

# **Back to the Future? European Partnership Agreements and Investment rules**

## **The WTO's Singapore Issues in Disguise?**

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### **Introduction:**

When the European Union failed in its efforts to launch negotiations at the World Trade Organization (WTO) on the so-called Singapore issues as a result of a coordinated opposition on the part of developing countries, many critics feared that the EU would use regional and bilateral means to achieve its goals. The opportunity would arise, they claimed, with the end of the preferential trade agreement that 76 countries of Africa, the Caribbean and the Pacific (ACP) had with the EU which had been in contravention of the WTO rules but were permitted under a waiver. The negotiation of these new economic partnership Agreements (EPAs) with a deadline of the end of 2007 would provide a means for the EU to push further liberalization on smaller developing countries. Given their trade dependence on EU markets and power asymmetries, these countries would be forced to sign agreements that might not be in their best interests. To date these negotiations have resulted in the initialing of a series of interim agreements but only one comprehensive agreement has been signed with the Caribbean states. That agreement, however, does include Singapore issues including the most controversial issue – investment. This paper will examine the history of the European Union's efforts to establish stronger rules on investor access and protection at the WTO and their more recent strategy using EPAs. The paper will address the question of whether EPA's, as a type of Free Trade Agreement (FTA) have provided a backdoor route to investment liberalization in developing countries which was unachievable for the EU in the multilateral context of the WTO.

The first section of the paper begins with a brief review of the history of the EU's attempts to launch multilateral negotiations on investment rules and their rough reception by developing countries at the WTO. It will outline the attempts of the EU, along with Canada and Japan to persuade developing countries of the need to add investment, along with three other issues of trade facilitation, transparency in government procurement and competition policy to the WTO negotiating agenda. The second section examines the developing-country response and coalitions which emerged and ultimately forced, first, the watering down of EU demands on investment and then finally the dropping of investment and two other Singapore issues from the Doha Round of Trade negotiations. The third section of the paper outlines the shifting EU trade strategy outlined in the Commission's policy paper *Global Europe* and examines where the negotiations on European Partnership Agreements fit within that process. The fourth section outlines the process of negotiation and the tactics the EU has used and why they have elicited opposition both in civil society organizations in Europe (especially development organizations) and those in the ACP countries, especially in Africa. The fifth section of the paper examines the only comprehensive agreement the EU has concluded with the CARICOM countries which includes investment and makes some preliminary observations linking the agreement to other regional and bilateral trade and investment agreements. The conclusion examines the link of the EPA negotiations to the underlying EU strategy on investment and the extent to which the struggle over investment rules has shifted from multilateral to bilateral or regional arenas.

## **The European Union, the WTO and the struggle over investment rules**

The issue of investment rules at the WTO has its origins in the desire of capital-exporting countries and investors to secure market access and stronger protection for investors through agreements. These agreements would ensure national treatment of foreign investors, limit host state regulation of entry, and ensure adequate compensation for expropriation of investments and effective dispute resolution measures. From the vantage point of capital-exporting countries a multilateral agreement had the advantage of coverage of a broad range of countries and consistency. The debate about a multilateral agreement among developed countries centered around which venue, the Organization for Economic Cooperation and Development (OECD) or the World Trade Organization, offered the best prospects for a "high standards" agreement- the standard for which is probably chapter 11 of the North American Free Trade Agreement (NAFTA).

The United States led efforts to launch negotiations at the OECD in the early 1990s because it was pessimistic about the prospects at the WTO. This pessimism reflected both the US experience with what it saw as limited achievements in the negotiation of Trade-Related Investment Measures (TRIMs) during the GATT Uruguay Round and a view that a higher standards agreement was more likely to be achieved among the like-minded OECD members. In contrast the European Union and its negotiating arm the Commission, along with Canada and Japan, favoured the WTO and sought to build momentum there for the first full WTO ministerial meeting held in Singapore in December, 1996. These differences with the US reflected the desire of the EU to negotiate in the venue where the Commission, rather than its individual member countries, would play a lead role, where the number of countries covered would be much broader, and the WTO negotiating agenda could be enlarged in a way that would afford the possibility of future trade-offs, particularly in relation to agriculture. But the European Commission recognized that any immediate attempt to launch negotiations at the WTO would be doomed to failure and proposed an educative work program that would build a consensus toward negotiations. A number of developing countries, led by India, strongly opposed to negotiations (Ramaiah 1997) while others, such as Brazil and Mexico, were more supportive.

No consensus was achieved on the issue prior to the meeting and a last minute compromise was forged in Singapore. The Singapore declaration reduced the initial proposal to a decision to "establish a working group to examine the relationship between trade and investment" the work of which "shall not prejudice whether negotiations will be initiated in the future." Both proponents and opponents of investment negotiations also agreed to provide a formal role for the United Nations Conference on Trade and Development (UNCTAD) in this process.

From Europe's perspective there was some basis for optimism. Competition among developing countries for more foreign direct investment (FDI) had led to a proliferation of incentives, liberalized entry rules for investors and the negotiation of a host Bilateral Investment Treaties (2181 by 2003) designed to attract foreign investors. At the WTO itself limits on a number of trade-related investment measures (TRIMs) had been agreed to in the Uruguay Round and the ongoing negotiations under the General Agreement on Trade in Services (GATS) also recognized a mode of service delivery (commercial presence) through foreign investment. Finally precedent-setting "high standard" investment rules had also been included in the North American Free Trade Agreement (NAFTA, chapter 11).

