 8 <[http://trade.ec.europa.eu/doclib/docs/2006/october/tradoc\\_130264.09.06\(FINAL\).pdf](http://trade.ec.europa.eu/doclib/docs/2006/october/tradoc_130264.09.06(FINAL).pdf)>

19 Art. 3 in different drafts.

20 See Art. 1 of proposed EU draft to SADC, April 2007.

instance in infrastructural services. Yet, as UNCTAD explains, for many developing countries competition in the world market is a step too far, and focusing on the regional level may be a more appropriate way to meet common challenges and to set up the necessary regulatory frameworks<sup>21</sup> as needed in the area of services and investment. For SADC, integration into the world economy is only one of its objectives, and one that is secondary to the overarching priorities of poverty eradication, sustainable and equitable economic growth, and socio-economic development in the region.<sup>22</sup>

It should be noted that ACP countries or regions wishing to attract non-regional foreign services investors in those sectors that are useful for their economic development and competitiveness strategies can liberalise unilaterally or in GATS (while first deciding jointly which sectors to liberalise in this way).

Moving beyond intra-regional integration, the next step for Africa may more usefully be integration at a continental level, as articulated in the objectives of the Abuja Treaty.<sup>23</sup> African ministers in charge of integration reiterated in July 2007 that the EPA negotiations should continue under the coordination of the AU Commission, taking into consideration the regional and continental integration agenda.<sup>24</sup> They requested a further rationalisation of the overlapping and diverse memberships of regional economic agreements, a problem which is exacerbated by the failure of EPAs to respect existing regional memberships. The AU ultimately aims for continent-wide regional integration.

## EPAs do not simplify initiatives to attract investment to Africa

Note that EPAs add to the complexity of various initiatives for Africa which aim to tackle problems in attracting investment in sectors which are seen as necessary for economic development, such as infrastructure and telecom services. These are being dealt with at a pan-African level by Africa itself, for example in NEPAD, and by donors such as G-8 and the NEPAD–OECD Africa Investment Initiative (which include EU member states),<sup>25</sup> the EU–Africa Initiative on Infrastructure,<sup>26</sup> and the EU–Africa Partnership on Energy proposed for the EU–Africa summit in December 2007.<sup>27</sup> Given these many initiatives to attract investment, no good assessments seem to have been made to identify initiatives that are best dealt with at the pan-African level (for example, support for practical investment projects that link countries of different regions), or at the level of existing regional initiatives, or at the EPA level. Nor has there been any attempt to identify what the specific contribution of the EU could be, or – more fundamentally – to assess whether these existing initiatives serve their purpose and result in poverty eradication and sustainable development.

## ACP regions' cooperation approach undermined by EU's liberalisation focus

Various studies of specific services sectors, including those conducted for the EC,<sup>28</sup> indicate that liberalisation processes must be properly sequenced and must be accompanied by appropriate regulations and institutions. ACP regions have tended to favour cooperation, information sharing, policy coordination, and technical

21 See UNCTAD, Trade and Development Report 2007, September 2007, pp. 41–47.

22 SADC Regional Indicative Strategic Development Plan.

23 The Lagos Plan of Action (1980), succeeded by the Abuja Treaty (1994), represents the African vision of regional integration. The ultimate goal is for full continental integration. The African Economic Community (AEC) Treaty provides for the establishment of a continentally integrated community over a number of phases, culminating in 2025. The various African Regional Economic Communities are supposed to be building-blocks towards this full continental integration.

24 M. Julian, EPA Update, ECDPM (acp-eu-trade.org), September 2007: at the Second Conference of African Ministers in charge of Integration (Rwanda, 26–27 July 2007).

25 For more information, see [www.oecd.org/document/51/0,3343,en\\_2649\\_34893\\_36167091\\_1\\_1\\_1\\_1,00.html](http://www.oecd.org/document/51/0,3343,en_2649_34893_36167091_1_1_1_1,00.html)

26 'Economic Partnership Agreements: Building or Shattering African Regional Integration?', published by Traidcraft, SEATINI, and EcoNews Africa, May 2007, p. 47: to be financed by EDF.

27 'From Cairo to Lisbon – The EU-Africa Strategic Partnership', Communication from the Commission to the European Parliament and the Council, 27 June 2007 (COM (2007) 357).

28 See, for instance, P. Hugon, F. Renversez, *op. cit.*, p. 8.



assistance at the regional level. They have adopted innovative approaches which prioritise putting regulations and institutions in place first and which support gradual and properly sequenced liberalisation that would allow selectivity towards strong competitors. ACP regions such as SADC, COMESA, and ECOWAS intend to strengthen the capacities of regional suppliers and regulators of services and investment before liberalisation among regional actors, and to extend liberalisation later to outside companies. Thus ACP countries have integrated in their regional initiatives an understanding that liberalising services and investment should be conducted carefully and in a way that is appropriate for regional needs, while providing for strong supportive mechanisms.

