

The CARIFORUM-EU Economic Partnership Agreement (EPA) Services and Investment Negotiations: Insights for Least Developed Countries (LDCs) in Operationalising the World Trade Organisation's (WTO) Services Waiver

Natasha Ward
ACP International Trade Advisors (Pty.) Ltd.

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Key Points

The CARIFORUM group made extensive use of consultations to determine its offensive interests on services and investment. This was supported by a wealth of technical work commissioned by regional negotiators on the main horizontal and sectoral issues. CARIFORUM’s offensive interests included market access for professional services and tourism service suppliers; meaningful mode 4 access, market access for cultural services; the establishment of a comprehensive regime for investment and a development support package. While the EU was generally responsive to CARIFORUM’s requests, there were some areas where the negotiated outcomes did not quite satisfy the latter group these include the limited access granted for mode 1 supply of professional services, market access for cultural and entertainment services especially in the audio-visual sector and the limitation of mode 4 market access through the use of economic needs tests. Such an outcome was reflective of the EU’s redlines which included access to cultural services and mode 4. In terms of a possible LDC negotiating position, elements include seeking commitments on independent professionals (IPs) and trainees (both graduate and those from vocational and technical institutions), requesting LDC only quotas for mode 4, articulating the ways in which non-market barriers such as those related to national treatment and domestic regulations can be addressed and requesting the preference granting WTO member states to create mechanisms to assist LDCs in capitalising on the market access opportunities.

Introduction

The paper explains how the CARIFORUM¹ member states identified their offensive interests on trade in services in the CARIFORM-EU Economic Partnership Agreement (EPA) and identifies what those interests were. It captures the reception and flexibilities show by the EU in the negotiations and the EU's redlines. On the basis of the information, it advances elements that may be useful for inclusion in the LDC's negotiating position on operationalising the services waiver.

The CARIFORUM Experience

CARIFORUM states, as small economies, increasingly dependent on the services sector, saw the EPA as offering an opportunity to improve and guarantee access to the EU market for the region's services suppliers. The services sector is the most significant contributor to GDP in all CARIFORUM States, except Guyana and Suriname. Therefore, favourable and assured access to the EU services market was one of its principal objectives in order to stimulate economic growth across the Caribbean.²

In identifying their national offensive interests, the individual CARIFORUM member states would have relied heavily on consultations with the private sector. For instance, Barbados, Jamaica and Trinidad and Tobago utilised formal consultative mechanisms to conduct these exercises with the Ministries of International Trade receiving inputs from the business support agencies representing services suppliers. In Trinidad and Tobago, the Coalition of Services Industries (CSI) and the Chamber of Commerce undertook consultations with the various professional associations which fell within their remit. In Barbados, the Private Sector Trade Team undertook sector specific consultations with stakeholders drawn from the relevant professional bodies and business support agencies to identify their interests.

In some cases, member states themselves were able to supplement the information received from the private sector with sector specific studies undertaken by international development partners such as the Commonwealth Secretariat. And lastly, negotiators carefully examined the EU's General Agreement on Trade in Services' (GATS) commitments and its offer in the Doha Development Round to identify any potential opportunities for CARIFORUM service providers.

In addition, the CARIFORUM states would have benefitted from a wealth of studies commissioned by the Caribbean Regional Negotiating Machinery (CRNM) - now the Office of Trade Negotiations - on horizontal issues such as mode 4 and on sectors of interest which would have provided invaluable insights into offensive interests as they provided information on industry size, export potential and capabilities, competitiveness and barriers to entry in foreign markets.

¹ CARIFORUM comprises the fourteen member states of CARICOM (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 and for the purposes of the EPA negotiations excluded Cuba.

² Errol Humphrey, CARIFORUM EPA Negotiations: Initial Reflections on the Outcome, Presentation to a DG Trade-organised workshop on the CARIFORUM-EC EPA, Brussels – 13 February 2008, 2.

