

The European Union as a global investment partner: law, policy and rhetoric in the attainment of development assistance and market liberalization?

Paul James Cardwell and Duncan French[#]

I. Introduction

The European Union (EU)'s interest and involvement in foreign direct investment (FDI) is by no means new.¹ However, it has only been comparatively recently that one has been able to begin to distinguish the particularities of a specific EU approach to FDI, especially when placed within a broader developmental context. The approach has been most visible during the ongoing negotiations of Economic Partnership Agreements (EPAs) with the African, Caribbean and Pacific (ACP) grouping of States. Though the EU-ACP relationship is often promoted (by the EU) as a model of mutual and benign cooperation between economically divergent States, the relationship highlights, in fact, political and normative challenges for both sides. In particular, whereas the EU has sought to utilise its links with the ACP countries to fashion a uniquely global role for itself, practice suggests this relationship is much more

[#] Both of the School of Law, University of Sheffield. Duncan French wishes to thank the British Academy for its financial support, thus allowing him to attend the 'International Investment Treaty Law and Arbitration: Evolution and Revolution in Substance and Procedure' conference at the University of Sydney, February 2010. This paper is a revised version of P.J. Cardwell and D. French, 'Liberalising Investment in the CARIFORUM-EU Economic Partnership Agreement: EU Priorities, Regional Agendas and Developmental Hegemony' in M. Gehring, M.-C. Cordonier Segger and A. Newcombe (eds.), *Sustainable Development in International Investment Law* (The Hague, Kluwer, forthcoming).

¹This paper does not deal with intra-EU bilateral investment treaties and the controversy surrounding their compatibility within the fundamental freedoms of the internal market, on which see H. Wehland, 'Intra-EU Investment Agreements and Arbitration: Is European Community Law an Obstacle?' (2009) 58 *International and Comparative Law Quarterly* 297-320.

problematic for both sides. And what has in the past proved true for trade, is proving equally true in relation to FDI.

This paper seeks to critically address the role of the EU as a global investment actor, with particular focus on the supposed synergies between FDI as a development assistance tool and FDI as a means to promote market liberalization. This is especially significant as the entry into force of the Treaty of Lisbon in December 2009 has, for the first time, introduced the first explicit reference to foreign investment in the EU's treaty arrangements. While the grant of competence to the EU in this area will provide a clearer mandate for action, it fails to resolve the overarching question as to its purpose. The paper thus focuses on one particular aspect of this broader debate, namely, the negotiation of investment provisions within EPAs, with particular comment on the investment provisions of the 2008 EPA negotiated between the EU and the Caribbean States.² In devising the rules on investment, the final text is innovative in numerous respects, though whether the investment liberalization attained will also provide the stated developmental benefits is more contested. The paper concludes by noting the unique range of pressures exerted on the EU in framing coordinated policies in the areas of FDI and development; thus, while the EU's rhetoric is often extremely positive on such issues, its capacity to implement them – and implement them in an integrated manner – is invariably subject to the risk of incoherence and fragmentation.

II. Foreign Direct Investment as a Matter of EU Law and Practice

² Economic Partnership Agreement between the CARIFORUM States of the one part, and the European Community and its Member States, of the other part, 15 October 2008, [2008] O.J. L289/I/3.

One of the defining aspects of the EU – right from the establishment of the European Economic Community (EEC) in 1957 – has been its common commercial policy.³ The policy represents an area in which the Member States have pooled sovereignty in external trade from the earliest days of the European integration project, granting the EU exclusive competence to act.⁴ Through its supranational institutions, most prominently the Commission,⁵ the EU has thus been able to present a unified policy-agenda on matters of external trade. This has had enormous implications both for the development of the regional organisation itself, but also for the international trading system. But it has always been accepted that this exclusive competence did not include investment policy; that the Commission could not negotiate – at least not without the express permission of the Member States – on matters of FDI.⁶ Moreover, even when it did so, this was restricted to issues of market access, certain aspects of post-establishment liberalization (notably national treatment) and investment promotion, almost always within the context of negotiating preferential *trade* agreements with third countries. Thus, the emphasis has clearly been on market liberalization and not investment protection. In addition, the Commission has very conspicuously sought to place its FDI approach within a pro-development framework.⁷ On the other hand, Member States have eagerly negotiated bilateral investment treaties (BITs) with third States, with particular emphasis on ensuring post-establishment protection of their investors, often premised upon

³ The legal basis for the common commercial policy is found in article 207 Treaty on the Function of the European Union (TFEU) (formerly Article 133 of the EC Treaty). Article 218 TFEU provides the legal basis for agreements with third countries or international organizations.

⁴ For a detailed analysis of the common commercial policy see, inter alia, P. Koutrakos, *EU International Relations Law* (Hart, 2006), chapters 1 and 2.

⁵ In matters of international trade, the European Commission acts as the principal negotiator on behalf of the European Union (article 207(3) TFEU).

⁶ There are, of course, a number of multilateral treaties to which the EU – technically the European Communities – and its Member States are parties, which traverses the trade-investment interface, including the 1994 Agreement on Trade-Related Aspects of Investment Measures, the 1994 Agreement on Trade-Related Aspects of Intellectual Property Rights and 1994 General Agreement on Trade in Services, all supervised by the World Trade Organization. See S. Subedi, *International Investment Law: Reconciling Policy and Principle* (Hart, 2008) 37-39.