The European Commission, Japan and Canada tried to use the WTO working group to build consensus on the need for an investment agreement. Member countries which opposed investment negotiations viewed the working group with more suspicion. By encouraging lengthy research questions and a general de-linking of the working group from any decision-making in the WTO, they sought to minimize its impact and use it to highlight their concerns about further liberalization and their opposition to future negotiations. The WGTI began meeting in June 1997 agreeing on a checklist of four issues:

1. Implications of the relationship between trade and investment for development and economic growth
2. The economic relationship between trade and investment.
3. A stocktaking and analysis of existing international instruments dealing with investment.
- 4 An assessment of the "gaps" in existing instruments and the advantages of multilateral over regional or bilateral rules.

Proponents' arguments centered around four key points including: the close integration of trade and investment, the economic benefits to host countries of foreign investment and the need for greater overall coherence, transparency and predictability in investment policies to enhance security for investors and thus increase FDI inflows. The final part of the argument was that the WTO could play a role in facilitating the latter two processes. The European Commission's submission (May 30, 1997) focussed on the growth and significance of FDI, especially its role in intra-firm trade. It later provided survey data of British companies purporting to show that a predictable, transparent and open regime for investment influenced outward FDI. Existing bilateral and regional agreements were characterized by the European Commission as a "patchwork of rules, inefficient and non-transparent". (European Community, 1997, 1) The WTO already had investment on its agenda as a result of the GATS and the TRIMs and, according to the EU, the WTO was in the best position to "level the playing field" so that small and medium European enterprises were willing and able to undertake the risk of FDI. Increased competition among host countries for FDI, the Commission warned, could lead to a race to the bottom with incentives and developing countries could gain much from a balanced set of rules. Yet at a later date the EU had to acknowledge record levels of investment flows including an increasing proportion to developing countries, in the absence of WTO rules. The EU pointed out however, that most of this FDI was concentrated in a few economies and argued that smaller economies would thus benefit if flows became more dispersed.

On the other side opponents questioned the nature of the trade and investment link for developing countries and the causal relationship between investor security, increased FDI inflows and the role of the WTO. India (India 1997) reminded members of the purely educational and non-prejudicial role of the Working Group and argued that the "development perspective should be all-pervasive." (India, 1997, 2) Concerns to be addressed should include the impact of FDI on the balance of payments, technology transfer, and recognition of the need of states to pursue their national industrial policies. India proposed an exhaustive list of twelve elements of study that should include "the business practices and corporate strategies of transnational corporations" and the "interrelationship between mobility of capital and mobility of labour" issues by and large ignored, or strongly opposed, by proponents. (India 1997, 3) Other opponents, such as the ASEAN group, pointed to their numerous Bilateral Investment Treaties (BITs) which already provided protection to established foreign firms and their success using targeted incentives to bring in record levels of FDI. Opponents also pointed to a lack of consensus on a definition of investor and whether most favoured nation or national treatment was really the prevailing international norm.

The WTO General Council meeting in late 1999 reflected the divisions in the WGTI in two competing paragraphs of the Seattle draft ministerial declaration, one launching negotiations based on a detailed framework and an alternative which simply called for further study. The divisions over investment continued in Seattle where India made its continued opposition to negotiations and its preference for the first option clear. With the collapse of the Seattle ministerial it was back to business in the working group. Despite spinning its wheels it was with the WTO's Doha Ministerial meeting in November 2001 that the working group finally got a specific mandate and new impetus and, for the European Union, a ray of hope. However, the three paragraphs of the Doha Declaration which addressed investment generated more confusion than light resulting in the need for an "explicit consensus" among members to launch negotiations.

The EU and its supporters set out again to forge that consensus this time adding, as did the Doha Declaration, a development dimension to their arguments and a recognition of the need to provide reluctant developing countries with technical assistance designed to prove the merits of launching negotiations on investment rules. The EU stressed development in its two concept papers calling for "a multilateral Investment for Development Agreement." (EU April 3, 2003) and claiming that investment rules could be fully compatible with development needs and a way of securing that policy space. The stability, transparency and predictability of investment rules, they argued, would enhance attractiveness and promote investment flows, although they had to admit a weak link between investment rules and FDI inflows. The EU also tried to suggest that smaller developing countries **would be better able to protect their interests in a multilateral, rather than in a bilateral, investment agreement where the asymmetry of power would leave small countries more vulnerable.** (The irony of this statement becomes clearer below) The continued arguments of opponents that investment rules would limit state "policy space for development" and

flexibility had to be addressed. The answer was to be a GATS type, bottom-up model for the agreement which would allow countries to choose which sectors they wished to see covered by investment disciplines and obligations. Other controversial issues included the principle of national treatment of foreign investment and whether this obligation in an agreement applied to both pre and post establishment stages of investment. For some developing countries the need to treat domestic and foreign investment differently and to screen and channel incoming investment in line with policy objectives was seen as crucial.

One of the main arguments against the launching of investment negotiations had been the lack of capacity on the part of a number of developing countries, especially the least developed, to deal with additional new issues on the WTO agenda. The Doha Declaration had called for "enhanced support for technical assistance and capacity building". (WTO, 2003, 17) To that end a WTO trust fund was established in late 2001 via member contributions with most of the training provided by WTO and UNCTAD staff. Reports to the WGTI indicate that an extraordinary number of investment training events (42) were held in 2002-3 alone (Smythe) either in Geneva or various developing-country locations.