CARIFORUM's key offensive interests on services and investment included: better access for the region's professional and tourism services; access for short-term visitors for business purposes and suppliers of services via mode 4; market access for cultural industries; and development support for dealing with information asymmetries, EU regulatory regimes, and capacity building.³ With respect to professional services, CARIFORUM sought to gain market access for areas not scheduled by the EU or with less than full commitment in the World Trade Organisation (WTO) negotiations.⁴ Some of the restrictive measures targeted were: restrictions on senior management/directors, residency and nationality requirements and economic needs tests (ENTs). With respect to investment (services and non-services sectors), CARIFORUM wanted to create a new complete framework which featured comprehensive investment provisions; to create a regime for investment and trade in the EPA to attract EU and third country firms to CARIFORUM and eliminate the need to negotiate new bilateral investment treaties.

The following section traces the negotiated outcomes and indicates where CARIFORUM achieved its objectives and where it was unable to do so.

Professional Services and Tourism

Mode 1

Much to the chagrin of the CARIFORUM states, many of the EU member states listed reservations on mode 1 or listed supply through this mode as unbound.⁵ CARIFORUM states had hoped for increased market access, particularly in professional services given the technological advances in information and communications technologies and the dramatic decline in the cost of supplying such services remotely. For mode 1, auditing services are limited in 21 states; architecture and urban planning and landscape architectural services in 13 states; medical and dental services in 21 states; veterinary services in 23 states, and; services provided by midwives, nurses, physiotherapists and para-medical personnel in 26 states.

The maintenance of restrictions by the majority of EU member states is also found in some major sub-sectors tourism and travel related services such as hotels and restaurants services. Generally the EU Member States have been more liberal with catering than with hotels and restaurants in mode 1.⁶ However, a closer inspection of the EU's mode 1 commitments on catering suggests that this gain may be of relatively limited value given the difficulty in practice in supplying catering services via mode 1. The EU's commitments for hotels and restaurants reveal a far more restricted access regime. Only Estonia, Finland and Hungary have removed their restrictions on the latter services while the remaining 24 EU member states remain unbound. For mode 1 supply of travel agencies

³ Ramesh Chaitoo, 'Services and Investment in the CARIFORUM -EC Economic Partnership Agreement (EPA)', presentation to the Jamaica Trade and Invest seminar on The Economic Partnership Agreement (EPA): Business Implications and Opportunities, Kingston, March 3, 2008.

⁴ CRNM, 'The Treatment of Professional Services in the EPA', Brief No.: 3200.3/EPA-08[08], 2008, 2.

⁵ An extensive discussion of the CARIFORUM EPA is presented in Pierre Sauvé and Natasha Ward, 'The EC-CARIFORUM Economic Partnership Agreement: Assessing the Outcome on Services and Investment', ECIPE Working Paper, January 2009.

⁶ CARIFORUM's tourism gains under the EPA are explored in Pierre Sauvé and Natasha Ward, 'Tourism Services Liberalization: The Role of Business Advocacy in the Caribbean-European Union Economic Partnership Agreement', Business and Trade Policy Case Study, Geneva: International Trade Centre, 2009.

and tour operator services only Bulgaria and Hungary have not opened the sector (it remains unbound). For tourist guide services, 17 countries have no restrictions.

Mode 2

For professional services, there are only reservations in mode 2 for legal advisory services, where 15 EU member states listed reservations; however, none listed the sector as unbound. The EU inscribed no limitations on mode 2 trade for any of the three tourism categories or for spa services. Such commitments are clearly of limited value as there were already no barriers to start with. CARIFORUM states had sought to add value to these commitments by requesting the portability of state funded medical insurance benefits so that the costs of medically mandated spa treatments would be eligible for reimbursement for EU citizens. However, this request met with little success as EU negotiators considered such insurance schemes to lie beyond the scope of the EPA given that economic activities supplied in the exercise of governmental authority were carved out from the agreement's remit.