⁷ <http://ec.europa.eu/trade/creating-opportunities/trade-topics/investment/> (last accessed: January 2010).

the implicit view that investment protection is a *sine qua non* for investor confidence, which will in turn generate developmental benefits. This bipartite division – between market liberalization and investor protection – reflects a clear distinction between international trade agreements and international investment agreements in international economic law.⁸ Though one can oversimplify this distinction, there is significant truth in portraying how these two areas of international economic law have been perceived and regulated over the last fifty years. And while there is evidence of increased synergy between them, the links between them remain tentative and not fully explored.⁹

Moreover, despite the negotiation of international rules by the EU (together with its Member States) for some time, it is the entry into force of the Treaty of Lisbon in December 2009 that is likely to have the most profound impact upon the capacity of the EU to act proactively in this area. The inclusion in (what has now become) article 207 of (what is now) the Treaty on the Functioning of the European Union¹⁰ of explicit reference to FDI in the common commercial policy is greatly significant. Not only is this the first express reference to FDI in EU treaty law,¹¹ but its incorporation within the common commercial policy thus transforms it into a matter for which the EU has exclusive competence. The Commission had long claimed that the EU's powers could not be exercised effectively whilst Member States were

⁸ F. Viale, 'External trade policy and the Lisbon Treaty: An enforcement of liberalisation of european commercial policy' <<http://www.s2bnetwork.org/download/LisbonTreaty&Trade>> (last accessed: December 2009).

⁹ A. Qureshi and A. Ziegler, *International Economic Law* (Sweet and Maxwell, 2007, 2nd ed) 401.

¹⁰ Article 207 (1) TFEU reads as follows: 'The common commercial policy shall be based on uniform principles, particularly with regard to changes in tariff rates, the conclusion of tariff and trade agreements relating to trade in goods and services, and the commercial aspects of intellectual property, foreign direct investment, the achievement of uniformity in measures of liberalisation, export policy and measures to protect trade such as those to be taken in the event of dumping or subsidies. The common commercial policy shall be conducted in the context of the principles and objectives of the Union's external action'.

¹¹ The Treaty Establishing a Constitution for Europe 2003 had included this provision, but the Treaty was not ratified by all Member States having been rejected in referenda in France and the Netherlands in 2005. The Treaty of Lisbon 'rescued' key provisions from the dropped Constitutional Treaty, including what became Article 207.

still able to create investment treaties of their own accord.¹² The inclusion of FDI within the common commercial policy raises the prospect of much more concerted – and centralised – activity at the European level.

This, however, is not without either its problems or its ambiguities. First, FDI is not defined by the Treaty, and though many would expect that the use of this terminology clearly indicates the EU's competence is limited to its traditional understanding of FDI, and thus does not include short-term portfolio investments, there are many instances in international investment agreements (IIAs) where investment is defined much more broadly.¹³ Doubts were raised of the reach of the investment provisions during both referenda held in Ireland on the Lisbon Treaty.¹⁴ While the absence of a definitive understanding is unlikely to prove problematic *per se*, it invariably leaves open the future possibility of a more flexible approach to investment, especially if Member States either accept – or resign themselves – to the EU utilising its competence on a more generalised basis. Secondly, and much more significantly, there is the question as to the scope of the EU's exclusive competence in this area. Does it refer only to issues of market access, investment promotion and certain aspects of post-establishment liberalization (as seen, for instance, in the CARIFORUM-EU EPA, discussed below)? Or might it go further and take a comprehensive approach to FDI and include, in addition to the above, the traditional post-establishment protections currently only found within States' BITs, such as requiring the payment of appropriate compensation for expropriation, demanding 'fair and equitable treatment', and establishing binding

¹² J. Wouters, D. Coppens and B. De Meester, 'The European Union's External Relations after the Lisbon Treaty' in S. Griller and J. Ziller (eds.), *The Lisbon Treaty: EU Constitutionalism without a Constitutional Treaty?* (Springer-Verlag, 2008) 171.

¹³ Subedi, above n 6, 58-62.

¹⁴ See, for example, J. Kennedy, 'Why Lisbon Treaty vote has mobilised Ireland's tech multinational leaders', *Irish Independent*, 27 August 2009 <<http://www.independent.ie/business/technology/why-lisbon-treaty-vote-has-mobilised-irelands-tech-multinational-leaders-1870952.html>> (last accessed: December 2009)

international arbitration in the event of disputes? This is clearly not just a matter of legal interpretation, but has huge political and economic significance, both in terms of future negotiations but also – controversially – for those hundreds of BITS already negotiated by the Member States.¹⁵ Though the finer details of the scope of the competence may ultimately have to be determined by recourse to the European Court of Justice,¹⁶ the lack of detail within the final text at least implies the postponement of controversial debates yet to be had both between Member States and between Member States and the institutions, especially the Commission.

Nevertheless, despite this ambiguity some are clear that a narrower interpretation is *a priori* the more preferable;

the extension of the common commercial policy to foreign direct investment could and should be read more narrowly...The inclusion of foreign direct investment...should therefore be understood to refer only to those aspects of foreign direct investment which have a direct link to international trade agreements.¹⁷

While not necessarily disagreeing with this analysis, this paper also accepts that the pull towards a more centralised – and comprehensive – understanding cannot be ignored. The political temptation and economic necessity of being able to negotiate wide-sweeping IIAs, mirroring the capacity of other major trading blocs to do so, may be too large to pass over. Certainly, it would seem to be the case that the Commission, perhaps not unsurprisingly,

¹⁵ D. Vis-Dunbar, ‘The Lisbon Treaty – Implications for Europe’s International Investment Agreements’ *Trade Negotiations Insights* Vol. 8 No. 9 (November 2009) <<http://ictsd.org/i/news/tni/59585/>> (last accessed: December 2009): ‘Not only could the Lisbon Treaty impact on future investment negotiations with the European Commission, it could also affect the more than two hundred BITs that currently exist between European and ACP Member States’.

