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# Integrating African Markets into the Global Exchange of Services: A Central African Perspective

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**INTEGRATING AFRICAN MARKETS INTO THE GLOBAL  
EXCHANGE OF SERVICES: A CENTRAL AFRICAN PERSPECTIVE**

by

Regis Y. Simo

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# **Integrating African Markets into the Global Exchange of Services: a Central African Perspective**

**Regis Y. Simo\***

## **Abstract:**

Services liberalisation has gradually become very important for growth in developed and less-developed countries alike and can, as such, be seen as development prospects for sub-Saharan Africa where numerous economic integration attempts are stories of repeated failures. Despite the abundant literature on PTAs, however, little attention has been given to Central Africa Economic and Monetary Community (CEMAC) as a trade bloc. This is an attempt to address that dearth

At a time when “boosting intra-African trade” is gaining currency on the continent, this article tests the compatibility of the potential CEMAC economic integration agreement (EIA) against the background of the existing framework and argues that Central Africa countries would be in a better position to integrate their economies after widening the borders of their individually tiny markets. Analysing the legal discipline behind services Preferential Trade Agreements (PTAs) under the General Agreement on Trade in Services (GATS) and how CEMAC’s agreement fits into this legal landscape, this article further advocates that this sub-group of countries should go beyond the Enabling Clause self-contentment and embark on a deeper (and comprehensive) integration.

**Keywords:** CEMAC, WTO, Trade in Services, Africa, Preferential Trade Agreements

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## I. INTRODUCTION

Talking about regionalism nowadays may seem old-fashioned because the phenomenon is neither new to the world trading system nor to Africa. Yet, the 2011 WTO Trade Report dedicated to Preferential Trade Agreements (PTAs)<sup>1</sup> is another indication that everything has not been said about this area of trade policy where cohabitation and coherence with the multilateral rules are still making debates.<sup>2</sup> In that context, services liberalisation has gradually become very important for growth in developed and less-developed countries alike<sup>3</sup> and can, as such, be seen as development prospects for sub-Saharan Africa where numerous economic integration attempts are stories of repeated failures. Despite the abundant literature on PTAs, however, little attention has been given to Central Africa Economic and Monetary Community (CEMAC) as a trade bloc.<sup>4</sup> This is an attempt to address that dearth.

It is also established that recent PTAs between countries in the Northern Hemisphere have a service component.<sup>5</sup> So unsurprisingly is the case of CEMAC that is merely a replica of the EU success story, even though services chapter has thus far remained marginal. The Doha

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<sup>1</sup> See World Trade Organization, *World Trade Report 2011, The WTO and Preferential Trade Agreements: From Co-existence to Coherence* (Geneva: WTO, 2011).

<sup>2</sup> See for instance R. Baldwin, *Multilaterising Regionalism: Spaghetti Bowls as Building Blocs on the Path to Global Free Trade*, 29 *The World Economy*, no.11 (2006), 1451-1518.

<sup>3</sup> On the importance of services for economic growth (and the desire to further remove existing barriers to their trade in the Doha framework and beyond) see B. Hoekman and A. Mattoo, *Services Trade Liberalization and Regulatory Reform: Re-invigorating International Cooperation*, World Bank Policy Research Working Paper No. WPS 5517 (January 2011). See also UNCTAD, *Trade in Services and Development Implications* (Geneva: UNCTAD/TD/B/COM.1/85, 2007).

<sup>4</sup> An exception being J.T. Gathii, *African Regional Trade Agreements as Legal Regimes* (Cambridge: Cambridge University Press, 2011), where the author in Chapter IX discusses CEMAC alongside other monetary unions such as the West African Economic and Monetary Union (UEMOA) and the West African Monetary Zone (WAMZ). Note that the study of CEMAC in this paper is without prejudice to the "rationalisation and harmonisation of African RECs" project that would entail the replacement of the latter by a wider REC – the Economic Community of Central African States (ECCAS).

<sup>5</sup> S. Stephenson, "GATS and Regional Integration", in P. Sauvé and R. M. Stern (eds.), *GATS 2000: New Directions in Services Trade Liberalization* (Washington, D.C.: Brookings Institution Press, 2000), p. 509.

Round stalemate, which has seen the rather meek involvement of African countries, in particular, has also reinvigorated interests of WTO Members to continue trading on a preferential basis. And today, the challenge of regionalism in Africa lies in its capacity to build confidence that would promote investment, driver of economic growth.

At a time when “boosting intra-African trade” is gaining currency on the continent,<sup>6</sup> it is expected of the harmonisation of regional economic policies and the implementation of joint infrastructures projects, especially of (producer) services to enhance CEMAC’s trade with other countries/sub-regions of the continent, strengthen its participation to the global market and increase capital flows. Taking advantage of the multilateral framework under Article V of the General Agreement on Trade in Services (GATS), this paper tests the compatibility of the potential CEMAC Economic Integration Agreement (EIA) against the background of the existing framework and argues that Central Africa countries would be in a better position to integrate their economies after widening the borders of their individually tiny markets. Analysing the legal discipline behind services PTAs and how CEMAC’s agreement fits into this legal landscape, this paper further advocates that this sub-group of countries should go beyond Enabling Clause self-contentment and embark on a deeper (and comprehensive) integration.

## II. GLOBALISATION AND REGIONALISM: A CASE FOR SERVICES

Notwithstanding the history of trade based on goods, services has proven to be the fastest growing sector, justifying their presence on the Uruguay Round agenda.<sup>7</sup> To the exception of some very few, however, developing countries, and sub-Saharan Africa (SSA) countries in particular, are still reluctant to grant market access to foreign services and service providers. Since 2000 and the ensuing launching of the Doha Development Agenda (DDA) they still have not made noticeable commitments in that sense at the multilateral level.<sup>8</sup> And the Doha deadlock continues to feed Members’ appetite to go for that second-best opportunity.<sup>9</sup> Therefore, to posit like Baldwin that “regionalism is here to stay”<sup>10</sup> sounds much like a truism today. The WTO 2011 report further reminds us that despite little novelty in the analysis of PTAs, there remains a ground to look at the typology of recent waves of regionalism. It is in

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<sup>6</sup> See for instance Paul Brenton and Gözde Isik (eds.), *De-fragmenting Africa: Deepening Regional Trade Integration in Goods and Services* (Washington, D.C.: World Bank, 2012), on the fact that Africa as a whole trades too little with itself, hence a desire to deepen integration in both goods and services in order to reap the fruits of trade liberalisation. See also the African Union Action Plan for boosting intra-African trade, available at: <http://www.au.int/en/sites/default/files/Action%20Plan%20for%20boosting%20intra-African%20trade%20F-English.pdf>, accessed 15 June 2012.

<sup>7</sup> See J. Marchetti and P. C. Mavroidis, *The Genesis of the GATS (General Agreement on Trade in Services)*, 22 *European Journal of International Law*, no.3 (2011), 689-721, tracing the GATS negotiating history.

<sup>8</sup> See e.g. R. Adlung and M. Roy, *Turning Hills into Mountains? Current Commitments under the GATS and Prospects for Change*, WTO Staff Working Paper ERSD-2005-01 (March, 2005).

<sup>9</sup> There may however be other reasons for this phenomenon of bilateralism. For political reasons why Governments may prefer regionalism over multilateralism, see e.g. C. Damro, “The Political Economy of Regional Trade Agreements”, in L. Bartels and F. Ortino (eds.), *Regional Trade Agreements and the WTO Legal System* (Oxford: Oxford University Press, 2006), pp. 23-42. Note however that the fact that “regionalism” is on the rise is no longer a secret. It is gradually appearing not as the “second-best” option portrayed in mainstream economics but as a fully-fledged policy option. In the words of the Panel in *Turkey – Textiles*, “regional trade agreements have greatly increased in number and importance since the establishment of GATT 1947 and today cover a significant proportion of world trade” (Panel Report, *Turkey – Textiles*, WT/DS34/R, adopted 19 November 1999, as modified by the Appellate Body Report, WT/DS34/AB/R, at para 9.97). In fact, in the words of Mavroidis, the status of PTAs has today moved from that of “exception” to that of “right”. See P. Mavroidis, *WTO and PTAs: A Preference for Multilateralism? (or the Dog that Tried to Stop the Bus)*, 43 *Journal of World Trade*, no.5 (2010), 1145-1154.

<sup>10</sup> See Baldwin (2006), *supra* note 2.

this context that new generations of PTAs are worth analysing and their potential to foster deeper integration (departing from the “linear” model of integration that has hitherto characterised African schemes).

Although based on non-discrimination, trade instruments provide exceptions to this core principle when faced with the rather particular and disadvantaged situations of developing and least-developed countries (LDCs). This is the essence of special and differential treatment (SDT) provisions in many WTO Agreements.<sup>11</sup> The General Agreement on Trade in Services (GATS), criticised by some as too intrusive into the national sovereignty of participating countries, was also hailed by others as the most developing-country-friendly Agreement of the entire WTO system.<sup>12</sup> In addition to the recent services Enabling Clause – the LDC waiver<sup>13</sup> – , the GATS accommodates developing countries and LDCs’ participation concerns in many respects.<sup>14</sup> “Economic Integration” provision of the GATS also allows parties to enter into PTAs that go contra the obligation not to discriminate, subject to discipline of its Article V.<sup>15</sup>

Despite the obligation to grant MFN (as the rule) per Article II of the GATS, SSA states (as less developed countries) have the “right” to enter into economic integration agreements to liberalise services among and between them if they so desire.<sup>16</sup> This in essence is in harmony with the proliferation of regional economic communities across the continent for more than half a century now. It is however disappointing how this proliferating and sometimes overlapping “blocs” have failed for the major part to achieve the objectives ascribed to them when they were formed. The CEMAC is one of these often recounted failures, critiques

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<sup>11</sup> SDT provisions, alongside capacity building and technical cooperation, were designed to allow LDCs to actively participate in the world trade. SDT are of many types. On this score, see E. Kessie, *Enforceability of the Legal Provisions Relating to Special and Differential Treatment under the WTO Agreements*, 3 *Journal of World Intellectual Property*, no.6 (2000), 955-975, tracing the evolution of developing countries’ negotiations of GATT/WTO Agreements and concessions accorded to them to accommodate their “weaker” statuses, and the possible avenues to make these “concessions” *enforceable* (in the full legal meaning of the word).

<sup>12</sup> J. Marchetti and P. Mavroidis, *What are the Main Challenges for the GATS Framework? Don’t Talk About Revolution*, 5 *European Business Organization Law Review*, no. 3 (2004), 511-562, at 513.

<sup>13</sup> The LDC waiver was adopted at the 8th WTO Ministerial Conference in Geneva on 17 December 2011 to enable WTO developing and developed-country Members to provide preferential treatment (hence market access privileges) to services and service suppliers of LDCs for 15 years from the date of its adoption. Although it is referred to as “enabling clause”, this terminology should not be confused with the trade in goods scenario where “enabling clause” refers to a preferential trade agreement among developing countries. In the services context, this is a “waiver”, providing a legal cover to developing and developed countries when they give preferential treatment to LDCs (whether WTO Member or not) contrary to Article II of the GATS (on MFN). Whether this waiver grants LDCs an “actionable” right is another matter altogether. Suffice it to say it does *not* in any manner *oblige* Members to grant preferences.

<sup>14</sup> For instance, the Agreement’s Preamble spells out the desire of WTO Members to “facilitate the increasing participation of developing countries in trade in services and the expansion of their services exports” with “particular account of serious difficulty of the least-developed countries”.

<sup>15</sup> But one caveat is worth making: Article V GATS is not directed *exclusively* to developing countries, as this “exclusivity” is essentially dealt with under Article IV GATS (“increasing participation of developing countries” in the world trade). Rather, Article V GATS offers *flexibility* (vis-à-vis the multilateral rule) when an agreement of the type envisaged by that provision has one or more developing countries as its members. That is different from its GATT counterpart (article XXIV) that designed no special rules concerning PTAs between developed and developing countries (although goods PTAs between two or more developing countries are dealt with under the “Enabling Clause”). Additionally, in the process of “progressive liberalisation”, Article XIX.2 GATS also offers “flexibility” in the manner it will be conducted in this group of countries (progressively opening fewer sectors, liberalising fewer types of transaction, etc. in line with Article IV objectives).