Mode 3

On mode 3, the EU removed many nationality requirements, some residency requirements and limitations on juridical form. In some areas, the EU's EPA commitments essentially mirrored its DDA offer whereby all market access and national treatment restrictions were eliminated. Such sectors include the entire computer services sub-sector as well as advertising, management consulting and services related to management consulting. However, the EU's commitments under the EPA in such sectors are more liberal as some countries such as Austria, Cyprus, Malta, Portugal and Slovenia removed some or all of their national horizontal restrictions. These national requirements included authorisation requirements for economic activities using certain types of legal form, foreign equity limitations, incorporation requirements and minimum capital requirements.

The EU's regime for the establishment of CARIFORUM commercial presence in tourism services improved on its DDA offer. For hotel, restaurant and catering services, all EU member states except Bulgaria and Italy have no restrictions on commercial presence.⁷ Bulgaria requires incorporation and Italy imposes economic needs tests. This compares favourably to the GATS where 7 other States also had limitations. For travel agency and tour operator services, only Bulgaria and Portugal maintain limitations requiring incorporation or maintenance of the firm's corporate base in the host country. Under the GATS, 5 EU Member States did not open the sector at all, and 3 applied economic needs tests as a condition to set up a business. There are no limitations on commercial presence in any EU state for tourist guides services. In addition, there are no restrictions on spa services.

Mode 4

The EU's specific commitments on the temporary entry and stay of key personnel and graduate trainees were made in the areas of business services, construction, distribution, education (only privately funded services), financial services, health (only privately funded services, tourism, recreational and transport services). The EU allows the entry of key personnel (business visitors and intra-corporate transferees) and graduate trainees in sectors where it has undertaken a

⁷ CRNM. 'The Treatment of Tourism in the CARFORUM-EC Economic Partnership Agreement.' Brief No. 3200.3/EPA-09[08], 2008, 4.

commitment to liberalise the supply of services through a commercial presence. However, two points stand out on the EU's commitment on this mode of supply for these two categories of persons. First, a significant number of economic needs tests remain in place. Second is the high incidence of nationality and residency requirements. Sectors in which mode 4 limitations are most prevalent include professional services (most notably in legal advisory services, medical and dental services, rental/leasing services relating to personal and household goods, security services and duplicating services), tourist guide services, services auxiliary to maritime transport as well as a number of services not included elsewhere in the United Nations Central Product Classification (CPC).

In sectors subject to liberalisation commitments, EU Members will continue to make significant use of ENTs to control market access conditions given that entry for these categories of suppliers is quota free. There are some countries that have remained unbound for specific sub-sectors, but overall there seems to have been a genuine effort to allow access to the European market. In sub-sectors such as advertising services, management consulting services and travel agencies and tour operators almost half of the EU member states made full commitments while the remaining states took partial commitments.

The EU granted access for contract services suppliers (CSS) in twenty-nine sub-sectors including chef de cuisine services and fashion model services which were newer areas of interest to CARIFORUM. CARIFORUM has also hailed the EU's decision to open the entertainment services sub-sector to access by CSS for the first time in a trade agreement as a significant gain.

While the EU liberalised access to 11 subsectors for IPs, CARIFORUM had been hoping for access to be granted to IPs across a wider range of sub-sectors. As it stands, market access for IPs has been provided for the following subsectors:

- i. Legal advisory services in respect of public international law;
- ii. Accounting and bookkeeping service;
- iii. Taxation advisory services;
- iv. Architectural services;
- v. Urban planning and landscape architectural services;
- vi. Engineering;
- vii. Integrated engineering;
- viii. Medical (including psychologists) and dental services;
- ix. Veterinary services;
- x. Services provided by midwives, nurses, physiotherapists and para-medical personnel.

Cultural Services

In addition to allowing the supply of entertainment services through CSS, Caribbean firms also gained the opportunity to invest in entertainment activities. Access granted to Caribbean entertainers, artists and other cultural practitioners may be subject to qualification requirements and are subject to economic needs tests. The economic needs tests (ENTs) condition was in exchange for a full commitment to market opening by the EU without quotas. But the ENTs are not new; this has been in practice in several states for a long time.