¹⁶ The general competences of the Court of Justice are found in article 19 (3) of the Treaty on European Union (TEU).

¹⁷ Viale, above n 8.

believes the new competence is worded to allow this broader interpretation – a 2008 communication from the Commission links the importance of investment with the EU’s internal strive for ‘growth and jobs’.¹⁸ As Woolcock has noted, ‘[t]he EU has already developed a common platform on investment rules and one must expect pressure to develop further a common EU policy on FDI’.¹⁹ Though it is far too early to speculate precisely how the new competence will be exercised, it is surely not inappropriate to note that the inclusion of FDI within the Treaty framework is an important milestone, and that it would not be unexpected if the EU, certainly the Commission, were to utilise (or, in the case of a Commission proposal, seek to utilise) this competence to promote itself as a global investment actor. In recognising the economic significance of investment liberalization, the paper now turns to consider the EU’s development policy (with particular reference to EU-ACP relations), which will then be followed by an analysis of the investment provisions of the CARIFORUM-EU EPA, which is at the forefront of EU attempts to converge these respective policy objectives.

III. EU-ACP Relations: Situating Investment in the Development Context

The EU’s relationships with states in Africa, the Caribbean and the Pacific have been an inherent part of the external dimension of the European integration process. At the time of the signature of the Treaty of Rome in 1957, some of the original member states of the EEC, principally Belgium and France, were yet to embark on a comprehensive decolonisation

¹⁸ *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on the External Dimension of the Lisbon Strategy for Growth and Jobs: Reporting on market access and setting the framework for more effective international regulatory cooperation* (COM(2008) 874 final, 16 December 2008) 5: ‘As the world’s largest exporter of commercial services and a major source of outward direct investment, the EU has an obvious interest to improve its access to foreign markets and to free the full potential of the EU’s internal strength in services and establishment’.

¹⁹ S. Woolcock, ‘The potential impact of the Lisbon Treaty on European Union External Trade Policy’ <<http://www.kommers.se/upload/Analysarkiv/In%20English/Analyses/Woolcock%20paper%20on%20impact%20of%20Lisbontreaty%20on%20tradepolicy.pdf>> (last accessed: December 2009) 4.

programme. Pre-independence territories in Africa and elsewhere were accorded the status of ‘associated territories’ in the EEC Treaty with preferential access to the markets of other EEC member states.²⁰ Member states were obliged to apply the same rules to commercial exchanges with the associated territories as to other member states.²¹ The EEC Treaty also laid down the requirement for member states to ‘contribute to the investments required by the progressive development of these countries and territories’.²²

Following the independence of most French and Belgian sub-Saharan African states in 1960, the 1963 Yaoundé Convention between the EEC, its member states and nineteen newly independent states was signed. This association agreement, concluded for five years and renewed in 1969, continued the preferential and reciprocal trade access between the EEC and associated states. It also created the European Development Fund (EDF) as a supplementary source of finance,²³ and it established common institutions: an Association Council, a Parliamentary Conference and an Arbitration Court.²⁴ The Yaoundé Convention set the template for EU-ACP relations to this day.²⁵ In 1974, following UK accession to the EEC and the expiry of the second Yaoundé Convention, the first Lomé Convention came into being, substantially enlarging the participating states to include former British colonies. The ACP group was thus born, and the Lomé Convention was renewed on four successive occasions in 1979, 1984, 1990 and 1995.

²⁰ Article 131-6 EEC (original text).

²¹ Article 132(2) EEC (original text).

²² Article 132(3) EEC (original text).

²³ Yaoundé Convention, 20 July 1963, [1964] O.J. 93/1431, Articles 16-17.

²⁴ *Ibid* at Articles 39-53.

²⁵ Cf. E. Koeb, ‘The Lisbon Treaty – Implications for ACP-EU Relations’ *Trade Negotiations Insights* Vol. 8 No. 8 (October 2009) <<http://ictsd.org/i/news/tni/57537/>> (last accessed: December 2009): ‘it is noteworthy that the reference to the ACP – in place since the Treaty of Maastricht of 1992 that safeguarded the intergovernmental nature of EU-ACP relations – has been removed from the Lisbon Treaty. The ‘Declaration on the European Development Fund’, part of the Treaty of the EU under the Final Act since the Maastricht Treaty, stipulating that the EDF should be outside the budget, has also been removed. These two changes are politically significant and give some indication that the ACP may be sliding from the EU agenda’.

The Lomé Conventions, granting preferential trade relations on a non-reciprocal basis, were designed to be more beneficial to the ACP states than the Generalised System of Preferences (GSP) which, alongside access to the EDF, was intended to promote a more-rounded development model for – and within – ACP states. Evidence suggests, however, that such mechanisms did little to increase actual trade between the EU and the ACP states.²⁶ It was only in the post-Cold War global context that the content of the EU-ACP agreements began to diversify. Against the background of the creation of the European Union in the 1992 Treaty of Maastricht, which included provisions on foreign policy so as to improve the EU's presence on the world stage, the content of the final Lomé Convention (1995)²⁷ and Cotonou Agreement (2000)²⁸ was adapted to include provisions on, *inter alia*, human rights and good governance.²⁹

In any event, the need to reform the content of the EU-ACP agreement was prompted by adverse decisions in the GATT and the WTO during the 1990s, which related to disputes over fundamental differences in the manner of EU treatment of banana imports from ACP and non-ACP developing countries.³⁰ The Cotonou Agreement therefore represented a significant break from the past, most notably in mandating that, because the preferential trade relations

²⁶ J. Mayall, 'The Shadow of Empire: the EU and the former Colonial World' in C. Hill and M. Smith (eds.), *International Relations and the European Union* (Oxford, 2005) 307.