<sup>16</sup> On the status of PTAs from that of “exception” to that of “right”, see Mavroidis (2010), *supra* note 9.

stemming from the fact that African PTAs should primarily – if not solely – be based on trade integration like other PTAs against which they are compared.<sup>17</sup>

As of January 2012, around 105 economic integration agreements (EIAs) in the sense of Article V of the GATS out of about 232 regional trade agreements (RTAs) are in force.<sup>18</sup> CEMAC like many RTAs in the developing world has been notified to the WTO under the “Enabling Clause”<sup>19</sup> over goods. Although some of these schemes envisage “service” liberalisation, that component is yet to be notified to the WTO for the corresponding discipline to kick in. What’s more, agreements under Article V GATS involving developing countries amount to half of notifications since 2009, but just a handful of them actually involve African countries.<sup>20</sup>

This paper envisages the multilateral framework serving as a benchmark for a better regional integration in central Africa. It is a fact to say that the recent proliferation of PTAs has not always been conditioned, if at all, on a prior satisfaction of the relevant legal regime.<sup>21</sup> We proceed to ask ourselves whether the situation at some point need not be reversed for the multilateral discipline to serve as the benchmark for a better intra-regional trade.<sup>22</sup> Since obstacles to integration often persist despite the proclaimed intentions, it could be that reliance on GATS V and its requirements would boost intra-regional trade, which in turn would serve its purpose as building block to the wider multilateral liberalisation.<sup>23</sup> Therefore, by respecting the existing legal regime, these countries can deviate<sup>24</sup> from MFN in a more efficient manner. But it should be remembered that trade liberalisation and integration into the world economy are not ends in themselves if other factors like geography, resources endowments, the quality of a country’s institutions and its regulatory framework are not put to

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<sup>17</sup> On the criticism of the general tendency of overstating the failure of African regional trade agreements because they usually serve other purposes (apart from trade integration), see J. Gathii, *African Regional Trade Agreements as Flexible Legal Regimes*, 35 North Carolina Journal of International Commercial Regulation, no. 3 (2010), 571-668, for whom recounting the so-called “failures” over and over again may be too pessimistic a take on African regionalism.

<sup>18</sup> See Regional Trade Agreements database, available at: <<http://rtais.wto.org/UI/PublicSearchByCrResult.aspx>>, accessed 15 June 2012.

<sup>19</sup> The Enabling Clause stands for the General Agreement on Tariffs and Trade (GATT) Contracting Parties “Decision on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries” of 28 November 1979 (GATT L/4903), GATT BISD 26th Supp. (Geneva, 1980), p.203. It was later incorporated in the corpus of WTO law by GATT 1994, para. 1(b) (iv).

<sup>20</sup> M. Roy, *Services Commitments in Preferential Trade Agreements: Surveying the Empirical Landscape*, NCCR-Trade Working Paper No 2012/02 (January 2012).

<sup>21</sup> P. Mavroidis, *If I Don't Do It, Somebody Else Will (Or Won't): Testing the Compliance of Preferential Trade Agreements With the Multilateral Rules*, 40 Journal of World Trade, no.2 (2006), 187-214.

<sup>22</sup> But let’s not ignore that non-compliance by a PTA with the multilateral rules does not impact upon its validity between the Parties who signed it. A PTA is an international treaty on its own and there is consequently no deference of one to the other since they both stand on an equal footing in international law. Thus, “WTO Agreements per se have no legal supremacy over Economic Integration Agreements”: T. Cottier and M. Molinuevo, “Article V GATS”, in R. Wolfrum, P. T. Stoll and C. Feinäugle (eds.), *Max Planck Commentaries on World Trade Law: WTO – Trade in Services*, vol. 6 (The Hague: Martinus Nijhoff, 2008), p. 128. But the undesirable effects might advocate for a PTA-compliant rather than a PTA-rebellious.

<sup>23</sup> Since it is less doubt that Baldwin’s concept of “multilateralising regionalism” commends that multilateralism and regionalism strengthen each another. See F. Söderbaum, *Unlocking the Relationship Between the WTO & Regional Integration Arrangements (RIAs)*, 35 *Review of African Political Economy*, no.118 (2008), 629-644, at 630. On how to do that, see R. Baldwin and P. Thornton, *Multilateralising Regionalism: Ideas for a WTO Action Plan on Regionalism* (London: Centre for Economic Policy Research, 2010).

<sup>24</sup> At least for the time needed to reverse the diverting effects it they exist and which, unfortunately (for the multilateral regime), might even take longer in services context given its particular nature (bound to be regulated) and the speed at which multilateral negotiations are being conducted. But we will see later that services PTAs do not necessarily lead to diversion.

contribution.<sup>25</sup> All expectations for economic growth and sustainable development do not therefore have to be placed on a subset of trade policy alone.<sup>26</sup> Yet, efforts must be put together so as not to annihilate the potentials that such subset can contribute for the overall growth aspirations. And because not so much has been (or likely to be) achieved since the launching of the Doha Round in terms of commitments, the “dialectic process of world trade liberalisation stimulated by regional process,”<sup>27</sup> is consequently called to take place again, in the sector of services.

### III. TRADE LIBERALISATION IN SERVICES: GATS AND AFRICAN (DEVELOPING) COUNTRIES

#### A. Some Basic Facts about services

Liberalisation of services finds its rationale in their role to economic activities at large. In so far as they are themselves tradable, they constitute for some of them inputs for the trading of goods and other services. Financial, transportation and other infrastructure services are the most oft-cited “producer services”, absent which development of trade in goods will be close to nil.

Services, the fastest growing sector of the world economy, represent two thirds of global output but contrasted by its share of about 20% of the global trade (“only”).<sup>28</sup> They account for more than two thirds of the Gross National Product (GNP) of the Organisation for Economic Co-operation and Development (OECD) countries<sup>29</sup> and between 60 and 75 percent of Gross Domestic Product (GDP) and employment in these countries.<sup>30</sup> Moreover, services exports (consisting of mainly tourism and travel services) in developing countries grew about 3 percent rapidly per annum (on a balance-of-payment basis) than developed countries’ exports between 1990 and 2000.<sup>31</sup> They account for some 52 percent of developing countries’ GDP and about 35 percent employment.<sup>32</sup>

The growing importance of this sector on world trade therefore prompted negotiations for an adoption of a legal instrument at multilateral level, pushed by developed countries chief among which were the United States and the European Community.<sup>33</sup> The Uruguay round culminated in the adoption of the GATS in 1995 as the first comprehensive and only

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<sup>25</sup> See J. Marchetti, “Developing Countries in the WTO Services Negotiations: Doing Enough?”, in G. Berman and P. Mavroidis (eds), *WTO Law and Developing Countries* (Cambridge: Cambridge University Press, 2007), p. 83.

<sup>26</sup> *Ibid.*

<sup>27</sup> T. Cottier, *The Challenge of Regionalization and Preferential Relations in World Trade Law and Policy*, 1 *European Foreign Affairs Review*, no.2 (1996), 147-167, at 156.

<sup>28</sup> B. Hoekman, and P. Sauvé, “Regional and Multilateral Liberalization of Service Markets: Complements or Substitutes?”, 32 *Journal of Common Market Studies* no.3 (1994), 282-318, at 284, footnote 1.

<sup>29</sup> M. Matsushita, T. Schoenbaum and P. Mavroidis, *The World Trade Organization: Law, Practice and Policy* (2nd ed., Oxford: Oxford University Press, 2006), p. 607. See also Wolfrum, Stoll and Feinäggle (eds.) (2008), *supra* note 22, p. (ix), where global services exports amounted to 2.6 trillion US Dollar in 2006.

<sup>30</sup> Hoekman and Sauvé (1994), *supra* note 28, at 284.

<sup>31</sup> World Trade Organization, *A Handbook on the GATS Agreement*, (Cambridge: Cambridge University Press, 2005), p. 3.

<sup>32</sup> UNCTAD (2007), *supra* note 3, p. 2. These figures notwithstanding, Africa represents only 10 percent of services exports in the developing world, see *Id.*, p. 3.

<sup>33</sup> The issue was nevertheless already present on the agenda of the Tokyo Round (1973-1979) at the initiative of the US. See Marchetti and Mavroidis (2011), *supra* note 7. See also C. Fuchs, “GATS Negotiating History”, in Wolfrum, Stoll and Feinäggle (eds.) (2008), *supra* note 22, p. 3.

multilateral agreement on services trade, which before then was conducted, when it did, on bilateral and regional bases.<sup>34</sup> Whether the advent of this instrument has increased the flow of services beyond the pre-GATS level is an empiric question significantly dependent on the conclusion of Doha (or any other subsequent round of services negotiations) negotiations.<sup>35</sup>

## B. The GATS

### 1. Overview

Like the GATT for goods, the GATS imposes a discipline on trading parties in services but as an instrument of “progressive liberalisation”.<sup>36</sup> If trade liberalisation in general requires granting market access to foreign companies by lowering entry barriers to trade, the issue is not less complex when it comes to services where barriers are not limited to border measures. GATS, therefore, does not pretend to *liberalise* at “one shot”, but rather to gradually remove regulations the purpose and/or effects of which restrict worldwide flow of services – i.e. “unnecessary regulations”. Nevertheless, it is up to different countries to choose sectors they wish to liberalise for which they commit themselves (somehow irreversibly).<sup>37</sup>

The GATS opted for a “flexible” regulatory framework – in many respects<sup>38</sup> – whereby each party’s level of commitment would be decided and clarified *ex ante*.<sup>39</sup> (Domestic) “Regulations” are the medium through which countries erect barriers to trade in services, for the large share of trade in services take place domestically, i.e. inside one’s own country. In order to balance between states’ regulatory objectives and international trade liberalisation,<sup>40</sup> GATS creates two categories of obligations: general obligations and specific commitments.

General obligations on the one hand cannot be deviated from (or contracted out of). They are the general discipline which all parties, by joining the WTO, agree to respect. They are binding even when one has not undertaken an obligation to liberalise a specific sector. The so-called “most-favoured nation” (MFN) principle<sup>41</sup> falls in this category. Specific commitments on the other hand bind a member only to the extent it has expressly entered a commitment to liberalise a particular sector, or a particular mode of supply – (which is a kind of bottom-up approach). Specific commitments are considered to be the main tools of liberalisation of GATS in that provisions contained therein aim at limiting the use of certain quantitative

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<sup>34</sup> Matsushita, Schoenbaum and Mavroidis (2006), *supra* note 29, p.604.

<sup>35</sup> See J. Marchetti and P. Mavroidis (2004), *supra* note 12, at 523-524.

<sup>36</sup> See recital 2 of GATS Preamble.

<sup>37</sup> Although Article XXI GATS allows a Member to modify a commitment in its Schedule (after three years), it is rather difficult to think of how that might happen in practice given that the modifying Member is required to negotiate “compensatory adjustments” with “affected Members” on an MFN basis, which the latter must agree with. This is a difficult result to achieve as it involves reaching consensus (by all WTO Members) to allow the modifying Member to deprive other Members of the advantages they have been enjoying in trading when that commitment was in force. This particular argument can be advanced on Article V:5 (modification and withdrawal of commitment in an economic integration agreement).

<sup>38</sup> The approach taken by negotiators was to opt for a “progressive liberalisation” for all Members, unresolved issues to be sorted out during subsequent rounds; and flexibility with respect to the participation of developing countries and loosened discipline when it comes to services of interest to them, etc.

<sup>39</sup> Matsushita, Schoenbaum and Mavroidis (2006), *supra* note 29, p. 605.

<sup>40</sup> It is argued, however, that GATS favours liberalisation over allowing domestic regulation due to the “right of Members to regulate, and to introduce new regulations, on the supply of services within their territories in order to meet national policies objectives”, as found in Recital 4 of the Preamble of GATS which, if it were to be accorded greater impact, should have simply been made part of the provisions of Article VI (Domestic Regulation). See H. Hestermeyer, “Preamble General Agreement on Trade in Services”, in Wolfrum, Stoll and Feinäugle (eds.) (2008), *supra* note 22, p. 27.

<sup>41</sup> Article II GATS.

restrictions to the provision of services once a party has undertaken to open up a service sector.<sup>42</sup> These disciplines are found in “market access” (Article XVI) and “national treatment” (Article XVII) provisions.