SADC has already taken initiatives to negotiate cooperation and policy-coordination agreements before making liberalisation commitments (see box).

29 See also SADC Regional Indicative Strategic Development Plan, Chapter 3: review of existing social and economic policies (3.2.5 Finance and investment).

### **SADC's different approach to regional integration**

The difference between the approaches of the EU and SADC to regional integration is reflected in the SADC Protocol on Finance and Investment, which does not include investment-liberalisation commitments but covers the following, for instance:

- cooperation on investment, investment promotion, and regional investment financing;
- macro-economic convergence;
- coordination and capacity building on supervision and regulation of banking (by Central Bankers) and all other financial services;
- cooperation to improve trans-border payments in the region – of particular interest to regional investors;
- cooperation, harmonisation, and regional approaches on tax-related matters<sup>29</sup> (including tax incentives) and money laundering.

In addition, SADC has an Infrastructure and Services (I&S) programme which includes a SADC Protocol on services. SADC is still in the process of dealing with liberalisation of services among its own members – a delicate and lengthy process, given South Africa's massive investments and services exports in the region. Nevertheless, SADC has already dealt more comprehensively with services and investment sectors of particular interest through separate Protocols on Tourism, Energy, Mining, Education and Training, and on Transport, Communications, and Meteorology.

Despite these SADC initiatives, the EU indicated to SADC EPA countries in November 2006 that common EU-SADC EPA liberalisation commitments and rules are the essential mechanism for building capacity regarding services and investment (and other trade-related issues), and that no cooperation support will be offered through EPA-related funds in the absence of such commitments on rules.

Rather than being forced by external pressure into making premature commitments, SADC proposed to the EU during the EPA negotiations in September 2007 that cooperation should be considered as an important prerequisite for progressive liberalisation of trade in services between the Parties. SADC considers that the EU *'could assist in the development of our institutional, policy and legislative infrastructure,*

(including) the development of common policies in SADC to foster regional integration'.<sup>30</sup>

The SADC proposal on services therefore demands that the EPA should:

- provide for technical assistance to develop appropriate national and regional policies, and regulatory and institutional frameworks;
- facilitate information exchange on regulatory matters regarding the impact of services liberalisation, and information exchange between services suppliers in the region;
- provide means to diminish supply-side constraints and lack of diversification in the services sector, as well as enhancing competitiveness in the region.

The African countries negotiating an EPA for the Eastern and Southern Africa (ESA) region have also stressed that they wanted the EPA to focus on a cooperation framework. By September 2007, a draft EPA text for the ESA region made a clear distinction between investment and trade in services, whereby no joint text was ready on services. The draft proposal on investment, entitled *Investment and Private Sector Development Support*, did not provide for liberalisation commitments but built on Cotonou Articles 74 to 78 by focusing on the promotion, the support and financing, and the protection of investments, not only from the ESA region itself but also from the EU. The EPA signatories are requested to:

- support investment-financing mechanisms, including measures for small and medium-sized enterprises (SMEs), and different kinds of investment risk-mitigation system;
- encourage investments that comply with the objectives of the EPA agreement; and
- support different investment-promotion mechanisms, not excluding entering into negotiations on agreements which will create a predictable and secure investment climate.

Yet, in contrast to the vigour with which it has pursued liberalisation principles, the EU has been much more reluctant to include cooperation provisions in the draft EPAs, as the ACP regions have requested – rejecting at least until the summer of 2007 proposals that included only cooperation and technical assistance provisions, without liberalisation commitments.

Although the Caribbean countries have agreed to negotiate services and investment liberalisation, they have insisted that the Caribbean EPA should also contain a substantive cooperation framework, not only to support the supply and export capacity of Caribbean service suppliers and regulatory matters, but also to adopt specific projects and programmes, for instance to promote new business links and develop the tourism sector. The specific Caribbean proposals were being met by the EC with much more general cooperation-support proposals that were spelling out only Articles 34 and 41.5 of the Cotonou Agreement, aiming to enhance the production, supply, and export capacity of the ACP countries. The inclusion of such cooperation with no extra binding commitments on finance beyond those of the Cotonou Agreement, and in part targeted only at those sectors in which the Caribbean countries have made commitments, was acceptable to the EU only because of the liberalisation commitments in the Caribbean EPA.

In sum, a range of innovative approaches is being pursued by ACP regions themselves in the area of services and investment, which the EU could support with development cooperation and existing Cotonou provisions. However, the liberalisation thrust

<sup>30</sup> Press release following the July 2007 meeting (in Walvis Bay, Namibia) issued by Namibian Ministry of Trade and Industry and quoted by Traidcraft, 'Low Down on EPAs', *op. cit.*, p.3.

of the EC proposals in EPAs neither recognises the different nature of the ACP-led approaches mentioned above, nor respects the ACP regions' wish to consolidate their own processes first, without the pressure to start liberalising at the same time. Where support for regional-led processes is offered, it seems to be made conditional upon adoption of liberalisation commitments. For example, the EC's response to SADC was that 'in any case request for support without commitment [to liberalise] is not acceptable'.<sup>31</sup>

## EU's narrow definition of regional integration

Furthermore, while the EC claims that the liberalisation of services and investment in EPAs is aimed at fostering ACP regional integration, its definition of regional integration is a limited one.