### **Developing Countries Resist: The Cancún Ministerial Meeting**

It was clear by the summer of 2003 that there was little consensus among WTO members on investment issues and members would have to make a decision at the WTO ministerial meeting in Cancún. Even many WTO observers and trade experts began to question the inclusion of the Singapore issues in the Doha Round, especially investment and competition, given the level of opposition. Others saw merit only in the possibility that developing countries might try to use the investment issue to leverage further concessions on agriculture out of the EU (Sauve 2004, Evenett 2003) reflecting a view that the whole rationale for the EU's push on the Singapore issues was merely to trade them off as a bargaining chip to avoid further movement on agriculture.

Despite years of study and technical assistance several factors worked against the EU's efforts. First the atmosphere and progress in many other areas of negotiations had deteriorated. Missed deadlines, little progress in agriculture, and ominous signs of US protectionism added to the difficulties of forming a consensus. Progress on the development part of the DDR was less than might have been expected and lingering deep concerns about implementation issues still outstanding from the Uruguay Round. Many developing countries were skeptical about the balance of benefits in agreements and promises of flexibility after their experience with the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS).

The second factor was the solidarity among developing countries. India had made efforts to build and maintain solidarity among developing countries meeting with a number of developing country blocs in the spring of 2003 on the Singapore, as well as other, issues. Once again the draft ministerial declaration discussed by the WTO General Council in August, at first glance, seemed to fully capture divisions among WTO members on investment. However, the second part of the annex appeared to pre-suppose that negotiations would begin post Cancún and laid out the modalities for negotiations as they had been outlined in the position papers of the EU and Japan -- modalities which, opponents protested, had never been agreed to in the WGTI.

For the Singapore issues Canada's trade minister, Pierre Pettigrew, was chosen as facilitator in Cancún despite Canada having been an active proponent of negotiating investment rules and the other Singapore issues at the WTO. The minister's meetings with small groups of delegates quickly revealed the extent of disagreement on the Singapore issues. Evident too was the link for a number of developing countries between these issues and real progress on agriculture. On September 12 a group of about 30 countries plus Bangladesh, representing the least developed countries (for a total of 60), sent a letter to Pettigrew expressing their opposition to negotiations on any of the four Singapore issues and raising concerns about the capacity to both negotiate new issues and implement resulting commitments (Aziz, 2003). They further complained about the process, reminded the Minister of the clear absence of an explicit consensus, and offered alternative wording on investment which would simply call for further clarification of these issues. A number of countries also demanded the unbundling of the four Singapore issues.

The following day (Sept 13), however, the second revised draft text of the ministerial declaration appeared showing approval of the launching of negotiations. Given the huge number of countries expressing opposition and the requirement under Doha for an explicit consensus to launch negotiations, this seemed in itself stunning. The Mexican chair's strategy of seeking a resolution first of the impasse on the Singapore issues coupled with the initial refusal of the EU to un-bundle the issues and drop investment doomed the session. Botswana informed the chair that the African Union countries would not accept

negotiation on *any* of the four Singapore issues. The meeting ended in disarray after the Mexican chair, citing no agreement, adjourned it. The EU negotiator Pascal Lamy seemed shocked and angry. The opposition of developing countries continued in Geneva two weeks later in December when the G90<sup>1</sup> spokesperson Ambassador Ntwaangae said:

Our alliance has long proclaimed that the Singapore Issues are not priority issues for us. Ideally our position is that all these issues should be dropped completely from the WTO agenda. If this happens, it will signal respect for the will of the majority. We form a majority of the membership. If it happens, it will demonstrate a very important principle regarding respect for the will of the majority, given that the WTO is a member-driven organization.

After initially sending confusing signals, the European Union finally declared that it is no longer a *demandeur* on investment. Only one of the four issues, trade facilitation, remained on the Doha agenda.

What accounted for the failure of the EU efforts? One answer lies in the changing membership and roles of WTO members (Narlikar and Tussie 2004). With larger numbers of developing countries, it could be argued, the case of investment merely reflected a shifting balance of power among state members at the WTO, a clash of differing interests and a growing mistrust making developing-country members especially reluctant to undertake new negotiations. Civil society organizations had also been doing much to oppose and challenge expanding the WTO agenda to include investment adding to the capacity of developing country WTO members to challenge and question the extent to which agreements, such as one on investment, would actually serve their interests or would unduly limit the policy space available for development.

### **Global Europe and a new approach**

With the breakdown in Cancún came a slowing of the negotiation momentum in Geneva. A breakdown of talks was followed by a re-start partly engineered by the former Commission negotiator Pascal Lamy, later to be Director-General of the WTO. Another ministerial meeting in Hong Kong in the fall of 2005 narrowly avoided collapse but produced further meagre results. This slowing momentum was paralleled by an increase in the movement by a number of major trade actors, such as the United States, to aggressive negotiation of regional and bilateral agreements something the US had never really abandoned despite the launch of the Doha Round in 2001.

It was in 2005 that the European Union began the process of moving away from what had been rather strong and unqualified support for multilateral trade agreements under Lamy as trade commissioner. The Commission's trade directorate officials acknowledged they faced a WTO that was stretched to its limits, more heterogeneous in its interests and no longer driven by deals crafted by agreement of the US and EU (CEO, 5). Work began on an analytical paper on trade and competitiveness which surveyed the global challenges facing Europe and acknowledged the meagre results multilateralism had yielded and called for new ideas in trade policy. These ideas, after close consultation with Business Europe (formerly UNICE), the umbrella organization of corporate interests in the European Union, resulted in the launching of the policy paper *Global Europe: Competing in the World* in the fall of 2006. It was endorsed by the Council in November and by the European Parliament in May 2007.