## 2. Coverage

The GATS applies to measures by Members affecting trade in services.<sup>43</sup> “Measures by Members” are those taken by central, regional or local governments as well as non-governmental bodies exercising delegated powers.<sup>44</sup> Concerning “services”, the GATS does not define them proper. Rather, it categorises those to which it applies (to the exclusion of some), as including *any service in any sector except services ‘supplied in the exercise of governmental authority’*.<sup>45</sup> This rather wide definition has the merits of embracing some areas that had in the past remained outside WTO foresight.

Services in the GATS context can be traded in four different ways – or modes of supply.<sup>46</sup> We will see later that these modes of supply are of particular importance to regional integration agreements because of their “substantial sectoral coverage” requirement.<sup>47</sup> It is also worth mentioning that *Mode 3*, the apparent dominant mode of supply for all sectors (except transport and tourism services),<sup>48</sup> is akin to an international agreement to liberalise investment in the sense that the opening of a sector amounts to opening up the sector to foreign investment.<sup>49</sup> *Mode 1* is the second most important mode of supply, while *Mode 4* the least significant across all sectors, and *Mode 2* the mode par excellence for tourism service trade.<sup>50</sup>

Overall, if *Mode 1* and *Mode 2* do pose less problems since they are analogous to the cross-border trade in goods, the GATS has succeeded to break new grounds with *Modes 3* and *4* in establishing multilateral rules that guarantee the opportunities for legal and natural persons to establish themselves in a foreign market.<sup>51</sup> Although *Mode 3* requires the establishment of a foreign supplier firm it does not necessarily imply the presence of staff with foreign nationalities. It follows that when a foreign establishment elects to employ a foreign manager for instance, the supply of service is covered by both *Mode 3* and *Mode 4*. *Mode 4*, which is the presence of natural person of a foreign nationality in another country to provide service, can also be found absent commercial presence, because the GATS embraces the possibility of providing services by individuals in an independent capacity.

## 3. Central Africa’s Countries amidst GATS Discipline

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<sup>42</sup> P. Delimatsis and M. Molinuevo, “Specific Commitments: Article XVI GATS”, in Wolfrum, Stoll and Feinäugle (eds.) (2008), *supra* note 22, p. 369.

<sup>43</sup> Article I:1 GATS.

<sup>44</sup> Article I:3(a) GATS.

<sup>45</sup> Article I:3(b) GATS. Article I:3(c) GATS on its part defines a service “supplied in the exercise of governmental authority” as one supplied neither on a commercial basis, nor in competition with one or more service suppliers, i.e. not-for-profit activities like social security or central banking services.

<sup>46</sup> Pursuant to Article I:2 GATS, services can be traded in the following manners: (i) *Mode 1* – cross-border supply; (ii) *Mode 2* – consumption abroad; (iii) *Mode 3* – commercial presence; (iv) *Mode 4* – presence of natural persons.

<sup>47</sup> Article V:1(a) GATS. See Section V.

<sup>48</sup> J. Hodge, “Liberalization of Trade in Services in Developing Countries”, in B. Hoekman, A. Mattoo, and P. English (eds.), *Development, Trade and the WTO: A Handbook* (Washington, D.C.: The World Bank, 2002), p. 222. See also Marchetti (2007), *supra* note 25, p. 97.

<sup>49</sup> Matsushita, Schoenbaum and Mavroidis (2006) *supra* note 29, p. 617.

<sup>50</sup> Hodge (2002), *supra* note 48, p. 222.

<sup>51</sup> World Trade Organization, *Guide to the Uruguay Round Agreements* (The Hague: Kluwer Law International, 1999), p. 164.

The majority of WTO Members (about four fifth) are not developed countries. But it is rather controversial the way discussions over services have moved during the Uruguay Round and the directions taken during DDA. If the majority of developing countries were vehemently opposed to the introduction of services in the former Round, especially *Mode 3* supply, the tendency was modestly toward the opposite direction in the DDA. In fact, having failed for some of them (especially Argentina and India) to approach negotiations in a more concerted manner in the heterogeneous “Café-au-Lait” Group (composed of both developed and developing countries), the tune soon changed, especially for India who became one of the co-authors of *Mode 4* on the movement of natural persons.<sup>52</sup> It also appears that *Mode 3* happens to be the mode of supply currently allowing wide regulatory manoeuvres by host countries wishing to control foreign companies’ establishments and activities in their markets. Furthermore, recent developments in, and access to, information technologies by developing countries have somehow increased their eagerness to see more commitments over *Mode 1* (to which they were also opposed during Uruguay Round for lack of capacities).<sup>53</sup>

If the above statements may hold true for some developing countries, it is not necessarily the case for all of them. African countries, not to speak of developing countries as a whole, are heterogeneous in nature, and many SSA countries do not enjoy the same development pace compared to the most advanced ones such as China, India, Brazil, Egypt or South Africa.<sup>54</sup> In this environment, stakes are not similar and levels (and willingness) of commitments uneven. Current multilateral negotiations exhibit these trends. Some developing countries (mostly middle-income economies) have undertaken commitments comparable and sometimes more ambitious in depth and breadth to those of developed economies thereby not relying too much on flexibilities,<sup>55</sup> while the poorest among them are characterised by hesitant stances (sometimes even failing to make use of flexibilities), criticising the process for not taking into account sectors and supply modes of potential benefit to them.<sup>56</sup> The number of committed sectors by WTO Members in July 2000 just pictured this inequality.<sup>57</sup>

It then seems logical to infer from this conduct homogeneous among poorer developing countries – although it is difficult to single out central African countries’ approach – that they have been cautious in embracing negotiations to open their services markets to competition from abroad. Even though such moves might bear several meanings in terms of tactics for future multilateral and regional negotiations or in terms of just a lack of interest, it nevertheless signals their intentions – past, present and future – to commit or not to.<sup>58</sup> Needless to note that protection, whatever the form, is harmful both to the local economy at large and to domestic consumers in particular on whom the burden of higher barriers to entry

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<sup>52</sup> Marchetti and Mavroidis (2011), *supra* note 7.

<sup>53</sup> Which Mode became one of the most important challenges for developing countries in the DDA of services negotiations. See Marchetti (2007), *supra* note 25, pp. 97, 115-116.

<sup>54</sup> The status of some of which is rather controversial since WTO does not have a definition of “developing countries” on its own, letting each of them to self-elect its status on accession. There is indeed no international consensus on the concept.

<sup>55</sup> R. Adlung et al, “The GATS: Key Features and Sectors”, in Hoekman, Mattoo and English (eds.) (2002), *supra* note 45, p. 261.

<sup>56</sup> A. Mukerji, *Developing Countries and the WTO: Issues of Implementation*, 34 *Journal of World Trade*, no.6 (2000), 33-74, at 33, 39-40 cited by Matsutshita, Shoenbaum and Mavroidis (2006), *supra* note 29, p. 782. Enhanced market access is the bone of contention between negotiating actors and the politically sensitive *Mode 4* is of utmost importance to developing countries that want to see developed nations commit while in turn refraining to open further on this mode of supply. Offers as of the end of 2005 has shown this dangling pattern. On this score, see J. Marchetti (2007), *supra* note 25, pp.100, 110-114.

<sup>57</sup> See Adlung et al (2002), *supra* note 55, at 263 (Table 27.3). See also Marchetti and Mavroidis (2004), *supra* note 12, at 521 and 558 (Table I).

<sup>58</sup> Marchetti (2007), *supra* note 25, p. 90.

and of the absence of competition falls in terms of monopolistic prices and sometimes low-quality goods and services. That is why substantial evidence has been advanced to demonstrate the welfare reducing effects of policies purporting to limit competition in services industries, especially producer services, which is a rather frequent pattern in developing countries as a whole.<sup>59</sup>

It remains a fact that SSA industries for the most part lack the degree of competitiveness against developed nations' firms. It is also no doubt that developing countries have the right, as given by GATS, to only liberalise at a pace convenient for their development goals and in sectors of interest to them. Moreover, flexibilities as far as (preferential) trade agreements have been granted, with the expectation that advantage would be driven from there. If they then seem not too enthusiastic thus far to commit further at the multilateral table, could regional agreements not help out? Given that their markets taken individually and even collectively are for the major part too small as mentioned, exploiting opportunities at regional levels would then be a step towards wider liberalisation. Because protection is costly, it will still be more beneficial to end up with more multilateral commitments at some point. And on this agenda, regional policy choices and individual States' domestic regulations would be the benchmarks by which integration will be judged as welfare enhancing enough or not. An interest for services talks at regional level is not absent though. Discussions within the ACP group (in which CEMAC countries participate) with the EU is one example.<sup>60</sup> Still, what is the level of liberalisation at central Africa sub-regional level remains an issue. What then could be feasible to improve upon the stagnating *status quo*?

#### IV. THE POTENTIAL CENTRAL AFRICA SERVICES ECONOMIC INTEGRATION AGREEMENT

##### A. Legal Discipline: the Rationale

The Panel in *Canada – Autos* stated that “Article V provides legal coverage for measures taken pursuant to economic integration agreements, which would otherwise be inconsistent with the MFN obligation in Article II”.<sup>61</sup> As such, WTO Members are allowed to enter into an agreement to further liberalise trade in services with other Members that accept to be parties to it. Simply put, Article V as intended by its *chapeau* may justify the adoption of a measure inconsistent with certain provisions of GATS provided such measure satisfies the requirements therein specified as discussed at length below.<sup>62</sup>

What the law denotes is that for a PTA under GATS to be consistent with the terms of Article V, thereby complying with the multilateral rules, it must not breach any term of the

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<sup>59</sup> *Ibid*, pp. 87-89. Marchetti shows how welfare has been enhanced in those countries whose telecommunication industries were liberalised, allowing for extended internet penetration that in turn affected in a positive manner how other services are being traded. The same holds true for maritime transport services liberalisation (in Chile) in the reduction of transportation costs, and also in distribution services (especially of agricultural products) where Zimbabwean farmers for instance have seen an increase in their income when competition was introduced (eliminating monopsony) in the market for the purchase of their production.

<sup>60</sup> See Joseph J.L. Correa, *L'OMC à l'épreuve des Accords de Partenariat Economique et de l'intégration économique africaine* (Zurich: Schulthess, 2007), pp.144-151.

<sup>61</sup> Panel Report, *Canada – Certain Measures Affecting the Automotive Industry*, WT/DS139/R and WT/DS142/R para. 10.271. [hereinafter *Canada – Autos*]

<sup>62</sup> Appellate Body Report, *Turkey – Restrictions on Imports of Textile and Clothing Products*, WT/DS34/AB/R, para.45 (hereinafter *Turkey – Textiles*) cited in Cottier and Molinuevo (2008), *supra* note 22, p. 128.

provision that are all mandatory in nature.<sup>63</sup> Just like a PTA under GATT, a potential central Africa services EIA would have to pass both a) the internal and b) the external test, which are of substantive nature, and c) as a matter of procedure, will have to be notified. GATS being a ground-breaking instrument with no precedent, interpretation of these requirements are obviously not crystal clear.

## **B. Internal Discipline of Central Africa EIA**

Satisfying the internal discipline requires an agreement to form an EIA to have (i) “substantial sectoral coverage”, and (ii) devoid of “substantially all discrimination” except for what is necessary under Articles XI, XII, XIV and XIV *bis*, and (iii) achieved within the prescribed timeframe.

### **1. Substantial sectoral coverage**

In view of limiting perversion of MFN, hence of the world trade as a whole, by concluding agreements on relatively few sectors and supply modes of interest to them (i.e. PTAs *à la carte*), GATS’s discipline requires EIAs to have substantial coverage between its parties.<sup>64</sup> For an agreement to have “substantial sectoral coverage” in the sense of Article V:1(a) GATS, footnote 1 provides for both a quantitative and a qualitative test and two arms with regards to “sectors” and “modes of supply” in stating that “this condition is understood in terms of number of sectors, volume of trade affected and modes of supply. [And] in order to meet this condition, *agreements should not provide for the a priori exclusion of any mode of supply.*” An agreement that excludes any mode of supply is *a priori* disqualified as an EIA as intended by the GATS. Grey areas persist as to the exact reach of these tests.