²⁷ Revised Fourth Lomé Convention, 4 November 1995, [1998] O.J. L156/3.

²⁸ Partnership Agreement between the Members of the African, Caribbean and Pacific Group of States of the one part, and the European Community and its Member States, of the other part, 23 June 2000, [2000] O.J. L317/3 [Cotonou Agreement].

²⁹ Article 9 (4) of the Cotonou Agreement states that 'The Partnership shall actively support the promotion of human rights, processes of democratisation, consolidation of the rule of law, and good governance'. This is also reflected in the 2005 European Consensus on Development – Joint Statement by the Council and the representatives of the governments of the Member States meeting within the Council, the European Parliament and the Commission on European Union Development Policy, 24 February 2006, [2006] O.J. C 46/01) paragraph 13.

³⁰ For a comprehensive account of the challenges to the EU banana regime, see P. Eeckhout, *External Relations of the European Union* (Oxford, 2004) at 381-394.

were incompatible with the same states' obligations under WTO rules,³¹ they were to be replaced with EPAs premised upon reciprocity of treatment. The original date foreseen for their replacement was 1 January 2008.³² The EPAs were to be negotiated with the ACP states organised largely through six regional blocs: the Economic Community of West African States (ECOWAS), the *Communauté Economique et Monétaire de l'Afrique Centrale* (CEMAC), Eastern and Southern Africa (ESA), the Southern African Development Community (SADC), the Caribbean (CARIFORUM), and the Pacific group. Critics, however, point out that where these regional negotiations have stalled, the EU has sought to undertake sub-regional and even individual negotiations, in direct contradiction to its assertion of the importance of regional integration.³³ This arguably reflects more general concerns about the rather aggressive handling of the negotiations by the Commission.³⁴

The EU has asserted that, notwithstanding the removal of trade preferences and, more generally, the move towards reciprocity, such EPAs would continue to incorporate a significant developmental focus. As the Cotonou Agreement stated, '[n]egotiations shall take account of the level of development and the socio-economic impact of trade measures on ACP countries, and their capacity to adapt and adjust their economies to the liberalization

³¹ Article 36(1) Cotonou Agreement: 'In view of the objectives and principles set out above, the Parties agree to conclude new World Trade Organisation (WTO) compatible trading arrangements, removing progressively barriers to trade between them and enhancing cooperation in all areas relevant to trade'.

³² This was the first day after the end of the WTO waiver (Decision of 14 November 2001) which temporarily legitimised the EU-ACP preferential trade relationship.

³³ EU-ACP Economic Partnership Agreements: Tearfund's provisional assessment of outcomes (January 2008) <<http://www.tearfund.org/webdocs/Website/Campaigning/Tearfund%20policy%20brief%20-%20provisional%20assessment%20of%20outcomes%20of%20EU-ACP%20EPAs.pdf>> (last accessed: December 2009): 'One of the key objectives of EPAs – increased regional integration – has been seriously undermined by the Commission's strategy to strike deals with individual governments or a regional sub-group, inevitably leading to increased trade barriers between neighbouring countries'.

³⁴ As a 2005 British Parliamentary report on EPA negotiations commented, 'The relationship between the EU and the ACP has never been an equal one. This has not changed in the negotiations for the Economic Partnership Agreements' (UK House of Commons, International Development Committee, 'Fair Trade? The European Union's Trade Agreements with African, Caribbean and Pacific Countries' (HC 68, 6 April 2005) paragraph 6).

process'.³⁵ This flexibility is to be achieved in numerous ways, though the principal device is the entrenchment of 'asymmetrical reciprocity' within the legal texts. In other words, though EPAs are to be premised upon ACP states opening up their markets to the EU, this will be done more gradually and more slowly than the EU will open its own markets to ACP states.³⁶ This approach, thus firmly is rooted in the notion that market liberalization, is a key aspect in promoting development, despite the fact that the benefits of opening up developing country markets are rarely automatic but dependent upon endogenous capacity-building, developmental assistance (particularly in areas such as infrastructure and other supply-side constraints) and flexibility in implementation. Moreover, one can point to the rather blunt nature of asymmetrical reciprocity; longer run-in times and variable geometry in the scope of binding commitments will not necessarily, in themselves, be sufficient to accommodate the special concerns and considerations of developing countries. While the EU would seem to recognise the importance of such matters (such as endorsing aid-for-trade financial packages),³⁷ its preferred method is to consider these issues 'off table' and certainly, as far as possible, not within the text of the EPAs themselves.

The concern is that the economically and politically weaker ACP states have little choice but to accept this negotiating stance. This point is particularly acute considering the lack of financial and technical support specified in the EPA. A study by the European Parliament reported in March 2009 that:

³⁵ Article 37(7) Cotonou Agreement.

³⁶ Whether such asymmetrical reciprocity is compatible with WTO rules, specifically Article XXIV GATT on regional trade agreements (RTAs), remains uncertain. The Cotonou Agreement itself recognises that the EU and ACP Parties will have to collaborate in the WTO 'with a view to defending the arrangements reached, in particular with regard to the degree of flexibility available' (article 37(8) Cotonou Agreement).