While it would be incorrect to say that the EU had not been engaged in regional or bilateral agreements outside of the WTO, in fact negotiations had been ongoing with Mercosur, and with the ACP countries, what was new was the articulation of a more aggressive regional and bilateral strategy clearly linked to concerns about the EU's global competitiveness. The early portion of the paper points to concerns about the extent to which the EU is losing out in emerging markets to competitors like the US and Japan. New rising actors like China are also identified as posing challenges especially to the EU's future access to resources. What is most striking, however, in the section 3.2 on Opening Markets Abroad, is how the EU identifies its trade priorities. The paper asserts "our core argument is that rejection of protectionism at home must be accompanied by activism in creating open markets and fair conditions for trade abroad openness." (*Global Europe*, 6) The two key aspects of the agenda are "stronger engagement with major emerging economies and regions; and a sharper focus on barriers to trade behind the border." What are the key barriers behind the border identified?

iii) New areas of growth: We will require a sharper focus on market opening and stronger rules in new trade areas of economic importance to us, notably intellectual property (IPR), services,

investment, public procurement and competition (*Global Europe 6* emphasis in the document itself)

---in essence services, intellectual property and the Singapore issues. The centrality of investment is made clear two pages later.

Improving investment conditions in third countries for services and other sectors can make an important contribution to growth, both in the EU and in the receiving countries. As supply chains are globalised, the ability to invest freely in third markets becomes more important. Geography and proximity still matter. Establishing a "physical" presence in a foreign country helps EU companies realize business opportunities, makes the flow of trade more predictable, and consolidates the image and reputation of the firm and of the country of origin. (*Global Europe, 8*)

Given that several members of the European Union, such as Germany, the Netherlands and the United Kingdom are major capital exporters the interest in furthering market access and protection for EU investors is not surprising. Over all the European Union has been a net capital exporter with FDI outflows exceeding inflows by 103 billion Euros in 2006. Most outward investment goes to North America (US and Canada), followed by non-EU countries in Europe. In terms of sectors services is the most important. Over all developing countries and the ACP in particular make up a small proportion of total outward FDI, representing about 3.1 per cent of the outward stock of EU FDI in 2002. Africa accounted for about 4.5 per cent of outflows in 2006, in comparison to over 39 per cent to North America. (Eurostat, 2007). The interest in pursuing access and protection for investors is logical, what is less clear is why it would be a priority with the ACP countries?

### **European Partnership Agreements**

Since the 1970s the European Union has had special trade arrangements with a group of countries in the south, many former colonies. By the 1990s these preferential trading arrangements had been found to be in violation of multilateral trade rules. In an effort to move toward compliance the European Commission (EC) had negotiated a series of agreements which were accorded a special waiver (exemption) from the WTO for the period of the agreement. The latest, the Cotonu Agreement, was due to expire at the end of 2007. With the failure in Cancún, the dropping of the Singapore issues, and the slowing momentum of multilateral negotiations, which the Hong Kong ministerial and the suspension of negotiations in Geneva in 2006 represented, the EU, many critics charge, used the deadline of expiration of the Cotonu Agreement to negotiate new Economic Partnerships Agreements (EPAs) with the 76 ACP countries. The European Union has generally portrayed these agreements as ones which it seeks both to comply with the WTO and afford development opportunities to the ACP countries.

3. As EU documents point out trade with the ACP countries involved about 40 bn Euros in exports to the EU in 2007 (about 2.5 per cent of Eof EU imports) with about 39.7 billion exports going to the ACP countries. For the ACP countries however the dependence on the EU market is much greater. Nearly 30 per cent of all ACP exports go to the EU and in some regions, such as Central Africa the figure is over 50 percent.

For critics of the EU this level of trade dependence and the adoption of a new aggressive policy to advance the EU's external economic competitiveness in October 2006 set the stage for the EU to use the negotiation of these EPAs to advance broader trade and investment interests, thus overcoming the opposition of the G90 at the WTO to the EU's trade agenda. Within the EPA's, even to the dismay of some EU member countries, the:

EC also seeks investment liberalisation, guaranteed protection for European corporate property and increased 'intellectual property' rights, the opening up of ACP services sectors and government procurement (public tenders) to the operations of European companies, the imposition of inappropriate 'competition' rules and much else. (Keet, 5)

Negotiations had begun as early as 2002. Given that the majority of countries with over 90 per cent of the population of the ACP are African it is not surprising that Africa has been the centre of resistance to the EPA's. At the same time many of the countries involved are small with very vulnerable economies that would be devastated if access to EU markets were to change abruptly. The ACP countries divided for negotiations into six groups as follows:



EPA configuration	EPA Interim agreements initialed or signed	EBA (31 LDCs)	GSP (10 non-LDCs)
Pacific	Papua New Guinea, Fiji	East Timor, Kiribati, Somoa Soloman Isl, Tuvalu, Vanuatu	Cook Isl, Marshall Isl. Nauru, Palau, Micronesia
*Caribbean	Anitgua and Barbuda, Bahamas, Barbados, Belize, Dominica, Grenada, Gayana, Haiti, Jamaica, St. Kitts and Nevis, St. Lucia, St. Vincent and the Grenadines, Suriname and Trinidad and Tobago and the Dominican Republic		
Central Africa	Cameroon	Central African Republic DR Congo-Kinchasa Chad Equitorial Guinea Sao Tome	Gabon, Rep Congo-Brazzaville
Eastern and Southern Africa	EAC: Burundi, Kenya, Tanzania and Uganda ESA: Comoros, Madagascar, Mauritius, Seychelles, Zambia, Zimbabwe		
West Africa	Cote d'Ivoire, Ghana	Benin, Burkina Faso, Cape-Verde, Gambia, Guinea, Guinea-Bissau, Liberia, Mali, Mauritania, Niger, Senegal, Sierra Leone, Togo	Nigeria
SADC	Botswana, Lesotho, Namibia, Mozambique, Swaziland  S. Africa was an observer and then a participant and has not signed an agreement	Angola	

Source: European Union (2008) Overview of the Interim Agreements (EPA Fact Sheets)

\*Signed a comprehensive agreement.