With the “qualitative” test pertaining to *sectors* for instance, questions arise as to whether the agreement can remain valid after individual services, sub-sector(s) or whole sector(s) have been excluded. Inferring from the Appellate Body’s decision in *Turkey – Textiles* where it was held that “substantially all trade” is not the same as “all trade” but should at least be “something considerable more than merely some of the trade”, Cottier and Molinuevo submit that Article V of the GATS does *not* require all sectors to be covered.<sup>65</sup> Rather, the EIA must not exclude “more than a very limited number of sectors” (i.e. not more than one sector entirely).<sup>66</sup> And a further controversial point is that in assessing the impact of the excluded sector, consideration has to be had on its economic importance in terms of world trade. In other words an agreement shall not exclude a “major sector”.<sup>67</sup>

At first instance, it should not be expected of an EIA to meet higher standard than that expressed in the GATS itself. In this vein, it would not be at odd with GATS V to exclude air transport services, maritime transport services, financial services each of which is the subject of a GATS “Annex” on its own. However, since the purpose of an EIA is generally to obtain at regional level what is unobtainable at multilateral level, EIA would not pass the test of GATS V if liberalisation were to be less in coverage. This argument militates for the view that

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<sup>63</sup> However, although it will make the agreement unlawful, non-compliance with one or more of GATS provisions does not render the PTA null and void. The issue would then be for interested (and/or third) parties to issue an MFN claim or ask for (adequate) compensation by way of dispute settlement. See Cottier (1996), *supra* note 27, pp.162-163.

<sup>64</sup> Cottier (1996), *supra* note 27, at 158.

<sup>65</sup> Cottier and Molinuevo (2008), *supra* note 22, p.131.

<sup>66</sup> *Ibid.*

<sup>67</sup> See the Committee of Regional Trade Agreements Note on the Meetings of 29-30 April and 3 May 1999, WT/REG/M/22, 4 June 1999, cited in Cottier and Molinuevo (2008), *supra* note 22, p. 131.

EIAs in principle are expected to liberalise further than what actually happens at the WTO's table.<sup>68</sup>

Furthermore, it would rather be awkward to exclude the so-called “producer services” that are essential for the supply of other services (e.g. financial services), and sometimes of merchandises themselves (e.g. transport services), especially in SSA where integration is highly needed to connect inland territories to the rest of the world. Views are nevertheless divergent on this point since there is no such obligation in GATS texts not to carve out one of these sectors.<sup>69</sup> Services supplied in the exercise of government authority are *per se* excluded from GATS's purview. These controversial points do not only have the power to render conclusion of EIAs difficult, but also the merit of protecting the MFN principle (which it however set out to deviate from).<sup>70</sup>

As for the “quantitative” test, again as far as *sectors* are concerned, the agreement must not allow for the exclusion of the sectors which amount to substantial trade between the parties. This applies to both actual (current) and/or potential trade. If restrictions on particular services or sectors are to be maintained, therefore, they must not be on those where significant trade between parties occurs or would occur (in absence of such restrictions).<sup>71</sup> Owing to the difficulties to quantifying the “volume of trade” (actual or potential) for lack of precise data on international trade in services, assessment of an EIA as WTO compatible or not leans in favour of the qualitative test.<sup>72</sup>

Concerning *modes of supply* that form the second arm of the internal requirement, footnote 1 to Article V:1(a) provides for the *a priori* non-exclusion of any mode. Again what this may mean in reality is far from certain. Cottier and Molinuevo opine that an EIA may provide for differential degrees of liberalisation for different modes of supply as long as none of them is excluded entirely.<sup>73</sup> And in particular, no EIA should *a priori* exclude investment (mode 3) or labour mobility (mode 4).<sup>74</sup> But the question is far from settled since it is not clear whether a requirement by a host country to establish oneself locally (mode 3) before trading its services (in a very particular sector) in the local market – thereby excluding cross-border supply (mode 1) – could amount to a violation of the provision.<sup>75</sup> Equally unclear is whether, in trading services under mode 4, all labour mobility must be included in an EIA.

For CEMAC whose aim is to form a customs union, it is important to note that commitments on the movement of natural persons should not be narrower in scope than under the GATS, and also that it might be expected (or at least desirable) of its Members to go a bit further than what is achievable under the GATS (even though GATS V does not actually differentiate between CUs and FTAs).<sup>76</sup>

It would then seem at odd with the idea of “regional” trade liberalisation where the idea is to achieve a high stage of integration to exclude from the outset one mode of supply. This is

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<sup>68</sup> But difficulties in interpretation resurface if no commitments on MFN basis have been made at all. This is due to the fact that it is difficult to depict free trade scenario in services since almost all barriers are regulatory in nature with no obligation to harmonise laws.

<sup>69</sup> Cottier and Molinuevo (2008), *supra* note 22, at 132.

<sup>70</sup> *Ibid.*

<sup>71</sup> *Ibid.*, at 132-33.

<sup>72</sup> *Ibid.*, at 133.

<sup>73</sup> *Ibid.*

<sup>74</sup> P. Van den Bossche, *The Law and Policy of the World Trade Organization*, (2nd ed., Cambridge: Cambridge University Press, 2008), p. 711.

<sup>75</sup> Stephenson (2000), *supra* note 5, p. 516.

<sup>76</sup> *Ibid.*, footnote 6. However, it may be relevant while reviewing the agreement under Article V:2 GATS.

because “the purpose of Article V is to allow for ambitious liberalisation to take place at regional level, while at the same time guarding against undermining the MFN obligation by engaging in minor preferential arrangements.”<sup>77</sup> As Cottier and Molinuevo summarise:

While a) no mode of supply should be a priori excluded from the agreement, b) liberalisation commitments may be undertaken with regard to some modes of supply more than others, provided that c) the lack of commitments with regard to one or modes of supply does not impair the liberalisation of substantial volumes of trade.<sup>78</sup>

## 2. Substantially all discrimination

While featuring a substantial sectoral coverage, an EIA is required by Article V:1(b) to provide for the absence or elimination of substantially all discrimination between or among the parties to the agreement. In other words, national treatment in the sense of Article XVII of GATS must be extended to services and service suppliers of other parties to the agreement in the same manner as domestic services and service suppliers. This requirement to treat no less favourably service suppliers of other parties than domestic service suppliers aims at bringing about level playing fields for undistorted competition, and it must be done in respective parties’ markets on an equal footing (i.e. on a reciprocal manner).<sup>79</sup> Furthermore, Article V:1(b) should be seen as granting MFN too when national treatment is satisfied. This is because it is deemed inconsistent with that article if more favourable treatment is to be accorded to services and service suppliers of one party and not to those of another party to the agreement,<sup>80</sup> which is obviously the main reason why parties conclude PTAs.

The extent to which discrimination can be allowed to remain in such an agreement is not clear though. Because when this provision requires the elimination of “substantially all” discrimination, it does not require the elimination of “all” discrimination.<sup>81</sup> This entails that discrimination between nationals and foreigners can be maintained to the extent that it is necessary under GATS Articles XI (Payments and Transfers), XII (Restrictions to Safeguard the Balance of Payments), XIV (General Exceptions on: health, safety, taxation, public order, etc.) and XIVbis (Security exception). These exceptions are provided in order to balance between the individual States’ legitimate regulatory objectives and those of comprehensive liberalisation in an EIA. These domestic policy objectives should not be undermined.

However, because this list is not exhaustive, doubts persist as to whether parties to an EIA are not allowed to discriminate against services suppliers of another member of the agreement in granting licences for professional services (since Article VII on Recognition is not specifically exempted) or in granting domestic subsidies (Article XV) and government procurement of services (Article XIII) nor even applying Emergency Safeguard Measures (Article X) to their agreement.<sup>82</sup>

As to whether the requirement to eliminate substantially all discrimination covers both present *and* future measures, or whether it means *either* present *or* future (i.e. in the alternative), it has been argued that they are *options* (or strategies) with regards to the sector(s) being liberalised for which *alternatives* to be freely chosen by parties *are not*

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<sup>77</sup> Panel Report, *Canada – Autos*, para. 10.271.

<sup>78</sup> Cottier and Molinuevo (2008), *supra* note 22, at 134.

<sup>79</sup> *Ibid.*, at 135.

<sup>80</sup> Van den Bossche (2008), *supra* note 74, p. 712.

<sup>81</sup> *Ibid.*, p. 664. See also Stephenson (2000), *supra* note 5, p. 517.

<sup>82</sup> Van den Bossche (2008), *supra* note 74, p. 664 & Stephenson (2000), *supra* note 5, p. 517.

allowed.<sup>83</sup> Article V:1(b) provides for the “(i) elimination of existing discriminatory measures (a rollback mechanism), and/or (ii) prohibition of new or more discriminatory measures”. While (i) entails an obligation to liberalise, (ii) prevents parties from introducing new restrictive measures (a stand-still obligation).<sup>84</sup> As posited, these two tracks are simply means to achieve the main obligation of an EIA to eliminate “substantially all discrimination”.<sup>85</sup> A party would therefore not discharge its obligation neither by removing existing discrimination prior to the conclusion of the EIA while introducing new such measures afterwards, nor by refraining from the latter while keeping old discriminating measures in place.

It nevertheless remains a fact that it is still difficult to understand clearly what “substantially all discrimination” in the sense of Article XVII means because the paucity of case law under that same provision does not help to clarify what “discrimination” means in the first place. This is another grey area in GATS’s law.

### 3. Timeframe for liberalisation

The requirements to liberalise substantially all trade and to eliminate substantially all discrimination must not necessarily be met immediately, but could be achieved over a reasonable period of time. According to the provisions of Article V:1(b) in its last paragraph, these requirements should be achieved “either at the entry of that agreement or on the basis of a reasonable time-frame”. What “reasonable timeframe” may mean is subject to interpretation. For want of a discussion of this phrase in the sphere of services, the Understanding on the Interpretation of Article XXIV GATT 1994 where ‘reasonable timeframe’ is provided as being not more than ten years, can be offered as guideline,<sup>86</sup> although some Members suggested a shorter timeframe such as five years.<sup>87</sup>

### C. External requirements as fortress warning

The GATS does not distinguish between CUs and FTAs. But GATS Article V EIA looks like a FTA since there is no obligation on its Members to adopt a common external tariff.<sup>88</sup> CEMAC currently features a CU meanwhile a GATS EIA does not necessarily have to be one. This would mean that in achieving liberalisation among them, individual CEMAC states would keep their respective services market at committed level with the WTO.<sup>89</sup> That distinction between FTA and CU notwithstanding, Article V:4 GATS provides that the

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<sup>83</sup> Committee on Regional Trade Agreement, *Examination of the North American Free Trade Agreement*, Note of the Meeting of 24 February 1997, WT/REG4/M/4, cited in Van den Bossche (2008), *supra* note 74, p. 712, footnote 399.

<sup>84</sup> Cottier and Molinuevo (2008), *supra* note 22, at 136

<sup>85</sup> *Ibid.*

<sup>86</sup> Van den Bossche, *supra* note 74, p. 712.

<sup>87</sup> Stephenson (2000), *supra* note 5, p. 519, footnote 8 citing a proposal made by Japan at a meeting of the WTO Council for Trade in Services in April 1999 where it is required of an EIA to eliminate discriminations in sectors covered within five years after the entry into force of that agreement. GATT Article XXIV discussions have also in some occasions suggested longer timeframes of say 12 years as practice shows (like in the case of the FTA between the United States and Chile). See L. Bartels, ‘Interim Agreements’ under Article XXIV GATT, 8 World Trade Review, no. 2 (2009), 339-350, at 346-348. See also Gathii (2011), *supra* note 4, p. 86 *et seq* where the author argues *inter alia* for longer timeframe for developing countries, especially pursuant to the Enabling Clause.

<sup>88</sup> See Matsushita, Schoenbaum and Mavroidis (2006), *supra* note 29, p. 578 who argue that GATS PTA borrows features of FTAs even though the term is not used as such.