³⁷ See *Communication from the Commission to the Council and the European Parliament: Economic Partnership Agreements* (COM (2007) 635 final, 23 October 2007) paragraph 5: 'Full EPAs will allow EDF funding to be directed towards the range of adjustment needs arising from commitments taken by ACP countries and will help establish priorities for additional funding from Member States'.

[a]lthough EU donors have made commitments that appear to be adequate there is no guarantee that they will be applied in an appropriate and timely way – and there is complete uncertainty over the funds for EPA support that will be committed by the European Commission and EU Member States beyond 2013.³⁸

Of particular controversy is the extent to which EPAs should include rules on the so-called ‘Singapore issues’, namely foreign direct investment, competition, government procurement and trade facilitation. Developing countries have successfully removed these issues (apart from trade facilitation) from negotiation at the global trade level within the Doha Development Round.³⁹ The EU has been keen to ensure that these topics are negotiated within the context of EPAs. Most ACP states, however, have been singularly more reticent and defensive about their inclusion.⁴⁰ Particular controversy has surrounded the issue of investment, and whilst FDI is not an entirely novel feature of contemporary EU-ACP relations,⁴¹ it has attained a new intensity with the negotiation of the EPAs. The wording of the Cotonou Agreement simply required that ‘general principles on protection and promotion of investments’ be ‘introduce[d]’ within EPAs.⁴² In any event, if the underlying purpose of EPAs is primarily to ensure compatibility with WTO *trade* commitments, then clearly such negotiations are additional to the core requirements.

³⁸ European Parliament, Directorate-General for External Policies, *The CARIFORUM-EU Economic Partnership Agreement (EPA): the Development Component (Study)* (2009) EXPO/B/DEVE/2008/60 at 10.

³⁹ Though included in the initial 2001 Doha Declaration, due to the absence of consensus within the WTO membership, these issues were jettisoned in the so-called July 2004 package.

⁴⁰ See, for instance, S. Woolcock, *Government Procurement Provisions in CARIFORUM EPA and Lessons for Other ACP States* <<http://www2.lse.ac.uk/internationalRelations/centresandunits/ITPU/ITPUindexdocs.aspx>> (last accessed December 2009).

⁴¹ S. Bilal and D. te Velde, ‘Foreign Direct Investment in the ACP-EU Development Cooperation: From Lomé to Cotonou’ (UNCTAD Expert Meeting, The Development Dimension of FDI, Geneva 6-8 November 2002).

⁴² Article 78(3) Cotonou Agreement.

More fundamentally, many ACP states are concerned that the inclusion of Singapore issues within EPAs jeopardises their overall developmental focus. As one commentator noted in evidence to a British Parliamentary investigation on EPAs, ‘what [ACP states] fear is that the EU will twist their arm to accept with the EPAs things they would never have to accept on a more level playing field’.⁴³ Moreover, the ongoing negotiation and conclusion of interim EPAs with a number of regional groupings and individual states is entirely due to the fact that these ACP states have so far refused to agree rules on, amongst other things, the Singapore issues. Nevertheless, the incorporation of so-called *rendez-vous* provisions within these interim agreements, setting forth areas (such as investment liberalization) to be included in the subsequent negotiations towards the conclusion of comprehensive EPAs, against the general wishes of ACP negotiators, again indicates both the general wariness of ACP states to negotiate on these issues as well as the unequal bargaining strength of the EU.

The debate over the inclusion of investment within the EPAs is therefore not unsurprising. If there is a general debate about how far and how quickly developing countries can, and should, be integrated into the global economy on a level of *reasonable* parity, differences in viewpoint become ever more acute when viewed from the perspective of the regulation and liberalization of FDI. From a developmental perspective, investment policy inevitably polarises an already strained debate. As one non-governmental organisation has noted,

[t]he EU and ACP countries agree on the potential value of investment and of sound, well-functioning regulatory regimes for development. What is in dispute is the added value of a rules-based investment agreement between the regions. Many ACP states already have ongoing domestic reforms relating to their investment regimes. The added value of an ACP-EC agreement could only be the EC’s belief that it

⁴³ Above note 34, paragraph 25 (evidence submitted by Dr Christopher Stevens, Research Fellow, Institute of Development Studies).

would ensure implementation and ‘locking in’ of reforms – thus increasing attractiveness to EU investors – or that it would act as an additional impetus for this reform agenda.⁴⁴

The same report is however sceptical of such value: ‘[d]eveloping countries want to attract inward investment, and manage such investment through regulation to minimise costs and maximise benefits. The usefulness of binding international rules on investment for developing countries is controversial, as they tend to limit these policy choices and do little to attract new investment’.⁴⁵ Others, however, view investment as pivotal to developmental opportunities; ‘the approach proposed by the EU demonstrates a strong development component...creating an open, transparent and predictable environment that delivers enhanced legal certainty would reduce the current perceived risk to invest in many of the ACP economies’.⁴⁶ Thus, the remainder of this paper focuses on the first (and, at the time of writing, the only) full EPA that has so far been signed – between the EU and the CARIFORUM states – and specifically on its rules on FDI.

(ii) Investment Provisions in the CARIFORUM-EU EPA: A Meeting of Minds?

Unlike many ACP states, the CARIFORUM states⁴⁷ were, as a whole, more willing to engage in comprehensive negotiations, in particular on investment and cross-border services.⁴⁸ To

⁴⁴ M. Masiwa *et al*, *EPAs and Investment* <http://www.christianaid.org.uk/Images/epas_and_investment.pdf> (last accessed: December 2009) 6.