Within each group were a variety of countries, some of which were classified as Least Developed. Depending on their situation some countries would qualify for the EU offer of tariff reductions under the Everything But Arms (EBA) offer, but without an EPA many others would fall under the Generalized System of Preferences (GSP). Many, in the event that they did not sign a new agreement by the dead line of the end of 2007, would be significantly worse off under the GSP regime.

Negotiations began slowly and it was clear by 2006 that the EU's deadline of the end of 2007 was not likely to be met. Moreover, a chorus of criticism of the EU's negotiating strategy began to emerge and included, among others, many civil society groups, especially in Africa, a number of Aid organizations such as Oxfam, Action Aid and the World Development Movement, the International Trade Committee of the European Parliament and even the World Bank, which suggested the negotiating deadline should be extended. Several aspects of the EU's approach were found to be troubling; one was the extent of bilateral pressure both in terms of looming loss of market access and the possible loss of aid and development funds. Even more concerning for many countries was the EU's demand for significant liberalization beyond goods and including services and other "trade-related" areas including investment, government procurement and competition policy.



A letter from five Socialist Members of the European Parliament to the *Financial Times*, in March 2007 made the link to the Singapore issues very clear:

'the Commission has sought to widen the EPA agenda to cover negotiations on services, intellectual property and the 'Singapore issues', such as competition policy and investment, and is pressing for EU interests in these areas. All ACP countries must have a clear right to choose whether to extend the negotiations beyond trade in goods: the additional issues must be taken off the table if ACP countries wish. ' (Action Aid, 57 )

The conduct of the Commission also led the UK's International Development Committee to conclude: "we remain concerned that the EU is abusing its position in the partnership to persuade the ACP countries that the New or Singapore issues are for development and by implying that there may be penalties if they reject them." (Action Aid, 56).

The South African Development Community (SADC) framework proposal regarding the EPA agenda made it very clear that they did not want to negotiate on the Singapore issues. They argued outcomes would result in obligations that would go "beyond those agreed to in the WTO (WTO-Plus) and introduce into the bilateral context, issues that contributed to the failures in Cancún (investment, competition and government procurement)" (Action Aid, 53). The main concerns reflected in their framework proposal was that member states had limited institutional and negotiating capacity which would be severely strained if these "new generation trade issues" such as investment, competition and government procurement were to negotiated under the EPA. This concern echoed that of the G90 at the WTO. Further, they argued, negotiations on these issues were premature and would pose serious policy challenges to regional integration since SADC had not yet developed common policies on these issues. Thus, they claimed, there was a "risk of delivering unbalanced outcomes that may be prejudicial to national developmental objectives and to prospects for deeper integration in SADC." Their framework proposal put forward in 2006 did not receive a reply from the Commission negotiators until 2007 and when it came it rejected the negotiation objectives outlined by SADC and insisted on the inclusion of services and investment, something which Namibia and South Africa ultimately rejected. As the pressure mounted South African negotiators described the way in which a number of SADC members under enormous pressure shifted position and committed to "immediately enter negotiations in services and investment without any binding upfront commitments for technical assistance from the EC and they committed to negotiate competition and government procurement in the future" (South Africa, 2008, 4), driving, in their view, a wedge into regional integration efforts in Southern Africa.

The European Union's response to concerns about the Singapore issues was, according to Peter Mandelson, EU Trade Commissioner, one of "disappointment in the lack of willingness so far to talk about these [investment, competition and government procurement] issues." (Oct 2006 as quoted in Action Aid, 54). Yet later Commission trade officials made it clear that such unwillingness would result in the EU finding it difficult to improve SADC access to its market (55). In the end the EPA negotiations were far from complete by the end of 2007 and many ACP countries or groups of countries opted to initial what have been called "interim" agreements which cover market access to goods. In a number of cases, however, these agreements also include commitments to further negotiations on the Singapore issues. The EU describes these agreements as follows:

- Central Africa: A regional agreement with Cameroon (other countries in the region finally opted not to join the agreement)
- Southern Africa (SADC region): A regional agreement with Botswana, Lesotho, Swaziland, Mozambique and Namibia
- West Africa: Individual agreements with Ivory Coast and Ghana
- East Africa: A regional agreement with the East African Community (Kenya, Uganda, Tanzania, Rwanda and Burundi)
- Eastern and Southern Africa (ESA region): A regional agreement with Comoros, Madagascar, Mauritius, Seychelles, Zambia, Zimbabwe (but with individual market access schedules)

- The Pacific: A regional agreement with Papua New Guinea and Fiji (but with individual market access schedules)

Many include future commitments to negotiate, as the EU describes, for East Africa:

On services and investment (establishment) the EU approach includes: predictable rules and legal certainty attracting foreign direct investment and boosting economic growth; asymmetrical liberalisation with flexibility for countries to choose the sectors and activities covered; asymmetry in the specially designed non discrimination (MFN) clause; a specific clause on regional integration; and clauses on development co-operation and technical assistance. EAC questions have confirmed their willingness to enter into services and establishment negotiations but these have not yet started. (European Union, January, 2009)

In other cases the extent of the willingness to negotiate remains unclear. For the SADC countries that signed interim agreements the EU refers to “continuing discussions on investment and services”. Just what does the EU have in mind for investment rules in future EPA negotiations? To answer that question we turn to the one and only comprehensive agreement that has been signed to date between the CARIFORUM<sup>1</sup> countries and the European Union.