<sup>89</sup> Commitments are inscribed in each WTO Member’s GATS Schedule of Specific Commitments. This Schedule is a document where a Member binds itself not to impose any new measures that would restrict entry into the market beyond the specified levels of market access and national treatment in the document.

members to an EIA must not raise the level of barriers applicable to outsiders.<sup>90</sup> In other words, liberalisation must not be achieved at the expense of others.<sup>91</sup>

Although in assessing the extent to which this barrier has been raised vis-à-vis third parties recourse has to be made to the level of barriers applicable prior to the conclusion of the agreement, and in a sector/subsector by sector/subsector basis, difficulties stemming from the almost impossibility to compute the “overall level of barriers” render the translation of this requirement into practice hard to achieve. This is simply because barriers to trade in services are for the most part not of a quantitative but of a qualitative nature.<sup>92</sup> But since the provision makes references to measures “applicable”, and not those “effectively applied”, what this requirement means in reality is that Members of the EIA should not raise with respect to third WTO Members barriers above their multilateral commitment.<sup>93</sup> Additionally, it would mean that parties of an EIA should not reduce the level of trade in services in any sector or subsector after conclusion of the agreement,<sup>94</sup> or that they should not reduce the level or growth of trade in any sector or subsector below a historical trend.<sup>95</sup> This in reality would be translated into a prohibition of using liberalisation in the accounting services to balance protection in legal services.

Article V:5 on the other hand sets compensatory adjustments in favour of affected parties when the conclusion, enlargement or any significant modification of an EIA leads to the withdrawal or modification of one of its Members’ specific commitments. An incumbent to the PTA shall only proceed with the modification or withdrawal of concession – often to comply with the EIA rules – upon having given a 90 days’ advance notice to the Council for Trade in Services (CTS), after which notice the procedures of Article XXI of the GATS (Modification of Schedules) in its paragraphs 2, 3 and 4 shall take effect. In all, any introduction of measures contrary to one’s specific commitments at multilateral level while joining an EIA triggers an immediate renegotiation process of those commitments as provided for by Article XXI of the GATS.<sup>96</sup> What Article V:5 stands out to say is that participation of a WTO Member into an EIA shall not, with respect to other Members with which the incumbent has concluded a contract prior to joining the scheme, be prejudicial. In this sense, Article V:5 is simply *lex specialis* to Article V:4 because the former is an elaboration of the latter.<sup>97</sup> This is however without prejudice to any WTO Member, whether participating or not

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<sup>90</sup> Article V:4 states in relevant part that an EIA “shall in no respect of any Member outside the agreement raise the overall level of barriers to trade in services within the respective sectors or subsectors compared to the level applicable prior to such an agreement”.

<sup>91</sup> Cottier (1996), *supra* note 27, at 159.

<sup>92</sup> Stephenson (2000), *supra* note 5, p.519.

<sup>93</sup> Cottier and Molinuevo (2008), *supra* note 22, p. 144.

<sup>94</sup> Stephenson (2000), *supra* note 5, p.519.

<sup>95</sup> *Ibid.* See also Van den Bossche (2008), *supra* note 74, p. 712.

<sup>96</sup> Cottier and Molinuevo (2008), *supra* note 19, p. 145. Article XXI of the GATS provides for situations where a WTO Member intends to modify or withdraw a commitment in its Schedule. Paragraphs 2, 3 and 4 of that provision essentially deal respectively with “compensatory adjustments” in favour of affected Member(s), arbitration proceedings in case no agreement has been reached between the modifying Member and the affected one(s), and “retaliation” by the affected Member(s) if the modifying Member does not comply with the findings of the arbitration.

<sup>97</sup> Matsushita, Schoenbaum and Mavroidis (2006), *supra* note 29, p. 579. The legal maxim of statutory interpretation “*lex specialis derogat lege generali*” (literally meaning that a “special law prevails over general laws”), applies in situations of conflicts and may also give instructions on what a general rule requires in the case at hand. Article V:4 and Article V:5 of the GATS are therefore governed by this general/special relationship. On the study of “*lex specialis*” in international law, see for instance M. Koskenniemi, *Fragmentation of International Law: Difficulties Arising From the Diversification and Expansion of International Law*, Report of

in an EIA, to introduce new restrictions on market access or national treatment in sectors and modes of supply where specific commitments were not made.<sup>98</sup>

#### D. Notification

As a matter of procedure, conclusion of a GATS EIA must be promptly notified to the WTO CTS accompanied by any relevant information that might be requested by the Council. This is what comes out from the provision of GATS Article V:7. What then constitutes “prompt notification” has been suggested to be notification occurring “no later than directly following the parties’ ratification of the EIA, and before the application of preferential treatment between the parties”. Hence, notification must be done prior to the implementation of obligations and commitments pertaining to the EIA.<sup>99</sup> In other words, notification to the CTS is a prospective action of the potential EIA.

The purpose of notification as it stems from the wordings of Article V:7(a) is to allow the CTS to examine its consistency with the provision of GATS V, hence its compatibility with the multilateral rules. There is a possibility for the CTS to set up a working party to examine the consistency of the agreement, but it is not required to do so. When the CTS elects to establish that working party, EIAs are naturally referred to the Committee on Regional Trade Agreements (CRTA) for examination. However, there has been no instance where a PTA was ruled outright, if at all, to be WTO-inconsistent in the CRTA process.<sup>100</sup> In fact, following the creation of the *Transparency Mechanism for Regional Trade Agreements* “the multilateral review has been narrowed down to a mere exercise in transparency”, and no such CRTA report exists to date on the GATS PTAs consistency.<sup>101</sup> In other words, the PTA review mechanism has moved progressively from an *ex ante* to an *ex post* exercise, mainly due to the fact that PTAs are often notified only after their conclusion and already operational.<sup>102</sup>

The application of Article V:7 GATS is also rendered difficult owing to the failure to notify the services component of preferential agreements burgeoning in many parts of the world. Many of these schemes by behaving like this fail to seize opportunities to deviate from MFN in legality, especially when “flexibility” (for developing countries) is on the menu. Others simply elect to operate in a state of illegality.<sup>103</sup> Because review by the CRTA does not always yield satisfactory results due to the “transparency exercise” as already pointed out, existing PTAs also benefit from the fact that other WTO Members are reluctant to challenge their functioning before the Dispute Settlement Body (DSB). If they were to, chances are that

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the Study Group on Fragmentation of the International Law Commission, UN. Doc. A/CN.4/L.682 (13 April 2006), available at: <[http://untreaty.un.org/ilc/documentation/english/a\\_cn4\\_l682.pdf](http://untreaty.un.org/ilc/documentation/english/a_cn4_l682.pdf)>.

<sup>98</sup> Cottier and Molinuevo (2008), *supra* note 22, p.146. It is again the place to note the vacuum in case no commitment at all has been made at multilateral level. In such a scenario, Article V:5 is of less significance, if at all. See also the text to note 68 *supra*.

<sup>99</sup> See the Transparency Mechanism for Regional Trade Agreements Decision, WT/L/671, para. 3 of 18 December 2006, cited in Cottier and Molinuevo (2008), *supra* note 22, p. 149.

<sup>100</sup> This has much to do with the unanimous decision method required within the CRTA to arrive (where, it is important to note, incumbents will also be voting) as well as risk-averse Panels’ strategies. On PTAs’ review mechanisms, see P. Mavroidis, *Trade in Goods: the GATT and the Other Agreements Regulating Trade in Goods*, (Oxford: Oxford University Press, 2007), pp. 148-178.

<sup>101</sup> The Transparency Mechanism for Regional Trade Agreements (of 14 December 2006) was meant to be a “complement” to the existing arsenal (namely Article XXIV GATT, Article V GATS, Understanding on the Interpretation of Article XXIV GATT, Decision on the establishment of the Committee on Regional Trade Agreements), but ended up being a “substitute” to it. On this score, see Mavroidis (2010), *supra* note 9, at 1149. See also Cottier and Molinuevo (2008), *supra* note 22, p. 150.

<sup>102</sup> Mavroidis (2006), *supra* note 21, at 204

<sup>103</sup> Stephenson (2000), *supra* note 5, p. 520.

it would result into the undesirable dispute battles.<sup>104</sup> Risks for governments' application of preferential rules being challenged by a third WTO Member are however even greater if a PTA was to be held illegal *ex post*. This would entail for companies losing the preference scheme under which they have been conducting their business, hence losing their competitive advantage.<sup>105</sup>

Although it is rather doubtful that a WTO Panel would order a straightforward dissolution of a PTA for failure to comply with the rules of procedure, precaution would dictate for an early notification to avoid the domino effect ensuing from a delayed notification. A strong dispute settlement mechanism is further a way to balance between the proliferation of PTAs and the need to ensure compliance with the multilateral discipline to avoid diversion of trade. And since governments do not want confidence placed in them by firms to be shaken by disputes that would nullify concessions under which they have been operating, this could serve as a deterrent for those PTAs willing to operate inconsistently with the multilateral rules. Practice seems to be at odd with this ideal nevertheless.

### **E. The Standard of Review**

Article V:2 reads:

In evaluating whether the conditions under paragraph 1(b) are met, consideration may be given to the relationship of the agreement to a wider process of economic integration or trade liberalisation among the members concerned.

In order to decide whether the requirement of absence or elimination of “substantially all discrimination” has been satisfied, the CTS (or based on the report of the CRTA) is allowed to take into account the contribution of the notified EIA to the “wider process of economic integration” between the members of the said EIA. In this vein, elements having to do with the overall development policy of participating countries to the EIA may be relevant in reviewing a notified scheme.<sup>106</sup> This concept of “wider process of economic integration” has been said in trade in goods to refer to the liberalisation pursuant to Article XXIV:5 GATT 1994.<sup>107</sup> But it seems not to provide in a clear manner how to consider the relationship between integration in goods and in services together. GATS Article V:1 as we have seen requires intra-trade to be “substantially liberalised” among and between EIA’s members by

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<sup>104</sup> Despite the strength of WTO judicial mechanism, disputes do not abound. There exists what has been described as a “mutual deterrence scenario”: Mavroidis (2006), *supra* note 21, at 211. This is the case even though it is clear that the party invoking the application of the provision related to the establishment of the PTA (i.e. the incumbent) bears the burden of showing that its scheme meets such requirement. It means that the challenging party (i.e. the outsider), *in principle*, bears no risk (if not that of seeing its own PTA facing challenges too). As Mavroidis puts it, motivations are possibly guided by the fact that “outsiders of today might be the incumbents of tomorrow”. As such, they gain from not challenging today what they might be benefitting from when they decide tomorrow to join the PTA, avoiding to “face the music [they] helped to compose”. Moreover, it is not excluded that challenge on a PTA provision might lead to retaliation on a complete different provision. To this risk-averse conduct, the author associates the often very high litigation costs (for sometimes countries with no diplomatic presence in Geneva). See ample discussion by Mavroidis (2007), *supra* note 100, pp. 171-177.

<sup>105</sup> Cottier (1996), *supra* note 27, at 161.

<sup>106</sup> Matsushita, Schoenbaum and Mavroidis (2006), *supra* note 29, p. 581.

<sup>107</sup> That is, the external requirement not to impose overall barriers to outsiders to the CU and not to maintain those of the members of the FTA, higher than those in place prior to the conclusion of the agreement. See the Committee of Regional Trade Agreements, Synopsis of Systemic Issues Related to Regional Trade Agreements, Note of the Secretariat, WT/REG/W/37 (2 March 2002), para. 85; and, Committee on Regional Trade Agreements, Systemic Issues Arising from Article V of the GATS, Communication from Hong Kong, China, WT/REG/W/34 (19 February 1999), para. 11, both cited in Cottier and Molinuevo (2008), *supra* note 22, p. 139.

the removal of “substantially all discrimination, and not vis-à-vis barriers to third-parties. Article V:4 GATS – external requirement – is not subject to Article V:2 review. This is understandable because members of a GATS EIA are not required to adopt a common external policy.