The EU has proposed to define<sup>32</sup> an economic integration agreement only as an '*agreement substantially liberalising trade and establishment pursuant to WTO rules*'. This is a very narrow definition of regional integration, which does not encompass or acknowledge the practical and region-specific approaches to regional integration taken by some African regions (as described above) through cooperation, capacity building, and coordination, including fast-tracking cooperation in key sectors that are of particular importance to them. The EU's far more limited definition of regional integration does not reflect, for instance, coordination and cooperation in SADC's Protocol on Finance and Investment on exchange-control policies and payment systems in the region, which SADC countries have judged to be an important way to remove barriers against investors from within the region. The protocol also includes measures to tackle harmful fiscal incentives and tax evasion, in order to prevent a 'race to the bottom' designed to attract foreign investment. Such an approach was also explored by ECOWAS when discussing a regional framework for an investment policy in 2006 (with no agreements made). This is a sensible approach, given that the competition among African countries to attract investment is fierce. The measures of ever-lower taxation are reducing the potential tax revenue that countries and regions could be using for building infrastructure and human-resource development, which are often more important drivers for attracting foreign services investors than tax holidays and even investment agreements. However, the EU's definition of what constitutes regional integration does not encompass such initiatives either.

Beyond defining a regional integration agreement as one that '*substantially liberalis[es] trade and establishment pursuant to WTO rules*', the EU even further narrowed the definition by specifying that it must require parties to that agreement to '*approximate their [each other's] legislation*'.<sup>33</sup> It is only then that ACP countries would be allowed to grant better treatment to companies within their region than they grant to those from the EU, through derogations to the 'most favoured nation' (MFN) principle enshrined in the EC's approach. (See the section below for a more detailed explanation of how MFN treatment is dealt with in EU proposals.) If this vaguely defined requirement to 'approximate legislation' reflects the EU directive on services<sup>34</sup> and means putting in place legislation designed to achieve equivalent levels of national treatment and market-access rules, it goes against the realities of approaches being pursued by ACP regions, whereby regions might be working towards common policies, but not yet have them fully in place, or might be developing common policies based on other principles.

31 EC Staff Working Document, accompanying document to the Communication from the Commission to the Council, 'Communication to Modify the Directives to EPA Negotiations with ACP Countries and Regions – Preliminary Indications of Impact', COM 2006 673 final, paragraph 26.

32 See for instance Art. 2(f) of the EU draft proposed to SADC in April 2007.

33 See Art. 9.2 and 16.2 in the same text.

34 EU, 'Directive on Services in the Internal Market', published in the Official Journal of the European Union, L376/36, 12 December 2006, Art. 15.

# Different model

Despite the EPA regions being very different from each other in economic terms and in terms of initiatives in the areas of services and investment, the EU proposed the same model text, entitled *Establishment, Trade in Services and E-Commerce*, to all six regions. For the regions, the challenge was then to find enough negotiation capacity and power to negotiate variations to the text, while the EU vigorously defended its original text. However, the EU proposes a model to liberalise investment which is untested in the regions.

35 See for instance Art. 6.2 and Art. 13.2 of the EU-proposed EPA text to SADC in April 2007.

## GATS model applied on investment in non-services sectors

The EU's proposed model text on *Establishment, Trade in Services and E-Commerce* is drawn from selected articles of the services agreement in the WTO (GATS). The EU model text links trans-border trade in services (modes 1 and 2 in GATS) and trans-border movement of persons providing services (mode 4) with 'establishment' that covers foreign direct investment in the services sector (mode 3) as well as non-services sectors. Through linking services and non-services investment in this way, the EU has extended 'market access' obligations contained in GATS (Art. XVI) to non-services investments. Such market-access rules mean a commitment not<sup>35</sup> to impose restrictions such as limitations on the number or the value of investments, or rules that prohibit the holding of 100 per cent of the shares in a company in the territory of the host country. Nor could obligations to form joint ventures in those sectors liberalised under EPAs be imposed. This is a novel and untested model of an investment agreement in non-services sectors. The impact of these GATS-style proposals can be limited only by making exemptions to market-access rules in the commitment schedules annexed to the EPAs. Since Article V of GATS does not apply to investments in non-services sectors, the ACP regions could in theory choose not to liberalise any non-services sector. Yet the EC's negotiation practice indicates that such a strategy is likely to be strongly opposed by the EC.

## GATS model vs BITs model

By using a GATS model in the context of EPAs, the EU introduces provisions and market-access commitments for investments which go beyond what many countries have already signed up to through various bilateral investment treaties (BITs) with EU member states and others. Many ACP countries have already signed such treaties with EU member states and other countries. BITs do not touch upon market access (pre-establishment), but they include comprehensive investor-protection provisions (such as provisions on expropriation) which were omitted in the EC's EPA proposals only because the EC has lacked competency in this sphere. Only individual EU member states can negotiate comprehensive investment-protection agreements.