### **CARIFORUM-EU Agreement**

Unlike their counterparts in Africa, the member countries of CARICOM and the Dominican Republic which make up the CARIFORUM group (see endnote ii) under the ACP negotiations signed the only comprehensive EPA to date with the European Union. As such it provides a window on what the EU sees as the acceptable level of commitments on investment rules in an EPA. This section reviews the main provisions of this agreement as they relate to investment.

The CARIFORUM commitments on investment are contained in Title 2 of the Agreement which deals with both investment and services. In the structure the agreement on investment follows the positive list model used for WTO services negotiations. In essence the positive list approach begins with the identification of sectors which states are willing to liberalize, rather than making broader commitments to liberalize and then negotiating exceptions. If we use the NAFTA commitments on investment as the high water mark of investment protection in bilateral and regional trade agreements it may help us to set this agreement in context. Investment agreements may address host state rules and regulation dealing with the entry of foreign investment into the host economy and/or the post establishment phase of investment, that is, the host state’s treatment of already-established foreign firms in the country. Agreements may also provide recourse for investors if their assets are expropriated, either directly by the host state, or indirectly, as a result of some state action or regulation. NAFTA gained a reputation among negotiators in various regional (FTAA), bilateral (Australia-US) and multilateral fora (WTO) as an agreement that provided a very high level of investor protection largely because it committed the state parties to the agreement, unless they negotiated exceptions to liberalizing the rules of entry for foreign investors, to accord already-established firms national (ie non-discriminatory) treatment *vis a vis* domestic firms. This limited the host state’s ability, for example, to impose performance requirements on foreign firms. By far the most contentious element of NAFTA’s chapter 11 was that it allowed foreign investors who felt their assets had been expropriated (very broadly defined as actions “tantamount to”) to have recourse to investor-state (not state-to-state) arbitration. The numerous cases lodged against the three NAFTA signatory states by various firms made many negotiators at the WTO and elsewhere very wary of the implication of such high standards of investment protection for a state’s capacity to regulate.

Within this context it is clear that the investment rules in the CARIFORUM agreement fall somewhat short of the NAFTA standard. That does not mean however, that they do not have important implications for the region and the policy space for development that CARIFORUM host states will have as a result. In terms of liberalization of access for foreign investors the agreement opens all sectors (Article 66) with a few exceptions such as mining and processing nuclear materials, arms production,

national marine cabotage, audio-visual services and air transport and related services. National treatment for foreign investors and those providing services via a commercial presence (ie direct investment) is accorded in articles 67 and 68. One of the more controversial elements which the EU has included in the agreement provides, in Article 70(1)b, for established EU firms and investors to benefit unconditionally via the EPA's MFN provision from any new more favourable treatment which the CARIFORUM states may provide to any industrialized country or major trading economy with which they might conclude a subsequent trade agreement (e.g. the United States, Canada, or a BRIC country such as Brazil). Brazil has expressed concern about this clause at the WTO General Council claiming that such a provision may have the effect of discouraging developing countries from concluding preferential trading agreements with EPA partners thus discouraging South-South trade.

Unlike many investment agreements the CARIFORUM EPA does include in article 72 issues of bribery and in 72 b and c calls on investors to act in accordance with core labour standards “as required by the International Labour Organization (ILO) Declaration on Fundamental Principles and Rights at Work, 1998, to which the EC Party and the Signatory CARIFORUM States are parties” and calls on investors to “not manage or operate their investments in a manner that circumvents international environmental or labour obligations arising from agreements to which the EC Party and the Signatory CARIFORUM States are parties.” As well investors are to “establish and maintain, where appropriate, local community liaison” especially in the case of natural resource projects.

What the EPA's investment chapter does not contain are the disciplines on the core investment protection issues of minimum standards of treatment, expropriation and compensation, nor does it provide for the investor-state arbitration procedures found in NAFTA (Sauve and Ward). Sauve and Ward speculate that this may be due to the reality of “the shared competency between Member States and the European Community in matters of investment regulation. Indeed, the Commission is not yet fully able to speak on behalf of Member states in matters of investment protection, a state of affairs that would be possible once the Lisbon Treaty is ratified by all Members.” On the other hand this has been by far the most notorious and controversial part of the NAFTA and that may also be reflected by its exclusion. However, other analysts enter a note of caution. Gus Van Harten's analysis of the agreement points out that it must be seen in the context of existing Bilateral Investment Treaties (BITs) signed with a number of European countries. The significant liberalization of entry which the CARIFORUM EPA provides, and interaction with existing BITs means, in his view:

that the CARIFORUM states will be exposed to claims against them by European investors whose investments are possible only because of the market access that is granted under the Agreement. These claims are most likely under BITs between a CARIFORUM state and an EC state. (Van Harten, 5)

Thus in his view this agreement helps fill a gap in the existing BITs that many EU countries have negotiated.

Existing BITs concluded by EC states do not contain commitments on market access but are instead limited to post-establishment protections for investors. They differ, as such, from the investment treaties of other major states, which typically include commitments on both pre-establishment and post-establishment stages of investment. In this respect, the market access commitments in EPAs are meant to ‘fill a gap’ in the BIT programmes of European capital-exporters by opening host economies to European investment in the manner of a US regional or bilateral investment treaty. (9)

The EPA also includes commitments to further liberalization down the road in article 62 which

commits the parties to “further negotiations on investment and trade in services no later than five years from the date of entry into force of this Agreement with the aim of enhancing the overall commitments undertaken under this Title.”