Furthermore, the fact that consideration “may be given” to participation in a wider integration process in both goods and services suggests that it is not a mandatory requirement to review compliance of a notified EIA with the multilateral rules. It is instead an *optional* consideration which, as has been argued, may lead to the CTS disregarding the relationship of the services component with goods liberalisation altogether, or simply subjecting the consideration of relationship between integration in goods and services to completely different criteria (the level of development of parties for instance).<sup>108</sup> This also fairly implies that an EIA is not required to cover goods and services simultaneously, at least, as has been put, on “formal” grounds absent a “specific obligation to that effect.”<sup>109</sup> Also, the language used here – that is its non-compelling character – has been attributed to the fact that the CRTA’s review process is now one focused on transparency only, and, as such, does not provide any practical effect of this standard of review provision.<sup>110</sup> Although unlikely, affected WTO Members (incumbents and outsiders together) are nonetheless not prevented from lodging a complaint for non-conformity of an EIA with the “wider process of economic integration” before a WTO judicial body.<sup>111</sup> Despite these doubts, it would not be absurd to see that a GATT-consistent PTA is judged GATS-consistent if liberalisation in services among Members is not quite complete yet, since Article V:2 does not entirely rule out this possibility. The immediate question that may follow, is whether Article V:2 could be combined with that of “flexibility” under Article V:3 when reviewing south-south services EIAs.<sup>112</sup>

Although a bit tangential, review of GATS EIAs could also be altered by the GATS Annex to Article II Exemptions.<sup>113</sup> In fact Article II:2 provides for the possibility for WTO Members to deviate from MFN if they inscribe these inconsistent measures in their MFN Exemptions List, provided, further, certain conditions are satisfied. It provides for justification for giving more favourable treatment to the Member(s) specified in the List.<sup>114</sup> Meant not to last for more than ten years, its legal value is put in doubt since some Members have ascribed a permanent status of their MFN exemptions in their Lists. The measure is available to new Members that later decide to join the WTO. This raises a problem of compatibility of this MFN exemption and the obligation of a Member in a EIA vis-à-vis the multilateral discipline. An acceding country can make use of its once-and-for-all opportunity to inscribe in its List

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<sup>108</sup> Cottier and Molinuevo (2008), *supra* note 22, p. 140. The level of development, as we will see, is also a criterion relevant in granting flexibility under Article V:3 GATS.

<sup>109</sup> Matsushita, Schoenbaum and Mavroidis (2006), *supra* note 29, p. 581.

<sup>110</sup> See text to note 101 *supra*.

<sup>111</sup> It seems unlikely to happen because an incumbent would rarely want to help burst a PTA he helped to build even if some Members to the agreement are not complying with their obligations. Yet, it is not excluded completely. Whether the incumbent is in possession of a valid claim is another issue altogether. As for the outsider, it is always possible, but again unlikely on the grounds that the EIA has breached the legal discipline of its internal requirement (Article V:1 GATS) (which would probably have been dealt with by the CTS/CRTA, or simply because it is a bad move to adopt since the less trade liberalisation exists among PTA members, the less the risk of trade diversion, hence more gains potentials for outsiders). Still, the outsider could be tempted to challenge the EIA on other grounds including, but not limited to, Article V:4 GATS. However, recall our discussion *supra* note 124, and see “Article V:6” GATS *infra*.

<sup>112</sup> On “flexibility”, see Section F *infra*.

<sup>113</sup> Stephenson (2000), *supra* note 5, pp. 525-526.

<sup>114</sup> WTO (1999), *supra* note 48, p.165, footnote 427.

some sectors that are required in order for the EIA to have “substantial sectoral coverage” in the terms of Article V:1.

Another review hurdle linked to the reluctance to notify RTAs has to do with multiple and overlapping memberships. This spaghetti bowl effect renders monitoring rather difficult.

#### **F. Flexibility for Developing Countries’ Economic Integration Agreements**

There is no GATS strict equivalent of the “Enabling Clause” as is the case in the sphere of goods.<sup>115</sup> When entering into a preferential services trade scheme, developing countries are subject to the same discipline of Article V like developed countries. Multilateral review of GATS EIAs is looser than in the goods context though. And it is even looser when developing countries are involved. This is what emanates from the provision of Article V:3 GATS. Article V:3(a) provides that:

“Where developing countries are parties to an agreement of the type referred to in paragraph 1, *flexibility shall be provided* for regarding the conditions set out in paragraph 1, particularly with reference to subparagraph (b) thereof, *in accordance with the level of development of the countries concerned*, both overall and individual sectors and subsectors.”

This paragraph requires that the standards applied with regard to ordinary EIAs be disregarded in favour of a more relaxed one when developing countries are implicated in the formation of such a bloc. Flexibility, however, is to be granted in accordance with the *level of development* of the countries concerned. This implies that an EIA can as well feature members with different levels of development, more precisely a developed country and a developing country. This would further mean that all parties to the agreement are not necessarily concerned by the flexibility, and that Article V:3 is not limited in the scope of PTAs concluded among developing countries.<sup>116</sup> In the case the agreement is between developed and developing countries, flexibility will concern the reciprocity requirement of “substantially all discrimination” elimination of Article V:1(b).<sup>117</sup> This would entail that the degree for granting national treatment would vary and be less constraining for the developing country party.

Since the level of development of the countries concerned is to be taken into consideration both the state and the prospects of competitiveness of the economy as a whole as well as those of particular services sectors should be the basis of assessment.<sup>118</sup> So, despite Article V:1(b) discipline, flexibility may allow for lesser commitment in less competitive sectors, or full exemption of these sectors and sub-sectors altogether or again allow for a longer transition period in order to extent the “reasonable timeframe” (for liberalisation) of developing countries.<sup>119</sup> This interpretation sounds much as an “infant-industry” safeguard-type of argument in GATT. Although GATS does not have a provision akin to this in the realm of service yet, it might hence develop quite well from EIAs. It would be sound, though debatable, to hold the same line of argument when the level of development is different between two developing countries as well, especially when the performance in international trade plus the degree of commitment at multilateral level are blatantly asymmetrical. This

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<sup>115</sup> Recall our discussion *supra* note 13 on LDCs services waiver.

<sup>116</sup> Cottier and Molinuevo (2008), *supra* note 22, pp.140-141.

<sup>117</sup> *Ibid.*, p.141.

<sup>118</sup> *Ibid.*

<sup>119</sup> *Ibid.*

could therefore counter the difficulty relating to “self-election” as developing countries at the WTO since this status remains until today uneasy to grasp.

What about asymmetry in development levels between CEMAC countries where intra-trade in goods is not that high? CEMAC’s membership is composed of Equatorial Guinea (classified by the United Nations as a Least Developed Country “LDC”)<sup>120</sup> and not yet a WTO Member, Central African Republic (CAR) and Chad (LDCs also), Cameroon, Congo and Gabon (being “developing countries”). Chad and CAR are also land-locked countries. What weight should be given to these factors while accessing the degree of trade liberalisation among parties and the extent to which they are bound to grant national treatment among themselves? If the deciding factor should be the degree of international competitiveness and commitments it might be expected of Cameroon and Gabon to be more open than Chad or CAR for instance. This poses another problem; that of the level of MFN the CAR is allowed to grant to the other parties of the agreement should it decide to open its market more to Chad with which it shares a “comparable level of development” and not to Gabon with which it does not. The readings of Article V:3 lit. a does not quite provide a clear answer to this question and we are tempted to argue that this will not be accepted even though allowing it might not render the agreement per se illegal. But all will be a matter of scheduling and whether a negative or a positive approach is adopted.

Article V:3(b) on the other hand reads:

Notwithstanding paragraph 6, in the case of an agreement of the type referred to in paragraph 1 involving only developing countries, more favourable treatment may be granted to juridical persons owned or controlled by natural persons of the parties to such an agreement.

This provision talks about an agreement where all parties are developing countries. It governs preferential rules of origin that parties to the agreement *may* choose to take advantage of or not. When developing countries decide to implement it, the benefits accrue from the fact that a firm is established and is conducting business in the territory of the parties to the agreement. The qualification for benefitting of the flexibility is that the entity should be owned or controlled by the individuals who are nationals of one of the parties to the EIA. This is different in scope with Article V:6, as we will see, where the discipline relates to legal persons controlled by natural persons of a third state. Article V:3(b) applies notwithstanding Article V:6. Under this provision, EIAs members would lawfully discriminate in favour of an Article V:3(b)-type firm even in the presence of an Article V:6-type firm.

It follows that preferential treatment to service suppliers owned or controlled by individuals is restricted to citizens to EIAs concluded among developing countries.<sup>121</sup> This in turn amounts to a particular privilege granted to private ownership which departs from the

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<sup>120</sup> The UN uses the following criteria to identify LDCs: (i) a low-income criterion, based on a three-year average estimate of the gross national income (GNI) per capita; (ii) a human resource weakness criterion, involving a composite Human Assets Index (HAI) based on indicators of: (a) nutrition; (b) health; (c) education; and (d) adult literacy; and (iii) an economic vulnerability criterion, involving a composite Economic Vulnerability Index (EVI) based on indicators of: (a) the instability of agricultural production; (b) the instability of exports of goods and services; (c) the economic importance of non-traditional activities (share of manufacturing and modern services in GDP); (d) merchandise export concentration; and (e) the handicap of economic smallness; and the percentage of population displaced by natural disasters. See the UN Office of the High Representative for the Least Developed Countries, Landlocked Developing Countries and Small Island Developing States, available at : <<http://www.un.org/special-rep/ohrls/ldc/ldc%20criteria.htm>>, accessed 08 June 2013.

<sup>121</sup> Cottier and Molinuevo (2008), *supra* note 22, p.142.

standard consideration of juridical persons whether owned or controlled by natural or juridical persons.<sup>122</sup> As such, it favours small and medium sized enterprises over enterprises of greater importance that are subject to Article V:6, but does not at the same time mean that barriers to outsiders should be unduly burdensome *contra* Article V:4.<sup>123</sup>

In summation, Article V:3 allows for broad flexibility when developing countries enter into an EIA. Pursuant to that provision, the level of development of the country in question must be taken into account while assessing the degree of flexibility its industries should enjoy. It further allows developing countries to grant more favourable treatment to their services providers provided it is controlled by their own nationals. However, paragraph (a) does not necessarily imply paragraph (b). Rather, they can be combined depending on the status of the parties. That is the reason why the flexibility of Article V:3(a) and the preferential rule of origin of V:3(b) are “two independent and cumulative means to grant special and differential treatment to developing countries in EIAs in services.”<sup>124</sup>

### **G. Foreign Direct Investments (FDIs) in EIAs or Liberal Rule of Origin: Article V:6<sup>125</sup>**

A company incorporated under the laws of a Member to the EIA and owned by individuals or firms of another country must be granted the benefits of the EIA provided it engages into substantive business operations in one of those countries.<sup>126</sup> As the market becomes larger by the conclusion of the EIA, opportunities for outsiders are also increased. Article V:6 thus extends the benefits stemming from the conclusion of the EIA to the service suppliers of a country not party to that scheme. In that sense, this is a revolutionary provision that encourages FDIs in EIAs. The rationale behind it is probably to reduce trade-distorting effects accruing from preferences inherent to EIAs with this extension to the benefit of any WTO Member that happens to satisfy the conditions attached to it.<sup>127</sup> RTAs members must therefore be aware that their preferential scheme does not prevent third parties from benefitting from the newly-formed larger market.

In concrete term, market access preferences and national treatment are henceforth granted to service suppliers of a third country established in one country party to the agreement without consideration as to whether they are owned or controlled by nationals of parties to that agreement.<sup>128</sup> A juridical person is defined under Article XXVIII (I) GATS as including “any legal entity duly constituted or otherwise organized [sic] under applicable law, whether for-profit or otherwise, and whether privately-owned or governmentally-owned, including any corporation, trust, partnership, joint venture, sole proprietorship or association.” And since the provision captures both *duly constituted* juridical persons (in the sense of incorporation) as well as *otherwise organised* such legal entities, it surrounds entities like branches, representative offices of foreign established corporations. This is because the various legal procedures through which these “otherwise organised” entities have to pass for their recognition are tantamount to “constitution”.<sup>129</sup> In this sense, non-incorporated entities are

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<sup>122</sup> *Ibid*, p.143.

<sup>123</sup> *Ibid*.

<sup>124</sup> *Ibid*.

<sup>125</sup> The phrase “liberal rule of origin” is borrowed from Cottier and Molinuevo (2008), *supra* note 22, p.146.

<sup>126</sup> Article V:6 reads: “[a] service supplier of any Member that is a juridical person constituted under the laws of a party to an agreement referred to in paragraph 1 shall be entitled to treatment granted under such agreement, provided that it engages in substantive business operations in the territories of parties to such agreements.”

<sup>127</sup> Cottier and Molinuevo (2008), *supra* note 22. p. 146

<sup>128</sup> *Ibid*.

<sup>129</sup> *Ibid*, p. 147.

embraced by the rule of origin since they are not *expressis verbis* excluded from this provision.