An under-explored consequence of the potential co-existence of EPAs and BITs is that investments in those sectors that have been liberalised under EPAs will receive BIT-like investment protection when a BIT has been signed between the host country and the home country of companies investing in these sectors.

The GATS-like model used for investment liberalisation in EPAs adds a further layer of complexity to existing or future commitments by ACP regions and their member states. In order to resolve some of this confusion of overlapping models, the Caribbean countries had hoped to replace the many BITs with EU member states by a single similar agreement in the context of the EPA negotiations. The Pacific and the Caribbean proposals to deal with services and investment in EPAs have included BIT-like investor-protection elements, based on their regional models. For example, the Pacific countries had included expropriation rules in their EPA proposal<sup>36</sup> for an investment chapter, as did the Caribbean countries in their September 2007 draft proposal. However, given that the EC lacks competency to negotiate BIT-like investment-protection agreements, the EC wants to use only the GATS model that focuses on investment liberalisation, and related GATS rules that provide for some kind of protection, such as national treatment and MFN rules (see below).

In their own regional initiatives, some ACP regions have used the BIT model as the basis for developing their regional agreement. For instance, the draft Investment Agreement for the COMESA Common Investment Area<sup>37</sup> follows the BIT model. However, it should be noted that these BIT-like measures give far-reaching protection to investors in the region, while it is not proven that they attract additional and development-oriented investments. As such, if ACP regions want to introduce such far-reaching measures, as COMESA members intend to do, the measures should at least be tried out first at the regional level before any attempt is made to include them in EPAs or an interim agreement. It should be noted that after the new EU Constitution (agreed on 19 October 2007) is ratified by mid-2009, the EC might have more possibilities to negotiate<sup>38</sup> BIT-like investment-protection agreements. This might affect ACP regions that have signed an EPA or interim agreement which commits them to continue to negotiate investment issues after December 2007.

## ACP regions cannot use additional flexibility under Article V of GATS

A further problem with the EC approach is that liberalising with the EU in EPAs has an impact on the flexibilities that the ACP countries can use among themselves according to GATS Article V 3(b). If the ACP regions were only to liberalise services among themselves or other developing countries, GATS Article V 3(b) allows even more flexibility and more discrimination in favour of their own service providers.<sup>39</sup> This would be a better way of allowing regionalisation to develop at its own pace, without EU interference.

36 Draft 'non-paper' with the Pacific proposal distributed to the EU member states on 10 October 2006.

37 Draft text of 10 May 2007.

38 D. Vis-Dunbar 'European treaty may revive debate over power to conclude investment agreements', *Investment Treaty News*, 30 October 2007, [www.investmenttreatynews.com](http://www.investmenttreatynews.com)

39 'More favourable treatment may be granted to juridical persons owned or controlled by natural persons of the parties to such an agreement.'

# Different pace

## The EU is pushing for wide sectoral liberalisation before regions have done so

There are a number of ways in which the EC is forcing the pace of liberalisation beyond what ACP regions are ready for, and in contrast to the ACP regions' approach of first prioritising their own investors in certain sectors.

First, as described above in the section about the EC's different approach, the EC has been pushing for considerable coverage of the sectors to be liberalised during negotiations with regions accepting liberalisation commitments in an EPA, such as the Caribbean region.

Second, the EU has made clear its wish for liberalisation in a wide range of sectors by covering these sectors in the chapter on the regulatory framework (see below).

Third, the EU has requested of ACP countries within the same EPA group that *'treatment provided by individual ACP countries to the EC shall automatically be extended to other ACP countries in the same region'*.<sup>40</sup> This would mean that an external driver – the EC – would force the pace of regional liberalisation. In the Caribbean, CARIFORUM negotiators were reluctant to adopt this approach.<sup>41</sup> For specific strategic reasons, ACP countries might want to liberalise particular sectors *vis-à-vis* the EU, but not yet *vis-à-vis* regional partners – or the sectors that they want to liberalise *vis-à-vis* the EU might be different from the sectors that they want to liberalise *vis-à-vis* regional partners. Also, concerns about the dominance of larger member countries within their respective regions might be a reason not to agree in EPAs on the same liberalisation commitments as among themselves, as is the case with SADC and COMESA.