Given how controversial investment rules were as a possible new issue for negotiation at the WTO during the Doha Round it is surprising to some that the CARIFORUM countries agreed to negotiations on this and other Singapore issues. As Sauve and Ward note:

The EPA's WTO+ nature has proven contentious in some quarters of the CARIFORUM region, ultimately prompting calls for the Agreement's renegotiation. (Girvan, for example). EPA critics have argued that the acceptance of WTO+ provisions in areas such as services, competition policy and investment will create legal precedents and could pave the way for their subsequent multilateralization. (Sauve and Ward, 5)

Clearly the agreement has proven controversial and raised concerns among some economists, such Norman Girvan and Clive Thomas. Guyana has also not signed on to the agreement and has expressed concerns about a number of aspects including the investment provisions. The fact that issues such as investment and government procurement found a place in the EPA even though CARIFORUM countries had not yet worked out their own internal arrangements on these issues is also surprising. The explanation of why the CARIFORUM countries negotiated on these issues may relate to the desire to attract new investment, particularly in the services sector. As capital importers the Caribbean states appear to have accepted the notion that liberalizing entry, according national treatment, and the commitment to transparent and predictable rules for foreign investors will enhance capital inflows from the EU countries. According to the CARIFORUM negotiators:

While European investments into CARIFORUM have generally increased over the last decade, investment flows in recent years have been stagnant in most non-tourism sectors. The Parties agreed to investment liberalization in the EPA, in order to establish rules that facilitate the easier flow of investment across the borders of the European Union and all CARIFORUM countries, The EU is a significant outward investor, with 9 EU members ranking in the top twenty leading outward investor economies. Therefore a properly managed relationship with the EU should create viable opportunities for CARIFORUM, and stimulate growth and dynamism in EU investment flows to the Caribbean. (CRNM, 2008)

This was an argument the EU used in its efforts to convince developing countries to negotiate investment rules at the WTO. Yet the evidence that there is a positive correlation between investment agreements and enhanced inflows is dubious at best.

Other suggest that unlike their African counterparts the Caribbean countries were comfortable with their capacity to negotiate on these issues having built up some technical capacity during FTAA negotiations and being familiar as “some Caribbean countries have long put in place arrangements with the US on investment and intellectual property, without feeling any negative effects”. (Gonzales) The question remains whether this agreement will prove to be a precedent that sets the direction of other EPA agreements down the road. One area that may shape the future of EPA agreements is the nature of civil society resistance to these agreements. It seems that this too may account for some of the differences between the CARIFORUM countries and the African countries.

**Civil Society Resistance to EPAs: From Brussels to Nairobi**

The first network of resistance to EPAs emerged in Africa. The African Trade Network (itself linked to Third World Network) launched a pan-African campaign in December 2002. At the same time it was clear that EPA's could not be challenged without the cooperation of activists in the North. The Seattle to Brussels Network of civil society activists had developed in Europe in the wake of the Seattle WTO ministerial and was a logical partner in the struggle. In April 2004 European civil society groups, along with ACP groups, took a decision to actively participate in the campaign.

The growing challenge of resisting complex bilateral, regional and multilateral trade agreements was also recognized by many in the activist community. Even keeping track of developments on many trade fronts was difficult. In September 2004 the Asia-Pacific Research Network and the Spanish based research network Genetic Resources Action International (GRAIN) noted "the ongoing trend already evident, but accelerating with the collapse at Cancún ministerial, to push the neo-liberal agenda through bilateral trade agreements" and launched a new "website against bilateral free trade and investment agreements. ([www.bilaterals.org](http://www.bilaterals.org))

The European Social Forum (ESF) provided an opportunity to link the North and South campaigns against the EPAs. At the London 2004 ESF European campaigners held a strategy meeting and then publicly launched the European STOP EPA campaign. The ESF included a number of panels dealing with the EPAs which brought representatives of European groups together with African activists from organizations such as SEATINI and the African Trade Network. Panels provided a rough guide to EPAs, informed European activists about the campaigns in Africa and then examined how the EPA campaigns linked to other campaigns and allowed for the sharing of ideas and strategy.

A number of social forums in Africa and the World Social Forum in Mali in 2006 provided opportunities to strengthen the networks further and share experiences. With the looming deadline of the end of 2007 and growing pressure on the ACP countries it is not surprising that the World Social Forum in Nairobi in January 2007 provided a focal point for mobilizing resistance to the EPAs. Hundreds of large and small sessions addressed the issue of EPAs and were offered by groups such as the Africa Trade Network (ATN), EcoNews, Eastern African Farmers Federation, Friends of the Earth, Agency for Co-operation and Research in Development (Acord), Alianza Social Continental (Hemispheric Social Alliance) and the Greek Net for an Alternative Agricultural Policy, along with the Our World is Not for Sale network and the Global Call to Action against poverty (GCAP). Many of these events provided an opportunity for experts on the negotiations such as Yosh Tandon from the South Centre in Geneva, Dot Keet from Transnational Institute, or Walden Bello from Focus on the Global South to provide the big picture of how these agreements fit into the broader context of trade negotiations. Other panels provided a chance for Africans themselves to testify to the impact of neo-liberal policies and the potentially devastating impacts of these new agreements on their countries. Many were able to share information about local anti-EPA campaigns. Sessions brought Europeans together with African activists to look at joint strategies. As TWN reported for some Europeans it was an eye-opener.