A service supplier of a third WTO Member will take advantage of this provision and be not discriminated against only on condition that it engages in “substantive business operations” in the territory of a Member of the PTA. Substantive business operations have been interpreted to mean “regular commercial activity” where “business operations” cover activities like production, distribution, marketing, sale and delivery of a service.<sup>130</sup>

Cottier and Molinuevo further submit that this requirement can be viewed in two ways: a wide view and a narrow one. Firstly, it could be said to mean that the “substantive business operation” is to take place in the territory of either party, in which case the rules of origin are cumulative.<sup>131</sup> Under this reading a Chinese company for instance would have access to Gabonese market and be granted national treatment simply by establishing a subsidiary in Chad. Secondly, it could be interpreted to mean that benefit of the provision stemming from substantive business operation would be accorded only in one territory especially where the service supplier is established. This is a way to narrow down the scope of the provision to actually catch only few of the service suppliers engaged in commercial activities in the territory of one party to the EIA. These two interpretations are however correct in that whether you take the first or the second, the result is to have a firm that qualifies as conducting trade “in the territory of the parties” to claim for non-discrimination, and it does qualify as such under each of the two grounds.

Article V:6, recall, applies without incidence to an EIA composed of only developing countries. In the latter scenario, the relevant provision is Article V:3(b) where a “restricted” rule of origin is applied militating for a more favourable treatment to service suppliers owned by nationals of the parties to the agreement, taking precedence over Article V:6. Noteworthy also is that the rule of origin as conceived here does not apply to natural persons under *Mode 4*, unfortunately.

## **H. Economic Integration Agreements’ Liberalisation Mechanisms**

### **1. Scope of Liberalisation and Depth of Commitments**

The scope also forms part of liberalisation strategy. EIAs either opt for universal sectoral coverage where particularly sensitive sectors, such as air transport and audiovisual services, are excluded.<sup>132</sup> Liberalisation here can adopt a progressive method with an adjustment period by which commitments should be implemented. It is also the case to feature in some EIAs separate treatment of investments and movements of natural persons.<sup>133</sup>

Concerning the depth of commitments, their intensity affects the way countries reap benefits of liberalisation at regional level. This is chiefly the case with the liberalisation of the controversial *Mode 4*. It is therefore possible for members of an EIA to balance between breadth (number of sectors covered) and depth (intensity of liberalisation of scheduled commitments).

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<sup>130</sup> Article XXVIII (b). See the Negotiating Group on Rules, Compendium of Issues Related to Regional Trade Agreements, Background Note by the Secretariat, Revision, TN/RL/W/8/Rev.1, paras 111-112 cited in Cottier and Molinuevo (2008), *supra* note 22, p. 148, footnote 41.

<sup>131</sup> *Ibid.*, p.148.

<sup>132</sup> UNCTAD (2007), *supra* note 3, p.7.

<sup>133</sup> *Ibid.*

## 2. Liberalisation Modalities

Instantaneous free services trade in EIAs is rather chimerical to think of. Countries that choose to liberalise services among them have done so in a GATS schedule of commitments manner and do have the possibility to elect between two competing major methods: a positive list approach and a negative list approach. It is also possible to adopt a “hybrid” method, sometimes said to be reflected in the positive list approach itself.<sup>134</sup> The positive list resembles GATS’s scheduling mechanism – i.e. no sector and mode of supply is liberalised unless expressly inscribed in the list of commitments – and provides much more flexibility regarding the scope and pace of liberalisation. This “bottom-up” approach features cautiousness on the part of parties to the EIA. The advantages it offers are that parties retain the right not to disclose to their partners the remaining discriminatory measures and the possibility to introduce new ones because they remain sovereign to undertake no commitments.<sup>135</sup> This method is prominent in agreements involving developing countries.

The positive list method is also described as hybrid in that it features “a voluntary, positive, choice of sectors, sub-sectors and/or modes of supply in which governments are willing to make binding commitments” [and] a negative list of non-conforming measures to be retained in scheduled areas”.<sup>136</sup>

The negative list on the other hand operates in a “list it or lose it” fashion.<sup>137</sup> That is, all sectors and modes of supply are *presumed* to be liberalised and subject to the requirement of non-discrimination within the trade bloc, *unless* a country *expressly* says the contrary by listing sectors and modes to which restrictions remain and/or apply. Here, practice has shown that parties to EIAs that opt for this approach usually insert in their “reservation lists” (that are subject to periodic negotiations or consultations) existing restrictions and possibilities for future ones so as to ensure transparency.<sup>138</sup> Western Hemisphere-type agreements led by NAFTA feature a negative listing method. Mexico’s participation in NAFTA has somewhat extended this pattern in other PTAs in which it takes part.<sup>139</sup>

Negative list approach bears its own advantages and drawbacks. As far as drawbacks are concerned, by not listing a particular sector countries automatically lose the right to introduce discriminatory measures in future sectors including sector that are inexistent or simply not yet regulated at the time the agreement enters into force.<sup>140</sup> Another inconvenience of a lesser magnitude is that it is burdensome to administer a scheme of this sort concluded under a negative listing commitment and even more burdensome when countries involved lack essential capacities like developing countries.<sup>141</sup> Adjustment time –as a response – conceded to some parties of that agreement to comply with their listing commitments might also blur transparency from a private party standpoint.<sup>142</sup> This fear should however be taken with a pinch of salt when an agreement of this kind involves countries with a comparable level of

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<sup>134</sup> A. Mattoo and P. Sauvé, “Regionalism in Services Trade”, in A. Mattoo, R. Stern and G. Zanini (eds.), *A Handbook of International Trade in Services*, (Oxford: Oxford University Press, 2007), p. 253.

<sup>135</sup> *Ibid.*

<sup>136</sup> *Ibid.*

<sup>137</sup> *Ibid.*

<sup>138</sup> *Ibid.*, p. 254.

<sup>139</sup> *Ibid.* In fact, it is the case with the Andean Community agreement that is said, however, to have adopted a “somewhat different version of the negative list”: see *Ibid.*, footnote 33.

<sup>140</sup> *Ibid.*, p. 256.

<sup>141</sup> *Ibid.*

<sup>142</sup> *Ibid.*

development and with comparable regulatory frameworks. Especially in certain South-South PTAs (or North-North), it should be of less concern than in North-South PTAs.

Concerning the benefits of the negative scheduling approach, one can cite transparency in general. This method of commitment signals the intention of one member not to rollback its policy and allows potential traders and investors to find in the reservation lists a one-stop shop of restrictions in foreign markets.<sup>143</sup>

## V. EFFECTS OF REGIONAL TRADE LIBERALISATION IN SERVICES AND A POTENTIAL CENTRAL AFRICA SERVICES TRADE BLOC

CEMAC was created in 1994 to replace the moribund UDEAC.<sup>144</sup> Pursuant to Article I of CEMAC Treaty of 1994, its objective is to promote a balanced development among the members. Parties also intend to move from the existing state of cooperation among them to that of a union capable of fulfilling the economic and monetary integration agenda.<sup>145</sup>

CEMAC is also open to other African countries sharing the same ideals – of solidarity, freedoms and liberties, democracy, human rights and the rule of law – to join.<sup>146</sup> This provision means at least three things: firstly, CEMAC is not *only* an economic institution, but also a political one; secondly, and probably more importantly, only an African country sharing the same ideal can ask to join – which can explain partly why it qualified under the “Enabling Clause”<sup>147</sup>–; and thirdly, the aspiring African country must not necessarily be contiguous to the present ones since the consideration is in terms of “ideals” and not that of “proximity” (in geographical terms). This leads us to the early conclusion that an EIA among these countries in light of the current treaty can only involve something among African States. Although at the time of writing Equatorial Guinea as a CEMAC Party is not yet a WTO Member, that does not affect our discussion since a PTA concluded between a WTO Member and a non-Member still has to pass the test of Article V of the GATS in respect of the WTO Member<sup>148</sup> (i.e. Cameroon, Central African Republic, Chad, Congo and Gabon).

In order to achieve its objective, the Treaty established an economic union to complement the pre-existing monetary union that was in place since the colonial period.<sup>149</sup> Member States empowered these two institutions to conduct the policies related to the elimination of all obstacles to intra-trade within the region with the ultimate aim of achieving a common market. The Economic Union of Central Africa (UEAC) is therefore the institution empowered with the “economic integration” agenda.

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<sup>143</sup> *Ibid.* p. 255.

<sup>144</sup> UDEAC stands for the Customs and Economic Union of Central Africa – a post-independence regional grouping formed in 1964. Worth noting is that it’s during UDEAC years that the EC and ACP conventions (Lomé I et seq) were entered into. Also, this period is marked by the creation of another, hence overlapping, central African regional grouping, as a concretisation of the Lagos Plan of Action: ECCAS (in 1981). CEMAC Treaty of 1994 was further revised in 2008.

<sup>145</sup> See also Article 2 CEMAC Treaty (Revised).

<sup>146</sup> Article 6 CEMAC and Article 55 CEMAC (Revised). This can qualify as a “semi-open” regionalism in that *any* African State can join the scheme (kind of “open”), but limited to African *only* (sort of “closed”).

<sup>147</sup> See WTO documents WT/COMTD/N/13 and WT/COMTD/24 of 29 September 2000. See for instance paragraph 2(c) of the Enabling Clause that allows less developed Members to enter into PTAs not meeting the strict requirements (of reciprocity, substantial all the trade, etc.) of Article XXIV GATT.

<sup>148</sup> Cottier and Molinuevo (2008), *supra* note 22, p.130.

<sup>149</sup> See the second intent of the Preamble of UEAC Convention.

## A. CEMAC Common Market Ambitions

Calqued on the EU integration model, CEMAC RTA intends to create a Central Africa Common Market based on the free movement of goods, services, capitals and persons.<sup>150</sup> The Convention governing the UEAC is the instrument that provides for the rules on elimination of obstacles to trade in the CEMAC region. This text invites parties to a gradual and partial conferral of their sovereignty in view of achieving the objective of regional integration.

Initially planned to be gradually achieved in three steps of five years each from the entering into force of this Convention in 1999, parties were forced to reconsider their ambitions after recording some delays in that sense. Against that backdrop a new Treaty was signed in 2008 and another UEAC Convention was entered into to build upon the results obtained from the first instrument. In this new vision, objectives of the economic union shall be realised in two steps of three years each.<sup>151</sup> Here, the common market which is to be real at the end of the second phase will consist in the scheme going through Balassa stages of economic integration.<sup>152</sup>

These ambitions, however, have yielded mitigated results. In fact, if CEMAC has managed to form a monetary and a customs union and succeeded to harmonise competition and business regulatory framework with a move towards macroeconomic convergence,<sup>153</sup> it has also not escaped documentation that CEMAC displays the lowest intraregional trade share of less than 2 percent as compared to all other RTAs in Africa.<sup>154</sup> A simplistic look at statistics depicts CEMAC's share of services exports also as one of the slowest to develop as compared to other major RTAs in Africa. Exports of services for this sub-region are still meaningless as compared to its ECOWAS counterpart not to mention its SADC or COMESA during the same period. It illustrates that the value and share of services exports in these other African RECs has more than quadrupled if not quintupled over time.<sup>155</sup> Conversely, imports have not ceased to increase and surpass the share of exports in this region. While the pattern is similar in other parts of the world, the trade balance tends to equilibrium in some parts of Africa. Again, *cum grano salis*, this is a rather non-conclusive statement because all factors are not taken into account, especially the informal sector. These statistics should also be taken with caution because of multiple and overlapping membership of some countries in these RTAs – DRC (for the purpose of this paper) is an obvious example. Moreover, these statistics account for international trade in general, and neither for interregional nor intra-regional trade.

A question that flows naturally from these observations is whether CEMAC texts in their present state are enough to be the driver of an emerging market where services form a substantial part.

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<sup>150</sup> Per Article 2(c) UEAC Convention.

<sup>151</sup> Article 3 UEAC Convention (Revised).

<sup>152</sup> This is the provision of Article 13 of the UEAC Convention pertaining to the “common market”. These Balassa's five stages are the following: free trade areas, customs unions, common markets, economic unions and complete economic integration as the final stage. See Bela Balassa, *The Theory of Economic Integration* (Richard D Irwin Inc., 1961), p. 2.

<sup>153</sup> UNCTAD, *Economic Development in Africa Report 2009: Strengthening Regional Economic Integration for Africa's Development* (Geneva: UNCTAD/ALDC/AFRICA/2009), p. 14.