Unequal capacities of investments and services providers in the region need to be carefully and sensitively dealt with: for example, by including specific support for SMEs or providing special and differential treatment for least developed countries in the region. Such measures would need to be enacted prior to or in tandem with commitments to liberalisation. Yet, as such measures are lacking in the EU proposal, it is no wonder that SADC feels that the proposed EPA will reduce its choice and room for manoeuvre to liberalise services at its own pace, and no wonder that it perceives the EU pressure to liberalise services at this stage as a *'threat to the nascent regional process'*.<sup>42</sup>

At the end of October 2007 it was clear that different ACP groupings were guarding against this forcing of the pace by resisting the signing of an EPA to include investment and services liberalisation. Further efforts to fend off the EU's aggressive stance will need careful negotiations of an interim agreement. SADC EPA negotiators have, for instance, proposed that liberalisation negotiations between SADC and the EU should take place in the future only after particular conditions are met (see below: 'Avoiding dangerous new interim agreements'). In addition, they have proposed that SADC EPA members should extend such potential liberalisation to other SADC members not belonging to the SADC EPA on a voluntary basis only.

40 Explanatory memorandum to the EU draft proposal to SADC in April 2007.

41 The Caribbean draft EPA text of 1 October 2007 did not include the EU formulation of that principle. This principle is formulated in Art. 3.2, proposed to SADC as follows: 'With respect to any measure affecting establishment or cross-border supply of services, as defined in Chapters II and III of this Title, in the context of the regional SADC integration, a Signatory SADC State shall accord to establishments, investors, services and services suppliers of other Signatory SADC States treatment no less favourable than that accorded to like establishments, investors, services and services suppliers of the Community or its Member States on the basis of this Agreements [sic] and to like establishments, investors, services and services suppliers of any other Signatory SADC State on the basis of an economic integration agreement.'

42 N. Khumalo, 'Trade in services: a threat to intra-regional trade', in *Trade Negotiations Insights*, Volume 6, No. 5, September 2007, pp. 8–9.

Draft EPA texts have not made clear how or whether it would be possible to reverse any liberalisation commitments. This makes the EU's enormous pressure all the more worrying. Regions may not yet have set their own regional priorities about which sectors it would be strategic to schedule for liberalisation (or not). For example, regional processes might lead to different decisions at a later date, which are not in conformity with liberalisation obligations in the region's EPA. Such a scenario occurred in the EU's own regional integration process: when the Central and Eastern European countries joined the EU, they had to withdraw some of their liberalisation commitments made under GATS and undertake negotiations (consuming both resources and time) to compensate countries that would lose business due to such withdrawal. GATS provides for procedures for compensation in case of re-closing markets, but draft EPA texts contain no clear measures for dealing with such a scenario.

43 See Art. 3.3 (defined explicitly in first sentence of Art. 9.2 and 16.2) proposed to SADC in April 2007.

44 EU proposal to SADC: Art. 9.1(b), 9.3, 16.1(b), 16.3.

## The MFN derogation gives only limited support for regional integration and cooperation

The only special provision by which the EU promotes regional integration by preferences for the region<sup>43</sup> is allowing EPA regions to derogate from the traditional 'most favoured nation' (MFN) treatment and grant more preferential treatment to regional service providers and investors than they grant to EU service providers and investors. Yet, as we saw above ('EU's narrow definition of regional integration'), this is allowed only in cases where parties to that agreement '*approximate their legislation*'. This seems to exclude from this MFN derogation regional integration processes and cooperation agreements, whereby legislation about services and investment is not yet being approximated. Examples of potential exclusion are agreements to coordinate and give technical assistance, which only in the long run might lead to legislative harmonisation. Other examples are agreements that do not include non-discrimination principles, as is the case with the SADC Protocol on Finance and Investment.

Analysis of successive drafts of EU–Caribbean negotiation texts during 2007 suggests that Caribbean countries were extremely reluctant to include the wording '*requiring the parties there to approximate their legislation*', because it is not appropriate to their stage of regional integration. Since the EC also does not allow for MFN exemptions regarding liberalisation commitments, this narrow definition reduces the scope for regions to differentiate between investors or services products from Europe and those from within the region.

The EC-proposed definition of MFN also reduces ACP regional choices, because MFN would be applied differently in EPAs, compared with GATS and BITs. In existing draft EPAs, MFN is being defined such that ACP countries would have to give EU investors and other (cross-border) service suppliers no less favourable treatment than that which they grant to foreign investors and services providers from any other 'major trading economy' with whom an economic integration agreement is signed *after* the signature of EPAs.<sup>44</sup> A major trading economy is broadly defined by the EU as any industrialised country or a country accounting for more than 1 per cent of world merchandise exports, or a group of countries accounting for more than 1.5 per cent. The EPA definition of MFN proposed by the EU would mean that

ACP regions wanting to sign services, trade, and investment agreements with other major countries or groupings, including those from the South, as a useful tool for their own economic and regional development, could not give companies from such countries more preferential treatment than they gave to European companies. The EU clearly indicates that it does not want European companies to receive less favourable treatment than their competitors coming from the USA, Japan, China, Brazil, or Australia, or even an economically significant country or region within the ACP. Caribbean countries disagreed with such a definition until at least October 2007 and have been proposing that a 'major trading economy' refers to a country responsible for 3 per cent of world goods exports, or any industrialised country or group of countries exporting more than 4.5 per cent of the world's goods. These proposals from the Caribbean – if accepted – would at least limit the constraints upon Caribbean countries wishing to grant preference to other partners, without having to grant such preferences automatically to the EU as well.