⁴⁵ *Ibid* at 9.

⁴⁶ F. Gehl, ‘Services and EPA: A Difficult but Vital Relationship’ *Trade Negotiations Insights* Vol. 8 No. 8 (October 2009) <<http://ictsd.org/i/news/tni/57522/>> (last accessed: December 2009).

⁴⁷ CARIFORUM covers members of the Caribbean Community (CARICOM) (Antigua and Barbuda, Bahamas, Barbados, Belize, Dominica, Grenada, Guyana, Haiti, Jamaica, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, Suriname and Trinidad and Tobago) and the Dominican Republic.

⁴⁸ Cf. Traidcraft, *First Economic Partnership Agreement (EPA) is Signed Amid Confusion* (21 October 2008) <http://www.traidcraft.co.uk/news_and_events/news/first_deal_signed.htm> (last accessed: December 2009): ‘The first EPA was signed between the EU and 13 Caribbean countries on 15th October 2008. The disarray surrounding the signing shows the extent of their unpopularity in the region and the pressure that the EU had to resort to in order to secure agreement. The signing was postponed several times after parliamentarians, leading academics and civil society organisations across the Caribbean voiced their concerns over the effects the deals would have on development’.

that extent, the very process of regional EPA negotiations has fragmented any semblance of ACP global policy coherence; those more cynical would note the EU's ability to strengthen its own position by undertaking disparate negotiations with different regional groupings.⁴⁹

As regards the provisions on investment in the CARIFORUM-EU EPA, it is important to note certain background factors that undoubtedly influenced the negotiations. First, as already noted, unlike many ACP states, there was a willingness amongst many of the CARIFORUM governments to negotiate on investment issues. In fact, as an analysis of the EPA notes, 'CARIFORUM is by far the most service-centric partner of all those the EU is currently negotiating with'.⁵⁰ More specifically, it seems that these states 'were in fact highly comfortable in negotiating on investment issues and exploiting the potential 'signalling' properties of negotiating advances in this area'.⁵¹ This is perhaps an overly generous assessment of the situation; certainly, a number of CARIFORUM states had (and continue to have) significant reservations over the entire EPA process.⁵²

Second, and building upon the previous point, CARIFORUM states had in fact sought to take investment negotiations further to include not only matters of market access and liberalization – the topics that were eventually to form the core of the final investment commitments – but

⁴⁹ South Centre, *EPAs and Development Assistance: Rebalancing Rights and Obligations* (September 2008) <http://www.southcentre.org/index.php?option=com_content&task=view&id=902> (last accessed: December 2009) paragraph 103: 'The European Union's Commission must recognize that the problems that have arisen as a result of the negotiations – the internal splintering of ACP regions, the lack of ACP countries signing before the deadline, and the concerns continually brought up by ACP negotiators – as indications of the problematic issues inherent within the EPAs'.

⁵⁰ P. Sauvé & N. Ward, *The EC-CARIFORUM Economic Partnership Agreement: Assessing the Outcome on Services and Investment* (Brussels: European Centre for International Political Economy, 2009) <<http://www.ecipe.org/publications/ecipe-working-papers/the-ec-cariform-economic-partnership-agreement-assessing-the-outcome-on-services-and-investment/PDF>> (last accessed: December 2009) 14.

⁵¹ *Ibid* at 15.

⁵² For instance, see Article 63 CARIFORUM-EU EPA, concerning the application of the investment and service provisions to the Bahamas and the Haiti. (Cf. Bahamas initial trade in services and investment commitments, January 2010 <http://trade.ec.europa.eu/doclib/docs/2010/january/tradoc_145746.pdf> (last accessed: January 2010)).

also issues on investment protection and promotion. As noted above, these topics were, beyond the current competence of the EU. Thus, it was for any BIT agreed between individual Caribbean and European states to determine matters such as expropriation and compensation, and the possibility of recourse to international arbitration.⁵³ To that extent, existing BITs will remain extremely relevant to many aspects of FDI between these parties. Moreover, the EPA contains no minimum standard of treatment rules; as will be noted below, the EPA's provisions on post-establishment regulatory conduct are both limited and potentially qualified in nature. The EPA's focus is investment liberalization: through market access, national treatment, and the application of the most-favoured-nation (MFN) concept.

Third, as with trade obligations, investment and service commitments are asymmetrical in nature.⁵⁴ In summarising the level of these commitments, the Commission notes that 'the EU opens up for investment to a much wider extent than Cariforum countries do towards the EU. Cariforum applies many more conditions and limitations to a more limited sectoral coverage'.⁵⁵ And in relation to cross-border services, the Commission calculates that the EU 'makes commitments in 94% of sectors while CARIFORUM does so, on average, in 75% of sectors'.⁵⁶ As an aside, it should be noted that unlike the GATS, but like NAFTA, the investment rules cover both service and non-service economic activities (referred to as 'commercial presence'); cross-border services are regulated separately, though many of the basic precepts remain the same.

⁵³ Footnote to Article 66 CARIFORUM-EU EPA.

⁵⁴ The commitments made are set out in Annex IV to the CARIFORUM-EU EPA.

⁵⁵ EC, *CARIFORUM-EC EPA: Investment*:

<http://trade.ec.europa.eu/doclib/docs/2008/october/tradoc_140979.pdf> (last accessed: December 2009).

⁵⁶ EC, *CARIFORUM-EC EPA: Trade in Services*:

<http://trade.ec.europa.eu/doclib/docs/2008/october/tradoc_140974.pdf> (last accessed: December 2009).