<sup>154</sup> *Ibid.*

<sup>155</sup> See *UNCTAD Handbook of Statistics 2011* (TD/STAT. 36, 18 December 2011) available at: <[http://unctad.org/en/Docs/tdstat36\\_en.pdf](http://unctad.org/en/Docs/tdstat36_en.pdf)>, accessed 15 June 2012. Note ECCAS' share of services export over the same period is almost twice that of CEMAC thereby militating in favour of a “merger” of these blocs for a meaningful impact.

## B. Article V GATS and Central Africa Services Trade Agreement: Coexistence or Deference?

### 1. Effects of Services PTAs

The characteristic of many preferential trade agreements mushrooming around the world has been the increasing featuring of services trade component. This pattern is yet to be followed in Africa and CEMAC sub-region in particular. Whether PTAs create or divert trade depends on whether conclusion of a PTA is an end in itself or just a means to prepare participants to a future multilaterally reciprocal trade, or as Hoekman and Sauvé argue, the issue is to a large extent a function of the degree of discrimination against outsiders.<sup>156</sup> Judging whether or not such schemes are compatible with multilateralism, is pretty much dependent upon whether regional agreements effectively lead to significant liberalisation and if they go substantially beyond what is attainable in the multilateral setting.<sup>157</sup> Consensus has not been found among economists and the literature supporting either view is abundant.<sup>158</sup> It is beyond the scope here to reopen this endless debate. Nonetheless, services are different from goods and it remains valid to see into their consequence.

Economic studies identify in the services area, more than in goods, greater potentials for gains – static and dynamic – stemming from regionalism.<sup>159</sup> In fact, Mattoo and Fink argue that countries stand a better likelihood to benefit from preferential liberalisation of services than they otherwise would if no (unilateral) liberalisation path is engaged.<sup>160</sup> Thus, a country will derive benefit from liberalising *at least* regionally (as opposed to multilaterally) instead of opting for protectionism because barriers in services trade do not generate revenues and as such do not increase global trade diversion costs. By so doing, the argument goes on, that country's economy takes advantage of the competition climate newly created and exploitation of economies of scale coupled with the "learning by doing" effects the new economic situation brings in. They warn, however, that other things equal, "non-preferential liberalisation" is always better and yields larger welfare gains since it allows consumer to choose among more competitive services suppliers coming into the market.<sup>161</sup> Under these circumstances non-competitive firms – be they domestic – simply have to exit the market.

As to the question whether there are *circumstances* where a country will be better off at regional level than otherwise in a multilateral forum, Mattoo and Fink identify at least two such circumstances, which they nevertheless cautioned are not services specific. Participants in such a scheme are likely to gain at the expense of the rest of the world – unless outsiders retaliate by concluding like agreements – because economic rents become concentrated in the hands of oligopolists.<sup>162</sup> Also, they maintain, it is more efficient to bargain and potentially

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<sup>156</sup> Hoekman and Sauvé (1994), *supra* note 28, at 314.

<sup>157</sup> *Ibid.*, at 313.

<sup>158</sup> While proponents of PTAs on the one side of the spectrum argue that they bring about large trade creation effects, the opponents on the other side consider PTAs harmful for global welfare. For the formers, see for instance Baldwin (2006), *supra* note 2. See Also R. Baldwin and E. Seghezza, *Are Trade Blocs Building or Stumbling Blocks? New Evidence*, CEPR Discussion Paper 6599 (2007). For the latter, see J. Bagwati, *The World Trading System at Risk* (Princeton: Princeton University Press, 1991); P. Krugman, *Is Bilateralism Bad?*, NBER Working Paper No. 2972 (May 1989).

<sup>159</sup> UNCTAD (2007), *supra* note 3, p. 6.

<sup>160</sup> A. Mattoo and C. Fink, *Regional Agreements and Trade in Services: Policy Issues*, World Bank Policy Research Working Paper No. 2852 (June 2002), at 4.

<sup>161</sup> *Ibid.*, at 5.

<sup>162</sup> *Ibid.*

lock-in policies among a subset of countries than it would otherwise be achievable on an MFN basis at the multilateral level where countries are weary about free-riding.

The dynamic of gains is however qualified. Still according to Mattoo and Fink “the sequence of liberalisation matters”, and countries could possibly lose in a long run if multilateral liberalisation comes *after* preferential liberalisation.<sup>163</sup> Vested interest of incumbents firms that have been operating under preference might be difficult to reverse when that country later decides to open its market on an MFN basis. This is basically due to sunk costs necessary to enter that particular market. Adequate sequencing therefore holds the key to contemplated long-term gains taking into account the characteristics of the sectors involved.

## 2. Some Implications on CEMAC

The Convention governing the Central Africa Economic Union has clearly marked out the reach of the agreement to encompass the freedom of movement of natural persons to seek employment in a country to the RTA, that of establishment and the freedom to provide services.<sup>164</sup> For lack of clarity in framing the provisions, the reach of these freedoms is however left to interpretation.

The freedoms of establishment and to provide services cover natural persons as well as legal persons that are legally set up in the territory of a party to the agreement. In fact, they grant independent individuals the right to settle in the territory of a Member State other than theirs in order to engage therein in a non-remunerated activity, as well as in the acquisition, constitution and management of companies.<sup>165</sup> On these grounds, national treatment should be extended to such service provider under the conditions that it is legally constituted under the laws of a particular party, and has its headquarters or its principal place of business or of management in the region. Furthermore, it can only benefit from the right of establishment on condition that it demonstrates an effective and continuous economic link between its activity and the economy of *that particular* Member.<sup>166</sup>

Freedom to provide services is full of discrimination nevertheless. In fact, domestic regulations in many cases still operate in a way that nullifies the said objectives. For instance, the law governing commercial activities in Cameroon subjects all foreigners that are not its *nationals* to a prior authorisation and the granting of a licence to do so, regardless of whether the person is from the territory of CEMAC or not, except in situations of mutual recognition (agreement) in the sector involved.<sup>167</sup> This also is the case of service suppliers already established in the territory of another country of the agreement, which somehow impairs investment. For example, that same law requires that at least 50 percent of the capital be detained by Cameroonian nationals before applying for a licence, again except there is a

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<sup>163</sup> *Ibid.*

<sup>164</sup> Article 27 UEAC Convention as read together with Article 13(d) (Revised).

<sup>165</sup> E. Gnimpieba Tonnang, *La libre circulation des personnes et des services en Afrique Centrale: entre consécration théoriques et hésitations politiques*, 71 *Juridis Périodique* (2007), at 94-95.

<sup>166</sup> *Ibid.*, at 95 footnote 95. This can appear as a limitation though because it allows the benefit of “national treatment” only if a service provider is linked somehow with the economy of the country in which the treatment is sought, and not in the territory of any other member of the community. This may call for a ‘mutual recognition’-type of principle akin to what obtains in the European context (with the celebrated *Cassis de Dijon* jurisprudence).

<sup>167</sup> *Ibid.*, at 96 footnote 103 on Article 9 of the Law n° 90/031 of 10 August 1990 regulating commercial activities in Cameroon.

mutual agreement to that effect.<sup>168</sup> These are just few of existing obstacles to trade in services in particular. Theories and wishes are present but practice is absent.

Enjoying full legal personality under international law, CEMAC treaty and the convention on UEAC that goes with it stress on a “coordination” and “harmonisation” methods to integration. Although the sequence of liberalisation matters, the whole process has so far appeared more as cooperation instead of integration. This is one of the reasons why it is weak and could possibly be superseded by a much stronger instrument. No use (yet) has been made of “flexibility” offered by GATS? Article V:3(b) for example?.

## VI. CONCLUSIONS

This paper intended to test the proposition that central African countries should integrate their economies in order to promote trade in services against the background of WTO Law on the matter, and assessed the legal disciplines that would govern such integration. Such an agreement to be GATS-consistent will have the stand the test of Article V, which is nevertheless ‘relaxed’ when developing countries are members and which also accords preferential rule of origin for the benefit of SMEs. Parties would further have to choose between two tracks: either renegotiating a fresh services agreement (open to outsiders as the case may be), or pass Community legislation in the field of services to give the Treaty establishing the CEMAC and the UEAC Convention some teeth. The first track also paves the way to the negotiations of services EPAs with the EU. Perceived to some extent as a threat to African integration,<sup>169</sup> EPA services agreements will certainly come under closer scrutiny since developed countries will be involved.

However, grey areas in the interpretation of Article V of the GATS have not been eliminated completely. It also does not come as a surprise given that GATS is a rather new instrument and services PTAs are for the most part still in their infancy. In fact, Article V discipline has not widely been tested yet. It was expected that the results of Doha negotiations on RTA rules would finally clarify the extent of the disciplines of Article V GATS which nevertheless remain vested in the *Transparency Mechanism for Regional Trade Agreements* which in turn, as we have seen, has substituted itself to the existing arsenal narrowing down review to a “mere exercise in transparency”.<sup>170</sup>

It has been submitted that there is a tendency at the WTO level by Members not to challenge PTAs. We also pointed out that PTAs’ review is looser in services as compared to goods PTAs, and more so when developing countries are implicated. This implies that, despite the reluctance to challenge PTAs, even if the potential CEMAC service PTA (as an EIA involving developing countries) were to face challenges, it would benefit from the second shield commensurate to the status of its participants. Seen from this angle, failure to take advantage of Article V GATS may be no strategy, but results from ignorance of potential gains.

Countries that have liberalised their services markets have grown faster than those that have not. This has proven true for developed economies and emerging developing countries.

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<sup>168</sup> *Ibid*, footnote 106.

<sup>169</sup> See for instance ACORD, *Economic Partnership Agreements: Jeopardizing a United Africa*, Policy Briefing Paper no.4 (June 2007), available at: <<http://www.acordinternational.org/silo/files/economic-partnership-agreements-jeopardising-a-united-africa.pdf>>, accessed 16 January 2012.

<sup>170</sup> See notes 101 and 102 *supra*.

Countries' competitiveness has been established to be the function of their services industries. Bad quality services leads to less competitiveness and less choices to consumers. Many poor countries are still to get on the train. This leads one to conclude that multilateralism is indeed a jungle where only strong players impact on the flow of trade. Bilateralism and regionalism sometimes are the best alternative for small economies, especially sub-Saharan African markets, which are rather minuscule when taken individually. Hence, regionalism is not in itself bad when conducted properly. But in order to yield benefits and attract investments, one must be committed to the task and comply with the existing rules.

The scheduling mechanism of a central African EIA is also worth mentioning. GATS's "positive list" method, although laudable because it leaves individual and cautious states with a bit of policy manoeuvres, will not be enough in this sub-regional setup. Against this backdrop of "new regionalism" that militates for a wider and deeper integration, embarking in a much stronger method is warranted. The objectives of CEMAC being to establish a 'common market', it is commendable to opt for a 'negative list' approach where *all* sectors and modes of supply are liberalised *unless* expressly excluded.

Comments on the DDA and the desirability for developing countries to be more active are worth making though. First, it shouldn't be forgotten that reasons that militated for the inclusion of SDT provisions for this group of countries are for the most part still present: their tiny shops (i.e. their market) have not overnight turned into giant supermarkets; and if some developing countries have gradually positioned themselves at a comparable level with developed nations (to the extent that the call for their "graduation" could sound legitimate) it is not however a uniform tendency across regions. Nevertheless, SDT provisions should not be maintained just for their sake. The perverse nature of differential treatments has not escaped documentation. Conditionality that has accompanied these "concessions" (local content, structural adjustments) with sometimes less related trade issues (labour standards, human rights), coupled with market distortions in the forms of farm and agriculture subsidies in some parts of the West have rendered practice difficult for poor countries that relied on crops as their main exports commodities. What was being given with the right hand was being taken with the left. CEMAC sub-region is not alien to this scenario.

On the other hand, it is also evident that too much reliance on this variable geometry has not helped built trade capacities, but increased addiction of the beneficiaries to aid. Inasmuch as it is ideal to move from this pattern to one that would ensure participation of poorer nations into the game of reciprocal trade, it is also undesirable to stifle their abilities to join forces to be a stronger partner. If multilateralism is the end of the journey, regionalism in Africa should be the gas station, not necessarily the parking place. A stop to fuel the engine, and not a stop to have a rest, since, after all, globalisation and multilateralism have no rest.