45 See EU draft explanatory memorandum in the EU draft EPA to SADC in April 2007, and articles 6.2, 8, 13.2, and 18 to 20.

A further problem is that the definition of national treatment and MFN treatment as treatment 'no less favourable' allows EU companies to be treated *more* favourably than local or regional companies. This is already often the case, given the immense bargaining power of many transnational corporations over developing-country governments. In EPAs, it would be better that any definition of national treatment or MFN, if included at all, was termed as 'equal' treatment.

## National treatment might result in unfair competition in the region

Once liberalisation commitments have been scheduled in particular sectors under EPAs, the 'national treatment' principle will apply. This non-discrimination principle, also central to GATS and most BITs, means that European investors and cross-border services traders must be granted treatment no less favourable than that granted to national investors of the same ACP region, and *vice versa*. This principle can pose problems for local and regional companies competing with large EU companies in their domestic market. Together with the EPA rules on market access, national treatment can restrict the ability of ACP regions to maintain or put in place policies and regulations to give extra support to domestic and regional investors and services companies, for instance in order to strengthen some sectors for the region. Although EC drafts suggest that the use of subsidies may be exempted from the 'national treatment' principle, flexibility in the use of subsidies is, in reality, likely to benefit European firms competing in ACP regions with regional firms, given that EU governments tend to have the resources to subsidise their own companies that developing-country governments usually lack.

It is important to note that all countries can make exemptions from national treatment at the time when they make liberalisation commitments in particular sectors. However, the theory may be rather different from the practice, in a number of ways.

First, the provision to do this relies on the foresight and technical expertise of negotiators and governments to make specific national-treatment 'reservations', 'limitations', or 'qualifications'<sup>45</sup> to be written into the schedules ('annexes'). There is



a danger that such exemptions are not carefully considered and set down in schedules, in the context of time pressure in EPA negotiations and lack of national or regional experience.

Second, the process is further complicated because the EU has proposed formats for schedules and for making ‘reservations’ which are ‘simplified’ but in practice less explicit in terms of what national-treatment reservations can be made.

Third, it remains to be seen whether regions that do seek to exclude substantial areas from national treatment will be able to do so in the face of EU pressure. For example, the SADC protocol on Finance and Investment (Annex I: Co-operation on Investment) excludes national treatment among regional members and explicitly allows preferential treatment to achieve national development objectives – as a part of a regional strategy to allow national companies and economies to be strengthened in the region. However, negotiations with the EC are likely to make it extremely difficult for the ACP to make comprehensive exemptions such that no EU companies receive national treatment – and the more so in that Article V of GATS explicitly states that discrimination must be removed in an FTA.

The EU’s proposed schedules are also different from the GATS schedules, as well as some potential regional schedules such as the COMESA draft Regulations for a Regional Framework for Trade in Services, and the draft Investment Agreement for the COMESA Common Investment Area. So EU-proposed ‘simplified’ formats for scheduling in EPAs add to the diversity of existing liberalisation schedules per region – in contrast to the clarity of rules at which the EU is aiming.

## **Additional regulatory requirements**

In its EPA drafts (Art. 3.1 and 3.4), the EU aims at economic integration not only through the liberalisation of services and investment, but also through the provision of regulatory obligations. This is in line with some regional initiatives which strive for common approaches to rules and common laws, supported by cooperation provision. However, the EC’s own proposals for ACP regulation do not come from the regions themselves, nor have regional groupings had an opportunity to discuss how they could be brought into line with regional priorities.

The Regulatory Framework (Chapter 5), and other regulatory commitments requested by the EU, in addition to the market-access rules (see section above entitled ‘GATS model on investment applied in non-services sectors’), include very specific ways of implementing regulation. The EU wants to shape ACP regulations:

- in many sectors (postal and courier services, telecommunication services, financial services, computer services);
- on mutual recognition of legislation and authorisation among parties to an EPA;
- on transparency of regulations and authorisation for service providers; and
- on transfer of capital.

The proposed regulations are mostly based on international standards, some of which (for example, standards in banking supervision) were designed without the

participation of ACP regions. However, they are clearly protecting the interests of EU companies.

The EU imposes a heavy burden of numerous, new, and burdensome regulations. Moreover, the EU is unwilling to make binding commitments in EPAs to provide additional financial and human resources for the ACP regions' implementation of these additional regulatory requirements.

It is a cause for concern that the proposed regulations will restrict the right to regulate, for instance in the area of universal access.<sup>46</sup> Where the EU demands that regulations should not be more burdensome than necessary, it sometimes goes beyond what is being required in GATS<sup>47</sup> or the Cotonou Agreement.<sup>48</sup>

In terms of regulatory proposals coming from regions themselves, the Caribbean countries have been proposing a regulatory chapter for the tourism sector, which is a major priority for the region especially after elimination of the sugar protocol and the erosion of the banana protocol. Tourism is mentioned as a priority area in the Cotonou Agreement (Art. 41) but not in the EPA drafts proposed by the EU. The Caribbean negotiators were being met with disappointing responses by the EU as regards the regulatory framework and elimination of measures that impede access to the EU market for Caribbean tourism providers.