Though it is not possible to discuss all the investment provisions of the CARIFORUM-EU EPA, certain aspects are clearly worth highlighting.⁵⁷ First, the EPA does not adopt a comprehensive definition of investment, but rather is based upon the notion of ‘commercial presence’,⁵⁸ which is either the ‘constitution, acquisition or maintenance of a juridical person’⁵⁹ (which itself requires the establishment or maintenance of ‘lasting economic links’⁶⁰) or ‘the creation or maintenance of a branch or representative office...for the purpose of performing an economic activity’⁶¹ (which itself is defined as having ‘the appearance of permanency’).⁶² Highly volatile share dealings – sometimes considered as FDI in certain contexts but which would be unlikely to support the host country’s long-term development – would fall outside this definition.

Second, the contracting Parties agree to open up only those sectors listed in their schedules of commitments – and this after taking into account those sectors which are *ex ante* excluded.⁶³ Within those schedules, Parties may set out limitations and qualifications, both in relation to market access and the obligation of national treatment. Moreover, these qualifications may be not just those current non-conforming measures which states wish to retain but also where states wish to post a reservation as to the possibility of enacting future non-conforming regulations. Thus the view expressed in one recent review – that ‘[I]beralisation will

⁵⁷ Other important provisions include articles on investment promotion (article 121), the maintenance of national standards (article 73) and a general exemption (article 184(3)). See generally, A. Dimopoulos, ‘The Common Commercial Policy after Lisbon: Establishing Parallelism between Internal and External Economic Relations?’ 4 *Croatian Yearbook of European Law and Policy* 101-129.

⁵⁸ Article 65(a) CARIFORUM-EU EPA: ‘‘commercial presence’ means any type of business or professional establishment’. The definition of ‘investor’ is equally tied to the notion as an ‘investor’ is ‘any natural or juridical person that performs an economic activity *through* setting up a commercial presence’ (Article 65(b), emphasis added).

⁵⁹ Article 65(a)(i) CARIFORUM-EU EPA.

⁶⁰ Footnote to Article 65(a)(i) CARIFORUM-EU EPA.

⁶¹ Article 65(a)(ii) CARIFORUM-EU EPA.

⁶² Article 65(f) CARIFORUM-EU EPA.

⁶³ Article 66 CARIFORUM-EU EPA. Exceptions include the ‘mining, manufacturing and processing of nuclear materials’ and the ‘production of or trade in arms, munitions and war material’.

therefore principally be achieved through the binding of existing regulatory practice and the resulting limitations on future attempts to close the door further to foreign investors'⁶⁴ – though indeed correct, must be further qualified by recognising the role of speculative reservations as to future regulatory conduct, which were also permitted in the schedules.

However, in those sectors where market access commitments are agreed, Parties commit themselves to a range of obligations, subject to whatever qualifications they have included.⁶⁵ These obligations are to 'not maintain or adopt' (i) limitations on the number of commercial presences, (ii) limitations on the total value of transactions or assets, (iii) limitations on the total number of operations or on the total quantity of output, (iv) limitations on the participation of foreign capital, and (v) measures which restrict or require specific types of commercial presence.⁶⁶ As regards national treatment, subject to the scheduling of non-conforming measures, parties guarantee to each other 'treatment no less favourable than that they accord to their own like commercial presences and investors'.⁶⁷

Third, and often viewed as one of the most controversial provisions, is the inclusion of a Most-Favoured-Nation (MFN) obligation. Despite the controversy, the CARIFORUM-EU EPA highlights that it is possible to negotiate a highly asymmetrical commitment in this regard. In particular, while the EU commits to providing CARIFORUM states the same rights and privileges as it gives to any third country with which it negotiates a future economic

⁶⁴ T. Westcott, 'Investment Provisions and Commitments in the CARIFORUM-EU EPA' Trade Negotiations Insights Vol. 7 No. 9 (November 2008) <<http://ictsd.net/i/news/tni/32972>> (last accessed: December 2009).

⁶⁵ Article 67(1) CARIFORUM-EU EPA: '[the respective states] shall accord to commercial presences and investors of the other Party a treatment no less favourable than that provided for in the specific commitments contained in Annex IV'.

⁶⁶ Article 67(2) CARIFORUM-EU EPA.

⁶⁷ Article 68 CARIFORUM-EU EPA.

integration agreement with improved terms,⁶⁸ the MFN obligations on CARIFORUM states is significantly less extensive. First, CARIFORUM states are not obliged to give the EU MFN status unless they negotiate a future economic integration agreement with a ‘major trading economy’ (rather than simply with any third party).⁶⁹ Moreover, the grant of MFN to EU member states is not automatic but will be subject to ‘consultations’ between the EU and CARIFORUM parties.⁷⁰ And second, CARIFORUM states are not required to grant MFN status to EU member states where the increased liberalization is the result of greater regional integration amongst the CARIFORUM states themselves.⁷¹ In short, the asymmetry has led some to wonder whether the EPA ‘reduces the MFN commitment to almost zero’.⁷² Others, however, still remain concerned that the very existence of the inclusion of an MFN provision exacerbates the economic disparity between the parties still further.⁷³ Moreover, as it is possible that the larger developing country economies, such as Brazil, may fall within the definition of ‘major trading economy’, such an MFN provision might also undermine South-South liberalization if the EU sought to take advantage of greater rights given to other countries in the region.⁷⁴

Fourth, in what was clearly a ‘win’ for CARIFORUM states, the EPA includes a singularly important provision on investor behaviour. Though the EU had been prepared to consider

⁶⁸ Article 70(1)(a) CARIFORUM-EU EPA.