The inclusion of some market access commitments on the cultural services sub-sector and of language on cultural cooperation matters marks a significant evolution in EU attitudes towards the subject matter in a trade policy context, hitherto marked by a desire to preserve maximum policy autonomy by eschewing any commitments in trade agreements and, in the case of the Doha Round, by refusing to direct market access. Although CARIFORUM was not successful in persuading the EU to grant market access in the audio-visual sub-sector in which it has a strong interest, the EU's flexibility is illustrated by the Protocol on Cultural Cooperation, which is annexed to the EPA, which provides for greater cooperation on all cultural fronts and with special provisions on audio-visual. In particular, co-produced audio-visual products and services involving European and Caribbean creative teams will qualify as domestic productions and meet the audio-visual content rules in all EU states and in the Caribbean.

Investment

CARIFORUM was somewhat disappointed that the EPA's investment chapter did not feature disciplines on the core investment protection issues of minimum standards of treatment, expropriation and compensation, or provide recourse to investor-state arbitration procedures. However, at the time of negotiations, the European Commission did not have exclusive competence on matters of investment regulation. On the services side, the EU has made commitments on sectors including business services, communications services, construction and related engineering services, distribution services, privately funded education services, environmental services, financial services, privately funded health services and social services, tourism and transport.

Development Support

CARIFORUM was successful in securing development support for services and investment activities in the form of technical assistance, training and capacity building in a number of areas. These include: (i) improving the ability of CARIFORUM service suppliers to gather information on and meet regulations and standards of the EU Parties; (ii) improving the export capacity of local service suppliers; (iii) facilitating interaction and dialogue between service suppliers of both Parties; (iv) addressing quality and standards in needs in those areas where the CARIFORUM states have undertaken commitments; (v) developing and implementing regulatory regimes for specific services at the CARIFORUM level and in the signatory CARIFORUM states; (vi) establishing mechanisms for promoting investment and joint ventures between service suppliers of the Parties; and (vii) enhancing the capacities of investment promotion agencies in CARIFORUM states.

The WTO Services Waiver & Possible Negotiating Position by LDCs

The 8th WTO Ministerial Conference adopted a waiver which releases developing and developed-country Members from their legal obligation to provide non-discriminatory treatment to all trading partners (GATS Article II: Most-Favoured-Nation Treatment). This gives them legal cover to provide preferential market access to LDCs in trade and services negotiations. The waiver will last 15 years from the date of adoption. While other non-market access preferences are not automatically covered, they can be authorised by the Council for Trade in Services (CTS).

In order for the services waiver to be beneficial for the LDCs, it has to deliver on market access in sectors and modes of supply (in particular, mode 4) of interest to LDCs; improve access of LDCs

services suppliers to global distribution channels and information networks.⁸ Its scope has to go beyond market access to make sure that regulations applied in developed countries do not act as barriers to LDC services exports.

Delivering on market access

One key area in which LDCs stand to benefit is the creation of meaningful mode 4 access for not only the high-skilled professions, but also for semi- and unskilled workers. While CARIFORUM gained market access for a number of categories of natural persons these were in high-skilled areas. In terms of the categories of natural persons allowed, CARIFORUM was accorded access for the traditional categories of key personnel and graduate trainees, contract service suppliers, business service sellers and independent professionals. Likewise, LDCs could benefit from the extension of commitments for these service providers to sectors of interest to them.

A few of the mode 4 innovations found in the EPA may be useful to the LDCs in formulating their negotiating position on operationalisation of the services waiver. Among the priorities for LDCs on services has been to de-link mode 4 service supply from commercial presence. In this regard, pressing for higher commitments in relation to IPs may help to achieve this goal. In addition, it would better serve the LDCs' interests if such access could be accorded across a wider range of skills and a wider range of occupations.