As different regions have various (cooperation) agreements on a range of other sectors (for example, the ECOWAS Energy Protocol, and SADC protocols in different sectors), EPAs will increase the regulatory mismatch rather than ensure the regulatory clarity and certainty for which the EU aims.

46 See M. Vander Stichele, 'Technical analysis of the problems resulting from liberalisation of services in EU-ACP Economic Partnership Agreements (EPAs)', SOMO, August 2007.

47 *Ibid.*

48 The EU demands that all current financial transactions be allowed, as well as all capital flows related to investments. Such capital flows can only be restricted in 'exceptional circumstances' and limited to measures that are 'strictly necessary' (Title IV Art. 3.1) for a maximum duration of six months. The EU proposal goes much further than what was agreed in Annex I of the Cotonou Agreement (Financial Protocol: chapter 4, Art. 12).

# Useful ACP proposals, measures, and safeguards

Further evidence that there is not a ‘one size fits all’ approach to deal with services and investments and to attract FDI is the range of innovative approaches and rules that the ACP regions have already proposed in the EPA negotiations or have been making in agreements among themselves. These have been missing in the EU proposals and draft EPAs, but could be used in continued negotiations in order to support regional integration.

## Investor rights vs investor obligations

The EU’s proposed EPA model on services and investment is based on the mainstream principle that investors need to be protected against government measures (see market-access rules) and need to be granted rights such as the right to entry in certain sectors (liberalisation commitments); the right not to be treated less favourably than national companies (‘national treatment’) or than other foreign companies (MFN clause); and the right to immediate transfer of capital related to the investments (included in another proposed EPA chapter). By implementing such EPA rules, the host government and parliament are restricted in rule making and control over investments – or likely to be subject to dispute settlements. In contrast, EC proposals impose no obligations on investors, and host governments have to deal with problems caused by European investors without supporting mechanisms from an EPA.

The Pacific countries made a proposal in October 2006 to balance the rights and obligations of investors, as well as those of host and home countries. In their September 2007 draft, the Caribbean countries also proposed the inclusion of investor obligations. Elements of obligations on investors proposed by Pacific countries (some proposed also by the Caribbean region) include requiring that investors should:

- strive to contribute to the development objectives and development plans of the host states and the local authorities;
- comply with minimum criteria for making an environmental and social impact assessment;
- uphold human rights in the workplace, including core labour standards;
- be subject to civil actions for liability in the judicial process of their home country in cases where their operations have led to significant damage, personal injuries, or loss of life in the host country;
- be forbidden to undertake corrupt activities (and ways to sanction corruption will be put in place in the home and host countries).

However, the Pacific proposals were rejected by the EU negotiators.

In another approach, regional initiatives on investment by COMESA and SADC have included a ‘no lowering of standards’ clause under an article called ‘*General principle*’ and not in the non-enforceable preamble, as the EU originally proposed. It would commit parties to refrain from lowering their social (labour, public, health and

safety) and environmental laws, or derogate from them, for the purpose of attracting investors, thus avoiding reducing the obligations of investors. The ‘no lowering of standards’ clause was included in both the chapters on environment and social aspects of the Caribbean draft EPA (mid-October 2007) but backed only by consultation mechanisms that cannot enforce implementation.

### **Missing safeguards and measures as proposed or used by some regions**

In addition, ACP regions have made a number of proposals on safeguards to be included in EPA negotiations or in their own regional arrangements. They include the following:

- the objectives of poverty eradication and universal access to basic services such as water, health care, education, electricity, and transport;
- progressive liberalisation so that sectors are liberalised only over a period of time, or some sectors are even excluded as being ‘sensitive sectors’;
- more flexibilities for least developed countries;
- emergency safeguard measures (ESMs) that will allow countries or regions to ban investments or services trade when a domestic sector is too much and unduly threatened;
- specific support for investment, trade, and development of SMEs in the region;
- exemption from ‘national treatment’ requirements in order to support SMEs;
- the inclusion of MFN derogations in the schedules, especially in order to support regional integration measures;
- measures to deal with abuses of market power and other abusive practices by foreign services providers and investors;
- obligations on investors, host countries, and home countries to respect labour and environmental standards;
- better measures to deal with balance-of-payments problems;
- special and comprehensive programmes for particular sectors, which might include liberalisation;
- sustainable impact assessments to be conducted every five years, and certainly before any new negotiation, from both national and regional perspectives;
- provisions that make it possible to reverse commitments, through mechanisms appropriate to the capacity of ACP countries;
- reviews or procedures that allow changes to be made in EPA texts if the agreed rules and liberalisation commitments undermine development benchmarks and regional economic, social, environmental, and poverty-eradication objectives.