⁶⁹ Article 70(1)(b) CARIFORUM-EU EPA.

⁷⁰ Article 70(5) CARIFORUM-EU EPA: ‘The Parties may decide whether the concerned Signatory CARIFORUM State may deny the more favourable treatment contained in the economic integration agreement to the EC Party.’

⁷¹ Article 70(2) CARIFORUM-EU EPA.

⁷² Westcott, above n 64.

⁷³ M. Stichele, *ACP Regionalism: Thwarted by EPAs and Interim Agreements on Services and Investments* (SOMO, 2007) <http://somo.nl/publications-en/Publication_2530/view> (last accessed: December 2009) 2: ‘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’.

⁷⁴ See Sauvé & Ward, above n 50 at 14-15: ‘Brazil, in particular, has expressed concern in the WTO in the WTO General Council that the insertion of such a provision into the CARIFORUM EPA and the interim EPAs may have the effect of discouraging countries from concluding [preferential trade agreements] with EPA partners...Neither CARIFORUM nor EC officials appear to find Brazil’s arguments persuasive. CARIFORUM officials contend that major developing trading partners are unlikely to match the terms of the EPA.’

general wording, perhaps of a more preambular kind, the final result was a legally binding provision. The provision is worth quoting extensively: ‘The EC Party and the Signatory CARIFORUM States shall cooperate and take, within their own respective territories, such measures as may be necessary, *inter alia*, through domestic legislation, to ensure that:’ (a) investors ‘are forbidden from, and held liable for, offering, promising or giving any undue pecuniary or other advantage’ for the purposes of bribing or corrupting public officials; (b) investors ‘act in accordance with [International Labour Organization] core labour standards’; (c) investors act in a way that does not ‘circumvent ... international environmental or labour obligations’; and (d) investors ‘establish and maintain, where appropriate, local community liaison processes, especially in projects involving extensive natural resource-based activities’.⁷⁵ As one review of the EPA notes, ‘[i]t bears noting that the above provisions were insisted into the EPA at the behest of CARIFORUM’.⁷⁶ This is itself telling both as to the EU’s own negotiating priorities and its regard for the values inherent within the Cotonou Agreement. Moreover, it is still unclear whether, and how far, the EU will adopt legal measures to regulate *extra-territorially* the activities of its private investors in the CARIFORUM region, or whether responsibility for the behaviour of EU investors will be left as purely a matter for the Caribbean States. Though the provision does not necessarily demand the extra-territorial extension of ‘home’ law, a reasonable argument can at least be made that the objectives contained therein can only be fully assured through a coordinated approach between all the parties.

Assessing the long-term developmental impact of the CARIFORUM-EU EPA is, of course, decidedly premature. Other ACP states, certainly those which have less experience in the

⁷⁵ Article 72 CARIFORUM-EU EPA.

⁷⁶ Sauv  & Ward, above n 50 at 15.

service sector and a different history towards FDI, are likely to be less willing to adopt such a rule-based liberalisation approach. Many developing countries are likely to want to endorse a much more cooperative framework, first building up local capacity and governance capability. If legal rules are to be negotiated, they would wish for their principal focus to be upon technical assistance, as well as (where appropriate) much greater asymmetry in commitments and significant flexibility in implementation. In fact, investment liberalisation in an EPA may be simply premature if it has not yet been grounded at the regional or sub-regional level.

IV. Conclusion: Accommodating Divergences in EU Development and FDI Policies

Whatever its perceived weaknesses, the CARIFORUM-EU EPA undoubtedly signals a new phase in both EU development and FDI policy. But in taking this process forward, one needs to appreciate the pressures upon the EU, as a political and economic entity, to act coherently both internally and at the global level. Of course, the EU is subject to many of the same pressures as any other major trading bloc – be that Japan, the United States or China – however the collective nature of the EU also means that it is also subject to a unique range of factors. These pressures reflect, in particular, the institutional and political nature of the EU in framing coordinated policies, developing legislative responses and negotiating international treaties. One approach to identifying such pressures – admittedly rather crude in many respects – is to differentiate between those that are internal to the EU *qua* regional economic integration organisation from those that are external thereto. For internal pressures, mention might be made of the differing priorities of the Member States on matters of development and FDI policy, the autonomous agenda of the European Commission on these issues and the deliberative, and indeed decision-making, role of the European Parliament. Such tensions are of course systemic to the EU-project as a whole, including in matters of general external relations, and thus it is unsurprising that the institutionalised tensions within

these general relationships will play a significant role in how EU policy in this area will evolve, particularly now with the entry into force of the Treaty of Lisbon and its express extension of Community competence.

But in addition to these internal pressures are those that might be better described as ‘external’ – the influence of civil society, the views of business interests, the negotiating positions of other major trading blocs, as well as the general norms of the international economic system – in framing the EU’s approach to these issues. And while such pressures are not unique to the EU, it is arguable that when combined with, and filtered through, the internal pressures identified above, it creates a curious array of policy drivers that might help throw some light – if not explain – the challenges in accommodating divergent, but notionally equally foundational, objectives within the same policy-space. Thus, while the EU’s rhetoric is often good – if not exemplary – the potential for fragmentation between the EU’s goal of supporting global development and expanding its own global investment opportunities is not only arguably an inevitable tension in-built within its own institutional framework but it is also representative of the EU, more generally, trying to continually (re-)position itself within the global order. However, in seeking to become a global *investment* partner, the EU must be forever mindful of the plethora of its other identities, both within and without the European region.