Another area of interest to LDCs may be the way in which the EPA treats graduate trainees. Under the GATS commitments, graduate trainees are able to move from headquarters to subsidiary or from subsidiary to subsidiary. The EPA widens this category to incorporate the movement of the graduate trainee from a company's subsidiary to its headquarters, which is not covered by the GATS. Another development-friendly feature of the EPA is that it permits the movement of a graduate trainee from a company in one party to a company in the other party where there the two companies are legally unrelated. This has been hailed as the developmental aspect of the EPA. In the case of LDCs, consideration should be given to requesting this type of movement not only for graduates, but also for those who have acquired vocational and technical qualifications as this provides avenues for this category of workers to improve their skills as well as gain meaningful opportunities in other WTO member states. However, as this type of movement is linked to a commercial presence, the ability to benefit from preferential treatment would depend on whether it satisfies the rules of origin set out in the waiver.

One of the issues which will affect both types of movement will be the recognition of qualifications, skills and experience. The EPA mandates the conclusion of mutual recognition agreements (MRAs) for professional services and tourism. However, MRAs are unlikely to provide a speedy solution to facilitating the movement of temporary workers from LDCs. Several approaches may be needed to address this issue. One method could involve capitalising on existing recognition arrangements. For example, where LDC workers have gained a qualification in one EU member, then other EU members could recognise this qualification.

⁸ South Centre, 'Analysis of Draft Waiver Decision on Services and Services Suppliers Of LDCs', Analytical Note SC/TDP/AN/SV/14, December 2011, 9.

The CARIFORUM experience points to the challenges involved in removing ENTs as barriers to market access especially to professional services and mode 4. These can prove highly effective barriers to market entry, especially if they are administered in an opaque or unduly discretionary manner by host country regulators. As such LDCs could make the case for the removal of ENTs in sectors of interest and try to negotiate for LDC only quotas for those sectors. However, LDCs would face an uphill challenge with the likelihood of WTO members removing their labour market needs tests being low especially in the current economic environment.

Extrapolating from the CARIFORUM experience, LDCs may also stand to gain from the reduction of barriers to the provision of services through other modes of supply. However, the gains may not be as significant given the restraints on capacity that many LDCs face such as the cost and reliability of information and communications technologies and the scarcity of capital for investing a commercial presence. Nevertheless, with respect to the supply of services via mode 1, some LDCs such as Bangladesh, may see some value in having WTO members states make commitments on providing access to their markets especially for services such as business process outsourcing. For mode 3, LDCs could request the removal or reduction of market access restrictions such foreign equity limitations and limitations on legal form in sub-sectors such as travel agencies and tour guides. For instance, some LDCs in Eastern and Southern Africa, such as Uganda, may have an interest in having a representative office in the WTO member states that are source countries for tourists in order to appropriate a higher proportion of the value of the services being provided in their countries.

Overcoming non-market access barriers

While the application of the waiver to non-market access measures is not automatic, LDCs should be in a position to identify some of those measures which work against them. CARIFORUM's experience highlights a number of measures such as nationality and residency requirements especially as they relate to mode 4. Such measures are likely to hinder the entry of LDC services providers across the entire skill range, i.e., high to low skilled occupations.

With respect to domestic regulation, there is not much to be gleaned from the CARIFORUM experience, but intuitively LDCs may be able benefit from preferential treatment in the form of simplified licensing procedures and reduced fees such as those for applying to provide a service or for licensing.

Creation of a package to support commitments

On services and investment, CARIFORUM sought to fit into current and new value chains in the EU and the global economy. This is equally applicable to LDCs who are likely to want to position themselves in global distribution channels and information networks. Clearly, while preferential treatment in terms of market access and other trade related measures can go a long way towards assisting LDC services suppliers, some other forms of assistance are required. In this regard, the development co-operation package contained in the EPA provides useful indications of the types of co-operation which can meaningfully support LDC efforts to turn access into real opportunities for development. As such LDCs could consider requesting the preference granting countries to implement measures such as facilitating the interface between their service suppliers and those in the LDCs and creating mechanisms to provide information on the standards and regulations in the preference granting countries.