Again, such measures are missing from EC proposals. The EU should accept such measures in EPAs, and ensure that EPAs do not prevent these measures being taken at the regional level.

## Avoiding dangerous new interim agreements

The SADC EPA region has made proposals by which it tries to avoid committing itself to future negotiations in services and investment which are not suitable to its regional processes and priorities. These could be useful in the context of negotiations on goods-only EPAs and interim agreements in which the EC is pushing for commitments on further negotiations on services and investment.

SADC proposed that the following criteria and conditions could be applied as minimum benchmarks to be achieved before discussions and negotiations on services and investment are resumed – if at all – between the EU and an ACP region:

- conformity with the Cotonou principle (Art. 41.4), stipulating that services liberalisation should be negotiated only after ACP regions have acquired some experience in MFN treatment under GATS;
- fulfilment of cooperation commitments in the Cotonou Agreement regarding regional integration, support for services, and investment sectors;
- sustainable impact assessments in each of the negotiating ACP party and regions in important services sectors, conducted before the negotiations start and taken fully into account during the negotiations;
- clear indicators that regional cooperation and integration processes on services and investment are in place before negotiations start;
- evidence to show that the level of development and capacity in the areas of services and investment of each of the parties are being taken into account;
- agreement on ways of building in special and differential treatment, reached prior to the resumption of negotiations, including, for example, the principle of gradual liberalisation through scheduling.

Given the concerns expressed in this report about the ways in which the EC negotiates, it is unlikely that ACP countries will be able to agree the kinds of services and investment clauses in interim agreements or (goods-only) EPAs that would serve regional processes. Rather, they risk being pushed into an EU approach to services and investment that would undermine a form of regional integration aimed at economic, social and environmentally-friendly development. Far safer for ACP countries would be to avoid including any kind of commitments in EPAs or interim agreements to negotiate services or investment in the future, or to avoid signing any EPAs or interim agreements pending further consolidation of regional integration within the ACP.

Establishment of any future EU-ACP cooperation and relations on services and investment could instead use the Cotonou mechanisms and focus on support for political and regulatory measures at the regional level, with the clear aim of developing the services and investment sectors in a way that contributes to poverty eradication and sustainable development in the social, environmental and economic fields. This could support ACP countries that wish to strengthen investors' obligations to respect human rights and labour rights and environmental standards.

# Conclusion and recommendations

This report has described the ways in which the EU is determining the model, the approach, and the pace of regional integration in ACP regions. These ways are contrary to most regions' own choices and already-established processes, priorities, and approaches. Of particular concern is the manner in which the EC is driving regions to make tough decisions, under pressure, about what to liberalise *vis-à-vis* the EU *before* most ACP regions have finalised negotiations on services and investment agreements among themselves. The ACP countries would also have to grant to the EU whatever preferences they decide to grant to third parties (in cases where they are 'major trading partners'). Such EPA negotiations could ultimately drive liberalisation commitments, both to the EU itself and to regional partners, at a pace for which the regions are unprepared. These EPA commitments would become the floor above which members of ACP regional groupings could make only more, not less, far-reaching liberalisation and regulatory commitments to one another than they make to the EU.

The report shows how the EU's approach is at odds with the more comprehensive, prudent, and innovative approach taken by some ACP regions.

Moreover, EPAs will add further layers of complexity to existing frameworks – for example by applying GATS-style treatment to investment in non-services sectors, and by overlaying such an EPA model on to the existing patchwork of BITs, regional, and pan-African initiatives – risking further confusion for investors, rather than creating clarity.

In regions where EPA negotiations on services and investments cannot be finalised by the end of 2007, the EU's push to enforce commitments to negotiations on these issues in the near future is dangerous. ACP countries may wish to impose stringent conditions before resumption of such negotiations, as proposed by SADC, but – given the EC's negotiation record – this is unlikely in future negotiations to eliminate the many concerns expressed in this paper.

By not signing the interim agreements or (goods-only) EPAs that the EU pushes for, the ACP countries, parliaments, and populations would gain the space and time for a more fundamental and comprehensive review of the issues. They could consider existing or draft services and investment agreements, and alternative proposals coming from experts and civil society that aim to achieve sustainable development and poverty eradication through regional initiatives. This would, for instance, create an opportunity to assess the impact of the draft COMESA agreements on services and investment,<sup>49</sup> which have been influenced by mainstream investment-protection principles and have not been discussed democratically. Other approaches should be discussed at the regional level, providing for ACP countries and regions to manage and control investments and services for the benefit of their people, societies, and economies. A range of policy tools could be developed, including regulatory and supply-side capacity building, selective entrance provisions where desired, measures to oblige investors and service providers to prevent abuses of human rights or labour rights and damage to the environment, and measures designed to uphold the objectives of sustainable development and poverty eradication.

49 The draft Investment Agreement for the COMESA Common Investment Area; and the draft Regulations for Establishing a Regional Framework Agreement for the Liberalisation of Trade in Services in COMESA.