An Austrian Member of the European Parliament (MEP) at the Africa Trade Network's activity on the theme 'Stop-EPAs: Resist Europe's new colonial agenda' expressed shock at the depth and breadth of the EPAs and the arm-twisting tactics employed by the European Commission.(Obeng)

Such tactics included trying to divide the ACP countries into more vulnerable negotiating groups and using aid as a lever against some of the smallest and most impoverished countries. Most interesting was the presence at the WSF of the Hemispheric Social Alliance, seen by many as a model for European and African activists of how Northern and Southern activists could unite in opposition to

trade agreements. Sessions also included exploration of alternative south-south regionalism and finally efforts to mobilize. These culminated in a march to the headquarters of the European Union on January 24 in Nairobi where thousands of demonstrators confronted the EU representative and handed over a petition with 30,000 signatures calling for an EU-ACP partnership that will:

- Protect ACP producers in domestic and regional markets;
- Be based on the principle of non-reciprocity, as instituted in the Generalised System of Preferences and special and differential treatment in the WTO;
- Reverse the pressure for trade and investment liberalisation; and Allow for the necessary policy space and support for ACP countries to pursue their own development strategies and protect and enable the fulfilment of all human rights
- Given that the EPAs do not take any of these concerns into consideration, and do not meet the development needs of ACP countries, we reiterate our call to stop the EPAs.

Given the growing resistance, the concerns regarding the lack of capacity to negotiate on these issues but the hard reality of trade dependence on the EU market it is perhaps not surprising that many African states opted to initial interim agreements rather than forego market access or try to negotiate on a broader agenda. What does this predict for the future of investment rules? Will the EU be able to realize its ambition of liberalizing investment rules in future EPA negotiations and if so will that carry over into the broader Global Europe strategy which envisages a plethora of free trade agreements with countries such as India?

**Conclusion:**

As Oxfam has pointed out there is a marked trend to negotiation of regional or bilateral agreements.

During 2006, more than 100 developing countries were engaged in over 67 bilateral or regional trade negotiations, and signed over 60 bilateral investment treaties. More than 250 regional and bilateral trade agreements now govern more than 30 per cent of world trade, whilst an average of two bilateral investment treaties have been agreed every week over the last ten years. (Oxfam, 2007, 1)

While driven largely by the US and the EU, other countries such as Canada and Australia are also busy negotiating such agreements. In many cases, as with the EPAs, these negotiations involve bilateral relationships that are profoundly asymmetrical. It is valid then to question the ultimate objectives of such agreements for actors such as the EU. This paper has examined the EU's investment agenda as it was reflected in the lengthy and ultimately failed attempt to launch investment negotiations at the WTO and now, more recently, in the emphasis on investment and services in the Global Europe policy statement and in the negotiations of EPAs. Is the EU using these agreements to push an agenda that was unachievable at the WTO because of the presence of effective developing country coalitions? Does it see major opportunities in services and investment in these markets, or is the effort more about imbedding a set of investor-friendly rules that can then set precedents for other negotiations with major actors like India? Is this process a reflection of the slowing momentum and stagnation of multilateral negotiations or a deliberate attempt to undermine them when they do not produce the desired results?

From the perspective of the weakest most vulnerable countries such bilateral negotiations are difficult to resist and yet they pose grave risks. Many smaller states lack the capacity to deal with a series of complex regional and bilateral negotiations. Such a complicated plethora of agreements clearly works to the advantage of powerful actors like the EU and the US. These agreements also pose a challenge to those activists arguing for more just trade agreements that

afford developing countries the policy space they may need and the flexibility to liberalize and sequence market opening in a way that meets national needs. Activists have seen the need to create transnational north-south coalitions, in the case of the EPAs, but while these have raised awareness of the dangers of such agreements they have not been sufficient to stop the process. In the case of the CARIFORUM agreement the EU has clearly gained improved market access especially for investment in services. Yet the size of the markets in question suggests there is much more to the EU effort than merely gaining a foothold in the CARICOM region. This paper suggests that the strategic use of regional and bilateral trade agreements by powerful actors is an important trend within the international political economy. Clearly its link to, and impact on, multilateral trade negotiations and ultimately on the possibilities for a fairer set of international trade rules merit further study.

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## **Endnotes**

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G90 Membership

- African Union/Group
  - African, Caribbean and Pacific Group
  - Least-Developed Countries: Angola, Antigua and Barbuda, Bangladesh, Barbados, Belize, Benin, Botswana, Burkina Faso, Burundi, Cambodia, Cameroon, Central African Republic, Chad, Republic of Congo, Cote d'Ivoire, Cuba, Democratic Republic of the Congo, Djibouti, Dominica, Dominican Republic, Egypt, Fiji, Gabon, Gambia, Ghana, Grenada, Guinea (Conakry), Guinea Bissau, Guyana, Haiti, Jamaica, Kenya, Lesotho, Madagascar, Malawi, Maldives, Mali, Mauritania, Mauritius, Morocco, Mozambique, Myanmar, Namibia, Nepal, Niger, Nigeria, Papua New Guinea, Rwanda, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, Senegal, Sierra Leone, Solomon Islands, South Africa, Suriname, Swaziland, Tanzania, Togo, Trinidad and Tobago, Tunisia, Uganda, Zambia, Zimbabwe
- ii The members of the group include the CARICOM countries( Antigua and Barbuda, Bahamas, Barbados, Belize, Dominica, Grenada, Guyana, Haiti, Jamaica, St. Kitts and Nevis, St. Lucia, St. Vincent and the Grenadines, Suriname and Trinidad and Tobago) plus the Dominican Republic. For purposes of EPA negotiations Cuba was not included.

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5. Resistance and Opposition FrBrussels to Nairobi: Civil society takes on EPAs

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